

[Draft] Equality as a fundamental element of the EU and of the national constitutional legal orders: the case of religious discrimination

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Summary: 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 – 2. The case of *Vera Egenberger*: non-discrimination and religious autonomy – 3. The horizontal application of the principle of non-discrimination on the ground of religion and the balance between equality and religious autonomy - 3.1 The horizontal application of the principle of non-discrimination - 3.2 The balance between equality and religious autonomy - 4. Some reflections over the importance of the principle of non-discrimination on the ground of religion for the EU constitutional legal order - 5. Conclusion

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 (as transposed in the Charter of Fundamental Rights – with the *caveat* of its limits - as well as in the Treaties) also in cases in which the applicable legal instrument – be that the Treaty or any other piece of EU primary legislation – was not applicable. This happened with particular reference when the Court of Justice decided to apply the obligation of non-discrimination in cases involving two private parties, applying what is usually defined as the horizontal direct effect of EU legal instruments. This is not only confirmed by the case law of the Court of Justice on non-discrimination between women and men (the *Defrenne* case law), on the ground of nationality (inter alia *Zambrano*), on the ground of age (*Mangold*, *Kücükdeveci* and ultimately *Ajos-Danske Industri*) but, eventually, from the case law of the Court of Justice on religious discrimination. This happened in a recent decision of the Court of Justice of the European Union, *Egenberger* ([C-414/16](#)), where a job applicant – Mrs Vera Egenberger – for a position offered by an auxiliary of the Protestant Church, in Germany, appealed the decision of the employer not to hire her – ironically enough – on a legal consultancy project on the application of the *United Nations International Convention on the Elimination of All Forms of Racial Discrimination*. In front of the EU Court of Justice, Mrs Egenberger invoked Directive 2000/78/EC and the Church invoked its right to religious autonomy, embedded in the exception contained in Art. 4(2) of Directive 2000/78/EC, that allows religious organizations, albeit in certain circumstances, to be exempted from the application of the directive. In cases like the one at hand, if the content of the Directive has not been transposed in national legislation, in principle, the EU institutions cannot take action or require the application of EU law to an individual (in this case the Church – employer or the individual - employee) who would be, otherwise, paying the price for the negligence of their national administrations. Since however failing to apply the Directive would have entailed a limitation of the obligation of non-discrimination, the Court ruled that the matter was falling under the scope of application of Directive 2000/78/EC but was not complying with the proportionality requirement to be considered as an exception to its application pursuant to its Art. 4(2). How this has been done, and in particular the use made of the principle of non-discrimination on the ground of religion, is a matter that will be further explained in the paper and in the intervention. For now it is sufficient to pose ourselves a fundamental question: the behavior of the Court, and the enforcement of the principle of non-discrimination on the ground of religion, is a restatement of the importance of non-discrimination in the national legal orders, or it is rather 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 paper will try to address these questions.

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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

It is well known that Art. 13 TEC of the Treaty of Amsterdam¹ introduced for the first time a legal basis for the adoption of legislative acts to contrast 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 on the ground of religion.² To this legal framework should be added the flourishing secondary legislation, *inter alia* 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 duty of non-discrimination on the ground of religion, and, as a consequence, almost no litigation in front of the Court of Justice of the European Union.⁵ This is most likely attributable to multiple factors. Discrimination on the ground of religion 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.⁶ This is one of the reasons that have originated over the years a number of exception towards the prohibition of religious discrimination. One example of these exceptions is at the heart of the dispute that is at the basis of this Article, namely Art. 4.2 of Directive 2000/78/EC.⁷ This

¹ Now Art. 19 TFEU.

² See Title III – Equality. In particular Art. 21 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 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 religion. CJEU, Case 41-74, 4 December 1974, *Yvonne van Duyn v Home Office*, EU:C:1974:133.

⁶ In this sense should be seen the difference between at least three different approaches to religion : 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 Ireland, Italy or Spain), without an express favor towards a specific religion; and the 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).

⁷ 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

Article contains a safeguard clause that is addressed 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 represents an exception to the overall system of protection of fundamental rights at EU level and in particular to 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 would have reached the Court of Justice. It must be said that the rulings of the Luxembourg Court⁸ 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,⁹ as well as on the principle of religious autonomy.¹⁰ Although the protection afforded by the European Union and by the Council of Europe systems presents common points, different approaches to the content of fundamental rights persists.¹¹ As it will be outlined along this article, this is one of the cases where the different approach is more evident. 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 has allowed the EU, over the years, to build a quasi-constitutional legal order that allows the application of the rights, principles and values that are characterizing it also when there might be a conflict with their interpretation at national level: this is very well represented by the doctrine of primacy¹² and direct effect of EU law,¹³ which, as we will see, is of central importance for the argument of the present paper.¹⁴ On the contrary, the ECHR

provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground”.

⁸ 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 (ADDDH) 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.

⁹ I.e. ECHR, *Lautsi v. Italy* [GC], Application no. 30814/06, judgment of 18/03/2011.

¹⁰ I.e. ECHR, *Lombardi Vallauri v Italy*, application No. 39128/05, judgment of 20/10/2009.

¹¹ 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* 1, 2018, 9.

¹² E.g. M. Avbelj, “Supremacy or Primacy of EU law – (Why) Does it Matter?” 2011, 17 *European Law Journal*, 744. K. Lenaerts, T. Corthaut, “Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law”, 2006, 31 *European Law Review* 3, 287. R. Schütze, “Supremacy Without Pre-emption? The Very Slowly Emergent Doctrine of Community Preemption” 2006, 43 *Common Market Law Review*, 1023. M. Dougan, “When World’s Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy”, 2007, 44 *Common Market Law Review*, 931.

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. As a way to celebrate the 50 years of the Judgment, there has been several attempts to re-read the seminal decision in a modern fashion. See the Symposium organized by the Court of Justice: 50th Anniversary of the Judgment in Van Gend en Loos (1963-2013), Conference Proceedings, 2013, CJEU, http://curia.europa.eu/jcms/jcms/P_95693/ accessed 15 November 2018. See also S. Robin-Oliver, “The Evolution of Direct Effect in the EU, Stocktaking, Problems, Projections”, 2014, 12 *International Journal of Constitutional Law* 1, 165

¹⁴ We can not however deny that its use was disputed since the beginning, as an authoritative voice defined direct effect as “an infant disease of European Community law”. See P. Pescatore, *The Doctrine of Direct Effect: An Infant Disease of Community Law* in 8 *European Law Review*, 1983, p. 155. From the same author see also: P. Pescatore, *L'Effet des directives communautaires: une tentative de démythification*, 1980, Recueil Dalloz-Sirey, Chronique XXV, 171.

has developed the doctrine of the margin of appreciation,¹⁵ 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 explains 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 we should necessary agree on what an “higher standard” is). 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 Justice¹⁶ 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 easily end in an *ultra vires* judgment by a national constitutional judge.¹⁷

2. The Court of Justice’s balance between non-discrimination on the ground of religion and religious autonomy

The Court of Justice has often been considered as the *de facto* implementer of the process of EU integration. In particular, in several cases the Court attempted to bring forward the protection of fundamental rights, as in its *Kadi* decisions,¹⁸ or of the principle of non discrimination on the ground of age.¹⁹ This was not the case for discrimination on the ground of religion before 2017. However, the circumstances made a sharp shift in recent times. After the *Achbita* and *Bougnauoi* judgments and before the *Liga Van Moskeen* case, the Court of Justice has been asked to rule on *Egenberger*,²⁰ an preliminary ruling coming from the Federal Labour Court of Germany and in *IR v IQ*, another preliminary ruling coming from a German Court. *Egenberger* has 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 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*”.²¹ This right of the

¹⁵ I.e. S. Greer, “The Margin of Appreciation: Interpretation and Discretion under the European Convention of Human Rights”, Council of Europe Publishing, 2000. Available at [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17\(2000\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17(2000).pdf) [...]

¹⁶ I.e., 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.

¹⁷ See the Danish Supreme Court, judgment of 6 December 2016, Case 15/2014. Available at <http://www.supremecourt.dk/supremecourt/nyheder/pressemeddelelser/Documents/Judgment%2015-2014.pdf>

¹⁸ 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.

¹⁹ See *infra*, para 3.a.1, where the case law of the CJEU on discrimination on the ground of age is thoroughly discussed.

²⁰ 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. See also A. Dashwood, “The Principle of Direct Effect in European Community Law” 1978, 16 *Journal of Common Market Studies*, 229.

²¹ *Egenberger*, para 25, cit *supra* at [20].

religious employer to demand for a religious affiliation was also reflected by the German legislation.²² 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 *ratione temporis* of the exception in Para 9 of the *Allgemeines Gleichbehandlungsgesetz* seems to be wider than the one established by the Directive 2000/78. 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 reference to temporal limitation. This might be explained making reference to the cultural and social background that underpins the judgment. In Germany, the Catholic and Protestant Churches are relevant and influential actors that, also thanks to a tax regime that provides for their financing,²³ 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 dismissed by the Higher Labour Court for Berlin and Brandenburg (*Landesarbeitsgericht Berlin-Brandenburg*).²⁴ It is only the Federal Labour Court, as court of last instance, that decided to refer a question for preliminary ruling to the Court of Justice of the EU on the interpretation of the German legislation in light of Directive 2000/78/EC and in particular of its Article 4.2. Another important judgment facing very similar circumstances, *IR v JQ*,²⁵ also was released by the Court of Justice: this decision is about the dismissal of a doctor from a Catholic hospital. The doctor was dismissed since he, after divorcing from his wife, got married to another woman. This behaviour was considered by the administration of the Catholic hospital as in breach of the bond of trust that keep together the employer and the employee and led ultimately to dismissal.²⁶ This judgment is equally relevant with respect to *Egenberger* since the Court of Justice had the possibility to confirm and clarify its precedent position on the prohibition of discrimination on the ground of religion and on the balance between equality and religious autonomy.

3. The horizontal application of the principle of non-discrimination on the ground of religion and the balance between equality and religious autonomy

The *Egenberger* and *IR v JQ* judgments are important for various reasons. 1) They contribute to the systematization of the horizontal direct effect of the principle of non discrimination, 2) for the first time the Court of Justice is confronted with a balance between discrimination on the ground of

²² Allgemeines Gleichbehandlungsgesetz (General Law on equal treatment) of 14 August 2006 (BGBl. 2006 I, p. 1897).

²³ S. Hoffer, *Caesar As God's Banker: Using Germany 's Church Tax As an Example of Non-Geographically Bounded Taxing Jurisdiction*, 9 *Washington University Global Studies Law Review* 4, 595 – 637.

²⁴ *Egenberger*, para 29, cit *supra* at [20].

²⁵ CJEU (Grand Chamber) of 11 September 2018, Case C-68/17, *IR v JQ*, EU:C:2018:696.

²⁶ Cfr. also the case law of the European Court of Human Rights in *Obst* [71] and *Schutz* [72], where the Strasbourg Court decided on the employment relationship of people working for churches.

religion and religious freedom and 3) the Court clarifies the scope of application and the limits of the exception in Art. 4.2 of Directive 2000/78/EC on the autonomy of religious organizations. For practical reasons, in the next paragraphs and sub-paragraphs we will divide this three-headed problem under two labels: in the first paragraph, we will focus on the application of horizontal direct effect and indirect effect to this judgment. In the second paragraph, we will face the issue of the balance between equality and autonomy (which, in this case, takes the form of the freedom to impose a genuine, legitimate and justified occupational requirement, the affiliation to Protestant Churches).

3.1 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.²⁷ 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.²⁸ The need to boost the effectiveness of EU law came from the various limitations to its scope of application.²⁹ These limitations were linked to its hybrid nature, defined by the Court of Justice as a *sui generis* legal order.³⁰ 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.³¹ In cases as *Egenberger*, accordingly, where the case turns around the application and interpretation of a provision of national law³² 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, a responsibility of the German State.³³ In a case

²⁷ J.A. Winter, "Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law", 1972 *Common Market Law Review*, 436

²⁸ D. Leczykiewicz, "Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability", in D. Chalmers and A. Arnall(eds.) *The Oxford Handbook of European Union Law*, OUP, 2015.

²⁹ I.e., 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.

³⁰ CJEU of 25 February 1988, C-296/83, *Parti Écologiste "Les Verts" v. European Parliament*, EU:C:1988:94

³¹ I.e. see P. Craig, "The legal effect of Directives: policy, rules and exceptions", 34 *European Law Review* 3, 2009, 349-377. A. Albors-Llorens, "The Direct Effect of Directives: Fresh Controversy or a Storm in a Teacup?", 2014, *European Law Review* 6, 850.

³² Y. Galmot, C. Bonichot, "La Cour de Justice des Communautés européennes et la transposition des directives en droit national", 1988, *Revue française de droit administrative*, 1. See also C. Odone, G. Di Federico, *Il recepimento delle direttive dell'Unione Europea nella prospettiva delle regioni italiane. Modelli e soluzioni*, Editoriale Scientifica, 2011.

³³ The Court of Justice had the occasion to clarify several times that directives do not enjoy horizontal direct effect, in particular in the *Marshall* and *Faccini Dori* decisions. CJEU, judgment of 14 July 1994, Case C-91/92, *Paola Faccini Dori v Recreb Srl*, EU:C:1994:292. CJEU, judgment of 26 February 1986, case 152/84, *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* EU:C:1986:84. T. Tridimas, "Horizontal effect of directives: a missed opportunity", 1994, *European Law Review*, 621; E. Turnbull, "The ECJ Rejects Horizontal Direct Effect of Directives", 1994, *European Business Law Review*, 230. A. Dashwood, "From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity?", 2007 9, *Cambridge Yearbook of Legal Studies* 81. More recently see: CJEU, 24 January 2012, case C-282/10, *Dominguez*, para 37; CJEU, judgment of 15 January 2015, case C-30/14, *Ryanair Ltd v PR Aviation BV*.

such as the one we are analyzing, the traditional interpretation of the theory of direct effect would leave to Ms Egenberger only one remedy: the action for State liability against Germany.³⁴

a. A Prologue: the previous case law on horizontal direct effect

For this reason, the Court of Justice has, over the years, applied the theory of direct effect also on general principles of law.³⁵ General principles of law are, according to the Statute of the International Court of Justice,³⁶ the principles of law that are common to the States.³⁷ 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 scholars, however, general principles of law are principles of interpretation, and does not seem to confer rights on individuals.³⁸ This is not the position of the Court of Justice of the European Union which has used general principles of law, and in particular the principle of non-discrimination, to confer rights on individuals several times. 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.³⁹ 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*,⁴⁰ 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*⁴¹ 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-

³⁴ This, however, taking into account the strict procedural and substantial rules to which this action is subjected in front of the Court of Justice [...].

³⁵ P. Cabral, R. Neves, “General Principles of EU Law and Horizontal Direct Effect”, 17 *European Public Law* 3, 2011, 437–451.

³⁶ Art. 38 of the Statute of the International Court of Justice.

³⁷ G. Gaja, “General Principles of Law”, in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, Oxford, 2013, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1410> accessed 15 November 2018.

³⁸ I.e. T. Hartley, *The Foundations of European Union Law*, OUP, 2010.

³⁹ 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.

⁴⁰ CJEU, C-144/04, *Werner Mangold v Rüdiger Helm*, [2005] EU:C:2005:709. See G. Di Federico, *Le discriminazioni in base all'età nella più recente giurisprudenza della Corte di Giustizia: da Mangold a Georgiev... e oltre* in *Studi sull'integrazione europea*, 3/2011, p. 585. See O. Thomas, “Case Commentary: Mangold v Helm (Case C-144/04) Grand Chamber, European Court of Justice 22 November 2006: Yet Another Way Round Horizontal Direct Effect...”, 2006, 18 *The Denning Law Journal*, 233.

⁴¹ CJEU, C-427/06, *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*, [2008] EU:C:2008:517

discrimination. Then in *Kücükdeveci*⁴² the Court of Justice did not follow the line of the “sufficient link” in *Bartsch* and went on declining the *Mangold* approach. In *Dansk Industri(DI)*⁴³, the Court of Justice continued with 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 and that, 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 (we leave aside, for the moment, the other ground of discrimination which are protected by the Charter and not 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,⁴⁴ 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, 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 times⁴⁵ 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*.

b. 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.⁴⁶ 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 *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

⁴² CJEU, C-555/07, *Seda Küçükdeveci v Swedex GmbH & Co. KG.*, [2010] EU:C:2010:21. See G. Thüsing & S. Horler, “Annotation on Case C-555/07, Seda Küçükdeveci”, 2010, 47 Common Market Law Review 4, 1161.

⁴³ See *Dansk Industri (DI)*, cit *supra* at [16].

⁴⁴ See Danish Supreme Court, cit *supra* at [17].

⁴⁵ *Egenberger*, paras 71-72-73, cit *supra* at [20].

⁴⁶ K. Lenaerts, “The Principle of Equal Treatment and the European Court of Justice”, 2013, *Il Diritto dell’Unione Europea*, 461 in part. 470. K. Lenaerts and J. Gutierrez Fons, “The Constitutional Allocation of Powers and General Principles in EU law”, 2010, *Common Market Law Review*, 1629 in part. 1648. L.S. Rossi, “How Fundamental are Fundamental Principles? Primacy and Fundamental Rights after Lisbon”, 2008, *Yearbook of European Law*, 65.

effect”⁴⁷ of legal instruments of EU law.⁴⁸ According to the Court of Justice, first in *Danske 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.⁴⁹ [...]

i. *A principle that is able to confer rights on individuals*

The principle of non-discrimination holds a particular place among the EU general principles. Although it can not be held as being hierarchically above the others, it is the only one that has been accorded horizontal direct effect. In order however to justify the (potentially) unlimited use of this principle at national level,⁵⁰ the Court of Justice has attempted to link its use to primary and secondary sources of law. In *Egenberger*, the Court of Justice has, in similar way to what the Court has been doing in *Danske 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”.⁵¹

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 *Danske Industri*:

⁴⁷ The indirect effect, as part of the doctrine of direct effect, states that the national courts have to interpret national legislation in accordance with EU law even if the EU primary legislation (in this case, a directive) is not applicable. [...]

⁴⁸ S. Prechal, “Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union”, in C. Barnard (ed.), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate*, Oxford, 2007, p. 35. G. Betlem, “The Doctrine of Consistent Interpretation – Managing Legal Uncertainty”, 2002, 22 *Oxford Journal of Legal Studies* 3, 397.

⁴⁹ *Egenberger*, para 73, cit *supra* at [20].

⁵⁰ 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 1, 149. This stance also might be interpreted as reflecting 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 *Verfassungsblog*, 14.03.2018, available at <https://verfassungsblog.de/constitutional-rights-first-the-italian-constitutional-court-fine-tunes-its-europarechtsfreundlichkeit/> 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 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.

⁵¹ *Egenberger*, para 47, cit. *supra* at [20].

*“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”.*⁵²

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 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 as long as 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 *Kücükdereveci*, C-555/07, EU:C:2010:21, paragraph 51)”.*⁵³

This point is further clarified 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”.*⁵⁴

In *Egenberger* the Court takes a very similar stance and develops the argument of the link between the Directive and the general principle of non-discrimination further:

“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

⁵² *Dansk Industri*, para 23, cit *supra* at [16].

⁵³ *Dansk Industri*, para 35, cit *supra* at [16].

⁵⁴ Emphasis added by the author.

*combating discrimination on various grounds, including religion and belief, as may be seen from its title and from Article 1”.*⁵⁵

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 on the ground of religion is an autonomous source of rights⁵⁶ to the extent that it can be applied when a legal instrument (i.e. a directive) of the EU is not *per se* applicable and it is not possible to interpret the national legislation according to EU law.⁵⁷ To provide further justification to a similar assertion is very useful to resort to the Opinion of Advocate General Bot in *Bauer*,⁵⁸ where is clarified by an authoritative member of the Court⁵⁹ in the exercise of its functions the *autosuffisance normative* (normative self-sufficiency) of the general principle of non discrimination. The Advocate General quotes, in a footnote,⁶⁰ a very interesting passage of an article written by Justice Lenaerts – the President of the Court of Justice of the European Union. In this article, President Lenaerts confirms that “[A] combined reading of the judgments in *Mangold*, *Kücükdeveci* and *AMS* suggests that the possibility of relying on the horizontal direct effect [of that principle] is, in the first place, based on its mandatory nature”.⁶¹ This sentence appears to me, together with the following one, also quoted by Advocate General Bot, to confirm the special place that the general principle of non discrimination occupies within the sources of European Union law:

“In the second place, the normative self-sufficiency of that principle played a decisive role in the reasoning of the Court of Justice. That self-sufficiency makes it possible to distinguish between applicable rules at the constitutional level and those which need legislative action in order to apply. Thus, that normative self-sufficiency makes it possible to confer horizontal

⁵⁵ *Egenberger*, para 75, cit. *supra* at [20].

⁵⁶ Cfr. C. Amalfitano, *General Principles of EU law and the Protection of Fundamental Rights*, Edward Elgar Publishing: London, 2018, p. 6.

⁵⁷ See also T. Tridimas, “Fundamental Rights, General Principles of EU Law, and the Charter”, 2014[...] *Cambridge Yearbook of European Legal Studies*, 361-392. In part. see p. 396, where the author notes that “*The ECJ understands non-discrimination as empowering it to supplement the legislative process*”. This supplementary value of the general principles has also be criticized since it underlines a main inconsistency within the theory of direct effect of EU legal instruments, since if direct effect is precluded to secondary sources of EU law, as directives, it should be also prohibited to other – uncodified – sources of EU law as general principles. Another argument used against the direct effect of general principles, but specifically addressed to fundamental rights as general principles, is that their use would undermine and downplay the Charter of Fundamental Rights of the European Union. See T. Papadopoulos, “Criticizing the horizontal direct effect of the EU general principle of equality”, 2011 4 *European Human Rights Law Review* [...], 437-447. Advocate Generals of the Court of Justice have been known for being contrary to horizontal direct effect. See, for instance: CJEU, Opinion of AG Ruiz-Jarabo Colomer in case C-397/01, *Pfeiffer*, para 46 and in joined cases C-55/07 and C-56/07, *Michaeler et al.* para 22; Opinion of AG Kokott in case C-321/05, *Kofoed v Skatteministeriet*, para 67; Opinion of AG Trstenjak in case C-282/10, *Dominguez* cit. paras 127 - 128. AG Trstenjak in particular maintains that the horizontal application of general principles would be in contrast with the limits towards the application of fundamental rights included in Art. 51 (2) of the Charter.

⁵⁸ Opinion of Advocate General Bot of 29 May 2018 in case Joined Cases C-569/16 and C-570/16, *Bauer*.

⁵⁹ As well known, the role of the Advocate General – who delivers non-binding although respected and authoritative Opinions - is different from the one of Judge within the Court of Justice, and this might have also influenced the liberty with which this idea is expressed.

⁶⁰ Opinion of Advocate General Bot in *Bauer*, cit. *supra* at [58], footnote 81.

⁶¹ Advocate General Bot mentions K. Lenaerts, “*L’invocabilité du principe de non-discrimination entre particuliers*”, in (eds.) *Le droit du travail au XXIe siècle, Liber Amicorum Claude Wantiez*, 2015, 89.

*direct effect on the principle of non-discrimination without disturbing the constitutional division of powers desired by the authors of the Treaties. Since that principle “is sufficient in itself to confer on individuals an individual right which they may invoke as such”, it does not encroach on the prerogatives of the EU or national legislatures”.*⁶²

The consideration that the self-sufficiency of the principle of non discrimination does not encroach on the prerogatives of the EU or national legislatures deserves to be developed more in depth in Paragraph 4 of this paper. Here we will focus on the fact that in the opinion of President Lenaerts (although not expressed in the exercise of its functions as Judge of the Court of Justice but merely in his vest of academic), the principle of non discrimination appears to represent a “*rule applicable at constitutional level*”. The self-sufficiency of the principle, which allows for its application in front of national and European Courts without the need to be further implemented by national and European legislation, is due to its constitutional level. This position challenges the traditional view according to which general principles of law (as the principle of non discrimination) are “principles of interpretation” and that comes of aid mainly in the interpretation of the national legislation according to EU law. The principle of non discrimination (in this case on the ground of religion) enjoys constitutional value in the EU legal order, and this constitutional character justifies the fact that - differently from other general principles - it is able to confer rights on individuals that can be relied on in front of national and European Courts.

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

The reading of the recent case law of the Court of Justice on the principle of non discrimination leads however to a step further in providing the *rationale* of its horizontal direct effect – lastly affirmed and developed in *Egenberger*:

*“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”.*⁶³

This further step is also confirmed in the successive judgment in *IR v JQ*, where the Court of Justice makes a similar stance with reference to the position of the principle within the sources of law in the EU constitutional legal order.

*“Before the entry into force of the Treaty of Lisbon, which conferred on the Charter the same legal status as the treaties, that principle derived from the common constitutional traditions of the Member States. The prohibition of all discrimination on grounds of religion or belief, now enshrined in Article 21 of the Charter, is therefore a mandatory general principle of EU law and is sufficient in itself to confer on individuals a right that they may actually rely on in disputes between them in a field covered by EU law”.*⁶⁴

⁶² Opinion of Advocate General Bot in *Bauer*, cit. supra at [58], footnote 81. See also: K. Lenaerts, “*L’invocabilité du principe de non-discrimination entre particuliers*”, cit. supra at [61].

⁶³ *Egenberger*, para 76, cit. supra at [20].

⁶⁴ *IR v JQ*, para 69 cit. supra at [25].

While in its previous case law (see the previous Sub-paragraph) the Court of Justice, to give reasons about the application of the general principle, made reference to its self-sufficiency - its nature of independent source of rights - , in *Egenberger* and in *IR v JQ* the Court appears to put emphasis on its link with the Charter. 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,⁶⁵ 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 on the limits of the Charter itself, for the Charter to be applicable is necessary that the matter falls within its scope of application of European Union law.⁶⁶ While we know, because the Court of Justice maintains that the applies the Charter, that the situation falls inside the scope of application of European Union law, the Court still seems not to clarify why the principle should be applied to a dispute where the Charter cannot be applied.⁶⁷ 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*”.⁶⁸

3.2 The balance between equality and religious autonomy

These first paragraphs allow to see in perspective the relationship between equality and religious autonomy which is detailed in the following pages. 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 discrimination on the ground of religion.⁶⁹ The European Court of Human Rights has also – well before the Court of Justice - developed a case law that touches upon discrimination on the ground of religion (*Lombardi Vallauri v. Italy*,⁷⁰ *Eweida and Others v. United Kingdom*⁷¹) and on the autonomy of religious organisations (*Obst v Germany*,⁷² *Schüth v. Germany*,⁷³ *Pastorul Cei Bun v. Romania*,⁷⁴ and *Fernandez Martínez v. Spain*⁷⁵). Since,

⁶⁵ Although the Court of Justice, as said in the paragraph before, also mentions the Directive 2000/78/EC.

⁶⁶ CJEU, 26 February 2013, Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105.

⁶⁷ On a similar note, see the comment by Filippo Fontanelli of the recent cases of the Court of Justice where the Court declared the horizontal application of Art. 31.2 of the Charter of Fundamental Rights (the right to paid leave) when the Directive was not applicable. F. Fontanelli, “You can teach a new court Mangold tricks – the horizontal effect of the Charter right to paid annual leave”, *EU Law Analysis*, 12 November 2018 <http://eulawanalysis.blogspot.com/2018/11/you-can-teach-new-court-mangold-tricks.html>, accessed 12 November 2018.

⁶⁸ *Dansk Industri (DI)*, para 26, cit. *supra* at [16].

⁶⁹ See the case law quoted *supra* at [8].

⁷⁰ ECHR, *Lombardi Vallauri v Italy*, application No. 39128/05, judgment of 20/10/2009.

⁷¹ ECHR, *Eweida and Others v. the United Kingdom*, application Nos. 48420/10, 59842/10, 51671/10 and 36516/10, judgment of 15 January 2013.

⁷² ECHR, *Obst v. Germany*, application No. 425/03, judgment of 23.09.2010.

⁷³ ECHR, *Schüth v. Germany*, application No. 1620/03, judgment of 23.09.2010.

⁷⁴ ECHR, *Sindicatul “Păstorul cel Bun” v. Romania* [GC], application No. 2330/09, judgment of 9/7/2013.

⁷⁵ ECHR, *Fernandez Martínez v. Spain* [GC], application No. 56030/07, judgment of 12 June 2014.

however, the system of protection of human rights of the Council of Europe is a *de minimis* one, although according to the ECHR and the case law of the Strasbourg Court the High Contracting Parties enjoy a narrower margin of discretion when the balance involves rights, as religious freedom, which belongs to the *noyau dur* of the Convention, the ECHR religious autonomy has ultimately won the balance with non-discrimination. In front of the Court of Justice, however, the possibility to obtain a different review are surely higher, since, although the discretion of the Member States is appreciated, the Court of Justice has demonstrated, over the years, to be able to defend in various ways the specific and distinctive elements of the EU legal order. [...]

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

In this analysis of the case law of the Court of Justice I have shown that the principle of non-discrimination is a *sui generis* general principle that is able to confer rights on individuals.⁷⁶ It is an autonomous source of rights, and, although the Court of Justice reminded to the referring Court, in *Egenberger* as well as in *IR v IQ* that the substance of the principle is now enshrined in the Charter of Fundamental Rights of the European Union,⁷⁷ 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”⁷⁸ 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 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”,⁷⁹ that reflected the vision of the EU founding fathers. 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 by the European Court of Human Rights, non-discrimination can prevail over religious autonomy. This in particular when the genuine occupational requirement that allows to derogate from the prohibition of non-discrimination present no actual link with the job description.

5. 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

⁷⁶ See *Dansk Industri*, para 36, cit. *supra* at [16].

⁷⁷ *IR v IQ*, para 69, cit. *supra* at [25].

⁷⁸ *Dansk Industri*, para 26, cit. *supra* at [16].

⁷⁹ Solemn Declaration on European Union. European Council, Stuttgart 19 June 1983. Bulletin of the European Communities, No. 6/1983, 24-29.

element” of the EU constitutional legal order. This précising the previous case law in *Mangold*, *Kucukdeveci* and *Danske Industri (DI)*, where the principle of non-discrimination appeared to be applicable without reference to written primary EU legislation. In *Egenberger* and in *IR v IQ* 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 it with the objection to its application made by the Danish Supreme Court, that retained the general principle an unwritten law, unable to produce effects *vis a vis* individuals without violating the principle of conferred powers.⁸⁰ At the same time, the clarification on the scope of application 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 this position will influence the decision of the national referring court. At the same time the position of the Court of Justice calls into question a balance between two competing fundamental rights that enjoy protection at European and national constitutional 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 on the significance and interpretation of equality 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 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 these decisions at national level. But the limit of the conflict with national constitutional rights and their interpretation might well be there, and the Court of Justice should prevent with any possible means the possibility of another situation alike the *Danske Industri* judgment of the Danish Supreme Court.⁸¹

⁸⁰ *Danish Supreme Court*, cit *supra* at 14. 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”.

⁸¹ See the proposal brought forward by Daniel Sarmiento on Verfassungblog, where he said: “In my opinion, the Court of Justice would be wise to be more empathetic towards national supreme and constitutional courts. Some will say that the Court already does that, but I think it does not, or not in the way I have in mind.” (D. Sarmiento, “An Instruction Manual to Stop a Judicial Rebellion (before it is too late, of course)”, Verfassungblog, 2 February 2017, <https://verfassungsblog.de/an-instruction-manual-to-stop-a-judicial-rebellion-before-it-is-too-late-of-course/> accessed 15 November 2018). Displaying empathy, which is also to a good degree what the Court did in the judgment in *M.A.S. and M.B.*, a request for preliminary ruling of the Italian Constitutional Court on the interpretation of the previous *Taricco* judgment, and waiting for a political solution of the case is surely an important part of the solution. What I argue for is that the Court of Justice should be little more concerned with the political (in the highest sense of the word) consequences of its judgments and of the fact that, in the current state of the exercise of public power in Europe, the highest courts (and also constitutional courts) cannot limit themselves to be the “*bouche de la loi*”.