

FINAL DRAFT

The effects of judgements by the European Court of Human Rights on religious education in England and Turkey

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Abstract

In this paper, we consider the differences between national and supranational space and time by focusing on one important strand within supranational processes: the European Court of Human Rights, which has given several judgements on religious education. We compare how the ECtHR's decisions and guidance are represented and interpreted in Turkey and England. This analysis shows that these decisions are deployed as catalysts for change as well as bulwarks of the status quo. We also consider how the two countries' responses are different, notably because Turkey has been a responding state in several proceedings, but England has not.

Key words: Religious Education, European Court of Human Rights, Right of Withdrawal, Turkey, England

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Introduction

In the field of religious education, it has been increasingly recognized that influences on religious education come from the supranational level, through international organisations and obligations, as well as from national and subnational levels, and arguments have grown for comparative religious education studies to better understand this phenomenon (Osmer and Schweitzer, 2003; Bråten, 2013). According to Bråten (2014) European countries 'are challenged by *the same* supranational processes' (p. 309, emphasis added), and she divides the supranational processes into formal ones, such as policy and law, and informal ones such as secularisation and pluralisation. In this paper, we consider one formal institution: the European Court of Human Rights (ECtHR or the Court hereafter). This Court has given several judgements on religious education (RE), which then become binding on all the signatory states, no matter what their particular religious history or form of RE: a judgement on Norway also affects Greece and Portugal.

There have been studies which have focused on the direct and indirect effects of the ECtHR judgements on the responding states (Lied, 2009; Özgül, 2019). Moreover, there have been studies which have focused on the general implications of the ECtHR judgements for RE in European countries (Evans, 2008; Relaño, 2010; Cumper, 2011; Leigh, 2012; Fancourt 2017a, 2021), but these judgements' wide-ranging effects within different countries need more attention. Using Bråten's (2014) model as a theoretical lens, we compare how the ECtHR's decisions and guidance are represented and interpreted in Turkey and England. This comparison is significant because RE in Turkey has been subject to ECtHR scrutiny whereas RE in England has not, and

because England is not a signatory in its own right but rather as part of the United Kingdom. This allows us to uncover the direct and indirect effects of the ECtHR judgements over space and time, which have become of wider interest as conceptual frames for researching RE (see Rothgangel et al. 2017, and in it especially Fancourt 2017b).

In what follows, ECtHR judgements on RE will be examined and then Turkey and England in terms of religious plurality and RE will be explored separately. We will then move to the treatment and effects of the ECtHR's judgments in Turkey and England.

European Court of Human Rights Judgements and their Effects

The ECtHR only gives judgements when a case is brought before it. Therefore, it has no oversight of how its judgements are implemented across Europe, and no means of responding to this implementation. It can only judge on the particular facts and issues at stake, and then review its approach when another similar case is brought before it. It also has to consider how other issues of religious freedom are affected, such as freedom of the press, or employment law, and how recent cases in these areas may impinge on RE.

Over the last two decades, there have been a handful of ECtHR cases related to RE in state schools. In 2007, the ECtHR handed down two cases related to RE: *Folgerø and Others v. Norway*¹ and *Hasan and Eylem Zengin v. Turkey*² brought by humanist and Alevi families respectively, under Article 9 and Article 2 of Protocol 1 of the European Convention on Human Rights, specifically on the right to opt out of the subject if it infringed religious freedom. In *Zengin*, the ECtHR set an important precedent:

the Court must determine, firstly, if the content-matter of this subject is taught in an objective, critical and pluralist manner (...) Secondly, it will examine whether appropriate

provisions have been introduced (...) to ensure that parents' convictions are respected.
(Zengin, p. 16)³

The quotation suggests that the opt-out clause is necessary if RE might infringe parents' and pupils' religious freedom, as the Court first determines whether RE is taught in an 'objective, critical and pluralist manner' before considering opt-out provisions. In *Folgerø*, the ECtHR decided that the RE provided in Norway was not conveyed in an objective, critical and pluralistic manner, emphasising that the content of existing RE course failed to respect the religious and philosophical convictions of the applicants. If Norwegian RE had been considered objective, there would have been no need for an opt-out clause. Accordingly, the Court found that the refusal to grant the applicants full exemption from RE for their children gave rise to a violation of Article 2 of Protocol No.1.

In *Zengin*, the ECtHR applied this two-stage test, and found that in a compulsory RE course 'the religious diversity which prevails in Turkish society is not taken into account. In particular, pupils receive no teaching on the confessional or ritual specificities of the Alevi faith' (p. 18). It then moved to the assessment of the exemption procedure applied in Turkey, finding it 'inappropriate' both because it was limited to Christians and Jews and because it obliged families to disclose their religious or philosophical convictions (pp. 19-21).

In the next case, in 2009, the ECtHR ruled in favour of the responding state. In *Appel-Irrgang and Others v. Germany* (2009),⁴ the Court rejected a claim by Christian parents that their children should be exempted from the compulsory ethics classes because they believed these classes to have 'a secular, atheist and anti-religious nature'. The Court held that the classes were 'neutral'. Here, the Court upheld the principle that if the subject matter is neutral or impartial, there is no need for the opt-out provision.

The next year, in 2010, another case, *Grzelak v. Poland*,⁵ focused on optional religion and ethics courses in Poland, where such courses are provided at the request of

parents. The case was brought by an agnostic parent who complained about the impossibility of attending an ethics class due to organisational difficulties and of the lack of any mark in their child's school reports for religion classes. The Court found that the absence of a mark for religion/ethics as indicated that the person did not attend religion classes and that 'he was thus likely to be regarded as a person without religious beliefs' and that unavailability of ethics classes, as opposed to widespread religion classes, was not 'reasonably justified' (pp. 24-25). If *Appel-Irrgang* set out the conditions for the absence of an opt-out clause, *Zengin* and *Folgerø* indicated that the lack of an appropriate mechanism for exemption from RE can be problematic (Leigh, 2012). The *Grzelak* case showed that an opt-out clause's mere existence is not enough to safeguard the religious and philosophical convictions of parents and children (Cumper, 2011).

In 2014, the Court returned to the position of Alevites in Turkey, in *Mansur Yalçın and Others v. Turkey*,⁶ scrutinising the content of the new RE course, which had been specifically reformed after *Zengin*. The Court noted 'the significant changes made' in the syllabus and textbooks since *Zengin* (p. 23), but held that,

the disparity complained of by the applicants between (...) the approach taken by the syllabus and (...) the particular features of their faith when compared with the Sunni understanding of Islam is such that it could not easily be bridged to an adequate extent solely by means of the information concerning Alevi beliefs and practice inserted in the textbooks. (p. 22)

Moreover, the Court again found that the exemption system, which remained unchanged, was inadequate (p. 23). It could be argued that there were subtle differences between *Zengin* and *Yalçın*. The *Zengin* judgement was often interpreted as offering Turkey two options: either RE should be more pluralistic, or it should not be compulsory (Akbulut and Usal, 2008, p. 454; Altıparmak, 2013, p. 4), though some argued that the only way forward was the introduction of an unqualified right of withdrawal (see Simon, 2008, p. 630). However, in *Yalçın* case, there was more stress

in the need for an appropriate exemption mechanism (see p. 24, para 84). The ECtHR's press release, which was shared widely in the Turkish media, stressed this:

Turkey had to remedy the situation without delay, in particular by introducing a system whereby pupils could be exempted from religion and ethics classes without their parents having to disclose their own religious or philosophical convictions.⁷

Finally, there was a decision five years later, in 2019, in *Papageorgiou and Others v. Greece*,⁸ concerning opt-out of compulsory RE course in Greece, where those seeking exemption were required to submit a solemn declaration stating that they were not an Orthodox Christian. The ECtHR found that this violated the families' rights to freedom of belief since they were obliged to declare their convictions. However, this case significantly departed from *Zengin*, *Folgerø* and *Yalçın* cases, as it did not include the consideration of the course content to determine whether it would need an exemption.

The ECtHR's RE judgements should be also understood against the backdrop of various other cases on religious symbols, as they all contribute to the ECtHR's approach to religious freedom in education (Fancourt 2020). Particularly in the headscarf cases⁹ the ECtHR upheld the state's right to restrict religious freedom, opening itself up to the criticism that its judgements on religious freedom, especially compared to RE judgements, are inconsistent (Hunter-Henin, 2015), 'selective' (Vespaziani, 2013, pp. 145–147), and even biased (see Evans, 2008; Relaño, 2010; Arthur and Holdsworth, 2012; Leigh, 2012; Fokas, 2019 for various criticisms levelled at the ECtHR and its judgements).

First, it should be noted that these problems and changes occur sporadically over time, as and when the cases are brought from different signatory states: Norway, Turkey, Germany, Poland and Greece. Unusually, the Court was able to review Turkish provision for Alevites twice; generally, it must abstract the human rights issues from diverse educational contexts. Space for the Court is therefore everywhere and nowhere, because whilst the judgements apply across Europe, they are devoid of

contextual detail and practicalities. Time for the Court is a matter of chance, since it cannot know when the next case on these issues will be brought before it. The Court decides in Strasbourg but where and when the decision is enacted is beyond its direct remit or control.

Second, the ECtHR's judgements have direct and indirect effects. The direct effect of the ECtHR is guaranteed by the obligation on contracting states to comply with any adverse findings of the ECtHR against them. However, given that there is no effective mechanism of the Council of Europe to enforce the states to act on the adverse findings of the ECtHR (Gürcan, 2015, p. 4), the direct effect might be limited, and the two Turkish cases show how variable this can be.

The indirect effects of the ECtHR's jurisprudence, however, might be more widespread, as this jurisprudence is considered as 'standard-setting for human rights worldwide' (Koenig, 2015, p. 51). The indirect effects of the ECtHR include how its judgements influence domestic debates in RE policy and content. ECtHR judgements might be deployed by policymakers, national courts and interested groups within national debates in different countries. They might prompt and encourage local actors to further engage with law and pursue or threat legal action in national and supranational courts (Galanter, 1983; Fokas and Anagnostou, 2019).

However, the effects of the courts might not be always straightforward and intended. The lack of effective guidance in the ECtHR's judgements (Relaño, 2010; Leigh, 2012, p. 205) and the fact that 'a single judicial action may radiate different messages to different audiences' (Galanter, 1983, p. 126) might lead to different interpretations and implementations. Moreover, as the norms articulated in these judgements are abstract and contested, some actors might appropriate them to promote their particular demands (Hendek, 2020). Furthermore, the ECtHR might have different effects in different contexts. Some local actors might ignore or oppose these judgements while some of these judgements might not be even heard or known by local actors

(Anagnostou and Andreescu, 2019). The importance and influence of these judgements can be discerned through comparative studies which reveal the interplay between supranational space and time and the different national contexts.

Turkey and England in terms of Religious Plurality and Religious Education

This paper compares two different cases for the impact of supranational processes, England and Turkey. These two states offer a valuable comparison because while they have both long been signatories to the ECHR, Turkey has been the respondent twice and England has never been before it; a comparison between Turkey and another respondent on curriculum issues, e.g., Norway, would also be insightful (Lied 2009; Bråten 2015), but here we focus on two contrasting cases. To make sense of the complex contextualisation of the ECtHR's judgements, some background on human rights law and RE in both countries is essential.

England (as part of the United Kingdom) and Turkey have been members of the Council of Europe since its establishment and ratified the European Convention on Human Rights (ECHR) in 1953 and 1954 respectively. Both countries accepted the jurisdiction of the ECtHR and the right of individual petition (England in 1966; Turkey in 1987). The introduction of the Human Rights Act 1998 in England gave direct effect in national law to the fundamental rights and freedoms in the ECHR. In a similar move, a constitutional amendment in 2004 in Turkey have given the ECHR and the case law of the ECtHR direct effect and supremacy over national law. England and Turkey, therefore, are subject to the 'same' formal supranational force: the ECtHR, as Bråten (2014) would argue.

However, how these countries deal with the ECtHR's judgements will depend not only on whether they have been responding states before the ECtHR, but also on their religious plurality and RE policy. In England, which has been a predominantly

Christian country, there has been increasing religious plurality, partly because of waves of non-Christian immigration, and a rising number of those identifying themselves as having no religion.¹⁰ The debates over RE in England, therefore, centre around this increasing religious and non-religious plurality.

Turkey, however, has never experienced any similar waves of immigration, nor has it experienced widespread individual secularisation, despite having adopted a French model of secularism under Atatürk. A frequently cited estimate suggests that 99% of the Turkish population follows Islamic teachings, and religious minorities, notably Christians and Jews comprise less than 1% of the population,¹¹ though this figure ignores those not claiming any religious convictions, and moreover, Islam, like any other religion, has different denominations, sects and interpretations, and in Turkey, therefore, the debates over RE are usually about the plurality within Islam, particularly, as seen above, Alevism.

RE (termed *Religious Culture and Ethics Knowledge* in Turkey, and *Religious Education* in England) is compulsory in both countries. In the former, RE was an essential element of the Ottoman education system, was excluded under Atatürk's strongly secularist approach in the 1930's, and was reintroduced in 1949, becoming compulsory in 1982. In England it has been a part of all schooling since the 19th century. Both countries allow parents to opt out of it on behalf of their children, though the exemption systems differ. In England, there is an 'unqualified' right to withdraw from RE wholly or partially without giving any reason, which is been in place in one form or another since 1870;¹² while in Turkey only children of Christian and Jewish families exempted, provided that they affirm their adherence to these religions.

The curriculum content of RE in England is overseen and determined locally; it is overseen by a Standing Advisory Council on Religious Education (SACRE), and determined by an Agreed Syllabus Conference (ASC); this structure has been in place since 1944 (Yeaxlee, 1944). However later legislation in 1988 specified that the locally

agreed syllabuses should 'reflect the fact that religious traditions in Great Britain are in the main Christian, whilst taking account of the teaching and practices of the other principal religions represented in Great Britain'.¹³ As the legislation refers to Christianity and 'other principal religions', it impliedly excludes non-religious worldviews – criticised at the time (see Hull 1989). Moreover, the SACRE and ASC consists of four committees, two of which should be religious groups: the Church of England, as one group and 'Christian and other religious denominations [that] reflect the principal religious traditions in the area' as the other. In other words, religions are represented, but non-religious worldviews are not formally recognised, even if some SACREs have co-opted humanist representatives; Wales departs from England in this respect and there is a major change taking place in RE policy which will be explored in the next section in relation to the effects of ECtHR judgements.

In Turkey, legislation does not specify the content of RE, nor the composition of the national committee which prepares the syllabus. However, the 1982 Constitution, which made RE compulsory, states that

Education and instruction in religion and ethics shall be conducted under state supervision and control. Religious culture and ethics instruction shall be compulsory in the curricula of primary and secondary schools. (Article 24).

The name of the course, 'Religious Culture and Ethics Knowledge', suggests that the course would be inclusive of different religions, and would be supra-denominational as it is a compulsory subject, but whether these principles are employed in practice is subject of much debate and the cause of litigation in both domestic and international courts.

These differences in religious plurality and RE policy between Turkey and England influence how the ECtHR's judgements are addressed in these two different countries.

Influence of the ECtHR's Judgements in Turkey and England

In this section, we compare the direct and indirect influences of the ECtHR judgements related to RE in Turkey and England.

Turkey

Compulsory RE in Turkey was subject of two ECtHR cases and in both cases, the ECtHR ruled in favour of the applicants. These cases, therefore, have stirred public debate about compulsory RE, as well as leading to official policy amendments.

The 2007 *Zengin* judgement was delivered at a time when RE was already on the educational and political agenda in Turkey. For example, RE syllabuses/programmes (*öğretim programı* in Turkish, meaning syllabus) were reformed in 2005/2006 and the new RE syllabuses included information and sections related to Alevi faith for the first time. As the *Zengin* case was lodged to the Court in 2004 and this was widely reported in the media,¹⁴ this reform can be seen as a pre-emptive response to the pending case.

The ECtHR examined the previous syllabuses and textbooks in *Zengin* (pp. 5-8), and to judge from official reactions in Turkey, it seemed that the outcome was expected. One Minister of State, for example, said that 'The decision of the ECtHR is not a grave decision. It is no surprise', although the Minister of National Education said that he could not make any final assessment without seeing the reasons for the judgement.¹⁵ After the ECtHR published its judgement in 2008 and a similar judgement was given by the Supreme Administrative Court in Turkey (see below), the Minister said that

the changes they wanted have already been made. The issues in the justification [of these cases] have already been resolved.¹⁶

In other words, the official position of the government was that the inclusion of Alevi faith into the syllabuses and textbooks, without amending the exemption system, was

enough for the execution of the *Zengin* case. This view however was not shared by some Alevi organisations, and one organisation, which had provided the applicants' legal support, started a campaign for the removal of compulsory RE on the basis of the judgement.¹⁷

Moreover, the judgement itself was also subject to heavy criticism. Ali Bardakoğlu, the then-president of the highest religious authority in Turkey, the Presidency of Religious Affairs, criticised the judgement, claiming it is 'technically wrong' and questioned the 'theological competence' of the judges:

The judiciary (...) should not determine what religion is and what it should be. If the judiciary goes to the point of determining how a religion should be taught, which doctrine is original, objective and rational, [and] which one is more biased and more sectarian, then of course we have the right to wonder on what data and on what scientific basis this [judgement] is based.¹⁸

For Bardakoğlu, what was taught in RE in Turkey was the shared tradition of Islam, based on the *Quran* and *Sunnah*, rather than belonging specifically to Sunnism. Despite these public criticisms of the judgement, however, the government set about considering further changes. In 2009/2010, a large number of workshops were held to examine the issues concerning the Alevi community. One of the main issues discussed was compulsory RE. The final report mentioned *Zengin*, as well as relevant international conventions and stated that the 2005/2006 reform was not 'found satisfactory enough by Alevi citizens' (p. 158).¹⁹ The report recommended a fairly radical reform: 'In the long term, what really matters is to remove [RE] courses from being obligatory', but the report noted that 'however, it is not foreseen that this expectation will be realised under the current circumstances' (p. 159), pointing to the government's unwillingness to make such a change and also to popular support for compulsory RE. Therefore, the report went on to recommend that new syllabuses should 'seek compliance with the principles of secularism, *objectivity*, *criticism* and *pluralism*' (p. 159, emphasis added). These workshops partly led to the new 2010 RE

syllabus, which was the direct impact of *Zengin*, and which contained expanded coverage of the Alevi tradition.

However, the new syllabuses were again considered not objective enough by some Alevi families, which led to 2014 *Yalçın* judgement (*Mansur Yalçın and Others v. Turkey*). Mansur Yalçın, the leading applicant, described the judgement as a 'milestone', and stated that

We wanted Alevis to benefit from the right of withdrawal enjoyed by the minorities [i.e. Christians and Jews]. This was the basic logic of the case.²⁰

As this was the 'basic logic of the case' according to the applicants, the media reported the case in this way.²¹ However, this time the ECtHR judgement received much more negative reactions, especially from the political authorities; newly elected President Erdoğan condemned the ECtHR's decision, stating that

This is an incorrect ruling and there is no similar example in the West. (...) [Compulsory RE] must not be opened to discussion.²²

This reaction is important, as it shows a change in the political space from *Zengin* to *Yalçın*. After *Zengin*, politicians' remarks mildly recognised the need for reform of the RE curriculum, but after *Yalçın* they defiantly defended the value of existing RE: the president made it clear that the government would not change the status of the course, publicly dismissing the *Yalçın* judgement.

Nevertheless, in 2017, the Ministry of National Education announced a reform of RE syllabuses and textbooks. The Minister had stated that new RE syllabuses 'will approach all religions equally' and 'an approach that championed Sunni Islam will (...) be eliminated in accordance with European Court of Human Rights rulings.'²³ The 2018 RE reformed syllabus, therefore, can be seen as another direct effect of the ECtHR judgements.

As stated above, the exemption system applied in Turkey was a point of concern in the ECtHR cases. The exemption of only Jewish and Christian students from RE has been the official policy since 1990. In *Zengin*, the government stated that ‘this exemption procedure could be extended to other religious or philosophical convictions, such as atheism’ (p. 5), and in 2007, there were reports in the media that the governing *AK Parti* (Justice and Development Party) commissioned a group of experts to prepare a draft constitution, which would include amendments to compulsory RE (Müftügil, 2011, pp. 154–155), but the draft never materialised. In 2008, the Minister of National Education stated that the government would not change the subject’s status; as noted above, after *Yalçın*, this was strongly verbalised by the president. In other words, the ECtHR’s judgements stirred debate over the exemption system, but they have not brought about any official policy change in this issue, which has been also the case in other responding states such as Norway (see Bråten, 2015).

The ECtHR’s cases’ direct influence can be seen on national court judgements. Soon after *Zengin*, a similar case was brought before the Supreme Administrative Court, in 2007, which in the past rejected the demands for exemption from RE. The Supreme Administrative Court followed the ECtHR’s reasoning, quoting *Zengin* at length, and concluded that RE courses could not be compulsory (see Altıparmak, 2013). However, in 2010, the Supreme Administrative Court overturned its 2007 judgements, stating that the curriculum changes made in 2005/2006 would be sufficient to meet the ECHR’s standards, probably not foreseeing that the ECtHR would find the new curriculum changes unsatisfactory in 2014. Since then, there have been different Supreme Administrative Court judgements on RE, with the most recent stating that RE in Turkey meets the standards set out in *Zengin* and *Yalçın* cases.²⁴

The lower level courts therefore are caught between the Supreme Administrative Court and ECtHR, which has led to contradictory judgements. What is considered ‘not objective’ in Istanbul is deemed to be ‘neutral’ in Erzurum,²⁵ even though the *same* RE syllabuses and textbooks are used across the country.

Another effect of the ECtHR judgements is that they increasingly became part of the discourse regarding RE in Turkey. Notably Alevis and atheists, have deployed these judgements before local courts to opt out (Özgül, 2019). Moreover, these judgements made their way into the European Commission's Turkey Progress reports, and since 2007 the Commission has called Turkey to implement these judgements (see for example the 2019 report).²⁶ Furthermore, these judgements have led to the proliferation of reports that assess all aspects of the subject, such as syllabus and textbooks, which take the ECtHR cases as their initial base (Kaymakcan, 2007; Eğitim Reformu Girişimi, 2011; Yıldırım, 2012; 2021; Altıparmak, 2013; Gürcan, 2015; Meral, 2015). In turn, these reports have been used by the applicants in the subsequent local and ECtHR cases. For example, in *Yalçın*, the applicants used three reports to make their case. However, it can be observed that over time there have been fewer reports, which take the ECtHR cases as their initial base, on these issues, which might be related to the realisation that the ECtHR judgements would not bring any major change to RE in Turkey.

In summary, the space and time of RE in Turkey are marked by febrile policy reform, the subject's politicisation, and a complex disjuncture between policy and the local courts. The ECtHR's decisions have affected this both directly and indirectly.

England

The effects in England are different. As RE in England was never subject to ECtHR's scrutiny, the ECtHR judgements have neither led to any official RE reforms, nor has there been any official response to them. Moreover, a study conducted in 2013 found that key stakeholders from the representatives of religious, secular and educational organisations to teachers and state officials hardly mentioned ECtHR judgements as a 'relevant factor' shaping RE in England, instead finding that they simply discussed the long-standing domestic legislation from 1944 onwards and factors such as secularisation and pluralisation (Hendek, 2020). However, these judgements came into

increasing prominence in a domestic court case in 2015 and the Commission on RE's final report in 2018. Debates over the proposed RE changes in Wales, over the internal border, have also affected the position in England.

In 2015, humanist parents, Mr and Mrs Fox, backed by Humanists UK, challenged the Department for Education over its exclusion of non-religious worldviews in public examinations, specifically the Religious Studies GCSE²⁷ Subject Content.²⁸ The judgement included long passages from various ECtHR judgements (pp. 6-13) and found that the Department had made 'an error of law', holding that the Subject Content 'represents a breach of the duty to take care that information or knowledge included in the curriculum is conveyed in a *pluralistic* manner' (p. 25, emphasis added). The court did not have to consider the right of withdrawal as a possible remedy for the exclusion of non-religious worldviews from Religious Studies GCSE Subject Content.

The judgement can be seen as the direct impact of the ECtHR judgements. However, like the ECtHR judgements, *Fox* too produced 'different messages' for different actors. After the judgement, both the Department for Education²⁹ and Humanists UK³⁰ issued legal advice on the implications of the case, with different interpretations of the judgement. Humanists UK announced that:

religious education syllabuses around the country will now have to include non-religious worldviews such as humanism on *an equal footing*, and pupils taking a GCSE will also have to learn about non-religious worldviews alongside the course. (emphasis added)³¹

The Department for Education contrastingly argued that the case 'ruled on a narrow, technical point', stating that

[It] will have no impact on what is currently being taught in religious education. (...) both faith and non-faith schools are completely entitled to *prioritise* the teaching of religion and faith over non-religious world views if they wish. (emphasis added)³²

This then led the Chief Executive of Humanists UK to warn that the government's guidance issued after *Fox* was not only 'obtuse', but also liable to lead 'schools and teachers into breaches of the law.'³³

After this judgement, Humanists UK have engaged further with the law and courts. For example, in 2017 it challenged a local council in Wales for its exclusion of a humanist representative in its SACRE, arguing that discrimination against humanists 'contravenes a 2015 High Court decision about the content of the RE curriculum'.³⁴ Eventually, the council withdrew its decision and allowed a humanist representative.³⁵ This led to an official policy change in Wales, which allowed representatives of non-religious belief systems in ASCs and SACREs 'to ensure compatibility with the Human Rights Act 1998'.³⁶ Similarly, in 2019 Humanists UK challenged Greenwich Council for its exclusion of humanist representative, notifying the council of its intention to apply to the High Court. The council backed down, acknowledging that there is 'a legal basis on which humanists can be full members of SACREs',³⁷ but this has not led to any official policy or statutory change in England.

These court cases and litigation threats show that some interested groups, particularly humanists and secularists whose campaigns related to RE long predated these judgements (see Freathy and Parker, 2013), have capitalised on the court judgements to strengthen their demands. For example, Humanists UK justified the inclusion of humanism in RE as follows:

Including humanism in RE lessons is an excellent way for teachers to fulfil their legal obligations to teach about a non-religious worldview. For more information about the 2015 High Court ruling, click here [hyperlink to the *Fox* ruling].³⁸

Moreover, these organisations intervened in other cases. For example, National Secular Society in England submitted a third-party intervention to the ECtHR in *Papageorgiou*, arguing that the exemption system in Greece breaches Article 2 of Protocol 1 of the ECHR. Its chief executive Stephen Evans said after the ruling:

This welcome ruling should act as a reminder that those in charge of education must not seek to push religion on children. Politicians in the UK should take note.³⁹

Thus he intimated its relevance in England. However, despite *Fox* and the efforts of humanist and secular groups, the ECtHR's judgements have not been always included in the debates on RE in England. In the last ten years, there has been a proliferation of reports which call for legal and/or curricula changes to RE in England. Three reports (Commission on Religion and Belief in British Public Life, 2015; Clarke and Woodhead, 2018; Commission on Religious Education, 2018) are of importance here as they had recommendations about the content of the subject and the parental right of withdrawal, which were the main issues raised in the ECtHR judgements, but only one of these reports mentioned the ECtHR judgements.

Clarke and Woodhead proposed a new 'Religion, Belief and Values' course and called, among other demands, for the removal of the right of withdrawal because this course would impartially accommodate a range of religions and beliefs (Clarke and Woodhead, 2018, p. 28), but there was no mention of the ECtHR or *Fox* throughout their report, despite heralding it as a 'new settlement' to replace the constitutional arrangements of the 1944 legislation. A similar recommendation had also been made by the Commission on Religion and Belief in British Public Life (2015). Even though its report argued that the changes should be 'informed by human rights values and standards' (p. 36), the Commission here referred to the Council of Europe and the Organisation for Cooperation and Security in Europe's (OSCE) recommendations and guidelines such as the Toledo Guiding Principles. These documents are clearly informed by the ECtHR's judgements, but Commission did not expressly cite the underlying law.

The Commission on Religious Education's final report (2018), however, differed from these two reports as it included an examination of the ECtHR's judgements and recommended retaining the right of withdrawal even after an RE reform. The

Commission argued that the right of withdrawal ‘is (...) protected by Article 2 of protocol no.1 of the [ECHR]’ (p. 63), despite acknowledging the concerns and problems related to the right of withdrawal and a popular support amongst teachers for its removal (Lundie and O’Siochru, 2021). After examining *Folgerø* and *Zengin*, and considering the school system in England, the Commission ‘*reluctantly* recommended retaining the right of withdrawal’ (emphasis added):

Given the freedoms afforded to schools to design their own curricula, we could not guarantee that every school curriculum nationally would be sufficiently ‘objective, critical and pluralistic’ to justify ending the right of withdrawal, particularly as so many of the challenges which have been brought [before ECtHR] have been successful. (p. 67)

The Commission on RE’s final report, therefore, stressed the relevance and importance of ECtHR case law for RE policy in England and Wales.

However, this report was taken up differently in Wales, which has a separate educational system but not a separate legal system. The Welsh Government recently made it clear that proposed changes including the removal of the right of withdrawal are ‘compatible with rights protected by the Human Rights Act 1998’ as the new RE ‘does not involve indoctrination and is provided in an objective, critical and pluralistic manner’.⁴⁰ However, others disagreed. For example, Humanists UK and the National Secular Society, which both operate across the United Kingdom, responded to the proposed removal by highlighting the ECtHR case law:

There is a large body of human rights case law that suggests that scrapping this right will be unlawful. (National Secular Society)⁴¹

For RE, simply put, any reading of case law [of the ECtHR] and any assessment of its implications leads to the conclusion that it is not yet possible to remove the right of withdrawal, and may never be so. (Humanists UK)⁴²

The proposal to remove the right of withdrawal was in general not popular among the respondents to the consultations,⁴³ but not all interested parties used the ECtHR case

law to make their case. For example, the Catholic Education Service opposed the move on the grounds that parents are the primary educators of their children and the removal of the right of withdrawal would be ‘huge erosion of parental rights’, adding that

The belief that parents are the primary educators of their children is enshrined in Canon Law (the law of the Catholic Church).⁴⁴

Moreover, some religious groups criticised the new subject’s composition. The government consultation document had stated that,

religion, values and ethics (RVE) should encompass both religious and non-religious beliefs that are philosophical convictions (in line with the European Convention on Human Rights).⁴⁵

The Catholic Church then argued that this would ‘represent a dumbing down of RE’⁴⁶ while Church in Wales expressed a more fundamental opposition:

We **do not** agree with the definition of philosophical convictions as defined by the ECHR (emphasis in original)

and warned that

If the intention of the proposed changes is to avoid legal challenge, it is unlikely to achieve this without greater clarification of philosophical convictions.⁴⁷

In England, and especially over the border in Wales, the importance and relevance of the ECtHR’s judgements have increased somewhat in recent years. Moreover, as the proposed changes in Wales will be implemented in 2022, the ECtHR might become a ‘relevant factor’ shaping English RE policy, as the Welsh example will provide a further catalyst for change across the United Kingdom. This contrasts starkly with the situation in 2013, when the ECtHR was not seen by key stakeholders as a ‘relevant factor’ in RE (Hendek, 2020).

To summarise the position in England, the ECtHR's judgements have only begun to have any effect, and this is largely through their citation in *Fox*, which has acted as a catalyst for their wider indirect deployment in arguments about the subject, especially the place of non-religions. Generally, space and time are marked by longer arguments at a slower pace, and by the absence of any politicisation. However, the potential for a different, legally informed approach to be taken in Wales may bring these issues more to the fore, so that they will also impinge on English RE decision-making.

Discussion

Turkey and the United Kingdom as 'contracting states' both have been subject to the same formal supranational influences from the ECtHR, because they are both subject to the same judgements. These judgements are given in the supranational time and space of the Strasbourg Court under Human Rights law, but the effects of this supranational factor have been met differently in the two countries because the socio-religious context, educational structure, policy stakeholders and place of the courts are different, and not least because RE in Turkey was subject to ECtHR scrutiny twice, so the effects are not simply direct but also directly applicable. The ECtHR's developing position on the content and nature of Turkish syllabuses, from criticising the lack of any information about Alevism in *Zengin*, to arguing that information alone would not be enough in *Yalçın* might also contribute to this situation; unusually, the ECtHR could comment on the direct effects of its judgement. These two judgements raised practical direct questions such as how much information about Alevi faith would be enough or whether it is ever legally possible to have compulsory RE in state schools, as well as involving sensitive theological issues, such as adjudging if the information about Islam found in textbooks is too specifically from a Sunni perspective. The two cases meant that the Court came to be heavily referenced in Turkish national debate, as in other responding states in litigation such as Greece or Norway.

Nevertheless, patterns of continuity and change can be detected. In a sense, the right of appeal to the ECtHR is itself a factor at the national level - a card to be played. However, in both countries, the ECtHR's judgements have encouraged minority parties such as Alevis in Turkey and humanists in England to further engage with the law and pursue or threaten legal action. The difference has been that in Turkey, these interventions have gone to the ECtHR and been seismic in their effects as political issues, but in England, they have manifested more recently and been less significant.

These have had three effects. First, the ECtHR judgements about RE have led to progressive reforms, challenging 'old religious education structures' (Bråten, 2014) in both countries. In Turkey, this has been in the form of bolstering the arguments for more pluralistic RE, especially including Alevism into RE syllabuses (Kaymakcan, 2007), which has been the driving force behind the recent RE reforms. In England, these judgements have bolstered arguments for including non-religious worldviews into RE and non-religious representatives in ASCs/SACREs, though through very little litigation, but rather its threat.

Second, these judgements simultaneously *strengthened* aspects of 'old religious education structures' such as the right of withdrawal (Leigh, 2012). Both Turkish cases have upheld it, and it was evident in the Commission on RE's final report (2018), which warned against its abolition partly because of possible litigation. The proposal to remove the right of withdrawal in Wales, too, is opposed on the grounds of ECtHR case law. In Turkey, the ECtHR judgements have been interpreted by some Alevi organisations as requiring the introduction of an unqualified exemption system, no matter what the subject's content.

Third, however, the rhetorical gesture of rejecting its decisions is also an inverse effect of the judgement. In Turkey, official reaction changed from being mildly responsive after *Zengin* to dismissive criticism of the Court after *Yalçın*. Özgül (2019, pp. 111–112) considered this due to domestic policy change under the conservative government in

Turkey. However, wider complaints about the ECtHR, that it is too ‘interventionist’ (Leigh, 2012, p. 214), ‘inconsistent’ (Hunter-Henin, 2015, p. 267) and ‘selective’ (Vespaziani, 2013, pp. 145–147) in cases related to religious freedom, might have bolstered the conservative government in publicly criticizing the ECtHR’s judgements.

Conclusion

In this paper, we have sought to demonstrate the value of comparative studies by comparing the direct and indirect effects of the ECtHR judgements on Turkey and England. The analysis shows that there have been differences between space and time both between the supranational and the national and then also between the two national systems. The ECtHR generally operates in an abstracted space over an extended time frame which it cannot control. The national systems operate in the flow of contextual and educational factors, often marked by rapid policy changes. However, the two countries themselves differ, depending on whether the country is the responding state in these cases, constitutional positions, national RE policy, and the responsiveness of the local actors, courts and mechanisms to these judgements. Moreover, the analysis shows that as a supranational factor, the ECtHR has challenged RE policy differently in the two countries. These judgements are deployed as a catalyst for progressive change for pluralistic RE in both countries. However, they have also become a bulwark of the status quo, in ensuring that long-standing features are retained, such as the right of withdrawal provision, which means that the supranational forces not only challenge the old RE structures, but also to some extent strengthen them. They have also become tropes in political rhetoric in their own right, since politicians can present themselves as law-abiding Europeans who follow decisions, or as patriots standing up to European meddling interference.

In conclusion, we have sought to show how sameness and difference are manifested across these national and supranational levels. Clearly, further work is needed on a deeper analysis of the Court’s other decisions, as well as on a wider range of countries,

including, as Bråten argues in the introductory chapter of this special issue, for further comparative studies to investigate further how RE cuts across the various kinds of space and time.

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¹ ECtHR (2007) *Folgerø and Others v. Norway* (Application no. 15472/02). Hereinafter, the case is simply referred to as *Folgerø*. This approach is used for all case law after the initial citation.

² ECtHR (2007) *Hasan and Eylem Zengin v. Turkey* (Application no. 1448/04).

³ All the references are the page numbers. When the paragraph number is given, ‘para’ is used.

⁴ ECtHR (2009) *Appel-Irrgang and Others v. Germany* (Application no. 45216/07).

⁵ ECtHR (2010) *Grzelak v. Poland* (Application no. 7710/02).

⁶ ECtHR (2014) *Mansur Yalçın and Others v. Turkey* (Application no. 21163/11).

⁷ <http://hudoc.echr.coe.int/eng?i=003-4868983-5948734>

It should be noted that the press releases do not ‘bind the Court’, as they are documents produced by the Registry, but their importance should be realised as they are the first instance of reference by the media and politicians. For example, a newspaper reported after the press release that ‘It was decided [by the ECtHR] that the students who do not want to take part in [RE course] should be granted the right of withdrawal’ see <https://www.sozcu.com.tr/2014/gundem/din-dersinde-aihmnden-karar-602923/>

⁸ ECtHR (2019) *Papageorgiou and Others v. Greece* (Applications nos. 4762/18 and 6140/18).

⁹ For example: ECtHR (2001) *Dahlab v. Switzerland* (Application No. 42393/98) and (2005) *Leyla Şahin v. Turkey* (Application No. 44774/98).

¹⁰ See the 2011 census:

<https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/religion/articles/religioninenglandandwales2011/2012-12-11>

¹¹ <https://minorityrights.org/country/turkey/>

¹² Elementary Education Act 1870.

¹³ Education Reform Act, 1988, section 8(3)

¹⁴ <https://www.hurriyet.com.tr/gundem/alevilere-zorunlu-din-dersi-aihmde-38561607>

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¹⁸ <https://www.altinoluk.com.tr/8220aihm-islama-hristiyanlik-gibi-bakiyor8221.html>

¹⁹ <https://serdargunes.files.wordpress.com/2013/08/alevi-c3a7alc4b1c59ftaylarc4b1-nihai-rapor-2010.pdf>

²⁰ <https://www.cumhuriyet.com.tr/haber/karar-milat-olacak-120572>

²¹ See <https://www.sozcu.com.tr/2014/gundem/din-dersinde-aihmden-karar-602923/>

²² <https://www.hurriyetdailynews.com/drugs-to-spread-if-religious-courses-abolished-president-erdogan-says-72340>

²³ <https://www.hurriyetdailynews.com/turkey-to-get-new-religious-class-curriculum-in-line-with-euro-court-rulings--109481>

²⁴ Supreme Administrative Court, 8th Chamber, dated 18.06.2020 docket no. 2016/8865, decision no. 2020/2604.

²⁵ <https://t24.com.tr/haber/zorunlu-din-dersinin-yansimalari-istanbul-ve-antalyada-nesnel-degil-erzurumda-cagdas,493306>

²⁶ <https://www.avrupa.info.tr/sites/default/files/2019-05/20190529-turkey-report.pdf>

²⁷ General Certificate of School Education: public examinations taken aged 16 years old in England and Wales.

²⁸ High Court of Justice (2015) *R(Fox and Others) v. Secretary of State for Education* (EWHC 3404 (Admin))

²⁹

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/536757/160704_Annex_A__further_RE_guidance.pdf

³⁰ <https://humanism.org.uk/wp-content/uploads/2016-04-28-FINAL-High-Court-ruling-on-Religious-Education-legal-guidance.pdf>

³¹ <https://humanism.org.uk/2015/11/25/judge-rules-government-broke-the-law-in-excluding-humanism-from-school-curriculum/>

³² <https://www.gov.uk/government/news/faith-groups-back-move-to-protect-religious-education-freedom>

³³ <https://humanism.org.uk/2015/12/29/44457/>

³⁴ <https://humanism.org.uk/2017/07/19/humanist-parent-in-high-court-challenge-to-exclusion-from-local-religious-education-body/>

³⁵ <https://humanism.org.uk/2018/11/08/humanist-representatives-will-be-included-on-schools-re-body-welsh-council-rules/>

³⁶ https://humanism.org.uk/wp-content/uploads/KW_0783_18-en.pdf

³⁷ <https://humanism.org.uk/2019/08/02/english-council-backs-down-after-legal-challenge-to-exclude-humanist-from-re-body/>

³⁸ <https://understandinghumanism.org.uk/guidance/>

³⁹ <https://www.secularism.org.uk/news/2019/10/compulsory-re-mustnt-indoctrinate-says-european-court-of-human-rights>

⁴⁰ <https://gov.wales/sites/default/files/consultations/2019-10/consultation-document-ensuring-access-to-the-full-curriculum.pdf>

⁴¹ <https://www.secularism.org.uk/uploads/nss-response-to-rve-legislative-proposals.pdf?v=1595865301>

⁴² https://humanism.org.uk/wp-content/uploads/Humanists-UK-response-to-the-Welsh-Governments-Our-National-Mission_-A-Transformational-Curriculum-1.pdf

⁴³ https://gov.wales/sites/default/files/consultations/2019-07/summary-of-responses-our-national-mission-a-transformational-curriculum_1.pdf

The question about the right of withdrawal in the consultation also included Relationships and Sexuality Education.

⁴⁴ <http://catholiceducation.org.uk/component/k2/item/1003674-statement-from-the-catholic-education-service-on-the-consultation-to-re-and-rse-in-wales>

⁴⁵ https://gov.wales/sites/default/files/consultations/2020-05/consultation-document-curriculum-for-wales-religion-values-and-ethics_0.pdf

⁴⁶ <http://catholiceducation.org.uk/component/k2/item/1003674-statement-from-the-catholic-education-service-on-the-consultation-to-re-and-rse-in-wales>

⁴⁷

https://llandaff.contentfiles.net/media/documents/Church_in_Wales_Consultation_Response_RVE.pdf