

PRACTICABLE PRIVATE LAW

Participating departments: Private Law and Notarial Law & Legal History

1. Introduction

In the previous research programme, the emphasis was on the consistency of Dutch private law in a multi-layered legal system. Consistency, however, is merely one of the aspects which may be distinguished within the idea of law as a system.¹ The main focus in the current programme is therefore on another aspect, i.e. the practicality of private law. The needs of those utilizing private law (whether judges, lawyers, businesses or consumers) hereby become paramount.

2. Setting of the programme: four trends

The importance of the practicality requirement has been significantly and permanently increased by four continuing trends.

Instrumentalization

Partly due to developments at the European Union (EU) level, private law has increasingly been seen by the government in recent decades as an instrument for achieving policy goals. Enforcement of private-law norms, for instance, has become a responsibility of the government itself, rather than a task left to private parties.

The instrumentalization of private law raises the question whether private parties can sufficiently accomplish their objectives through private-law means. Criteria such as justice, transparency, efficiency, and effectiveness of private law rules (as perceived by those utilizing private law) will become more prominent.

Individualization and normative fragmentization

Society's ever-increasing individualization makes it nearly impossible to furnish forms which are appropriate in a majority of cases. Freedom of choice has become a crucial norm to be respected. Issues specifically pertaining to the law of persons and family law are cropping up, certainly given the public policy-related nature of these legal areas. Unlike in the past, marriage no longer represents the main point of reference. Individuals themselves want to shape their relationships and expect private law to afford them this opportunity. The expectations concerning surname law, adoption and acknowledgment of children are similar.

Another factor is normative fragmentization. Because of the culturally diverse nature of contemporary Dutch society, there are no essentially unequivocal moral principles to provide guidance.

Such individualization and normative fragmentization thus compel a continuous re-examination of the arrangements which private law supplies to people to regulate their relationships with each other.

Globalization and Europeanization

The interdependence of markets means that developments in Dutch property law and civil procedural law have substantial economic consequences. The Dutch economy benefits if

¹ See Asser-Vranken **, 1995, Nos. 118-130. A third aspect which Vranken distinguishes is the 'limiting function' (No. 130).

foreign companies continue to have a favourable opinion of Dutch law. If the notion takes hold in foreign boardrooms that Dutch law is unpredictable because of vague standards or because courts claim substantial discretionary power, parties will seek to avoid having Dutch law apply to their legal relationships. This will also be the case if the Dutch legal system is regarded as slow or unpredictable.

The mere fact that Dutch private law differs on a particular point may in itself be decisive. Hence, globalization gives rise to the question of how desirable a certain rule is if it turns out that the Netherlands is alone in its position. It was partly against this background that a choice for ‘two-tier board’ legal entities was made in the law of legal entities. The same question has arisen in property law regarding pre-contractual liability for unsuccessful negotiations.

Private law is becoming less and less a purely national matter. EU legislation, for example, has a huge impact on private law through directives and regulations. Likewise, harmonization projects such as the Draft Common Frame of Reference (DCFR) and comparative law studies are relevant to formulating ideas about national private law.

Law as a process

A final trend is a change in outlook about the courts and the law. Under this different outlook, the law is simply a tool. Court decisions and legal processes (for example, ‘chains’ of civil-law notaries and the Land Registry Office) are generally assessed based on their usefulness and efficiency. The strict legal correctness or consistency of these decisions or processes is a far less important criterion in reviewing them. This trend is largely attributable to the increasing digitalization of society, making legal processes go more smoothly on the one hand, but, on the other, also creating new practical and legal problems.

All of this not only affects the way in which ‘customers’ or ‘end users’ look at legal processes, but also colours the views of legislators, judges and other actors, such as civil-law notaries. Academics hoping to make a contribution to actual practice would therefore be well advised to analyse the law from the same perspective.

3. Research question

The two-fold general research question for this programme can be stated as follows:

- (1) To what extent is Dutch and European private law practical for each of the actors that must deal with it (businesses, natural persons, lawyers, courts, and the government as policymaker)? Of course, the meaning of the term ‘practical’ will also be investigated in this connection.
- (2) Insofar as private law is not as practical as it should be:
 - a. how can this be improved? and
 - b. who should ensure this (national or European courts or legislatures), or should this be achieved through some other means, such as self-regulation?

4. Approach and methodology

In addressing the above issues in different sub-areas, we will rely on an assumption which is itself the subject of investigation, to wit, that the degree to which private-law norms are clear-cut (transparent, easy to apply) is the critical factor in determining their practicality. The assumption to be tested, then, is that rules that require a balancing of the various interests at play is deemed sub-optimal for most of the actors in many areas.

Information derived from the following three sources will be used to answer the research question.

Comparative law study

This study will play a major role. Solutions tested in legal practice in other countries may offer worthwhile alternatives to the solutions opted for here. A comparative law study can supply alternative and/or more practical solutions for problems identified in the Netherlands.

Legal principles

Practicality problems may be the result of a lack of clarity concerning the principles underlying certain rules. Furnishing clarity about underlying principles may therefore solve these problems. An underlying principle can sometimes be ascertained, but, in most instances, it is more or less a construct. This is especially true where a new problem or new development (the internet, for example) poses a challenge to the existing rules. Because lawmakers could not have anticipated the new development when devising those rules, a logical solution cannot be deduced from the law. The solution entails a normative choice, in which normative principles play a major role, in addition to the more consequences-oriented criteria (efficiency and effectiveness). Legal principles may suggest a direction in that respect, or at least make apparent which fundamental interests are at stake. Legal history research may offer valuable reference points for constructing such underlying principles.²

Information from Dutch legal practice

(i) First, a review of the case law may reveal practicality problems. An abundance of case law or conflicting decisions may point to this.

(ii) Second, the problems may be obvious from questions in the Dutch House of Representatives or attention in the media.

(iii) Where desirable, interviews and/or surveys may provide a more complete overview of the opinions held by a certain group. This is facilitated by the fact that all the professors associated with this research programme have practical experience, hold other positions besides their professorial appointments, give courses and advice, and maintain lots of contact with the profession. Where appropriate and available use can be made of research done in other fields.

5. Focus areas of the research

To encourage cooperation among the various participating sub-fields, the research programme has opted for a thematic design.

Communication

Communication is vital in private law. In contract law, it is extremely important for information to be provided and exchanged properly. This applies, for example, to notices of default and duties to furnish information under EU rules; the latter rules also constitute one of the ways in which duties to communicate may come up in liability law.

Modernization

The progressive digitalization and computerization of society opens up perspectives for new property-law concepts (or new possibilities for applying existing concepts). Changing social

² Cf. J. Gordley, *Foundations of Private Law*, Oxford University Press: Oxford 2006.

structures, in particular scaling-up and internationalization, impose new requirements on existing legal concepts, presenting us with new challenges and raising novel questions about traditional concepts such as pledges, mortgages and forced sales. These developments also necessitate reconsideration of the position, organization and function of the Land Registry Office, civil-law notaries, banks, liquidators and the other main actors.

Effectuation of the law

This portion of the programme concerns the practicality of legal proceedings and legal work processes. It will examine whether and how litigants and entitled parties can obtain, in a practical manner, what they have a right to. For instance, can legal work processes, such as those at or by a civil-law notary, be designed efficiently and practically? Do civil proceedings contain impediments for the practical effectuation of rightful claims? And to what extent is mediation a suitable alternative?

Legal principles

Determining those legal principles in Dutch property law which are *not* different or unique, but rather are consistent with other private-law systems, may make the application of Dutch law more predictable to those outside the Netherlands. The application of Dutch law can then remain an attractive option for foreign companies. In this way, continental-law research in the property-law area (regarding, for example, notices of default and strict liability) can increase the practicality of Dutch private law.

6. Profile of the programme

Pay attention to:

1. Societal relevance: lower costs for legal advice, avoidance of litigation
2. Mono/multidisciplinary nature
3. Use of foundations of the law
4. International positioning:
 - (i) The research can put forward solutions for the development of European private law.
 - (ii) The research may assist lawyers in countries with a comparable socioeconomic structure who are faced with the same problems.
 - (iii) The research may correct inaccurate assumptions about Dutch private law that might prevent parties to a contract to have the contract governed by Dutch law.
5. Fundraising
