the other way not to cite commentary which may have contributed positively to the Court's reasoning.

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A BONFIRE OF RELIGIOUS LIBERTIES?

IN Case C-414/16, ECLI:EU:C:2018:257, Vera Egenberger had applied for a job at "Evangelisches Werk", an auxiliary organisation of the Protestant Church in Germany, and appeared to have been unsuccessful only on the grounds of her (lack of) religious belief. She then pursued a claim against that organisation for an infringement of section 7(1) of the German General Law on Equal Treatment (the General Law), because she considered that she had been discriminated against on the grounds of religion in the application process. The problem that she faced was that section 9(1) of the General Law allowed a derogation from this rule for religious organisations "if a particular religion or belief constitutes a justified occupational requirement, having regard to the self-perception of the religious society … concerned". The General Law itself was supposed to be the implementing legislation for Council Directive 2000/78 (O.J. [2000] L 303/16) – the Equality Framework Directive (the Directive) – but appeared to differ from the Directive by allowing the derogation outlined in Article 4(2) of the Directive to be determined by "self-perception". In addition, according to the CJEU, the German Federal Constitutional Court (the Constitutional Court) appeared to have used this derogation in its case law to conduct a mere "plausibility" review as opposed to a more stringent standard of review, with plausibility in this context meaning a plausible link between the job advertised and the need to proclaim the "church's message" (at [31]). The German Federal Labour Law Court made a preliminary reference to the CJEU and asked, first, whether the standard of review outlined in the General Law was compatible with the Directive. Secondly, it asked whether the General Law should be disapplied in the case of a dispute between private parties.

The CJEU's answer to the first question was that Article 4(2) of the Directive required substantive review of any decision of a religious organisation based on that derogation. The CJEU then outlined the kind of substantive balancing exercise under the principle of proportionality that the national court should adopt, in effect ignoring the standard of review under section 9(1) of the General Law. The Court left the most controversial question until the end and concluded that, in a dispute between two private individuals, the national court is obliged to "ensure … the judicial

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protection deriving . . . from Articles 21 and 47 of the Charter and to guarantee the full effectiveness of those articles by disapplying, if need be, any contrary provision of national law" (at [82]).

The CJEU explained that its reasoning was derived from the (much derided) *Mangold* case (Case C-144/04, ECLI:EU:C:2005:709) on the implications of general principles of EU law for domestic law (at [81]) but (perhaps inadvertently) wandered itself into a legal minefield which could have significant constitutional implications in years to come. Unlike *Mangold,* this case straddles across three key, interrelated and emerging, areas of EU law. First, the interpretation of the freedom of religion and belief in EU law. Secondly, the impact of the Charter (and EU secondary legislation that appears to implement or specify parts of it) on contradictory national constitutional law. Finally, and more generally, the application and interpretation of the obligations that flow from the Charter of Fundamental Rights ("the Charter"), particularly in terms of the Charter's horizontal application in relation to obligations that derive from EU directives.

First, the decision in *Egenberger* could have a radical impact on employment by religious organisations. The defendant in the national proceedings had formed the view that section 9 of the General Law provided a vital constitutional safeguard for its (and all religious organisations') religious autonomy within Germany (at [28]). Ms. Egenberger was not applying to work as a janitor in a Lutheran Church building. She was applying to work at the highest end of policy-building within it, and the job description was quite particular about needing to represent the church to the wider world (at [24]). It could be argued that giving religious organisations almost complete autonomy in deciding whom to employ for this kind of jobs was the purpose of the apparent amendment to the Directive contained within section 9(1) of the General Law. This perhaps also explains why the Constitutional Court restricted itself to a plausibility review in order to prevent a court substituting its value judgment for that of a religious organisation in terms of who would be more appropriate for a given role.

The CJEU appeared to justify its reasoning by claiming that the right to religious autonomy is essentially preserved by the Charter and the general principles of EU law. It made the point that, by disapplying the plausibility test, the national court was simply left with the task of balancing competing rights: the applicant's right to not be discriminated against on the grounds of religion in her job application versus the defendant's right to freedom of religion and belief. Thus, all the Court did was merely to suggest that the national court should disapply the Constitutional Court's standard of review without in any way impacting upon the protection of the fundamental right to religious autonomy (at [50]–[55], [72]).

For the defendant, the standard of review as outlined by the Constitutional Court, not simply section 9(1) of the General Law, was one manifestation of the constitutional principle protecting the autonomy

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of religious organisations reflected in Article 17(1) TFEU. The Court formed the contrary view: that Article 17(1) merely expresses the Union's neutrality to the organisation of religion in the Member States and was fully considered as part of the legislative process which led to the enactment of the Directive (albeit in its previous guise as Declaration No. 11 to the Treaty of Amsterdam) (at [56]–[58]). What was left, then, was the plain wording of the derogation under Article 4(2) of the Directive which would be "deprived of effect" if the religious organisations themselves were allowed to determine subjectively whether the derogation has been met (at [46]). Nonetheless, regardless whether this rationale can be justified or not, what appears to be the consequence of the case is that religious organisations, by virtue of EU law, are much more constrained in whom they can and cannot employ.

Secondly, the judgment overrode basic German constitutional principles, given that religious autonomy is one such principle and dates back to the early Weimar period. It is thus of high constitutional significance in Germany and incorporated into its Basic Law – under Articles 4 and 140 (the latter incorporating Article 137 of the Weimar Constitution protecting religious autonomy). In asking the national court to set aside conflicting national law to ensure the application of Article 21 of the Charter (which the Directive embodied) the CJEU tried to use a number of prior cases to justify its reasoning. However, none of these cases concerned a direct conflict with a core constitutional provision in a dispute between private parties, and most of them contained rights that are historically considered to be core EU rights such as free movement (*Angonese,* Case C-281/98, ECLI:EU:2000:530) and equal treatment on grounds of sex (*Defrenne,* Case 43/75, ECLI:EU:1976:56). Only in *Viking* (Case C-438/05, ECLI:EU:2007:772) was there a direct conflict between the constitutionally protected right to collective action and the right to freedom of establishment, with the right to freedom of establishment ultimately being prioritised. However, *Egenberger* arguably goes further by asking the national court to disapply a provision of national constitutional law in favour of the Charter itself (at [77]). Thus, from a constitutional perspective, the case constitutes a radical development of the case law.

Finally, by virtue of the two points above, *Egenberger* extends the case law on the horizontal application of the Charter in *Mangold*-type situations to novel and controversial scenarios. These are novel in the sense of applying to the examination of the scope of the right to freedom of religion or belief. They are also controversial, given the apparent hierarchical prioritisation of the Charter over a fundamental constitutional provision of a Member State (at least as understood by the Constitutional Court).

The litmus test will be how the case will be viewed by the Constitutional Court. On the one hand, what might take place is a form of constitutional accommodation in German domestic law, as the Court has repeatedly

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undertaken to date. There is evidence within the case itself that this might happen as it is noticeable that the applicant was initially successful at first instance even under the plausibility test in already being awarded some measure of compensation for breach of the General Law (at [29]). In other words, the CJEU's ruling did not diverge as extensively from national law as it may first appear. On the other hand, there remains the possibility that constitutional accommodation may have been stretched too far. Thus, a core provision of national constitutional law has been effectively replaced by the Charter, whereas Advocate General Tanchev in *Egenberger* was simply not prepared to allow the horizontal application of a provision of EU law which appeared directly to contradict a provision of national constitutional law (at [119]). It is also at variance with *Fernandez Martinez v Spain* ((2014) 60 EHRR 35) where the European Court of Human Rights (which the CJEU cited in the case), showed much greater deference to the autonomy of religious organisations. In the end only time will tell whether *Egenberger* will be acclaimed or detracted but it certainly pushes the jurisprudence of the CJEU in a novel direction.

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EU FUNDAMENTAL RIGHTS AND THEIR ENFORCEMENT

THE Charter of Fundamental Rights of the EU (CFREU), an instrument which brings together the fundamental rights protected in the EU, was proclaimed in 2000 and finally came into force in 2009 with the adoption of the Treaty of Lisbon. Fundamental rights are now enshrined in the primary law of the EU but the exact nature of their legal status is yet to be determined. The recent judgment of the Court of Justice in *Bauer et al.*, joined Cases C-569/16 and C-570/16, ECLI:EU:C:2018:871, clarifies the Court's position on the horizontal direct effect of certain EU fundamental rights.

The judgment in *Bauer* stemmed from the request for a preliminary ruling from the German Federal Labour Court made in proceedings brought by Mrs. Bauer (Case C-569/16) and Mrs. Broßonn (Case C-570/16) against the former employers of their late husbands, respectively Stadt Wuppertal (a state employer) and Mr. Volker Willmeroth (a private employer). Both cases concerned the employers' refusal to pay the widows an allowance in lieu of the paid annual leave not taken by their spouses before their deaths.

The issue under consideration was governed by both EU law and German law. Article 31(2) CFREU provides that "every worker has the right … to an annual period of paid leave". Article 7(1) of Directive

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