BOOK REVIEW

Emma Ahlm, *EU Law and Religion: a study of how the Court of Justice has adjudicated on religious matters in Union Law,* Uppsala University 2020, 343 pages, ISBN 978-91-506-2847-0

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In his famous lecture 'What is a Nation?' Ernest Renan affirms that "Every French citizen must have forgotten the St. Bartholomew massacre".[1] This massacre, in which thousands of protestant Huguenots were killed by the Catholic majority, was the bloody climax of the French Wars of Religion, that tore the Kingdom of France apart in the 16th century. Renan argues that the modern nation of France, and the identity of the French citizen, is necessarily linked to the conscious decision to overcome the theological disagreements that gave rise to these terrible events, and to find an accommodation that could allow all French citizens to live together despite their religious differences.

Renan's lecture reminds us that the identity - the very existence - of the modern European state is ineluctably tied to questions concerning the relationship between the Church and the state, and to questions concerning the tension between the freedom of the individual to follow the precepts of his or her religion and the prerogative of the sovereign to determine religious practice within the territory. These tensions and conflicts are reflected in the wide range of settlements which different European states have reached, through which religious freedom, and religious and secular authority have been accommodated in the national legal and political order.

Given the sensitivity of these settlements, and the profound significance that they have for the national identity of the member states, it was not surprising that the Fathers of the Treaties chose to leave religious questions entirely outside the scope of the original EEC Treaty. All matters concerning religion were considered to remain within the prerogative of the Member States. Nonetheless, as the scope of application of EU law widened, and EU law reached ever deeper into the national legal orders, religious matters began to fall into the ambit of EU law. With the introduction of EU measures dealing with religious discrimination in the workplace, and the coming into force of the Charter of Fundamental Rights, it was inevitable that the Court of Justice of the EU would eventually be asked to adjudicate on religious matters, including matters concerning the relationship between the Church and the state. In the past few years this has come to pass, and the Court of Justice has indeed adjudicated in a number of important and controversial cases involving EU law and religion.

Emma Ahlm's new book, *EU Law and Religion: A study of how the Court of Justice has Adjudicated on religious matters in Union law* provides an excellent guide to these developments.

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[1] "Ernest Renan 'Qu'est-ce qu'une nation?' Lecture delivered at the Sorbonne, 11 March 1882, at: <http://www.iheal.univ-paris3.fr/sites/www.iheal.univ-paris3.fr/files/Renan_-_Qu_est-ce_qu_une_Nation.pdf.>

It is the outcome of a doctoral dissertation from Uppsala University, defended in November 2020, and it focuses specifically on a number of cases handed down between 2017 and 2019.[2] The book provides a detailed analysis of these key cases, engaging both with the Judgments and with the Opinions of the Advocates General. The approach is mostly an internal, doctrinal approach, drawing on the methodology that the Court of Justice itself deploys in order to interpret and apply EU law.[3] This allows Ahlm to critically engage with the reasoning of the Court, by highlighting potential contradictions, pointing areas where the Court appears to deviate from normative principles underpinning the Union legal order. Ahlm is also able to place these legal developments in the broader context of the EU legal order, and to contrast the approach of the Court of Justice with the European Court of Human Rights. The aim of the study is to identify the principles and standards by which the Court of Justice adjudicates on religious matters, in particular concerning the relationship between the Union and the Member States.

The book consists of six substantive chapters, together with an introduction and a conclusion chapter.

Chapter 2 provides a historical framework with three key elements: the place of religion in the development of the modern European state, the transition from the principle that the sovereign determines religious matters within the state's territory to the requirement to guarantee individual religious freedom; and the embedding of religion within the legal framework of the Union. These are all huge topics, so they are dealt with in a necessarily abbreviated from – Ahlm is not a historian, and this chapter is merely scene setting for the legal analysis. Nonetheless, the Chapter does a good job of highlighting how "the dialectic between the territorial aspects of religion … and the secularity of the state … is a defining trait of a European State".[4] This helps the reader understand what is at stake when the Court of Justice makes determinations concerning religious matters in the member states' legal orders. The section on how religion came into EU law focuses very much on the textual changes to the legal materials, but there is some engagement with the political controversies which preceded the Constitutional Treaty, and the adoption of what is now Article 17 TFEU, which highlights how contested and controversial questions concerning the role of religion in the Union are.

Chapter 3 seeks to identify the place of religion within the structure and objectives of the EU. The focus of the chapter is fixed on legal questions[5] concerning the Union's competences in religious matters. It is here, however, that I consider the author goes slightly astray. The Union is presented as having *the objective* of combating religious discrimination – this is said to be stipulated in Article 2 TEU, which sets out the values on which the Union

[2] Ahlm provides a comprehensive overview of all cases where religious matters played a role, but there are four cases that receive particularly detailed analysis: C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* [2017] EU:C:2017:203, C-188/15 *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA* [2017] EU:C:2017:204, C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* [2018] EU:C:2018:257 and C-426/16 *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen, VZW and Others v Vlaams Gewest.* [2018] EU:C:2018:335.

[3] Ahlm provides the reader with an overview of the interpretative methods deployed by the Court of Justice, which guides her own approach (p. 24).

[4] P. 41.

[5] Ahlm avoids the charged questions on whether the European Union project is a reflection or embodiment of Christian values, which have resurfaced in the debate about the identity of the European Union (see e.g. Jonathan Chaplin and Gary Wilton *God and the EU: Faith in the European Project* (Routledge, 2016)).

is founded, which include human dignity, equality, non-discrimination and the respect of the rights of persons belonging to minorities, as well as certain provisions in Article 3. However, as von Bogdandy reminds, in EU law it is important to distinguish between, on the one hand, values or principles, and on the other objectives.[6] The former are about the 'how' of EU action – they guide and limit EU action. The latter "stipulate the intended effects in social reality"[7] – they are about the 'what' of EU action.

Combating religious discrimination is not specified as one of the objectives of the Union, under Article 3 TEU. It may be possible to argue that, even it is not so specified, it nonetheless should be considered such an objective. [8] But it may also be possible to argue that it is not, and Ahlm does not consider this possibility. This is significant, because the EU only has competence to act in order to achieve the objectives set out in the Treaties.[9] Furthermore, EU law has a strong teleological orientation,[10] which implies that all provisions of EU law must be interpreted in light of the objectives of the EU. This includes fundamental rights provisions, including the right not to be discriminated. As the Court pointed out, EU fundamental rights must be interpreted in light of the structure and objectives of the EU.[11]

The conclusion of Chapter 3 is that "religious matters are subjected to EU law *if* EU law applies". This is the correct conclusion, and it is a clear echo of the conclusions of the Court of Justice in respect of the scope of application of EU fundamental rights.[12] It is however, incomplete, because it does not answer the key question – when does EU law apply? The caselaw set out in Chapter 3 appears to indicate an answer: EU law applies to national measures where those national measures impact on the achievement of EU law objectives, in particular the functioning of the internal market[13] and of the area of freedom, security and justice.[14]

The case of *Monachos Eirinaios*[15] seems particularly relevant. The case concerned a Greek rule which stipulated that a person who held the status of a monk could not be registered as a lawyer. The applicant had qualified as a lawyer in Cyprus, and applied to the Athens Bar Association for recognition of his qualifications. The Bar Association refused on the grounds that the applicant had the status of a monk. The Court of Justice held that Directive 98/5 "harmonises fully the preconditions for exercise of the right of establishment conferred by that directive"., By imposing an extra condition on the exercise of the right of establishment of the applicant (that he not be a monk) the Greek state breached the obligations imposed on that Directive. The focus was entirely on whether the national measure undermined the Directive, and created an obstacle to the operation of the rules

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[6] Armin von Bogdandy 'Founding Principles' in von Bogdandy and Bast (eds) *Principles of European Constitutional Law* (2nd edn, Hart, 2009), p. 23.
[7] Ibid.
[8] Ahlm makes reference to provisions in Article 3 that would also include combating religious discrimination as an objective of the EU.
[9] A point which Ahlm herself emphasizes, by reference to Article 5 TEU (p. 72).
[A] Ahlm notes that the telelological approach is the characteristic interpretative method of the CJEU (p. 24).
[11] Opinion 2/13, para. 170.
[12] According to the Court "the applicability of European Union law entails applicability of [EU] fundamental rights" (C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] EU:C:2013:105, para. 21).
[13] Which was at the centre of the Court's reasoning in most of the cases presented in Chapter 3, such as *Steynmann*, *Van Duyn* and *Monachos Erinaios*, as well as the state aid cases.
[14] Which was relevant in the family law cases discussed in Chapter 3.
[15] C-431/17 *Monachos Eirinaios, v Dikigorikos Syllogos Athinon* [2019] ECLI:EU:C:2019:368, discussed at p. 97.

guaranteeing freedom of establishment. The question of whether or not the rule amounted to discrimination on grounds of religion was not considered at all, even though the rule appeared to directly discriminate against the applicant on the grounds of his status as a member of a religious order.

The caselaw presented in Chapter 3 does not appear to support the author's claim that the EU has the objective of combating religious discrimination. Rather, it seems to suggest that the reason why EU will interfere in national measures concerning religion is when such measures risk undermining the unity, primacy and effectiveness of EU law.[16]

In chapters 4, 5, 6 and 7 the book embarks on a close analysis of four distinct but interrelated issues: the extent to which EU law provides member states with a degree of autonomy in respect of the status which they grant to churches and religious organisations under their jurisdiction (chapter 4), the protection of religious freedom as an EU fundamental right (chapter 5), the prohibition of religious discrimination in EU law (chapter 6), and the extent to which religious organisations are exempt from EU anti-discrimination law (chapter 7).

These chapters provide an excellent resource for scholars interested in the place of religion in EU law. Chapter 4 and 7 are particularly relevant for those interested in the triangular relationship between Church, State and the EU, and it is here the Ahlm gives her most definite conclusions concerning what she terms 'the limits of the EU's secular jurisdiction'. As Ahlm notes, the EU maintains an apparently neutral stance in respect of the arrangements which member states have in place concerning the place of religious organisations. Indeed, this appears to be mandated by Article 17 TFEU. However, this does not prevent the court from engaging in quite close scrutiny of member states' measures. Ahlm observes that, in contrast to the ECtHR, the Court of Justice appears not to grant states member states a significant margin of discretion, and appears to seek to impose a uniform EU standard.[17]

Chapter 5 engages with religious freedom as an EU fundamental right, and entails a detailed comparison of corresponding ECHR right. Ahlm examines closely the general approach of the Court to the protection of fundamental rights, and reminds us that member states are free to uphold national standards of fundamental rights, including religious freedom if, and only if, the national standard "does not compromise the primacy, unity and effectiveness of EU law".[18]

Chapter 6 deals with one the most controversial and current issues concerning EU law and religion: religious equality in EU law. The chapter has the rather misleading title of 'The European Union's duty to combat religious discrimination', but the core of this chapter concerns the notorious cases of *Bouganoui* and *G4S*. Rather than being about the EU's duty to combat religious discrimination, these cases demonstrate how EU law can limit the ability of member state to keep in place rules designed to protect the position of religious minorities

[16] See *mutatis mutandis* C-206/13 *Cruciano Siragusa* v. *Regione Sicilia* EU:C:2014:126, where the court held that "the reason for pursuing that objective [of protecting fundamental rights in EU law] is the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law" (para. 32). For an exploration of the instrumental nature of EU fundamental rights see Eduardo Gill-Pedro *EU Law, Fundamental Rights and National Democracy* (Routledge, 2019).

[17] p. 279.

[18] p. 186.

in the workplace. This chapter provides us with a very detailed and sophisticated analysis of the judgments in particular of the Opinions of the Advocates General.[19] The differences of approach of the two Advocates General are presented as "a sign of the deep rift in Europe .. concerning public displays of religion in public in general, and the presence (and visibility) of Islam – through the wearing of hijab – in particular".[20]

In light of the developments set out in this book, it is clear that, as Ahlm argues in her conclusion, we can now talk of a 'EU law on religion'. The EU may present itself as 'neutral' in respect of the choices the member states make in accommodating religion in their legal orders. Nonetheless, EU law does indeed shape and constrain the way in which Member States deal with religious matters in their jurisdiction. It does so in a very wide range of areas, and it does so autonomously, both from the national law of the member states and from the ECHR.

It is less clear whether the book has succeeded in its stated objective of identifying the "principles and standards" which underpin EU law on religion. There are a number of themes that emerge in book and are presented in the Conclusion: The purported neutrality of the EU, the claim to centrality of religious equality, the drive to set a uniform standard of religious freedom and religious equality. However, there are many gaps and contradictions in the caselaw, and it is difficult to discern a coherent normative framework guiding these developments.

This is not a deficiency of the book – the caselaw presented is indeed inconsistent and sometimes contradictory, and the way the law has developed does not appear to reflect a coherent set of principles. What the book does provide is a very detailed and vivid picture of a quite recent[21] and very complex legal development, and present its different facets in the broader context of the EU legal order. Just like the cover painting (by the author herself), the meaning of the picture provided is not clear. But the reader is left in no doubt that the picture depicts something of profound importance – the European Union is actively engaging in something which lies at the heart of the socio-political arrangements that constitute the member states. We all need to reflect on the implications of this development, and this book provides excellent stimulus for such a reflection.

[19] AG Kokott wrote the Opinion in G4S and AG Sharpston in *Bouganouii.*

[20] p. 297.

[21] In her conclusion Ahlm signposts a number of cases that were pending at the time of publlication. Some of these have now been decided (see in particular C-804/18 and C-341/19.*IX and MH Müller Handels GmbH v WABE eV and MJ* [2021] EU:C:2021:594) and it is clear that the controversy has not abated (see P. Toynbee 'The European ruling on headscarves opens the way to rank discrimination' *The Guardian* 15 July 2021, at <https://www.theguardian.com/commentisfree/2021/jul/15/european-ruling-headscarves-discrimination-humanists-religious-identity).>