

EGENBERGER, OR THE PLACE OF NON-DISCRIMINATION ON THE GROUND OF RELIGION IN THE EU CONSTITUTIONAL LEGAL ORDER

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Abstract: The general obligation of non-discrimination enjoys a special place within the sources of law of the EU constitutional legal order, up to the point that the Court of Justice has ensured its enforcement also beyond the scope of application of ordinary EU legal instruments. The Court of Justice has, in fact, granted the application of the obligation not to discriminate against the protected categories in cases where the applicable legal instrument – directives in particular – was not applicable. This occurred when the Court of Justice applied the obligation of non-discrimination in cases between two private parties, the horizontal direct effect of EU legal instruments. This happened in a recent decision of the Court of Justice of the European Union, *Egenberger*, where a job applicant for a position offered by an auxiliary of the Protestant Church, in Germany, appealed the decision of the employer not to hire her on a legal consultancy project. The behaviour of the Court, and the enforcement of the principle of non-discrimination on the ground of religion, can be considered as the affirmation of the specific and fundamental place that non-discrimination on the ground of religion occupies in the EU constitutional legal order? How this can be reconciled with religious freedom? The article will try to address these questions.

Keywords: European Union, equality, religion, religious autonomy, principle

1. Introduction: the increasing central role of non-discrimination on the ground of religion in the case law of the Court of Justice of the European Union

Art. 13 TEC of the Treaty of Amsterdam¹ introduced for the first time a legal basis for the adoption of legislative acts to fight discrimination on grounds other than nationality. At the same time, the Charter of Fundamental Rights of the European Union, solemnly proclaimed in 2001, which became binding with the entrance into force of the Lisbon Treaty, in December 2009, contains an express prohibition of discrimination, *inter alia*, on the ground of religion.² To this legal framework should be added the flourishing secondary legislation, as Directive 2000/78/EC³ on discrimination in the working place and Directive 2000/43/EC⁴ on racial and ethnic discrimination. Despite the abundance of legal provisions, for long time there has been little if no application at European level of the prohibition of discrimination on the ground of religion, and, as a consequence, almost no litigation in front of the Court of Justice of the European Union (CJEU).⁵ This is most likely attributable to multiple

¹ Now Art. 19 TFEU.

² See Title III – Equality. In particular Art. 21, Charter of Fundamental Rights of the European Union (CFREU): "1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited".

³ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16–22.

⁴ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22–26.

⁵ It should be however recalled that one of the seminal judgments of the Court of Justice of the European Union (hereinafter CJEU), *Van Duyn*, had a link with religion. Ms Van Duyn was a Dutch employee of the Church of Scientology (whose status as fully-fledged religion is however debated) who was denied the permit to enter as a worker in the United Kingdom. At that time there was however no legal basis to enter in the dispute if the facts of the case were, at the same time, also representing a discrimination on the ground of

factors. Discrimination on the ground of religion⁶ depends strictly on the definition of religion, which is not equal along the different Member States. At the same time, it depends also on the specific role that religion plays in the public sphere in the various Member States, which is often reflected by the Constitutional status that religion enjoys in various European countries.⁷ These are some of the reasons that have created, over the years, a number of exception to the prohibition of religious discrimination. One of these exceptions is at the heart of the dispute: Art. 4.2 of Directive 2000/78/EC.⁸ This provision contains a safeguard clause that is addressed

religion. CJEU, Case 41-74, 4 December 1974, *Yvonne van Duyn v Home Office*, EU:C:1974:133.

6 See e.g. **M. HILL** (ed.), *Religion and Discrimination Law in the European Union*, Institute for European Constitutional Law, Trier, 2012. **L. ZUCCA**, *A Secular Europe. Law and Religion in the European Constitutional Landscape*, Oxford University Press, Oxford, 2012. **L. ZUCCA, C. UNGUREANU** (eds.) *Law State and Religion and in the New Europe: Debates and Dilemmas*, Cambridge University Press, Cambridge, 2012. **F. CASOLARI**, *L'azione dell'Unione europea contro le discriminazioni basate sulla religione: l'impatto della giurisprudenza della Corte europea dei diritti umani* in *Diritti Umani e Diritto Internazionale*, 2012 vol. 3, p. 475 ss. **R. MCCREA**, *Religion and the Public Order of the European Union*, Oxford University Press, Oxford, 2010. **L.N. LEUSTEAN, J.T.S. MADELEY**, *Religion, Politics and Law in the European Union*, Routledge, Abingdon, 2009. See also **D. DURISOTTO**, *Unione europea, chiese e organizzazioni filosofiche non confessionali (art. 17 TFUE)* in *Stato, Chiesa e pluralismo confessionale*, Rivista telematica (www.statoechiese.it), giugno 2016, p. 8.

⁷ In this sense should be seen the difference between at least three different approaches to religion in Europe: the purely secularist approach (reflected by France) which does not recognize a specific status to any religion; the official recognition of the role played by religion (as in Italy or Spain), without an express favour towards a specific religion; and States where a specific religion enjoys a recognized constitutional status, as the head of State is also the head of the Church (United Kingdom, Denmark, Sweden).

⁸ Art. 4.2, Directive 2000/78/EC: "Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground".

into preserving the existing practices connected to religion in employment law that could result in a difference of treatment between religious and non-religious employees. A clause like the one at hand is not at ease with the overall system of protection of fundamental rights at EU level and in particular with the Charter of Fundamental Rights of the European Union. It was accordingly predictable that, with the application of the protection agreed by the Charter after its entrance into force, sooner or later, a case requiring to find a balance between the prohibition of non-discrimination and the freedom of religion of the employer would have reached the Court of Justice. It must be said that the rulings of the Luxembourg Court⁹ have been preceded by at least a decade by the European Court of Human Rights. The ECHR had several opportunities to rule on discrimination on the ground on religion,¹⁰ as well as on the principle of religious autonomy.¹¹ Although the protection afforded by the European Union and by the Council of Europe systems presents several points in common, different approaches to the content of fundamental rights persists.¹² As it will be outlined along this article, this is one of the cases where the different approach emerges. This is linked in particular to the nature of the two legal orders: while the Council of Europe is a purely international legal order, based on the consensus of the High Contracting Parties, the EU is, on the other side, based on the principle of conferred powers. This allowed the EU, over the years, to build a quasi-constitutional legal order that applies its characterising rights, principles and values also when there might be a conflict with their interpretation at national level. This is well represented

⁹ See CJEU (Grand Chamber) of 14 March 2017, case C-157/15, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, EU:C:2017:203; CJEU (Grand Chamber) of 14 March 2017, Case C-188/15, *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA*, EU:C:2017:204; CJEU (Grand Chamber) of 29 May 2018, case C-426/16, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen, VZW and Others v Vlaams Gewest*, EU:C:2018:335.

¹⁰ E.g. European Court of Human Rights (hereinafter ECHR), *Eweida and Others v. the United Kingdom*, application Nos. 48420/10, 59842/10, 51671/10 and 36516/10, judgment of 15 January 2013.

¹¹ E.g. ECHR, *Sindicatul "Păstorul cel Bun" v. Romania* [GC], application No. 2330/09, judgment of 9 July 2013.

¹² See **K. LENAERTS**, *The European Court of Human Rights and the Court of Justice of the European Union: Creating Synergies, in the Field of Fundamental Rights Protection in Il Diritto dell'Unione Europea*, 2018, p. 9 ss.

by the doctrine of direct effect,¹³ of central importance for the argument of the present essay. On the contrary, the ECHR has developed the doctrine of the margin of appreciation,¹⁴ that allows the Contracting Parties to enjoy a wider margin of discretion in the implementation of certain, specific, rights that are part of the Convention system. This might explain why the results of the protection afforded in the case law of the Court of Justice on discrimination and religious freedom are surely well below in number, but appears to ensure a higher standard of protection (although a similar statement is highly debatable). A last factor that has negatively impacted the amount of case law on religious discrimination and religious autonomy is the potential conflict between the content of the right at EU level and the content of the rights at constitutional level. In this sense, the recent case law of the Court of Justice¹⁵ has shown, although in different fields of European law, the necessity for an increased cooperation between the national and the European level in order to avoid misunderstandings that could end up with an *ultra vires* judgment by national constitutional courts.¹⁶

1. The case of Vera Egenberger: non-discrimination and religious autonomy

After the *Achbita* and *Bougnauoi* decisions and a few weeks before the *Liga Van Moskeen* case,¹⁷ the Court of Justice has been asked to rule on *Egenberger*,¹⁸ a preliminary ruling coming from the Federal Labour Court of Germany. The circumstances of the case had to do with a person of no religious affiliation (of “no denomination”) applying for a fixed term position at the *Evangelisches Werk für Diakonie und Entwicklung* (Protestant Agency for Diakonia and Development). The position entailed the preparation of a legal report on the UN International Convention on the

¹³ CJEU of 5 February 1963, case 26-62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, EU:C:1963:1.

¹⁴ E.g. S. GREER, *The Margin of Appreciation: Interpretation and Discretion under the European Convention of Human Rights*, Council of Europe Publishing, Strasbourg, 2000.

¹⁵ E.g., see CJEU of 19 April 2016, C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*, EU:C:2016:278; CJEU of 5 December 2017, C-42/17, *Criminal proceedings against M.A.S. and M.B.*, EU:C:2017:936.

¹⁶ See Danish Supreme Court, judgment of 6 December 2016, Case 15/2014.

¹⁷ The number of the decisions are quoted *supra* at 8.

¹⁸ CJEU (Grand Chamber) of 17 April 2018, case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, EU:C:2018:257.

Elimination of All Forms of Racial Discriminations. In the job offer was clearly stated that the affiliation to one of the German Protestant Churches was considered as a pre-condition for taking up the job: “*We presuppose membership of a Protestant church or a church belonging to the [Working Group of Christian Churches in Germany] and identification with the diaconal mission. Please state your church membership in your curriculum vitae*”.¹⁹ This right of the religious employer to demand for a religious affiliation was also reflected by the German legislation.²⁰ Paragraph 9 of the General Law on equal treatment (*Allgemeines Gleichbehandlungsgesetz*) – which implements Directive 2000/78/EC and in particular its Art. 4.2 - states that “*difference of treatment on grounds of religion or belief [...] shall also be permitted if a particular religion or belief constitutes a justified occupational requirement*”. This “justified occupation requirement” corresponds to the “genuine, legitimate and justified occupational requirement” of Art. 4.2 of Directive 2000/78/EC. As a preliminary remark, it should be noted that the scope of application of the exception in Para 9 of the *Allgemeines Gleichbehandlungsgesetz* seems to be wider than the one established by the Directive. This, in principle, seems to contradict the EU rules that establish that Member States enjoy discretion in the implementation of a directive. In this case seems that the German legislator has painted well outside the frame of the Directive. Art. 4.2 of the Directive provides in fact for a clear time frame for the operationalization of the exceptions on religious autonomy: “*Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive*”. Para 9 of the *Allgemeines Gleichbehandlungsgesetz* does not contain any kind of temporal limitation. This is a first factor to consider to contextualize the interpretation of the facts of the case to the cultural and social background. In Germany, the Cristian Churches (both Catholics and Protestants) are relevant and influential actors that, also thanks to a tax regime that provides for their financing,²¹ are often acting as employers. Ms Egenberger action for damages against the refusal to employ was partly allowed – by the Berlin Labour Court (*Arbeitsgericht Berlin*) – and then

¹⁹ CJEU, *Egenberger*, para 25, cit. *supra* at 18.

²⁰ *Allgemeines Gleichbehandlungsgesetz* (General Law on equal treatment) of 14 August 2006 (BGBl. 2006 I, p. 1897).

²¹ **S. HOFFER**, *Caesar As God's Banker: Using Germany's Church Tax As an Example of Non-Geographically Bounded Taxing Jurisdiction* in *Washington University Global Studies Law Review* vol. 9, 595 ss.

dismissed by the Higher Labour Court for Berlin and Brandenburg (*Landesarbeitsgericht Berlin-Brandenburg*).²² The Federal Labour Court, being court of last instance, decided to stay the proceeding and refer three questions for preliminary ruling to the Court of Justice of the EU in order to ascertain if the German legislation complies with Directive 2000/78/EC and in particular with its Article 4.2.

2. The horizontal application of the principle of non-discrimination on the ground of religion

The *Egenberger* judgment is a seminal decision, and for various reasons. 1) Represents another step towards the systematization of the horizontal application of direct effect and its relationship with indirect effect, 2) for the first time the Court of Justice is confronted with a balance between equality and religious freedom and 3) it tackles - again for the first time - the issue of the autonomy of religious organizations. For practical reasons, in the next sub-paragraphs we will divide this three-headed problem under two labels: in the first sub-paragraph, we will focus on the application of horizontal direct effect and indirect effect to this judgment. In the third sub-paragraph, after a second one devoted to the previous case law of the Court of Justice, we will try to understand the legal *rationale* of the Court of Justice, before going, in the last two paragraphs, into the discussion on the balance between religious autonomy and non discrimination and on the place of non discrimination in the EU constitutional legal order.

a) The horizontal application of the principle of non-discrimination

This decision gives the opportunity to reflect further on the development of the theory of direct effect by the Court of Justice of the EU and its application. The theory on direct effect has been created by the Court of Justice to ensure the effectiveness of EU law, entrusting individuals with the power to invoke provisions of EU legislative and non-legislative acts in front of national jurisdictions.²³ The need to boost the effectiveness of

²² CJEU, *Egenberger*, para 29, cit. *supra* at 18.

²³ D. LECZYKIEWICZ, *Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability* in D. CHALMERS and A. ARNULL (eds.) *The Oxford Handbook of European Union Law*, Oxford University Press, Oxford, 2015.

EU law came from the various limitations to its scope of application.²⁴ These limitations were linked to its hybrid nature, defined by the Court of Justice as a *sui generis* legal order.²⁵ While the evolution of the European Union has increasingly led to a *corpus* of legislation (the *acquis communautaire*) that is independent from the national one, it is widely accepted in doctrine, although not unanimously, that certain legal instruments, as directives, are addressed towards the Member States and cannot as such impose obligations on EU citizens, but only rights.²⁶ In cases as *Egenberger*, accordingly, where the case turns around the application and interpretation of a provision of national law in light of Directive 2000/78/EC to a dispute between two individuals, the application and interpretation of the Directive would go against this rule, imposing to the Protestant Church the obligation to comply with EU legislation, that is responsibility of the German State. In a case such as the one we are analysing, the traditional interpretation of the theory of direct effect would leave to Ms Egenberger only one remedy: the action for State liability against Germany.²⁷

b) A summary of the previous case law on horizontal direct effect of the principle of non discrimination

The Court of Justice has applied, over the years, the theory of direct effect also to general principles of law, and to the general principles of non-discrimination.²⁸ General principles of law are, according to the ICJ Statute, the principles of law that are common to the States.²⁹ Within EU law, general principles are defined under Art. 6 TEU, but more in detail within the case law of the Court of Justice. According to the view of many

²⁴ E.g., see the examples of limitations to the scope of application of EU law: the internal market, the Charter, the persistence of the unanimity vote in the Council.

²⁵ CJEU of 25 February 1988, C-296/83, *Parti Écologiste "Les Verts" v. European Parliament*, EU:C:1988:94.

²⁶ E.g. see P. CRAIG, *The legal effect of Directives: policy, rules and exceptions* in *European Law Review*, 2009 vol. 3, p. 349 ss.

²⁷ This, however, taking into account the strict procedural and substantial rules to which this action is subjected in front of the Court of Justice. See A. DI MARCO, *La responsabilità extracontrattuale dello stato per violazioni del diritto dell'UE*, Editoriale Scientifica, Napoli, 2017.

²⁸ P. CABRAL, R. NEVES, *General Principles of EU Law and Horizontal Direct Effect*, in *European Public Law*, 2011 vol. 3, 437 ss.

²⁹ Art. 38 of the Statute of the International Court of Justice.

scholars, however, general principles of law are principles of interpretation, and does not seem to confer rights on individuals.³⁰ This is the case of the general principle of non-discrimination, that the Court of Justice has used to confer rights on individuals in various occasions.³¹ If this conferral of rights, obtained through the application of the theory of direct effect, is applied within a dispute between an individual and a public administration, then in principle this does not represent a problem. If on the contrary this conferral happens within a dispute within two individuals, this enters into a conflict with the traditional theory of direct effect, as long as the legal instrument involved is a directive. To provide effectiveness to EU law, the Court of Justice has started to apply horizontally the principle of non-discrimination in various occasions.³² This is linked to the fact that the anti-discrimination law of the European Union is governed by directives (if we except the Treaties and the Charter), and in particular by Directive 2000/78/EC and Directive 2000/43/EC. The first occasion in which the Court started to enforce the principle of non-discrimination has been *Mangold*,³³ where the Court has recognized that the principle of non-discrimination on the ground of age was applicable notwithstanding the inapplicability of Directive 2000/78/EC, since the dispute was involving two private parties. In *Bartsch*³⁴ however the Court of Justice seemed to do a step back, declaring a situation similar to the one in *Mangold* not presenting a sufficient link with EU law to apply the principle of non-discrimination. Then in *Kucukdeveci*³⁵ the Court of Justice

³⁰ E.g. **T. HARTLEY**, *The Foundations of European Union Law*, Oxford University Press, Oxford, 2010.

³¹ See the reconstruction of the principle and the argument made in **C. AMALFITANO**, *General Principles of EU law and the Protection of Fundamental Rights*, Edward Elgar Publishing: London, 2018, p. 6. *Si licet*, see also **G. ZACCARONI**, *Dialogue and conflict between supreme European courts in Dansk Industri in Federalismi*, n. 9 2018.

³² It should also be noted that the fact that general principles of law enjoys direct effect is present within EU law since the *Defrenne* case law, when the Court recognized that the general principle of non-discrimination was applicable to a dispute between two private parties. See CJEU of 8 April 1976, 43-75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena [Defrenne II]*, EU:C:1976:56.

³³ CJEU of 22 November 2005, C-144/04, *Werner Mangold v Rüdiger Helm*, EU:C:2005:709.

³⁴ CJEU of 23 September 2008, C-427/06, *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*, EU:C:2008:517

³⁵ CJEU of 19 January 2010, C-555/07, *Seda Küçükdeveci v Swedex GmbH & Co. KG.*, EU:C:2010:21.

did not follow the line of the “sufficient link” in *Bartsch* and went on with the *Mangold* approach. In *Dansk Industri(DI)*³⁶, the Court of Justice resumed the *Mangold* approach, declaring, in a preliminary ruling received from the Danish Supreme Court (the highest jurisdictional authority in Denmark) that the principle of non-discrimination on the ground of age required the national judge to interpret the national legislation in order to ensure compliance with the prohibition of non-discrimination. In the event that the interpretation of the national legislation according to EU law was not possible, than the national court should have proceeded with the disapplication of the national legislation contrasting with the principle of non-discrimination. Until *Egenberger*, however, it was disputed if this approach was applicable only to discrimination on the ground of age or was, on the other side, applicable also to the other grounds of discrimination prohibited by the Treaties. This also in sight of the fact that, after *Dansk Industri(DI)*, the Danish Supreme Court has declared as *ultra vires* the horizontal application of the principle of non-discrimination,³⁷ for contrasting with the principle of conferred powers. In *Egenberger*, however, the Court of Justice decides to reaffirm, for discrimination on the ground of religion and belief, its case law on the principle of non-discrimination on the ground of age, reinforcing the opinion that the horizontal application of the principle non-discrimination is not a case by case approach of the Court of Justice but that it is rather a consistent application of a fundamental element of the EU constitutional legal order, and that might well be valid for all the grounds of discrimination protected by the Treaties. It is not by chance, perhaps, that the Court of Justice quotes *Dansk Industri(DI)* several times³⁸ along its legal *rationale*, demonstrating the validity of its previous case law even in spite of the *ultra vires* judgment of the *Danish Supreme Court*.

c) Understanding the legal *rationale* of the Court of Justice

The judgment of the Court of Justice in *Egenberger* gives the opportunity to reflect further also on the *rationale* behind the horizontal application of the principle non-discrimination. If in the previous *Mangold-Kucukdeveci* case law the Court was putting the emphasis on the disapplication of the national legislation contrasting with the principle of non-discrimination, in

³⁶ See CJEU, *Dansk Industri (DI)*, cit. *supra* at 15.

³⁷ See Danish Supreme Court, cit. *supra* at 16.

³⁸ CJEU, *Egenberger*, paras 71-72-73, cit. *supra* at 18.

Egenberger the Court underlines the fact that the horizontal application – which in any case is for the national court – should be resorted only if it is not possible to interpret the national legislation according to EU law, ensuring the “indirect effect”³⁹ of legal instruments of EU law. According to the Court of Justice, first in *Dansk Industri* and then in *Egenberger*, the national court is deemed to disapply the contrasting national legislation even in the case this provision has been consistently interpreted in a manner that is incompatible with EU law.⁴⁰

- i. *The complex relationship between the principle of non-discrimination and other sources of EU law: a principle that is applied to supplement the directive?*

The principle of non-discrimination holds a particular place among the EU general principles. Although it cannot be held as being hierarchically above the others, it is one that has been accorded horizontal direct effect.⁴¹ In order however to govern the (potentially) unlimited use of this principle at national level,⁴² the Court of Justice has attempted to link its use to

³⁹ The indirect effect, as part of the doctrine of direct effect, states that while the EU primary legislation (in this case, a directive) is not applicable national courts have to interpret national legislation in accordance with EU law. CJEU of 10 April 1984, case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, EU:C:1984:153, para. 26. CJEU of 13 November 1990, C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA.*, EU:C:1990:395. See e.g. **P. CRAIG**, *Direct Effect, Indirect Effect and the Construction of National Legislation in European Law Review*, 1997, p. 519 ss.

⁴⁰ CJEU, *Egenberger*, para 73, cit. *supra* at 18.

⁴¹ The principle of the protection of fundamental rights has been also declared horizontally directly effective. See the *Kadi* case law of the CJEU of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation / Council and Commission*, EU:C:2008:461.

⁴² In this sense, the Court of Justice seems to be aware of the comments made by several national constitutional judges, reflected (*inter alia*) in **A. BARBERA**, *La Carta dei diritti: per un dialogo fra la Corte italiana e la Corte di giustizia* in *Quaderni Costituzionali*, 2018 vol. 1, p. 149 ss. This stance reflects also the move made by the Italian Constitutional Court on dual preliminary in late 2017 (Italian Constitutional Court, decision n. 269/2017, on which see **P. FARAGUNA**, *Constitutional Rights First: The Italian Constitutional Court fine-tunes its "Europarechts-freundlichkeit"*, in *Verfassungblog*, 14 March 2018 and **L. S. ROSSI**, *Il "triangolo giurisdizionale" e la difficile applicazione della sentenza 269/17 della Corte costituzionale italiana* in *Federalismi* n. 16/2018), in order to ensure that the national courts, if the matter deals with a constitutional right, give precedence to the *a quo* constitutional legitimacy procedure instead of referring directly to the Court of Justice. This move, while

primary and secondary sources of law. In *Egenberger*, the Court of Justice has, in similar way to what the Court has been doing in *Dansk Industri* (DI) decided to put the emphasis on the relationship between, in first instance, the general principle of non-discrimination and the directive. In paragraph 47 of the judgment, the Court of Justice holds that:

*“As regards, secondly, the objective of Directive 2000/78 and the context of Article 4(2) of the directive, it must be recalled that that directive’s objective, as stated in Article 1, is to lay down a general framework for combating discrimination on the grounds inter alia of religion or belief as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment. The directive is thus a specific expression, in the field covered by it, of the general prohibition of discrimination laid down in Article 21 of the Charter”.*⁴³

The last sentence is of particular interest for the argument brought forward by the CJEU. The directive is “a the specific expression [...] of the general prohibition of discrimination laid down in Article 21 of the Charter”. This phrase seems to be in line with what the Court has affirmed previously in *Dansk Industri*:

*“It should then be noted that, as Directive 2000/78 does not itself lay down the general principle prohibiting discrimination on grounds of age but simply gives concrete expression to that principle in relation to employment and occupation, the scope of the protection conferred by the directive does not go beyond that afforded by that principle”.*⁴⁴

In both cases, the Court states that the Directive is the expression of the general prohibition non-discrimination, and, in particular in *Dansk Industri*, it seems to regard the general principle as an unwritten source of law. This has no consequences for the legal status of the Directive, nor it has, as commentators or national Courts might argue, for the principle of conferred powers. It states that the principle of non-discrimination is the *rationale* and the background of the Directive, confirming the special place that the principle retains in the EU legal order. This however has

protecting the Italian system of constitutional review, might have consequences in light of the role of national judges as EU judges, as well as on the effectiveness of the preliminary ruling procedure.

⁴³ CJEU, *Egenberger*, para 47, cit. *supra* at 18.

⁴⁴ CJEU, *Dansk Industri*, para 27, cit. *supra* at 15.

consequences on the position and on the rights of the parties in the dispute. The principle of non-discrimination is, in *Egenberger* as well as in *Dansk Industri (DI)*, applicable precisely because the Directive is not applicable and it is not possible, in the opinion of the national court, to interpret national legislation in conformity with EU law. In *Dansk Industri (DI)* the Court repeats the need to disapply contrasting national legislation when it is not possible to interpret it in conformity with EU law:

*“That point having been made clear, it should be added that even if a national court seised of a dispute that calls into question the general principle prohibiting discrimination on grounds of age, as given concrete expression in Directive 2000/78, does in fact find it impossible to arrive at an interpretation of national law that is consistent with the directive, it is nonetheless under an obligation to provide, within the limits of its jurisdiction, the legal protection which individuals derive from EU law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle (judgment in Küçükdeveci, C- 555/07, EU:C:2010:21, paragraph 51)”.*⁴⁵

This argument is developed further in paragraph 36:

*“Moreover, it is apparent from paragraph 47 of the judgment in Association de médiation sociale (C-176/12, EU:C:2014:2) that the principle prohibiting discrimination on grounds of age confers on private persons an individual right which they may invoke as such and which, even in disputes between private persons, requires the national courts to disapply national provisions that do not comply with that principle”.*⁴⁶

In *Egenberger* the Court expresses a very similar position and takes the argument of the link between the Directive and the principle of non-discrimination farther:

“In the event that it is impossible to interpret the national provision at issue in the main proceedings in conformity with EU law, it must be pointed out, first, that Directive 2000/78 does not itself establish the principle of equal treatment in the field of employment and occupation, which originates in various international instruments and the constitutional traditions common to the Member States, but has the sole purpose of laying down, in that field, a general framework for combating discrimination on various grounds,

⁴⁵ CJEU, *Dansk Industri*, para 35, cit. *supra* at 15.

⁴⁶ CJEU, *Dansk Industri*, para 36, cit. *supra* at 15.

*including religion and belief, as may be seen from its title and from Article 1".*⁴⁷

From these reflections we can draw a preliminary conclusion: in the opinion of the Court of Justice (which, as we know, has been strongly confronted by national Constitutional Courts), the principle of non-discrimination is an autonomous source of rights, to the extent that it can be applied when a legal instrument (a Directive) of the EU is not *per se* applicable and it is not possible to interpret the national legislation according to EU law.

ii. *A principle that has been codified by the Charter?*

The reading of the legal reasoning of the Court of Justice in *Egenberger* leads however to a step further in providing the *rationale* of the direct effect of Directives:

*"The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is 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".*⁴⁸

While in its previous case law the Court of Justice, to give reasons about the application of the general principle, made reference to its nature of independent source of rights, in *Egenberger* takes a different decision. The Court maintains that the prohibition of all discriminations on the grounds of religion or belief "is laid down in Article 21(1) of the Charter". In the opinion of the Court of Justice is the Charter itself, rather than the Directive,⁴⁹ that justifies the horizontal application of the general principle of non-discrimination on the grounds of religion and belief. It should be noted that, according to the case law of the Court of Justice as well as to Art. 51 of the Charter itself, for the Charter to be applicable is necessary that 1) the matter falls within its scope of application and 2) since the Charter is addressed to the Member States, that the dispute involves at least one public administration or a subject with a link with the State

⁴⁷ CJEU, *Egenberger*, para 75, cit. *supra* at 18.

⁴⁸ CJEU, *Egenberger*, para 76, cit. *supra* at 18.

⁴⁹ Although the Court of Justice, as said in the paragraph before, also mentions the Directive 2000/78/EC.

administration. While we know that the Court of Justice maintains that the condition under point 1) is satisfied, the Court still seems not to clarify why, again, the principle should be applied to a dispute where the Charter should not be applied (point 2). The reason might be that, as the Court of Justice maintains in *Dansk Industri (DI)*, we are handling a principle that enjoys a particular, *sui generis*, status in the EU constitutional legal order:

*“the fundamental principle of equal treatment, the general principle prohibiting discrimination on grounds of age being merely a specific expression of that principle”.*⁵⁰

3. The balance between equality and religious autonomy

These first paragraphs allow to see in perspective the relationship between equality and religious autonomy. Although it is the first time that the Court of Justice has been called to interpret Art. 4.2 of Directive 2000/78/EC, in the last years the Court of Justice has been asked several times to judge on religious freedom and on discrimination on the ground of religion. The European Court of Human Rights (ECHR) has already developed its own case law on various aspects of equality and religious belief, under the scope of Art. 9 of the Convention,⁵¹ Art. 10 of the Convention⁵² as well as on religious autonomy with decisions on Art. 11⁵³ and on Art. 8.⁵⁴ The protection of fundamental rights offered by Council of Europe, although presenting several similarities, is different from the one of the European Union. According to the case law of the Strasbourg Court, the High Contracting Parties enjoy a wider margin of discretion when two rights which are at the core of the protection offered by the Convention enters into conflict, as equality and religious freedom. Hence, in the Convention system, the choice of the Contracting Parties to let prevail in turn religious autonomy⁵⁵ or equality⁵⁶ is usually upheld. This is due to the main

⁵⁰ CJEU, *Dansk Industri (DI)*, para 26, cit. *supra* at 15.

⁵¹ ECHR, *Eweida and Others v. the United Kingdom*, cit. *supra* at 10.

⁵² ECHR, *Lombardi Vallauri v Italy*, application No. 39128/05, judgment of 20 October 2009.

⁵³ ECHR, *Sindicatul “Păstorul cel Bun” v. Romania* [GC], cit. *supra* at 11. In this case the ECHR found no violation of Art. 11 of the Convention.

⁵⁴ ECHR, *Fernandez Martinez v. Spain* [GC], application No. 56030/07, judgment of 12 June 2014. Equally, in this decision the ECHR found no violation of Art. 8 of the Convention, because of the religious autonomy of the religious organization involved.

⁵⁵ See *Fernandez Martinez*, cit. *supra* at 53.

⁵⁶ See ECHR, *Leila Sahin v Turkey*, Application no. 44774/98, judgment of 29 June 2004.

technique used by the Strasbourg Court to solve conflict of rights, the doctrine of the margin of appreciation.⁵⁷ Through this technique, the European Court of Human Rights has governed the exercise of this discretion by the High Contracting Parties, balancing competing rights with a result that has often been questioned.⁵⁸ In front of the Court of Justice, however, the possibility to obtain deeper review is higher, since, although the discretion of the Member States is appreciated, the Court of Justice has demonstrated, over the years, to be committed to defend in various ways the specific and distinctive elements of the EU legal order. *Egenberger* is no exception, since the Court holds that the conditions established by Art. 4.2 of Directive 2000/78/EC are to be interpreted in a narrow way. In order for a religious organisation to take profit of the exception of religious autonomy, the genuine, legitimate and justified occupational requirement by the employer should be necessary and objectively dictated by the nature of the occupational activity concerned or the circumstances in which it is carried out, and cannot cover considerations which have no connection with that ethos or with the right of autonomy of the church or organization.⁵⁹ The Court of Justice is accordingly suggesting that, albeit in very exceptional circumstances, the balance between equality and religious autonomy should be resolved in favour of equality. A further confirmation of this trend can be found in *Achbita*,⁶⁰ where the Court maintained that even a neutral policy addressed into limiting the display of religious symbols in a working environment can be regarded as an indirect discrimination.

⁵⁷ Cfr. **M. LUGATO**, *The "Margin of Appreciation" and Freedom of Religion: Between Treaty Interpretation and Subsidiarity* in *Journal of Catholic Legal Studies*, 2017 vol. 52, p. 43 ss. **R. SAPIENZA**, *L'interpretazione della Convenzione tra margine d'apprezzamento e vincolo di interpretazione conforme. Profili sistematici* in **F. SALERNO, R. SAPIENZA** (a cura di), *La Convenzione europea dei diritti dell'uomo e il giudice italiano*, Giappichelli, Torino, 2011, p. 169 ss. **M. DELMAS-MARTY, M.L. IZORCHE**, *Marge nationale d'appréciation et internationalisation du droit. Réflexions sur la validité formelle d'un droit commun pluraliste* in *Revue internationale de droit comparé*, 2000 vol. 4, p. 753 ss. esp. 763.

⁵⁸ **O.M. ARNARDOTTIR**, *Rethinking the Two Margins of Appreciation* in *European Constitutional Law Review*, 2016, p. 27ss. See in particular the reconstruction and the literature review of the margin of appreciation doctrine at p. 28-29.

⁵⁹ CJEU, *Egenberger*, cit. *supra* at 18, para 69.

⁶⁰ See *Achbita*, cit. *supra* at 9, in particular para. 35, where the Court of Justice maintains that it is not inconceivable that the national referring court rules that a neutral policy which forbids the display of religious symbols in the working place might be indirectly discriminatory against "active" religious symbols, as the veil.

4. Some reflections over the importance of the principle of non-discrimination on the ground of religion for the EU constitutional legal order

As we have learned through this analysis of the case law of the Court of Justice, the principle of non-discrimination is a *sui generis* general principle. It is an autonomous source of rights, and, although the Court of Justice has attempted to reconcile it with the primary sources of law of the European Union, it seems to enjoy a specific place among the sources of EU law. This “constitutive” value of the principle of non-discrimination, affirmed for the first time on the ground of age and now on the ground on religion, is linked to the role that the “fundamental principle of equal treatment” plays in the EU constitutional legal order. The prohibition of non-discrimination has been, since the outset of the European Coal and Steel Community and of the European Economic Community, the *medium iuris* through which the Court and the EU institutions have shaped the internal market. After its completion in 1992 and 1997, the very same principle is now forging the construction of the “ever closer Union”,⁶¹ that reflected the vision of the EU founding fathers: the synthesis between economic and social Europe. The fact that the Court of Justice rules that the balancing between non-discrimination on the ground of religion and religious freedom is to be, pursuant to European law, resolved in favour of the first, and that the contrasting national legislation should be disapplied (provided that the national judge does not find an interpretation of the national legislation that complies with EU law), reveals that, differently from what has been maintained, for instance, by the European Court of Human Rights, non-discrimination can prevail over religious autonomy. The decision in *Egenberger* allows us also to reflect on the place of the principle of non discrimination on the ground of religion among the sources of EU law. The primacy of non discrimination over the autonomy of religious organisations is relevant in two senses: first, it allows to state that the principle of non discrimination is an autonomous source of law. Second, that the importance of the principle in the EU legal order leaves much less room for the autonomy of religious organisations. This in particular – as

⁶¹ Solemn Declaration on European Union. European Council, Stuttgart 19 June 1983. Bulletin of the European Communities, No. 6/1983, 24-29.

in *Egenberger*⁶² - when the genuine occupational requirement that allows to derogate from the prohibition of non-discrimination present no actual link with the job description.

6. Conclusion

According to what we have been going through, the Court of Justice in *Egenberger* has reinforced and reaffirmed the interpretation of the general principle of non-discrimination as a “fundamental element” of the EU constitutional legal order. This précising the previous case law in *Mangold*, *Kucukdeveci* and *Dansk Industri (DI)*, where the principle of non-discrimination appeared to be applicable without a link to primary EU legislation. In *Egenberger* the Court of Justice moves forward, underlining that the principle is now enshrined in the Charter of Fundamental Rights of the EU. This tries to reconcile with the objection to its application made by the Danish Supreme Court, that retained the general principle an unwritten law, unable to produce effects on the legal position of individuals without violating the principle of conferred powers.⁶³ At the same time, the limitation to the use of Art. 4.2 of Directive 2000/78/EC, underlining the need for judicial review of the decisions of the Churches when examining jobs applicants and advocating for a strict interpretation of the notion of “genuine occupational requirement” suggests that the Court of Justice has a clear solution to the balance between the two competing rights and that it will be very difficult for the national court to provide a different solution. At the same time, however, the position of the Court of Justice calls into question a balance between two competing fundamental rights at European and national level. If the national judge decides to ask to the *Bundesverfassungsgericht* if this balance of rights complies with the German Constitution, then there will be another open confrontation that will lead to an uncertain end. It should be also taken into account that the reference made to the link with the Charter does not seem to reinforce the legal reasoning of the Court of Justice much more than the

⁶² See also the recent *IR v JQ* case, CJEU (Grand Chamber) of 11 September 2018, case C-68/17, *IR v JQ*, EU:C:2018:696.

⁶³ Danish Supreme Court, cit. *supra* at 15. See in particular p. 47 (English version – translation courtesy of the DSC): “In summary, we accordingly find that the Law on accession does not provide the legal basis to allow the unwritten principle prohibiting discrimination on grounds of age to take precedence over Paragraph 2a(3) of the Law on salaried employees in so far as the provision is contrary to the prohibition”.

previous mention of Directive 2000/78/EC as being an expression of the general principle of non-discrimination. This decision is a confirmation that the Court of Justice regards the principle of non-discrimination on the ground of religion as a fundamental element of the EU constitutional legal order. By virtue of the primacy of EU law, this should suffice for the national judges to enforce this decision at national level. But the limit of the national constitutional rights and their interpretation might well be there, and in the event of another decision like the *Dansk Industri* one of the Danish Supreme Court, the Court of Justice will have no weapons to fight.

***Egenberger*, o del ruolo del divieto di discriminazione sulla base della religione nell'ordinamento costituzionale dell'Unione Europea**

Abstract: Il divieto di ogni discriminazione occupa un posto speciale all'interno delle fonti del diritto costituzionale dell'Unione europea, al punto che la Corte di Giustizia ne ha assicurato l'applicazione ben al di là dei limiti previsti dal diritto primario. La Corte di giustizia ha, infatti, garantito l'applicazione del divieto di discriminazione nei confronti delle categorie protette in casi in cui lo strumento giuridico preso in considerazione, soprattutto direttive, non sarebbe stato applicabile. È questo il caso in cui la Corte di giustizia ha applicato il divieto di discriminazione ad una controversia tra privati, avverando quello che solitamente viene definito come l'effetto diretto orizzontale degli strumenti giuridici del diritto dell'Unione. Come nella recente sentenza della Corte di giustizia dell'Unione europea, *Egenberger*, dove una candidata per una posizione lavorativa riguardante una consulenza legale in materia di diritti fondamentali in una associazione affiliata alla Chiesa Protestante Tedesca ha impugnato il rifiuto di assumerla del datore di lavoro. La decisione della Corte di applicare il principio di non discriminazione sulla base della religione può dunque considerarsi un tentativo di affermare il valore specifico e fondamentale che ha il principio di non discriminazione nell'ordinamento costituzionale dell'Unione? E quale è il rapporto fra

principio di uguaglianza e la libertà religiosa? Questo saggio tenterà di rispondere a queste domande.

Parole chiave: Unione Europea, religione, uguaglianza, autonomia religiosa, principio