



International Academy of Comparative Law

Académie Internationale de Droit Comparé

Silvia Ferreri
Editor

**COMPLEXITY OF
TRANSNATIONAL SOURCES**

**LA COMPLEXITÉ DES SOURCES
TRANSNATIONALES**

Reports to the XVIIIth International Congress of Comparative Law

Rapports au XVIII^e Congrès international de droit comparé

Washington, D.C. 2010

JAN M. SMITS

**COMPLEXITY OF TRANSNATIONAL SOURCES
NATIONAL LAW
THE NETHERLANDS**

Electronic edition of the national reports presented to the XVIIIth International Congress of Comparative Law on the theme «Complexity of Transnational Sources» prepared by the Isaidat Law Review for the *Società Italiana di Ricerca nel Diritto Comparato* (SIRD).

Copyright by each author.

With the editorial assistance of Laura Lasagna

Version électronique des rapports nationaux présentés au XVIII^e Congrès international de droit comparé sur le thème «La complexité des sources transnationales», préparée par la Revue Juridique de l'Isaidat pour la *Società Italiana di Ricerca nel Diritto Comparato* (SIRD).

Droit d'auteur: chaque auteur est titulaire de droit propres sur sa contribution.

Merci à Laura Lasagna pour la révision des textes

ISSN: 2039-1323

(2011) Volume 1 –Special Issue 3, Article 9

**COMPLEXITY OF TRANSNATIONAL SOURCES
NATIONAL LAW
THE NETHERLANDS***

JAN M. SMITS**

1. Introduction. - 2. Causes of increasing complexity and types of fragmentation. - 3
How to deal with fragmentation of Private Law? Dutch (and European) answers. - 4
The need to rethink Private Law as a national and coherent system

1. Introduction

It is generally acknowledged that laws are increasingly flowing from different sources. It is equally well established that this multiplication of sources deeply disturbs the idea of law as a coherent and unitary system. This incoherence and fragmentation of the law have been the subject of study in a wide variety of fields. For example, since 2006, significant attention has been paid to the report of the study group of the International Law Commission¹ on the fragmentation of international law.² This report made it abundantly clear that increasing globalisation not only leads to social life becoming more and more uniform, but also more fragmented because of the emergence of specialised and autonomous ‘spheres of social action’.³ There is no longer one general international law, but a myriad of specialised systems (*e.g.*, human rights law, law of the sea, trade law and international

* This article was presented as the Netherlands Report to the XVIII International Congress of the International Academy of Comparative Law (Washington D.C., 25 July-1 August 2010). Thanks are due to Mark Kawakami for invaluable research assistance.

** Jan Smits is Professor of European Private Law at Maastricht University and Research Professor of Comparative Legal Studies at the University of Helsinki.

¹ *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, report of the Study Group of the International Law Commission finalised by Martti Koskenniemi, UN A/CN.4/L.682 (13 April 2006).

² Fragmentation is not new at all in this field. See *e.g.* Anne-Charlotte Martineau, ‘The Rhetoric of Fragmentation: Fear and Faith in International Law’, *Leiden Journal of International Law* 22 (2009), 1.

³ *Fragmentation of International Law*, report of the Study Group, *o.c.*, 11.

criminal law), each having its own principles and often failing to take into account developments in neighbouring areas. Such fragmentation through the emergence of ‘functional regimes’⁴ is not limited to (the subfields of) international law. Thus, fragmentation was also identified as an important characteristic of such diverse fields as (global) administrative law,⁵ constitutional law,⁶ environmental law⁷ and private international law.⁸ It is no coincidence that these are all areas particularly affected by internationalisation: especially the emergence of norms emanating from European and supranational actors next to the rules of national origin has disturbed the supposedly coherent legal systems of the past.

The aim of this contribution is to explore the increasing complexity of private law. As is the case in the fields already mentioned, this complexity is primarily caused by the multiplication of sources out of which private law flows, leading to a fragmentation of law at different levels (explored in section 2). This phenomenon can be observed in all countries of the European Union and, to a lesser extent, also in other countries. It leads to the important question of how we should deal with this fragmentation. Section 3 explores how fragmentation of private law is perceived in the Netherlands and which strategies are adopted to remedy the problems it causes. We will see that the way in which

⁴ Andreas Fischer-Lescano & Günther Teubner, Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law, *Michigan Journal of International Law* 25 (2004), 999 ff.

⁵ Ming-Sung Kuo, Between Fragmentation and Unity: The Uneasy Relationship between Global administrative law and global constitutionalism, *San Diego International Law Journal* 10 (2009), 439 ff.

⁶ Neil Walker, The Idea of Constitutional Pluralism, *Modern Law Review* 65 (2002), 338.

⁷ Tim Stephens, Multiple International Courts and the ‘Fragmentation’ of International Environmental Law, *Australian Yearbook of International Law* 25 (2006), 227 ff.

⁸ Peter McEleavy & Aude Fiorini, The Evolution of European Private International Law, *ICLQ* 57 (2008), 969 ff.

this phenomenon is dealt with is not unique for the Netherlands. Section 4 contains some concluding remarks.⁹

2. Causes of increasing complexity and types of fragmentation

Multiplication of sources

To truly understand the impact of increasing complexity or fragmentation of law, one must compare the present situation with a previous one. For most scholars, the traditional picture is one in which private law is a coherent, unitary and national system. In that picture (some would say ‘narrative’), cases, rules, standards and concepts are all part of a consistent whole without any contradictions within the system itself.¹⁰ Except for systematic purity, such consistency serves the important goal of establishing equality before the law (and thereby legal certainty): only if rules and principles are applied in a uniform way, similar cases can be treated alike. Consistency can be achieved because all actors involved in the development of the legal system (legislatures, courts and legal scholars) are located in the same country and share a more or less uniform set of values. In such a view, private law can be a ‘self-contained and self-referential system’¹¹ with clear hierarchies among the actors involved in the making and application of the law.

Leaving aside the accuracy of this past view, it is abundantly clear that this view no longer represents present-day private law. The main reason for this is the multiplication of legal sources we have seen over the last decades. Next to the rules emanating from

⁹ This contribution attempts to answer the questions posed in the questionnaire prepared by Silvia Ferreri. It builds upon some of my previous publications, in particular on the articles referred to in footnotes 10 and 69.

¹⁰ Cf. Ronald Dworkin, *Law's Empire*, London 1986, 211: ‘law as integrity’ means we should think of the law as a coherent set of principles about justice and fairness. Cf. generally Jaap Hage, Law and Coherence, *Ratio Juris* 17 (2004), 87 ff. and, with more details, Jan M. Smits, European Private Law: A Plea for a Spontaneous Legal Order, in: Deirdre M. Curtin, Jan M. Smits et al, *European Integration and Law*, Antwerp-Oxford 2006, no. 32 ff.

¹¹ Pierre Legrand, Against a European Civil Code, *Modern Law Review* 60 (1997), 45 ff.

the national legislatures and courts, we now have at least three other types of actors involved in the making of private law.¹²

First, private law is increasingly a product of supranational lawmakers. The most important example in the context of private law is the United Nations Convention on Contracts for the International Sale of Goods (CISG). In the almost 75 countries that have adopted the CISG a new contract law regime has come to exist *next to* the set of rules on national contract law. This means there is no longer one uniform and coherent contract law for the entire national territory; instead, it depends on the transactions involved (and on whether the parties have excluded the applicability of the convention or not) which legal regime (with its own rules, rationality and mode of interpretation) applies. The introduction of the CISG thus leads not only to fragmentation at the *national* level, but also to a fragmented harmonisation at the *international* level because of the autonomy of States in accepting the CISG. Thus, it is well known that the failure of the United Kingdom, Ireland and Portugal to ratify the CISG adds to existing complexity of commercial contract law within the European Union.

Second, we are all witnesses to the rise of the so-called ‘private global norm-production.’¹³ On one hand, norms and policy decisions are no longer being made by national States, but by other actors. Apart from organisations such as the IMF and the World Bank, in particular the activities of the WTO have an important impact on the conduct of private parties, more specifically, on the issues of free trade, taxes, intellectual property and protection of health. On the other hand, various types of voluntary law,¹⁴ such as norms adopted by corporate networks (the most important example being codes of conduct for corporate social or environmental responsibility), rules of standardisation organisations for technical standards (such as the *codex alimentarius*) and other types of self-regulation also influence the conduct of

¹² See in more detail Jan M. Smits, Democracy and (European) Private Law: a Functional Approach, *European Journal of Legal Studies* 2 (2009), 26-40.

¹³ Gunther Teubner, Breaking Frames: The Global Interplay of Legal and Social Systems, *American Journal of Comparative Law* 45 (1997), 149 ff., at 157.

¹⁴ Cf. Anne-Marie Slaughter, International Law in a World of Liberal States, *European Journal of International Law* 6 (1995), 503 ff., at 518.

private parties. These norms would not be recognised as binding in a traditional conception of the law because they do not meet the formal criterion of being enacted by the relevant authorities and backed by coercive power. But they often do set the norms for specific groups of people and are therefore important in predicting their behaviour: in this sense, they are often more important as a source of private law than rules that are formally binding.

A third actor involved in the making of private law is the European Union. Over the last twenty years, the European legislature issued almost twenty directives that have all been implemented by the (now) 27 member states.¹⁵ These formally binding rules are accompanied by several sets of soft law that were prepared with the support of the European Commission. The two most important examples of such sets are the Principles of European Contract Law (PECL)¹⁶ and its more elaborate successor in the form of the Draft Common Frame of Reference (DCFR).¹⁷ These rules were prepared with a view to their future application by private parties, legislatures and courts. In private international law, the European legislature has even been more active: the far-ranging competences it has in this field since the enactment of the Treaty of Amsterdam led to the adoption of a number of important regulations.¹⁸

Fragmentation in practice

How does this multiplication of sources affect the idea of private law as a coherent system? It is useful to try to answer this question in detail for the most important ‘new’ source, that of

¹⁵ See for a recent overview e.g. Reinhard Zimmermann, The Present State of European Private Law, *American Journal of Comparative Law* 57 (2009), 479 ff.

¹⁶ Various editions were published since 2000. See http://frontpage.cbs.dk/law/commission_on_european_contract_law for the latest versions.

¹⁷ Christian Von Bar and Eric Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference*, München 2009.

¹⁸ Such as Regulation 1346/2000 on Insolvency, Regulation 1348/2000 on judicial and extrajudicial documents, Brussels I-Regulation 44/2001, Evidence-Regulation 1206/2001, Brussels II-Regulation 2201/2003, European enforcement order-Regulation 805/2004, Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II) and Regulation 593/2008 on the law applicable to contractual obligations (Rome I).

European legislation. I believe there are three reasons why Europeanisation disturbs the national systems of private law.¹⁹

First, European legislation is difficult to incorporate into national legal systems because it is functionally oriented: it is based on the rationality of the market (cf. art. 114 Treaty on the Functioning of the European Union).²⁰ While national private law offers general rules, directives only provide rules for specific themes that are thought to be of particular importance for the development of the internal market (such as information duties of the professional party and rights of withdrawal of the consumer). These fragments of European law are often out of tune within the national legal order: if a directive provides rules for contract remedies, but not for the formation of contracts, this is seen as a violation of the coherent system that private law once was.²¹ Given that the national legislatures do not want to give up their competences in the fields covered by European directives, we end up having two legislatures dealing with the same topic. Complexity is even increased by the fact that the applicability of European law is not always obvious, leading to uncertainty for the parties.²²

Second, directives often contain detailed rules with terms that deviate from national legal terminology.²³ Thus, the European legislature consciously makes use of neutral terms such as the ‘right to withdraw’ and ‘reduction of the price’.²⁴ Implementation of these rules into national legislation would still be relatively easy if member states were free to transpose directives in the way they

¹⁹ The following is based on Smits, *Spontaneous Order*, *o.c.*

²⁰ See *e.g.* Christoph U. Schmid, *The ECJ as a Constitutional and a Private Law Court: A Methodological Comparison*, *ZERP Diskussionspapier* 2006/4, 8 ff.

²¹ Cf. W.-H. Roth, *Transposing ‘Pointillist’ EC Guidelines into Systematic National Codes – Problems and Consequences*, *European Review of Private Law* 2002, 761 ff., 769.

²² The so-called ‘jack-in-the-box’-effect of European law, identified by Thomas Wilhelmsson, ‘Jack-in-the-box theory of European Community law’, in: Krämer, Micklitz & Tonner (eds.), *Law and Diffuse Interests in the European Legal Order*, Baden-Baden 1997, 177.

²³ Roth (*o.c.* ERPL 2002, 761 ff.) calls them pointillist: they suffer from *Detailversessenheit* (cf. Roth, *Juristenzeitung* 2001, 485).

²⁴ Art. 6 Directive 97/7 (distance contracts) and art. 3 Directive 1999/44 (consumer sale).

want to, and could sometimes even refrain from implementation, if national law can be interpreted in accordance with these directives. However, reality is different: according to the European Court of Justice, the consumer should be able to immediately recognise his/her 'European' rights. This means that there is a duty for the member states to meticulously implement directives in the field of consumer protection: a national court interpreting existing national law in line with a directive cannot achieve the clarity and precision needed to meet the requirement of legal certainty.²⁵ Thus, if European law allows a right to price reduction in case of non-conformity in consumer sales, it is not sufficient if the national court allows partial termination of the contract: the national legislature must explicitly enact a right to reduction of the price. This duty to implement detailed provisions reinforces the disruption of the national system: what already follows from the system of national law, still needs to be explicitly codified. Gunther Teubner²⁶ coined the term 'legal irritants' to explain that the rule of European origin does not assimilate, but instead disorders the existing system.

Third, the unity of the national legal order is affected by the way in which (implemented) European law is to be interpreted. This interpretation is to take place 'in the light of the wording and the purpose of the directive.'²⁷ This is often at odds with the prevailing way of interpretation of national law that usually puts the legislative history and the system of law as a whole at the centre of attention.²⁸ The legal certainty civil law countries seek to establish by reference to the legislative history and national system, the European Court of Justice finds in a foremost textual and teleological interpretation of directives.

Dutch law provides an example of the conceptual divergence caused by these different modes of interpretation. Art. 7.5 of the

²⁵ ECJ 10 May 2001, Case C-144/99, *ECR* 2001, I-3541 (Commission/Netherlands).

²⁶ Gunther Teubner, Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences, *Modern Law Review* 61 (1998), 12.

²⁷ ECJ 10 April 1984, Case C-14/83, *ECR* 1984, 1891 (Von Colson and Kamann/Nordrhein-Westfalen).

²⁸ See, instead of many others, Stefan Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent*, Tübingen 2001.

Dutch Civil Code contains a definition of ‘consumer sale.’ Dutch law generally holds that the interpretation of this term needs to take place in a subjective way: if the seller did not know – nor had to know – that the buyer bought a thing for private purposes (because it legitimately thought that the buyer bought it in a professional capacity), the buyer is still protected as a consumer.²⁹ It seems to be different from the way in which the European term ‘consumer’ is to be interpreted: the ECJ favours a more objective approach.³⁰ Thus, one term in the Dutch Civil Code (or in the German and French Code, for that matter) has two different meanings, dependent on whether the case in question falls within the scope of application of the European directive. There are many more examples of this phenomenon. Thus, when there is doubt about how to interpret a contract clause on which there have been no separate negotiations among the parties, interpretation of this clause *must* take place in favour of the consumer (the ‘European’ rule), while an interpretation *contra proferentem* is not required for other contracts (the ‘Dutch’ rule).³¹ Also the concept of (non-) conformity in contract law differs, dependent on whether we deal with a (European) consumer sale or a (Dutch) ‘normal’ sales contract.³² These types of divergence will only increase in the future. It even seems unavoidable that the ECJ will finally provide ‘European’ interpretations of all implemented European provisions and that these interpretations will not necessarily coincide with the national ones.

Even more fragmentation

The previous sections clearly show that the emergence of supranational, ‘private’ and European sources has made private law more complex. The main reason for this is that private law is now dealt with at different, and partly overlapping, levels of governance without much coordination among these levels. Private law has

²⁹ See (critically) Asser-Hijma 5-I, *Koop en ruil*, 6th ed., Deventer 2001, no. 77 ff.

³⁰ See *e.g.* in the context of (now) Art. 15 Brussels I-Regulation, ECJ 20 January 2005, Case C-464/01 (Gruber/Bay Wa).

³¹ See Art. 5 Directive 93/13 (Unfair terms), Art. 6:238 s. 2 Dutch Civil Code and Hoge Raad 18 October 2002, *Nederlandse Jurisprudentie* 2003, 258.

³² Arts. 7:17 and 7:18 Dutch Civil Code.

become a building ground where there are several architects, located at the supranational, European and national levels.³³ Political scientists have coined the term *multilevel governance*,³⁴ describing when international integration leads to overlapping rules of national and other lawmakers.

To complete this picture of how private law is affected by fragmentation, there are two more phenomena to be observed. They do not have so much to do with the emergence of new producers of private law (for which the term ‘institutional fragmentation’ can be used), but with fragmentation of substantive rules and of procedural justice. The first development is the increasing use of the possibility to choose a foreign legal system as the applicable law. Within the limits set by private international law (that usually requires some connection between the parties or their activities and the designated State³⁵), people are often able to choose the substantive law that suits their interests best. This led to a ‘law market’³⁶ that is already very real in some areas (like commercial and contract law), forcing courts to apply foreign law where that is the parties’ wish. It does not need much explanation how this development affects the work of the courts that have to apply foreign law.

A second phenomenon is the increasing influence of fundamental rights on private law. The concern is in this respect not so much that the values laid down in the national Constitutions, or in the European Convention on Human Rights, are also important for relationships among private citizens,³⁷ but much more that national Constitutional courts or the European

³³ See for this metaphor Roth, *o.c.*, *Juristenzeitung* 2001, 488.

³⁴ See for a definition *e.g.* Gary Marks *et al.*, Competencies, Cracks and Conflicts: Regional Mobilisation in the European Union, *Comparative Political Studies* 29 (1996), p. 167: ‘overlapping competencies among multiple levels of governments and the interaction of political actors across those levels.’

³⁵ See for the European Union *e.g.* Regulation 593/2008 on the law applicable to contractual obligations (Rome I), *OJ EC* 2008, L 177/6.

³⁶ Erin O’Hara and Larry E. Ribstein, *The Law Market*, Oxford 2009.

³⁷ The values behind fundamental rights are already largely incorporated in private law: see on this ‘indirect effect’ *e.g.* Olha O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party*, München 2007, 69 ff.

Court of Human Rights come to deal with cases that are much better dealt with on the basis of private law. There is little doubt that one can decide most disputes among private parties by balancing competing fundamental rights, but it is equally clear that this approach is not very useful in so far as subtle rules developed by private law courts are available to deal with these same disputes. This is in essence a debate about the hierarchy between fundamental rights (as applied among private citizens) and private law. In countries with a Constitutional court, this court thus engages in a competition with the highest civil court, leading to procedural fragmentation.³⁸ The Netherlands has been relatively unaffected by this phenomenon because it does not have a Constitutional court.³⁹

3. How to deal with fragmentation of Private Law? Dutch (and European) answers.

Introduction

This section considers the extent to which concerns about this increasing complexity are recognised in the Netherlands and which proposals (if any) are suggested to cope with the problems caused by it. In doing so, I will follow the structure of the previous section: I will first discuss institutional fragmentation (mainly caused by European legislation) and then go on to consider the two examples of substantive and procedural fragmentation (enhanced party choice and constitutionalisation of private law). This structure is indicative of how fragmentation is almost always perceived in the Netherlands: not as a general phenomenon cutting across several areas (the way in which it was presented in the previous section), but as something that is only observed in separate areas of the law.

Fragmentation through the Europeanisation of Private Law

The increased complexity of national private law, caused (mainly) by the implementation of European directives, has not

³⁸ See on this, and other types of, competition Nikolaos Lavranos, *Jurisdictional Competition*, Groningen 2009.

³⁹ According to Art. 120 of the Dutch Constitution constitutional review by the courts of acts of Parliament is not allowed.

gone unnoticed. The European Parliament already called for the drafting of a European Civil Code in 1989.⁴⁰ This naïve call (the European competence to enact such a Code is lacking) was followed by a more fruitful debate initiated by the European Commission in 2001.⁴¹ This recently led to the publication of the Draft Common Frame of Reference for European Private Law. The Dutch government supports the use of this DCFR as a non-binding instrument to make existing directives more consistent, but does not regard it as a step towards a European Civil Code.⁴² The Dutch Minister of Justice took this position after Parliament raised questions about an article in a Dutch newspaper, claiming that the European Commission was trying to introduce a European Civil Code ‘through the backdoor.’⁴³ I should add that, even if the European competence to introduce a binding European Civil Code would exist, this would not end present fragmentation: private law will still be dealt with at various levels of governance. One only needs to think of closely connected areas of procedural and administrative law (that will remain national) and competition law (that is largely European), leaving aside that a European Civil Code, in whatever form, will probably not contain rules on immovable property, family law and the law of succession.⁴⁴ The DCFR may have some impact on the revision of existing directives and the drafting of new ones, but it is too early to say anything definitive about this at the moment.

⁴⁰ Resolution A2-157/89, *OJ EC* 1989, C 158/400.

⁴¹ Communication [...] on European Contract Law, COM (2001) 398 final, *OJ EC* 2001, C 255/1, followed by Communication [...]: A More Coherent Contract Law – An Action Plan, COM (2003) 68 final, *OJ EC* 2003, C 63/01 and by Communication [...] on European Contract Law and the Revision of the *Acquis*: the Way Forward, COM (2004) 651 final, *OJ EC* 2005, C 14/6.

⁴² Letter of the Minister of Justice of 27 May 2008, EK 2007-2008, 23490.

⁴³ *NRC Handelsblad* 4 October 2007, followed by a discussion among Dutch academics in *Nederlands Juristenblad* 2007, Issue 39.

⁴⁴ See Martijn W. Hesselink, The Structure of the New European Private Law, *Electronic Journal of Comparative Law* 6.4 (2003), Christian Joerges, Interactive Adjudication in the Europeanisation Process? A Demanding Perspective and a Modest Example, *European Review of Private Law* 2000, 1 and Olivier Remien, Einheit, Mehrstufigkeit und Flexibilität im europäischen Privat- und Wirtschaftsrecht, *Rabels Zeitschrift* 62 (1998), 627. The DCFR does not contain rules in the fields mentioned.

If the efforts at the European level can only have a limited effect, what can be done at the *national* level to deal with a fragmented private law?⁴⁵ The Dutch legislature, well aware of the risk of fragmentation, made the reasoned choice to incorporate European directives into the Civil Code in order to keep the national legal system intact as much as possible.⁴⁶ Implementation inside the Civil Code allows one to scrutinise the consequences of the directive for national law, including ‘where national law, in view of the coherence of the national legal system, is to be adjusted in a more far reaching way than the directive would possibly oblige it to.’ Only by giving directives such a greater field of application (so-called ‘supererogatory implementation’⁴⁷) than strictly necessary, a ‘coherent system’ can be maintained.⁴⁸ The solution to implement directives outside of the Civil Code would lead to ‘patchwork’ policies and ‘a poorly organised whole of separate statutes, having for a consequence inner inconsistencies and untraceable and obscure provisions.’⁴⁹ Thus, provisions that the European legislature only intended to affect consumer contracts, were sometimes given a more extensive application and now also cover other types of contracts. This is, for example, the case with the duty to use plain intelligible language when drafting standard contract terms, and with the concept of non-conformity in consumer sales.⁵⁰ This is also a well-known technique in Germany, where the European directive on the sale of consumer goods was, for example, also made applicable to B2B and C2C contracts (see § 433 ff. BGB).

This implementation strategy has the important advantage of allowing the national Civil Code to retain its role as the major codification of private law. However, one can still question whether this strategy really enhances overall consistency. Even after supererogatory implementation, two of the three reasons for

⁴⁵ Smits, Spontaneous order, *o.c.*, no. 34 ff.

⁴⁶ See *e.g.* *Handelingen EK* 1 March 2005, EK 17-759 ff.

⁴⁷ For this term: Stefan Leible, The Approach to European Law in Domestic Legislation, *German Law Journal* 4 (2003), 1266, at 1268.

⁴⁸ *Handelingen EK* 2005, 17-760 and 17-768.

⁴⁹ *Handelingen EK* 2005, 17-760.

⁵⁰ See art. 4 s. 2 of Directive 93/13 (unfair terms) and art. 2 s. 2 of Directive 1999/44 (consumer sale).

disturbance of the coherent system (see above, section 2.2) remain intact: the detailed character of the European provisions and the way in which these provisions have to be interpreted. It was therefore observed in Dutch doctrine that with the fundamental choice for implementation inside the Civil Code, the Code has become a sandcastle, with European law as an incoming tide.⁵¹ This castle is bound to disappear, no matter how hard the national legislature tries to prevent this from happening. Other doubtful consequence of the present approach is that the Civil Code needs permanent updating and that it is often unclear which provisions are of European origin (although this can be easily remedied if publishers of commercial text editions of Dutch legislation would give the rules of European origin a different colour⁵²).

The prevailing view in the Dutch doctrine⁵³ is that there is no easy way out of the dilemma posed by the Europeanisation of private law: a coherent implementation inside the Civil Code is never fully possible, whereas implementation outside the Code would damage the idea of the Code as a complete and consistent whole. At the 2006 annual meeting of the most important professional association of Dutch lawyers (the *Nederlandse Juristen-Vereeniging*), the influence of European law on national law was widely discussed, but the participants were not unanimous in their view on how to deal with the fragmentation it causes.⁵⁴

When it comes to the application of European law, there are several schemes in place to enhance its uniformity. The most important one is the European Judicial Network (EJN) in civil and commercial matters, in operation since 2002.⁵⁵ The aim of this network is to facilitate judicial cooperation between the European

⁵¹ W.H. van Boom, *Algemene en bijzondere regelingen in het vermogensrecht*, *RM Themis* 2003, 299.

⁵² See the discussion on the reports of the NJV: *Handelingen Nederlandse Juristen-Vereeniging* 136 (2006-2), Deventer 2007.

⁵³ The various implementation strategies were discussed at the 2006 annual meeting of the *Nederlandse Juristen-Vereeniging* (NJV) on basis of a report written by the present author.

⁵⁴ *Europese integratie*, *Handelingen Nederlandse Juristen-Vereeniging* 136 (2006-1), Deventer 2006.

⁵⁵ Council Decision 2001/470 establishing a European Judicial Network in Civil and Commercial matters, *OJ ECL* 174/25.

member states, in particular where European legislation already exists. The network has been particularly active in the field of private international law.⁵⁶ In addition, the Dutch training institute for the judiciary (*SSR*) provides special training to judges to increase their proficiency in dealing with international sources of law and provides traineeships for Dutch judges with foreign courts, or with the European Court of Justice.⁵⁷ These initiatives are generally seen as much needed mechanisms that enhance the uniform application of European law *at the national level*. Efforts to create even more enhanced methods of coordination, such as in the field of European competition law,⁵⁸ are usually seen as enlightening examples of how coordination could also take place in other fields.

Substantive and procedural fragmentation

The other types of fragmentation, distinguished in section 2, have also been widely discussed in the Dutch literature. For example, the rise of private regulation was the topic of yet another recent meeting of the *Nederlandse Juristen-Vereeniging*.⁵⁹ The risks of trading in detailed private law rules for a rough balancing of fundamental rights were mostly highlighted in the doctrine.⁶⁰ Although the problems associated with these developments – and with the multiplication of sources generally – are acknowledged in the Dutch literature, one cannot say that the doctrine provides the courts with strategies to deal with them. This means that courts

⁵⁶ The Dutch EJM-website can be found at http://ec.europa.eu/civiljustice/index_nl.htm.

⁵⁷ Information on the European Judicial Training Network is provided at <http://www.ejtn.net>.

⁵⁸ Within the European Competition Network, specific cases are allocated among national competition authorities on basis of soft law rules. See Commission Notice on cooperation within the Network of Competition Authorities of 2004, *OJ EC C 101/43* and Maartje de Visser, *Network-Based Governance in EC Law*, Oxford 2009.

⁵⁹ *Alternatieve regelgeving*, Handelingen Nederlandse Juristen-Vereeniging 137 (2007-1), Deventer 2007.

⁶⁰ See e.g. Olha Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party*, o.c. The opposite view is represented by Chantal Mak, *Fundamental Rights in European Contract Law*, Austin 2008.

often have to find their way in a complex web of rules on conflict of laws, international conventions on the law applicable to transnational relationships, domestic rules of a mandatory character limiting or affecting the applicability of international provisions, and a large variety of private codes of conduct, guidelines, restatements of trade usages and practices, as well as collections of principles by non-governmental organisations.⁶¹ Particularly in the field of private international law, this multitude of norms sometimes poses serious problems for the courts.⁶² These problems are even reinforced by the fact that often not one (foreign) legal system as a whole is applicable to all aspects of the case at hand. Thus, in cases of a divorce with international aspects, it could be that different laws apply to the divorce itself, to the claim for alimony, to child custody and to the distribution of matrimonial property. It led one Dutch author to recently state that, as a result of this differentiation, Dutch private international law has become a patchwork of subsystems, endangering its practical use.⁶³ The emergence of a 'law market' (see above, section 2.3) will only increase this problem.

An interesting debate took place in the Netherlands about how to deal with this plural private international law. This debate was heavily influenced by the old plan (going back to 1947, when work on the new Dutch Civil Code started) to codify Dutch private international law in a separate book (Book 10) of the Dutch Civil Code. On one hand, it was suggested to give up this idea especially because of the multiplication of sources and the far-ranging competences the European Union has in this field since the Treaty of Amsterdam. On the other hand, however, codification was presented as an answer to the existing plurality of sources: this plurality would even provide an incentive to codify. This is also the view of the Dutch government that sent a draft statute for a new

⁶¹ As stated in the questionnaire prepared by Professor Silvia Ferreri.

⁶² In private international law, the variety of sources is seen as a main characteristic of the field. See *e.g.* the main Dutch textbook on private international law: L. Strikwerda, *Inleiding tot het Nederlandse internationaal privaatrecht*, Deventer 2002, no. 9.

⁶³ M.V. Polak, *Onbegrip en onbehagen*, in: *Ex libris Hans Nieuwenhuis*, Deventer 2009, 231.

Book 10 to Parliament in September 2009.⁶⁴ The draft explicitly refers to the aim of bringing coherence among national, European and international rules and to facilitate the incorporation of future European rules. Reference in this context is made to Belgium, where private international law was codified in 2004.⁶⁵

This strategy fits in with the way in which the Dutch government implements European directives (see above, section 3.2): it tries to create coherence by conflating all foreign elements into the Dutch system. The soundness of this reasoning must be doubted, for it is built on the assumption that by having one system (the Dutch one) prevail, coherence can be attained. As we already witnessed, however, this strategy will not work because the very essence of a pluralist law states that there is no one system, which prevails. If private law is made by different actors, it is no longer in the power of one of these actors to create a coherent system. Rather than to pretend that this is even possible, a better strategy may be to inform legal practice as much as possible about the other actors and their activities. The Dutch government has made a good start by providing information on all international agreements the Netherlands has concluded on a special website, including the exemptions and reservations it makes.⁶⁶ It now refers to 6500 treaties ratified since 1961 and it considerably enhances the accessibility of relevant sources.

Courts also have techniques available to elude complexity. Although Dutch law does not accept the basic rule of the *lex fori* as a general principle, there are several rules that come close. Thus, the statute on the law of conflicts in case of divorce of 1981 states that Dutch law is to be applied if the parties before the court choose Dutch law to be applicable; if such choice was not made, foreign law can only be applied in exceptional circumstances. De Boer has suggested to accept the theory of ‘facultative choice of

⁶⁴ TK 2009-2010, 32137 (Vaststelling en invoering van Boek 10 van het Burgerlijk Wetboek).

⁶⁵ See *e.g.* TK 2005-2006, Aanhangsel, nr. 892 and TK 2009-2010, 32137, nr. 3, p. 4.

⁶⁶ This *Verdragenbank* is available at <http://www.minbuza.nl/nl/Onderwerpen/Verdragen>. The database contains links to the full text consolidated versions of the treaties (in so far as published after 1981).

law' in Dutch law.⁶⁷ It means that the courts only need to apply conflict of laws if one of the parties asks for it. If this request is not made, the courts must apply the *lex fori*. The recent draft statute of 2009 (see above) explicitly rejects this view, meaning that the courts will have to apply foreign law at their own initiative wherever necessary. Their task is of course facilitated by the possibility to ask for information under the European Convention on Information on Foreign Law (1968). However, it is more likely that the parties (or their lawyers) provide the court with expert opinions, or that the court looks into foreign law itself.⁶⁸

4. The need to rethink Private Law as a national and coherent system

If anything should have become clear in the preceding paragraphs, it is that private law is much more fragmented today than it was in the past. This fragmentation is primarily caused by a multiplication of sources: different aspects of private law are dealt with by different 'lawgivers' without an overall responsibility for coherence and unity in the hands of one overarching institution. This has led to diverging substantive norms, all with an equal claim to validity.⁶⁹ This phenomenon is not unique for the Netherlands, but can be observed in all countries of the European Union (and beyond).

The approach of the Dutch legislature in dealing with this fragmentation is to try to re-establish a coherent system. This is apparent from both the ways in which European directives are implemented and from the Dutch efforts to deal with the increasing complexity of private international law. European directives are implemented as much as possible inside the Dutch Civil Code in order to keep the private law system intact, even

⁶⁷ Th.M. de Boer, Facultative Choice of Law, in: *Recueil des cours de l'Académie de droit international*, vol. 257, 's Gravenhage 1996, 225.

⁶⁸ The Dutch government indicates this possibility is facilitated by the Internet: TK 2009-2010, 32137, nr. 3, p. 9.

⁶⁹ See in more detail, and with a theoretical embedment in legal pluralism, Jan M. Smits, Plurality of Sources in European Private Law, or: How to Live With Legal Diversity?, in: Roger Brownsword, Hans-W. Micklitz, Leone Niglia and Stephen Weatherill (eds.), *The Foundations of European Private Law*, Oxford 2011 (forthcoming).

though this cannot take away the causes of increasing incoherence. Also the disperse rules on private international law are structured in a new part of the Civil Code, even though it is no longer in the power of the national legislature to create a coherent system. In my view, the strategy of the Dutch legislature is therefore clearly wrong: it should accept it has no longer the power to create a coherent system through legislation and seek new strategies to deal with the various legal regimes that exist on its territory. These strategies will have to take into account the multilevel structure of present-day private law. It must be accepted that the responsibility for coherence and unity of the legal system is no longer in the hands of one institution. Making available information about the various legal regimes in force within one country is a strategy many national governments (including the Dutch one) already adopted. Another possible solution is to enhance coordination among the various actors involved in the multilevel system.⁷⁰ Most of all, however, we need to rethink our view of private law as a national and coherent system.⁷¹

⁷⁰ Such as the Open Method of Coordination (OMC), accepted as a method of governance at the 2000 Lisbon European Council and since then applied in various areas.

⁷¹ See Smits, *Plurality of Sources in European Private Law, or: How to Live With Legal Diversity?*, *o.c.* for an attempt.