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Colombi Ciacchi, Aurelia

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Editorial

Egenberger and Comparative Law: A Victory of the Direct Horizontal Effect of Fundamental Rights

The recent *Egenberger* judgment of the CJEU¹ can be seen as a milestone in the European debate on the horizontal effect of fundamental rights. This decision established, with beautiful clarity, two principles (among others): Firstly, the prohibition of discrimination laid down in Article 21(1) of the Charter is mandatory as a general principle of EU law, and is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law.² Secondly, like Article 21 of the Charter, Article 47 of the Charter on the right to effective judicial protection is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such.³ In other words: Both Article 21 and Article 47 of the Charter have direct horizontal effect.⁴

These principles do not mark any revolution in the ECJ/CJEU jurisprudence. Arguably there exists a logical line of continuity from *van Gend and Loos*⁵

1 Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* Judgment of the Court (Grand Chamber) of 17 April 2018. ECLI:EU:C:2018:257. Retrieved 17 July 2018 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0414>.

2 *Egenberger* (n 1) para. 76, with reference to Case C-176/12 *Association de médiation sociale*, ECLI:EU:C:2014:2, para. 47.

3 *Egenberger* (n 1) para. 78.

4 For a comment on *Egenberger* from the viewpoint of the horizontal effect doctrines see E. Frantziou, 'Mangold recast? The ECJ's flirtation with *Drittwirkung* in *Egenberger*', *European Law Blog*, 24 April 2018. Retrieved 18 July 2018 <https://europeanlawblog.eu/2018/04/24/mangold-recast-the-eajs-flirtation-with-drittwirkung-in-egenberger/>.

5 Case 26/62 *van Gend and Loos* [1963] ECR I.

to *Egenberger*, passing through *Walrave*,⁶ *Defrenne*,⁷ *Angonese*,⁸ *Mangold*,⁹ *Küçükdeveci*,¹⁰ and others. As a result, the prohibition of discrimination as a general principle of EU law, now codified in Article 21 of the Charter, has direct horizontal effect in all fields covered by EU law.¹¹

What Does this Have to Do with Comparative Law?

Last year, I published a chapter on the judicial dialogue between the ECJ/CJEU and national courts concerning the effect of European fundamental rights on private litigations.¹² In a section of this chapter, I argued that the ECJ in *Angonese*¹³ took a position in the cross-national (comparative) judicial dialogue on the horizontal effect of fundamental rights, freedoms and constitutional principles, reinforcing the direct horizontality doctrine.^{14,15}

6 Case C-36/1974 *Walrave and Koch* [1974] ECR 1405.

7 Case C-43/1975 *Defrenne v. Sabena* (1) [1976] ECR 455.

8 Case C-281/98 *Angonese* [2000] ECR I-4139.

9 Case C-144/04 *Mangold* [2005] ECR I-9981.

10 Case C-555/07 *Küçükdeveci* [2010] ECR. I-365.

11 On the horizontal effect of fundamental rights and principles in EU law see inter alia A. Hartkamp, 'The Effect of the EC Treaty in Private Law: On Direct and Indirect Horizontal Effects of Primary Community Law', *European Review of Private Law* 3 (2010) 527; E. Spaventa, 'The Horizontal Application of Fundamental Rights as General Principles of Union Law', in: A. Arnulf et al. (eds.), *A Constitutional Order of States – Essays in Honour of Alan Dashwood* (Oxford: Hart Publishing, 2011) 199; D. Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights', *European Law Review* 38 (2013) 479; C. Mak, 'Uncharte(re)d Territory: EU Fundamental Rights and National Private Law', CESCL Working Paper Series No. 2013–05, Amsterdam Law School Research Paper No. 2013–25; A. Colombi Ciacchi, 'European Fundamental Rights, Private Law and Judicial Governance', in: H.-W. Micklitz (ed.), *The Constitutionalisation of European Private Law* (Oxford: Oxford University Press, 2014) 102; E. Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality', *European Law Journal* 21 (2015) 657; O. Cherednychenko and N. Reich, 'The Constitutionalization of European Private Law: Gateways, Constraints, and Challenges', *European Review of Private Law* 23 (2016) 797.

12 A. Colombi Ciacchi, 'European fundamental rights and private litigations: judicial dialogue and judicial governance', in: F. Cafaggi and S. Law (eds.), *Judicial Cooperation in European Private Law* (Cheltenham: Edward Elgar, 2017) 208–222.

13 *Angonese* (n 8).

14 Colombi Ciacchi (n 12) 216.

15 The remaining part of this Editorial, starting from the main text that follows the present footnote, consists in a shortened and updated version of the section '*Angonese* and the

In fact, between the late 1940s and the end of the 1970s, the national courts of different EU Member States, including Italy and Germany, applied constitutionally protected fundamental rights and principles (such as the equality principle) *directly* in adjudicating litigation on labour relationships.¹⁶ In the 1970s, the ECJ also began to apply fundamental principles enshrined in the Treaty, such as the prohibition of discrimination, *directly* in adjudicating litigations on labour relationships.¹⁷ One might therefore argue that a harmonious judicial dialogue, or at least a harmonious judicial interaction on this issue, existed between the ECJ and the national courts of the said Member States until the end of the 1970s.

This harmony was partially troubled in the 1980s by the change of the prevalent opinion in Germany. In order to understand this change, one has to consider the history of the German judicial dialogue on the horizontal effect of fundamental rights on labour relationships. In the early 1950s, Germany was one of the first European countries to embrace the doctrine of direct horizontal effect of fundamental rights and constitutional principles on labour relationships. This doctrine was mainly developed by Nipperdey, who was not only a scholar¹⁸ but also the President of the German Federal Labour Court

cross national judicial dialogue on the horizontal effect of fundamental rights', included in Colombi Ciacchi (n 12) 216–219.

- 16 In Italy, see for example Trib. Firenze, 23 March 1948, Mon. trib. 1949 no. 18: the Court held that the stipulation of a too low remuneration in an individual labour contract was invalid on ground of violation of Art.36 of the Italian Constitution, which establishes the right to a remuneration sufficient to ensure a free and dignified existence for employees and their families. In Germany, see ArbG Bamberg, 7 November 1950, RdA 1951, 118: the Court found a dismissal from employment due to the employee's membership of the Communist Party invalid on ground of violation of the fundamental right to freedom of expression of political opinions enshrined in Art.5(1) of the German Constitution. On the direct and indirect horizontal application of fundamental rights to the adjudication of private litigation in nine European countries see G. Brüggemeier, A. Colombi Ciacchi and G. Comandé (eds.), *Fundamental Rights and Private Law in the European Union. Volume 1: A Comparative Overview* (Cambridge: Cambridge University Press 2010).
- 17 Walrave (n 6); Defrenne (n 7). For a relatively recent account on horizontal effect of EU fundamental rights see M. Fornasier, 'The Impact of EU Fundamental Rights on Private Relationships: Direct or Indirect Effect?' *European Review of Private Law* 23 (2015) 29.
- 18 H.C. Nipperdey, 'Gleicher Lohn der Frau für gleiche Arbeit', *Recht der Arbeit* 1950, 121; H.C. Nipperdey in L. Enneccerus and H.C. Nipperdey, *Allgemeiner Teil des Bürgerlichen Rechts* (14th edn, Tübingen: Mohr, 1954); H.C. Nipperdey, 'Die Würde des Menschen', in: K.A. Bettermann, F.L. Neumann, H.C. Nipperdey and U. Scheuner (eds.), *Die Grundrechte. Handbuch der Theorie und Praxis der Grundrechte* Vol. 11: *Die Freiheitsrechte in*

(*Bundesarbeitsgericht, BAG*) from 1954 until 1963. Not unrelatedly, the first *BAG* decision on the direct horizontal effect of fundamental rights goes back to 1954.¹⁹

However, in its famous *Lüth* decision of 1958,²⁰ the German Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*) did not embrace Nipperdey's doctrine. Instead, it embraced the doctrine of *indirect* horizontal effect of fundamental rights theorised by Dürig, who was one of the leading commentators on the German Constitution.²¹ Since the *Lüth* case did not concern labour law, the *BAG* continued to apply the direct horizontal effect doctrine to labour relationships until the 1980s. The disharmony in the internal German judicial dialogue on this issue ceased in 1985, when the *BAG* aligned its jurisprudence to that of the *BVerfG* and definitively rejected the direct horizontal effect doctrine in respect of individual labour relationships.²² Moreover, in the course of the last 30 years, the *BAG* has increasingly established the indirect horizontal effect doctrine for what concerns collective labour agreements.²³

The current German approach²⁴ substantially converges with the prevalent opinion in the UK, which also supports a merely indirect horizontal effect of

Deutschland (Berlin: Duncker & Humblot, 1954) 111, 143; H.C. Nipperdey, *Grundrechte und Privatrecht* (Krefeld: Scherpe, 1961).

- 19 BAG 3 December 1954, BAGE 1, 185; NJW 1955, 606. For a discussion of this case in English see P. Beckmann, A. Colombi Ciacchi *et al.*, 'Germany', in: Brüggemeier, Colombi Ciacchi and Comandé (n 16), 253, 289–90.
- 20 BVerfG 15 January 1958, BVerfGE 7, 198. For a discussion of this case in English see G. Brüggemeier, 'Constitutionalisation of Private Law – The German Perspective', in: T. Barkhuysen and S. Lindenberg (eds.), *Constitutionalisation of Private Law* (Leiden: Brill/Nijhoff, 2006) 59, 68 et seq.
- 21 G. Dürig, 'Grundrechte und Zivilrechtsprechung', in: T. Maunz (ed.), *Vom Bonner Grundgesetz zur gesamtdeutschen Verfassung*, Festschrift zum 75. Geburtstag von Hans Nawiasky (München: Beck, 1956) 176.
- 22 BAG 27 February 1985, BAGE 48, 123. For an overview of the scholarly debate on the direct and indirect horizontal effect of fundamental rights in labour relationships between 1950 and 1985 see D. Fabisch, *Die unmittelbare Wirkung der Grundrechte im Arbeitsrecht* (Bern: Peter Lang, 2010) 223.
- 23 BAG 25 February 1998, BAGE 88, 118, 123; BAG 18 March 2009, BAGE 130, 43. However, the different sections of the Court take different positions on this issue. For an overview see F. Hartmann, *Negative Tarifvertragsfreiheit im deutschen und europäischen Arbeitsrecht* (Mohr Siebeck 2014) 92; M. Fornasier, 'Die Wirkung der europäischen Grundrechte im Arbeitsverhältnis', in: C. Latzel and C. Picker (eds.), *Neue Arbeitswelt* (Tübingen: Mohr, 2014) 25 with further references.
- 24 For recent accounts on the horizontal effect of fundamental rights and freedoms in Germany see D.W. Belling, A. Herold and M. Kneis, 'Die Wirkung der Grundrechte und Grundfreiheiten zwischen Privaten', in: B. Attila and D.W. Belling (eds.), *Rechtsentwicklungen*

fundamental human rights on contractual relationships.²⁵ However, these German and UK approaches clash with the prevalent position of courts and scholars in other European countries, such as Italy and France, where fundamental rights undoubtedly have *direct* horizontal effect on labour relationships.²⁶

As a result, *Angonese*, *Mangold*, *Küçükdeveci*, and now *Egenberger*, fully harmonise with the previous ECJ jurisprudence and with the Italian-French case law, while they clash with the currently prevalent approaches in Germany and England. This comparative law dimension of the ECJ/CJEU jurisprudence on the horizontal effect of fundamental rights and freedoms does not seem to have been discussed much in the literature.²⁷

Were the ECJ/CJEU judges who decided *Angonese*, *Mangold*, *Küçükdeveci*, and *Egenberger*, aware of the conflict of views between judiciaries of different Member States on the direct application of fundamental rights and freedoms on labour relationships? Probably yes. However, even if they were unaware of it, these judgments objectively represent a strong voice in the supranational and cross-national judicial dialogue on this issue. They arguably mark the victory of the direct horizontal effect doctrines (and of the French-Italian approach) in the fields covered by EU law, at least for what concerns labour relationships.

Aurelia Colombi Ciacchi

Editor-in-Chief EJCL; Professor of Law and Governance,
University of Groningen, The Netherlands
a.l.b.colombi.ciacchi@rug.nl

aus europäischer Perspektive im 21. Jahrhundert – European Perspectives on Legal Developments in the 21st Century (Potsdam: Acta Iuridica Universitatis Potsdamiensis, 2014) 53; D. Looschelders and M. Makowsky, 'The Influence of Human Rights and Basic Rights in German Private Law', in: V. Trstenjak and P. Weingerl (eds.), *The Influence of Human Rights and Basic Rights in Private Law* (Berlin et al: Springer, 2016) 295 et seq. with further references.

- 25 S.J. Whittaker, 'Introductory', in: H. Beale (gen. ed.), *Chitty on Contracts: Volume 1, General Principles* (31st edn, London: Sweet & Maxwell, 2012) 68 et seq.; A.L. Young, 'The Human Rights Act 1998, Horizontality and the Constitutionalisation of Private Law', in: K. Ziegler and P. Huber (eds.), *Current Problems in the Protection of Human Rights* (Oxford: Hart Publishing, 2013) 69 et seq. For a relatively recent comparison of the German and English horizontal effect approaches see J.F. Krahé, 'The Impact of Public Law Norms on Private Law Relationships – Horizontal Effect in German, English, ECHR and EU Law' *European Journal of Comparative Law and Governance* 2 (2015) 124 with further references.
- 26 C. Herrmann and C. Perfumi, 'France', in Brüggenmeier, Colombi Ciacchi and Comandé (n 16) 190, 206 et seq.; C. Mak, M.D. Sanchez Galera, S. Wünsch, F. Jorge Ramos and C. Kraus, 'Italy', in: Brüggenmeier, Colombi Ciacchi and Comandé (n 16) 325, 341.
- 27 Apart from my chapter of 2017 (n 12).