Introduction and editorial preface

Michael Faure and André van der Walt

1 PROBLEM DEFINITION AND REASONS FOR THIS BOOK

A central focus in the debate on private law in Europe has recently been whether in specific domains (liability, property or company law) one can notice a convergence of legal systems or whether there is still room for divergence. The many harmonization processes in Europe (but also in other jurisdictions) and in federal systems have been described and critically evaluated in the literature. Less attention has so far been given, at least in private law doctrine and theory, to the more public law oriented processes behind lawmaking in private law. Many private lawyers do pay attention to the increasing so-called constitutionalization of private law, for example focusing their attention on the influence of human rights in private legal relationships. Private lawyers have also noticed that, as a result of evolutions at the level of public law (international organizations, EU, WTO), fundamental changes have taken place that affect the area of private law.

In continental Europe, for instance, lawmaking has been influenced by regional and international changes and shifts in emphasis for a long time. English law has started feeling the impact of this process more recently, since the adoption of the Human Rights Act 1998 and the concomitant domestic implementation of the European Convention on Human Rights. In South Africa, similar interactions between international human rights principles, a new democratic Constitution (including a Bill of Rights) and private law lawmaking have become visible since the early 1990s. As a result of these shifts, the traditional division of labour between national law makers and the judiciary has also changed. In this respect one can for example refer to the fact that judicial review now often also involves the application of international norms, even in domestic private legal disputes.

Private lawyers have noticed the influence of the changing institutional structures. However, so far insufficient attention has been paid to the changing institutional processes and the way in which they affect the agenda of private law in a globalizing world. In particular, private lawyers have not yet come to explore the full implications of globalization on lawmaking in the
sphere of private legal relationships. At most, one can speak of indications that traditional law makers and judicial officers in the sphere of ‘pure’ private law may resist the increasing influence of international and other public law instruments, rules and standards, while on the other hand there are strong indications that the influence of international law and of non-traditional legal sources is de facto increasing.

1.1 Lawmaking in a Globalized World

It is not difficult to point to a variety of developments that have taken place recently as a result of which the scope and contents of private law, and more particularly the sources and responsibilities for lawmaking, have changed. On the one hand, one can point to the importance of institutional globalization, whereby national constitutions, regional and international conventions on human rights and other international treaties, instruments and processes are increasingly influencing the scope and content of private law. However, globalization not only influences private law on the institutional level of decision-making (for example, through constitutionalization of private law, influence of human rights and centralization of decision-making); it also influences the material contents of private law. In this respect one just has to point to the fact that the globalization of international financial markets has had a considerable influence on the contents of private legal relations. Increasingly, institutional investors seem to determine decision-making of private actors, irrespective of national borders.

This globalization of financial markets has of course highlighted the limits of legal remedies as well, and many have asked to what extent these internationally operating institutional investors comply with standards of accountability and, moreover, whether they can be held accountable for their behaviour, considering their influence on private legal relationships. The growing institutional tendency to shift powers away from the national legislator and towards international organizations and institutions seems to be mirrored by a similar development towards more self-regulation, precisely to control this process of globalization in financial markets. Formal institutional structures are often lacking and are replaced by fiduciary duties or codes of conduct, often under the heading of corporate governance or corporate social responsibility. However, recent scandals whereby private investors seemed to be victimized by failing control and auditing mechanisms have led to serious questions concerning the effectiveness of this type of self-regulation and have led to increased calls for institutional controls, including in this area of globalizing financial markets.

However, it is not only economic and financial globalization which is of great importance, but also political globalization, which may have implica-
tions for domestic legal systems as well. The implications and the importance of financial/economic globalization are clear for private as well as for public law (for example, pointing to developments within international trade law). There are, in addition, increasing signs of political globalization, more particularly a further expansion of the notion of constitutional democracy. Originally, this political model seems to have been the ‘privilege’ of countries in the North. Nowadays, however, this model is exported to quite remote places. This political globalization has important consequences for the legal system as well. Hence, one may wonder whether, in addition to economic globalization, there is also a convergence of virtues, values and interests that results from increasing political globalization.

1.2 Convergence, Divergence, Accountability and Legitimacy

Indeed, questions arise about the appropriate way in which the legal system should react to the pressures of increasing globalization that directly affects private legal relationships. Some argue that increasing harmonization of legal systems is the appropriate answer to globalization in financial markets, whereas others argue that globalization does not do away with local differences and differing preferences, so that room should still be left for divergence. A fundamental question in this respect is who finally takes the decision on lawmaking: within the so-called federalism debate it may be clear that it is no longer only the national legislator who takes decisions, since lawmaking is increasingly influenced by international institutions and organizations. However, the role of these organizations in lawmaking raises serious questions of accountability and legitimacy.

Questions also arise about the relationship between the judge in the domestic legal system who has to resolve disputes between private parties and international norms. In some cases, judges in national courts can be called upon to apply international norms directly, or they can test the legitimacy of national legal instruments against international norms (such as human rights). At the international level, globalization thus also has a direct influence on adjudication of private legal relationships. Less clear, however, especially at the normative level, is who should ideally have the power of decision-making in this respect: should it be the legislator, or can sufficient leeway be given to the judiciary? Moreover, the fact that the judiciary is called upon to interpret and apply international legal norms does not answer the fundamental questions with respect to the accountability and legitimacy of international organizations which set the standards that the judges apply within the national legal context. To some extent, institutional solutions within the public law arena are presented as either judicial review or review by constitutional courts or courts of human rights. However, the mechanisms put in place within the different
settings and jurisdictions vary to a large extent, including as far as their influence on private legal relationships is concerned.

1.3 Who Sets the Agenda?

Increasing political globalization has important consequences and leads to fundamental questions, *inter alia* with respect to who are the key drivers behind the process of convergence of norms and values. Some hold without further discussion that the US and other industrialized democracies should define the agenda leading to a further convergence towards constitutional democratization at a global level. In this respect one can quote Seita,¹ who argued that

Perhaps by the year 2001, the representatives of oppressors, victims, victors, losers and adversaries, could assemble on a world stage in a therapeutic ceremony to put the past behind.

That futuristic perspective has not been realized yet and, moreover, the question is whether, as some of the literature indicates, it should indeed be ‘the West’ that determines the agenda leading to convergence of values at the political level. Given the importance of political globalization an important question is how various multicultural perspectives can be taken into account in such a legal-political process of convergence. The traditional view that the West can impose its norms upon the rest of the world is obviously no longer the prevailing paradigm. The cultural clash between the West and, for example, Muslim communities has shown that a convergence perspective should also take multiculturalism into account. In that respect the comparison between Europe and developments in South Africa is highly interesting, given the fact that South Africa has, in its constitution, moved towards a recognition of multiculturalism within one legal system.

2 HISTORY AND ORIGINS OF THIS BOOK

The project which inspired this book was based on cooperation between the Ius Commune Research School and the Law Faculty of Stellenbosch University in South Africa. The chapters in this book are based upon papers that were presented at two conferences held in December 2007 and December 2008 in Stellenbosch (South Africa).

¹ Seita (1997).
Many of the European contributors to this book worked together in the Ius Commune Research School which is a collaboration between the law faculties of the universities of Amsterdam, Maastricht and Utrecht (the Netherlands) with the Catholic University of Leuven. The focus of the Ius Commune Research School is on the role of law in integration processes. A lot of attention has always been paid in the research of the Ius Commune Research School to questions of harmonization and comparative law in the area of private law, focusing strongly on the questions related to the harmonization debate. In that respect the Ius Commune Research School (which started its activities in 1997) has a long-standing collaboration with law faculties representing mixed legal systems, on the basis of the belief that the lessons from mixed legal systems can prove valuable for the harmonization debate in Europe. Hence, the Ius Commune Research School has long-standing contacts with the law faculty of the University of Edinburgh and with the law faculty of the University of Stellenbosch in South Africa. Earlier joint conferences have been organized and books have been published together with South African colleagues and the Scottish and South African colleagues have always attended the annual conferences of the Ius Commune Research School.

During a dinner at an annual conference of the Ius Commune Research School organized by the Utrecht Law Faculty in November 2006, a group of South African and European Ius Commune scholars sat together, brainstorming the abovementioned problems concerning the making of private law in the age of globalization. It was the conviction of the participants in that brainstorming session that globalization poses specific problems for the making of private law that have not been sufficiently studied and that merit a thorough comparative analysis. It was decided that a combination of insights from European scholars interested in the harmonization debate and South African experience with mixed legal systems could enrich the common research agenda.

As a result of that discussion, a first exploratory research workshop was organized at the Stellenbosch Institute for Advanced Study (STIAS) on 6–8 December 2007, where during three days 12 papers were presented, intense discussions took place and comparative conclusions were drafted. On the basis of this first workshop it was decided that the time was not right yet for a...
publication, although a valuable contribution to the setting of the research agenda had been made. Hence, following a memo ‘Globalization and private law: the way forward’, it was decided to ask a few contributors to work out their earlier presentations in further detail and to invite some new presentations. On that basis, a second conference was held in December 2008 at the Stellenbosch University Law Faculty, and more particularly at the South African Research Chair in Property Law. Presenters at the December 2007 and December 2008 conferences were subsequently invited to rework their papers in the light of the discussions and comments received. A brief review procedure was followed, resulting in this book.

3 METHODOLOGY

The organizers of the seminars consisted of the editors of this book, together with Jan Smits (Tilburg University) and Jacques Du Plessis (Stellenbosch University). The organizers were of the opinion that an attempt to provide a useful contribution to the debate on the influence of globalization on private lawmaking necessitates a combination of various methodological approaches.

3.1 Legal Multidisciplinarity

As will be clear from the table of contents, we have looked for insights from various legal disciplines and authors, who have tried to integrate various legal disciplines into their chapters. Of course, the traditional private law legal approach is followed by many contributors (for example Smits), while others look at the influence of harmonization in the area of international trade law on private law (Sieg Eiselen). Crucial for a better understanding of the lawmaking process in private law is obviously the incorporation of insights from public law scholars. They pay attention to the fact that the traditional boundaries between public and private law become increasingly blurry since state actors increasingly use private law to reach their goals (Geo Quinot and Frits Stroink). Particular case studies looking at the influence of globalization on specific areas of the law also provided valuable insights, for example focusing on the domains of company law (Bas Steins Bisschop and Philip Sutherland), procedural law (C.H. van Rhee) and environmental law (Michael Faure and Jaap Spier). Specific attention was paid in many contributions to the increasing influence of human rights, obviously in constitutional interpretation (Lourens du Plessis), but also in private law (Siewert Lindenbergh).
3.2 Comparative Approach

Given the nature of this book, which originated as a cooperation between European and South African scholars, legal comparison received a lot of emphasis. Not only do many chapters discuss interesting topics from the domestic legal system of the author (either European or South African), but many also engage explicitly in comparison with other legal systems (such as that of the US). A lot of attention is paid to specific problems of comparative legal methodology, related inter alia to problems that may arise in the case of so-called borrowing, but also related to the question of how globalization affects fundamental differences between legal cultures and values.

3.3 Multidisciplinarity

Even though this book started from a seemingly straightforward legal question (how globalization affects private lawmaking) it soon became clear that one needs more than ‘hard’ law to be able to answer this question. Hence, the second chapter (by Deirdre Curtin) promptly addresses fundamental notions of democracy and accountability and draws lessons from political science to explain how the notions of legitimacy and accountability could be interpreted in a meaningful way in the debate on private lawmaking. The fundamental question of whether globalization necessarily leads to global lawmaking is one which has also been extensively dealt with in economic literature. Hence, some chapters are especially devoted to the question of whether the economic analysis of law also provides useful insights for the (normative) question as to what types of issues should be regulated on a central rather than a decentred level (Roger Van den Bergh and, regarding environmental problems, Michael Faure).

4 TOPICS

It may be clear from the broadly formulated and ambitious research agenda (see Section 1) that various major issues can be distinguished:

- The effect of globalization on private law is central to the whole project. This is largely a factual question whereby the importance of the reallocation of economic power and the importance of changes in financial streams have to be analysed for private legal relationships.
- A related question is how private law can react to this process of globalization. Attention can be given in that respect to the factual answers that private parties provide to globalization, but also to institutional
structures that can provide the backing for globalization (such as the constitutionalization of private law and the influence of international institutions and structures). Attention can also be given to the nature of the legal reaction to globalization, more particularly as far as the importance of self-regulation for private law is concerned.

• A closely related topic is of course whether the distinction between public and private law is still valid today in this globalizing context. Above it was pointed out how public law evolutions affect private law as well. That merits the question of whether the traditional distinction between these systems, at least in civil law, should still be maintained. This unavoidably also reopens the classic distinction between the civil and common law systems, because in the common law the traditional dichotomy between private and public law always had a different meaning from that in civil law jurisdictions.

Of course these major issues are still rather broadly formulated. The organizers of this research project formulated ten more specific questions that might play a role in the debate on the influence of globalization on private lawmaking. Without suggesting that all of these topics would be fully dealt with in the chapters in this book we identified at least ten that were to a larger or smaller extent touched upon:

1. Who is in charge of agenda setting? This relates to the important constitutional question of who is in charge of lawmaking, where the traditional division of labour between legislator and the judiciary seems to be shifting as a result of globalization. This question can be addressed both in a descriptive (positive) manner and in a normative (more policy oriented) way.

2. Related to the previous question is the question of the influence of national and international constitutions and conventions on private legal relationships. Increasingly, one notices that national judges are influenced by provisions in (inter)national constitutions in deciding private legal disputes. This merits an in-depth analysis of the role of traditional judicial review in a multi-governance setting.

3. Another related question is the influence of human rights on private law, also referred to as the debate on the constitutionalization of private law, to which some attention has already been paid in the literature.

4. Within the debate on the role of private law in a globalizing world, the multi-level governance debate also needs to pay attention to the traditional division of labour within federal systems. This concerns not only the abovementioned division between the legislator and the judiciary, but also the division between the different levels of government. One can for
instance notice an increasing enthusiasm, at least in Europe, for harmonization of private law. Some even plead for a European Civil Code, whereas others strongly doubt whether this type of far-reaching harmonization is indeed an adequate answer to globalization.

5. In South Africa a debate is also taking place concerning the optimal structure of harmonization. For example, with respect to the core private law topic of the law of sale, the possibilities of harmonization between the OHADA states is currently being debated.

6. The influence of globalization and international institutional structures on specific domains in private law also needs to be addressed. For instance, in the domain of real estate and property law one notices in many legal systems (in South Africa, but also in many European legal systems) that political developments and human rights shape the interpretation and development of the traditional concept of property rights.

7. The same is undoubtedly true for procedural law, where one also notices the decreasing autonomy of national legal systems and (under influence of globalization?) a variety of developments towards alternative dispute resolution (one can in this respect also refer to the increasing importance of arbitration), as well as changes within national legal procedures themselves in an attempt to adapt these procedures to the changing demands of the social partners.

8. An important topic is the increasing importance of arbitration, which raises the question of to what extent this can constitute a serious response to increasing demands for access to justice in a globalizing world.

9. Attention also needs to be paid to the role of self-regulation and self-regulatory norms of conduct in private law. Some argue that self-regulation has, particularly in the area of contract law, to some extent always been prominent in private law. In areas like company law and to some extent in liability law (where rules of professional conduct may shape the standards of care), self-regulation has also always been mixed with government regulation. In a globalizing world questions arise regarding to what extent self-regulation can or should replace or supplement government regulation and how the increasing tendency towards self-regulation can be reconciled with the rule of law requirements related to accountability and legitimacy.

10. Given the central focus on the importance of globalization in the financial and economic sphere for private law, attention will undoubtedly also be paid to a few areas that are crucially related to the financial and economic sector. In this respect one can think of the importance of world trade law and more particularly the way in which this affects the trade–environment dispute, but also on regulations concerning corporate social responsibility (CSR).
5 CENTRAL FOCUS

It may be clear that dealing at length with these ten topics would require ten books rather than one. This collection of chapters can hence do no more than touch upon these issues in the hope of contributing to the research agenda in this domain. It was suggested to the contributors that under the broad heading of ‘the influence of globalization on private lawmaking’ a few central issues play a role:

1. It is a financially and economically unavoidable fact that the shape and the scope of private law have changed and are still changing under the pressure of globalization.
2. This influence is combined with institutional changes such as the increasing influence of norms of a higher level (like human rights) that also shape private legal relationships.
3. Private law seeks remedies to both challenges by looking for new institutional structures at different levels (multi-level governance), but to some extent also outside the traditional legal arena (for example, through self-regulation).

6 STRUCTURE OF THIS BOOK

In order to provide structure to the contributions the book is divided into parts. Part I deals with general problems concerning globalization, democracy and accountability. It contains a contribution by Jan Smits on a functional approach to democracy and (European) private law (Chapter 1) and a chapter by Deirdre Curtin on public accountability of transnational rule making: a view from the European Union and beyond.

Part II deals with the debate between harmonization and differentiation or, in institutional terms, between centralization and decentralization. Chapter 3, written by Roger Van den Bergh, deals with private law in a globalizing world and provides economic criteria for choosing the optimal regulatory level in a multi-level government system. Chapter 4, by Sieg Eiselen, deals with globalization and harmonization of international trade law.


Part IV deals with the effects of globalization on corporate governance.
Bas Steins Bisschop addresses the role of globalization in the resolution of the credit crisis in Chapter 8. Chapter 9, by Philip Sutherland, addresses globalization and corporate law.

Part V focuses on procedural issues and consists of Chapter 10, by C.H. van Rhee, on civil procedure in a globalizing world.

Part VI focuses on human rights and environmental issues. Chapter 11, by Siewert Lindenbergh, deals with fundamental rights in private law and asks whether these are anchors or goals in a globalizing legal order. Chapter 12, by Michael Faure, addresses globalization and multi-level governance of environmental standards; while Jaap Spier asks whether there are particular obstacles for shaping the law to meet the demands of a civilized society, particularly in relation to climate change (Chapter 13).

Part VII consists of Chapter 14, which contains a set of comparative and concluding remarks by the editors.

7 CONTRIBUTORS

The contributors to this book come, as was made clear, from various universities in Europe and South Africa. Michael Faure, Bas Steins Bisschop, Frits stroink, C.H. van Rhee, Jan Smits and Jaap Spier are (or at least were, in the case of Jan Smits) connected (full-time or part-time) to Maastricht University. Michael Faure also works at the Erasmus University Rotterdam, as do Siewert Lindenbergh and Roger Van den Bergh. Deirdre Curtin is affiliated to the University of Amsterdam. Lourens du Plessis, Geo Quinot, Philip Sutherland and André van der Walt are all connected to Stellenbosch University in South Africa. Sieg Eiselen is affiliated with the University of South Africa. A complete list of the contributors and their affiliations is provided in the list of contributors in the preliminary pages.

8 ACKNOWLEDGEMENTS

As editors of this book we are grateful to many people who made this project possible. In this respect we refer especially to the two conferences held in December 2007 and December 2008 in Stellenbosch. First of all we would like to thank the Stellenbosch Institute of Advanced Studies (STIAS) for facilitating the December 2007 conference and the University of Stellenbosch Law Faculty and more particularly the Dean, Gerhard Lubbe, for organizing (and financially supporting) the December 2008 conference. As editors we owe special thanks to William Binchy (Trinity College, Dublin), Jacques du Plessis (Stellenbosch) and C.H. van Rhee (Maastricht) for providing excellent
summaries and overviews of the presentations and discussion, which provided an excellent basis for our comparative conclusions.

We also owe thanks for the administrative support by the Maastricht European Institute for Transnational Legal Research (METRO) and especially to Joke Declercq for editorial assistance in the preparation for the publication of this book. Finally we are truly grateful for the professional cooperation with the people working at Edward Elgar, our publisher, for their assistance in the publication of this book.

Texts were finalized in June 2009, and for that reason developments after that date have not been included in this book.

Michael Faure
André van der Walt
Maastricht/Stellenbosch, June 2009

REFERENCES