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Colombi Ciacchi, Aurelia

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Marietta Auer is a Research Fellow in Private Law at the Ludwig-Maximilian University of Munich (Germany) and a post-doctoral staff member of Prof. Dr. Dr. h.c. mult. Claus-Wilhelm Canaris. This book is a re-elaborated version of her doctoral thesis, which she submitted in 2003. For this outstanding work she received two awards: the 2004 Munich Law Faculty Prize and the 2005 Prize of the Munich Law Society for the best doctoral theses.
Moreover, the volume was recommended as one of the German “Law Books of the Year” 2005.¹

Open norms of private law such as “good faith” and “good morals” (called “general clauses” in the European continental legal discourse), mostly relevant in the law of contracts, have been the subject of countless contributions both in Germany and elsewhere. To write an original work on this topic is a real challenge, which Marietta Auer has beautifully mastered.

In European continental academic environments such as the German one, junior researchers rarely have the courage to openly criticise in their dissertations their own mentors’ theories. Marietta Auer had this courage. Already at the beginning of her book² she unveils her intention to challenge the perspective followed by most German scholars including Canaris, who believe the values underlying private law can be reconciled in a normatively unitary and coherent system. Marietta Auer starts from the assumption that not everything is coherence and harmony in private law and legal ethics. Private law has always been, is, and will ever be the playing field of irreconcilable antinomies, conflicting principles, values, and policies. This is true both in general, and for the interpretation and application of general clauses in particular.

The book starts with a quotation from Oliver Wendell Holmes.³ Marietta Auer’s approach is clearly influenced by the American Legal Realism and the Critical Legal Studies, which is no surprise since she undertook her master degree at Harvard under the supervision of Duncan Kennedy. Her theoretical constructs build on Kennedy’s analysis of the tensions between formalism and functionalism, individualism and collectivism, legal certainty and case-by-case justice, characterising the legal ethic discourse in private law.

The book is structured into four chapters. The first and largest chapter (10–99) explores three basic tensions in private law thinking: (1) individualism vs. collectivism, (2) legal certainty vs. equitable flexibility, (3) judicial constraint vs. judicial freedom. The second, also quite large chapter (102–178) is devoted to the history, function and theories of general clauses in Germany. The third chapter (179-209) deals with US good faith doctrines. The author’s conclusions in terms of legal methodology and legal ethics are briefly outlined in a fourth and last chapter (211–222).

In the first chapter, Auer demonstrates the impossibility to reconcile the basic antinomies in private law thinking. The three tensions between individualism and collectivism, legal

² Introduction, 3 et seq (in particular, n 10).
³ “Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. (…) Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind” (‘The Path of the Law’, 10 Harvard Law Review (1897) 457).
certainty and equitable flexibility, judicial constraint and judicial freedom, create a need for legal solutions in the form of compromises. Such compromises are historically determined and continuously changing. This makes the above three tensions the very engine of development of modern private law thinking. Accordingly, a change of perspective is needed in dealing with general clauses of private law. Traditionally, German legal scholarship maintains that general clauses (Generalklauseln) empower the judiciary to strike a balance between conflicting interests and values in private law. Marietta Auer tells us that in fact things run the other way round: it is the presence and operation of the above three basic tensions that motivates legal scholars and courts to make Generalklauseln out of certain legislative provisions.

The second chapter deals with the history and development of the debate on general clauses in German private law. Surprisingly enough, the notion of Generalklauseln and the correspondent discussion did not arise in connection with the good faith and good morals clauses of the Civil Code, but with a completely different piece of legislation: the 1909 reform of the Unfair Competition Act 1896. Only later on, as civil courts began to use the good faith and good morals clauses of the Civil Code to avoid the unfair results of a formalistic application of private law, were those provisions also qualified in jurisprudence as Generalklauseln. Auer’s book sheds light on the close link between the development of such open norms and the changes in the dominant system of values through the German history. Throughout the 20th century – before, during and after the 3rd Reich – until today, the expansions of the scope of application of the Generalklauseln have mirrored a shift in the ethics of private law from individualism to altruism or collectivism, from legal certainty to equitable flexibility, and from judicial constraint to judicial freedom. The author submits that a convincing theoretical explanation of the functioning of general clauses is possible only against the background of such historically determined shifts of the ethical balance of private law. She criticises all the German doctrines previously proposed on the definition, interpretation and concretisation of the Generalklauseln, as none of them has managed to demonstrate its assumptions without incurring contradictions. These doctrines have failed since they attempted to define the concept and legitimate scope of general clauses without reference to their historical background and ethical significance.

The third chapter, devoted to the US debate, tracks the acknowledgment of the good faith principle from the beginning of the 20th century until today. Before 1940, the majority of the States did not recognise a general principle of good faith in contract law. Only in some States such as New York and California, were judgments passed in which good faith served as an implied covenant to achieve equitable adjustments of contractual rights and duties. No mention of the good faith principle was made in the 1932 Restatement of Contracts. The picture changed with the step-by-step preparation and enactment of the Uniform Commercial Code in the years from 1940 to 1962. This codification process was closely connected with the person and work of Karl N. Llewellyn, a major exponent of the con-

4 Marietta Auer warns against making the vagueness of the Generalklauseln themselves responsible for the abuses in adjudication committed during the 3rd Reich. She points out that during this period the open norms of private law were not only used to foster the Nazi ideology but also to protect victims’ interests (118–121). On this see also B. Rüthers, Die unbegrenzte Auslegung. Zum Wandel der Privatrechtsordnung im Nationalsozialismus (6th ed, Tübingen: Mohr Siebeck, 2005).
temporary American Legal Realism. He imported European continental, especially German legal theories to the US. This might also have influenced the American acknowledgment of the good faith principle. Later on, in 1968, Robert S. Summers managed to systematise all US judgments on good faith in groups of cases, demonstrating that the acknowledgment of such a general principle was fully justified also on the basis of US common law. To a certain extent, these groups of cases resembled the correspondent German *Fallgruppen* on good faith under § 242 BGB. Summers' work then built the basis for the second Restatement of Contracts 1981, recognising a general duty of good faith and fair dealing in the performance and enforcement of contracts.5 Marietta Auer argues that in contemporary US law the good faith principle operates in a way comparable to Germany, despite its narrower scope of application. In both countries, a good faith based adjudication establishing a contractual duty of fair dealing (*vertragliche Rücksichtsnahme*) has shifted the ethical balance of private law towards more collectivism, equitable flexibility, and judicial freedom. Finally, the author maintains that in both countries an in-depth methodological analysis of open norms such as good faith cannot do without the three basic antinomies: individualism vs. collectivism, legal certainty vs. equitable flexibility, and judicial constraint vs. judicial freedom.

The last chapter contains comments on legal methodology and legal theory which would have equally well, if not even better, fitted in the introductory part of the volume. First, the author adopts Hart’s distinction between internal and external perspective.6 To look at a legal system from an internal perspective means to take the perspective of participants in this system, i.e. legal actors such as courts. They are expected to give a judgment on the rightness and legitimacy of a legal solution from the viewpoint of legal sources produced by the legal system itself. Conversely, to look at a legal system from an external perspective means to take the perspective of external observers who merely describe a legal system or a specific legal problem without pursuing normative goals. Those observers may be legal scholars as well as observers from other disciplines than law: sociologists, economists, political scientists etc. Both the widely acknowledged German value-based jurisprudence (*Wertungsjurisprudenz*) and Dworkin’s principles theory follow an internal perspective. In contrast, Marietta Auer takes a position in favour of an external approach. She deems an internal perspective on general clauses, and on private law in general, incompatible with the decisive role played by the above three basic ethical tensions in private law. The basic values of private law cannot be reconciled in an unitary and coherent system of principles: private law decisions and solutions are based not exclusively on legal reasons, but also often and initially on historical, moral, economic, social and policy reasons. Second, the author draws a distinction between positivism in the application and positivism in the validity of the law. She criticises the former but she deems the latter to be right. The reason for her de-

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fense of positivism in the validity of the law consists in her rejection of natural-law-based approaches, according to which the sources of legitimacy of legal solutions lie in ethical considerations on whether these solutions are good or bad, just or unjust. The author’s understanding of positive law is one not excluding, but including the ethical-based, policy-based elements of law. She defends the distinction between “is” and “ought to be” in the law while integrating ethics, history, and policy in the concept of “is” law. Her suggestion for a further development of private law theory is to explore the actual, existing structure of private law thinking, contemplated in its mix of legal (rechtliche) and policy (rechtspolitische) values.

This suggestion is actually not a new one. To limit the horizon to Germany, Rudolf Wiethölter and his academic disciples from Frankfurt and Bremen have maintained for a long time that all law – and all private law – is policy, and that the legal discourse must move away from the traditional internal perspective to embrace a broader, external perspective. In this line of thought, Gunther Teubner concluded in 1971 his first monograph on the good moral clause, and in 1980 his comment on the good faith clause for the Alternativkommentar to the BGB. To have made the external perspective and the law-and-policy approach in private law ready for being accepted in the more traditional German academic legal environments not related to the Frankfurt school is only one of Marietta Auer’s great achievements. She fully succeeded in demonstrating that an analysis based on historically changing compromises between conflicting, irreconcilable values and policies in private law enables one to tackle the issue of general clauses better than mainstream German approaches such as the Wertungjurisprudenz. The author modestly concludes her book by saying that it remains to be seen whether or not this is also true in respect of other private law topics. Her readers however probably already know that the answer will certainly be “yes”!

Aurelia Colombi Ciacchi, Fellow of the Centre of European Law and Politics (ZERP) at the University of Bremen, Lecturer in Comparative Law at the Hanse Law School, Bremen


Last year’s SECOLA conference was devoted to the subject of constitutional values and private law. The issue is well known in national laws. German legal theory has intensively debated whether the rules and principles of constitutional law, fundamental rights in particular,

7 There is a clear link between this German approach and the Critical Legal Studies approach. See C. Joerges & D. Trubek (eds), Critical Legal Thought: An American-German Debate (Baden-Baden: Nomos, 1989). In this volume see in particular Duncan Kennedy’s comment on Rudolf Wiethölter’s theory: D. Kennedy, Comment on Rudolf Wiethölter’s ‘Materialization and Proceduralization in Modern Law’ and ‘Proceduralization of the Category of Law’, 511 et seq.
8 G. Teubner, Standards und Direktiven in Generalklauseln (Frankfurt: Athenäum, 1971).
apply directly also to the relations between private parties (unmittelbare Drittwirkung) or whether their influence is “merely” indirect (mittelbare Drittwirkung). The introduction of the Human Rights Act has triggered similar discussions in the United Kingdom. And, indeed, the constitutionalisation of private law has been called a truly international question. Not surprisingly, it is also an issue in European Law. While the Constitutional Treaty still awaits ratification and the Charta of Fundamental rights still is not binding law, the relation of constitutional law and private law already is of direct practical effect in regard of the fundamental freedoms. Körber’s extensive treaties examines the subject in all its respects.

Körber’s analysis is based on a broad fundament. After an introduction to the concept of the Internal Market and the role of private law and the fundamental freedoms, he devotes about one third of his book (pp. 55–376) to the fundamental freedoms in general and the five freedoms in particular. He gives a careful account of the Court’s jurisprudence and a thoughtful analysis and systematisation. Based on this fundament, Körber examines the effect of the fundamental freedoms on national private law (Part 3, pp. 377–630) and the question, whether fundamental freedoms can have a direct effect on private parties (unmittelbare Drittwirkung; Part 4, pp. 631–819).

Part 3 of the book starts with general considerations (pp. 378–431). Körber demonstrates that the fundamental freedoms constitute a guarantee for the fundamental institutions of private law such as freedom of contract and private property, though only with a limited range (the “core”). Based on the Court’s jurisprudence in regard of the French farmers’ protests, the fundamental freedoms do not merely prohibit restrictions of the Member States but may also oblige them to take positive action to protect the freedoms (Schutz- und Förderpflichten). This obligation, based on the effet utile, does not bind the Member States specifically but rather leaves the ways and means to reach the prescribed effect to their discretion. In particular, the duty to protect the fundamental freedoms will usually not amount to an obligation to enact specific legislation. Körber continues to enquire whether private law is subject to scrutiny under the fundamental freedoms. His answer is affirmative. However, he convincingly argues that rules of private law are compatible with the fundamental freedoms if they merely give the parties an option: such as in the case of mere default rules (dispositives Recht) or, following Alsthom Atlantique, rules that the parties can avoid by choice of law.

Körber continues with the application of these principles to the rules on conflict of laws (pp. 432–562). These are not as such exempt from control under the fundamental freedoms. Given their formal character, they will, however, usually not be objectionable. This applies in particular where the conflict-rules give the parties a choice. Given the fact that conflict rules merely determine the applicable law, they will themselves not usually hinder the entrance to a national market. Körber develops these considerations on the basis of the Court’s jurisprudence and continues with an extensive examination of the German rules on conflicts of laws (pp. 490–562!).

Following the Keck-distinction of distribution-rules and product-rules, substantive private law of the Member States is largely exempt from control under the fundamental freedoms (pp. 563–630). This applies even to the law of unfair competition which has often been subject to the Court’s intervention (pp. 564–582). The same is true for the law of contract (pp. 582–618). Much of contract law consists of mere default rules and will as such be compatible with the fundamental freedoms. In addition, the law of contract does not affect the product but rather the distribution.
Körber finally addresses the direct application of fundamental freedoms to the relations of private individuals (Part 4; for a definition of the issue: pp. 632–635). He first discusses borderline cases: the special issue of state action in the form of private law and of enterprises acting under Art. 86 of the Treaty. Körber continues with a detailed survey of the Court’s jurisprudence on unmittelbare Drittwirkung (663–720). The case law does not appear to be consistent as the Court has recognised a direct applicability of Art. 39, 43, 49 EC as well as of the anti-discrimination rules of Art. 12 and 141 EC but denied the same with regard to Art. 28, 29 EC. Consequently, Körber turns to an analysis and interpretation of the relevant provisions in the Treaty with regard to their purpose within the Internal Market (721–797). He convincingly argues that the wording of the fundamental freedoms is as such inconclusive. However, if we look at the Treaty as a consistent whole, i.e. a system, the competition rules strongly argue against unmittelbare Drittwirkung, given the fact that they specifically and comprehensively regulate the issue of private power. The effet utile which is often brought forward as an argument in the debate cannot as such justify the direct applicability of fundamental freedoms to private individuals. Körber has thus argued his case. But to give the argument more weight, he continues to point out that his position will not lead to lacunae in the protection of the Internal Market or individual actors therein (pp. 798–819). Körber demonstrates that in an open market, private power is being controlled primarily by the principle of freedom of contract and by competition. A second instrument is the protection by the competition rules. (Only) Where both instruments should not effectively control private conduct, the Member States may be obliged to protect the fundamental freedoms. There is no need for direct applicability of the fundamental freedoms to private parties.

The book covers a broad range of subjects. It offers a coherent and convincing framework for the relation of fundamental freedoms and private law. The clear and thoughtful concept is based on a rich analysis of the Court’s jurisprudence. While focussed on fundamental freedoms, Körber also paves the way for the more general discussion of constitutional values and private law.

Karl Riesenhuber, Professor of Private Law, German and European Trade and Economic Law, Ruhr-Universität Bochum


This book edited by Fabrizio Cafaggi of the European University Institute (Florence) deals with the institutional framework of European Private Law (EPL). It is made out of several contributions written by leading scholars in their fields. The subject covered by the book is very broad, ranging from constitutional law to private international law. The methods applied by the authors are very diverse, ranging from comparative law to economic analysis. This book raises many questions and provides many of them with reasoned and convincing answers.

One of the main virtues of the book is to provide the private lawyer interested in the making of a EPL with a broad overview of the institutional background and the constitutional instruments of this process. From this point of view very instructive are the contributions by Stephen Weatherill on the constitutional dimension of EPL and by Angus Johnston and
Hannes Unberath on the different sources of harmonisation of national laws. Both these contributions are concerned, from different perspectives, with the tension between harmonisation and diversity within the EU.

Weatherill deals mainly with the issue of competence. The question is: does the EU have the competence to harmonise private laws of Member States? And eventually, to what extent? Weatherill does not attempt to give a definitive answer to this question, but rather makes the very clear point that the issue of competence will deserve greater attention in the future. The issue of competence is then examined within the specific subject of European contract law. Weatherill discusses in some details the recent Communications by the Commission on European contract law and clarifies how the rising “competence sensitivity” has influenced the Commission when drafting these documents.

Johnston and Unberath deal with the issue of implementation by Member States of Directives affecting private law. More specifically they examine, both in great detail and with a critical approach, what happens if a Directive is not timely or correctly implemented. They discuss different topics, such as the direct effect of Directives (both in horizontal and vertical relations), the “conform interpretation” of national laws, and the role of the Commission on policing implementation. Coherently with the goal of this book, they discuss the role played and the attitude taken towards harmonisation by different actors, most notably the European Court of Justice (ECJ), the Commission, and national judges. Throughout their contribution they take the view that Directives have the advantage over Regulations of preserving diversity among national laws and that this advantage (and diversity between the two instruments) should be kept in place.

After the very rich introduction by Cafaggi, the first contribution of the book is by Walter van Gerven on “Bringing (Private) Laws Closer at the European Level”. Van Gerven provides the reader with an excellent introduction to our subject. His contribution ranges from the advantages and disadvantages of harmonization, to the role of legal education on the process of bringing national laws closer to each other. Van Gerven is sceptical about the idea of having full harmonization of national laws, for example through the adoption of a code. He seems to prefer a more gradual process based on the adoption of an action plan by the Community and aiming at facilitating cross fertilization and mutual learning between different European and national institutions, legal scholars, students, and practitioners.

Cafaggi himself deals with a very intriguing subject: the comparative role of regulation and civil liability in the management of certain risks. Cafaggi focuses both on risks to health (regulation of and liability arising from products) and on risks to the environment. There is a growing body of literature addressing from a law and economics perspective the comparative role of regulation and civil liability in achieving optimal deterrence and compensation. However, this literature usually assumes that regulation and civil liability are alternative methods of risk management. Cafaggi, on the other hand, claims that these methods are not alternative, but rather complementary, i.e. optimal deterrence and compensation can only be achieved by using these methods together. The analysis by Cafaggi is too complex to be summarized here. However his conclusions should be reported: a call for a greater integration between different institutions and strategies dealing with regulation and liability.

Noteworthy is also the discussion by Albertina Albors-Llorens of the role played by consumer law and competition law on the making of European private law. Albors-Llorens stresses the connections between these two fields of the law, being consumers’ protection
the paramount value of competition law. Albors-Llorens could not discuss the very recent progresses on private enforcement of competition law (the Green Paper by the Commission and the Manfredi judgement by the ECJ), which are making clear that private enforcement of competition law will strengthen its role in the making of EPL. However, Albors-Llorens’s contribution provides the reader with a very good introduction to this issue.

Horatia Muir Watt deals with the private international law dimension of EPL. Her contribution is mainly concerned with the issue of regulatory competition. She takes both an economic and a comparative approach, making frequent references to solutions adopted in the U.S. She is against a general acceptance of mutual recognition and of the country of origin rule. Her claim is that regulatory competition would bring to undesirable results in many contexts. She uses strong arguments, such as the race to the bottom theory and the risk of externalizations when third parties are affected.

Finally, the contribution by Norbert Reich deals with the transformation of contract law and civil justice in the new EU Member States, taking the examples of the Baltic States, Hungary, and Poland. Reich focuses on the reception in these countries of fundamental values of European contract law, such as private autonomy, regulation of consumers’ contracts and information duties between the parties. This reception is examined against the background of the transition from a socialist to a market economy. As far as consumers’ contracts are concerned, Reich discusses in some details the implementation in these countries of Directive 93/13 on unfair terms and Directive 99/44 on legal warranties in sales. He distinguishes between the different approaches taken by each of these countries in implementing these Directives, ranging from the monist approach of Estonia, to the mixed approach of Poland. Noteworthy is Reich’s discussion of the difficulties experienced and the progresses made by ex socialist countries in the enforcement of individual rights.

The book we have briefly summarized is a valuable source of information for both the student of EPL and the knowledgeable scholar. Specific consideration is given, almost in every contribution, to European contract law, as the forerunner of harmonisation of European national laws.

Vincenzo Roppo, Full Professor of Contract Law and General Private Law, University of Genoa, in cooperation with Giorgio Afferni, Doctorate in Private Law (University of Pisa), Lecturer in European Private Law (University of Genoa)