

Report from the seminar “Defragmentation of Law. Systemic view of the reconstruction of contemporary law”¹

On the 6th of October 2023, the Faculty of Law of Charles University hosted a seminar with the title “Defragmentation of Law. Systemic view of the reconstruction of contemporary law”. Organized by the Department of Legal Theory and Legal Doctrines and the Czech Association for the Philosophy of Law and Social Philosophy (Czech IVR), the event was tied to the recently released monography of **Associate Professor Pavel Ondřejek** with the eponymous title.² The seminar provided a platform for discussion of the arguments presented in the monography.

The event was introduced by **Professor Aleš Gerloch**, the chairman of the Czech IVR. The seminar itself consisted of two main contributions, which were put forward by Ph.D. students **Tomáš Koref** and **Jan Pokorný**, and Pavel Ondřejek’s response to the comments and arguments presented.

The first contribution titled “Defragmentation of (private) law through the proportionality test” was presented by Tomáš Koref and was centered mainly around the question of the applicability of the proportionality test in private law. In the first part of his contribution T. Koref critically assessed the monography and the main ideas encompassed in it. T. Koref pointed out the originality of Pavel Ondřejek’s approach in the monography, that being the assessment of fragmentation not only in international law, as is typical in dealing with this issue, but also in national law. The process of fragmentation in national law is defined in the monography as the undesirable weakening of bonds between branches of law, sources of law and legal institutions.

Tomáš Koref emphasized that Pavel Ondřejek defines the fragmentation of national law as having three distinct levels: substantial fragmentation, institutional fragmentation, and methodological fragmentation, all of which were briefly described.

Tomáš Koref highlighted how Pavel Ondřejek not only describes fragmentation in his monography, but concerns himself primarily with the method of tackling fragmentation and thus strengthening the unity of law; his ultimate goal being the possibility of achieving de-fragmentation, by using suitable legal argumentation and the correct method of law creation. This forms the core of P. Ondřejek’s novel approach to law, termed normative coherentism.

The second part of the contribution was devoted to its namesake, the idea of using the proportionality test in private law and applying it to achieve de-fragmentation within the given field of legal endeavour. Tomáš Koref critiqued that Pavel Ondřejek views the proportionality test in his monography as a useful tool in constitutional law but doesn’t address the merit of its potential for usage in private law, where T. Koref believes it could be used as a universal methodological tool for the application of the principles of private law. T. Koref backed his ideas by three main arguments: the argument of normative coherentism (as formulated by P. Ondřejek in his monography), the analytical argument (by R. Alexy) and finally the argument based on the right to justification (by M. Klatt). Tomáš Koref presented the analytical argument by stating that the nature of private law principles, that being the requirement of applying the principles in the highest possible extent, determines the method of their application, thus pointing out the need for the proportionality test. Based on the right to justification argument, the proportionality test should, according to T. Koref, be used in civil law cases as it would increase transparency, verifiability, and greater quality of justification.

The second contribution was made by **Jan Pokorný**, who assessed whether the growing complexity of law truly is a problem and if the law is getting fragmented equally among different jurisdictions. J. Pokorný presented what Pavel Ondřejek regards as the initial source of fragmentation, the increasing complexity of societal relations. These circumstances in turn create waves of statutory novelisations and the specialisation of law. In light of this, J. Pokorný introduced his hypothesis of the law

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² ONDŘEJEK, Pavel. *Defragmentation of law: reconstruction of contemporary law as a system*. Cambridge: Intersentia, 2023.

getting more complex and thus fragmented. This trend is bound to result in the average citizen not being able to understand regulations and lessens their ability to deal with potential legal problems on their own. J. Pokorný joined Pavel Ondřejek in supporting his arguments with research, conducted by Associate Professor František Cvrček, who himself even points to the lack of sociological research as a clear limiting factor. Aware of these constraints, Jan Pokorný looked for other statistical data. J. Pokorný quoted two statistical surveys, that support his hypothesis. From these surveys, he discerned that the law is becoming more complicated and thus the average citizen is indeed less familiar with the contents of it. Despite this happening, the surveys concluded, that most working-class people are still able to adequately solve their legal problems or find legal aid.

In the second part of his contribution Jan Pokorný focused on, whether the fragmentation of law occurs equally among different jurisdictions. J. Pokorný suggested that Pavel Ondřejek's definition of fragmentation might not be as generally applicable as is suggested and is more fitting for specific countries of the continental legal culture, in particular the central European countries. Jan Pokorný stated that one of the causes for the variable fragmentation of law among different jurisdictions, is indirectly correlated with the given countries economic and military power, this gives these countries greater say in regards to the creation and application of international law and can be easily highlighted by the UN security council, where the permanent members have veto power, thus having the power to quash any UN enforcement measures against their interests. In the final part of his contribution, Jan Pokorný addressed legal pluralism and its potential to become a source of integration for law. J. Pokorný presented the different theories of legal pluralism, addressed their main ideas, and summarized their use in the monography. He then mentioned legal pluralism in relation to quasi-states and failed states, where the autonomous communities create their own independent legislation, which forms a quasi-legal system. J. Pokorný reacted to Pavel Ondřejek's argument where he contradicts the established doctrine of legal pluralism being a negative element. Expanding on P. Ondřejek's concept, that being the higher courts and international courts gradually aligning their legal opinions, Jan Pokorný focused on the hybridization of continental and Anglo-Saxon legal cultures, where the former, due to their precedential character, are not hindered by the need of frequent novelisations and burdening of the body of law, and have thus provided the continental legal culture with new avenues of quasi-precedential decisions, which can be used for the unification of law.

Reacting to the contributions made by Tomáš Koref and Jan Pokorný, Pavel Ondřejek presented his response, in which he addressed their arguments and suggestions. Responding to Tomáš Koref's contribution, Pavel Ondřejek stressed the difference of his approach from T. Koref's, composed of his recognition of the constitutional aspects of civil law cases, directly leading to the debate about the horizontal legal effect of human rights and the role of proportionality in constitutional law and other fields of law. In response to Jan Pokorný's contribution, Pavel Ondřejek agreed in principle with J. Pokorný on the fact that the collision of legal systems isn't a problem in states not adhering to obligations stemming from international law but stated that these unique conditions require further evaluation. Pavel Ondřejek thanked the authors of the contributions for pointing out several issues that opened the door for further discussion, and he appreciated their critical comments and highlighting of weaknesses, concerning the argumentation used in the monography, which made him realise, that some of the ideas presented in the monography needed to be explained further and placed in the context of his other publications. An hourlong discussion followed Pavel Ondřejek's response, where representatives from their respective faculties of law in Plzeň, Brno, Olomouc and Prague voiced their opinions and comments about the monography, the contributions and the author's response. Each member of the panel promptly reacted to the newly voiced opinions and comments, by addressing them and presenting new arguments to support their findings. The seminar was concluded by Professor Aleš Gerloch, who made a short assessment of the event and thanked the attendees.

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