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Book Review

Max Fabian Starke, *EU-Grundrechte und Vertragsrecht*, Mohr Siebeck, 2016, ISBN 978-3-16-154977-9

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When I first took this book in my hands, I thought it was a *Habilitationsschrift* – a comprehensive second monograph with which post-doctoral scholars qualify themselves for a full professorship in Germany. Everything seemed to confirm it: the thickness of the volume (445 pages), its academic level and theoretical depth, the width and completeness of the analysis, and the publisher (most *Habilitationsschriften* in law are issued by Mohr Siebeck). Well, I was wrong. This book is Dr. Starke's doctoral thesis, defended in May 2016 at the Humboldt University in Berlin.

After finishing the reading, I realised that this dissertation would have been really worth of being a *Habilitationsschrift*. It is a fantastic book, of a higher academic quality and more beautiful to read than many *Habilitationsschriften*.

The book is structured in five parts. The first part – Foundations – discusses concepts and functions of contract and (European) contract law, and embeds EU fundamental rights in a multilevel system. The sections on contract law are pleasantly concise and evidence the author's wide comparative cultural background, looking at history and present, Europe and America.

The second part – Case Law – analyses ECJ/CJEU judgments where EU fundamental rights have impacted on private law. It is subdivided in five sections: anti-discrimination law, labour law, consumer law, digital/intellectual property and data protection, and other matters ('Sonstiges'). One might question the added value of a separate category of anti-discrimination law: on the one hand, the five cases discussed hereunder concern either labour law (*Mangold*, *Küçükdeveci*, *Prigge* and *HK Danmark*) or consumer law (*Test-Achats*), and on the other hand, also cases not listed in the 'anti-discrimination law' section, such as *McDonagh*, deal (albeit not primarily) with the prohibition of discrimination.

In the third part – Structure – the author takes a position in relation to a number of academic debates on the effect of (European) fundamental rights on private relationships. He rightfully acknowledges that it does not make any sense to conceptualise the horizontal effect of EU fundamental rights with categories or arguments borrowed from the German debate on the third-party effect (*Drittwir-*

kung) of national fundamental rights. From a EU law perspective, it is perfectly logical and coherent that EU fundamental rights can have direct horizontal effect when it is not possible to interpret EU secondary legislation or national legislation in conformity with them, provided that the EU fundamental right in question is sufficiently precise. Furthermore, Starke convincingly argues that EU fundamental rights, as interpreted and balanced against each other by the Court of Justice, do not prescribe just one solution to a certain private law problem, but a whole range, a corridor, of possible and legitimate national solutions.

The fourth part – Content – is subdivided in three sections. The first one tackles the big cross-cutting issues of private autonomy and private power. For what concerns private autonomy, Starke observes that EU fundamental rights not only limit private autonomy, but can also help defend the classic formal freedom of contract and have deregulatory effects (such as in the *Alemo Herron* case).¹ However, he also acknowledges that EU fundamental rights limit the *formal* freedom of contract, require a pluralistic contract law based on the prohibition of discrimination, and strengthen the substantive freedom of contract and actual self-determination.² For what concerns private power, Starke follows Luhmann's theory and comes to the conclusion that private power is not a requirement for the effect of EU fundamental rights in contract law, not even for their direct horizontal effect. Private power can nevertheless become relevant as an argument in the balancing of conflicting fundamental rights. The second section discusses the impulses and potentials of EU fundamental rights in selected areas of contract law. The third section identifies the market logic as a paradigm/general trend of the existing influences of EU fundamental rights on contract law. From this perspective, the regulating effects of EU fundamental rights towards consumer protection and prohibition of discrimination are seen as plain expressions of the market logic, as necessary corrections of market imperfections or failures. Like many other authors before him, Starke notes that the Court of Justice has applied EU fundamental freedoms as limitations to fundamental rights in a market-friendly way, while it has not let the social fundamental rights enshrined in the solidarity sec-

1 The *Alemo-Herron* case has been fiercely criticized in the literature. See inter alia J. Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law: Case C-426/11 *Alemo-Herron and others v Parkwood Leisure Ltd*' 42 *Industrial Law Journal* 2013, 434–446; M. Bartl and C. Leone, 'Minimum Harmonisation after *Alemo-Herron*: The Janus Face of EU Fundamental Rights Review' 11 *European Constitutional Law Review* 2015, 140–154; M. W. Hesselink, 'The Justice Dimensions of the Relationship between Fundamental Rights and Private Law' 24 *European Review of Private Law* 2016, 425–455.

2 On substantive freedom of contract and self-determination from a EU fundamental rights perspective see A. Colombi Ciacchi, 'Party Autonomy as a Fundamental Right in the European Union' 6 *European Review of Contract Law* 2010, 303–318.

tion of the Charter produce any significant effects on contract law (although the Court could have had several good occasions for applying them). Here I miss an original or constructive criticism in Starke's analysis, which is pretty mainstream. Personally, I prefer Dagmar Schiek's approach, who courageously and constructively offers a new constitutional vision to the Court of Justice, which would realise and considerably strengthen the social fundamental rights of the EU.³

The fifth part – Procedural Issues – addresses the division of tasks between the Court of Justice and the national courts in applying EU fundamental rights to private relationships. In regard to both his description of the current state of affairs, and his normative caveat (the Court should refrain from a complete balancing of the conflicting fundamental rights, which should not become the rule), Starke's approach is convincing but certainly not original.

I agree with almost all conclusions reached in this book, except one. The author maintains that the question of whether EU fundamental rights also create obligations for private parties cannot be definitively answered. In my opinion, for what concerns Article 21(1) of the Charter, the Court of Justice has definitively answered this question in the affirmative. In the *Egenberger* case of 17 April 2018,⁴ the Court very clearly stated: 'The prohibition of all discrimination (...) laid down in Article 21(1) of the Charter, 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'.⁵ I believe that the Court's precise phrase 'in disputes between them' covers every type of dispute resolution, including completely private dispute resolution mechanisms, even where such mechanisms are self-regulated by one of the parties of the dispute without the intervention of any third party, or the dispute is otherwise managed by the parties themselves through contracts. In other words, the prohibition of discrimination laid down in Article 21(1) of the Charter obliges a private contract party not to discriminate in the fields covered by EU law.

Actually, this binding force *does not descend from the Charter itself*, which according to its Article 51(1) merely addresses public bodies. The binding force on private contract parties descends instead from the prohibition of discrimination

³ D. Schiek, 'Towards More Resilience for a Social EU – the Constitutionally Conditioned Internal Market' 13 *European Constitutional Law Review* 2017, 611–640.

⁴ Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, 17 April 2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CJ0414&from=EN>. I have briefly commented on this judgment in a recent Editorial: A. Colombi Ciacchi, 'Egenberger and Comparative Law: A Victory of the Direct Horizontal Effect of Fundamental Rights' 5 *European Journal of Comparative Law and Governance* 2018, 207–211.

⁵ *Ibid*, para 76.

on ground of sex, religion, age etc being a mandatory general principle of EU law (acknowledged earlier by the Court and later merely codified in the Charter), a prohibition considered by the Court as 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. General principles of EU law considered mandatory and sufficiently precise, such as the prohibition of discrimination on ground of sex, religion, age etc, create obligations not only on public entities but also on private contract parties, exactly like the principle of equal pay for equal work enshrined in the Treaty. In fact, the ECJ in the *Defrenne II* case held that ‘the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.’⁶ Commenting on this part of the *Defrenne II* judgment, Lenaerts and Gutiérrez-Fons maintain that the prohibition of discrimination between men and women is mandatory in nature ‘and accordingly, applies to public authorities and private individuals alike’.⁷ I agree with this interpretation at least for what concerns private contract parties: the Court in *Defrenne II* does not speak of ‘private individuals’ altogether, but of ‘contracts between individuals’. There is no reason why discrimination on ground of sex should be treated differently than discrimination on ground of age, religion etc. Therefore, the prohibition on discrimination on all grounds listed in Article 21 (1) Charter creates obligations for private contract parties.

Nevertheless, I have very much enjoyed reading this monograph, which is excellent from both the viewpoint of form and content. From the viewpoint of form, it is very elegantly written and perfectly documented with references to all pieces of scholarship relevant not only for the German debate but also for the Europe-wide debate (at least for what concerns the publications in English). From the viewpoint of content, it offers a convincing and truly European analysis, courageously detaching itself from the mainstream Germany-centric *Drittwirkung* debate. A must-read book for all European contract law scholars who can read German.

⁶ See Case C-43/75 *Defrenne v Sabena* (No 2) [1976] ECR 455, para 39.

⁷ K. Lenaerts and J.A. Gutiérrez-Fons, ‘The Constitutional Allocation of Powers and General Principles of EU Law’ 47 *Common Market Law Review* 2010, 1629–1669 at 1648.