

# MANIFESTATION OF RELIGION AND RELIGIOUS EDUCATION UNDER THE ECHR JURISDICTION

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This essay will explore religious education under European Court of Human Rights (ECHR) jurisdiction especially for minority beliefs. Thus, I will look at Article 9 of the ECHR (guarantees religious freedom), Article 2 of the First Protocol (provides rights to parents in education and teaching for their children according to their own religious convictions). The first section of this essay will lay down the general frame of religious education under the above mentioned articles of the ECHR, the general principles that came out from the ECHR cases. We are aware that with the exception of Somalia and USA, all world states signed the Convention on Children Rights (CRC). Thus, we can claim that even under ECHR jurisdiction we might be able to follow “the best interest of the child” principle.<sup>1</sup> When there is a religious education issue, mostly or almost all debates go beyond the upbringing of children. Some liberals, like Amy Guttmann, argued in *Democratic Education*, parents should not have the right to control their own children’s education and society has legitimate aim to make children learn “a common set of democratic values.”<sup>2</sup> Martha Minow questions: “Do children belong to the State, even more than to their parents, or even to themselves?”<sup>3</sup> How can a religious parent be ensured that their children are educated according to their religious convictions under the ECHR system? Finally when there is a conflict between the best interest of the child and parents’ choice, what is the solution of the ECHR system? The best interest of the child principle can also serve as a mediation tool for a child

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<sup>1</sup> In her article Ursula Kilkelly clearly shows the CRC’s effects on the ECHR case law, especially in the areas of physical punishment and juvenile justice. See Ursula Kilkelly, ‘The Impact of the Convention on the Case-Law of the European Court of Human Rights’ in *Revisiting Children’s Rights: 10 Years of the UN Convention on the Rights of the Child*, Deirdre Fottre, (The Hague, Kluwer, 2000).

<sup>2</sup> See Martha Minow, “Keynote: Before and After Pierce; A Colloquium on Parents, Children, Religion, and Schools” 78 U. Det. Mercy L. Rev. (2000-2001) at 413.

<sup>3</sup> *Id.*, at 415.

to access education.<sup>4</sup> I take a stand that as a general principle I claim that children should have religious education as being in their best interest. Of course, if there is abuse of this right, the state can limit this right under Article 9/2. Without giving or accepting autonomy and individuality for children, we cannot serve the best interest of the child principle and our autonomy and individuality shaped by and in our community. Thus, it is very important for children of minorities to access religious education in order to have a proper marker for identity of its own religious community. One commentator pointed out:

*“Considering the question of autonomy with the child in mind, we reminded that identity is always a communal enterprise that involves more than a free willing individual. The identity of the individual is always shaped in relation to a larger set of communal identities. In turn, a viable collective identity, be it religious or secular, needs a community for its creation and preservation.”*<sup>5</sup>

In the second section, I will briefly look at the concept of secularism in a modern world sense. Today, many of us believe that religious beliefs caused many wars in the past, and it could be the same thing in today’s world. Most of us believe that liberal modern states should not have ideological indoctrination. However, we should note that there is no possibility of full objectivity to act in public spheres. For example, public holidays, or religious holidays, which ethnic or religious groups could hold in public arenas. In other words, whose voices will take charge in public places? Let me put it this way, if in France, Catholicism (is) will be recognized by authorities when choosing public holidays, in Turkey, Islam (is) will have the same right. Definitely, in a Turkish context, debates and discussions of religious education either for majority or minority go hand in hand with secularism.

In the third and the last section, I will look at the case of *Leyla Sahin v. Turkey*, and *Ciftci v. Turkey*. Especially, under the margin of appreciation doctrine which provides some exception/privilege to the ECHR signatory states. In other words, this doctrine provides some level of discretion to national authorities when there are national practices under the ECHR standards.<sup>6</sup> The ECHR Court approved Turkish state practices that deal with secularism (Turkish version). In the case of *Ciftci v. Turkey*, I believe, the ECHR went on a very dangerous path in regards to religious education. The case was deemed inadmissible, the Court made it acceptable that any child under age twelve could not attend any religious courses even if it were for only an hour a week and children aged between twelve and fifteen could attend religious courses on a part time basis: after age fifteen they could register in a full time course. I will finish off with closing remarks.

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<sup>4</sup> See Philip Alston, “The Best Interest Principle: Towards a Reconciling of Culture and Human Rights” in *The Best Interest of the Child: Reconciling Culture and Human Rights* (Oxford, Clarendon Press, Unicef, Florence, 1994) at 20.

<sup>5</sup> See Leora Bilsky, “Child-Parent-State: the Absence of Community in the Courts’ Approach to Education” at 145, in *Children’s Rights and Traditional Values*, (Dartmouth, Ashgate, 1998), Gillian Douglas & Leslie Sebba (eds.).

<sup>6</sup> See Alston, *supra note* 4, id.

### **A) Manifestation of Religion and Religious Education and the ECHR**

Article 9 of the ECHR echoes to Article 18 of the International Covenant on Civil and Political Rights (ICCPR) and has a broader extent than Article 14 of the CRC.<sup>7</sup> Actually, it was taken from Article 18 of the Universal Declaration of Human Rights (UDHR). Article 9 states that:

*“1. Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in private or public, to manifest his religion or belief in worship, teaching, practice and observance.*

*2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”*

The ECHR system protects atheism and agnosticism<sup>8</sup> like the ICCPR. Generally, when the Court or Commission deals with the term religion or belief, they are so liberal and give recognition to different religious beliefs.<sup>9</sup> In *Kokkinakis v. Greece*, the first case under Article 9, the Court pointed out<sup>10</sup>:

*“As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a ‘democratic society’ within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics, and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over centuries, depends on it.”*

The Commission, in the case of *Arrowsmith v. the United Kingdom*<sup>11</sup> developed the Arrowsmith test; that for an action to be determined as an acceptable form of manifestation of religious belief, the practice must be closely linked to the requirements of the religious belief. Interestingly, in *X. v. the U. K.*<sup>12</sup> the Commission turned down the application of a Muslim teacher who was asking to have a short break in order to attend Friday prayer. However, the Commission concluded that the applicant could not show this as a requirement of religious belief. However, anyone with a general knowledge of Islam would

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<sup>7</sup> See Ursula Kilkelly, “The Child’s Right to Religious Freedom in International Law: Time to Reform the Right that Never Was” at 14 in *Competing Paradigms: Children, Religion and Human Rights* (Ashgate, 2009), Martha L. A. Fineman and Karen Worthington (eds.).

<sup>8</sup> See Peter W. Edge, *Legal Responses to Religious Difference* (The Hague, Kluwer, 2002) at 46. See more similarity about between the ECHR jurisprudence and the ICCPR system, at 47-48. See also, Peter W. Edge, “The European Court of Human Rights and Religious Rights” 47 Int. Com. L. Q. (1998) 680-87.

<sup>9</sup> See Carolyn Evans, “Religious Freedom in European Human Rights Law: the Search for a Guiding Conception” in *Religion and International Law* (Leiden, Boston, MNP, 2004) at 396, Mark W. Janis & Carolyn Evans (eds.).

<sup>10</sup> *Kokkinakis v. Greece*, App. No. Series A, no. 260-A (1994), 17 EHRR 397, par. 31.

<sup>11</sup> App. No. 7050, 20Eur. Comm’n H. R. Dec. & Rep 5 (1978).

<sup>12</sup> App. No. 8160/78, 22 Eur. Comm’n H. R. Dec. & Rep 27 (1981).

know that Friday prayer is one of the main requirements of Islamic belief. However, the Commission (had) and the Court has a tendency to be very fussy or broad when it comes time to determine what constitutes a religious manifestation, thus worship<sup>13</sup> and proselytism<sup>14</sup> are considered an essential part of religion, but the wearing of certain religious clothing is not.<sup>15</sup> Rightly Kilkelly concludes that Article 9 does not make any reference to children, however, ECHR provisions do not have any limit in terms of adults and does not exclude children and also Article 14 will not allow this exclusive understanding (prohibition of discrimination) “on any ground” such as birth or other status), thus children have the same right as adults have under the ECHR system.<sup>16</sup> Article 9 does not provide any guidance rights for parents in relation to religious education of children, however Article 2 of the First Protocol does.<sup>17</sup> Article 2 of the First Protocol:

*“No person shall be denied the right to an education. In the exercise of any functions which it assumes in relation to education and teaching, the State shall respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”*

Actually, Article 2 does not provide any information on the kind of education that is guaranteed for children; however the Commission stated that there is a main concern for elementary education.<sup>18</sup> This provision’s aim was to block state indoctrination over children.<sup>19</sup> Kilkelly, points out that we read the first sentence of the provision that provides the right to education for children

<sup>13</sup> Manoussakis and others v. Greece, App. No. 23Eur. Hum. Rts. Rep 387 (1978 (1997)

<sup>14</sup> Kokkinakis v. Greece, App. No. Series A, no. 260-A (1994), 17 EHRR 397.

<sup>15</sup> Karaduman v. Turkey, App. No. 16278/90, 74 Eur. Comm’n H. R. Dec. & Rep 93 (1993).

*Dahlab v. Switzerland*, App. No. 42393/98, Admissibility Decision of 15 February 2001; the applicant was a teacher who was teaching the age of four to eight years old children in a Swiss state school and converted into Islam and began to wear headscarf, however state authorities forbitted to her wearing headscarf at work. The aim was establishing religious neutrality in school environment. The Court held that Islamic headscarf might have proselytizing effect on young children might cause negative messages to about the sex equality.

At another case, *Leyla Sahin v. Turkey*, App. No. 44774/98 (2004), the Court unfortunately followed the same attitude. In the third section of this chapter I will look at this case from the point of secularism and religious education.

<sup>16</sup> See Kilkelly, *supra* note 7, at 14.

<sup>17</sup> *Id.*, at 15.

<sup>18</sup> See Ursula Kilkelly, *The Child and the European Convention on Human Rights* (Aldershot, Ashgate, 1999) at 63.

<sup>19</sup> See Kilkelly, *supra* note 7, at 15.

Interestingly, Turkey made a reservation on 18 May 1954 when it was ratifying Article 2 of the First Protocol, “Article 2 of the First Protocol shall not affect the provisions of Law of No. 430 of 3<sup>rd</sup> March 1924 relating to the unification of education.” I will look at this issue at chapter V.

See Malcolm Evans, *Religious Liberty and International Law in Europe* (Clarendon, OUP, 1997) at 362.

and this right should work with respect to parental guidance. Moreover and most importantly, if parent's choices damage the right to education, it should not be respected.<sup>20</sup>

In *Kjeldsen, et. Al. v. Denmark* (Danish Sex Education Case), the Court concluded that any instruction a child receives from the state is under parental guidance. Compulsory sex education does not violate Article 2 of the First Protocol as long as instruction was provided in a "objective, critical, and pluralistic" manner.<sup>21</sup> However, most importantly, this case laid down when and where there is a competing interest between child and parent, the best interest of the child was given priority.<sup>22</sup> The Court did not see sex education as constituting indoctrination.<sup>23</sup> In the Court's words<sup>24</sup>:

*"The State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that the information or knowledge included in the curriculum is conveyed in an objective, critical, and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting the parents' religious and philosophical convictions. That is the limit of what must not be exceeded."*

In *Angelini v. Sweden* (1987)<sup>25</sup>, the ECHR held that compulsory attendance of religious classes violates Article 2 of the First Protocol. Religion should be given as a separate subject, when parents are able to withdraw their children from religious instruction classes it means that the state has complied with Article 2 of the First Protocol. Religious activities should not be compulsory, compulsory religious education must be objective and neutral. The ECHR case law and Article 18 of the ICCPR cases use the same standards in terms of the curriculum content. Kristin Henrard rightly pointed out,<sup>26</sup> regarding the case of *Angelini v. Sweden*;

*"Since public education generally reflects the values, culture, language, and religion of the dominant population group (s), it is crucial for (members of) minorities to have certain guarantees that public education will be as neutral as possible. Furthermore, they should be able to obtain an exemption if there is a course which is not neutral."*

In *H v. U. K.* (1984)<sup>27</sup>; the Commission held that state has the right to establish compulsory schooling. In *Campbell & Cosans v. U. K.*<sup>28</sup>, the parents refused to accept corporal punishment as a disciplinary measure in a state

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<sup>20</sup> See Kilkelly, *supra* note 18, at 64.

<sup>21</sup> *Kjeldsen, et. Al v. Denmark*, 23 Eur. Ct. H. R. Ser. A. (1976), p. 35.

<sup>22</sup> See Kilkelly, *supra* note 18, at 86.

<sup>23</sup> See Ingvill Thorson Plesner, "Legal Limitations to Freedom of Religion or Belief in School Education" 19 Emory Int'l L. Rev. (2005) 569.

<sup>24</sup> *Kjeldsen, et. Al v. Denmark*, 23 Eur. Ct. H. R. Ser. A. (1976), p. 53.

<sup>25</sup> App. No. 10941/83, 51 Eur. Comm'n H. R. Dec. & Rep. 41 (1987).

<sup>26</sup> See Kristin Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination* (The Hague/Boston/London, Martinus Nijhoff, 2000) at 114.

<sup>27</sup> App. No. 10233, 1983.

<sup>28</sup> 4 EHRR 293 (1982).

school, thus their child was excluded from the school until accepting this practice. The State argued that using corporal punishment was a disciplinary action and Article 2 of the First Protocol is only related with curriculum content. However, the Court rightly interpreted education and teaching very broadly and added that corporal punishment was an integral part of the educational process.<sup>29</sup> Teaching is a transmission of knowledge to intellectual development, education is the “whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young.” Parents’ religious or philosophical convictions should not be inconsistent with the educational rights of the child.<sup>30</sup> This case also clarified that parents could not block their children’s right to education due to their religious or philosophical beliefs.<sup>31</sup> Under Article 9 religious freedom of children are protected and it is not limited by parental guidance, however, in most cases the ECHR case law such as in *Hoffman v. Austria (1993)* entitles parents to bring up children in their own religion.<sup>32</sup>

In *Efstathiou v. Greece (1996)*, *Valsamis v. Greece (1996)*; the Court held that the compulsory participation in a military parade in school does not violate Article 2 of the First Protocol. The girls’ parents had asked exemption from religious education and any activities which are in inconsistency with Jehovah’s Witness belief. However, school authorities penalized both children because of non- attendance of commemoration of the Greek-Italian War. Judge Vilhjalmsson and Jambrek gave a joint dissenting opinion by stating that Victoria’s view (daughter of Mr. and Mrs. Valsamis) that “the parade had character and symbolism” it was inconsistent to her pacifist belief. Moreover, in a democratic society, there is no necessary basis for compulsory attendance into a parade.<sup>33</sup> With this decision the Court denied at some level pluralism and

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<sup>29</sup> Ser. A. No. 48. (1982), p. 33. See also Kilkelly, *supra note 18*, at 63.

<sup>30</sup> Ser. A. No. 48. (1982), p. 36.

<sup>31</sup> See Helen Mountfield, “The Implications of the Human Rights Act 1998 for the Law of Education” *Edu. LJ* (2000) at 157.

<sup>32</sup> See Kilkelly, *supra note 7*, at 16.

*Hoffman v. Austria* (1993), 255 Eur. Ct. H. R. Ser. A. The Austrian Supreme Court guaranteed the custody of children to their fathers after the divorce. The Court held that if children live with their fathers it would be better for them from the point of children’s welfare, because their mother is a Jehovah’s Witness who refuses blood transfusions and it seems likely children become “social outcast.” However, the European Court concluded that it was not proportional legitimate aim, thus there was a violation of Article 8 in conjunction with Article 14.

See more Ann Sherlock, “Case Comment: Parental Rights, Religious Beliefs and the Convention” 19(2) *E. L. Rev.* (1994) 228-230.

See also Willi Fuhrmann, International Law and Religion Symposium Article: “Perspectives on Religious Freedom from the Vantage Point of the European Court of Human Rights” *B. Y. U. L. Rev.* (2000) 829-839.

<sup>33</sup> See more “Case Comment: Penalty for Refusing to take Part in School Parade Due to Religious Beliefs-Article 2 of Protocol 1, Articles 9, 3 and 13” 3 *E. H. R. L. R.* (1997) 304-307.

tolerance in a democratic state.<sup>34</sup> Moreover, how do we do protect minority religions or belief under this decision? Compulsory attendance in patriotic school parades did not violate Article 2 of the First Protocol.

In *Erdem v. Turkey*<sup>35</sup>, the applicant complained that his children were not exempted from religious classes but were refused by school authorities. The Turkish Constitution makes religious culture and ethics compulsory in class. The Court held that Turkey is in violation of Article 2 of the First Protocol.

Of course the state does not have a duty or obligation to establish private school for religious minorities, Kilkelly rightly claims that when we read Article 2 of the First Protocol with Article 14 of the ECHR separate schools might also be funded like state schools.<sup>36</sup> It is evident that those can afford private school may survive their own tradition and religion, and the poor who cannot afford private school would be left to the hands of the state.<sup>37</sup> It was argued that Article 2 of the First Protocol gives legitimacy to parents' authority over the state in the education and upbringing of children.<sup>38</sup> Article 9/2 shows limitation basis-prescribed by law-legitimate aim-necessary in a democratic

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<sup>34</sup> See Kilkelly, *supra* note 7, at 19.

See more about funding separate schools, Carolyn Hamilton, *Family, Law and Religion* (London, Sweet & Maxwell, 1995) 252-3.

Hamilton argues that if state gives full power or autonomy to religious community over the education, it might threat equality of opportunity for children. At 254.

<sup>35</sup> App. No. 26328/95.

<sup>36</sup> See Kilkelly, *supra* note 7, at 20.

However, Malcolm Evans argued that taking into account Article 2 of the First Protocol with the conjunction of Article 14, it is unlikely to improve the issue of accessing funds in order to establish separate school system.

See Evans, *supra* note 19, at 362.

Interestingly, Article 13 of the European Framework Convention for the Protection of National Minorities repeats non-obligation of member states on funding of separate schools:

*"1. Within the framework of their education systems, the Parties shall recognize that persons belonging to a national minority have the right to set up and to manage their own private educational and training establishments.*

*2. The exercise of this right shall not entail any financial obligation for the Parties."*

See more Patrick Thornberry, Article 13, in *The Rights of Minorities in Europe: A Commentary on the European Framework Convention of the Protection of National Minorities*, Marc Weller (Clarendon, OUP, 2005) 395-406.

Carolyn Evans takes words from the *Belgian Linguistics* case (1968); 'The Convention lays down no specific obligations concerning the extend of these means and the manner of their organization or subsidisation.' And with her own words, "thus parents can organize private, religious schools but cannot expect government funding for them." See Evans, *supra* note 9, at 89.

<sup>37</sup> See Hamilton, *supra* note 34, at 255-6.

<sup>38</sup> See Kilkelly, *supra* note 7, at 16.

society- on religious freedom is also applicable for Article 2 of the First Protocol.<sup>39</sup>

If a child would like to change his/her religion to something their parents do not follow, Article 9 allows this to take place but how would Article 2 of the First Protocol operate in this situation?<sup>40</sup> Kilkelly notes that relationships of these two provisions are unclear and the Court also pointed out that Article 2 of the First Protocol which provides the basis for guidance and parental role in education and religious matters and it has to be understood “in the context of the Convention as a whole” but specifically with Article 8 (respecting privacy and family life), Article 9, and Article 10 (freedom of expression).<sup>41</sup> In other words, the ECHR case law indicated that parental guidance and unification of the family has priority over the autonomy of children in terms of religious freedom and [education].<sup>42</sup> If a religious group or person does not fit into “the ethos of the modern State,” what we do for children, Hamilton offers that we must act under the principle of the best interest of the child.<sup>43</sup>

The ECHR case law suggest that states should respect parents’ religious convictions. Also when religious courses are compulsory it should be provided in an “objective, critical, and pluralistic” manner and definitely be given the right to out-opt from the classes. However, the Greek cases propose that some level of indoctrination of the State is acceptable. In the next section, I will explore religion and secularism and their relationship in today’s democracies.

## **B) Religion and Secularism in Modern World**

Religious freedom is a fundamental right of citizens of modern world democracies. As stated in the earlier chapter, the understanding of the need to protect minorities in the modern world began with the protection of religious minorities in the early Seventeenth Century. Then in the early Twentieth Century this also expanded to the protection of linguistic and ethnic minorities, especially with the establishment of the League of Nations and bilateral treaties between these countries. However, in today’s world, due to a fear of religious radicalism, many of us believe that if we provide more religious freedom for a religious group, even if the majority of the population belongs to it, we are in danger of losing our democracies. In particular there is a fear of theocratic states. Moreover, today we have many unresolved or disputed subjects such as new dilemmas for the EU countries especially regarding Islam. One of main concern is that Islam is inconsistent with democratic principles. Or that headscarf may affect freedom of the others thus should be limited especially in the public sphere. Paul M. Taylor, like many others, observes that in the

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<sup>39</sup> See Javier Martinez-Torron, “Legal Limitations on Religious Freedom in the Case Law of the European Court of Human Rights” 19 *Emory Int’L L. Rev.* (2005) 589.

<sup>40</sup> See Kilkelly, *supra note 7*, at 17.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See Hamilton, *supra note 34*, at 257.



aftermath of 9/11, religious hatred has been significantly increased around the world as well as a significant increase in the distrust and fear of Muslims.<sup>44</sup>

Still, religion is at the heart of debates on multiculturalism.<sup>45</sup> Kristin Henrard warns us that an ethnic group could, simultaneously, be part of a linguistic or religious minority.<sup>46</sup> This is the case with religious minorities in Turkey. Moreover, conversely, there are ethnic groups which are also part of religious minorities, such as Greeks, Armenians, Jews, and Assyrians. Interestingly, there are also linguistic minorities like Kurds of Turkey. However, the Jews and Christians of Turkey appear more in legal, social, economic, or

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<sup>44</sup> See Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (New York, Cambridge UP, 2005) at ix.

An interesting case came out recently regarding “the wearing of distinctive clothing” such as headscarves on January 15, 2007 from the Bavarian Constitutional Court, the highest court in Southern Germany. It held that banning headscarves for female Muslim teachers in the classroom was not unconstitutional. The court argued that this ban was not against Christian values. My response to this decision is that in any case whether they are Muslims or not and whether or not dress codes exclude headscarves or mini skirts the outcome is the same; a violation of human rights. After a while it may appear that the German society fears the increase in classroom bans were expanding to the rest or other parts of the public sphere, this case of Germany and the dress codes in schools was taken before the court by an Islamic religious group. However, one should also recognize that the Christian cross and other religious symbols are free to be displayed in class (Lander). Eight German states banned the wearing of headscarves, and the state of Berlin banned all religious symbols to treat all religions equally. This decision could arguable be viewed as unfair to any religion. What if I did not wear a headscarf but wanted to wear a cross or Yarmulke? When we compare a cross and headscarf they are not the same thing. For a Muslim woman, her headscarf is a really important aspect of her religious life, but can we say the same about the meaning of the cross? It appears that Berlin is also playing a game under a non-discrimination policy. Ekin Deligoz who is a former Turkish MP from the Green party now serving in the German parliament. She claimed that the headscarf is a sign of separation and unwillingness to integrate. So if we use the same logic, can I argue that after 10 years of living abroad, Iranian women, with the exception of a few, do not wear a headscarf abroad. I think it could be argued successfully that I might be wrong. It is wise to say that it is unfair to label people because of their dress code; first of all most of these women escaped religious fundamentalism or state oppression because they were dissenters. Thus if we use Deligoz’s argument, any woman in Iran who does not wear a headscarf must be a separatist. These kinds of arguments destroy peace among society. How people in society choose to dress should not be the business of the state. Finally, I believe, Europe is in a state of crisis because of Islam phobia or since September 11. It must be noted that in Germany students may wear headscarves in the classrooms however wearing of the headscarf is banned in France.

See “Bavarian Constitutional Court Upholds Headscarf Ban,” available at, <http://www.dw-world.de/dw/article/0,2144,2310985,00.html> (accessed on January 15, 2007), and “Bavyera türban yasağını onayladı,” available at, <http://hurarsiv.hurriyet.com.tr/goster/haber.aspx?id=5783627> (accessed on January 15, 2007). See more about secularism and headscarf, Alenka Kuhelj “Religious Freedom in European Democracies” 20 Tul. Eur. & Civ. L. F. (2005) 1

<sup>45</sup> *Id.*

<sup>46</sup> See Henrard, *supra* note 26, at 51.

political arenas because of their religious belief, rather than for their linguistic difference. Their self-identification is connected with the religious minorities of Turkey rather than linguistic minorities. However, modern democratic states are also prone to becoming fundamentalist in their secularism. Secularism itself behaves like a religion. I will further argue that practicing hard-line secularism may in itself destroy our democracies, since it kills religious freedom in the name of protecting secularism. This misunderstanding of secularism, especially in Turkey and France destroys the peace and social consensus within society. Moreover, deep-seated defenders of Turkish secularism makes the same mistake as Charles Taylor does with Talal Asad's observance<sup>47</sup>:

*"The eminent philosopher Charles Taylor is among those who insists that although secularism emerged in response to the political problems of Western Christian society in early modernity-beginning with its devastating wars of religion-it is applicable to non-Christian societies everywhere that have become modern."*

Taylor offers that the modern state should make citizenship its main principle identity and in order to unify different identities within itself it should use secularism as the main tool or transcendent mediation ship. However, Asad claims that using secularism is not the way to create social peace and toleration in a modern state.<sup>48</sup> Because Taylor expects that every individual should believe in independent secular ethics and that when there is a conflict persuasion and negotiation will resolve it. Asad argues that<sup>49</sup> "... the nation state is not a generous agent its law does not deal in persuasion...A secular state does not guarantee toleration; it puts into play different structures of ambition and fear. The law never seeks to eliminate violence since its object is always to regulate violence." To the modern world I say..."Secularism-like religion is such a concept."<sup>50</sup>

As James Massey rightly observes "religious freedom is the condition and guardian of all other freedoms, furthermore, even individuals without any religious convictions, but who have faith in democracy, acknowledge this

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<sup>47</sup> See Talal Asad, *The Formations of the Secular: Christianity, Islam, Modernity* (Stanford, SUP, 2003) at 2. See further about French version secularism, Keturah A. Dunne, "Addressing Religious Intolerance in Europe: The Limited Application of Article 9 of the European Convention of Human Rights and Fundamental Freedoms" 30 Cal. W. Int'l L. J. (1999) 117.

<sup>48</sup> See Asad, *id.*, at 4.

<sup>49</sup> *Id.*, at 6, 8.

<sup>50</sup> *Id.*, at 17. In his excellence book, Asad informs that during the Ottoman times under Sharia court, some Jews and Christian women took their cases before those Islamic law operated courts when their community courts may not able to provide sufficient and acceptable decisions. At 210. His source is Najwa al-Qattan, "Dhimmes in the Muslim Court: Legal Autonomy and Religious Discrimination" 31 Int. J. M. E. S. (1999).

relationship.”<sup>51</sup> Around the world, there is the misconception that “diversity of opinion” causes religious conflicts among the groups. However the reality is that such conflicts occur because of “the absence of tolerance and understanding.”<sup>52</sup> Massey supports this by quoting the Indian thinker, Humayun Kabir, when he says “we cannot have a democracy, without minorities, without distinct and different groups..Where there is no democracy, the question of minorities as such cannot arise.”<sup>53</sup> This could be the case with Turkish democracy. Here I will show that our current fear does not have any real factual basis, but rather that it is based on our past fears and stereotypes. Another multiculturalism intellectual, Tariq Modood, claims that “most theorists of difference and multiculturalism exhibit very little sympathy for religious groups; religious groups are usually absent in their theorizing and there is usually a presumption in favour of secularism.”<sup>54</sup> He warns us that we should not block religious groups from political debates on multiculturalism. Secularism should be careful to maintain dialogue between religious and non-religious groups.<sup>55</sup> He adds that this ignorance predominates in the Western world about Muslims. I claim that, generally speaking, the same ignorance takes place in Islamic countries about Jews or Christians. More specifically, it occurs in Turkey.

The Western world believes that Islam does not separate politics and religion. Modood rightly claims that this is one of the biases against Islam in Europe.<sup>56</sup> Most of the Western world accepts the bad examples of Iranian Islam rather than recognizing that Ottoman practices took place successfully for seven centuries. Interestingly, the Ottoman State fought against Iranian Islamic practices. Modood argues that we can distinguish theocracy from mainstream Islam. Radical or ideological secularism could be that which claims absolute separation between state and religion, which is in practice at a moderate level in Western Europe except France.<sup>57</sup> Unfortunately, at the moment, Germany as well as some other European countries are beginning to follow the examples of

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<sup>51</sup> See James Massey, *Minorities and Religious Freedom in a Democracy* (New Delhi, Manohar Publishers, 2003) at 9. His book deals very insight to look at India and its religious minorities.

<sup>52</sup> *Id.*, at 10. John Rex challenges that religious conflicts are not happening every time because of religions. Most of the time reason seem that ethnicity, political conflict, and nationalism. See John Rex, *Ethnic Minorities in the Modern Nation State: Working Papers in the Theory of Multiculturalism and Political Integration* (London, McMillan Press, 1996) at 200.

<sup>53</sup> *Id.*, at 17.

<sup>54</sup> See Tariq Modood, “Anti-Essentialism, Multiculturalism and the ‘Recognition’ of Religious Groups” 6 *The Journal of Political Philosophy* (1998) at 390. In his excellent article he claims and defends that the Western world should not act based on prejudices about Muslim groups who live in Europe. Here, I claim vice versa for Turkey should not fear of providing for freedom religious minorities who are either Christians or Jews who live in Turkey.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*, at 391.

<sup>57</sup> *Id.*

France, especially after 9/11. The main reason for this seems to be that the U. S. media is prejudiced against Islam and the cultures of Islamic countries. Modood insists that even in Europe religion defines and shapes the dimensions of European secularism and that no absolute separation of religion and politics exists.<sup>58</sup> For example, most state holidays are based on Christian religious feasts. Furthermore, schools in these countries often offer Catholic-based education, though not Judaism or Islamic education. Finally he acknowledges that Muslims should not be excluded from recognition in multicultural states due to their belief in Islam; anything less does not fulfill the promise of Western secularism, since for there to be equality between religions, multicultural states should not favour one over another.<sup>59</sup> Modood, beliefs are similar to the other liberal thinkers, he believes that liberal states should support or encourage individualistic religions, maintaining a neutral stance rather than taking sides. He points out that “ethnic associations, businesses, trades unions, sport and film stars and so on should support or involve electoral candidates, but churches and religious groups are restricted. It makes a weak argument of corporate representation and how much is really view or accepted as democratic?”<sup>60</sup> This claim should be taken very seriously because each organization, religious or non-religious, has an ambition to influence politics. In the name of secularism, we provide this opportunity to non-religious groups, but not to religious groups. This is clearly undemocratic. Instead, I believe there has to be an ongoing dialogue, as well as tolerance among religious and non-religious groups in order to establish strong and peaceful societies in modern democracies.

Some authors believe that liberalism is a tool used to cover the secularist values held by authority figures such as legislators, executives, and judges.<sup>61</sup> Ze’ev Falk claims that secularist rhetoric about pluralism and personal liberty, in truth, comes from secular judgments which are “against the truth of metaphysics and religion.”<sup>62</sup> The reality is that personal liberty and pluralism has no guidelines for moral decisions, and there is no consensus or authority on most controversial issues. There is no common standard by which to judge what is good and evil.<sup>63</sup> Falk claims in his final remark that “the voices of religious individuals and institutions are therefore [as] legitimate in the political arena as those of their secular antagonists; and there is no “objective” solution to the problem of “Synagogue [Religion] and State.”<sup>64</sup> Thus, in a broad sense, the question is how should political and social institutions in modern

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<sup>58</sup> *Id.*, at 392.

<sup>59</sup> *Id.*, at 392-3.

<sup>60</sup> *Id.*, at 396. He calls that “there is a theoretical incompatibility between multiculturalism and radical secularism.” When there is no recognition of religious minorities, this incompatibility becomes a practical issue.

<sup>61</sup> See Ze’ev W. Falk, “Minority Religions in a Democratic Republic” 12 *Journal of Law and Religion* (1995-1996) at 450.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*, at 451. Falk gives little chance to the idea of “separation of Synagogue and State” may become the majority opinion in Israel. At 452.

democracies treat people who would like to practice a different religion from that of the majority?<sup>65</sup> Here there is a misconception; the separation of Church [Religion] and State does not mean public institutions cannot "...accommodate [the] religious needs of people."<sup>66</sup> I think this is the balance point of our democratic philosophy. A multicultural state is responsible for accommodating religious groups, just as they do ethnic and linguistic groups. Thus we have to keep in our mind the question of "how far may government properly go in compelling individuals to perform obligations of citizenship which conflict with their beliefs or conscience?"<sup>67</sup>

Why do secular systems fail to protect religious pluralism and yet not lose their legitimacy in front of the public? Jonathan Fox quotes Mark Juergensmeyer who answers the question by suggesting that secular nationalism currently performs societal functions in modern world democracies.<sup>68</sup> However, those systems are heading towards a "loss of faith" and this causes a legitimacy crisis. Juergensmeyer explains the reasons for loss of faith in secularism. Firstly, secular nationalist's governments do not keep their promises which were political freedom, economic prosperity, and social justice. Second, most of the time the non-Western world imported secular nationalism from outside thus the ideology does not have any domestic authority or legitimacy. Third, because of this importing from the outside, secular nationalism has been identified with cultural colonialism. Moreover, secular nationalism destroys or eliminates the traditional lifestyles of societies which are influenced by religious belief or practices. In addition, advocates of secular nationalists stand together with Western powers, which encourage people to believe in a global conspiracy against religion. These things break the legitimacy of secularism.<sup>69</sup> In short, our belief in religious liberty shapes the understanding of the "relations of morality and law, ethics and human government, moral purposes of government, and moral limitations that should restrain the state's use of coercive power."<sup>70</sup>

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<sup>65</sup> See Gloria T. Beckley & Paul Burstein, "Religious Pluralism, Equal Opportunity, and the State" 44 *The Western Political Quarterly* (1991) at 190.

<sup>66</sup> *Id.*, at 191. At the above quoted sentence belongs to Judge William O. Douglas who spelled it out in *Zorach v. Clauson*, 343 U. S. 315, 1952.

<sup>67</sup> See Philip E. Jacob, "Religious Freedom-A Good Security Risk?" 300 *Annals of the American Academy of Political and Social Science* (1995) at 44.

<sup>68</sup> See Jonathan Fox, "The Influence of Religious Legitimacy on Grievance Formation by Ethno-Religious Minorities" 36 *Journal of Peace Research* (1999) at 290. Fox rightly argues that Juergensmeyer uses his theory for the Third World Countries; however those arguments are also applicable to more developed countries. At, 293.

<sup>69</sup> *Id.*, at 291-2.

<sup>70</sup> See Daniel R. Heimbach, "Contrasting Views of Religious Liberty: Clarifying the Relationship between Responsible Government and the Freedom of Religion" 11 *Journal of Law and Religion* (1994-95) at 715.

### C) Leyla Sahin v. Turkey, Ciftci v. Turkey: Secularism, ECHR, and Religious Education

“It was generally agreed that using a school for religious or moral indoctrination was abhorrent and could become a tool of a totalitarian government.”<sup>71</sup> It is forbidden for the state in education to aim indoctrination.<sup>72</sup> Article 2 of the First Protocol makes sure children are not subjected to indoctrination against their parents’ wishes in elementary education.<sup>73</sup> The Republic of Turkey mostly adopted its administrative practices from French secularism especially those regarding religious issues. This tradition mistakenly began after the 1839 Tanzimat Fermanı (Administrative Reforms). However, most of the Turkish secular system dismisses this reality from Turkish history; religion (church or mosque) has never had a place in Turkish history as it has had in European history, especially in France. I would also like to stress that<sup>74</sup>:

“..the French concept of *‘laïcité’* is the idea that religion is not important and that the State is entitled to intervene in religious affairs and control them. This attitude towards religion is rooted in the history, anti-clericalism and hostility towards the excesses of the Catholic Church prior to the French Revolution.”

The Margin of Appreciation Doctrine (MAD) recognizes the exceptionality when national authorities limit freedoms of the ECHR provisions. The reason is that national authorities are in better place than the Court when evaluating the restrictive manners in terms of public interest and interpretation of domestic law.<sup>75</sup> This doctrine (MAD) was produced by the case law of Commission and Court, and was not derived from the provisions of the Convention.<sup>76</sup>

<sup>71</sup> See Evans, *supra note* 9, at 88.

<sup>72</sup> See Patrick Thornberry & Dianne Gibbons, “Education and Minority Rights: A Short Survey of International Standards” 4 Int. J. Min. Rt. (1997) at 125.

<sup>73</sup> See Evans, *supra note* 19, at 358.

<sup>74</sup> See Samantha Knights, “Religious Symbols in the School: Freedom of Religion, Minorities and Education” 5 E. H. R. L. R. (2005) at 504.

<sup>75</sup> See Javier Martinez-Torron, “Legal Limitations on Religious Freedom in the Case Law of the European Court of Human Rights” 19 Emory Int’l L. Rev. (2005) 589.

<sup>76</sup> See James A. Sweeney, “Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era” 54 ICLQ (2005) at 462. In his article, the author argues that “the European Court’s continued recognition of a margin of appreciation has not resulted in a relativistic Court or the lowering of Convention standards. The doctrine’s use has been presented as a valuable tool for recognizing and accommodating limited local variations within a nevertheless universal model of human rights.” At 474.

However, all the time we keep it on our mind, which Lord Lester spelled it out: “the danger of continuing to use the standardless doctrine of the margin of appreciation is that, especially in the enlarged Council of Europe, it will become the source of a pernicious ‘variable’ geometry of human rights, eroding the *acquis* of existing jurisprudence and giving undue deference to local conditions, traditions, and practices.” At 462. The author quoted Lord Lester from A. Lester “Universality versus Subsidiarity: A Reply” 1 EHRLR (1998) 73, at 76.

Parker rightly claimed that using secularism for restricting grounds of religious freedom causes several problems; first that the ECHR does not list secularism as a principle for restricting manifestation of religious belief (without specifically showing religious influence as a threat to public order); second is the principle of secularism that makes inconsistency with the standard of religious pluralism as one of the cornerstones of democracy (leaving religion in the private sphere). Thus, both Turkey and France with “the application of the principle of secularism, are simply shielding government and other citizens from the influence of committed religious believers, they violate the principle of pluralism, and by extension, the principles of democracy.”<sup>77</sup> Like Parker, I conclude that using the principle of secularism in order to restrict religious freedom “is not a faithful reading of the ICCPR and the ECHR” and it is an illegitimate justification.<sup>78</sup> In *Leyla Sahin v. Turkey*, the Court held that no violation of Article 9 was made. The Court recognized the importance of secularism in Turkey. The applicant, Leyla Sahin, was attending the faculty of medicine at Istanbul University. On 23 February 1998 the Vice-Chancellor of the University issued a circular directing students with beards and those wearing an Islamic headscarf would be refused admission to lectures, courses and tutorials. After March 1998, the applicant was denied admittance into exams, lectures or courses. Finally, the faculty issued a warning against her because she was not complying with university code and suspended her for a term from the faculty.<sup>79</sup>

The courts reasoned that this restriction was acceptable because there are many religions and beliefs coexisting in Turkish society, and it was used to reconcile the interests of these different beliefs and most importantly to ensure that everyone’s beliefs were respected. With this decision the Court gave a very wide and extensive coverage to MAD, or in other words it allowed the Turkish state future limitations on the manifestation of religious beliefs. The applicant claimed that by not permitting the headscarf in schools was a violation of Article 9 and also unjustified interference and violated her right to education under Article 2 of the First Protocol and finally, she also argued that there was a violation under Article 9 with conjunction to Article 14, thus there was discrimination between believers and non-believers of Islam [this reference was made by Ms. Sahin’s lawyers although I believe that then term “believer” and “non-believer” cannot solely be designated to those who wear a headscarf, or in other words it does not necessarily mean you do not believe in the faith of Islam if you do not wear a scarf or vice versa] and that if you wanted to study

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<sup>77</sup> See M. Todd Parker, “The Freedom to Manifest Religious Belief: An Analysis of the Necessity Clauses of the ICCPR and the ECHR” 17 *Duke J. Comp. & Int’l L.* (2006) at 121-2.

<sup>78</sup> *Id.*, at 125.

<sup>79</sup> *Leyla Sahin v. Turkey*, App. No. 44774/98, p. 11-13, Judgment of 2004, the case was taken before the Grand Chamber, unfortunately, the same decision came out from there in November 2005.

Actually, first headscarf case was before the Court was *Karaduman v. Turkey* (1993). The Court concluded that the prohibition of the headscarf in secular universities were acceptable under Article 9/2.

you had to choose between religion and education. Moreover, she complained of another violation, also under Article 8 and 10. However, the Court applied the margin of appreciation doctrine and found no violation under Article 9. It also added that there were no separate issues that arouse under the aforementioned Articles. The State's legitimate aim or interference is based on principles of secularism, equality, the rights and freedoms of others, and protecting public order. Interestingly, with regulations on dress codes, the States aim was to preserve pluralism within universities. The Court added that this restriction was necessary in a democratic society. Even the Turkish government did not show that "the pressing social need and the ban would have to be proportionate to the need."<sup>80</sup> In the Court's words<sup>81</sup>:

*"It is the principle of secularism, as elucidated by the Constitutional Court, which is the paramount consideration underlying the ban on the wearing of religious insignia in universities. It is understandable [?!..] in such a context where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women, are being taught and applied in practice, that the relevant authorities would consider that it ran counter to the furtherance of such values to accept the wearing of insignia, including as in the present case, that women students cover their heads with a headscarf while on university premises... In the light of the foregoing and having regard in particular to the margin of appreciation left to the Contracting States, the Court finds that the University of Istanbul's regulations imposing restrictions on the wearing of Islamic headscarves and the measures taken to implement them were justified in principle and proportionate to the aims pursued and, therefore, could be regarded as "necessary in a democratic society."*

Agreeably, "it is hardly a sign of tolerance to not accept symbols that are carried by women of a particular religious tradition."<sup>82</sup> Kilkelly explains: [the] "ECHR case law on Article 9 suggests a strong preference for secularism rather than religious freedom regarding the wearing of religious symbols."<sup>83</sup> Judge Tulkens of Belgium notices the truth without judicial eyebrow in the Sahin judgment through the words of Kilkelly, "poorly reasoned and one-sided, appears to have an unspeakable anti-Muslim bias at its heart."<sup>84</sup> Unfortunately, the case did not touch on the issue of education or the religious right of an individual.<sup>85</sup> However, after following *Dahlab v. Switzerland*, in *Sahin v. Turkey*, the Court clarified and upheld that "policies on the prevention of religious indoctrination and pressure" will be acceptable.<sup>86</sup> The attitude of

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<sup>80</sup> See Parker, *supra* note 77, at 124.

<sup>81</sup> *Id.*, p. 110 and 114.

<sup>82</sup> See Plesner, *supra* note 23, at 573.

<sup>83</sup> See Kilkelly, *supra* note 7, at 23.

<sup>84</sup> *Id.*, at 27.

<sup>85</sup> *Id.*, at 28.

<sup>86</sup> See Sylvie Langlaude, "Indoctrination, Secularism, Religious Liberty, and the ECHR" 55 ICLQ (2006) at 929. In *Dahlab v. Switzerland*, the Court concluded that wearing headscarf in front of children "is a form of indoctrination and proselytism." See *supra* note 15.



the Court in hopes of “promoting and enforcing a normative order of secularism” regrettably causes damage to religious freedom.<sup>87</sup> In *Sahin*, the Court held that wearing a headscarf was indoctrination to others even when it involved adults in a highly mature and sophisticated university environment.<sup>88</sup>

The Court did not find any violations against Article 2 of the First Protocol, and Ms. Sahin was forced to complete her medical studies in Vienna. The court’s concluding was very unfortunate, how can a person indoctrinate others with clothing, the headscarf symbolizes religion not fashion and cannot solely be worn for fashionable reasons[most of the time]? What the Court also missed was that individual (s) may practice proselytism, but we still do not call it indoctrination. Otherwise, all proselytism should be accepted as being indoctrination. However, states that practice indoctrination, like in Turkey, go against human rights law. Most importantly, in the Turkish context, this limitation is not prescribed by law, it is based on the regulations made by the Higher Education Board that were interpreted extremely in the name of secular belief by the Turkish Constitutional Court. What a judicial eyebrow? At least ninety five percent of the population in Turkey is Muslim. But all in the name of secularism, majority beliefs (specifically those of observant female students’ in the educational system) were limited and/or blocked. For example, in South Africa Black People were the Turkish headscarved women, the majority that had lost their rights. This is a classic example for how militant secularism lacked down religious freedom in the private sphere.<sup>89</sup> Borrowing from Ingvill Thorson Plesner, Sylvie Langlaude states that society is divided into the private and public spheres causing very serious implications on freedom of religious belief [specifically manifestation] and “liberal secularism does not prohibit

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*, at 933. In my point of view, from Turkey three important cases came before the Court in order to test religious freedom; *Kalac v. Turkey* (dismissing a Military Court Judge from the Army due to being a member of illegal Islamic group (?) “Suleymanci”). This group was formed around 1940s due to the prohibition of teaching Koran in Turkey because of the policy of secularism. The Court upheld that even according to domestic law there is no judicial control for the Supreme Military Council decisions. Let me note that in Turkey none of the religious group (Islamic ones) can claim that it is a religious organization. What they do, they operate non-profit organizations in order to achieve their goals without spelling their own identity. Until today, none of them used violence or proposed throwing away government. Of course, they criticize all the time unjustifiable limitation standards for religious freedom.

The other one is *Sahin v. Turkey* and lastly *Ciftci v. Turkey*. I think the Court failed to protect religious freedom in Turkish democracy. I think one of the main reasons is that bias about religion of Islam because of European based history knowledge and current Middle East Islamic practices (?). Looking at the Court’s concluding, there is no proper room for Islam in European democracy, at least in Turkish democracy. Let me clarify that if I am a military officer in France and if I go to church, I will lose my job. One another example is that if I am a female student and I follow Amish tradition or any kind of Christianity which orders headscarf and when I am trying to attend university courses in Paris, I will be dismissed from university because of my special clothing style. This is what happens in Turkey.

<sup>89</sup> *Id.*, at 937.

individual manifestations of religion or belief in the public sphere or even inside public institutions.”<sup>90</sup> So observant Turkish women can do what ever they want in their private lives but cannot have a voice in public.

Another important case came before the Court, *Ciftci v. Turkey*<sup>91</sup>, directly dealing with religious education and was also found inadmissible by the Court. The applicant claimed that a violation of Article 9 with conjunction of Article 14 had occurred. The Court examined the issues under Article 2 of the First Protocol and held that the claim was manifestly ill-founded. The Court upheld that a child under twelve could not attend Quran’ic classes [Bible or Talmud courses] but also stated that it is not a violation of Article 2 of the First Protocol. Agreeably, the Court noted that according to case law, *Campbell and Cosans v. the United Kingdom*, the state may regulate educational systems and Article 2 of the First Protocol forbids the aim of indoctrination and parents’ religious convictions should be respected (*Kjeldsen, Busk Madsen and Pedersen v. Denmark*). The applicant, Ciftci, applied to his son’s school (state) for permission (documentation) so he may enroll in Qu’ranic courses in order to study the Qu’ran and its interpretation. I have to note that current practices in those courses in Turkey, that is after the establishment of the Republic, only teaches kids how to read the Qur’an, and its Arabic roots and meanings are not taught, nor are its interpretations. How can it be indoctrination when you learn how to read something but have no idea what it means?

The applicant’s son was under twelve and because of domestic law his application was refused that is domestic law ordered that:

*“The Religious Affairs Department shall afford those wishing to learn about the Koran and its interpretation and to increase their knowledge of religion the opportunity to attend Quranic study classes, outside the compulsory religious-education lessons at primary and secondary schools, provided that they have obtained the primary-school leaving certificate....”*

Since 1997 in Turkey grade eight completion is compulsory whether or not you attend religious school or not and the Turkish system does not provide any exception and also there is no home schooling for students in elementary school. When children complete grade eight they generally reach the age of fourteen or fifteen. Currently, if a child would like to learn how to read Qu’ran in an official school or institution, without interpretation, must reach at least age twelve. The Court stated that the goal of domestic regulation was not indoctrination, the aim was protecting children from indoctrination and that children could receive religious courses after reaching at certain level of “maturity.” The Court used the same reasoning in *Dehlab* stating that young children ask many questions and could easily be influenced by their observant [headscarved] teacher... Thus they have to be protected against indoctrination or proselytism. In other words, the Court’s aim was to protect children from

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<sup>90</sup> *Id.*

<sup>91</sup> *Ciftci v. Turkey*, App. No. 71860/01 (2004) inadmissible. The ECHR official webpage, HUDOC system provides the translation of French version which originally came out from the Court. The case translation is about two pages, thus I cannot point out paragraphs.

religious influence and it believes that it is in their best interests before the age of twelve not to be faced with this influence.<sup>92</sup> I would like to point out that:

“..It [the Court] puts too much emphasis on neutrality (although it is very difficult to define), and because children cannot be brought up in a neutral fashion. Moreover, neutral education at school might not be favourable to the religious upbringing of children and what counts as neutrality may be hostile to religious communities. For example, it does not take into account the interests of the Islamic community that its children are thought the Koran at an early age. In conclusion, the Court fails children in relation to their religion when it decides that neutrality is the way forward in the education and religious education of children.”<sup>93</sup>

The Court also noted that compulsory religious courses were provided in primary schools, another judicial eyebrow. In the Turkish school system, children attend religious courses in grade four (age eleven) and until grade nine. All school children must attend these religious courses which are usually not provided in an objective-neutral manner, everything is explained in the beliefs and ways of Sunni Islam. There is no opting-out of these classes. The children of Alevi's [Turkish version of Shite Islam] or minorities have no choice. This is actual indoctrination. Blocking children from religious courses and going against their parents wishes is very clear indoctrination. My other concern is of the cases that will ail the court in the near future whether it be about religious minorities of Turkey or not.

#### **D) Concluding Remarks**

The ECHR case law does not provide enough guidance regarding religious education. Overall, the cases give us mixed messages. However, the Court accepted the right to education, Article 2 of the First Protocol belonging to the child, and parental guidance as the subsidiary here. The Child was protected against indoctrination and parental guidance was put here to achieve this aim<sup>94</sup> especially, as we have seen in the Greek and Turkish cases, under the margin of appreciation doctrine which has given legitimacy to restrictions on religious freedom and education. The Court seems more concerned about political and social thoughts<sup>95</sup> rather than equal opportunity for minority beliefs and protecting pluralism. With the Turkish cases, the Court added secularism as an acceptable limitation even if it is not listed on the provision of the Convention. Specifically, the case of *Ciftci v. Turkey*, opened a very dangerous path on right to religious education in the name of preventing indoctrination. I believe that it has also limited the right to religious education for minority beliefs. The Court eliminates pluralism which is one of the cornerstones of today's democracies. I would not want to live in a world with only a single voice. In the words of Martha Minow's:

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<sup>92</sup> See Langlaude, *supra* note 86, at 935.

<sup>93</sup> *Id* and at 936.

<sup>94</sup> See Kilkelly, *supra* note 18, at 84.

<sup>95</sup> See Kilkelly, *supra* note 7, at 36.

"I do not want to live in a world without *Pierce*<sup>96</sup>, a world standardizing children, squeezing pluralism to the margins of society, allowing the majority to impose its values on the minority in the most vital context of preparing and educating young people by making public school attendance mandatory. So I am grateful to live in a world made by *Pierce*...a world beyond *Pierce*, one without a dual, two-tiered system, ensuring superb education to some and depriving it to others."<sup>97</sup>

Without pluralism, our liberal democracies would not survive. Pluralism means showing respect and providing rights or opportunities to each different group whether they are majority or minority. Finally; no one should face involuntary indoctrination against his/her own beliefs.<sup>98</sup> Hopefully, in the near future the Court will understand these distinct groups and their cultural and religious beliefs, especially in the Turkish cases, and will stop sending us mixed messages. I understand why Hamilton points out:

*"A Democratic society must offer equality of opportunity-the right of a child to receive an education of equal quality to that received by the majority, while at the same time recognizing the need to protect pluralism. Pluralism requires that the state respect the religious wishes of all groups, whether the majority or the minority."*<sup>99</sup>

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<sup>96</sup> *Pierce v. Society of Sisters*, 268 U. S., 510, 535 (1925), invalidated Oregon's compulsory public school attendance law and recognized the liberty of parents and guardians to direct the upbringing and education of children.

<sup>97</sup> See Minow, *supra* note 2, at 423.

<sup>98</sup> See Alison Mawhinney, "The Opt-Out Clause: Imperfect Protection for the Right to Freedom of Religion in Schools" 7 *Edu L J* (2006) at 102.

<sup>99</sup> See Hamilton, *supra* note 34, at 254.