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## Book Review

**Reiner Schulze**, *Non-Discrimination in European Private Law*,  
(Tübingen: Mohr Siebeck, 2011)

At first glance, the growing influence of non-discrimination law on private legal relationships in Europe presents a paradox. If private law is concerned with the regulation of the sphere in which actors may in principle arrange their interrelations as they wish, free from government intervention, then it seems that rules of private law should always allow parties to distinguish with whom they like to contract and on what terms. The principle of freedom of contract does not seem to provide space for public interests, such as those concerning protection against discriminatory treatment.

Yet, on a closer look, it becomes clear that the relationship between non-discrimination law and private law is more complex and nuanced than this. First, the impact of public policy on private legal relationships can be explained by the reasoning that principles of equality and non-discrimination can only be fully effective to the extent that they do not only apply in vertical legal relationships (eg the employment of civil servants by the State), but also in horizontal ones (eg employment by private companies; cf the European Court of Justice's *Defrenne* case law). It is also understandable in light of the privatization of former government tasks, eg the supply of basic services, such as energy, water, and public transport. Moreover, a restriction on freedom of contract is already implied in the concept itself; insofar as all private actors may appeal to this principle, the freedom of one meets its limits where it encroaches upon the freedom of the other.

The blurring divide between public and private spheres, and public and private law, does not make it easy to come to terms with the integration of non-discrimination provisions in European private law reasoning. The challenge to 'more closely determine the relation between freedom of contract and non-discrimination' was taken up by a number of legal scholars from various European countries, who discussed different aspects of the theme in a series of lectures organized by Reiner Schulze at the Centre for European Private Law in Münster. The book under review collects the papers resulting from this seminar series.

The book is comprised of three parts, one on 'General Issues', one on 'Specific Aspects of Non-Discrimination Law' and one on 'Perspectives from Member States'. Part I addresses the legal concept of non-discrimination (Sir David Edward), the economics of non-discrimination (Ann-Sophie Vandenberghe) and the principles and concepts of protection against discrimination in European private

law (Stefan Leible). Part II looks into effective private law remedies in discrimination cases (Norbert Reich), discrimination in insurance law (with contributions by Herman Cousy and Daniel Effer-Uhe), rules of evidence in anti-discrimination procedures (Guillermo Ormazabal Sánchez), a comparative taxonomy of 'positive action' and 'affirmative action' policies (Christopher McCrudden) and the illustration of fundamental rights aspects in private law through the application of non-discrimination provisions (Anna Verena Lauber). Part III, finally, presents national perspectives based on Dutch law (Ewoud Hondius), British law (Mark Bell) and Spanish law (Susana Navas Navarro). While most contributions were written in English, four opted for the language of the hosts of the seminar series, German (Leible, Effer-Uhe, Ormazabal Sánchez and Hondius).

Since space does not allow a full discussion of all interesting insights offered in the volume, just three important issues are singled out in this review: 1) the place of non-discrimination provisions in European private law; 2) the role of fundamental rights in this context; and 3) legal pluralism and its impact on the questions raised in the debate on non-discrimination and European private law.

As Edward points out, the negative connotation that the term 'discrimination' has in the current debate dates from fairly recent times; examples of its use in situations concerning the morally objectionable, or even illegal, distinction between two persons and situations to the disadvantage of one of them go back to the US and England of around the 1880s. Its inclusion in human rights documents, EU treaties and the case law of the European Court of Justice laid the basis for legal action against unequal treatment, in the public as well as in the private sphere. Still, does contract law offer the most suitable means of pursuing the ideals incorporated in non-discrimination provisions? Vandenberghe's well-balanced economic analysis of contractual liability and alternative means of enforcement of non-discrimination law in private legal relationships underlines the difficulties of effectively changing or shaping preferences so as to counter discriminatory treatment. From that perspective, the inclusion of a chapter on non-discrimination in the academic Draft Common Frame of Reference (DCFR) encounters objections. Would it not impose too strict constraints on freedom of contract? On the one hand, these objections seem overstated: Leible's comparison of the DCFR to the *Acquis Principles*, for example, demonstrates that the application of non-discrimination rules integrated in a comprehensive instrument of private law, such as the DCFR, does not necessarily have to yield different results than the application of the *acquis communautaire* to private legal relationships. On the other hand, fundamental rights have been known to change legal reasoning in private law adjudication and further research into the nature and desirability of such effects seems necessary to evaluate the merits of placing non-discrimination provisions in an instrument of private law.

The role of fundamental rights in the field of scrutiny is illustrated by the Court of Justice's well-known *Mangold* and *Küçükdeveci* judgments. As Lauber observes, looking at the development of EU law, 'the principle of non-discrimination has developed from a purely economic principle via a fundamental principle of European Social Policy towards a principle with human rights status'. The recognition of a general principle of non-discrimination on the ground of age that was criticized in the wake of the *Mangold* decision is now codified in Article 21 of the EU Charter of Fundamental Rights. Since the EU legislature and judiciary tend to make less of a distinction between public and private law than domestic systems mostly do, this and other fundamental rights may have pervasive influence on legislation affecting private legal relationships. Although this could, for instance, strengthen the basis of remedies in private law (cf Reich), at the same time fundamental rights are likely to come into conflict with principles of private law. A telling example is the idea of actuarial fairness applied in insurance law, according to which women pay lesser premiums as a result of their longer life expectancy than men, which the European Court of Justice set aside in favour of the principle of equal treatment of men and women (in *Test-Achats*, discussed by Cousy and Effer-Uhe). Furthermore, rules of evidence in non-discrimination law could upset national civil procedure (Ormazabal Sánchez). These experiences call for further research into the reconciliation of principles of private law with (European) non-discrimination law. McCrudden's conceptualization of 'affirmative action' policies provides a model that may provide guidance in this process, being aware of difficulties related to, for instance, the definition of the 'preferred group' that is the beneficiary of an affirmative action programme.

A further complication is related to the plurality of sources of rules of private law and of non-discrimination in Europe. Different principles of private law are endorsed among national legal systems as well as between the EU and the Member State level. Furthermore, similar fundamental rights, including those regarding non-discrimination, may receive different interpretations and applications in different legal orders. While the handling of this plurality of sources raises many questions, the contributions in the volume under review give some constructive guidance as to how to approach legal pluralism in this context. Hondius shows how legal comparison can provide lessons for both systems compared: while he praises the advanced integration of constitutional review in German private law reasoning in comparison with Dutch law, he criticizes the German legal system's attitude towards the paradigm of protection of weaker contracting parties, which has been further developed in the neighbouring Dutch system. Bell explains recent developments in British equality law, focusing on the adoption of the Equality Act, tracing the Europeanisation of domestic law as well as analysing the ways in which to achieve the aims of reforming and harmonising

the law. The British experience could, thus, offer insights relevant to the further elaboration of non-discrimination law in the EU's multi-level and multi-valued order of private law. Navas Navarro, finally, analyses the implementation of EU law on non-discrimination on the basis of sex in Spanish law and compares it to provisions of the DCFR. It appears that the Spanish legal framework needs further elaboration in order to provide effective remedies against gender discrimination, while the scope of the relevant DCFR's provisions is still too limited to give the necessary protection. These three national perspectives, thus, illustrate how legal sources on different levels of governance influence each other and give specific suggestions for further progress. They offer specific insights that could inspire the growing body of literature on the role of principles, fundamental rights and pluralism in European private law.

In sum, the varying contributions underline the importance of the debate on non-discrimination and European private law and bring fresh views to the discussion on the basis of a detailed analysis of specific topics. In the Foreword to the book, the editor expresses the hope that, although the contributions may not give a comprehensive overview, they 'may perhaps promote the further discussion of the issues' related to the tension between freedom of contract and non-discrimination. Notwithstanding the complexity of the theme, there is no doubt that this collection of essays contributes to that aim.

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