Book review: Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis* (OUP 2019).

In a societal context where the distinction between *private* and *public* exercise of power becomes blurred, and where a multitude of private interactions increasingly affect the equal enjoyment of fundamental rights of a wide range of subjects, 'horizontality' is warranted re-conceptualisation in its purpose and parameters. Denoting the application of rights disputes between private parties, the doctrine of horizontality questions the traditional application of fundamental rights against the state. An investigation of its function and criteria is particularly compelling, and at once extremely challenging, in the context of the EU: a hybrid supranational constitutional order and a public sphere historically privileging market actors.[1] Horizontality is becoming a pressing doctrine, particularly as cases brought to the CJEU concern less and less market-focused issues, and more frequently touch upon socially-relevant issues.[2] In the light of the Court's narrow-sighted interpretation of *horizontality*, how can the latter be re-conceptualised and justified? Which criteria should guide its determination and why? These questions are at the heart of Dr. Eleni Frantziou's insightful and forward-thinking book on *The Horizontal Effect of Fundamental Rights in the European Union*.

The book represents an urgent contribution to the body of literature addressing the horizontal effect of fundamental rights in EU law. Especially following the entry into force of the Lisbon Treaty, scholars have cast their attention on the horizontal effect of the EU Charter and fundamental rights more in general: the focus has been on the status and extent of application of the Charter in horizontal situations (Lenaerts 2010; Leczykiewicz 2013); the scope of the horizontal effect of fundamental rights as general principles (Spaventa 2011; Tridimas 2013); broader issues of constitutionalisation of EU private law (Ferreira 2010; Cherednychenko and Reich 2016); and finally accounts and criticisms of the development of the horizontality doctrine in the caselaw of the ECJ in the context of fundamental rights (Walkila 2016). As questions have revolved around *how* and *whether* fundamental rights *should*, if at all, enjoy horizontal effect; Frantziou's book manages to distinctively add to this literature by asking '*why*' questions that go at the root of the debates, by providing the basis whence discussions can be prompted as to the *how*, *whether* and *should*.

The main argument of the book flows from her finding that the way horizontality has developed in the ECJ caselaw has neglected considerations of a constitutional type; and has instead focused on the drier aim of maintaining the primacy of EU law.[3] Frantziou highlights blatant discrepancies and inchorences in the Court's reasoning: from the legacy of *Van Gend and Loos* and *Defrenne*,[4] the mechanisms that the Court created to, first, limit the application of horizontal direct effect (*Marshall* and *Faccini Dori*)[5] and then to counteract instances of lack of horizontal effect (*Francovich* and *Brasserie du Pêcheur*),[6] led to a formalistic and source-based approach that Frantziou qualifies as "far from self-evident"[7] and surely not satisfactory from a constitutional perspective; the rulings in *Mangold* and *Kücükdeveci* on the horizontal effect of fundamental rights as general principles of EU law[8] also were not applied consistently to all the rights of the Charter.[9] Post-Lisbon, the direction of the Court's reasoning did not change significantly and additionally avoided discussing the direct effect of the Charter when it should have (*AMS*).[10] The general thread is rather one of functional and inconsistent lines of argument, which smartly avoid more political and content-related judgments. Recent caselaw that more

[1] Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis* (OUP 2019) 170-1, 175.
[2] Ibid 81.
[3] Ibid chapters 3 and 4.
[4] Case 26/72, *Van Gend en Loos v Nederlands Administratie der Belastingen* [1963] ECR 1; Case 43/75, *Defrenne v. Sabena* (No 2) [1976] ECR 455.
[5] Case C-271/91, *Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723; Case C-91/92, *Faccini Dori v. Recreb* [1994] ECR 1–3325.
[6] Case C-6/90, *Francovich and Bonifaci v. Italy* [1991] ECR I-5375; Joined Cases C-46 and 48/93, *Brasserie du Pêcheur v Germany and R v Secretary of State for Transport, ex parte Factortame (No 3)* [1996] ECR I-1029.
[7] Frantziou (n 1) 66.
[8] Case C-144/04, *Mangold v. Helm* [2005] ECR I-9981; Case C-555/07, *Kücükdeveci v. Swedex* [2010] IRLR 346.
[9] Frantziou (n 1) 78.
[10] Case C-176/12, *Association de Médiation Sociale v. Union Locale des Syndicats CGT and Others*, EU:C:2014:2.

thoroughly analyses the horizontal applicability of provisions conferring individual rights is presented as adding further uncertainty (*DI* and *Egenberger*).[11]

What the authors refers to as a one-dimensional, *ad hoc* and casuistic approach of the Court is judged inadequate against recent social and legal developments.[12] The author convincingly argues that the need emerges to rethink the "normative underpinnings of horizontality" in the context of fundamental rights.[13] The Charter is presented as a revived benchmark for what the EU should set out to be, hence providing new ground for how horizontality should be understood. Against a backdrop of EU law gradually shifting from a state- to an individual-based interpretation of the Treaties,[14] Frantziou's main argument seems to suggest that a step further is necessary: in order to achieve the *inclusionary* potential of the doctrine of horizontality, such step would rest on an interpretation that looked at the individual as a participant of a political community; not as an isolated bearer of rights, but someone to be recognised as *an equal holder of rights* in the collective dimension,[15] and who should thus be able to enjoy them equally in the public sphere. Horizontality is therefore understood as performing this function.

The problem underlying the rethinking of horizontality can be said to be multifaceted in nature: it is *theoretical*, inasmuch it contemplates how horizontality can be understood through the lenses of constitutional theory, and how the latter can provide the tools to conceive of the *function* of horizontality in a different, more principled way; it is also *legal*, as it has to do with conflicts and balance of rights as constitutional claims, not least with *why* and *on which criteria* horizontality should be determined; finally, it also possesses *social* relevance, as the main argument is driven by concerns of inequality and unequal enjoyment of rights, which a novel assessment of horizontality should take into consideration. In addition, while the author excludes any stepping into the realm of normativity, it could be argued that by presenting the Charter as the justification for a renewed horizontal doctrine, normativity can be found in what the EU is said it should strive to be.[16] The different dimensions of the problem are reflected in the structure of the book, which is divided into three main parts, dealing respectively with the theory, the caselaw and the test proposed.

Part I discusses the doctrine of horizontality within constitutional theory, arguing that when conceived as 'fundamental to' a political community, fundamental rights necessitate a constitutional interpretation that takes into account their function of enabling equal participation in public life. In doing so, Frantziou addresses the very fundamental question of *why* horizontality should apply, as opposed to the more traditional *how* question, relating to whether the claim fulfils legalistic requirements of direct effect and horizontal relationship. To justify the need for such theoretical foundations, Part II provides a sound and comprehensive overview of the development of the caselaw on the matter, while providing a critical perspective on it. The discussion on the caselaw pre- and post-Lisbon is separated for methodological reasons, yet it is found that only small improvements have characterised the caselaw following the adoption of the Charter when compared to the framework in Part I. Against these deficiencies, Part III puts forward the substantive elements for an assessment of horizontality based on the concept of political equality.

The core contribution of the book lies in this original and forward-looking exercise that aims to design a test for horizontality, through a reconceptualisation of the doctrine that departs from the shape that it has so far inherited from the caselaw. From the standpoint that neither the fundamental nature of the right, nor the relevance of it to a private dispute would be sufficient to determine the applicability of horizontality, Frantziou relies on the concept of political equality. It follows that there emerges a willingness to find a justification for horizontality that, first, goes beyond the state/individual and the public/private divides by advocating a public law reasoning for private disputes; and, second, that also goes beyond the protection of fundamental rights as such, by understanding them as avenues of political equality. In this sense, it is forward-looking since it substantially criticises the current approach and engages into the development of a new one. Such exercise, while

[11] Frantziou (1) 100. Case C-441/14, *Dansk Industry (DI) v Securitas Securidad España* EU:C:2015:831; Case C-414/16, *Egenberger v. Evangelisches Werk für Diakonie und Entwicklunge.V*, EU:C:2018:257.
[12] Ibid.
[13] Ibid 138.
[14] Samo Bardutzky and Elaine Fahey (eds), *Framing the Subjects and Objects of Contemporary EU Law* (Elgar 2017) 3.
[15] Hannah Arendt in Frantziou (1) 162.
[16] Frantziou (1) 137.

seeking to develop a new methodology *beyond* current practice, is able to *fit* the boundaries of the existing legal framework, and is hence highly innovative and reasonable.

Probably not doing justice to its depth, Frantziou's reasoning can be summarised as follows: political equality is the concept that best resonates with the purpose and content of the Charter;[17] in turn, fundamental rights are considered avenues for such political equality, as their fulfilment in private relations with public relevance contributes to democratic processes and in particular to the equal exercise of rights of "those individuals whose political status cannot be guaranteed by public institutions".[18] For political equality to happen, then, fundamental rights should guide the reasoning of horizontality, through lenses that looked at the constitutional relevance of horizontal fundamental rights as enabling conditions for interaction in the public sphere.[19] The aim of accommodating a reconceptualisation of horizontality to the existing legal framework yet implies a dense creative exercise: bridges and logical links are built between concepts and revisited purposes, in a particular context of social interactions and power-relations. What at first sight would look like a reconceptualisation of horizontality brings with it also important reflections on the role of fundamental rights in the public sphere, not least about the direction of the EU as a political community.

The methodological approach is perfectly adapted to the multifaceted nature of the problem. While not explicitly mentioned, a *law-in-context* approach unfolds from the way the social context where the law operates - that of the public sphere where the rights ought to be equally enjoyed - is taken into consideration in the conceptualisation of horizontality. The individual is not looked in isolation, but appreciated in its private interactions with other subjects when participating in the political community. Related to this, underlying the book is the acknowledgement of the changes in power interactions in society, as well as the obsolescence of the distinction between private and public in determining the kind of reasoning that will guide horizontality. These social interactions are thus imbued, and effectively addressed, in the new justification for horizontality. In this sense, Frantziou's book centrally contributes to discussions of how the law and its function are (and should be) shaped by the societal context. This perspective is also entirely coherent with the criticism addressed to the Court, namely its doctrinal and too formalistic interpretations. Such an approach additionally gains more strength as the Court's struggle in examining rights in their "operation within a social context" is expressly recognised by the author.[20]

By way of conclusion, Frantziou's book bears significance on a number of fronts. It is a very ambitious, meticulous and logic endeavour, able to address, from the specific issue of horizontality, directional questions and broader debates relating to the EU as a polity. In the legal field, it provides an innovative contribution to the evolution, reasoning and role of the horizontality doctrine; the test that is put forward could potentially serve as ground for future claims brought to the Court, and in this sense, steer the direction of its reasoning. If this was the case, social significance would also stem from a more thorough interpretation of the content and policising effect of fundamental rights, and their role in achieving a political community where rights were enjoyed equally. The book is extremely relevant for future research, too. Especially in the light of the most recent caselaw on the matter, such as *Bauer* and *Cresco*,[21] further studies could assess the extent to which the Court's reasoning has moved closer to Frantziou's principled justification. Further research could also consider whether the problems relating to horizontality are exclusively peculiar to the EU as a hybrid constitutional supranational order; and/or to what extent it would be possible to apply the core of Frantziou's thesis to other systems of governance beyond the state. The book will be of great value for scholars to appreciate the extensiveness of fundamental rights applicability in private relations today, from an EU law and constitutional theory perspective.

[17] Ibid 163.
[18] Ibid 11.
[19] Ibid and 198.
[20] Ibid 136.
[21] Joined Cases C-569/16 and C-570/16, *Bauer et al* EU:C:2018:871; Case C-193/17, *Cresco Investigation* EU:C:2019:43.