SECULARITY OR SECULARISM: TWO COMPETING VISIONS FOR THE RELATIONSHIP BETWEEN RELIGION AND THE STATE IN THE NEW TURKISH CONSTITUTION

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ABSTRACT

One of the most controversial issues in crafting a new constitution for Turkey will likely be the definition and conceptualization of what kind of secular state Turkey envisions for itself and what the relationship between religion and the state ought to be. In this paper I want to suggest that there is an important, perhaps critical, distinction between *secularity* and *secularism* – in particular that one concept is a fundamental component of liberal pluralism and a bastion against religious extremism, and that the other is a misguided, even dangerous, ideology that may degenerate into its own dystopian fundamentalism. Secularity is an approach to religion-state relations that avoids identification of the state with any particular religion or ideology (including secularism itself) and that endeavors to provide a neutral framework capable of accommodating a broad range of religions and beliefs. Secularism, in contrast, is an ideological position that is committed to promoting a secular order. In this paper I will illustrate the difference between these conceptualizations of the secular state with examples of cases from several different jurisdictions focusing on the institutional relationships between religion and the state, and the individual's relationship with the state.

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I. INTRODUCTION

One of the most controversial issues in crafting a new constitution for Turkey will likely be the definition and conceptualization of what kind of secular state Turkey envisions for itself and that the relationship between religion and the state ought to be. In this paper I want to suggest that there is an important, perhaps critical, distinction between *secularity* and *secularism* – in particular that one concept is a fundamental component of liberal pluralism and a bastion against religious extremism, and that the other is a misguided, even dangerous, ideology that may degenerate into its own dystopian fundamentalism.

In Part II, I will describe in greater detail the distinction as I am describing it between secularity and secularism. In Part III, I will illustrate the difference between these conceptualizations of the secular state with several examples of recent cases from a variety of legal jurisdictions. The first set of illustrations will focus on the institutional relationships between religion and the state, and the second set of examples will focus on the individual's relationship with the state. In Part IV, I conclude with a few observations relating to the constitution-making process in Turkey.

II. SECULARITY AND SECULARISM

Both secularity and secularism are linked to the general historical process of secularization, but as I use the terms, they have significantly different meanings and practical implications.[1] By 'secularity' I mean an approach to

[1] The distinction, of course, is not original to me. For other discussions of the difference between secularity and secularism *see*, e.g., Fr. Evaldo Xavier Gomes, 'Church-State Relations from a Catholic Perspective: General Consideration on Nicolas Sarkozy's new Concept of Laïcité Positive', 48 J. *Cath. Legal Stud.* (2009), p. 201 (setting forth a Catholic perspective on the distinction between secularity and secularism, in which secularity is "one of the attributes of the state in the eyes of the Church" and secularism is "characterized by a negative conception of separation between Church and state, in which the Church is persecuted or denied basic rights.") Gomez goes on to say, "[a]ccording to the Catholic conception, secularity is understood as a healthy cooperation between Church and state. In this sense, the Church and state are not opposed to each other; both are in the service of human beings, so between them there must be dialogue, cooperation, and solidarity." *Ibid*., p. 211. Le-ann Thio, 'Constitutional Accommodation of the Rights of Ethnic and Religious Minorities in Plural Democracies: Lessons and Cautionary Tales From South-East Asia', 22 *Pace int'l L. Rev.* 43 (addressing accommodation of racial and religious minorities in society and asserting that "attention needs to be paid both to constitutional and non-constitutional solutions, to ensure the protection of the identity and culture of minorities," and warning that "[f]orcible assimilation and repressive measures against minority groups, utilizing the 'tools of coercion'... will only exacerbate conflict and thwart the forging of a durable peace."). Thio, in discussing the challenges of fostering a national identity among minority

religion-state relations that avoids identification of the state with any particular religion or ideology (including secularism itself) and that endeavors to provide a neutral framework capable of accommodating a broad range of religions and beliefs. By 'secularism', in contrast, I mean an ideological position that is committed to promoting a secular order. Secularity is a more modest concept, committed to creating what might be called a broad realm of 'constitutional space'[2] in which competing conceptions of the good (some religious, some not) may be worked out in theory and lived in practice by their proponents, adherents, and critics. Secularism, in contrast, is itself a positive ideology that the state may be committed to promoting, an ideology that may manifest itself as opposition to religiously-based or religiously-motivated reasons by political actors, hostility to religion in public life and an insistence that religious manifestations, reasons, or even beliefs be relegated to an ever-

groups and tribes offers secularity as a helpful solution but rejects secularism as problematic, using Islamic revivalism and demands for legal systems based on Shari'a as an example. "Secularism itself as a constitutional principle is a useful ordering device for state-religion relations insofar as it does not adopt the form of a substantive, anti-theistic ideology which is hostile towards religious belief. Rather than descend into a form of secular fundamentalism, the principle of secularity operates as a framework under which disparate religious groups may peacefully co-exist. This requires that religious (and non-religious) groups are treated equally under the law, that is, the state is to adopt a neutral posture towards religious groups." *Ibid*., pp. 73–74. *See also* András Sajó, 'Preliminaries to a concept of Constitutional Secularism', 6 *Int'l J. Const. L.* (2008), p. 605 (advocating a "robust notion of secularism" characterized by a "duty of public reason giving in law" that "denies the acceptability of divine reasons" and "precludes any source of law but the secular" to combat what he calls "strong religion," which aspires "to control or reclaim the public square"). Sajó's definition of the term "secularism" as "legal arrangements that [do] not follow considerations based on the transcendental or the sacred" may be closer to what I mean by 'secularity' than 'secularism'. As Sajó uses the term, 'secularism' takes no specific position regarding religion, but rather focuses on the concept of public reason, the idea that in politics and law reasons should be translated, or at least translatable into public reason, reasons that are accessible to all citizens. As is often the case, the devil is in the definitions. *Ibid*., p. 607–608. He acknowledges that "secularism is a somewhat unfortunate term for use in constitutional theory" because as a term it is "overloaded," referring to different although related concepts in different languages and in different academic disciplines. *Ibid*., p. 608. *See also* András Sajó, 'Constitutionalism and Secularism: The Need for Public Reason', 30 *Cardozo L. Rev.* (2009); Lorenzo Zucca, 'The Crisis of the Secular State – A Reply to Professor Sajó', 7 *Int'l J. Const. L.* (2009); András Sajó, 'The Crisis That Was Not There: Notes on a Reply', 7 *Int'l J. Const. L.* (2009). An early formulation of this distinction is found in *David Martin, Notes Towards a General Theory of Secularization* (1969), revised as *On Secularization: Towards a Revised General Theory* (Ashgate, 2005), at 85 et seq. (distinguishing "secularity" from "principled secularism").

[2] I would like to thank Carolyn Evans of Melbourne University School of Law for drawing my attention to the concept of 'constitutional space'.

shrinking sphere of private life, or even an aggressive proselytizing atheism, or what has been called "secular fundamentalism."[3]

In most modern liberal democratic legal systems, there are proponents of both secularity and secularism. Constitutional and other legal texts addressing religion-state issues can often be interpreted as supporting one or the other of these views and, in fact, some of the key debates involving freedom of religion and belief turn on the difference between these two approaches. Historically, French *laïcité* is closer to secularism, while American separationism is closer to secularity. But there are debates in both societies about how strictly secular the sate (and more broadly, the public realm) should be. This tension between two conceptions of the secular runs through much of religion-state theory in contemporary settings.

At the outset, it may be helpful say a little more about the distinction, as I am proposing to understand it, between secularity and secularism. These two conceptions of the secular concept are different in important ways. For example, secularity will be drawn to what Isaiah Berlin called negative freedom, whereas secularism will be attracted to positive conceptions of freedom. On a related note, secularity will view human values as plural and incommensurable, whereas secularism will view values as reducible and commensurable. As a result, secularity will be drawn to thin theories of the good, whereas secularism will be drawn to thicker theories of the good. Finally, secularity will be more attentive to what Robert Cover has described as the jurisgenerative function of the law, and protective of multiple meanings, whereas secularism will be more drawn to the jurispathic function of the law, striving to give authoritative interpretations of what the law is. Although I describe these four differences in greater detail elsewhere, I will briefly describe these differences, because they help make more concrete what may seem like a rather abstract distinction between secularity and secularism.

Negative and Positive Freedom. The British philosopher Isaiah Berlin distinguished between what he called negative and positive freedom. Secularity is drawn toward a political philosophy based upon negative liberty (*freedom from* interference by other people, including the state), whereas secularism will be inclined towards positive liberty (which implies having the

[3] *See* Paul F. Campos, 'Secular Fundamentalism', 94 *Colum. L. Rev.* 1814 (1994) (arguing that Rawls's central concept in Political Liberalism of 'public reason' is empty, "and that Rawls's analysis of political issues amounts to little more than the shamanistic incantation of the word 'reasonable.'"). According to Campos, Rawls employs the concept of "reasonableness" in the same way that "God" is invoked in dogmatic religious argument. *Ibid*., p. 1817.

power, resources or *freedom to* fulfill one's potential, perhaps a potential properly understood by others, who are willing to use coercive means to help us achieve what is good for us).

Positive freedom may be an attractive moral ideal, for individuals or communities, but the idea of freedom as self-mastery can easily devolve in a view of man being "divided against himself,"[4] unable to understand what is best for himself or, if he understands it, unable to exert sufficient self-discipline and mastery to achieve it. If freedom means rational self-direction, then "I cannot deny that what is right for me must, for the same reasons, be right for others who are rational like me."[5] When this happens, liberty and authority are not seen as being at odds with each other; rather, "liberty, so far from being incompatible with authority, becomes virtually identical with it."[6] Laws may limit liberty, but such limits are necessary to ultimately increase liberty. When rulers are sufficiently wise, "liberty coincides with law: autonomy with authority. A law which forbids me to do what I could not, as a sane being, conceivably wish to do is not a restraint of my freedom."[7]

Berlin describes the French Revolution, at least in its Jacobin form, as "an eruption of the desire for 'positive' freedom of collective self-direction on the part of a large body of Frenchmen who felt liberated as a nation, even though the result was, for a good many of them, a severe restriction of individual freedoms."[8] A robust *laïcité*, as a fully-developed positive vision, may be the most enduring fruit of the French revolution.

Berlin ends his essay, *Two Concepts of Liberty*, with a crushing indictment of positive liberty as a political ideal. Part VIII, the final section of the essay, entitled 'The One and the Many', opens with Berlin thundering:

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4 *Ibid*., p. 134.

5 *Ibid*., p. 145.

6 *Ibid.*

7 *Ibid*., p. 148–149. Berlin summarizes the conditions that will facilitate a virtuous despotism, a despotism of "the best or the wisest," but still despotism, "which turns out to be identical with freedom:" – "first, that all men have one true purpose, and one only, that of rational self-direction second, that the ends of all rational beings must of necessity fit into a single universal, harmonious pattern, which some men may be able to discern more clearly than others; third, that all conflict, and consequently all tragedy, is due solely to the clash of reason with the irrational or the insufficiently rational...; finally, that when all men have been made rational, they will obey the rational laws of their own natures, which are one and the same in them all, and so be at once wholly law-abiding and wholly free." *Ibid*., p. 154.

8 *Ibid*., p. 162.

One belief, more than any other, is responsible for the slaughter of individuals on the altars of the great historical ideals – justice or progress or the happiness of future generations, or the sacred mission or emancipation of a nation or race or class, or even liberty itself, which demands the sacrifice of individuals for the freedom of society. This is the belief that somewhere, in the past or in the future, in divine revelation or in the mind of an individual thinker, in the pronouncements of history or science, or in the simple heart of an uncorrupted good man, there is a final solution. This ancient faith rests on the conviction that all the positive values in which men have believed must, in the end, be compatible, and perhaps even entail one another...[9]

Secularism, in contrast, with secularity is a positive freedom ideal. It posits a set of attitudes and beliefs that are best and true, and is willing to marshal the coercive means of the state to help citizens along to becoming genuinely rational and virtuous, as the ideal defines and envisions those terms.[10]

Berlin gives an even more searing condemnation of any such hoped for "final solution" in his essay, *The Pursuit of the Ideal*:

I conclude that the very notion of a final solution is not only impracticable but, if I am right, and some values cannot but clash, incoherent also. The possibility of a final solution – even if we forget the terrible sense that these words acquired in Hitler's day – turns out to be an illusion; and a very dangerous one. For if one really believes that such a solution is possible, then surely no cost would be too high to obtain it; to make mankind just and happy and creative and harmonious for ever – what could be too high a price to pay for that. To make such an omelette, there is surely no limit to the number of eggs that should be broken – that was the faith of Lenin, of Trotsky, of Mao, for all I know of Pol Pot. Since I know the only true path to the ultimate solution of the problems of society, I know which way to drive the human caravan; and since you are ignorant of what I know, you cannot be allowed to have liberty of choice even within the narrowest limits, if the goal is to be reached. You declare that a given policy will make you happier, or freer, or give you room to breathe; but I know that you are mistaken, I know what you need, what all men need; and if there is resistance based on ignorance or

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9 *Ibid*., p. 167.

10 The same critique would apply to other positive visions, including religious ones, that seek to impose themselves on a state's constitutional order. Thus, a similar basis exists for condemning what András Sajó's describes as "strong religion." *See* András Sajó, *supra* note 2, pp. 605-607.

malevolence, then it must be broken and hundreds of thousands may have to perish to make millions happy for all time.[11]

The project of omelette making is not an appropriate undertaking for nation-states. The state is unlikely to have the 'best' recipe, and, in any event, the notion that there is a single 'best' recipe for omelettes is mistaken; it is, in Berlin's phrase, "an illusion; and a very dangerous one." This is not because there are no valid, appropriate, or helpful metrics for evaluating omelettes; rather it is because there is no single metric that is universally applicable in every situation.

Values as Incommensurable or Commensurable. Secularity and secularism are also drawn to different conceptions of the character of human values. Secularity is likely to view human values as multiple and ultimately incommensurable (meaning values have different types of deep appeal that cannot be reduced to a single metric of value, such as utility or wealth). Secularism, in contrast, is more like to view values as reducible to some common metric of value and will view moral and political values as commensurable.

Following his denunciation of political "final solutions" Berlin says this:

The world that we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate, and claims equally absolute, the realization of some of which must inevitably involve the sacrifice of others. Indeed, it is because this is their situation that men place such immense value upon the freedom to choose; for if they had assurance that in some perfect state, realizable by men on earth, no ends pursued by them would ever be in conflict, the necessity and agony of choice would disappear, and with it the central importance of the freedom to choose.[12]

Value incommensurability is the view that some important values (those that are incommensurable) may not be fully reduced to or expressed in terms of some other value. It is not that values that are incommensurable have nothing in common (if so, they are incomparable), but rather that what makes each of them attractive, or choice-worthy, cannot be fully captured by a single common value metric. This means that practical reason is more than a task requiring calculation or maximization. It also implies a tolerance of pluralism,

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[11] Isaiah Berlin, 'The Pursuit of the Ideal', in Henry Hardy (ed.), *The Crooked Timber of Humanity: Chapters in the History of Ideas* (New York: Alfred A. Knopf, 1991), p. 15.

[12] Berlin, *supra* note 5, p. 168.

rather than a commitment to a positive ideal of the good that must be imposed on everyone.

Thus, at the end of the day, Berlin advocates the ideal of pluralism, a concept that lies at the heart of secularity:

Pluralism, with the measure of 'negative' liberty that it entails, seems to be a truer and more humane ideal than the goals of those who seek in the great, disciplined, authoritarian structures, the ideal of 'positive' self-mastery by classes, or people, or the whole of mankind. It is truer, because it does, at least, recognize the fact that human goals are many, not all of them commensurable, and in perpetual rivalry with one another. To assume that all values can be graded on one scale, so that it is a mere matter of inspection to determine the highest, seems to me to falsify our knowledge that men are free agents, to represent moral decision as an operation which a slide-rule could, in principle, perform. To say that in some ultimate, all-reconciling, realizable synthesis, duty *is* interest, or individual freedom *is* pure democracy or an authoritarian state, is to throw a metaphysical blanket over either self-deceit or deliberate hypocrisy.[13]

Secularism makes the same mistake made by other varieties of value monism (including what András Sajó describes as "strong religion"[14] that seeks to co-opt the legislative process and impose religious rules on everyone) – concluding that the same complex recipe of values is best for everyone, and that it is the state's job to impose them on everyone.

Thin and Thick Conceptions of the Good. A third way of looking at the distinction between secularity and secularism is through the lens of what John Rawls described as thin and thick conceptions of the good. Secularity may be viewed as providing primarily a framework, rather than a substantive positive ideology. John Rawls distinguished between what he called "thin" and "thick" political theories of the good (one that makes room for diverse and conflicting philosophies of life, rather than a conception of the good spelled out in comprehensive detail). Here I draw upon complimentary concepts advocated by Rawls, Michael Walzer, and Cass Sunstein.

In his book, *A Theory of Justice*, Rawls makes a distinction between what he calls 'thin' and 'thick' theories of the good.[15] His argument is part of his

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13 *Ibid*., p. 171.

14 *See supra*, note 2.

15 John Rawls, *A Theory of Justice* (Massachusetts: Harvard University Press, 1971), p. 395.

discussion of what rational actors in the original position would choose for principles of justice to govern their lives, before they know anything about the particularities of their circumstances as human beings. The thought experiment of the original position is designed to show that there are certain basic or primary goods that we are all likely to value, and that we know we are likely to value, even before we know the specific contours of our particular lives. These things include basic liberties, such as freedom of thought and liberty of conscience, access to some minimal quantum of social resources, and opportunities that are relatively equal.

Although we may or may not agree whether the original position is a useful, or sufficient, mechanism for reasoning our way to an acceptable theory of justice, let alone broader principles of morality, or truth, the idea of a 'thin' theory of the good has proved remarkably attractive and resilient. As I take it, a thin theory of the good will be a modest theory, one that is likely to appeal to a wide range of people, even those with remarkable different 'thick' or complete ideas (what Rawls calls "comprehensive doctrines") about morality and justice.

A similar sensibility is evident in Michael Walzer's discussion of "spheres of justice," overlapping areas of life, where the types of arguments and reasons that are appropriate, or that we find persuasive, may vary.[16] John Rawls develops a similar theme in his later book, *Political Liberalism*, where he argues that an "overlapping consensus" about political values can help create a stable political framework, within which individuals and communities can develop and live their own "comprehensive doctrines."[17] Cass Sunstein makes a complementary argument with his concept of "incompletely theorized agreements" – agreements between people of different views that leave for a substantial amount of disagreement while still providing some common basis for government and society.

Incompletely theorized agreements are ubiquitous. We often agree about general principles while disagreeing on specific applications of those principles. We often agree about general policies while disagreeing about the best philosophical bases for those policies. And we often agree about specific rules and procedures without having deep agreement about their underlying justification.

Concepts such as these – thin versus thick moral arguments, overlapping consensus, incompletely theorized agreements – provide the basis for more

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16 Michael Walzer, *Spheres of Justice*, (New York: Basic Books, 1984).

17 John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 134.

than a mere *modus vivendi* – a wary standoff where peace is maintained by three criminals each having a gun aimed at the head of one of the others. Rather, a reasonably stable, just, and sustainable political order can be maintained by finding common moral ground – through thin theories and moral arguments, by developing overlapping consensus, and on the basis of incompletely theorized agreements. In reality, most of our agreements and our disagreements (at home and abroad) are not as deep or as entrenched as we imagine them to be. When we seem to agree, we can begin to dig and explore, and will soon enough find that we are not entirely in agreement after all. And when we seem to disagree, we can often find that beneath what appear to be vast disagreements there is significant common ground.

Secularism tries to do too much – it insists that it is uniquely true when reasonable people may disagree, it insists that everyone accept a 'thick' theory that is infused with questionable content, it posits a comprehensive doctrine and insists that anyone who resists it is irrational or in the grip of self-deception, it seeks to impose rather than develop consensus.

Secularity, less ambitious, more modest, creates space for individuals and communities to define and live out what Rawls calls their "comprehensive doctrines," without undue fear and within a political space where they can feel safe. Some limits will be warranted and justified, but they will be narrowly construed and grounded on compelling public needs.

Jurisgenetic and Jurispathic Dimensions of Law. A fourth way of looking at the distinction between secularity and secularism focuses on the distinction Robert Cover draws between the ways in which the law is both jurisgenerative and jurispathic.[18] In his masterwork, *Nomos and Narrative*, Cover begins by observing that we live in a *nomos* – "a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void."[19] Cover calls this process of creating legal meaning "jurisgenesis" and notes that it is decentralized and rooted in communal precepts and narratives.

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[18] My discussion of Cover's distinction between the jurisgenerative and jurispathic faces of the law draws upon an earlier discussion in Brett G. Scharffs, Creation and Preservation in the Constitution of Civil Religion, part of a symposium, "'Civil Religion' in the United States and Europe: Four Comparative Perspectives," 41 *George Washington International Law Review* 985-1000 (2010).

[19] Robert M. Cover, 'Nomos and Narrative, The Supreme Court 1982 Term Forward', 97 *Harv. L. Rev.* (1983), p. 4.

As described by Cover, there are two patterns at work in forming a *nomos*. The first pattern he calls *paideic* or "world creating," and the second pattern he calls "imperial," or "world maintaining." The *paideic* or world creating mode is creative in character, while the imperial pattern focuses on preservation. Cover maintains that normative worlds are never created or maintained exclusively in either a *paideic* or an imperial mode.[20]

It is the very creation of multiple normative meanings from single texts, events, or symbols that leads to the need for the imperial virtues of world maintenance. For example, even a single constitutive text, such as the 13th Amendment to the U.S. Constitution (which freed the slaves) or the 14thAmendment (which guaranteed equal protection and due process of law) will not have a single normative meaning. As Cover puts it:

Some of us would claim Frederick Douglass [a former slave and staunch abolitionist] as a father, some Abraham Lincoln [the sixteenth president], and some Jefferson Davis [the President of the Confederacy]. Choosing ancestry is a serious business with major implications. Thus, the narrative strand integrating who we are and what we stand for with the patterns of precept would differ even were we to possess a canonical narrative text.[21]

Thus, one of the functions of the law, and of courts in particular, is to decide among the multiplicity of meanings that are generated by interpretive communities. As Cover explains:

It is the problem of the multiplicity of meaning – the fact that never only one but always many worlds are created by the too fertile forces of jurisgenesis – that leads at once to the imperial virtues and the imperial mode of world maintenance. Maintaining the world is no small matter and requires no less energy than creating it.[22]

Thus, legal institutions – legislatures, executives, and courts – respond to jurisgenesis, the 'too fertile' proliferation of multiple meanings of a single text or symbol, with an authoritative voice that chooses which meaning will be given official sanction and which will enjoy the coercive imprimatur of the

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[20] Cover explains, "Any *nomos* must be paideic to the extent that it contains within it the commonalities of meaning that make continued normative activity possible. Law must be meaningful in the sense that it permits those who live together to express themselves with it and with respect to it. It must both ground predictable behavior and provide meaning for behavior that departs from the ordinary." *Ibid*., p. 14.

[21] *Ibid*., p. 18.

[22] *Ibid*., p. 16.

state. This does not depend upon judges or other public officials having a superior hermeneutical methodology, but rather, as Justice Jackson succinctly stated of the Supreme Court, it rests upon power: "We are not final because we are infallible, but we are infallible only because we are final."[23]

Cover's account is instructive on a number of levels. Here I will focus on just one – the distinctive role of judges in this normative dialectic between the forces of creation and the forces of preservation. While Cover was concerned specifically with judges in the U.S. system of justice, which is characterized by the powerful institution of judicial review, the specific seductions of jurispathic power apply to whomever the power is given to declare authoritatively what the law is.

Since judges have the power to decide among multiple meanings, Cover describes the judges' power as "jurispathic." The judge's job is not so much to create legal meaning but, rather, to kill it. As Cover explains, "[i]nterpretation always takes place in the shadow of coercion;"[24] or as he put it in the opening sentences of *Violence and the Word*, "[l]egal interpretation takes place in a field of pain and death."[25]

Cover makes his point in *Nomos and Narrative* with characteristic drama:

Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that *this* one is law and destroy or try to destroy the rest.[26]

Judges confronted with too much creativity in the elucidation of normative meanings by various communities within the polis, decide for one, put the coercive power of the state behind it, and in so doing destroy or attempt to destroy all other competing meanings. Thus, for example, when a French legislature or court determines that the headscarf is a symbol of oppression, its decision carries with it the coercive power of the state, and its determination of what the headscarf 'means' is jurispathic – it kills (or at least tries to), in a decisive and conclusive way, alternative meanings, at least as far as French law is concerned. Muslim girls or women may have a different understanding of what the headscarf means, but when the state declares in an

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23 *Ibid*., p. 42, citing *Brown* v. *Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

24 *Ibid*., p. 40.

25 Robert Cover, 'Violence and the Word', 95 *Yale L. J.* (1986), p. 1601.

26 Cover, *supra* note 20, p. 53.

authoritative, official voice, those alternative meanings are not just undermined, they are delegitimized.[27]

The jurispathic role of the law and of courts is to some extent inescapable and necessary. After all, the law as a normative institution is not just about creation, but preservation as well. A community that is exclusively creative, one that is in the grip of competing jurisgenerative visions, will splinter and fall apart. The center will not hold. One job of the judge is to decide among competing conceptions, even if it means eliminating others. Cover recognizes this and explains this reality as follows:

But judges are also people of peace. Among warring sects, each of which wraps itself in the mantle of a law of its own, they assert a regulative function that permits a life of law rather than violence.[28]

Thus, the jurispathic work of judges is closely related to their 'world maintaining' function of preserving a community and maintaining the peace.

By favoring a political framework characterized by secularism rather than secularity, a state tips the scales of the jurisgenerative and the jurispathic tendencies of the law too far in the jurispathic direction. By giving an official imprimatur to a thick, substantive conception (secularism), the state kills other conceptions (including religious conceptions) that might flourish in a system of secularity that is less inclined decisively to favor a single thick conception of the good. When engaging in a law making or law interpreting role, state officials should be aware that they are not just one voice in the crowd; they should remain acutely aware of their jurispathic power – their capacity to kill alternative conceptions of the good and to adopt a single 'official' conception.

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[27] See, e.g., Judge Tulkens dissenting opinion in Leyla Sahin v. Turkey, European Court of Human Rights, App. No. 44774/98, Eur. Ct. H.R., Grand Chamber (2005) particularly para. 11 of her opinion: "Turning to *equality*, the majority focus on the protection of women's rights and the principle of sexual equality (see paragraphs 115 and 116 of the judgment). Wearing the headscarf is considered on the contrary to be synonymous with the alienation of women. The ban on wearing the headscarf is therefore seen as promoting equality between men and women. However, what, in fact, is the connection between the ban and sexual equality? The judgment does not say. Indeed, what is the signification of wearing the headscarf? As the German Constitutional Court noted in its judgment of 24 September 2003, wearing the headscarf has no single meaning; it is a practice that is engaged in for a variety of reasons. It does not necessarily symbolize the submission of women to men and there are those who maintain that, in certain cases, it can even be a means of emancipating women. What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to." The European Court of Human Rights' holding in *Sahin* may on its face be viewed as a victory for secularism, but only by characterizing Turkish secularism as very brittle and vulnerable.

[28] *Idem*.

III. IMPLICATIONS OF THE DISTINCTION BETWEEN SECULARITY AND SECULARISM FOR INSTITUTIONS AND INDIVIDUALS

A. Institutional Dimensions

1. Secularity

Secularity is illustrated by several recent European Court of Human Rights cases, Lautsi v. Italy, involving the presence of crucifixes in Italian public school classrooms, and several German cases involving church employment.

a. Italy: Classroom Crucifix Case

In March, 2011, a Grand Chamber of the European Court of Human Rights reversed an earlier panel decision in *Lautsi & Ors. v. Italy,*[29] holding that the display of crucifixes in the classrooms of Italian state schools was within the margin of appreciation accorded to member states of the Council of Europe and did not, therefore, violate Article 2 of Protocol No. 1 ECHR (right to education and right of parents to ensure such education is in conformity with their own religious and philosophical convictions). The Grand Chamber also concluded it was not necessary separately to examine the complaints under Articles 9 (thought, conscience and religion) and 14 (discrimination))[30]

The earlier Chamber judgment took the view that while the crucifix may have a plurality of meanings, the religious meaning was predominant.[31] Thus, the display of the crucifix was "incompatible with the State's duty to respect neutrality in the exercise of public authority, particularly in the field of education."[32]

The Grand Chamber agreed that the crucifix is "above all a religious symbol."[33] It also noted that the Government of Italy explained the presence of the crucifix in classrooms as "being the result of Italy's historical

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29 *Lautsi & Ors. v. Italy* [2011] ECtHR (GC) (No. 30814/06) (18 March 2011) (reversing the decision of the Second Section, the Grand Chamber held by fifteen votes to two (Malinverni and Kalaydjieva JJ dissenting)

30 *Idem.*

31 Grand Chamber judgment, at para. 31. "It accordingly considered that the compulsory and highly visible presence of crucifixes in classrooms was cap able not only of clashing with the secular convictions of [applicants], but also of being emotionally disturbing for pupils of non-Christian religions or those who professed no religion."

32 Panel judgment, para. 57, quoted in Grand Chamber judgment, at para. 32.

33 Grand Chamber judgment, at para. 66.

development," with both religious and identity-linked connotations, and now "corresponded to a tradition" they considered it important to perpetuate. They added that, beyond its religious meaning, the crucifix symbolised "the principles and values which formed the foundation of democracy and western civilisation, and that its presence in classrooms was justifiable on that account."[34]

The Grand Chamber concluded that "the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State,"[35] while also noting that an appeal to tradition cannot relieve a state of its obligation to respect the rights and freedoms enshrined in the Convention and its Protocols.[36]

Significantly, the Grand Chamber stepped away from dictating a particular, legally binding conclusion about the meaning of the crucifix. It noted that various parties and Courts have differing views, and the Constitutional Court of Italy has not given a ruling. "It is not for the Court to take a position regarding a domestic debate among domestic courts."[37] Thus the Court exercised what Alexander Bickel has described as a "passive virtue," declining to give an authoritative answer that would have the jurispathic effect of killing other legal meanings.

The Court makes two important moves that reflect secularity rather than secularism. The first is invoking the margin of appreciation, which preserves pluralism among member states. The second is declining to take an absolute position with respect to the meaning of the crucifix, which results in the Court allowing various interpretations and significations to continue to exist.

The concurring opinion of Judge Bonello makes even more strongly the point that religious freedom is not equivalent to an ideology of secularism.

2.3 The Convention has given this Court the remit to enforce freedom of religion and of conscience, but has not empowered it to bully States into secularism or to coerce countries into schemes of religious neutrality. It is for each individual State to choose whether to be secular or not, and to what extent, to separate Church and governance. What is not for the State to do is to deny freedom of religion and of conscience to anyone. An immense,

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34 Grand Chamber judgment, at para. 67.

35 Grand Chamber judgment, at para. 68.

36 Idem.

37 Grand Chamber judgment, at para. 68.

axiomatic chasm separates one prescriptive concept from the other non-prescriptive ones.

2.4 Most of the arguments raised by the applicant called upon the Court to ensure the separation of Church and State and to enforce a regime of aseptic secularism in Italian schools. Bluntly, that ought to be none of this Court's business. This Court has to see that Ms Lautsi and her children enjoy to the full their fundamental right to freedom of religion and conscience. Period.

2.5 The Convention proves to be quite helpful with its detailed and exhaustive inventory of what freedom of religion and conscience really means, and we would do well to keep these institutional constraints in mind. Freedom of religion is *not* secularism. Freedom of religion is *not* the separation of Church and State. Freedom of religion is *not* religious equidistance – all seductive notions, but of which no one has so far appointed this Court to be the custodian. In Europe, secularism is optional, freedom of religion is not.

2.6 Freedom of religion, and freedom from religion, in substance, consists in the rights to profess freely any religion of the individual's choice, the right to freely change one's religion, the right not to embrace any religion at all, and the right to manifest one's religion by means of belief, worship, teaching and observance. Here the Convention catalogue grinds to a half, well short of the promotion of any State secularism.[38]

Thus, as Judge Bonello points out, the provisions of the European Convention protecting religious freedom do not impose a model of state secularism. The European Convention creates a framework for freedom of religion and belief – freedom, alone and in community with others, to believe (or not), profess (or not), embrace (or not), change (or not), manifest, through belief, worship, teaching and observance (or not), subject to a limited set of acceptable limitations. Freedom of religion does not entail the promotion of an ideology of secularism.

Judge Power makes a related point in [his] concurring opinion about the meaning and implications of the concept of neutrality. Judge Power argues that the Chamber was correct in referring to "the State's duty to uphold confessional neutrality in public education (§ 56). But then he adds:

However, it proceeded, to conclude, incorrectly, that this duty required the effective preference or elevation of one ideology (or body of ideas) over all other religious and/or philosophical perspectives or world views. Neutrality requires a pluralist approach on the part of the State, not a secularist one. It encourages

[38] Judge Bonello (concurring), at 2.3-2.6.

respect for all world views rather than a preference for one. To my mind, the Chamber Judgment was striking in its failure to recognise that secularism (which was the applicant's preferred belief or world view) was, in itself, one ideology among others. A preference for secularism over alternative world views – whether religious, philosophical or otherwise – is not a neutral option."[39]

Judge Power makes what should be an obvious point, but one that is often neglected, or even affirmatively denied, by proponents of secularism. It is not neutral. It is a substantive world view, itself an ideology. And when the state prefers secularism over other world views, this is not neutral. A framework for pluralism is a far different thing than an ideology of secularism.

U.S.: The Mount Soledad Cross Case

In a January 2011 case, *Steve Trunk, et al v. City of San Diego, et al.,*[40] the 9th Circuit Court of Appeals in the United States faced a somewhat similar issue, but it reached a conclusion that reflects an attitude of secularism rather than secularity. At issue in that case was a forty-three foot cross on federally-owned public land, erected as a war memorial, atop Mount Soledad in San Diego. The 9th Circuit concluded this was an unconstitutional violation of the Establishment Clause. In reaching this conclusion, the 9th Circuit disagreed with a federal district court judge's conclusion that the memorial was "primarily non-sectarian," and concluded that the monument was unconstitutional because it favored one religion over another and "primarily conveys a message of government endorsement of religion."

The Mount Soledad Cross case is an interesting counterpoint to Lautsi, because whereas the Grand Chamber of the European Court declined to provide an authoritative pronouncement on the meaning of the cross, the 9th Circuit took sides.

b. Germany: Church Autonomy and Employment

Differing attitudes of secularity and secularism is also apparent in the many recent cases involving church autonomy and employment. I will highlight only a few here, which illustrate these different approaches.

In *Siebenharr v. Germany*,[41] decided by the European Court of Human Rights in February 2011, the applicant was a Roman Catholic childcare

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39 Judge Power (concurring), at 44-45.

40 No. 08-56415 (9thCir., 2011).

41 *Siebenhaar v. Germany,* [2011] ECtHR (No. 18136/02) (3 Feb. 2011).

assistant in a day-nursery run by a Protestant parish in Pforzheim, who was dismissed without notice by the Baden Protestant Church on the grounds of her involvement in a religious community, the 'Church Universal / Brotherhood of Mankind', whose teachings were deemed to be incompatible with those of the Protestant Church. Ms Siebenharr argued that her termination violated her Article 9 (thought, conscience and religion) rights, read in light of Article 11 (assembly and association). The European Court concluded there had been no violation of her Article 9 rights, because Germany had put in place a system of labour courts, whose decisions are reviewable by the German Constitutional Court, which complied with its positive obligations of balancing her rights against the religious freedom and associational rights of the church. The Court also noted that "the complainant was or should have been aware, when signing her employment contract … that her membership in the Universal Church and her activities in support of it were inconsistent with her commitment to the Protestant Church."[42]

Here the Court reflected an attitude of secularity, recognizing that religious employers have freedom of religion and associational rights, that have to be balanced against the rights of individual employees, and that equality does not demand that non-discrimination norms be applied uniformly, regardless of the religious character of the employer. In two other recently decided cases, *Obst v. Germany,*[43] and *Schüth v. Germany,*[44] the Court sent mixed signals in its interpretation of a different ECHR provision, Article 8 (private and family life).

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[42] Id. at § 46.

[43] *Obst v. Germany,* [2010] ECtHR (No. 425/03) (23 September 2010) (the dismissal by the Church of Jesus Christ of Latter-day Saints of its Director of Public Relations for Europe on grounds of adultery had not breached Article 8 ECHR (private and family life) since the German labour courts had taken account of all the relevant factors and undertaken a careful and thorough balancing exercise regarding the interests involved and, having grown up in the Mormon Church, the claimant had been or should have been aware of the importance of marital fidelity for his employer and of the incompatibility of his extramarital relationship with his position in the Church.) (parenthetical description quoted from Law and Religion Scholars Network, Centre for Law and Religion, Cardiff University). See also *German Religious Employment Cases,* [1985] FedConstCtGermany, 2 BvR 1703, 718/83 and 856/84, BVerfGE 70, 138 (1985) (upholding dismissals of doctor from a Catholic hospital on grounds that he signed a letter published in a magazine criticizing anti-abortion statements made by clergy, a bookkeeper who worked in a Catholic hostel who had resigned his membership in the Catholic Church. The court said the Federal Labor Court, which held for petitioners, "did not attach the constitutionally required weight to the church's understanding of itself, and in this way it unconstitutionally limited the freedom of the church to organize its affairs independently.")

2. Secularism

Secularism is illustrated in several cases from the United Kingdom involving the narrowing of the ministerial exception to employment discrimination laws, and the issue is raised by a similar case currently pending before the U.S. Supreme Court.

a. United Kingdom: Ministerial Exception Cases and Jewish School Case

In *Moore v. President of the Methodist Conference,*[45] a British court narrowed the ministerial exception from the employment nondiscrimination laws, holding that a lower court in concluding that a Methodist minister who brought proceedings for unfair dismissal was not an employee. Thus, even a minister may not qualify for the ministerial exception.[46] This is the latest in a series of cases where UK courts have given narrow readings to the ministerial exception, including *MacDonald v. Free Presbyterian Church of Scotland,*[47] and *Pierce v. Board of National Mission of the Church of Scotland.*[48]

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[44] *Schüth v. Germany,* [2010] ECtHR (No. 1620/03) (23 September 2010) (the dismissal by the Roman Catholic Church of a parish and deanery organist and choirmaster on the grounds that his functions were so closely connected to the proclamatory mission of the Church that the parish could not continue employing him without losing credibility had breached his rights under Article 8 ECHR (private and family life): the labour courts had paid no regard to his *de facto* family life with his new partner or to the legal protection afforded it, and while Schüth had entered into a duty of loyalty towards the Catholic Church which limited his right to respect for his private life to a some degree, his signature on the contract could not be interpreted as an unequivocal commitment to celibacy in the event of separation or divorce.) (parenthetical description quoted from Law and Religion Scholars network, Centre for Law and Religion, Cardiff University). See also *Lombardi Vallauri v. Italy,* [2009] ECtHR (No. 39128/05) (20 October 2009) (the refusal to consider for a permanent teaching appointment someone who had been teaching at a private Catholic university on temporary contracts for over twenty years, on the grounds that he held heterodox opinions, had violated his rights under Article 10 (expression) ECHR because the university had not specified how his alleged opinions had affected his teaching and how, therefore, they were likely to affect the university's interests in providing education based on its religious beliefs: the procedural safeguards of the subsequent judicial review proceedings had also been inadequate and had violated Article 6 (fair hearing) (parenthetical description quoted from Law and Religion Scholars Network, Centre for Law and Religion, Cardiff University).

[45] *Moore v. President of the Methodist Conference,*[45][2011] UKEAT 0219 10 1503 (15 March 2011)

[46] Moore v. President of the Methodist Conference, id. (citing *Percy v. Board of National Mission of the Church of Scotland* [2005] UKHL 27) (giving a narrow reading of ministerial exception to nondiscrimination laws).

[47] *MacDonald v. Free Presbyterian Church of Scotland,* [2010] UKEATS/0034/09/BI (10 February 2010): *MacDonald, Re Application for Judicial Review*ScotCS CSOH 55 (28 April 2010) (be-

A similar light regard for church autonomy was evident in the Jewish Schools case, *E, R (On the Application of) v. JFS Governing Body & Anor,*[49] where the House of Lords refused to defer to a Jewish school's definition of what was Jewish in administering its admissions of students.

A strong pattern of favoring secularism and away from secularity is evident in these U.K. cases.

b. United States: Ministerial Exception Case Pending Before U.S. Supreme Court

In March 2011, the U.S. Supreme Court has accepted a case concerning the scope of the ministerial exception from nondiscrimination norms in hiring. The case, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, may be the most important free exercise case in the United States in the past

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cause Free Presbyterian ministers, elders and deacons are office-holders rather than employees it was not possible for a minister to be unfairly dismissed: however, by pursuing his claim for wrongful dismissal in the employment tribunal and the EAT the petitioner had not forfeited the right to seek reduction by the Court of Session of decisions of the tribunals of the Church. [The petition for judicial review has been put out By Order to consider further procedure.]) (parenthetical description quoted from Law and Religion Scholars Network, Center for Law and Religion, Cardiff University).

[48] *Percy v. Board of National Mission of the Church of Scotland,* [2005] UKHL 73 (15 Dec. 2005); [2006] 2 AC 28 (where a female minister had been persuaded to demit status after an accusation of adultery, the question as to whether or not she was 'employed' (and therefore within the scope of Sex Discrimination Act 1975) rested on a false apposition between 'office' and 'employment': in certain circumstances a minister of religion could have a contractual relationship with his or her Church as an employee: in the absence of express intention the provisions of the Sex Discrimination Act 1975 could not be set aside, and by entering into a contract for services the parties brought themselves within the civil law and took the relationship outside the exclusive jurisdiction of the ecclesiastical courts, so that the provisions of Church of Scotland Act 1921 did not apply to the case: the judgment of the Inner House in *Percy v. Board of National Mission of the Church*[2001] CS (IH) 65 (20 March 2001) reversed (Lord Hoffmann dissenting)) (parenthetical description quoted from Law and Religion Scholars Network, Center for Law and Religion, Cardiff University).

[49] *E, R (On the Application of) v. JFS Governing Body & Anor* [2009] UKSC 15 (16 December): Lord Phillips PSC and Lords Mance, Kerr, Clarke and Lady Hale held that the admissions policy of JFS (formerly the Jewish Free School), which refused to admit a child who was not recognised as Jewish by the Office of the Chief Rabbi (OCR) because the OCR did not recognise the mother's conversion, discriminated against him directly on grounds of ethnicity rather than of religion and was therefore unlawful under the Race Relations Act 1976; in addition, Lord Hope and Lord Walker held that though there had been no direct discrimination, there had been unjustifiable *indirect* discrimination: Lord Rodger and Lord Brown would have dismissed the appeal in its entirety, considering this to be an exclusively religious requirement not dependent upon ethnic origin. See also *E, R (on the Application of) v. JFS Governing Body &Anor*[2009] EWCA Civ 626 (25 June 2009).

decade. The case concerns whether a religious school can claim a "ministerial exception" to a discrimination charge brought under the Americans with Disabilities Act by a teacher, dismissed for insubordination, who taught primarily secular subjects, but also teaches daily religion classes, is a commissioned minister, and regularly leads students in prayer and worship. In a unanimous 2010 opinion, a panel of the 6th U.S. Circuit Court of Appeals in Cincinnati sided with the employee, observing that the "legislative history makes clear that Congress intended the ADA to broadly protect employees of religious entities from retaliation on the job, subject only to narrowly drawn religious exemption."[50] Historically, U.S. Courts have been quite differential to religious groups when it comes to employment disputes involving church personnel.[51] This deference has extended to employees who are not necessarily ministers,[52] and even to religiously-affiliated universities.[53] Whether the *Hosanna-Tabor* case will be an occasion for reaffirming church autonomy and principles of secularity, or whether the Supreme Court will follow the Sixth Circuit in the direction of secularism is yet to be seen.

B. Individual Dimensions

1. Secularity

Secularity is illustrated in two cases involving claims for an exemption from general and neutral laws in South Africa and Japan.

a. South Africa: Pillay

A good example of secularity rather than secularism in a request for an accommodation is found in the 2007 South African Constitutional Court case, *Pillay v. MEC for Education, KwaZulu-Natal and Others*,[54] which held that schools

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50 Case description adapted from International Center for Law and Religion Studies web site

51 See *Serbian Eastern Orthodox Diocese v. Milivejevich*, 426 U.S. 696 (1976) (reversing Illinois Supreme Court that sided in a dispute about leadership of the church, declining to assess "arbitrariness" of the decision of the highest judicatory of the hierarchical church).

52 *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (holding that a statutory exemption from the nondiscrimination provisions of the Civil Rights Act of 1964 does not violate the Establishment clause, thus leaving in place the dismissal of employees of church owned businesses were dismissed for failing to meet religious qualifications).

53 *EEOC v. Catholic University of America*, 83 F.3d 455 (D.C. Cir., 1996) (application of the anti-discrimination provisions of Title VII to the employment of a professor denied tenure in the department of canon law of a Catholic university is forbidden by the Establishment Clause).

54 *Pillay v. MEC for Education, KwaZulu-Natal and Others*, (CCT 51/06 [2007] ZACC 21.

officials who refused to make an exception from a code of conduct prohibition jewelry for Hindu teenager girl, Sunali Pillay, who wore a nose stud in keeping with Hindu custom, was unconstitutional unreasonable discrimination. The case is an interesting contrast to the numerous cases involving headscarves that have arisen in France and Turkey, as well as a number of other countries.

Sunali Pillay was a female student of Indian descent who acquired a nose stud over the school holidays. When she returned to school she was told that the stud violated the school's dress code and she was directed to remove it. Pillay and her mother explained the religious and cultural significance of the insertion of the nose stud as part of a religious ritual marking her coming of age. After consulting with experts, the Governing Body of the school rejected Ms. Pillay's petition for an exemption from the school dress code. The case worked its way from the equality court, to the high court, and eventually to the South African Constitutional Court, which concluded that the refusal to grant an exemption for Pillay constituted unfair discrimination, and ordered the school to amend its code of conduct to "provide for the reasonable accommodation of deviations from the Code on religious or cultural grounds and a procedure according to which such exemptions from the Code and be sought and granted." The Court did not get entangled in the issue whether the nose stud was a cultural or religious practice, noting instead that the Court should focus on the sincerity of the belief and observing that "cultural convictions or practices may be as strongly held and as important to those who hold them as religious beliefs...."

Most significantly, the Court endeavored to not create unnecessary conflicts between conscienceon the one hand and general and neutral laws that create burdens on conscience. The Constitutional Court stated:

The traditional basis for invalidating laws that prohibit the exercise of an obligatory practiceis that it confronts the adherents with a Hobson's choice between observance of their faith and adherence to the law. There is however more to the protection of religious and cultural practices than saving believers from hard choices. Religious and cultural practices are protected because they are central to human identity and hence to human dignity which is in turn central to equality.

In determining whether the discrimination was fair, the Court considered the principle of reasonable accommodation, defining it as "the notion that sometimes the community must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not regulate people to the margins of society because they do not or cannot conform to certain social

norms." In determining the extent of the duty to accommodate, the Court adopted a flexible standard: "Reasonable accommodation is, in a sense, an exercise in proportionality that will depend intimately on the facts." The Court held that fairness required accommodation in this case by measuring the importance of the practice to Sunali against the hardship the school would endure by allowing her an exemption.

b. Japan: Kendo Case

Another interesting example of secularity is found in a case from the Supreme Court of Japan involving a college student who objected to participating in mandatory Kendo (a form of swordplay) classes based upon his religious beliefs. Kunihito Kobayashi, refused to participate in a required kendo class at his public technical college, claiming it violated his religious beliefs. Kobayashi was a Jehovah's Witness and believed that the scripture in Isaiah 2:4 provided a prohibition against studying any form of martial arts, including Kendo.[55]

Kobayashi requested to be allowed to participate in alternative activities, such as writing reports, but school officials denied his request. His refusal to participate in kendo resulted in the school first retaining him in his class another year. When he again refused to participate the following year, he was dismissed from school on the basis that he was not expected to complete his studies.

When Kobayashi's case was appealed to the Japanese Supreme Court, the school argued that it could not make an exception for Kobayashi and provide alternative assignments both because of practical difficulties in offering alternative instruction and because Article 20, paragraph 3 of the Constitution prohibits public schools from asking about or scrutinizing students' religious faith, or ranking religious hierarchically and treating them differently.[56]

The Court rejected this argument, stating that "the Court does not believe that, in the case of a student who is not able to participate in kendo practice for valid reasons of religious faith, the action of offering alternative activities such as requiring the relevant student to take part in alternative physical training activities, write reports and so on and evaluating the results thereof, has religious implications in its purpose, or has the effect of supporting, enhancing,

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[55] Isaiah 2:4 reads: "They will have to beat their swords into plowshares and their spears into pruning shears. Nation will not lift up sword against nation, neither will they learn war anymore." King James version.

[56] Article 20, Paragraph 3 provides, "The State and its organs shall refrain from religious education or any other religious activity."

or promoting a specific religion or the effect of oppressing or interfering with those believing in other religions or those with no religion...."

The Court further reasoned that "when a student refuses to participate in kendo practice for reasons of religious faith, the school, in order to determine the justifiability of the reasons, makes an investigation to determine whether it is an excuse for idleness, or whether there is any rational relevance between the religious teaching explained by the student in question and the refusal to participate. If the student invites investigation into his or her religious convictions by asking for accommodation for their religious beliefs, then investigation does not violate the principle of religious neutrality, and failure to make an effort to accommodate the religious beliefs of the student may violate the protection of religious freedom.

The Court concluded by finding that the school "fail[ed] to take into account the matters to be considered, or obviously [fell] short of rationally evaluating the facts under consideration; hence, this Court arrives at the ruling that the Appellant handed down dispositions that are lacking in appropriateness compared with the view commonly accepted in society and that are illegal beyond the scope of discretionary authority."

It is remarkable that although the Constitution of Japan creates a very strong separation of religion and the state, and the Japanese Supreme Court has affirmed that separation in important cases,[57] here the Court requires state institutions to accommodate conscientious objection to general and neutral laws. The primary test articulated by the court is whether the religious claim is pretextual ("an excuse for idleness"), and whether there is any "rational relevance" between the religious reason and the claimed exemption, which is quite a low threshold. Thus strong institutional separation is not incompatible with accommodating individual claims of conscience. The Court concludes that the state can make an accommodation without violating the principle of state neutrality towards religion, and that failing to make reasonable accommodations may violate religious freedom.

2. Secularism

Secularism is illustrated in similar cases involving headscarves (in Turkey, France, and Kenya), the right to wear religious insignia at work (in the United Kingdom).

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[57] See, e.g., Yasukuni Shrine case

a. Headscarf cases in Turkey, France, and Kenya

In a series of cases involving the headscarf, the European Court of Human Rights followed a path of secularism in holding that concerns for public order and the rights and freedoms of others justified prohibitions on wearing the headscarf. In the most famous of these cases, *Leyla Sahin v. Turkey*,[58] the European Court of Human Rights upheld the University of Istanbul's restrictions on wearing the Islamic headscarf, concluding that the measures did not violate Ms Sahin's rights under Article 9 (thought, conscience and religion), because they were justified in principle and proportionate to the aims of public order and protecting the rights and freedoms of other, and could therefore be regarded as necessary in a democratic society.

A similar result was reached in an interesting Kenyan case involving a religious exemption claim for a headscarf from a group of conservative Christian students. Echoing the reasoning of the European Court of Human Rights in the Turkish and French headscarf cases, the Kenyan Supreme Court held that the principle of secularism prevented an accommodation from being made.

A contrasting result occurred in the 2010 case, *Ahmet Arslan & Ors v. Turkey*,[59] in which the Court's conclusion reflected a slight shift in perspective from secularism to secularity. The Court held that the conviction of members of a Muslim religious group for wearing their distinctive religious headgear and dress in public other than for religious ceremonies had not pursued the legitimate aim of protecting public safety and preventing disorder and had therefore violated Article 9 ECHR (thought, conscience and religion).

b. United Kingdom: Religious Jewelry

In several cases involving the religious freedom of employees to wear religious symbols at work, courts in the United Kingdom have adopted a similar strong secularism in declining to accommodate religious manifestations in the workplace. For example, in *Chaplin v. Royal Devon & Exeter Hospital NHS Foundation Trust*,[60] the court found no direct or indirect discrimination in

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58 *Leyla Sahin v. Turkey* [2005] ECtHR (GC) (No. 44774/98) (10 Nov. 2005); for earlier proceedings see *Leyla Sahin v. Turkey* - 44774/98 [2004] ECtHR 299 (No. 44774/98) (29 June 2004).

59 *Ahmet Arslan & Ors v. Turkey* [2010] ECtHR (No. 41135/98) (23 February 2010) [French text only]

60 *Chaplin v. Royal Devon & Exeter Hospital NHS Foundation Trust* [2010] ET 1702886/2009 (21 April 2010); see also *Eweida v. British Airways PLC,* [2010] EWCA Civ 80 (12 February 2010)).

violation of the Employment Equality regulations, when a nurse who refused on religious grounds to stop wearing a crucifix with her uniform contrary to the Trust's health and safety policy was transferred to a different position where she was not subject to the same regulations.

IV. CONCLUSION

The history of religion-state relations from the time of the Ottoman Empire to contemporary Turkey is exceedingly complex and beyond the scope of this paper. But by comparing these sets of cases we can see two distinctly different interpretations of the relationship of a secular state and religious institutions, and a secular state and individual claims of religious conscience. To a significant extent, from my perspective Turkey appears to be at a crossroads where it will pursue a vision of religion-state relations that resembles either what I have been calling secularity or a model based upon secularism. To date, it seems the model of secularism has been the more dominant vision in Turkey, but the current constitutional process presents an invitation to reconsider this direction.

Of course, to a considerable extent, this re-imagining of the contours of secularism is taking place within the notion of, *laïcité*, whichis itself a complex concept that is capable of many different conceptions. *Laïcité* may be interpreted in ways that come much closer to what I have been calling secularity rather than secularism. It may be said that this is what French President Nicolas Sarkozy has been attempting to do in his articulation of '*laïcité positive*', or a positive *laïcité.* In speeches in Rome in 2007 and Riyadh in 2008, he advanced this concept. In Rome he defended positive *laïcité,* which he defined as "an open secularism, an invitation to dialogue, tolerance, and respect. It is a new chance, a jump, a further dimension to public debate."[61] Sarkozy even acknowledged the possibility that morality grounded in religion may be superior to secular morality. As Father Evaldo Xavier Gomez understands it, "[u]nder this new conception of *laïcité*, the state is not anti-religious. In his speech in Riyadh, Sarkozy asserted that religious feelings are not dangerous ("ce n'est pas le sentiment religieux qui est dangereux"). Going even further, he asserted that a civil society owes religions for the principles of universal morality, human dignity, the universal values of freedom, responsibility, honesty, and rightness. In Sarkozy's words, "there is a need for a

[61] Fr. Evaldo Xavier Gomes, 'Church-State Relations from a Catholic Perspective: General Considerations on Nicholas Sarkozy's New Concept of Laïcité Positive', 48 *J. Cath. Legal Stud.* (2009), p. 215.