Coherence and Fragmentation in European Private Law

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Introduction

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A. Introduction

One of the most important characteristics of today’s private law is that it is fragmented. This is to a large extent caused by increasing Europeanization. Next to age-old national legislation and case law, private law today is increasingly shaped by European and supranational sources and by private regulation. As the various producers of norms have their own aims and policies to pursue, private law is rapidly becoming a mixture of differently oriented rules and principles. This development can be described as one from coherence to fragmentation – to no less an extent also caused by the fragmentary nature of the European acquis itself. The aim of this book is to consider how this important shift works out in different subfields within the broad field of European private law. There is every reason to carry out such an exercise across various sub-disciplines: While the thesis that private law is increasingly fragmented has been put forward many times before, it has never been tested for a range of different sub-disciplines.

The disciplines chosen for this book are not only general contract law and property law but also competition law, insurance contract law, marketing law, private international law and the law of intellectual property. We thus draw upon a lack of common understanding of what exactly the area of European private law covers and understand this field to embrace a range of disciplines that deal with the regulation of relationships among private actors. All authors, specialists in their respective fields, were asked to consider a number of common questions. These include how the concept of coherence is perceived in their field, what are the manifestations of fragmentation and how the adverse effects of this fragmentation should in their view be remedied. The aim of this introduction is to take stock of the findings and to show how common questions are answered in the various fields under review.

The structure of this introduction is as follows. Section B starts with a discussion of what legal coherence is and why it is generally seen as important to achieve it. More clarity on what constitutes coherence is essential for the present book, in which the concept is mainly used as an analytical tool to understand the current development towards fragmentation. This is followed by an overview of the various manifestations of fragmentation that we can identify in the fields covered in this book (section C). Perhaps the most interesting question is how increasing fragmentation is dealt with and what solutions are put forward to deal with the problems this creates (section D). Finally, the present trend towards fragmentation is put into perspective: A historical account (section E)
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shows that a belief in one coherent and uniform system of law was influential in the nineteenth and twentieth centuries but that in reality fragmented law is the historical norm.

B. What is coherence of private law?

The question of what is ‘coherence’ in the field of private law has not received much attention. When the term is used, it often denotes either divergence within the existing European acquis (such as varying withdrawal rights or a different scope of application of directives) or indicates that rules of European origin have a different ratio than national rules. Thomas Wilhelmsson distinguishes three types of coherence: coherence of concepts, coherence of particular norms and coherence of the system. In addition, it is possible to identify coherence of policies. In each of these varieties of coherence, the main aim of making the law coherent is to keep it intelligible, thereby promoting values such as legal certainty, predictability and equality. As Kaarlo Tuori rightly claims, legal norms are coherent if they give expression to the same general principle or to a set of matching principles. This is relatively easy to achieve if all legal actors involved in development of the legal system (such as legislatures, courts and legal scholars) are located in the same country and share a uniform set of values. If this coherence can no longer be guaranteed, it puts at risk the likelihood that – in Dworkin’s view – fair outcomes will be reached in individual cases.

The lack of a uniform understanding of what constitutes coherence is reflected in the contributions to this volume. Two strands of thinking are identifiable. On the one hand (evident in the writings of – in particular – Teemu Juutilainen, Ulla Liukkunen and Jan Smits), coherence is seen as being about harmony of law. The legal components relevant to deciding a case must fit together, meaning that a decision is coherent with other decisions if the arguments it is based on are well connected with each other (and are thus in line with ‘the system’). Perhaps not surprisingly, two of these authors write about private international law, where Savigny’s ideal of ‘decisional harmony’ requires courts of different jurisdictions to determine the applicable substantive law in a similar way, allowing parties to foresee the substantive outcome and respond accordingly. This means in practical terms that the main concern is to present existing

2 Wilhelmsson, Sammelband 4. Europäischer Juristentag, o.c., 133 ff.
3 Kaarlo Tuori, Ratio and Voluntas: The Tension Between Reason and Will in Law, 2011, 164-165.
4 Cf. Ronald Dworkin, Law’s Empire, 1986, p. 211: ‘law as integrity’ means we should think of the law as a coherent set of principles about justice and fairness.
C. Manifestations of fragmentation

It has become a commonplace to say that Europeanization of private law is affecting national legal systems in their aim to provide coherence. The aim of this section is to show the manifestations of this fragmentation in the various fields under scrutiny in this book. The contributions are unanimous in identifying increasing multiplication of sources as the main cause of fragmentation. In general, three types of sources affect national coherence. First and foremost among these is European legislation. Two reasons account for its pervasive influence on national law: its mandatory character (either by way of regulations or directives) and the fact that European rules are necessarily limited in their scope of application. Unlike the case with national legislatures, the European legislature can only create rules in so far as competence exists. Of the fields covered in this volume, in particular Art. 114 TFEU severely limits consistent setting of rules. Put differently: Private law of European origin is instrumental in nature, making it difficult to fit it in with age-old national private laws that aim for comprehensiveness and coherence in a search for substantive fairness and equality. Secondly, private law is increasingly a product of supranational

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lawmakers. This is in particular visible in the field of contract law, where the
(CISG) has led to a set of rules that exists next to national contract laws. But
private international law is also notorious for being an amalgam of national,
European and supranational sources (in particular flowing from The Hague
Conventions), making it difficult to systematize. Thirdly, in many of the fields
discussed in this volume the official national, European or supranational rules
are supplemented by private lawmaking. This is particularly apparent in the
fields of marketing (with a large number of self-regulatory codes), competition
and insurance contract law.

How exactly does Europeanization affect the coherence of private law? The
contributions show that this can occur in different ways. The first is the most
fundamental because it is about conflicting policies and the impossibility of
making a definitive choice among these policies at a higher level (as a result of
European private law being a multi-level system). This is evident in the field
of contract law, where a permanent tension exists between the European aim
of market integration and the delicate balance between safeguarding autonomy
and social justice at the national level, but in other fields as well. Katri Havu,
writing on the field of EU competition law-related damages actions, makes very
clear how the aims of law on damages differ: While national tort law rectifies
wrongs inspired by an idea of corrective justice, competition law promotes eco-
nomic efficiency and at best some idea of “access justice”. In the words of Hans
Micklitz: “The European Union grants ‘access justice’ to those excluded from
the market or to those who face difficulties in making use of market freedoms.”
Perhaps the most severe collisions between different policy goals exist in labour
law. Evidence of this is Ulla Liukkunen’s contribution, where she shows abun-
dantly clearly how economic and social goals conflict at both the European level
itself as at the level of the member states.

A second type of fragmentation is caused by the often detailed ‘pointil-
list’ rules in European legislation that deviate from national legal terminology.

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6 See Fabrizio Cafaggi, Private Regulation in European Private Law, in: A.S. Hartkamp
7 See also Christoph U. Schmid, Die Instrumentalisierung des Privatrechts durch die
Europäische Union, 2010 and Ralf Michaels, Of Islands and the Ocean: the Two Ration-
Eeckhout/Takis Tridimas (eds) Yearbook of European Law 28 (2010), 3 ff. and id., Social
European Private Law, 2011, 3 ff., at 37.
C. Manifestations of fragmentation

Gunther Teubner\textsuperscript{10} coined the term ‘legal irritants’ to explain that a rule of European origin does not assimilate with, but instead disorders the existing system and this is indeed what we see happening at the ‘ground level’ of national laws where European rules land. This fragmentation is reinforced by what Smits identifies as a third type of fragmentation: The coherence of the national legal order is also affected by the way in which (implemented) European law has to be interpreted. This interpretation is to take place in ‘the light of the wording and the purpose of the directive,’\textsuperscript{11} which is often at odds with the prevailing way of interpreting national law, which usually puts the legislative history and the system of law as a whole at the centre of attention. This leads to conceptual divergence: One legislative provision (or term) is to be interpreted in different ways dependent on its origin.

There are still other types of fragmentation. One type comes into the equation if one adopts the perspective of the European Union as a whole, within which exist at present 27 different national legal systems that may stand in the way of creating a truly European market. Understandably, the European Commission does not become tired of emphasizing this point, in particular in the discussion on European harmonization of contract law. This is also the perspective we find in the contribution of Jaana Norio-Timonen, stating that if a single European insurance market is desirable, the obstacle of a European insurance contract legislation fragmented into 27 different national legislations has to be overcome. The difficulty is not only that the case for an increase in the volume of transactions in the European market as a result of harmonization is not as strong as the European Commission suggests, it is also difficult to create a truly harmonized interpretation of European legislation. The uncertainty about proper definition of the European consumer (should the consumer be seen as reasonably circumspect or as an innocent party in need of protection?)\textsuperscript{12} is telling in this respect.

Yet another type of fragmentation is identified in Johan Bärlund’s contribution. He makes clear that in the field of marketing law the main problem consists in the interplay between national law and the different European standards adopted in the fields of misleading and comparative advertising and unfair commercial practices. This calls, among other things, for a clear view of when so-called ‘spillover effects’ from EU law need to be allowed: To what extent must national legislatures or courts expand the scope of application of implemented European norms in order to keep national law more coherent? The answer to this question clearly differs from one member state to another.


\textsuperscript{11} European Court of Justice (ECJ) 10.04.1984, Case C-14/83 (Von Colson and Kamann/ Nordrhein-Westfalen), [1984] ECR 1891.