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EVALUATION OF THE PRINCIPLE OF SECULARISM WITH REGARD TO EDUCATION AND EMPLOYMENT IN THE DOCTRINE DEVELOPED BY THE EUROPEAN COURT OF HUMAN RIGHTS JURISPRUDENCE

Master's Thesis

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Tallinn
2024

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ACKNOWLEDGEMENTS

First of all, I would like to express my sincere gratitude to my supervisors DPhil Merilin Kiviorg and Ph.D., Dr. Juris Julia Laffranque for their exceptional support, guidance, attention and understanding throughout the entire journey.

Secondly, I wish to thank all the esteemed Professors, who during my studies in Tallinn, imparted their insightful knowledge and afforded me an invaluable opportunity to pursue my academic goals. Their guidance enabled me to delve into the intricacies of international law, and explore its different branches.

Furthemore, I want to express my heartfelt appreciation for the immense love and unwavering support of my family and friends, who have consistently stood by my side.

Finally, I am immensely grateful for the Estonian Ministry of Foreign Affairs for granting me both tuition waiver and monthly stipend. Without it, for me, studying at the University of Tartu would be an unreachable dream.

Per Aspera Ad Astra
Nika Gelashvili

INTRODUCTION

On January 7, 2015 the offices of the French satirical weekly magazine, *Charlie Hebdo*, were assaulted, resulting in the death of twelve and wounded eleven people.[1] The pretext of one of the deadliest attacks in Paris became the cartoon portrayals of Prophet Mohammed published by *Charlie Hebdo*, which insulted the cultural identity of Islam followers and elicited an appalling reaction.

Not long before this atrocious event the European Court of Human Rights ('ECtHR'), sitting as a Grand Chamber, delivered a controversial judgement in Lautsi v. Italy case[2]. Italy was given a wide margin of appreciation ('MoA') to decide whether or not to remove the crucifix from public schools after reversing the decision of the Second Section of the Strasbourg Court. However, prior to the Grand Chamber's final judgement, there was a backlash in Italian society, demanding for ardent support for Italian identity and values.[3] On the other hand, some of the academics criticised the Court's approach as it did not provide a satisfactory explanation on a number of issues.[4]

Needless to say, there is hardly any similarity between these two events except one principle which has been a matter of debate for decades: secularism. The latter, strictly speaking, is a separation of church and state and therefore, keeping religions and political authorities separate.[5] The second understanding of secularism refers to "the removal of religious elements from public life and creating a kind of public culture to replace it[6]". From these definitions it is reasonable to conclude that the 2015 Paris attack on the French satirical weekly magazine, *Charlie Hebdo* is one of the indirect consequences of secularism and in a similar vein, Lautsi v.

[1] Tom Lewis, 'At the Deep End of the Pool: Religious Offence, Debate Speech and the Margin of Appreciation before the European Court of Human Rights' in Jeroen Temperman and András Koltay (eds), *Blasphemy and Freedom of Expression: Comparative Theoretical and Historical Reflections after the Charlie Hebdo Massacre* (Cambridge University Press 2017) 259
[2] Lautsi v. Italy App no 30814/06 (ECtHR, 18 March 2011)
[3] Sebastián Guidi, 'Law Over Legalism: International Court Legitimacy in Lautsi v. Italy' (2023) 33(1) Duke J. Comp. & Int'L. <https://scholarship.law.duke.edu/djcil/vol33/iss1/2/> accessed 16 December 2023
[4] Lorenzo Zucca, 'A Commentary on a Decision by the ECtHR Grand Chamber' 2013 11(1) Int.J. Const. Law <https://academic.oup.com/icon/article/11/1/218/776139> accessed 17 December 2023
[5] Mark Juerensmeyer, 'The Imagined War Between Secularism and Religion in Phil Zuckerman and John R. Shook (eds), *The Oxford Handbook of Secularism* (Oxford University Press 2017) 75
[6] Ibid.

Italy's judgement represents a clash between secularism and religion which led to the decision before the ECtHR. The only difference between the above-mentioned two events is the degree the way they were addressed. One of them ended in a fatal, violent way, whereas the other one was handled before the international courts and therefore, the parties had an opportunity to provide the arguments and seek justice in a civilised way.

However, France was not the only country which suffered due to extremist minorities.[7] Therefore, the following thesis intends to assess not the political reasons behind those attacks, but as Lorenzo Zucca craftily puts it, "the spectre of secularism"[8] and its legal dimension before the ECtHR encompassing all Contracting States of the ECHR. Apart from that, the term "secularism" is one of the complex and multifaceted phrases both in political lexicon[9] and constitutional theory.[10] It has been evolving constantly and thus, creating uncertainties in different disciplines. Legal science is not an exception. The following chapter will attempt to find the answer about the meaning of the principle of secularism within the framework of the ECHR - a regional international convention intending to protect fundamental human rights and freedoms.

Considering the fact the principle of secularism is ambiguous and has no clear definition in social science, a number of questions can be raised. Can the above-mentioned principle be considered as a constitutional value or philosophical conviction and thus, portrayed as a radically subjective concept? How does the Strasbourg Court approach the argumentative clash between religious and non-religious individuals?

The answer may be found through the lines of the ECtHR judgements that employ different interpretative tools, such as MoA and European consensus while adjudicating the cases. However, the beauty of the decisions is not only the argumentation between the parties, but dissenting opinions among the judges, who remind the society that judgements do not

[7] Lorenzo Zucca, 'Rethinking Secularism in Europe' in Nehal Bhuta (ed), *Freedom of Religion, Secularism, and Human Rights* (Oxford University Press 2019) 141
[8] Ibid.
[9] Jaspues Berlinerblau, 'Political Secularism' in in Phil Zuckerman and John R. Shook (eds), *The Oxford Handbook of Secularism* (Oxford University Press 2017) 85
[10] Andras Sajó, 'Preliminaries to a Concept of Constitutional Secularism' (2008) 6(3-4) International Journal of Constitutional Law 605, 608

provide absolute truth. They may be subject to criticism, constant rethinking and a way of setting novel standards with regard to specific issues.

The thesis is written at a time when ECtHR has handed down a number of judgements invoking the principle of secularism under Article 9 (freedom of religion or belief) of the Convention concerning education and employment applications.

The thesis aims at providing legal input for the discussions over the principle of secularism under Article 9 of the European Convention on Human Rights ('ECHR') before the Strasbourg Court. The problem lies in a number of controversial decisions with regard to striking a balance between religious freedom to wear symbols against other interests. The objective of the thesis is to observe under which circumstances the principle of secularism was invoked as a justification to infringe an individuals' rights under Article 9 of the ECHR with respect to education and employment matters.

The main research questions the author attempts to answer are the following:

1. Under which circumstances has the European Court of Human Rights in its case-law under Article 9 of the ECHR justified a wide MoA given to the states when it comes to invoking the principle of secularism with respect to education and employment applications?
2. What are the different rights that need to be balanced in both subcategories - education and employment - when invoking the principle of secularism? Is there a difference or similarity?
3. Comparing the two categories, education and working place, does the European Court of Human Rights employ clear standards when applying the concept of MoA with respect to Article 9 of the ECHR when parties have invoked the principle of secularism as a justification to limit individuals' rights?

To address the questions posed above, the thesis employs analytical, dogmatic and empirical methods to comprehensively analyse the place of secularism in the ECHR case-law particularly under articles Article 9 and Article 2 of Protocol No. 1. While the focus is on the

ECtHR I also need to reflect on domestic law, cases and understandings of secularism to the extent they are taken into account in the ECtHRs reasoning. The analysis in my thesis is supplemented by respective literature and the opinions of academicians. The thesis also has a comparative element to flash out similarities and differences in the approach to secularism in two different strands of case law of the ECtHR - employment and education.

The present thesis focuses on two subcategories - education and employment - for analysis as the case-law not only addresses the freedom of religion stipulated under Article 9 of the Convention, but also displays the other conflicting rights involved. For example, in the following chapters the interests of children and parents will be touched upon as well as the interests of employees and patients.

The thesis revolves around the hypothesis that (i) the Court relies heavily on MoA, a judge-made doctrine, when invoking the principle of secularism with regard to education and employment applications; (ii) the Strasbourg Court does not provide a satisfactory explanation of what does the principle of secularism itself entail with respect to the cases dealing with both education and employment matters and therefore, relies on definitions provided by the Member States of the ECHR; (iii) the *Lautsi* case that has been one of the landmark cases in the history of the ECtHR, is not consistent with previous case-law, in which the principle of secularism was invoked as a justification to limit individual's rights with respect to education matters.

The thesis consists of three chapters. The first chapter examines the concept of MoA, which has been used by the ECtHR in a number of cases. The method applied in the chapter is primarily analytical and doctrinal. Even though it has been described by academics extensively, there is still no clear formula how the concept applies to cases and what are its definite characteristics. Apart from that, the chapter explains the correlation between the MoA and the concept of European consensus, which is another judge-made creation of the ECtHR. Generally, the idea behind those both doctrines is to ensure the protection of fundamental human rights and freedoms, while taking into consideration "the existing diversity among Contracting States".[11]

[11] Francisco Javier Mena Parras, 'Democracy, Diversity and the Margin of Appreciation: A theoretical Analysis from the Perspective of the International and Constitutional Functions of the European Court of Human Rights' (2015) 29 Revista Electrónica de Estudios Internacionales 1, 11

However, there are some questions with regard to using those legitimising tools by the ECtHR. For example, the MoA has come under criticism among scholars.[12] It is problematic because it could potentially undermine the legitimacy of the ECtHR and the Convention. Therefore, the chapter will analyse not only the idea behind the concepts, but also critical approaches that are prevalent among the scholars.

The second chapter delves into the concept of secularism and its invocation by the Strasbourg Court based solely on the ECHR articles with respect to education. Considering the peculiarity of the above-mentioned concept, a special emphasis will be placed on Article 9 - freedom of thought, conscience and religion - of the ECHR. The chapter also makes a reference to Article 2 of Protocol No. 1 of the Convention which deals with the right to education and offers a short summary of the right itself. The judgements of the ECtHR encompass the period starting from 2005 up to the current time[13]. When necessary, dissenting and concurring opinions are used to substantiate the argument. Apart from discussing the principle of secularism, the chapter provides an analysis and different understanding about the concept of neutrality that has been invoked by the Strasbourg Court as a justification to infringe the applicants' rights. Thus, there will be presented both the ideas behind state's neutrality based on three contrasting approaches, such as neutrality as absence of coercion, neutrality as absence of preference and neutrality as exclusion of religion from the public sphere.[14] Apart from that, the notions of exclusive and inclusive neutrality elaborated by the academicians will be touched upon.. These theories intend to display what are the approaches employed by the ECtHR when there is an alleged violation of Article 9 and 2 of the Protocol No. 1 of the Convention. Besides this, the chapter pays a significant attention to the doctrine of MoA in light of human rights clashes and attempts to discern the occasions, in which the Court invokes the judge-made concept.

The third chapter deals with the analysis of the principle of secularism and its invocation by the ECtHR under articles of the ECHR with respect to employment (workplace) matters.

[12] Murat Tümay, 'The "Margin of Appreciation Doctrine" Developed by the Case Law of the European Court of Human Rights (2006) 5(2) Ankara Law Review 201, 214

[13] It should be noted that the period that ECtHR judgements cover only refer to the dates when the actual decisions were handed down by the ECtHR. For example, in the *Şahin* case, the circumstances of the case started in 1998, whereas the Grand Chamber delivered the judgement in 2005.

[14] Julie Ringelheim, 'State Religious Neutrality as a Common European Standard? Re-Appraising the European Court of Human Rights Approach' (2017) 6(1) Oxford Journal of Law and Religion 1, 9

Unlike the second chapter, which also made a reference to the right to education stipulated in Article 2 of Protocol No. 1 of the Convention, the third chapter analyses cases solely based on Article 9 of the ECHR. All the ECtHR rulings with regard to workplace matters span from 2001 up to the current time. The judgements endeavour to analyse in which scenarios employs the Strasbourg Court the concept of secularism and whether it has used the same pattern as in the education related cases on similar matters. Apart from that, the chapter attempts to assess whether states are given wide or narrow MoA when the principle of secularism is employed by the ECtHR with regard to employment matters under Article 9 of the Convention.

Principle of secularism is not a novel issue and it has been discussed among the scholars. For example, the Oxford Handbook of Secularism provides a multidisciplinary analysis of the concept itself, encompassing different fields, such as political theory, law, international studies, history, philosophy, etc.[15] Besides this, Gunn comments on the historical roots of Turkish and French understanding of the principle of secularism with respect to ECtHR.[16] In a similar vein, the doctrine of MoA has been a subject of discussion. However, there is a gap in the literature as to how the Strasbourg Court defines the principle of secularism in cases under Article 9 Article 2 of Protocol No. 1 of the Convention. The thesis intends to fill the gap regarding the ambiguity of the principle of secularism by examining the case-law of the ECtHR and observe whether there is any trend related to both education and employment related applications. Besides this, the author aims at finding out if the Strasbourg Court has been consistent when using the principle of secularism and also, if the concept has the same meaning as the principle of neutrality that has been used in the Court's practice as well. In addition to that, considering the fact that the ECtHR uses the MoA frequently, the author attempts to analyse how the doctrine defines the meaning of the principle of secularism in both education and employment related applications.

Keywords: principle of secularism, margin of appreciation, European Court of Human Rights, principle of neutrality, freedom of religion

[15] Phil Zuckerman and John R. Shook (eds), *The Oxford Handbook of Secularism* (Oxford University Press 2017)
[16] T. Jeremy Gunn, 'The "Principle of Secularism" and the European Court of Human Rights: A Shall Game' in T. Jeremy Gunn and Malcolm D. Evans (eds), *The European Court of Human Rights and the Freedom of Religion and Belief: The 25 Years since Kokkinakis* (Brill | Nijhoff 2019)

CHAPTER I. PRINCIPLE OF SECULARISM IN GENERAL AND THE DOCTRINES DEVELOPED BY THE EUROPEAN COURT OF HUMAN RIGHTS, IN PARTICULAR MARGIN OF APPRECIATION

The rules of norm-based international legal order regulates rights and obligations of the states. However, apart from general principles which are binding to all states, international courts and tribunals employ specific legal methodologies to adjudicate on disputed matters. In this regard, the ECtHR is not an exception. The latter was created to protect fundamental human rights and freedoms based on the ECHR, which itself aimed at preventing "rebirth of totalitarianism" in the aftermath of World War II[17]. However, interpretation of international human rights conventions and especially, ECHR that has been praised as "the most effective human rights instrument ever devised[18]" has never been a simple task. The ECtHR judges have to use doctrines to persuade "the general public that even then politically and morally most controversial judgements are principled, logically consistent and coherent, and therefore can claim general validity through the medium of legality and its sanctions[19]". One of the doctrines that has been developed in the case-law of the ECtHR is the MoA.

The idea behind one of the interpretative techniques of the Strasbourg Court can be understood in its applicability to the cases, in which state interests are of great importance and therefore, 'Convention organs' are more cautious to comment on a particular issue[20]. In addition to that, Greer offers the definition of the MoA, according to which, it is "the room for manoeuvre the Strasbourg institutions are prepared to accord national authorities in fulfilling their obligations under the European Convention on Human Rights.[21]" Another explanation of MoA can be found in Howard Charles Yourow's comprehensive work: "The latitude of deference or

[17] Joseph Zand, 'The Concept of Democracy and the European Convention on Human Rights' (2017) 5 University of Baltimore Journal of International Law 195, 198
[18] Ibid., 196.
[19] Jiří Přibáň, 'Anything to Appreciate? A Sociological View of the Margin of Rights and the Persuasive Force of Their Doctrines' in Petr Agha (ed), *Human Rights Between Law and Politics: The Margin of Appreciation in Post-National Contexts* (Bloomsbury Publishing 2017) 89
[20] Dean Spielman, 'Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2012) 24 Cambridge Yearbook of European Legal Studies 381, 387
[21] Steven Greer, 'The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation' (2010) 3 UCL Hum. Rts. Rev. 1, 2

error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies before it is prepared to declare a national derogation from the Convention, or restriction or limitation upon a right guaranteed by the Convention to constitute a violation of one of the Convention's substantive guarantees[22]".

The MoA doctrine is not limited only to one concept. The ECtHR uses "an ambit of discretion, 'latitude of deference or error', or 'room for manoeuvre'[23]", judicial deference[24] and all of them have the same meaning for purposes of the above-mentioned doctrine.

The importance of MoA can be observed in adoption of Protocol 15 of the ECHR by the Committee of Ministers of the Council of Europe in 2013[25]. Apart from amending Article 35 of the Convention and thus, reducing the period within which an application must be made to the Court from six to four months and introducing other important changes, the Protocol No. 15 adds a reference to the MoA doctrine and principle of subsidiarity. It should be also noted that the Protocol was an indirect product of high-level conferences which were held in Interlaken[26] and Izmir[27], in 2010 and 2011, respectively. These conferences produced declarations on a number of issues, such as the high number of interim measures requested in immigration cases[28], repetitive applications[29], case overload, etc. On top of that, Interlaken Declaration touches upon the principle of subsidiarity and its role "in the interpretation and application of the Convention[30]". Therefore, it can be concluded that both the Interlaken and Izmir Declarations laid the foundation

[22] Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff Publishers 1996) 13
[23] Yutaka Arai-Takashi, 'The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013) 62
[24] Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012) 27
[25] Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 24 Jun 2013, entered into force 1 Aug 2021) 213 CETS
[26] High Level Conference on The Future of the European Court of Human Rights (Interlaken Declaration, 18-19 February 2010), <https://www.echr.coe.int/documents/d/echr/2010_interlaken_finaldeclaration_eng> accessed 06 January 2024.
[27] High Level Conference on The Future of the European Court of Human Rights (Izmir Declaration, 26-27 April 2011), <https://www.echr.coe.int/documents/d/echr/2011_izmir_finaldeclaration_eng> accessed 06 January 2024.
[28] Ibid., 3.
[29] Ibid., 4.
[30] High Level Conference on the Future of the European Court of Human Rights (Interlaken Declaration, 18-19 February 2010), <https://www.echr.coe.int/documents/d/echr/2010_interlaken_finaldeclaration_eng>, p. 5, accessed 06 Jan 2024.

for putting a crucial emphasis on MoA doctrine in the Brighton Declaration[31] and then inserting it in the Preamble of ECHR.

Considering the fact that MoA was only included through the practice of ECtHR until Protocol No. 15 entered into force on 1 August 2021[32], it is important to comment on why there was a necessity for including MoA into the Preamble of the ECHR. As Explanatory Report on Protocol No. 15 clarifies, it was for enhancing "the transparency and accessibility of these characteristics of the Convention system and to be consistent with the doctrine of the margin of appreciation as developed by the Court in its case law"[33]. On top of that, the debate has been sparked among scholars and politicians pertaining to the inclusion of MoA in the Convention. Former President of the ECtHR Robert Spano endorsed the idea as "the Court's refinement of the principle of subsidiarity and margin of appreciation, introduces a clear procedural dimension that can be examined on the basis of objective factors informed by the defendant government in its pleadings."[34] British politicians followed the suit and they welcomed the amendment of the Preamble of the Convention[35] as it increases "both the democratic legitimacy and the effectiveness of the Convention system, by encouraging both parliaments to conduct their own detailed and reasoned assessments of Convention compatibility[36]". Another argument for such a change in ECHR could be related to the Court's contextual interpretation and its importance when adjudicating a case. Following that, "the Convention should be interpreted as a whole[37]" and therefore, the "object and purpose" have to be taken into consideration. The argument makes more sense in light of Article 31(1) of Vienna Convention On the Law of Treaties[38], according to

[31] High Level Conference on the Future of the European Court of Human Rights (Brighton Declaration, 19-20 April 2012), <https://www.echr.coe.int/documents/d/echr/2012_brighton_finaldeclaration_eng>, p. 3, accessed 02 Apr 2024.
[32] Library of the Court, Protocols to the Convention, <https://www.echr.coe.int/documents/d/echr/Library_Collection_ProtocolsTable_ENG> accessed 06 Jan 2024.
[33] Council of Europe, Explanatory Report on Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms, <https://www.echr.coe.int/documents/d/echr/protocol_15_explanatory_report_eng>, p. 2, accessed 06 Jan 2024.
[34] Robert Spano, 'The European Court of Human Rights and National Courts: A Constructive Conversation or a Dialogue of Disrespect?' (2015) 33(1) Nordic Journal of Human Rights 1, 6
[35] House of Lords & House of Commons, Joint Committee on Human Rights, Protocol 15 to the European Convention on Human Rights, <https://publications.parliament.uk/pa/jt201415/jtselect/jtrights/71/71.pdf>, p. 17, accessed 06 Jan 2024.
[36] Ibid.
[37] Nikos Vogiatzis, 'When 'Reform' Meets Judicial Restraint': Protocol 15 Amending the European Convention on Human Rights' (2015) 66(2) NILQ 127, 141
[38] Vienna Convention on the Law of Treaties, UNTS, vol. 1155, May 1969

which "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in light of its object and purposes".[39] Considering the fact that the Preamble is a part of a Treaty[40], it has to pronounce "fundamental precepts" that the Court relies on when deciding on a case.[41]

On the other hand, Protocol No. 15 was not regarded as a "far-reaching measure of reform, but rather a modest package."[42] From my point of view, even if it is "a modest package", the benefits of inserting Protocol No.15 into the Preamble of the Convention are much more essential than not carrying out any reform at all. The key point is that the MoA is a judge-made doctrine that has been established in a case-law, but was not indicated in the ECHR itself. Therefore, it can be argued here that its incorporation can strengthen the Court's credibility and legitimacy and thus, there may be less criticism from Member States about invoking a doctrine that is a part of a founding document.

1.1. The Correlation between the MoA and European Consensus

The question of granting national authorities certain MoA has been a controversial issue. Therefore, it is important to sort out main concepts which are related to the doctrine. Particularly, wide, narrow and "certain" MoA doctrines are employed by the Court.[43] When the ECtHR employs a wide MoA, it means that the Court "applies self-restraint to the highest possible extent".[44] Therefore, in this case, the principle of subsidiarity plays a significant role. On the other hand, when national authorities are granted a narrow MoA, "the states are practically deprived of their right to a certain degree of legitimate difference and the Court now adopts its

[39] Ibid., Article 31 (1)
[40] Nikos Vogiatzis, 'When 'Reform' Meets Judicial Restraint': Protocol 15 Amending the European Convention on Human Rights' (2015) 66(2) NILQ 127, 141
[41] Ibid., at 142
[42] Dean Spielman, 'Whither the Margin of Appreciation?' (2014) 67(1) Current Legal Problems 49, 52.
[43] Martin Kopa, 'The Algorithm of the Margin of Appreciation Doctrine in Light of the Protocol No. 15 Amending the European Convention on Human Rights' (2014) 14(1) ICLR 37, 43
[44] Ibid.

role of a unifier".[45] As for the "certain" MoA, the concept itself should be a middle ground between the wide and narrow one. However, the Court's case-law does not clarify what is an idea behind it.[46]

The breadth of MoA is connected to the judge-made concept "European consensus". Even though the Court has not defined what is an actual meaning of the term,[47] it has been used in a number of ECHR judgements. The term "European consensus" means an agreement among Contracting Parties on issues "in an identical or significantly similar way".[48] Besides this, it is approached as a mediator between dynamic interpretation and margin of appreciation".[49] However, the ECtHR practice does require unanimity among Member States and therefore, a trend in laws can be sufficient to conclude potential existence of a consensus. In addition to that, "the Court is not looking for identical legal rules but rather tracing a convergence among States".[50]

If the MoA granted to the national authorities is narrow, it means that there is a consensus about the issue and therefore, "the burden of proof shifts from the applicant to the state".[51] There are some areas where narrow MoA is granted to the States: racial and ethnic discrimination, intimate aspect of private life, positive obligations arising out of absolute rights, such as right to life or right not be subject to torture or inhuman and degrading treatment, cases concerning an identity or the very existence of an individual, etc.[52] As for the wide MoA, the Court uses it in the following areas: national security, public emergency, protection of morals, social and economic areas of law, searching for a fair balance between conflicting Convention rights and public interests.[53]

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[45] Ibid., 44
[46] Ibid.
[47] Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press 2015) 11
[48] Ibid., 12
[49] Kanstantsin Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights (2011) 12 German Law Journal 1730, 1733
[50] Ibid.
[51] Martin Kopa, 'The Algorithm of the Margin of Appreciation Doctrine in Light of the Protocol No. 15 Amending the European Convention on Human Rights' (2014) 14(1) ICLR 37, 45
[52] Ibid.
[53] Ibid., 44

It is important to comment on the interplay between the MoA and freedom of religion under Article 9 of the Convention as the latter is one of main focus points in the present thesis. The Strasbourg Court addressed the doctrine MoA in a number of cases concerning freedom of religion. For example, in the *Şahin* case, the Respondent Governments enjoyed a wide MoA "where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance."[54] In addition to that, in both the *S.A.S* and *Lautsi* cases, the Strasbourg Court employed the wide MoA "because of the lack of European consensus on wearing religious dress".[55]

1.2. Justification and Criticism of the MoA

The MoA has its proponents and therefore, the use of the doctrine has been justified for several reasons. First of all, it is an expression of judicial restraint[56], meaning that the Court allows Member states to have a room for a manoeuvre with regard to certain issues. The MoA is used to "demarcate the room left for national sovereignty vis-à-vis supranational control".[57] Secondly, the MoA takes into consideration legal, social or cultural differences or similarities of Member states and thus, recognises whether there is European consensus in certain areas. It is a tool that advocates and endorses diversity among Contracting states. Thirdly, granting MoA to States implies that national authorities have more legitimacy to make the decisions than the ECtHR because these decisions stem from democratically elected bodies.[58] The same was confirmed in the *S.A.S. v. France* that concerned the prohibition of full-face covering in public space, the Court stated the following: "It is also important to emphasise the fundamentally

[54] Leyla Şahin v. Turkey App no 44744/98, para. 109 (ECtHR 10 November 2005)
[55] M. Lufti Chakim, 'The Margin of Appreciation and Freedom of Religion: Assessing standards of the European Court of Human Rights' (2020) 24(6) The International Journal of Human Rights 850, 861
[56] Eva Brems, The Margin of Appreciation Doctrine of the European Court of Human Rights: Accommodating Diversity within Europe in David P. Forsythe and Patrice C. McMahon (eds), *Human Rights and Diversity: Area Studies Revisited* (University of Nebraska Press 2003) 82
[57] Ibid.
[58] Francisco Javier Mena Parras, 'Democracy, Diversity and the Margin of Appreciation: A theoretical Analysis from the Perspective of the International and Constitutional Functions of the European Court of Human Rights' (2015) 29 Revista Electrónica de Estudios Internacionales 1, 14

subsidiary role of the Convention mechanism. The national authorities have direct democratic legitimation [...] in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, [...] the role of the domestic policy-maker should be given special weight".[59]

Despite use of the MoA in the ECtHR jurisprudence and inserting it into the Preamble of the Convention, the doctrine is far from ideal and it has been a matter of debate among the scholars. The first criticism of the MoA refers to the possible threat to the concept of universality of human rights.[60] In addition to that, if the MoA is applied liberally, "the doctrine can undermine seriously the promise of international enforcement of human rights that overcomes national policies".[61] In a similar vein, the MoA was described as a 'Trojan horse' for the purpose of fragmenting the unity and harmony of the established Convention standards."[62] Moreover, the use of the doctrine can lead to judicial double standards if different margins are allowed by the court in similar cases[63]. Benvenisti goes further by arguing that supporting national MoA can result in "national institutions to resist external review[64]" and thus, claiming that they are in a better position to decide on a case. Following the logic, Bentevisti does not rule out that such an approach could lead to undermining the authority of international human rights bodies and therefore, the idea of universal standards might be under threat.[65]

In addition to that, Some of the judges of the Court resonated with the criticism with regard to the doctrine. In his partly dissenting opinion, Judge De Meyer commented on the MoA the following: "I believe that it is high time for the Court to banish that concept from its reasoning. It has already delayed too long in abandoning this hackneyed phrase and recanting the relativism it implies. It is possible to envisage a margin of appreciation in certain domains… But

[59] S.A.S. v. France App no 43835/11, para. 129, (ECtHR 01 July 2014)
[60] Eyal Benvenisti, 'Margin of Appreciation, Consensus, and the Universal Standards' (1999) 31 NYU Int'l L & Pol. 843, 844
[61] Ibid.
[62] Yutaka Arai-Takashi, 'The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013) 81
[63] Eyal Benvenisti, 'Margin of Appreciation, Consensus, and the Universal Standards' (1999) 31 NYU Int'l L & Pol. 843, 844
[64] Ibid.
[65] Ibid.

where human rights are concerned, there is no room for a margin of appreciation which would enable the States to decide what is acceptable and what is not… the boundary not to be overstepped must be as clear and precise as possible. It is for the Court, not each state individually, to decide that issue…"[66]

The MoA has been criticised for its inconsistent application. Particularly, Gerards argues that the Court "hardly ever clarifies the consequences of the margin for the standards of review".[67] Besides this, there are cases in which the Respondent State is given wide MoA, but the Court is quite strict in its review and vice versa - the Court's test sometimes is lenient, whereas there is a narrow margin granted to the Member States[68]. Another issue that has been identified by Gerrards is that the Court does provide little or no explanation when there is a 'certain' MoA.[69] In addition to that, the ECtHR "may merely state, for example, in very general terms that a wide margin means that it has to apply a fair balance test".[70]

It can be a matter of discussion whether the changes in Protocol No. 15 have brought any significant changes for the functioning of the Strasbourg Court. On the one hand, one could argue that the inclusion of both MoA and subsidiarity doctrines is symbolic as the Court have been employing these concepts in its case law on a regular basis. In addition to that, while reading Protocol No. 15, it is clear that it lacks the clarification concerning the usage of the above-mentioned principles. However, I would argue that the inclusion of those principles in a written way strengthens the Court's legitimacy. On the other hand, it may encourage Member States to advocate for using a wide MoA in cases where social, cultural or historical values are at stake, including the relationship between religion and state. It can be said that the principle of secularism which is one of forms of relationship between state and religion and is discussed in the present thesis can be a more heated discussion point before the ECtHR because of the constitutionalisation of MoA. Before that I would analyse the case-law in which the Court tries

[66] Z v. Finland App no 22009/93 (ECtHR 25 February 1997)
[67] Janneke Gerards, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights' (2018) 18 Human Rights Law Review 495, 504
[68] Ibid.
[69] Ibid.
[70] Ibid.

to find the correct answers through concepts of principle of secularism and above-mentioned judge-made doctrines.

1.3. Conclusion of the First Chapter

The chapter analysed the concept of MoA which has been used by the ECtHR in a number of cases when invoking the principle of secularism. Since the research questions of the present thesis touch upon the relationship between the MoA and two subcategories - education and employment, it was necessary to define the above-mentioned judge-made doctrine and also, critical approaches that are prevalent among the scholars as well.

The concept of MoA is connected to another doctrine - European consensus. There is no clear definition of the concept itself, but the ECtHR employs it in a number of judgments to establish whether there is unanimity among Member States about certain issues. For the purposes of this thesis, both above-mentioned doctrines will be addressed. However, based on the case-law of the ECtHR, analysed in the following chapters, it is distinct that Member States are given a wide MoA in the judgements in which the principle of secularism was invoked under Article 9 Article 2 of Protocol No. 1 of the Convention. It gets more apparent in cases related to the employed in public sectors or students in public education establishments.

CHAPTER II. PRINCIPLE OF SECULARISM AND THE ECTHR CASES REGARDING EDUCATION

The ECtHR has addressed the principle of secularism in a number of judgements within Article 9 (freedom of religion or belief) of the Convention. In these cases, the Court employed the principle of secularism as a justification to infringe an individuals' rights under Article 9 and Article 2 of Protocol No. 1 of the ECHR. The following chapter will analyse cases related to educational institutions which encompass the period starting from 2005 up to the current time.

The principle of secularism under the case law of the ECtHR, primarily, stems from Article 9 of the ECHR. The essence and significance of the article can be observed in the *Kokkinakis* case, which remarked that "freedom of thought, consciences and religion is one the foundations of a 'democratic society' within the meaning of the Convention'".[71] It can be divided into two parts. Based on Article 9(1), everyone has the right to have or change a religion or belief (so-called *forum internum*), whereas Article 9(2) indicates the right to "manifest" religion or belief (so-called *forum externum*).[72] However, there is no definition of the concepts, such as 'religion' and 'belief' and thus, "the ECtHR understands 'belief' broadly, as including not only established religions but also deeply held convictions such as pacifism or veganism".[73]

The ECHR and its Protocols make a reference to the right to education only in Article 2 of Protocol 1.[74] It can be said that the right itself "belongs to the category of economic, social, and cultural right".[75] Apart from that, even though the article does mention any exceptions, the right is not absolute and it can be subject to some limitations.[76] Compared to other ECHR articles, there is no particular list of legitimate aims with regard to the right to education.

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[71] Malcolm Evans, 'The Freedom of Religion or Belief in the ECHR since Kokkinakis or 'Quoting Kokkinakis' 2017 12 Religion and Human Rights 83, 83

[72] Guilia Evolvi and Mauro Gatti, 'Proselytism and Ostentation: a Critical Discourse Analysis of the European Court of Human Rights' Case Law on Religious Symbols' (2021) 14 Journal of Religion in Europe 162, 170

[73] Ibid.

[74] European Convention on Human Rights (adopted 4 Nov 1950, entered into force 3 Sep 1953), Article 2 of Protocol No. 1

[75] William A. Schabas, *The European Convention on Human Rights: Commentary* (OUP 2015) 986

[76] Ibid., p. 996.

Article 2 of Protocol No. 1 of the Convention safeguards the right to education and recognises the prerogative of parents to ensure that their children receive schooling consistent with their religious or philosophical convictions.[77] It implies that the states have to respect parents' decisions when it comes to educating children. However, the term 'respect' has both "a positive as well as a negative obligation, meaning more than 'acknowledge' or 'take into account'".[78]

It is important to make some clarification with the wording of the article as well. The latter mentions the word 'conviction' that does not have the same meaning as the words 'opinions' and 'ideas'[79]. The word is "more akin to the term 'beliefs'".[80]

Considering the fact that the chapter delves into the discussion of the principle of secularism and its possible invocation under Article 2 of the Protocol No.1, it has to be mentioned that the article applies to both State and private teaching.[81]

2.1. Principle of Secularism and Wearing of Religious Symbols or Clothing at School and at University

2.1.1. Students - Case against Turkey

The case dealt with a student at the Faculty of Medicine at Istanbul University, who was refused to enter lectures and examinations due to wearing Islamic headscarf after the Vice-Chancellor of Istanbul University issued a circular.[82] As a result, the applicant lodged an application with the Istanbul Administrative Court for an order revoking the circular. However, the application was dismissed as "neither the regulations in issue, nor the measures taken against

[77] European Convention on Human Rights (adopted 4 Nov 1950, entered into force 3 Sep 1953), Article 2 of Protocol No. 1.
[78] William A. Schabas, *The European Convention on Human Rights: Commentary* (OUP 2015) 1001
[79] Ibid.
[80] Ibid.
[81] Folgerø and others v. Norway App no 15472/02, para. 84, (ECtHR 29 June 2007)
[82] Leyla Şahin v. Turkey App no 44744/98, para. 15-16, (ECtHR 10 November 2005)

the applicant, could be considered illegal".[83] An applicant, Leyla Şahin, continued wearing the headscarf and firstly, she got a warning and then she was suspended from the university for a semester.[84] Şahin appealed before the ECtHR and argued that her rights and freedom under Articles 8, 9, 10 and 14 of the Convention and Article 2 of Protocol No. 1 had been violated by prohibitions on wearing the Islamic headscarf in institutions of higher education.[85]

It is important to mention that the Turkish Constitutional Court, before the case was brought to the ECtHR, addressed the issue of secularism by stating that it "had acquired constitutional status by reason of the historical experience of the country and particularities of Islam compared to other religions; secularism was an essential condition for democracy and acted as guarantor of freedom of religion and of equality before the law".[86] Besides this, the Court elaborated that the principle was necessary to not to allow discrimination between practising Muslims and non-practicing Muslims.[87] In addition to that, secularism in Turkey not only creates a level playing field for both religious believers and non-believers, but also it "served to protect the individual not only against arbitrary interference by the State but from external pressure from extremist movements".[88]

As for the proceedings before the ECtHR, it is one of the first judgements in education cases in which the Strasbourg Court employed the concept of secularism under Article 9 of the Convention to justify the restriction imposed on the applicant. Specifically, the Court agreed with Chamber's decision and held that the notion of secularism is consistent with the values of the ECHR.[89] In addition to that, the Court addressed whether there was an interference in applicant's right under Article 9 and if so, whether it was 'prescribed by law', had a 'legitimate aim' and was 'necessary in a democratic society' under Article 9, paragraph 2 of the Convention.[90] In this regard, the Court found out that the applicant's freedom of religion was interfered with and it

[83] Ibid., para 20.
[84] Ibid., para. 24.
[85] Ibid., para. 3.
[86] Ibid., para. 39.
[87] Ibid.
[88] Ibid., para. 113.
[89] Ibid., para. 114.
[90] Ibid., para. 75.

was prescribed by law.[91] Limitation was deemed necessary in a democratic society to protect the rights and freedoms of others and public order.[92]

Another issue which was addressed by the Court was the MoA. Generally, states are given a wide MoA when a state's policy is inclined to be more neutral.[93] In this case, the Court followed the suit and Turkey enjoyed a significant MoA based on the subsidiarity principle: "Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance".[94] Besides this, the Court corroborated his argument by adding that there was no European consensus with regard to regulating the wearing of religious symbols in Member States and thus, national authorities were in a better position to make a decision.[95] However, in her dissenting opinion, Judge Tulkens argued that the Respondent State should not be given a wide MoA as "none of the member States has the ban on wearing religious symbols extended to university education"[96], meaning that there was European consensus on regulating the wearing of religious symbols. Apart from that, the judgement did not provide European supervision and Turkey was granted a wide MoA without elaborating it.

It is worth mentioning that even though the Court found no violation of Article 9 of the ECHR, the judgement has left many unanswered questions. To start with, the Grand Chamber agreed with the Chamber's position about the Contracting States' right to take a stance against political movements that could potentially pose a threat to society and public order taking into account historical experience.[97] However, the Court did not investigate what could be a potential threat if ban was not imposed on wearing a religious symbol. In addition to that, the applicant argued that "there had been no sign of tension in institutions of higher education that would have justified such a radical measure".[98] Judge Tulkins commented that "merely wearing the headscarf cannot be associated with fundamentalism and it is vital to distinguish between those who wear

[91] Ibid., para. 76-79.
[92] Ibid., para. 110.
[93] Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing 2008) 106
[94] Leyla Şahin v. Turkey App no 44744/98, para. 15-16, (ECtHR 10 November 2005), para. 109.
[95] Ibid.
[96] Ibid., dissenting opinion of Judge Tulkens, para. 3.
[97] Ibid., para. 115.
[98] Ibid., para. 100.

the headscarf and "extremists" who seek to impose the headscarf as they do other religious symbols. Not all women who wear the headscarf are fundamentalists and there is nothing to suggest that the applicant held fundamentalist views".[99] Therefore, it can be argued that in such cases, when there is a blanket ban that results in interference in applicant's fundamental right, the Court has to provide more arguments to be more persuasive.

2.1.2. Pupils - Case against Turkey

Shortly after the judgement in *Leyla Şahin v. Turkey*, the ECtHR found the applicant's submission inadmissible.[100] The case concerned a ban on wearing an Islamic headscarf during classes in public schools. Like in the *Şahin* case, the directive was issued by Istanbul's Regional Governor's Office that imposed the dress code on students and thus, restricted the applicants' right to freedom of religion.[101] It was argued that there was a violation under Article 9 of the Convention and such restriction from school authorities constituted a discrimination towards Muslims.

The Court in this case reiterated that "secularism is the cornerstone of the Turkish State-education system."[102] Therefore, national authorities decide themselves how to interpret and apply domestic law. Besides this, the Court mentioned that allowing pupils wearing the Islamic headscarf is against secularism and women's freedom and fundamental principles.[103]

It is important to mention that the applicants complained that their rights under the second sentence of Article 2 of Protocol No. 1 have been violated. Specifically, their children were enrolled under the assumption that they would get an education consistent with their religious beliefs. However, the Court observed that even though the main task of the educational institution was to train future religious functionaries, they are not religious schools, they are part

[99] Ibid., dissenting opinion of Judge Tulkens, para. 10.
[100] Köse and Others v. Turkey App no 26625/02 (ECtHR 24 January 2006)
[101] Ibid., p. 1
[102] Ibid., p. 10
[103] Ibid.

of the State education system and operate in conformity with the principle of secularism.[104] As a result, Member States have an obligation to be a neutral arbiter and protect religious pluralism and this becomes more apparent when there is a principle of secularism stipulated in the constitution of the Contracting State.

This judgement, like in *Şahin* case, comments on the MoA and states that the national authorities enjoy a "certain margin of appreciation", but it is up to the Court to decide what are the Convention requirements in a specific case.[105] However, considering the fact that the judgement resembles the *Şahin* case in terms of imposing a ban on wearing religious attire, the Court did not use the wording "a wide MoA" that leaves some questions unanswered. Does it mean that in this case "a wide MoA" has the similar meaning as "a certain MoA"? It can be argued that even though the "certain" MoA is used as a middle ground between the wide and narrow ones, there is still ambiguity how the Court employs that concept.

Another issue that arose from the judgement is the Court's overall reasoning with respect to the complaints under Articles 3, 8, 10, 13 and 14 of the Convention and Article 1 of Protocol No.1. The Court stated that "The manifest purpose of the rules is to preserve neutrality and secularism within schools - thus protecting adolescents at an age when they are impressionable - and to protect the interests of the education system".[106] In the *Şahin* case, the principle of secularism has been defined by the Constitutional Court[107] and it became the ground for invoking a ban on wearing a headscarf in educational institutions in Turkey. However, in the Köse case, the Strasbourg Court not only mentions the principle of secularism which could be protected by allowing a restriction on religious attire, but also refers to neutrality as well. Can it be argued that these concepts are used interchangeably and have the same meaning?

It is noteworthy to mention that the concept of neutrality is one of the foundational principles on which the notions of freedom of religion, conscience and thought rests upon.[108] As

[104] Ibid., p. 13.
[105] Ibid., p.10
[106] Ibid., p. 15.
[107] Leyla Şahin v. Turkey App no 44744/98, para. 39, (ECtHR 10 November 2005)
[108] Alice Ollino, 'Modes of Neutrality in the ECtHR Jurisprudence Related to Religious Matters: Some Critical Remarks' (2018) 31 Stato, Chiese e Pluralismo confessionale 1, 2

Pin states "neutrality is an attitude that does not endorse or prefer any religious denomination or belief and is implied by the same religious freedom that the European Convention enforces…".[109] The definition of State neutrality in the context of ECtHR is flexible for two reasons: Firstly, the idea of State neutrality can be interpreted in various ways. For example, it can be understood as impartiality, meaning "the State shall not only refrain from imposing certain understanding of the good, but it should to some extent ensure equidistance with regard to different ideological conceptions".[110] On the other hand, State neutrality may imply State's indifference "toward preferences that individuals seek to maximise".[111] Secondly, State neutrality as a concept is flexible because all Contracting States of the ECHR have their understanding of the relationship between state and religion and they differ throughout Europe. Therefore, the ECtHR can not impose on Member States a model of state-religion relationship that can be suitable for everyone.

The flexibility of the concept of State neutrality can be still narrowed down on a general level. Ringelheim defines the duty of states to be neutral as refraining from "forbidding, imposing, or deliberately promoting one particular religious or philosophical doctrine".[112] Apart from that, Ringelheim argues that there are three concepts of neutrality: the first one refers to neutrality as absence of coercion, meaning that states can not impose religion or belief on people. The second approach defines neutrality as absence of preference. The latter defines the state as neutral "if it abstains from expressing a preference for a religion in its institutions".[113] Compared to the first concept, the second one obliges the state "not only abstain from imposing a religion on but also refrain from promoting a faith and trying to influence an individual's conscience".[114] As for the third approach, she argues that any visibility of religion should be excluded in public institutions. Apart from that, "Any outward manifestation of religion in the physical space of official institutions compromises state neutrality and threatens freedom of conscience and equality. Thus, in order to appear strictly neutral, the state would have to ban religious expression from its institutions and confine the manifestation of religion to the private sphere".[115] It should

[109] Andrea Pin, '(European) Stars or (American) Stripes: Are the European Court of Human Rights' Neutrality and the Supreme Court's Wall of Separation One and the Same?' (2011) 85(2) St. John's Law Review 627, 635
[110] Ibid.
[111] Ibid.
[112] Julie Ringelheim, 'State Religious Neutrality as a Common European Standard? Re-Appraising the European Court of Human Rights Approach' (2017) 6(1) Oxford Journal of Law and Religion 1, 5
[113] Ibid., 9.
[114] Ibid.
[115] Ibid.

be added that the third approach is used not by applicants, but by the Contracting States to justify interference in one's religious beliefs. For example, in *Şahin* case, the applicant was banned from wearing a headscarf in a public university. The Court accepted the Respondent State's argument based on a principle of secularism stipulated in Turkey's Constitution and therefore, did not find a violation of Article 9 of the Convention. Similar justification was employed in *Köse* case as well, in which the Court justified restriction of the applicant's right by "by the legitimate aim of preserving the neutral character of secondary education, which is intended to protect adolescents when they are at an impressionable age".[116]

Besides this, Uitz states that state neutrality is not an autonomous concept under the Convention when it comes to discussing headscarf cases.[117] Instead, such a justification comes from constitutional law of the member states. As mentioned above, in both *Şahin* and *Köse* cases, the Respondent Government accepted the decision of the Turkish Constitutional Court to justify the interference in the applicant's rights. The ECtHR accepted the arguments from the Government and the principle of secularism was regarded as a legitimate basis for interfering in one's belief.

Therefore, addressing the above-stated question whether the concept of secularism and neutrality have the same meaning under the Convention, it can be argued that even though state neutrality is not stipulated in the ECHR, it is implied in the concept of secularism. The third approach of state neutrality that excludes any visibility of religion in public institutions can be equated with the concept of secularism which was stated by the Constitutional Court of Turkey: "The principle prevented the State from manifesting a preference for a particular religion or belief; it thereby guided the State in its role of impartial arbiter, and necessarily entailed freedom of religion and conscience."[118] Even though the Strasbourg Court did not use the word 'neutrality' in some its decisions related to headscarf wearing, it accepted the arguments from the Respondent States that wearing of religious attires in universities can affect state neutrality of these educational institutions and therefore, states are given a wide MoA to decide themselves

[116] Köse and Others v. Turkey App no 26625/02, p.12, (ECtHR 24 January 2006)
[117] Renàta Uitz, 'Religion and Equality: From Managing Pluralism towards a European Requirement of State Neutrality in Jeroen Temperman, T. Jeremy Gunn and Malcolm D. Evans (eds), *The European Court of Human Rights and the Freedom of Religion and Belief: The 25 Years since Kokkinakis* (Brill | Nijhoff 2019) 226
[118] Leyla Şahin v. Turkey App no 44744/98, para. 113, (ECtHR 10 November 2005)

which public order is suitable. Until now, in both cases related to Turkey the government employs the third model of state neutrality and the Court has accepted the arguments offered by the Respondent Government.

2.1.2. Pupils - Cases against France and Switzerland

Due to the similarity of the context of the cases, it is appropriate not to separate them, but cover their analysis in one section. However, particular attention will be paid to a *Dogru* case.

In both cases, girls decided to wear their headscarves during physical education and sports classes. The applicant was expelled from school" for breaching the duty of assiduity by failing to participate actively in physical education and sports classes".[119] The decision was appealed to the Director of Education for Caen, but it was not accepted on several grounds, including "health and safety rules".[120]

These judgements indicate that the ECtHR has continued its approach and used secularism as one of the main justifications to infringe the applicant's freedom of religion.[121] It has been confirmed by the Court's argumentation additionally when citing *Şahin*'s case with regard to the principle of secularism.[122] Apart from that, the Court has commented on whether interference was "prescribed by law", had "legitimate aims", and was necessary in "a democratic society". The Court concluded that "at the material time there was no legal provision explicitly prohibiting pupils from wearing the headscarf during physical education classes"[123], but it was still "prescribed by law" because the Minister for Education, the *Conseil d'Etat,* gave school principals instructions regarding implementation of their disciplinary power in this regard.[124]

[119] Dogru v. France App no 27058/05, para. 8 (ECtHR 4 March 2009)
[120] Ibid., para.10.
[121] Ibid., para 69-72.
[122] Ibid., para. 37.
[123] Ibid., para. 50.
[124] Ibid., para. 56.

However, Hashmi argues that there was no headscarf ban when the applicant was expelled.[125] The Court also stated that legitimate aims included protecting the rights and freedoms of others and protecting public order. It is found that the headscarf ban was "necessary in a democratic society".[126]

It is important to comment on the arguments that were proposed by the Court as a justification to allow the Respondent State to interfere with the right to wear the headscarf. Firstly, it was mentioned in the case that the ban could be justified on grounds of "compliance with the school rules on health, safety and assiduity which were applicable to all pupils without distinction".[127] However, the Court did not mention how wearing the headscarf would be connected to health or safety issues.[128] Secondly, the restriction on the freedom of the applicant's right was placed due to the State's role as "the neutral and impartial organiser of the exercise of various religions, faiths and beliefs".[129] The Court emphasised France's obligation to act neutrally to protect other religions and beliefs. In doing so, the Respondent State was given a wide MoA: "the role of the national decision-making body must be given special importance".[130] It is clear that like in the *Köse* case, the judgement of the *Dogru* case indicates the concept of neutrality as exclusion of religion from the public sphere.

However, Gunn argues that the absence of convincing arguments provided by the Respondent State raises some questions.[131] It was proved that the Respondent State acted neutrally and therefore, did not violate the Article 9 of the Convention. On top of that, Gunn adds that the laïcite principle, which advocates for a strict separation of state and religious

[125] Hera Hashmi, 'Too Much to Bare? A Comparative Analysis of the Headscarf in France, Turkey and the United States' (2010) 10(2) U. Md. L.J. Race Relig. Gender & Class 409, 424
[126] Dogru v. France App no 27058/05, para. 61 (ECtHR 4 March 2009)
[127] Dogru v. France App no 27058/05, para. 68 (ECtHR 4 March 2009)
[128] T. Jeremy Gunn, 'The "Principle of Secularism" and the European Court of Human Rights: A Shall Game' in T. Jeremy Gunn and Malcolm D. Evans (eds), *The European Court of Human Rights and the Freedom of Religion and Belief: The 25 Years since Kokkinakis* (Brill | Nijhoff 2019) 550
[129] Dogru v. France App no 27058/05, para. 62 (ECtHR 4 March 2009)
[130] Ibid., para. 63.
[131] T. Jeremy Gunn, 'The "Principle of Secularism" and the European Court of Human Rights: A Shall Game', in T. Jeremy Gunn and Malcolm D. Evans (eds), *The European Court of Human Rights and the Freedom of Religion and Belief: The 25 Years since Kokkinakis* (Brill | Nijhoff 2019) 552

communities, was modified after the new French 2004 Law.[132] The latter "reversed the law as understood by the Council of State and the High Council of Integration…".[133]

After *Dogru and* the *Kervanci cases*, the Strasbourg Court delivered a similar judgement in the *Osmanoğlu* case. The case concerned the refusal to Muslim pupils to be exempted from compulsory mixed-sex swimming classes in Swiss public schools. The applicants (students' parents) argued that they act based on their religious beliefs and therefore, they want their daughters to follow their convictions.[134] Furthermore, they stated that even though it was not indicated in Koran that womens' bodies should be covered until puberty, they wanted their daughters to be prepared for this moment. Although there were attempts of conciliation, the conflict between the parents and the school ended in the Federal Supreme Court.

The Court accepted the arguments brought forward by the Swiss Government and found out that there are some exceptions that could be justified in the process of social integration, but it should be only in very exceptional circumstances.[135] Apart from that, the Court considered that swimming is crucial for children's development and health.[136] It is also important to mention that the ECtHR took into consideration the Swiss Government's argument about offering a flexible arrangement. Namely, the students were allowed to wear burkini to the swimming lessons, but the parents argued that it would be stigmatising for their daughters. Overall, the Strasbourg Court did not find a violation of Article 9 of the Convention.

From the all above-mentioned cases it can be concluded that the Strasbourg Court granted Respondent Governments a wide MoA when it comes to the relationship between the state and religion.[137] Besides this, the ECtHR took into consideration that physical education classes took place in public schools and therefore, states enjoy a "considerable MoA".[138]

[132] Ibid.
[133] Ibid.
[134] Osmanoğlu and Kocabaş v. Switzerland App no 29086/12, para. 9 (ECtHR 10 January 2017)
[135] Ibid., para. 96.
[136] Ibid., para. 98.
[137] Ibid., para. 87.
[138] Ibid., para. 95.

Another group of cases[139] in which France was the Respondent Government, Muslim school-aged children wore religious attires (Girls Islamic headscarves to cover their hair and some young men Sikh keski or under-turban). All the pupils were expelled from the school because their accessories were in breach of a French law passed in 2004 prohibiting the wearing of all conspicuous signs of religious faith during lessons.[140]

All cases were found as inadmissible under Article 9 of the Convention. Even though the expulsion of pupils was a restriction on their freedom to manifest their religion, it "meant to protect the constitutional principle of secularity, an aim in keeping with the values underlying the Convention and the Court's case-law".[141] The Strasbourg Court once again has justified a restriction based on the principle of secularism that had a constitutional value in France. Apart from that, the Respondent Government was afforded a MoA which is not an exception itself.

2.2. Principle of Secularism and Religious Teaching (Alevi) in Schools

Both the *Zengin* and the *Yalçin* judgements, delivered by the ECtHR, addressed the issue of parent's freedom to ensure their children an education based on their religious and philosophical convictions in Turkey in 2007 and 2014, respectively. These cases have similar context and thus, the following paragraph will analyse the *Zengin* judgement because of the Strasbourg Court's clear emphasis on the principle of secularism. However, the *Yalçin* case will be used to observe if there is any trend in the ECtHR's analysis.

The *Zengin* case showed the inconsistency of Turkish law with the freedom of religion under the ECHR. The applicant who was an adherent of Alevism - it is a branch of Islam which rejects sharia and sunna and defend freedom of religion, human rights, women's rights, humanism, democracy, rationalism, modernism, universalism, tolerance and secularism[142] -

[139] Bayrak v. France, Aktas v. France, Gamaleddyn v. France, Ghazal v. France, Jasvir Singh v. France and Ranjit Singh v. France
[140] Bayrak v. France App no 14308/08 (ECtHR, 30 June 2009)
[141] Ibid.
[142] Hasan and Eylem Zengin v. Turkey App no 1448/04, para. 9 (ECtHR 9 October 2007)

requested the Provincial Directorate of National Education for his daughter to be exempt from religious and ethics classes.[143] The argument behind exemption from the classes proposed by the parent was twofold: Firstly, parents had the right to choose what type of education their children could get and secondly, mandatory education in classes was against the principle of secularism.

However, the applicant's request was not accepted and his daughter was not exempted from religious and ethics classes based on an argument that these are compulsory subjects in primary and upper secondary schools which have to be taught and they are under State supervision and control.[144] The applicant appealed the decision in Istanbul Administrative Court and argued that religious classes were based on the fundamental rules of Hanafite Islam that were against their belief. However, the Court rejected the parent's appeal and provided the same argument as the Provincial Directorate of National Education.[145] As a result, the applicants filed an application in the ECtHR, arguing that their rights were violated under Article 9 and second sentence of Article 2 of Protocol No. 1 of the Convention.

The judgement is important to assess how the Strasbourg Court sees the principle of secularism in state schools when it comes to teaching religious and ethics classes. Therefore, the Court not only gave general remarks about compatibility of Turkish law with freedom of religion under the ECHR, but also checked the substance of the course syllabus and textbooks. Indeed, the syllabus provided that "the subject is to be taught in compliance with respect for the principles of secularism and freedom of thought, religion and conscience and is intended to "foster a culture of peace and a context of tolerance".[146]

The Court observed that the intentions of the syllabus were compatible with Article 2 of Protocol No. 1. In addition to that, the principle of secularism is stipulated in the Turkish Constitution which "prevents the State from manifesting a preference for a particular religion or belief, thereby guiding the State in its role of impartial arbiter, and necessarily entails freedom of religion and conscience".[147] However, the Strasbourg Court noted that the syllabus, in its essence,

[143] Ibid., para. 10.
[144] Ibid., para. 11.
[145] Ibid., para. 15.
[146] Ibid., para. 58.
[147] Ibid., para. 59.

did not have a general character and provided the instruction about the fundamental aspects of Islam, such as ""pilgrimage and sacrifice", "angels and other invisible creatures" and "belief in the other world"."[148] In addition to that, the Strasbourg Court concluded that giving priority to knowledge of Islam in the textbooks was not considered as an indoctrination.[149]

What was problematic in the judgement is the applicant's allegation that there was a lack of teaching of Alevi faith or its rituals in school lessons. The Court took several points into consideration: First of all, it paid attention to the fact that Alevism has many supporters in Turkish society and therefore, not teaching that belief and instead of that, focusing on Sunni understanding of Islam can not fall under the objective criteria for the purpose of the second sentence of Article 2 of Protocol No. 1.[150] Apart from that, the Court took into account the Supreme Council for Education's decision of 9 July 1990, which allowed children of Turkish nationality who belong to the Christian or Jewish religion to be exempted from religious classes.[151] This decision did not ensure that the adherents of other religious beliefs could get the same treatment as above-mentioned two religions. Therefore, the interests of the concerned applicants were not taken into account, leading to the violation of Article 2 of Protocol No. 1.

As for the *Yalçin* case, the Strasbourg Court discussed a similar issue - passive freedom of education - once more. The latter which is guaranteed under the ECHR is "the right of parents to choose a school in accordance with their religious/philosophical/pedagogical convictions".[152] The definition is closely connected to "active freedom of education" which allows "parents, (religious) associations, churches, etc., to establish their own schools".[153] In both *Hasan* and *Yalçin* cases, the Respondent State violated the Convention and apart from that, Turkey has become the only country that has lost two cases before the ECtHR concerning the parent's freedom to choose the education for their children in accordance with their religious or philosophical convictions.[154]

[148] Ibid., para. 60.
[149] Ibid., para. 63.
[150] Ibid., para. 68.
[151] Ibid., para. 72.
[152] Leni Franken and Gerdien Bertram-Troost, 'Passive Freedom of Education: Educational Choice in Flanders and the Netherlands' (2022) 13(1) Religions 1,1
[153] Ibid.
[154] Recep Kaymakcan and Abdurrahman Hendek, 'European Court of Human Rights' Judgements and Compulsory Religious Education in Turkey' (2022) 44(4) British Journal of Religious Education 444, 444

Comparing both the *Zengin* and the *Yalçin* judgements, I would argue that the ECtHR set the comprehensible criteria for State educational establishments and their mandatory classes regarding the principle of secularism under the ECHR. The Strasbourg Court paid much attention to the substance of the course syllabus and textbooks and even though, in the *Yalçin* case "the content of the subject in question has undergone significant changes"[155], the ECtHR concluded that the applicant's right was still violated because there was not an appropriate exemption mechanism which was provided by the Turkish education system in a very limited scope.[156]

2.3. Principle of Secularism and Display of Religious Symbols in State-school Classrooms

In March 2011, the Grand Chamber of the ECtHR reversed the decision of the Court's Second Section in Lautsi v. Italy[157] and found out that the presence of religious symbols in the classroom was compatible with the principle of secularism and it was not a violation of Article 2 of Protocol No.1.

The case concerned the display of a crucifix in state schools. The applicant, Soile Lautsi, filed an application on her children's behalf against the Republic of Italy. She stated that keeping religious symbols in the classroom was an infringement of freedom of religion stipulated in the Italian Constitution and Article 9 of the Convention. In national proceedings, the Italian Courts dismissed the applicant's request on the ground that "crucifix was a historical and cultural symbol, possessing on that account an "identity-linked value" for the Italian people, in that it "represent[ed] in a way the historical and cultural development characteristic of [Italy]".[158] Besides this, the religious symbol was considered as a "value system underpinning the Italian Constitution".[159] In addition to that, the Italian Courts went on saying that the crucifix could be fulfilled – even in a "secular perspective distinct from the religious perspective to which it

[155] Mansur Yalçin and others v. Turkey App no 21163/11, para. 66 (ECtHR, 16 September 2014)
[156] Ibid., para. 76.
[157] Lautsi v. Italy App no 30814/06 (ECtHR, 18 March 2011)
[158] Ibid., para. 15.
[159] Ibid.

specifically referred – a highly educational symbolic function, irrespective of the religion professed by the pupils".[160] As a result, the applicant lodged an application against Italy as her request was not satisfied on a national level.

The Grand Chamber's judgement has sparked a huge wave of debates on a number of issues not only among scholars, but also among the representatives of other spheres as well.[161] The case was unprecedented as a number of countries intervened as *amici curiae*.[162] Eleven countries expressed doubts about the Court's decision and urged for the preservation of national and religious identities and traditions.[163]

The first issue that has become a matter of debate was the Court's recognition of the crucifix as a passive symbol.[164] It is noteworthy to mention that by this decision the Grand Chamber went against the Second Section's decision, which determined that the crucifix was a "powerful external symbol".[165] It was powerful because it was associated with the school environment and the students studying there would have a feeling of "being brought up in an environment marked by a particular religion supported by the State".[166] Some authors argued Italy developed the concept of a "passive symbol" to create an impression that *Lautsi* case is not similar to other cases which are about mandatory religious teaching.[167] The ambiguity about the issue of crucifix's role and influence in the classroom was preceded by the Court's statement that presence of a religious symbol refers to Christianity, but "it is not in itself sufficient, however, to denote a process of indoctrination on the respondent State's part and establish a breach of the requirements of Article 2 of Protocol No. 1".[168] However, the Court did not provide the argument how the crucifix can not play a role when displayed in the schools. Nor the sufficient comments were given what is a difference between 'passive' and 'powerful external' symbols. It is

[160] Ibid., para. 16.
[161] Sebastián Guidi, 'Law Over Legalism: International Court Legitimacy in Lautsi v. Italy' (2023) 33(1) Duke J. Comp. & Int'L 45, 47
[162] Grégor Puppinck, 'The Case of Lautsi v. Italy: A Synthesis' (2012) 3(7) BYU. L. Rev. 873, 886.
[163] Ibid.
[164] Lautsi v. Italy App no 30814/06, para. 72 (ECtHR, 18 March 2011)
[165] Ibid., para. 73.
[166] Grégor Puppinck, 'The Case of Lautsi v. Italy: A Synthesis' (2012) 3(7) BYU. L. Rev. 873, 900.
[167] Ibid., 873, 901.
[168] Lautsi v. Italy App no 30814/06, para. 71 (ECtHR, 18 March 2011)

undeniable that the crucifixion of Christ evokes emotions and affects people's lives positively.[169] As Lorenzo Zucca mentions, the idea of symbols is "to convey meaning without engaging in speech or actions".[170] Also, the Grand Chamber ('GC') stated[171] that the presence of religious symbols has less impact than the effect of speech "which is counterintuitive in Western societies, where there is consensus on the impact of visual culture through media".[172] Besides this, the GC provided another shaky argument by correcting the Second Chamber's decision and arguing that the display of crucifix did not pose a risk of emotional disturbance.[173] The GC justified this point by pointing out that it was only a "subjective perception" that is not sufficient to establish a breach of Article 2 of Protocol No. 1.[174] As one author indicates, the Court should not have commented on this issue without providing a strong justification as even slight impact of the crucifix is the real *ratio decidendi*.[175] However, it would have been interpreted as the Court's inability to deal with landmark cases[176] and therefore, affected the Court's legitimacy in the future.

Another issue that is worth mentioning is the concept of neutrality and its application in the *Lautsi* case. The Court concluded that "States have responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs."[177] However, the Convention does not mention the term 'neutrality' as such in order to have a clear understanding of the meaning of it in the *Lautsi* case. Therefore, state neutrality can be interpreted from the point of philosophy that may facilitate comprehending the Court's approach.

As Pierik and van der Burg explain, the idea behind the conceptions of neutrality is adopting "a wide variety of plans of life and endorse different views about what makes life

[169] Lorenzo Zucca, 'A Commentary on a Decision by the ECtHR Grand Chamber' 2013 11(1) Int.J. Const. Law 218, 220
[170] Ibid.
[171] Lautsi v. Italy App no 30814/06, para. 72 (ECtHR, 18 March 2011)
[172] Lorenzo Zucca, 'A Commentary on a Decision by the ECtHR Grand Chamber' 2013 11(1) Int.J. Const. Law 218, 220
[173] Lautsi v. Italy App no 30814/06, concurring opinion of Judge Power (ECtHR, 18 March 2011)
[174] Ibid., para. 66.
[175] Grégor Puppinck, 'The Case of Lautsi v. Italy: A Synthesis' (2012) 3(7) BYU. L. Rev. 873, 903.
[176] Ibid.
[177] Lautsi v. Italy App no 30814/06, para. 59-61 (ECtHR, 18 March 2011)

valuable."[178] The government does not have to impose sanctions or incentives on individuals and their own perspectives about the above-mentioned concept, but "provide an impartial framework within which each citizen can pursue the good life as (s)he sees it."[179]

The authors offer two different ideas behind the concept of neutrality. The first one is *exclusive neutrality*, which advocates for a state that is indifferent to religious and cultural distinctions. Following this perspective, all forms of religious or cultural representation, including arguments, organisations, and symbols, have to be eliminated from the public domain.[180] In contrast, the second concept of neutrality - *inclusive neutrality* - asserts that within political dialogues and governmental strategies, consideration should be given to religious and cultural diversities. Therefore, individuals have freedom to assemble in the public arena based on religious and cultural beliefs and views. However, within this framework, neutrality means that some religions should not be given an unfair advantage and privileges.[181]

Based on these definitions, one can reflect on the Court's approach in the *Lautsi* case. The applicant in that case advocated for exclusive neutrality, so she wanted the crucifixes to be banned from the walls of classrooms. On the other hand, the Italian Government tried to argue that the crucifix was not related to the concept of neutrality invoking two following points: the first one was connected to the Italian Constitution, which mentions Catholic Church and therefore, presence of crucifix has a direct link to the Italy's main legal document. According to the second argument, the crucifix is a religious symbol. However, it is compatible with the notion of secularism and its followers as such.[182]

When it comes to comparing the positions of the Second and Grand Chambers of the ECtHR, it can be argued that the former supports the idea of exclusive neutrality by stating the following: states have an obligation "to refrain from imposing beliefs, even indirectly, in places where persons are dependent on it in places where they are particularly vulnerable."[183] As for the

[178] Roland Pierik and Wibren van der Burg, 'The Neutral State and the Mandatory Crucifix' (2011) 6(3) Religion and Human Rights 267, 268
[179] Ibid.
[180] Ibid.
[181] Ibid.
[182] Ibid., 270.
[183] Ibid.

GC, it concluded that Italy enjoyed a wide MoA and also, "there is no evidence … that the display of a religious symbol on classroom walls may have an influence on pupils."[184] However, some authors think that the Court's approach was in violation with the concept of state neutrality. Crucifix, as a religious symbol, can be an "exclusive and even offensive symbol".[185] Historically speaking, there are particular groups which were oppressed by the Roman Catholic Church, such as homosexual, divorced women or atheists. Therefore, claim of the Italian administrative court that "the crucifix should be regarded not only as a symbol of a historical and cultural development, and therefore of the identity of our people, but also as a symbol of a value system"[186] is not completely correct.

After discussing the concepts of inclusive and exclusive neutrality, it is obvious that the latter was not accepted before the ECtHR. Therefore, it was argued that inclusive neutrality could be a possible solution to representation of pluralism that is one of the fundamental pillars of democratic society under the ECHR. However, this idea does not seem completely convincing. How inclusive plurality ensures the protection of rights of atheists who advocate for the absence of religious symbols in educational institutions? Besides this, what could be the criteria that define which symbols should be displayed? Considering the diversity of religion and thus, a huge variety of symbols, one can argue that "an empty wall"[187] can be a better solution compared to inclusive neutrality that allows all religions to be displayed in the classrooms. The latter concept seems like opening a Pandora's box as it will result in sparking discussions over 'superiority' of particular religions and therefore, its importance to be present in educational institutions more than others.

Needless to say, the *Lautsi* case did have a great importance for both religious identities and the followers of the principle of secularism. After the Second Chamber made a decision in favour of a secularist approach, it was up to the GC to take a final stance either by reversing the lower instance's judgement and thus, recognising the role of religion in Italian society, or

[184] Lautsi v. Italy App no 30814/06, para. 62-70 (ECtHR, 18 March 2011)
[185] Roland Pierik and Wibren van der Burg, 'The Neutral State and the Mandatory Crucifix' (2011) 6(3) Religion and Human Rights 267, 271
[186] Lautsi v. Italy App no 30814/06, para. 15 (ECtHR, 18 March 2011)
[187] Roland Pierik, 'State Neutrality and the Limits of Religious Symbolism' in Jeroen Temperman (ad), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Brill | Nijhoff 2012) 213

upholding the Second Chamber's position and therefore, endorsing the principle of secularism under ECHR. In the end, by overturning the initial decision, the GC solidified states' right to protect their religious identities. Conversely, the proponents of the idea of secularism were not able to create a 'framework' in Europe as it is presented in France - in other words, so-called assertive secularism - a model, in which the state "excludes religion from the public sphere"[188] and it is different from a passive form of secularism that advocates for a less interventionist role from a state's side and "allows for the public visibility of religion".[189] On top of that, the Court indicated that Member States can still fulfil the obligations under the Convention while preserving their unique history and culture.

The GC has stated its position about secularism. It emphasised that "the supporters of secularism are able to lay claim to views attaining the "level of cogency, seriousness, cohesion and importance…within the meaning of Article 9 of the Convention and Article 2 of Protocol No.1"".[190] Therefore, secularism was regarded as a 'philosophical conviction', "worthy of respect in a democratic society"[191] and compatible with human dignity. In addition to that, one can conclude from the judgement that secularism is not a general principle stipulated in the Convention. It is just one conviction as other ones, meaning that the principle can not "embody neutrality itself".[192] Therefore, the GC accepted the positions of the intervening government which stated that "favouring secularism is a political position that, whilst respectable, was not neutral".[193] It can be concluded that the principle of secularism was rejected by the GC, "not as void or evil in itself but as extraneous to the Convention system".[194] By neglecting the applicant's position, the Strasbourg Court stated that "secularism was a necessary consequence of neutrality"[195] and thus, favouring the notion of neutrality.

[188] Amélie Barras, 'Secularism in France' in Phil Zuckerman and John R. Shook (eds), *The Oxford Handbook of Secularism* (Oxford University Press 2017) 150
[189] Ibid.
[190] Lautsi v. Italy App no 30814/06 (ECtHR, 18 March 2011), para. 58
[191] Ibid.
[192] Grégor Puppinck, 'The Case of Lautsi v. Italy: A Synthesis' (2012) 3(7) BYU. L. Rev. 873, 892.
[193] Lautsi v. Italy App no 30814/06, para. 47 (ECtHR, 18 March 2011)
[194] Grégor Puppinck, 'The Case of Lautsi v. Italy: A Synthesis' (2012) 3(7) BYU. L. Rev. 873, 893.
[195] Ibid.

One of the important discussions in the *Lautsi* case was sparked by Professor Joseph Weiler, who presented the views[196] on behalf of the eight intervening states. He argued that the formulation of "neutrality" in the *Lautsi* case based on two conceptual errors: Firstly, even though freedom of religion is guaranteed in Member States, "no State is not required under the Convention system to espouse laïcité".[197] Weiler further points to the fact that there is no common ground about State-Church relationship in Europe and therefore, there is a place for religious symbols in the public sphere, religious symbols have to be presented in public education.[198] In addition to that, Weiler states that the Convention has to represent the values of people with different religious beliefs and therefore, the message of the ECHR should not be "intolerance towards one's own identity".[199] He points out that the second conceptual error is based on misunderstanding and conflation of neutrality and secularism. He argues that the latter is "the political conviction that religion only has a legitimate place in the private sphere and that there may not be any entanglement of public authority and religion".[200] Therefore, Professor Weiler comes down to the following premise: secularism can not be regarded as neutral.

The discussion about the presence of crucifixes in classrooms is just a tip of the iceberg. Based on the *Lautsi* case, one can argue that it is a clash between on the one hand, the constitutional values, which itself stem from liberal democracies and advocate for rule of law, protection of fundamental rights of citizens and the demands of state neutrality[201] and on the other hand, political, legal and educational institutions that have a strong connection with historically dominant religions.[202] Following this, Pierik argues that such clashes result in a European constitutional deficit.[203] This is a situation in which states do not have the willingness to protect the fruits of constitutional principles and respect the pluralistic character of their

[196]Joseph Weiler, Oral Submission by Professor JHH Weiler on behalf of Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, The Russian Federation and San Marino - Third Party Intervening States in the Lautsi Case before the Grand Chamber of the European Court of Human Rights, accessed <https://7676076fde29cb34e26d-759f611b127203e9f2a0021aa1b7da05.ssl.cf2.rackcdn.com/eclj/weiler_lautsi_third_parties_submission_by_jhh_weiler.pdf> accessed 24 Feb 2024
[197] Ibid, para. 10.
[198] Ibid., para. 12.
[199] Ibid., para. 16.
[200] Ibid., para. 21.
[201] Roland Pierik, 'State Neutrality and the Limits of Religious Symbolism' in Jeroen Temperman (ad), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Brill | Nijhoff 2012) 208
[202] Ibid.
[203] Ibid.

societies. The *Lautsi* case is a clear example of European constitutional deficit: A dominant religion that has been part of Italian society for decades was challenged by an atheist individual.

It should be mentioned that the GC understood secularism not as a constitutional principle, but as a philosophical conviction within the meaning of Article 9 of the Convention. This argument was accepted in her concurring opinion by Judge Power. She argued that secularism "was, in itself, one ideology among others."[204] Apart from that, she further stated that "a preference for secularism over alternative worldviews - whether religious, philosophical or otherwise - is not a neutral option. The Convention requires that respect be given to the first applicant's convictions insofar as the education and teaching of her children was concerned. It does not require a preferential option for and endorsement of those convictions over and above all others."[205]

One can argue that the concept of secularism was not interpreted by the GC in the *Lautsi* case properly. It had to be considered as a constitutional principle that treats both religious and non-religious individuals equally. As for neutrality, Pierik mentions that it is a normative ideal that "can never be fully attained, and different policies will be more or less successful in achieving this ideal."[206]

Speaking of neutrality, Professor Weiler's argument that "absence of religion is not a neutral option" or "In the conditions of our societies, the naked public square, the naked wall in the school, is decidedly not a neutral position…"[207] is not convincing. Pierik also adds a nuance to it: "If there are only two options available, the empty wall or the display of the crucifix, the former is, all things considered, by far the more neutral choice."[208] As it was mentioned above, the similar idea was pronounced by Judge Power in her concurring opinion. Also, Pierik argues that a naked wall without a religious symbol cannot be considered as a 'victory' for secularists. It

[204] Lautsi v. Italy App no 30814/06, Concurring Opinion of Judge Power (ECtHR, 18 March 2011)
[205] Ibid.
[206] Roland Pierik, 'State Neutrality and the Limits of Religious Symbolism' in Jeroen Temperman (ad), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Brill | Nijhoff 2012) 214
[207] Ibid.
[208] Ibid., 215

does not carry any meaning. It is just a wall, lacking any symbolic bearing that is much more neutral than a crucifix which is a representation of one dominant religion.[209]

2.4. Conclusion of the Second Chapter

The chapter has analysed the Court's invocation of the principle of secularism based on the case-law of ECHR within the meaning of Article 9 and Article 2 of Protocol No.1 of the Convention, spanning the period from 2005 up to the current time. The cases touched upon the field of education, encompassing both schools and universities.

In the present chapter, the invocation of the principle of secularism mainly concerned the cases in which applicants had a desire to wear religious attire in educational establishments - universities and schools. The judgments show that the States are given a wide MoA when it comes to the wearing of religious symbols or clothing at public schools and at universities. The cases analysed above not only addressed the rights stipulated under Article 9 and Article 2 of Protocol No.1 of the Convention, but also emphasised the complex nature of conflicting rights, in which the interests of children and parents had to be balanced. The Strasbourg Court does not shy away from reiterating that domestic authorities are better placed to make a decision in this regard. It has been consistent to employ the doctrine in the above-mentioned cases related to the educational environment under Article 9 of the Convention. However, even though it was not a surprise that a wide MoA was granted to Italy as states have a room for manoeuvre when it comes to deciding to exercise their functions in relation to education and teaching[210], the Court relied on the doctrine heavily[211] and the question marks about its proper application was mentioned in his dissenting opinion by Judge Malinverni.

Besides employing a wide MoA with respect to cases concerning wearing of religious symbols, I would argue that the Court has been innovative in its judgement. The ECtHR

[209] Ibid.
[210] Ibid., para. 69.
[211] Lorenzo Zucca, 'A Commentary on a Decision by the ECtHR Grand Chamber' 2013 11(1) Int.J. Const. Law 218, 226

emphasised the fundamental role of social integration in the harmonious development of pupils and thus, does not endorse the idea of seclusion of pupils. In a wide range social integration implies the ability to connect with other people or children, in this case regard, and build important relationships with them. It is a total of all social processes through which children learn and reproduce a certain paradigm of knowledge, norms and values which allow them to successfully become full members of the society, mastering social roles and cultural norms. Therefore, the Court paid particular attention to this aspect, in a sense prioritising it over freedom of religion.

As it was mentioned in the introduction, the definition of "secularism" is not straightforward and it can have a contrasting understanding in different disciplines. Based on the analysis of the above-mentioned cases, I would argue that the Strasbourg Court does not provide a satisfactory explanation of what does the principle of secularism mean with respect to the cases dealing with education under Article 9 and Article 2 of Protocol No.1 of the Convention. Even though the Strasbourg Court stated that the notion of secularism is consistent with the values underpinning the Convention[212], in the *Şahin* judgement it relied on the reasoning of the Turkish Constitutional Court, which stated that "secularism, as the guarantor of democratic values, was the meeting point of liberty and equality".[213] In a similar vein, in the *Dogru* case, the ECtHR employed French understanding of the principle of secularism "arising out of a long French tradition".[214] As for the *Lautsi* case, the Strasbourg Court took into consideration the Italian Supreme Administrative Court's explanation concerning the above-mentioned principle.[215] Considering the diversity of Contracting States of the ECHR, it can be concluded that the ECtHR differentiates from each other Turkish, French, Italian, etc. contexts based on their cultural and/or historical peculiarities. However, the Strasbourg Court has not explained how the notion of secularism is "consistent with the values underpinning the Convention".[216]

As it was concluded in the previous paragraph, the ECtHR does not offer a uniform understanding of the principle of secularism, but does it mean that the concept in Turkey or Italy

[212] Leyla Şahin v. Turkey App no 44744/98, para. 114 (ECtHR 10 November 2005)
[213] Ibid., para. 39.
[214] Dogru v. France App no 27058/05, para. 8 (ECtHR 4 March 2009)
[215] Lautsi v. Italy App no 30814/06, para. 16 (ECtHR, 18 March 2011)
[216] Leyla Şahin v. Turkey App no 44744/98, para. 114 (ECtHR 10 November 2005)

has more value than the concept in French or vice versa? All the judgments discussed above indicate that the Strasbourg Court does not prefer one understanding or explanation of the principle of secularism over others as long as it is compatible with the spirit of the ECHR. However, the concept itself can be different from country to country. For example, based on the French context, the principle of secularism means "religious pluralism and State neutrality towards religions"[217], whereas in Turkey it "was an essential condition for democracy and acted as a guarantor of freedom of religion and of equality before the law".[218]

It is noteworthy to mention that in the cases discussed above, all applicants except one lost the case against their respective governments before the ECtHR. The Strasbourg Court stated that states enjoyed a wide MoA when it came to the relationship between state and religion. However, the *Lautsi* case was an exception. I would argue that by overturning the Second Chamber's decision, the GC not only avoided a criticism from Italian Government[219] and other intervening states[220], but also from my point of view, did not put under question its legitimacy before the European states.

The judgement in the *Lautsi* case raises a number of issues that are not consistent with the previous case-law when it comes to invoking the principle of secularism in education related applications. First of all, the GC has stated that "the decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State."[221] It is not a surprise that a wide MoA was granted to Italy as states have a room for manoeuvre when it comes to deciding to exercise their functions in relation to education and teaching.[222] However, the Court relied on the doctrine heavily[223] and the question marks about its proper application was mentioned in his dissenting opinion by Judge

[217] Dogru v. France App no 27058/05, para. 18 (ECtHR 4 March 2009)
[218] Leyla Şahin v. Turkey App no 44744/98, para. 39 (ECtHR 10 November 2005)
[219] Giulio Itzcovich, 'One, None and One Hundred Thousand Margins of Appreciations: The *Lautsi* Case' (2013) 13(2) Human Rights Law Review 287, 289
[220] Dimitrios Tsarapatsanis, 'Human Rights beyond Ideal Morality: The ECHR and Political Judgement' (2021) 10(4) Laws 77, 97
[221] Lautsi v. Italy App no 30814/06, para. 70 (ECtHR, 18 March 2011)
[222] Ibid., para. 69.
[223] Lorenzo Zucca, 'A Commentary on a Decision by the ECtHR Grand Chamber' 2013 11(1) Int.J. Const. Law 218, 226

Malinverni.[224] Secondly, the GC interpreted the principle secularism as a religious/philosophical conviction that was one of the main arguments from the Italian Government and other intervening countries and therefore, went against the Second Chamber's decision, which concluded that the display of crucifix in the classroom was a violation of the principle of neutrality and incompatible with the applicant's secular convictions.[225]

I would argue that the overuse of MoA in the *Lautsi case* was a way to avoid discussing the real understanding of the principle of secularism. The latter, as a constitutional value, has been fragmented in majority constitutional systems.[226] It is a fuzzy constitutional concept, which alongside other terms such as neutrality and non-sectarianism are called as "to be little more than vague code words useful for the theoretical construction of a framework within which sensible compromises that are required in a religiously plural society, can be reached."[227] On top of that, the challenge to constitutional secularism "comes from the emotionally charged revival of religious identity and also from religion becoming, once again, a major organising force of collective action…"[228] The *Lautsi* case definitely fits to this description considering the reaction of a number of governments after the Second Chamber's decision.

Generally, the principle of secularism can have different meanings, such as a constitutional value, a philosophical conviction, ideology, etc. However, in a legal context, "it truly should be understood as an eminently positive stance that made values of liberty, equality, and solidarity possible."[229] As a constitutional principle, it attempts to protect freedom of belief for both religious and non-religious people.[230] Therefore, it has to be distinguished from a philosophical conviction that was stated by the Strasbourg Court. In the *Lautsi* case, the GC did not take into consideration the established case-law, which invoked the principle of secularism,

[224] Lautsi v. Italy App no 30814/06, dissenting opinion of Judge Malinverni Joined by Judge Kalaydjieva, p. 48 (ECtHR, 18 March 2011)
[225] Lorenzo Zucca, 'A Commentary on a Decision by the ECtHR Grand Chamber' 2013 11(1) Int.J. Const. Law 218, 221
[226] Andras Sajó, 'Preliminaries to a Concept of Constitutional Secularism' (2008) 6(3-4) International Journal of Constitutional Law 605, 617
[227] Ibid., p. 617
[228] Ibid., p. 620.
[229] Lorenzo Zucca, 'A Commentary on a Decision by the ECtHR Grand Chamber' 2013 11(1) Int.J. Const. Law 218, 222
[230] Ibid.

as a constitutional value, to justify infringement to individuals' freedom of religion related to education under the ECHR. Like in the examples of Turkey and France mentioned above, there was a legal basis in Italian law.[231] However, the GC avoided the discussion about the principle of secularism by employing the doctrine of MoA and concluding that the display of a crucifix on the wall is a passive symbol. The Court did not provide a proper explanation of the difference between 'passive' and 'active' symbols. It is surprising that the display of a religious symbol that represents a dominant religion, according to the ECtHR, does not interfere with an individual's thinking and fundamental rights. .

Finally, as Professor Weiler mentioned, the concept of neutrality and secularism were conflated and misunderstood by the Second Chamber.[232] The main question here stands as follows: Does a naked wall favour secularism? Is secularism neutral? First of all, it is important to mention that neutrality has "more force when applied to state action that pertains to central aspects of one's status as free and equal participant in a fair scheme of social cooperation."[233] As Kyritsis and Tsakyrakis argue, aspects, such as political participation and access to justice are one of the main areas in which equal and impartial treatment plays a significant role for citizens' standing.[234] Following this, the same can be attributed to educational policy that has to "increase social cohesion"[235] However, it cannot be achieved "if it sends a message of unequal standing to public school students, depending on their religious beliefs."[236] Therefore, Pierik argues that empty walls do not favour secularism. It is an equal and impartial place both for religious and non-religious people and represents an example of neutrality. Following this, secularism, as a constitutional value, is neutral and does not favour non-religious people.

[231] Lorenzo Zucca, 'A Commentary on a Decision by the ECtHR Grand Chamber' 2013 11(1) Int.J. Const. Law 218, 221
[232] Grégor Puppinck, 'The Case of Lautsi v. Italy: A Synthesis' (2012) 3(7) BYU. L. Rev. 873, 893
[233] Dimitrios Kyritsis and Stavros Tsakyrakis, 'Neutrality in the Classroom' (2013) 11(1) International Journal of Constitutional Law 200, 209
[234] Ibid., 210.
[235] Ibid.
[236] Ibid.

CHAPTER III. PRINCIPLE OF SECULARISM AND THE ECTHR CASES INVOLVING EMPLOYMENT

The last chapter analysed the principle of secularism and the ECtHR cases regarding education, whereas the present chapter will deal with the cases related to employment. The latter is not explicitly protected by the ECHR, but "but some of its provisions, especially the right to respect for private life in Article 8, have been interpreted by the European Court of Human Rights (ECtHR) to include some protection for access to the labour market".[237]

The judgments in the previous chapter addressed the rights under Article 9 and Article 2 of Protocol No.1 of the Convention that needed to be balanced with respect to the interest of students, pupils and also, parents. In the present chapter, the majority of applicants are adults and thus, unlike education applications, there are different conflicting rights arising out of employer/employee relations, such as in an airplane company or hospitals. However, there is a similarity between education and employment applications when invoking the principle of secularism under Article 9 of the Convention. Specifically, in both subcategories the discussion revolved around the interest of children. Thus, the following chapter will start analysing the *Dahlab* case. Even though the latter revolves around the applicant who was prohibited from wearing her headscarf in a primary school, I would argue that the case belongs to employment category as the applicant was dismissed from public sector employment and judgement paid much attention to compatibility of her teaching duties with respect to her freedom to manifest her religion under Article 9 of the Convention

[237] Virginia Mantouvalou, *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing 2014) 228

3.1. Principle of Secularism and Wearing of Religious Symbols and Items of Clothing in Public Sector

3.1.1. Teachers and professors

One of the first judgements in which the ECtHR addressed the issue of religious symbols at work was in the *Dahlab* case. The latter concerned a primary-school teacher - Ms. Dahlab, who converted to Islam and thus, started wearing the Islamic headscarf, including when being at school. After some time, the Director General of Primary Education requested her to stop wearing the religious attire, but the applicant refused. Therefore, Ms. Dahlab was prohibited from wearing her Islamic headscarf because it constituted "an obvious means of identification imposed by a teacher on her pupils, especially in a public, secular education system".[238] Following this, the applicant appealed in the national courts, but it was dismissed on the ground that the public schools under the guidance of state policy were limited with the "strict obligation of denominational neutrality".[239] Besides this, the national courts emphasised how clothing could play an important role when it comes to expressing one's religious message. Since the pupils the applicant was teaching were at a very young age (between four and eight), based on the Federal Court's argumentation, they seem to be easily influenced and also, children's curiosity won't allow the teacher to conduct a class without stating her belief that is against "a clear separation between Church and State, reflected in particular by the distinctly secular nature of the State education system."[240] Therefore, the Federal Court did not find a violation in applicant's right to freedom of religion and the case was brought before the ECtHR as the parents argued that Article 9 of the Convention was violated.

First of all, when it comes to the regulation of wearing a religious symbol in an educational context, the Contracting States are given a room for manoeuvre and also, this is more appropriate in a case where there is no a European consensus[241]. Like in the previous chapter,

[238] Dahlab v. Switzerland App no 42393/98, p. 2 (ECtHR 15 February 2001)
[239] Ibid.
[240] Ibid., p. 6.
[241] Aaron A. Ostrovsky, 'What's So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves the Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals' (2005) 1(1) Hanse Law Review 47, 54

there was no European consensus with regard to regulating the wearing of religious symbols. Following the established standard, the Strasbourg Court has granted a certain MoA to the Swiss Government to prohibit the applicant from wearing Islamic headscarf in a public school[242], arguing that it was "very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children."[243] Secondly, the Court by declaring the application inadmissible stated that the regulation of wearing headscarves in a public school serves the protection of secular tradition.[244] This argument was strengthened by the Court's indication about "ensuring the neutrality of the State primary-education system".[245] On the other hand, it is noteworthy to mention the Government's argument, which referred to the possible difference between public and private schools and their relation to the principle of secularism. Particularly, the Swiss Government argued that the applicant could teach the classes in private schools that were not bound by the principle of secularism[246].

The judgement did receive criticism in an academic circle. One point of disagreement was about the pupil's freedom from religion. Specifically, it was argued that the children because of the age in the *Dahlab* case, are vulnerable and "only have a limited—slowly growing—potential for autonomy, they are generally considered to not have a right to freedom of religion in the same sense as adults do".[247] This idea was challenged on the ground that children, when exposed to (non-) religious ideas and views, "will arguably benefit from contact with religious diversity in the development of their own (non-)religious convictions and their identity."[248] It is clear that on the one hand, there is conflict between the childrens' right to be protected from undue interference by their teacher and on the other hand, one's right to wear religious attire in a public school and therefore, assign herself/himself a right to freedom of

[242] Ibid., p.13.
[243] Ibid.
[244] Aaron A. Ostrovsky, 'What's So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves the Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals' (2005) 1(1) Hanse Law Review 47, 54
[245] Dahlab v. Switzerland App no 42393/98, p.14 (ECtHR 15 February 2001)
[246] Ibid., p. 9.
[247] Stijn Smet, 'Freedom of Religion v. Freedom from Religion: Putting Religious Dictates of Conscience (Back) on the Map' in Jeroen Temperman (ad), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Brill | Nijhoff 2012) 122
[248] Ibid.

religion. Even though it could not be concluded directly from the *Dahlab* case that the applicant had some kind of proselytising effect on children, I think that the argument that pupils are vulnerable to be influenced seems more logical. However, the potential effect the headscarf has on children and its influence on them should not be underestimated.

When it comes to comparing the effect particular religious symbols on people in an educational context have, one has to discuss the *Lautsi* case, in which a crucifix in the classroom was qualified as a "passive symbol"[249], whereas in the *Dahlab* case, the Court stated the headscarf was a "powerful external symbol".[250] It is evident that the ECtHR have provided two contradictory decisions about the religious symbols. It could be argued that both cases are similar in terms of interfering with one's thinking. In the *Dahlab* case, even though the application was declared as inadmissible, wearing the headscarf and its impact on the classroom was not assessed in line with the decision in the *Lautsi* case, in which the core symbol of the majority religion was displayed in the public schools and the Court concluded that Italy had a right to keep it in the classroom and therefore, the applicant's right was not violated. However, Piret argues that the comparison of these cases is not correct and can lead to false conclusions.[251] Specifically, he points to the fact that in Switzerland the Cantons have independence and therefore, it is up to them to decide "their own regime of relations between the authorities and religion"[252], whereas Italian domestic law does not indicate the principle of secularism clearly and therefore, it is different from France and Turkey.[253] Because of the Canton of Geneva's confessionally neutral public system, Ms. Dahlab's freedom of religion could be restricted and also justified by the concept of MoA.[254] On the other hand, Piret adds that the *Lautsi* case is different as Italy's historically established significance of Catholicism "did not trump the right of the Italian state to display the core symbol of the majority religion in public schools."[255] In addition to that, Piret

[249] Lautsi v. Italy App no 30814/06, para. 72 (ECtHR, 18 March 2011)
[250] Dahlab v. Switzerland App no 42393/98, p.13 (ECtHR 15 February 2001)
[251] Jean-Marc Piret, 'Limitations of Supranational Jurisdiction, Judicial Restraint and the Nature of Treaty Law' in Jeroen Temperman (ad), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Brill | Nijhoff 2012) 73
[252] Ibid.
[253] Grégor Puppinck, 'The Case of Lautsi v. Italy: A Synthesis' (2012) 3(7) BYU. L. Rev. 873, 908.
[254] Jean-Marc Piret, 'Limitations of Supranational Jurisdiction, Judicial Restraint and the Nature of Treaty Law, in Jeroen Temperman (ad), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Brill | Nijhoff 2012) 74
[255] Ibid.

thinks that the MoA doctrine was employed correctly as there was no reason based on the Convention, Italy to accept a radical form of neutrality which is as same as laïcité.[256] However, it can be argued that even if Catholicism played a significant role in Italian society, the case itself had to be examined not from the point of view of parents, but taking into consideration the fundamental rights, liberties and legitimate interests of children.[257]

Differently from the above, Gunn states that the Strasbourg Court did not manage to comprehend the idea of a "powerful external symbol".[258] He questions the religiousness of Mrs. Dahlab's Islamic headscarf by stating that it is a "modesty similar to a woman's decision not to expose her breasts or thighs".[259] Answering to the question, it can be argued that wearing an Islamic headscarf that is a religious symbol and undeniably part of Islamic culture can not be compared with clothes that could potentially be used to cover body parts because Islamic headscarf has its own religious value that can be distinguished from clothes which carry no additional connotation. Therefore, wearing a religious symbol in educational institutions that have been following the principle of denominational neutrality triggers a strong association among people with different (non-) religious views.

Another case which itself is similar to the *Dahlab* case that revolved around the issue of Muslim teacher's right to wear a Islamic headscarf in a public school. However, in the *Kurtulmus* case, the applicant was an associate professor at the University of Istanbul, who started wearing a headscarf after she got her doctorate in 1992 and professorship in 1996.

After a number of warnings and reminders (both written and verbal), she received a reprimand for continuing wearing religious attire while teaching. As a result, she had to resign from her post for breaching Disciplinary Procedure Rules as she did not comply with the Rules on Dress applicable to Staff in State Institutions.[260] Following that, Ms. Kurtulmuş lodged an application in national courts.

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[256] Ibid.
[257] Jeroen Temperman, 'Lautsi II: A Lesson in Burying Fundamental Children's Rights' (2011) 6(3) Religion and Human Rights - An International Journal 279, 282.
[258] T. Jeremy Gunn, 'Limitations Clauses, Evidence and the Burden of Proof in the European Court of Human Rights (2020) 15(1-2) Religion and Human Rights 192, 195
[259] Ibid.
[260] Kurtulmuş v Turkey App no 65500/500, p.1 (ECtHR 24 January 2006)

The Istanbul Administrative Court did not accept the applicant's request as she continuously refused to adhere to the regulations on dress for public servants. The applicant appealed and argued that she only had to get either warning or a reprimand and therefore, the penalty that was imposed on her was harsh.[261] In the end, her application was not examined because a new law came into force that was an amnesty for public servants who received penalties. However, the case ended up before the Strasbourg Court.

The applicant argued that the restriction on her wearing a headscarf was a violation of her right guaranteed by Article 9 of the Convention. She also complained that there was sexual discrimination on the ground that religious precept that "required the headscarf to be worn applied only to Muslim women, whereas Muslim men were free to go about their occupation without constraint."[262]

The ECtHR followed the same pattern as in the *Şahin* case by stating that the principle of secularism is one of the "fundamental principles of the Turkish State."[263] Apart from that, the Court emphasised the fact that Ms. Kurtulmuş was a public servant, so she had to be loyal to the constitutional principles. In addition to that, in the previous chapter, in the *Köse* case, the Strasbourg Court not only mentions the principle of secularism which could be protected by allowing a restriction on religious attire, but also refers to neutrality as well. In a similar vein, in the present case, the ECtHR not only invokes the principle of secularism to substantiate its argument, but also employs the principle of neutrality and its application in the public service, in particular in the Stated education system.[264] I would argue that in both cases both the principle of secularism and the principle of neutrality have the same meaning and they are used interchangeably. The Strasbourg Court followed thes suit, employed the third approach of state neutrality that excludes any visibility of religion in public institutions and thus, equated the principle of neutrality with the principle of secularism.

[261] Ibid., p. 2
[262] Ibid., p. 3
[263] Ibid.
[264] Ibid., p. 7

Besides this, the Court granted Turkey a MoA when it comes to "determining the obligations on teachers in the State education system", following the standard in the *Dahlab* case.[265]

Based on all the above-mentioned arguments, the ECtHR found the case inadmissible. However, the case left some questions unanswered. First of all, as it was mentioned above, the Court employed the principle of secularism as one of the justifications to restrict the applicant's right to wear a headscarf. On the other hand, the ECtHR suggests that Turkey's approach is necessary to comply with the principle neutrality. Unfortunately, the definitions of these terms were not explained, "as if the Court's labelling something as 'neutral' actually makes it neutral."[266] Besides this, not only in the present case, but also in the *Şahin* judgement, the Court does not elaborate about what are the sources of Turkish "principle of secularism". As Gunn mentions, the only answer can be found in laws and interpretations, but offered by Turkish courts and institutions.[267]

3.1.2. Employees of State authorities

The case concerned a social worker, Ms. Ebrahimian, who got a fixed contract in the psychiatric unit at the Nanterre Hospital and Social Care Centre ("the CASH") - a public health establishment. After 15 months, the applicant was informed by the Director of Human Resources that her contract would not be renewed because her patients and social workers complained about her refusal to stop wearing an Islamic headscarf. In addition to that, the applicant, as a response to her letter to the Director of Human Resources was indicated to the opinion issued by the Conseil d'État stated the following: "the principle of freedom of conscience, the principle of State secularism and the principle that all public services must be neutral prevented employees in

[265] Ibid. p. 6.
[266] T. Jeremy Gunn, 'The "Principle of Secularism" and the European Court of Human Rights: A Shall Game', in T. Jeremy Gunn and Malcolm D. Evans (eds), *The European Court of Human Rights and the Freedom of Religion and Belief: The 25 Years since Kokkinakis* (Brill | Nijhoff 2019) 519
[267] Ibid., p. 518.

the public sector from enjoying the right to manifest their religious beliefs".[268] The applicant challenged the decision in the national courts. The latter dismissed her request based on the principle of secularism and neutrality of public spaces.[269] She appealed in the Versailles Administrative Court, but the lower courts' judgement was upheld. As a result, Ms. Ebrahimian lodged an application before the ECtHR, where she argued that her refusal to stop wearing a headscarf resulting in termination of her employment contract was a violation of Article 9 of the Convention.

It should be mentioned that the principle of secularism is guaranteed by the French Constitution. In addition to that, "the State is neutral, meaning that the principle of neutrality is one of fundamental pillars of the public service; it also follows that the Republic does not recognise any religious denomination".[270] Therefore, all public services and their employees are obliged to be constrained by the above-mentioned principles.

The judgement shows how the doctrine of laïcité that ensures state's neutrality towards religion can be used as a justification to interfere with one's rights stipulated in the Convention. The *Dahlab* case applied only one - educational sector, whereas the present case encompasses "the entirety of the public service, including doctors, mail carriers and daycare workers".[271] The same idea resonated in the partly concurring and partly dissenting opinion of Judge O'Leary: "while the outcome of the present case is somewhat limited…the consequences of the judgement are not."[272] On top of that, Judge O'Leary considers it as a blanket ban which is justified by the principle of secularism and neutrality.[273]

One of the most crucial aspects of the present case is the religious symbol - Islamic headscarf that became a reason for not renewing an employment contract to Ms. Ebrahimian. It is obvious that wearing the Islamic headscarf was considered as a powerful symbol and was not

[268] Ebrahimian v. France App no 64846/11, para. 8 (ECtHR 26 November 2015)
[269] Ibid., para. 11.
[270] Ibid., para. 14.
[271] Melanie Adrian, 'The Principled Slope: Religious Freedom and the European Court of Human Rights', (2017) 45(3-4) Religion, State & Society 174, 180
[272] Ebrahimian v. France App no 64846/11, Partly Concurring and Partly Dissenting Opinion of Judge O'Leary ((ECtHR 26 November 2015)
[273] Ibid.

compatible with the principles of secularism and neutrality. As a result, the Administrative Court stated that the decision not to renew the contract was compatible with the principles of secularism and neutrality of public services and thus, protected the patients who "were in a fragile or dependent state".[274] The ECtHR went on saying that "In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on the freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected."[275]

Another aspect that is worth mentioning is the MoA given to the Respondent State. The Court mentioned that the wearing of religious clothing is not regulated in a majority of the Council of Europe member States, including for civil servants.[276] However, a special importance should be given to the State-Church relations that change over time. Following this, the ECtHR concluded that France had to be given a large MoA, citing the *Şahin* case.[277] Thus, a wide MoA was given to national authorities, which were "better placed to take decisions in their establishments than a court".[278]

3.2. Principle of Secularism and Wearing of Religious symbols and Items of Clothing by Employees in Private Sector

One of the most important judgments with respect to wearing of religious symbols and items of clothing by employees in the private sector was brought by the four applicants against the UK government. The claims can be divided into two categories: The first one (applications from Eweida and Chaplin) addressed wearing a religious symbol - Christian cross - at work, whereas the other concerned with a refusal to perform services which, based on Ladele and

[274] Ebrahimian v. France App no 64846/11, para. 11 (ECtHR 26 November 2015)
[275] Ibid., para. 54
[276] Ibid., para. 65
[277] Ibid.
[278] Ibid.

McFarlane, was considered to condone homosexual union.[279] For the purposes of this chapter, the emphasis will be put on the Eweida and Chaplin applications.

Ms. Eweida was a practising Coptic Christian, who was employed as a check-in staff for British Airways Plc ("BA") - a private company. The latter had its own uniform policy that prohibited wearing religious symbols visibly. However, in certain religions clothing was "considered by British Airways to be mandatory", so male Sikh employees were authorised to display Sikh bracelet in summer if they obtained authorisation to wear a short-sleeved shirt. Female Muslim ground staff members were authorised to wear hijab (headscarves) in British Airways approved colours."[280]

Ms. Eweida, who concealed a cross at work under her clothing, decided to start wearing it openly. Because of that, she was asked to remove the cross or conceal it under the cravat. Two times she agreed to do that, but on the third time she did not comply with the regulations that resulted in sending her home unpaid. It should be noted that Ms. Eweida was offered administrative work without customer contact, but she rejected the offer.[281] Even though the BA amended its rules on uniform later and allowed the employees wearing the religious symbols, the company refused to compensate Ms. Eweida "for the earnings lost during the period when she had chosen not to come to work."[282] Therefore, she lodged an application with the Employment Tribunal and argued that there was a breach of her right to manifest her religion under Article 9 of the Convention.

During the national proceedings, the courts concluded that the applicant "had failed to establish that the uniform policy had put Christians generally at a disadvantage, as was necessary in order to establish a claim of indirect discrimination."[283] In addition to that, the applicant could not prove that the indirect discrimination which required establishing evidence that there was a

[279] Eweida and Others v. The United Kingdom App nos. 48420/10, 59842/10, 51671/10 and 36516/10, para. 3 (ECtHR 27 May 2013)
[280] Ibid., para. 11
[281] Ibid., para. 13
[282] Ibid.
[283] Ibid., para. 14

discrimination against a defined group existed in the case.[284] Therefore, the case was brought before the ECtHR.

The Strasbourg Court made several significant conclusions: Firstly, even though the United Kingdom did not have a legal framework concerning the regulating the wearing of clothing and symbols in the workplace, the applicant's case was examined in detail including "the legitimacy of the uniform code and the proportionality of the measures taken by BA."[285] Secondly, the ECtHR concluded that the national courts failed to strike a right balance as BA was accorded too much weight and the MoA afforded to the national authorities was exceeded.[286] The factors that were taken into account were size of the religious symbol[287] and the lack of evidence that the cross affected the private company's image. Therefore, there was a violation of Article 9 of the Convention.

It should be noted the Court reached a contrasting judgement with regard to the second applicant. Ms. Chaplin was also a practising Christian, who was working as a nurse on a geniatric ward and wearing a cross while working. Based on guidance from the Department of Health, she was asked to remove the cross, but she refused, resulting in moving her to a non-nursing position that ceased to exist afterwards.[288] Similar to the first applicant, she complained to national courts and argued that there was both direct and indirect discrimination towards her. However, her application was rejected based on the arguments that "the health authority's policy was proportionate to the aim pursued".[289] As a result, Ms. Chaplin lodged an application before the ECtHR against the UK and argued that there was a violation of Article 9 of the Convention.

First of all, the Strasbourg Court granted a wide MoA to the UK because "the protection of health and safety on a hospital ward, was inherently of a greater magnitude than that which applied in respect of Ms Eweida".[290] Therefore, it was stated that health and safety was an area

[284] Ibid., para. 15.
[285] Ibid., para. 92.
[286] Ibid., para 94.
[287] Ibid.
[288] Ibid., para. 96.
[289] Ibid.
[290] Ibid., para. 99.

where domestic authorities (in this case, hospital managers) were better placed to make a decision. As a result, interference with Ms. Chaplin's freedom to manifest her religion was necessary and justified in a democratic society.[291] Secondly, even though the ECtHR concluded that there was an interference in the applicant's right, it did not comment on the Ms. Chaplin's argumentation that "no evidence was adduced before the Employment Tribunal to demonstrate that wearing the cross caused health and safety problems".[292] Therefore, it creates a problem in terms of allowing employers to have a freedom to invoke 'health and safety' to infringe one's rights.[293]

Unlike all other judgments discussed in this chapter, there is one pending case against Germany, in which the applicant complained under Article 9 of the Convention of an unjustified interference with her freedom of religion.[294] Despite lack of factual circumstances, the case is about a Muslim nurse who works in a hospital which is held by a private company whose only shareholder was a protestant foundation. The applicant decided to wear a headscarf during working hours for religious reasons after returning from leave and notified her employer of her intentions. The hospital did not agree to her conditions and thus, domestic proceedings were followed. However, the applicant's request was accepted neither to Labour Courts nor to the Federal Constitutional Court.

This pending application is of great value for several reasons. Firstly, considering the substance of the case, it resembles the *Eweida* case, in which the second applicant, Ms Chaplin, a practising Christian, was working as a nurse on a geniatric ward and wearing a cross while working. However, the main difference between those two applications is that in the *Eweida* case, Ms. Chaplin was working in State hospital, whereas in the pending *Türk* case, the applicant was an employee in a hospital held by a private company. The Strasbourg Court found the former's application inadmissible based on the argument that "the protection of health and safety on a hospital ward, was inherently of a greater magnitude than that which applied in respect of

[291] Ibid.
[292] Ibid., para. 69.
[293] Ian Leigh and Andrew Hambler, 'Religious Symbol, Conscience, and the Rights of Others' (2014) 3(1) Oxford Journal of Law and Religion 2, 4
[294] TÜRK v. Germany App no 61347/16 (Communicated Case, 12 September 2018)

Ms. Eweida".[295] On the other hand, in the same *Eweida* case, the first applicant, Ms. Eweida, who was employed by a private company which prohibited her from wearing a cross during working hours, won the case against the Respondent Government. The Strasbourg Court concluded that the domestic courts accorded "too much weight"[296] employer's wish to project "a certain corporate image".[297] Ms. Eweida's cross was discreet and it did not have any negative effect on the private company's brand. Thus, there was a violation of Article 9 of the Convention in respect of the first applicant.

Taking into consideration *Eweida* and *Ebrahimian* cases, I would argue the *Türk* case has the potential to develop the case-law of the ECtHR under Article 9 of the Convention. First of all, even though the first applicant in the *Eweida* case was employed by a private company, the Strasbourg Court afforded a wide MoA to the national authorities "in weighing the proportionality of the measures taken by a private company in respect of its employee".[298] I think that the ECtHR will follow suit and afford a wide MoA to Germany. Apart from that, the *Eweida* case will be used to state that "in the majority of States the wearing of religious clothing and/or religious symbols in the workplace is unregulated".[299] Germany is one of the five states in which "the domestic courts have expressly admitted, at least in principle, an employer's right to impose certain limitations upon the wearing of religious symbols by employees; however, there are neither laws nor regulations in any of these countries expressly allowing an employer to do so".[300] Thus, in the pending *Türk* case, the employer has a right to impose limitations on wearing a headscarf. However, I would argue that the Strasbourg will not be able to rely on the justification stated in the *Eweida* case, in which Ms. Chaplin was rejected wearing a cross because of health and safety issues.

The main difference between Ms. Chaplin in the *Eweida* case and the *Türk* case is the former was working with patients and thus wearing a cross and chain "could come into contact

[295] Eweida and Others v. The United Kingdom App nos. 48420/10, 59842/10, 51671/10 and 36516/10, para. 99 (ECtHR 27 May 2013)
[296] Ibid., para. 94.
[297] Ibid.
[298] Ibid.
[299] Ibid., para. 47.
[300] Ibid., para. 20.

with open wounds" [301], whereas in the *Türk* case, based on the factual circumstances, the nurse was prohibited from wearing a headscarf after returning from leave and thus, there was no indication that wearing a headscarf would cause health and safety issues to patients.

Apart from that, the *Türk* case is of great value because it gives an opportunity to the ECtHR to comment on the difference between cross and headscarf and their influence on patients in hospitals. None of the cases mentioned above has not addressed this issue and thus, I think that the Strasbourg Court is slowly approaching to establish the case-law in this regard. From my point of view, even though cross and headscarf both are religious symbols, they should be differentiated. I agree with the logic offered in the *Eweida* case, in which Ms. Chaplin was not allowed to wear a cross if it swung free. Even if the chain was secured with magnetic catches, there is still a theoretical chance that it could be broken apart if pulled by the patient. Apart from that, the size of the cross should be taken into account as well. The bigger it is, the higher chances are to cause health and safety issues to patients. As for the headscarf, it is a religious cloth that can cover some part of one's head and thus, won't be a threat in terms of health issues when having contact with patients.

It is clear that in the *Türk* case, the refusal by the private company amounted to an interference with the applicant's right to manifest her religion. The interference was not directly attributable to the State and thus, the ECtHR has to examine whether in all the circumstances the State authorities complied with their positive obligation under Article 9 of the Convention. Like in the *Eweida* case, the fact that there was no specific protection under domestic law does not necessarily mean that wearing a religious symbol at work was insufficiently protected.[302] However, there is no real evidence of any real encroachment on the interests of others. Thus, I think that the refusal by the private company in the *Türk* case is a blank restriction in applicant's right to manifest her religion under Article 9 of the Convention and thus, violation of the ECHR.

[301] Ibid., para. 92.
[302]

3.3. Conclusion of the Third Chapter

The chapter has analysed the Court's invocation of the principle of secularism based on the case-law of ECHR within the meaning of Article 9 of the Convention, The judgements of the ECtHR encompass the period starting from 2001 up to the current time. All the cases, except one, touched upon the field of employment.

First of all, these judgements show that the Strasbourg Court, similar to the cases discussed in the previous chapter, grants a certain MoA to the Contracting States with respect to employment applications. The Strasbourg Court has reiterated that domestic authorities are better placed to make a decision in this regard. It has been consistent to employ the doctrine in the above-mentioned cases related to the employment under Article 9 of the Convention. However, in the *Eweida* case, the Strasbourg Court found out that the MoA afforded to the national authorities was exceeded.

Secondly, the cases discussed in the present chapter do not offer any clear explanation of the principle of secularism under Article 9 of the Convention. The same refers to the principle of neutrality which was mentioned in the judgement with regard to employment applications. For example, in the *Kurtulmuş* case, the ECtHR suggested that Turkey's approach was necessary to comply with the principle neutrality. Unfortunately, the definitions of these terms were not explained, "as if the Court's labelling something as 'neutral' actually makes it neutral."[303] Interestingly, the Court mentioned the principle of neutrality that is applicable to the public service. Like in the cases related to education matters discussed in the previous chapter, the ECtHR avoids elaborating on the both principle of secularism and neutrality and solely relies on the national context.

The chapter has analysed cases regarding employment both in public and private sectors. In the public sector, employees of State authorities and teachers and professors lost their cases against their Respondent Governments. The main reason was invoking the principle of

[303] T. Jeremy Gunn, 'The "Principle of Secularism" and the European Court of Human Rights: A Shall Game', in T. Jeremy Gunn and Malcolm D. Evans (eds), *The European Court of Human Rights and the Freedom of Religion and Belief: The 25 Years since Kokkinakis* (Brill | Nijhoff 2019) 519

secularism as a justification to interfere with the applicants' rights which was accepted by the Strasbourg Court. As for the private sector, the Court mentioned that since the interference was not directly attributable to the State and thus, the ECtHR has to examine whether in all the circumstances the State authorities complied with their positive obligation under Article 9 of the Convention.

In the private sector, the wearing of religious symbols or clothes were discussed. The cases analysed above were related to both wearing cross and headscarf. Apart from that, the chapter commented on the pending application that could potentially shed light on the impact of the above-mentioned religious symbols or clothes on the workplace.

OVERALL CONCLUSION

The purpose of the presented thesis was to provide a legal analysis for the discussions over the principle of secularism under the ECHR (particularly, Article 9 and Article 2 of Protocol No. 1) in education and employment.

The objective of the thesis was to observe under which circumstances the principle of secularism was invoked as a justification to infringe an individuals' rights under Article 9 and Article 2 of Protocol No. 1 of the ECHR with respect to education and employment matters. Based on the judgments analysed above, it is clear that the above-mentioned principle was invoked in cases, where the applicant's right to express her religious belief was in conflict with the constitutional value stipulated in the respective country's main documents - constitutions. All the judgements, except the *Lautsi* case, upheld the principle of secularism compatible with the values of the ECHR.

In order to better understand the above-mentioned issue, the author analysed the judgments of the ECtHR concerning education matters and rulings of the ECtHR from the time

such cases ever came to the public arena until present. In addition to that, the thesis discussed the ECtHR's approach to the principle of secularism in the light of MoA and European consensus which are judge-made doctrines and have been used in the case-law of the ECtHR frequently.

The first research question aimed to analyse what were the circumstances under Article 9 and Article 2 of Protocol No.1 of the ECHR the Strasbourg Court justified a wide MoA when it came to invoking the principle of secularism with respect to education and employment applications. The thesis found out in cases that concerned the relationship between the religion and state, the latter was given a wide MoA. Starting from the *Şahin* judgement that touched upon the prohibition of wearing the headscarf at public university finishing with the Osmanoğlu case, the Court used the interpretative tools actively to allow states to have "the room for manoeuvre [...] while fulfilling their obligations under the European Convention on Human Rights".[304] In the cases concerning the Allevi faith followers, it is obvious that apart from granting Turkey a MoA, the Court checked the curriculum and its content itself to deliver the judgement.

As for the cases concerning the principle of secularism and its invocation with regard to employment matters under Article 9 of the Convention, the Court has a similar approach as in the judgments with respect to right to education. Determining the obligations at the workplace is an area where domestic authorities are better placed to make a decision. When the cases referred to public servants the principle of secularism was a constitutional value in a respective country, the latter was given a wide MoA. Besides this, in the *Kurtulmuş* case, the ECtHR alongside with the principle of secularism used the principle of neutrality, but did not elaborate on its meaning. As for the *Eweida* case, even though the case concerned alleged breach of individuals' rights by the private company, the Strasbourg Court still addressed the issue and found out that MoA afforded to national courts was exceeded. In the same case, unlike the first applicant, the Court granted a wide MoA to the Respondent Government because of protecting the health and safety of others.

[304] Steven Greer, 'The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation' (2010) 3 UCL Hum. Rts. Rev. 1, 2

The thesis also found out that the explanation and definition of the principle of secularism is not clear, meaning that there is no an uniform approach and thus, the Court relies on interpretations offered by the national courts and institutions both with respect to education and employment applications. Following, the principle of secularism has no legal basis in the Convention and remains as a concept subject to a constant examination on a case-by-case basis.

The second research question looked at what are the different rights that need to be balanced in both subcategories - education and employment - when invoking the principle of secularism. Comparing both education and employment subcategories, the standard is that the Strasbourg Court has a clearer approach with respect to public education establishments and public sector. In this respect, if there is a case involving the Article 9 and Article 2 of Protocol No.1 of the ECHR and the Member State has a principle of secularism in its constitution explicitly stipulated, then for the applicant it becomes complicated to provide weighty arguments against the Respondent Government. As it was concluded in the previous chapter, there is no explanation and definition of the principle of secularism and thus, it would be better if the Court comments on the general standards and approaches when dealing with cases concerning that principle.

The third research question attempted to answer whether the Strasbourg Court employed clear standards when invoked the MoA in cases where the principle of secularism was used as a justification to infringe individuals' rights with regard to education and employment applications. In both subcategories, in which the principle of secularism was invoked as a justification under Article 9 of the Convention, the Strasbourg Court stated that states enjoyed a wide MoA when it came to the relationship between state and religion. Even in the *Lautsi* case, the ECtHR followed suit and granted Italy a certain MoA. However, the problem in that case was an excessive use of the judge-made doctrine and ambiguous debate about the real importance of the Cross. Therefore, it can be concluded that even though the Court uses other doctrines, such as "European Consensus", "principle of subsidiarity", etc. there are no clear standards how the MoA has to be employed uniformly.

It is obvious that the Court used interpretative tools to substantiate its arguments and preserve diversity among the Member States. However, both MoA and European consensus doctrines are far from being ideal doctrines. The analysis of the above-mentioned sub-categories shows that these doctrines are used frequently by the ECtHR, but not inconsistently. This becomes more obvious with regard to landmark cases. For example, in the *Lautsi* judgement, the Court overturned the Second Chamber's decision and did not find the violation of the respective articles of the Convention. In that case, the Court relied on the above-mentioned doctrine heavily and went against previous judgements in which the principle of secularism, as a constitutional value, was invoked as a justification to protect the rights under Article 9 of the Convention. Such a change in the jurisprudence of the ECtHR case-law makes one think that the Court does not employ clear standards when using the doctrine of MoA and European consensus, resulting in questioning the stability of those interpretative tools and thus, legitimacy of the ECHR.

When it comes to employment in the private sector, the ECtHR has not commented yet on what could be a potential difference between different religious items or cloth and their impact on the workplace. As I argued in the 3rd Chapter, the *Türk* case is a great opportunity for the Court to elaborate more in this regard and thus, establish a case-law that would ensure a clear application of the ECHR.

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