

Andras Koltay, *The Troubled Relationship between Religions and the State Freedom of Expression and Freedom of Religion*

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This book by Andras Koltay<sup>1</sup> can be seen as a valuable and timely contribution to the literature on the relationship between religions and the State in contemporary European societies, where this relationship is, indeed often 'troubled' and the subject of public discourse. The book discusses this relationship with a particular focus on the intersection between freedom of expression and freedom of religion, and examines these right in the following situations: the use of religious symbols in public places and schools (Chapter 1); the freedom of the State in integrating religious studies in public education (Chapter 2); limitations on wearing religious clothing and symbols (Chapter 3); media advertisements with a religious context (Chapter 4); and, the restriction of blasphemy and defamation of religions (Chapter 5). In all these situations, freedom of expression and freedom of religion both play a role and these rights can sometimes even be in conflict with each other. However, not all of these issues are given equal attention and the length of the chapters is very varied, which leads to a slight imbalance in the discussion with a very strong emphasis on blasphemous expressions. However, the book brings together a number of important issues related to the relationship between these rights.

The right to freedom of expression is not an absolute right and may be subject to restrictions by the State. However, the situations in which restrictions are allowed and the way in which restrictions are imposed are subject of many and heated public debates all over Europe. This is linked to the social and political changes taking place in many European countries which have seen an influx of migrants who are often from a different religion than the predominantly Christian population. This has led to tensions in the five situations examined in this book and these are clearly analysed against this background. The book thus deals with a number of very contemporary European issues and makes suggestions as to how these can be dealt with within the context of human rights.

In the introduction, Koltay sets out his viewpoint that freedom of conscience and religion are both communication rights, which are clearly linked to freedom of expression: the manifestation of religious convictions in the public sphere is part of the right to freedom of expression. On the other hand, while these rights overlap, they are clearly independent fundamental rights and they should be treated as such.

Another important issue discussed in the introduction and an issue that recurs throughout the book, although not always in the same depth in each Chapter, is the meaning, or the lack of a uniform meaning, of state neutrality. It is, according to Koltay, part of modern democracies that the State and the churches function separately from one another. However, no consensus exists on the exact content of this concept of state neutrality and there are different interpretations. In its most extreme interpretation (referred to as 'radical secularism'), religion does not have a right to be present in the public sphere and excluding religion from all areas of societal life is considered desirable. In a more moderate view of religious neutrality/secularism, the State and various

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churches function separately, but when overlap occurs, they take note of each other presence and cooperate. Here, state neutrality means no discrimination in matters of religion; in other words, the exclusion of partiality, bias or taking sides. Koltay clearly prefers the second interpretation of the term.

In Chapter 1, the use of religious symbols in public places and in schools is examined. Koltay analyses a number of cases, including from the US Supreme Court relating to symbols used by the government of certain States, and examines whether this means government endorsement of religious symbols. His conclusion is that, although the cases are quite diverse and have significantly divergent opinions on the part of the justices, what they have in common is that all have held that, whenever a religious symbol is used by the government, this must be done for a secular purpose. This means that the symbol, apart from its religious meaning, must also convey a secular meaning and the latter must be more important than the former. But, in the case law, the significance of the historic past and community traditions are also acknowledged and this is correct, according to Koltay.

The *Lautsi*<sup>2</sup> decisions of the European Court of Human Rights (ECtHR) are also analysed in Chapter 1. The ECtHR oversees the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The *Lautsi* case concerned the compulsory display of crucifixes in state schools in Italy, and led to two different decisions. In the first one, the Second Chamber of the ECtHR decided that the Italian government had violated the applicant's rights to freedom of religion (Article 9 ECHR) and freedom of education (Article 2, Protocol 1 ECHR). It considered that the crucifix had a predominantly religious meaning and may be emotionally disturbing to non-Christians or those who profess no religion; and, that negative freedom of religion also extends to being free from symbols. However, the Grand Chamber reversed this decision and dismissed the application. It found that there was no evidence that the display of the crucifix had an influence on pupils; that the crucifix in itself was a passive symbol; and, that it contributed to Italian identity and was traditionally displayed in class rooms. The decision whether to perpetuate this tradition fell within the margin of appreciation of the State as there was no common European standard as to whether or not religious symbols should have a place in public life. Koltay discusses the criticism raised against both decisions and relates this to the different interpretations of secularism/state neutrality. He concludes that state neutrality cannot be a synonym for indifference and that the state might take a stand in debates over values, but it cannot force anybody to take any decision in this area. Another conclusion is that tradition and history do count and that religion, as part of a country's traditions, must be considered and, thus, that the conduct of the State might reflect the cultural traditions of the society.

Chapter 2 contains an analysis of the freedom of the State to integrate religious studies in public education. Koltay explains that appropriately integrating religions in the education system entails a certain choice of values on the part of the State and that this can thus be seen as the State expressing an 'opinion' and this is the reason it is discussed in this book. He points out that there are different ways in which European States treat religious education in state schools. He looks briefly at religious education in schools in some countries and then discusses the case law of the ECtHR. The latter is summed up as follows: the compulsory nature of religious education is not *per se* contrary to the freedom of religion and the right to education, provided it does not aim to indoctrinate and it does not pressurise students to accept and identify with the teachings of a particular religion; there

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<sup>2</sup> *Lautsi v Italy*, Application No 30814/06, Judgment 3 November 2009 (Second Section) and Judgment 18 March 2011 (Grand Chamber).

must be a real, non-discriminatory and easy to achieve possibility to opt out of religious education; and, the State is not obliged to provide schooling to all according to their religious or philosophical views. Similar principles also apply to mandatory school prayers which exist in some states.

An examination of the limitations on the wearing of religious clothing and symbols can be found in Chapter 3. Regulations and case law in France, Germany, Turkey and the UK and the case law of the ECtHR in relation to education are discussed. Koltay concludes that the ECtHR judgments have left a number of questions unanswered, including why freedom of religion can be subjected to restrictions of a much broader scale than freedom of expression; if it is appropriate to display such a paternalistic attitude towards applicants as the ECtHR does; and, whether it is possible, in a school environment, to establish if the wearing of religious symbols does indeed harm or pose a threat to others, even if the person wearing it does not wish to exert any influence on others.

Chapter 3 continues with a discussion of the wearing of religious symbols at work and the ECtHR case law on this, which shows the importance of the protection of the rights of others and of the protection of health and safety in the justification of restrictions. Then, general bans on the wearing of religious clothing in public in a number of different states and the case law of the ECtHR regarding this is analysed and critiqued. Two cases concerning general bans – *Ahmet Arslan and Others v Turkey*<sup>3</sup> and *S.A.S. v France*<sup>4</sup> - are examined and distinguished from each other to come to a different outcome. In *S.A.S. v France*, the ECtHR held that a ban on wearing a face-covering veil in public was necessary for the protection of the rights of others which included the minimum requirements of civility necessary for social interaction or of 'living together'. This is followed by a critical discussion of the arguments used in the case law in relation to restrictions, including the protection of public safety, public order and peaceful cohabitation, the avoidance of segregation, and, the pursuit of gender equality, individual autonomy and freedom of expression. Koltay concludes that, in the headscarf related cases, the ECtHR or domestic authorities and courts do not seem to wish to protect the right to be religious and they limit practising one's religion through clothing or symbols to the private sphere. This is, in his view, not acceptable from the viewpoint of the protection of freedom of religion as a human right.

In Chapter 4, the regulation of publishing religious advertisements in the media is considered, including whether advertising of religions and churches should be allowed and, whether believers should be protected against such advertisements. Both concern the desirability of avoiding offence to religious beliefs. After giving a short overview of regulations on religious advertisements in the EU and its Member States, Koltay looks at the ECtHR case law which shows that proselytising does not qualify as exercising the freedom of religion as protected by the ECHR. Proselytising is defined as the activity of persuasion carried out by imposing undue pressure, especially if it takes place between people who are connected to one another in a hierarchical manner. The ECtHR distinguishes between religious and political advertisements and weighs these up according to their importance in the public debate. Political advertisements are given greater protection than religious advertisements and Koltay criticises this because considering religious motivated opinions to be less important than political views from a free speech perspective impairs the diversity of the public debate. He concludes that a general ban on religious advertisements would not be admissible but that some limitations in certain circumstances are indicated.

Chapter 5 is the most extensive chapter, taking up more than a third of the book, and examines restriction on blasphemy. From the case law of the ECtHR, Koltay draws a number of conclusions.

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<sup>3</sup> *Ahmet Arslan and Others v Turkey*, Application No 41135/98, Judgment 23 February 2010.

<sup>4</sup> *SAS v France*, Application No 43855/11, Judgment of 10 November 2014.

First, in cases of blasphemy, the ECtHR gives a broad interpretation to the principle of the margin of appreciation and does not endeavour to establish a universal European standard. Second, religious believers cannot expect their religious views to be free from all criticism, they must tolerate the expressions of ideas that might be hostile to their views, and, the freedom of the public debate must be protected. Third, states can legitimately decide to restrict opinions which are considered to be incompatible with the respect for other's right to freedom of religion. Fourth, the exercise of freedom of expression brings with it duties and responsibilities, one of which is to avoid the publication of defamatory, gratuitously offensive opinions relating to religions which do not contribute to the public debate. Koltay stresses that the basic consideration when analysing freedom of expression (in relation to blasphemy but also in a wider context) is the robust protection of public discourse and criticism and the right of everyone to participate in the public debate. Therefore, the protection of the democratic public debate on public affairs plays an important role in determining whether a restriction on freedom of expression is justified. A final conclusion is that only the manner/style/tone of the communication can be interfered with, not the content of the statement or opinion.

After discussing the regulations regarding blasphemy in a number of states around the world, Koltay examines some theoretical considerations in relation to blasphemy. He links this to the Danish cartoon affair and the 2015 attacks on the employees at the French magazine Charlie Hebdo. These attacks have created a new perspective on freedom of speech and how to deal with terrorism, raising questions not only about the clash between Muslim radicalism and European values, but also about Christianity and secularism/state neutrality. The analysis in this book of the issues related to the freedom of speech is, therefore, a necessary and important contribution to the discourse on the future of Europe.

The last part of Chapter 5 touches on hate speech (although very briefly) and on free expression and ethical standards, in other words, the question whether we can demand that freedom of expression is only used in a morally appropriate manner. Koltay concludes that this can only be an ethical and non-enforceable norm, not a legal norm. Another argument against accepting restrictions on freedom of expression discussed is the 'slippery slope' argument: restrictions, once adopted, could be used as a basis for the introduction of new restrictions, and this is how freedom of expression starts to slip further down the slope.

In the closing remarks, Koltay points to a number of questions which remain: what is the role of Christianity in Europe today? Is it possible to take a different legal approach to issues related to the right to freedom of religion and speech, depending on whether they are related to Christianity or Islam, and, if so, to what extent? In what ways should hostile attitudes towards religious communities be countered? He then concludes that there is no single, uniform legal approach to the questions pertaining to the right to freedom of religion and speech discussed in the book. The ECtHR has made efforts to define certain criteria, which are to be carefully weighed up by state authorities before they adopt decisions limiting certain rights. These criteria are detailed and well-established in certain areas – religious education and blasphemy – but vague in others – crucifix at schools, religious advertisements and headscarves.

Reading the book, it becomes obvious how troubled the relationship between church and State is and how States and national and international courts struggle with the demarcation between these two. For the European Court of Human Rights, this issue is complicated further by the presence of many different relationships between church and State and many different interpretations of the principle of state neutrality across European countries. Koltay convincingly argues against a radical secularism and for a softer secularism, and, concludes that the importance of the traditions and the

history (including the religious history) of a state must count in decisions regarding the balance between freedom of expression and freedom of religion.

The book is clearly written and is recommended to everyone interested in the relationship between freedom of expression and freedom of religion in contemporary Europe. It shows a clear understanding of the complexity of the issues and suggest ways of dealing with these while recognising that there are a number of questions still to be answered. Koltay has made a valuable addition to scholarship in this topical and difficult area of debate.