Coherence and Fragmentation in European Private Law

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ISBN (print) 978-3-86653-228-1
ISBN (eBook) 978-3-86653-965-5

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at http://dnb.dnb.de.

Production: Karina Hack, Munich. Typesetting: fidus Publikations-Service GmbH, Nördlingen. Printing and binding: AZ Druck und Datentechnik GmbH, Kempten. Printed on acid-free, non-ageing paper. Printed in Germany.

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Preface

Private law is traditionally said to consist of a coherent system formed by a set of general principles and concepts, with rules as their consistent corollaries. The main function of this coherence would lie in providing those who make use of this system (such as legal scholars, courts and legislatures) with a tool to describe existing law and to decide new cases ensuring legal certainty and equality. This systematic view of private law has been highly influential over the last two centuries. At the same time, it is a view closely associated with national private law and with national legal actors that work closely together in maintaining and developing the system. Increasing Europeanization has fundamentally challenged this idea: private law today is said to be fragmented.

The aim of this book is to test that view for a number of different fields forming part of European private law in the broad sense of the term: contract law, property law, competition law, insurance law, marketing law, private international law and the law of intellectual property. It aims to show how fragmentation is perceived in each of these fields and what solutions are available to remedy its adverse effects. Furthermore, this volume shows how aspirations to new (European) coherence may result in greater fragmentation. In addition, a historical perspective on fragmentation and coherence is provided.

This book is the joint product of one of the four research groups active within the Centre of Excellence in the Foundations of European Law and Polity Research at the University of Helsinki. The Centre is funded by the Academy of Finland and aims to research the effects of Europeanization on law and legal theory, even to rethink European legal thinking. The research group that produced the book – all authors are associated with the Centre and with the Helsinki Faculty of Law – looks specifically at the consequences of Europeanization in the field of private law and its underlying values. Discussion about the research of which this volume is the result took place at a number of seminars organized by the Centre during 2010 and 2011.

Several people have provided support in preparing this book. We would like to mention in particular Ilona Nieminen, coordinator of the Centre, and Christopher Goddard, who provided excellent language editing. We are grateful to both, as we are to the staff at sellier european law publishers.

Helsinki, June 2012 *The Editors*

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Introduction

Jan Smits/Pia Letto-Vanamo

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)

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.[1] 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.[2] 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.[3] 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.[4]

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

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1 Cf. *Thomas Wilhelmsson*, The Contract Law *Acquis*: Towards More Coherence Through Generalisation?, in: Sammelband 4. Europäischer Juristentag, Wien 2008, 111 ff., at 130: 'astonishingly little is said about the concept of coherence itself.'

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.

materials so as to avoid inner contradictions. Principles, rules and cases are then all seen as part of one overall system, allowing analogous interpretation: If a certain topic is not dealt with, the system allows a conclusion to be reached. This has the advantage of efficiency (one does not have to make specific rules for all types of situation) and of reducing uncertainty about the application of law.

The other understanding of coherence is not so much aimed at creating a perfect (or as perfect as possible) system of law, but is directed towards guaranteeing that some coherent policy is implemented. This is evident from the writings of – in particular – Katri Havu and Juha Vesala who, in the area of competition law, point at the importance of enabling policymakers to pursue a pre-set goal, such as fostering innovation. We can also see this instrumental use of coherence in other areas of European law and it can even be argued that the great majority of European rules are tailored to some external goal (in particular, completion of the internal market). In the end, the question is whether the pursuit of such policy goals is at all compatible with the coherence of a legal system.

It is clear that, as Teemu Juutilainen rightly notes, coherence is always a matter of degree. It depends on how large one wants to span the web whether it is possible to come up with any meaningful presentation of the law as a coherent system. The main choice that needs to be made in this respect is whether one wants to systematise European norms, national law, or both.

C. Manifestations of fragmentation

It has become a commonplace to say that Europeanization of private law[5] 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

[5] On which in general *Reinhard Zimmermann*, The Present State of European Private Law, American Journal of Comparative Law (AJCL) 2009, 479 ff.

lawmakers. This is in particular visible in the field of contract law, where the United Nations Convention on Contracts for the International Sale of Goods (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.[6]

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).[7] 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 economic efficiency and at best some idea of "access justice".[8] 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."[9] Perhaps the most severe collisions between different policy goals exist in labour law. Evidence of this is Ulla Liukkunen's contribution, where she shows abundantly 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 'pointillist' 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 et al (eds), Towards a European Civil Code, 4th ed., 2011, 91 ff.

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 Rationalities of European Private Law, in: Roger Brownsword/Hans Micklitz/Leone Niglia/Stephen Weatherill (eds), The Foundations of European Private Law, 2011, 139 ff.

8 See *Hans-W. Micklitz*, The Visible Hand of European Regulatory Private Law, in: Piet Eeckhout/Takis Tridimas (eds) *Yearbook of European Law* 28 (2010), 3 ff. and id., Social Justice and Access Justice in Private Law, EUI Working Paper Law 2011/02.

9 *Hans-W. Micklitz*, Introduction, in: id. (ed.), The Many Concepts of Social Justice in European Private Law, 2011, 3 ff., at 37.

Gunther Teubner[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,'[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?)[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.

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[10] *Gunther Teubner,* 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', Modern Law Review (MLR) 1998, 12.

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

[12] See *Hannes Unberath/Angus Johnston,* The Double-Headed Approach of the ECJ Concerning Consumer Protection, Common Market Law Review 2007, 1237 ff.

D. In search of solutions

The third main question addressed in this volume is how to deal with increasing fragmentation: What strategies can be adopted to deal with its adverse consequences? The contributions show that solutions are proposed both at European level, at national level and as a combination of both.

The European legislature sees the adverse effects of fragmentation mainly in the continuing existence of different national laws in the European market. Over the years, it has also come to recognize that its own legislative products in a certain field (such as consumer law) are often incoherent. This has led to well-known public consultations (by way of Green Papers) and often also to legislative measures in most of the fields covered in this book. The best-known efforts are those in the field of private law in general. Here, the European legislature has actively supported creation of background rules by way of the Draft Common Frame of Reference for European Private Law[13] (see the contribution by Smits). This DCFR may influence revision of existing directives and drafting of new ones. Next to these soft principles, the European legislature adopts an active policy of revising an incoherent *acquis* and of moving away from minimum towards full harmonization.

Understandably, in their quest for more coherence some authors argue in favour of creating a truly unified private law by way of European rules that completely replace existing national rules in a certain field. Both Jaana Norio-Timonen and Teemu Juutilainen hint even at this possibility. However, this option is not likely to be successful in view of the present competences of the European legislature and the present political climate – regardless of other objections one might have. Two other possible avenues for the European legislature are therefore more likely to be accepted. The first is to create uniform conflict rules (as we already have for example in the field of contract law by way of the Rome I Regulation). Teemu Juutilainen argues for similar rules in property law with the argument that they will promote innovation, experimental learning and competition between legal systems. The second possibility is to argue for European optional regimes. Jaana Norio-Timonen does so for the field of insurance contract law, thus following the example of the European Commission Proposal for a Common European Sales Law.[14] Optional regimes indeed have the potential to be much less intrusive for national jurisdictions as they exist next to substantive national laws, instead of replacing or even affecting them.

Another way to remedy the adverse effects of fragmentation at the European level is to put one's hopes on a more active Court of Justice of the European Un-

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

[14] Proposal for a Regulation on a Common European Sales Law, COM (2011) 635 final.

ion. This was proposed before for European consumer law.[15] Johan Bärlund also proposes this for marketing law, arguing in favour of a Court of Justice that not only interprets directives but also engages in 'cross-directive alignment.' Ulla Liukkunen also makes her plea for new ways to approach collisions between the economic and the social in a European Union dependent on the ability of the Court to solve this tension in a better way.

Clearly, these efforts at the European level will not offer the ultimate solution to fragmentation. This raises the question as to what can be done at national level to deal with a fragmented private law. The usual strategy of national legislatures is to make the scope of European legislation broader in order to fit it in with pre-existing national law. This 'supererogatory implementation' does indeed to some extent avoid a patchwork (and allows civil law countries to retain the national civil code as the exclusive codification of private law), but the reasons for disturbance of a coherent system remain intact. The different ratio of European provisions, their often detailed character and the way these provisions have to be interpreted will still cause fragmentation to continue.

Unsurprisingly, greater coherence cannot be found at either European or national level alone. Katri Havu makes the important and sensible point that the great majority of European rules, including those in her field of competition law-related damages, are in need of national law to become effective: 'Directive-based rules will acquire their soul as they are applied together with national law, by national courts.' Put differently: Every field investigated in this volume has become a multi-level system in which the responsibility for coherence or unity no longer lies with one institution. This phenomenon will become more rather than less important. This calls for strategies of coordination and cooperation among actors rather than a search for new hierarchies. The search for principles by legal scholars along with setting up judicial networks and legislative proposals for optional instruments must all be seen in this light. In the end, all contributions point to the need to rethink our view of private law as a national and coherent system.

E. Putting fragmentation into perspective

If the above overview of the findings of this volume suggests that the discussion about the tension between coherence and fragmentation is a modern phenomenon, this is erroneous. The contribution of Pia Letto-Vanamo shows that the co-existence of different legal orders on the same territory is not a new thing at all. Before the nineteenth century, there was not one law but rather a 'multi-layered network of several legal orders' produced by different lawgivers or providers of legal authority. These legal orders (and their actors) were in competition with

[15] *Vanessa Mak*, Harmonisation through 'Directive-related' Case Law; The Role of the ECJ in the Development of European Consumer Law, ZEuP 2009, 129 ff.

each other. It was through legal scholarship that these diverse sources were put into one system, of course helped by the building of national states. To realize that fragmentation is in this respect the historical norm can help us better understand that we should not search for the same type of legal coherence that we had become used to in the 19th and 20th centuries. A better strategy, then, is to look at the functions that coherence serves (such as predictability and equality), and see if these functions can be taken care of in a different way. This indeed requires rethinking private law as a system. The times of one 'grand systematic design' are over and private law will continue to follow a haphazard and uneven course.[16] Fragmentation is here to stay.

[16] See *Jürgen Basedow/Klaus Hopt/Reinhard Zimmermann,* The Max Planck Encyclopedia of European Private Law, 2012, Preface, p. v.

Coherence and Fragmentation in the Law of Contract*

Jan Smits

A. Introduction

The classic picture of private law is that it consists of a system. This system would be formed by a set of principles, rules and policies that do not contradict each other and that is therefore coherent. The main function of this coherence would lie in providing those who make use of this system (such as academics, courts and legislatures) with a tool to describe the existing law and to decide new cases ensuring legal certainty and equality. This systematic view of private law has been very influential in the last two centuries. At the same time, it is a view closely associated with national private law and with national legal actors that work closely together in guarding the system.

The widely accepted view is that Europeanisation and globalisation have fundamentally distorted this classic idea: coherence would to a large extent have made place for fragmentation as a result of increasing European influence on national private laws. This contribution will test this hypothesis for the field of contract law. It starts off with an account of what is meant by coherence in private law (section B): although talk of a system is persistent, it is often not very clear what is exactly meant by it. Section C subsequently considers how this system is affected by internationalisation. This still leaves open what remedies exist to deal with the consequences of Europeanisation and whether it is still possible to think of (private) law in terms of a coherent system: this is explored in section D.

B. What is coherence in contract law?

When asking what the coherence of a system actually consists of, it is surprising to see that, although talk of a system is persistent, what it means is not very often defined. The word is rather used as an umbrella term to denote several aspects of how private law is traditionally viewed. This 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 all form part

* This contribution follows the argument set out before in *Jan M. Smits*, The Complexity of Transnational Law: Coherence and Fragmentation of Private Law, (2012) 20 European Review of Private Law (ERPL), 153.

of a consistent whole without contradictions within the system itself.[1] Next to the pursuit of 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 can similar cases be treated alike. Consistency can be achieved because all actors involved in development of the legal system (legislatures, courts and legal academics) are located in the same country and share a more or less uniform set of values. In this view, private law is a 'self-contained and self-referential system'[2] with clear hierarchies among the actors involved in making and applying the law.

One is able to distinguish between two main aspects of this coherence: coherence of the legal system itself (which is mainly about describing and presenting the existing law) and coherence of the policies underlying legal norms (which is about the normative question of what the law should be and how it is to be applied).[3] Both aspects are closely related (at least in the civil law and Nordic tradition), but it is useful to distinguish them, especially because they have started to go their own way as a result of present fragmentation (see below).

When it comes to coherence of the legal system itself, the main concern is to present existing materials so that inner contradictions are avoided and that the law can be seen in a way that is as clear and transparent as possible. This means that principles, rules and cases are all seen as part of one overall system, allowing analogous interpretation: if a certain topic is not dealt with, the *system* allows a conclusion to be reached. This has the advantage of efficiency (one does not have to make specific rules for all types of contracts) and of making the law more accessible, thus reducing uncertainty about its application.[4] Thus, any modern legal system accepts the principles of binding force, freedom of contract and consensus as governing any contract, providing the skeleton on which the rest of contract law relies.

This type of systematisation finds its origins in Modernism. It is well known that until the reception of Roman law many different types of contract existed,

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1 Cf. *Ronald Dworkin,* Law's Empire, Fontana, London 1986, p. 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, (2004) 17 Ratio Iuris, 87 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.* (eds), European Integration and Law, Antwerp-Oxford 2006, no. 32 ff.

2 *Pierre Legrand,* 'Against a European Civil Code', (1997) 60 Modern Law Review (MLR), 45.

3 See for a different distinction between types of coherence (coherence of concepts, of particular norms and of the system as a whole) *Thomas Wilhelmsson,* The Contract Law Acquis: Towards More Coherence Through Generalisation?, in: Sammelband 4. Europäischer Juristentag, Wien 2008, p. 111 ff, at 133 ff.

4 See e.g. the Dutch legislature: Parlementaire Geschiedenis van het nieuw Burgerlijk Wetboek Boek 3, Deventer 1981, p. 157-158 and Boek 6, id., p. 47.

all with their own specific requirements.[5] Only if a contract could be neatly placed into one of the accepted categories (such as real contracts, written contracts) could it be enforced. In other words: Roman law did not have *one* system of contract law. Any question about generalisation simply did not arise.[6] This changed in the 16th century with a desire to systematise reality *more geometrico* not only in nature (Galileo and Newton) and politics (Hobbes), but elsewhere. This implied that all irrelevant details were eliminated to build one coherent system.[7] In law, it was through the authors of the late Spanish scholastics and through Hugo Grotius (1583-1645) and Samuel Pufendorf (1632-1694) that a general theory of contract started to emerge. André van der Walt rightly emphasises:[8]

> 'Many theorists wanted to ensure that choices among competing rights are constrained by clear and unambiguous principles, so that judicial judgment could be separated from the uncertainties of political rhetoric and metaphysical theory. The lawyers of the Enlightenment were, in a word, looking for a legal science in which certainty was guaranteed through method. Ever since the Enlightenment this implied that the legal story (...) would have to be transformed from a religious fable into a scientific dissertation.'

This scientific programme was turned to perfection in later ages, finding its culmination in 19th century German Pandectism, in which legal method became close to the mathematical one.[9] This development was not limited to continental civil law jurisdictions. Until the Commentaries on the Laws of England of Blackstone (1765-1770) English contract law lacked a coherent structure. There was only a list of claims (actions) that were from the educational point of view seen as 'something of a nightmare'.[10] Classical Roman law and English law thus

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5 See e.g. *Robert Feenstra,* Pact and Contract in the Low Countries from the 16th to the 18th century, in: John Barton (ed), Towards a General Law of Contract, Berlin 1990, p. 197 ff. and *James Gordley,* Natural Law Origins of the Common Law of Contract, in: idem, p. 367 ff.

6 Cf. *Gordley,* o.c., p. 372: 'The Romans had worked out these rules ad hoc without trying to explain why a given transaction should be binding on consent, on delivery, or through a formality.'

7 *Stephen Toulmin,* Cosmopolis; The Hidden Agenda of Modernity, New York 1990, p. 31 ff.

8 *A.J. van der Walt,* Marginal notes on powerful(l) legends: Critical perspectives on property theory, (1995) 58 Tydskrif vir Hedendaagse Romeins-Hollandse Reg (THRHR), 402.

9 On Savigny's mathematical method: *Laurens Winkel,* l'Histoire du droit, exemple d'une science interdisciplinaire, (1996) Sartoniana, 133.

10 *Geoffrey Samuel,* The Foundations of Legal Reasoning, Antwerpen 1994, p. 72.