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The educational competence of the European Court of Human Rights: judicial pedagogies of religious symbols in classrooms

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ABSTRACT

The courts' role in educational disputes is much researched, but while the legal and socio-political implications of judicial decisions are often scrutinised, judges' pedagogical assumptions have generally been overlooked. This paper focuses on educational competency by considering judges' understandings of the pedagogical effect of religious symbols in classrooms. The formal judgements of two key cases in the European Court of Human Rights are treated as textual data for qualitative analysis: *Dahlab v Switzerland*, concerning a Muslim teacher's right to wear hijab; *Italy v Lautsi*, concerning whether the classroom display of crucifixes breached atheist pupils' rights. Four approaches emerged: unmediated didacticism – a direct emission of meaning by the symbolic objects; mediated didacticism – when the symbols require a spoken explanation to convey meaning; contextual factors – then other factors determine or limit the symbol's meaning; dialogical pedagogy - when education is conceived as an open encounter with different points of view. The wide variation in the judges' pedagogical assumptions is discussed, including the implications of how educational competency affects the variable radiating effects of the courts' decisions. Further, the concept of educational competence is developed, particularly in relation to issues of religion and belief.

KEYWORDS

Human rights; religion; law; education; symbols

Introduction

Courts around the world have increasingly been required to decide on conflicts between school policies or practices and individuals' religions or beliefs, including the content of religious teaching or education in schools, school admissions criteria, teachers' or pupils' dress, and corporal punishment (e.g. Hunter-Henin, 2011). These issues are often rooted in disputes about conflicting human rights – to education and to freedom of religion and belief – and involve the supranational legislation and judiciary of human rights. Here, we focus on one issue, the pedagogical effect of displaying religious symbols in the classroom, to consider how judges interpret their presence.

The question of whether religious symbols should be displayed in classrooms is entwined with questions about religious education within state education. These have

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typically focused on avoiding indoctrination and creating neutrality or impartiality, including distinguishing between neutrality, as the removal of any religious elements, from impartiality, as the equitable treatment of different religions (e.g. Jackson 2014; Jackson & Everington, 2017). Research has focused on the longstanding question of whether teachers can express their personal commitments in the classroom (Cooling, 2002), and recently on the role of language, notably dialogue between teachers and pupils, and between pupils themselves (e.g. ter Avest et al., 2009), as an education for democratic citizenship (O'Grady, 2020). In much research, the word 'classroom' is used to describe curriculum and pedagogy, rather than the physical setting (e.g. Everington, 2012), and the notion of a 'safe space' is often a metaphor for discursive impartiality and openness. However, the *topic* of religious symbols is common, to be identified and explained either within one religion or across several (see Mead, 2008). Signs and symbols might be an object of study, the focus of impartial teaching and classroom discussion, but the pedagogical effect of their display has been largely unexplored – even though they can be the focus of a supranational judiciary.

This potential judicial attention raises wider questions about the role of judicial decisions in education, not least because courts are increasingly portrayed as law enforcers or are used to promote educational reforms by litigants. The role of litigation in effecting educational change is explored, before analysing how two leading cases of the European Court of Human Rights ('ECtHR'): *Dahlab v Switzerland*,[1] on a teacher's right to wear hijab to work in school, and *Lautsi v Italy*,[2] on whether the display of crucifixes in classrooms.

Litigation, the courts and educational change

The courts' special place in addressing educational issues is well established (e.g. Tyack & Benavot, 1985). They can be enforcers of new reforms (Howard & Roch, 2001), and often sites for the contestation of existing practices under new legislation (Aubry & Dorsi, 2016; Dolmage, 1992). Such litigation has often focused on educational equity, notably the *Brown* case on racial segregation in the US,[3] and in Belgium, Israel (Perry-Hazan & Perelstain, 2018), England (Harris & Smith, 2009) or Taiwan (Kuo, 2012); other increasingly litigious issues include school finance and accountability (Superfine, 2013).

The court's role is particularly complex when ambiguities and contradictions emerge. There can be discrepancies between new and old laws, or intersecting legal issues (Heise, 2002), and courts must decide whether new legislation on one issue should supersede overlapping older law on another; thus, Superfine (2009) analysed the intersection of standards-based accountability laws and school financing laws in the US. Tensions emerge between local, national or supranational jurisdictions, such as between state and federal legislation and court, in the United States (Superfine, 2009), or between the national and the international, for instance, under the European Convention on Human Rights ('ECHR') (Aubry & Dorsi, 2016; New & Merry, 2010). These tensions problematise the nature and limitations of the courts' powers – and litigation itself – as catalysts for change (McCann, 1992; Superfine, 2009; Perry-Hazan, 2015a, 2015b). Judicial decisions can advance reform by creating case law, but they are only decided under existing law on the particular facts in question, and the judiciary takes no further action in implementing

its decision once the cumbersome, costly and time-consuming litigation ends (Heise, 2004).

The courts' role in education is therefore powerful but problematic. Perry-Hazan (2015a) developed a distinctive analytical model, first considering the courts' *ex-ante* position, including their constitutional position, under the 'axis' of legitimacy; their powers are circumscribed by their relationship to other branches of government and other courts – whether domestic or international – and by prescribed processes of jurisprudential reasoning. Alternatively, their role can be explored *ex-post*, through considering their decisions, across two further axes: competency and effectiveness. Competency refers to their understanding of the issues involved, and here is termed 'educational competence' to avoid confusion with the legal use of the term 'competency' to describe a court's authority to hear a particular case. For Perry-Hazan, educational competency ranges from weak in that courts may 'lack the ability to obtain, understand, and process the data that constitute the basis for complex policy decisions' (Perry-Hazan, 2015a, p. 719), to strong, in that they may 'apply clear guidelines in the legal framework'. The second axis – effectiveness – covers whether schooling is genuinely influenced as a result. This too can be weak, as they 'cannot produce significant and effective social change without political support [and] judicial rulings generate unintended consequences' (p. 719), or it can be strong if they 'facilitate educational reform … transform political and public discourse … [and] develop rights consciousness' (p. 719). Those wishing to influence education would hope for competent and efficient decisions, though this may be hard to achieve (McCann, 1992; Rosenberg, 2008). Clearly these latter two axes are related. Weak competency may lead to weak effectiveness, though as Galanter observed, 'Courts produce not only decisions, but messages. These messages are resources that parties use in envisioning, devising, pursuing, negotiating, vindicating claims (and in avoiding, defending, and defeating them)' (Galanter, 1983, p. 126), so weak competency may be strongly effective because of its rhetorical or emblematic value (Heise, 2002) – even if those particular effects are unintended.

The European Court of Human Rights, religions and education

The ECtHR has unquestionably changed the European legal landscape since its establishment in 1959. Its *ex-ante* position is strong (see Koenig, 2015), making it valuable for 'think[ing] more thoroughly about the strengths and weaknesses of courts as a forum for shaping education policy' (Perry-Hazan, 2015a, p. 717). One litigious question is the place of religions and beliefs in schooling, under Article 9 of the ECHR, and Article 2 of Protocol 1 of the EHCR. Article 9 states that:

> (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his/her religion or belief and freedom, either alone or in community with others and in public or private, to manifest his/her religion or belief, in worship, teaching, practice and observance.
>
> (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public

> safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. (ECtHR, undated 2017)

Article 2 of Protocol 1 states that:

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. (ECtHR, undated 2017; see European Court of Human Rights, 2019)

The former essentially establishes individuals' rights vis-à-vis the state and limits those rights in relation to either broad public interests or the rights of other individuals. The latter sets out the right to education for all, and then parental rights in relation to their beliefs. These articles have led to deliberations on the display of religious symbols, and other related issues: students' religious symbols and dress (*Sahin v Turkey*[4]; *Dogru and Kervanci v France*[5]); opting out of religious education (*Folgerø v Norway*,[6] *Zengin v Turkey*,[7] *Grzelak v Poland*[8]); classroom blessings (*Perovy v Russia*[9]) sex education (*Keldsen* et al. *v. Denmark*[10]); physical education (*Osmanoğlu and Kocabaş v Switzerland*).[11] These decisions are bound up in broader issues of religious freedom, such as employment law,[12] religious symbols in public (e.g. the 'burkini' ban in France), or freedom of the press.[13] The ECtHR must therefore consider any potential wider ramifications, which are themselves entwined in the interplay between human rights and national constitutional arrangements. The formal religious or secular status of states varies (Sullivan & Beaman, 2013), from strict separation of the state from any religious establishment, such as the French model of *laïcité*, to a historically established church, such as Norway or England, or to the more recent post-Communist re-establishment of religious identity, such as Poland or Hungary (Davis & Miroshnikova, 2013). Moreover, the ECtHR's judgements have implications across all forty-nine signatory countries: a decision about Norway has implications for Turkey or Portugal, even though their constitutional and educational systems are different, and indeed this decision may also affect a different aspect of religious freedom, such as employment law in, for example, France or Greece; this means that the ECtHR must also review its own jurisprudential role in balancing individual rights against the sovereignty of the signatory states (Spano, 2018).

The ECtHR's decisions therefore generate considerable academic reaction and commentary, which can be classified within three broad approaches. First, legal theory and political philosophy approaches address the legal reasoning itself, notably by reviewing the coherence of the judgment and its implications for case law (e.g. Hunter-Henin, 2011; Temperman, 2012). These raise constitutional issues, about the state's religiosity, neutrality or secularity (e.g. Jiménez Lobeira, 2014; Movsesian, 2012; Poulter, 1997), and can be considered philosophically as issues of freedom of conscience (e.g. Benhabib, 2010; Bhuta, 2014), or sociologically, though the lens of secularisation theory (Arthur, 2008; Arthur & Holdsworth, 2012). In Perry-Hazan's typology, these approaches raise both *ex-post* questions of competence, but also relate to the *ex-ante* question of the ECtHR's supra-national position (Spano, 2018), particularly since the court's role is to uphold human rights and not to argue for or against any particular constitutional position, as secular or neutral.

Second, policy enactment approaches explore the implications of judicial decisions for social movements and policy reform, i.e. the courts' *effectiveness* (see also Welner, 2012). For instance, Fokas (2019) recently addressed the indirect effects of the ECtHR's

judgements, showing how they become tropes within educational debates and campaigns, either when a particular state has been a party in ECtHR litigation, such as Turkey (Özgül, 2019) or Italy (Giorgi & Annicchino, 2019), or otherwise, e.g. Greece (Markoviti, 2019) and Romania (Popa & Andreescu, 2019). Their analyses show how campaigners across these countries invoke these cases rhetorically – and how the judgment and threat of litigation becomes a 'shadow' in these arguments (Popa & Andreescu, 2019).

A third approach, adopted here, also falls within Perry-Hazan's notion of competence, and focuses on judges' pedagogical or educational assumptions (see also Fancourt, 2017). Superficially, the ECtHR's position appears fairly settled, in that states can either provide confessional religious instruction with the right to opt out, or neutral/impartial religious education, in which case the opt out clause is not needed (see *Folgerø*, and *Zengin*). However, Cumper (2011) analysed different judicial views of religious education and showed that there was 'a latent uncertainty as to how religion should be taught in the classroom' (p. 222), notably a failure to distinguish between religious instruction and religion education, and Cumper and Lewis (2018) argued that there is a lack of empathy with appellants in decisions on religious dress in educational settings. Judges' different approaches are unsurprising given the different cultural forms of teaching and learning internationally; one might have imagined that judges would realise this, but it is striking that the courts neither recognise these divergences nor their own assumptions. One judge in *Lautsi* held that:

> The Convention . . . bans any teaching in schools unwelcome to parents on religious, ethical and philosophical grounds. The keyword of this norm is obviously "teaching" and I doubt how far the mute presence of a symbol of European cultural continuity would amount to teaching in any sense of *that fairly unambiguous word* (*Lautsi*; Donello's Opinion, paragraph 3.2) [emphasis added]

However, there is considerable disagreement in educational circles about this 'keyword'. The ECtHR's judges would have had different personal experiences of education, including the place of religions in education – differing both from the cases before them, and each other. Their assumptions about how the presence of symbols 'would amount to teaching in the sense of that fairly unambiguous word' are therefore worth examining.

The two cases: *Dahlab* and *Lautsi*

Over the last two decades, there have been two key cases, summarised here. Lucia Dahlab[14] was a Swiss-heritage female primary school teacher in Geneva who abandoned her Catholic upbringing and converted to Islam. She started wearing the hijab to work. The school authorities asked her to remove it but she refused, so they obtained a formal prohibition. She appealed to the Swiss appelate courts and then the ECtHR on the grounds that her freedom of religion, under Article 9, was being supressed but they all rejected her claim, on the basis that the pupils' freedom *from* religion was being impinged. The ECtHR followed an earlier case on whether university students could wear hijab (*Sahin v Turkey*), and held that:

> It is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about

> many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran … (*Dahlab*, section 1)

Thus, it identified the hijab as a 'powerful external symbol' and linked this to pupils' intellectual development, adding that:

> It appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils. (*Dahlab*, section 1)

It therefore specified a particular role for education in democratic societies, in which the hijab had no place.

By contrast, the two Lautsi brothers attended a primary school in Abano Terne in Italy, where a crucifix was displayed in every classroom. Their mother, an atheist, complained to the school that this display violated their familial right to freedom of belief (under both Article 9 and Protocol 1) and asked that the crucifixes be removed; the school refused, arguing that they were required under Italian law. She pursued the litigation through the Italian courts, which all rejected her claim, before appealing to the ECtHR – twice. At the first hearing, the court accepted her claim. It was then re-heard by a Grand Chamber of seventeen judges, with an array of other litigants who had joined the action on both sides, including ten member states that also displayed Christian symbols (e.g. Greece, Romania and Russia), thirty-three members of the European Parliament, and several non-governmental organisations – both Human Rights organisations and religious groups. This Grand Chamber rejected her claim, notably holding that the crucifix was a 'passive' symbol, though two judges dissented.

The cases differ slightly because Dahlab was a teacher arguing *for* the right to display a symbol in a state-regulated space whereas the Lautsi family were arguing *against* its display by the state. Both decisions unsurprisingly sparked much commentary, particularly given the apparent reversal of *Dahlab* by *Lautsi. Lautsi* was seen by some as an attack on state secularism (Temperman, 2012), and the differing treatment of Muslim and Christian symbols in the two cases was interpreted as 'an unstable mixture of values and preoccupations' (Bhuta, 2014, p. 11). These criticisms and commentaries point to the contestation around the decisions; the puzzle here however is in explaining the pedagogical effect of these symbols, rather than taking sides for or against Templeman's or Bhuta's arguments, largely because these debates are arguably naive *because* they overlook the pedagogical dimension.

Socio-cultural pedagogy and the symbolic culture of schools

It has long been recognised, notably within Vygotskian perspectives (Vygotsky, 1978; Wertsch, 2009), that the socio-cultural elements of teaching and learning are an essential component of pupils' mental development; 'one has to analyse the cultural conditions in order to understand the particular processes in learning' (Afdal, 2010, p. 53). Teaching and learning are deeply embedded within cultural and social contexts, including their spatial and visual manifestations (e.g. Daniels, 1989); Ivic suggested that education:

> . . . implies a certain structuring of time and space and is based on a system of social relations (between pupils and teacher, between the pupils themselves, between the school and its surroundings, and so on). Indeed, the impact of formal education depends to a considerable extent on these aspects of the 'educational medium'. (Ivic, 1994, p. 10)

Relationships between individuals, organisations and the working environment have been the foci of various studies of classroom semiotics (see Van Leeuwen, 2008), and of school design and architecture, which address socio-spatial networks and relations (Daniels et al., 2019). Indeed, classroom displays – of school culture or pupils' work – have long been part of schooling (e.g. Andrew-Power, 2009), and researchers have sought to theorise their effects (Prosser, 2007; Van Leeuwen, 2008). Similarly, teachers' dress is recognised both in practical guidance and research as influencing students' perceptions of their teacher, notably the effect of overly informal dress (e.g. Simmons, 1996; Workman & Freeburg, 2010): students decode a teacher's status and position through their clothing, which is imbued with pedagogical significance.

However, this is not a straightforwardly behavioural argument that pupils are thereby directly taught or influenced by these socio-spatial elements. Pupils' identities – whether religious or educational – are not simply passive outcomes of context: pupils react to organisational culture. Indeed, it is hardly ground-breaking to suggest that pupils often actively resist the manifest intentions of schooling, and the interrelationship between pupil agency and religious identity is complex because both are in flux (Bertram-Troost et al., 2009; Casson, 2011). Thus, the meaning of religious symbols in schools unfolds within schools' wider symbolic culture, including: the architecture and layout of classrooms, social organisation and pedagogical practices, pupils' and teachers' dress, and pupils' religious and educational agency and identity.

Methodology and analysis

The essential research question here is: what understandings of the pedagogical effect of religious symbols in classrooms are found within the Judgements of the ECtHR? Recognising that analysis of judicial decisions in education requires 'insights from various disciplines' (Superfine, 2013, p. 6), here an *ex-ante* cross-case inductive textual analysis of the two formal judgements was conducted, drawing on educational and socio-legal methodologies. The study of court judgements alone is rare in educational policy research, though some research includes court judgements alongside legislation and other policy documents (Diem, 2017; Kuo, 2012). This approach aims to develop an understanding of educational competence, by analysing how the judges 'understand and process the data that constitute the basis for complex policy decisions' (Perry-Hazan, 2015a, p. 719). The judgements are not analysed according to their jurisprudential logic. They are treated as qualitative textual data (Miles et al., 2019) thereby 'provid[ing] an objective means by which to critique conventional and alternative positions' (Kirkham & O'Loughlin 2019, p. 338); phrases, sentences and paragraphs were coded abductively (Timmermans & Tavory, 2012), initially guided deductively by broad insights from socio-cultural theory and the substantive legal issues (e.g. 'dialogue', 'symbol'), but inductively open to nuances and alternative points. Once the codes were developed, the judgment texts were reread to ensure comprehensiveness and saturation. ECtHR Judgements are

valuable as naturally occurring textual data because they *must* contain certain elements, notably, a summary of the facts, the arguments, the preceding judgements in national courts, and the reasons for the ECtHR's decision, including the leading, concurring and any dissenting judgements; they are published in English and French (see Rainey et al., 2017). The descriptions of the national courts' judgements are valuable in revealing their educational competence, over which the ECtHR deliberated.

Judges clearly recognised that the school environment was as important as the 'content of teaching' (*Lautsi*, para. 63), and four different categories were developed: unmediated didacticism; mediated didacticism; contextual factors; dialogical pedagogy.

Unmediated didacticism

Judges in both cases sometimes considered that religious symbols had a fixed meaning which they automatically projected, almost by emission: the presence of the object 'taught' in and of itself. In *Dahlab*, the court held that:

> The wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran. (Section 1)

Here, the Qur'anic injunctions[15] were bound up in the 'headscarf' and would therefore be proselytising. No further commentary or explanation by the teacher was required, as its meaning was so immutable that it could not be reduced or negated by other teaching:

> It appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils. (Section 1)

The implication is that a teacher could not say or do anything that would overcome this undemocratic proselytisation. This decision followed the previous decision in *Sahin*, in which a university student was forbidden from wearing hijab, but here additionally the symbol is deemed to have a pedagogical effect per se on pupils; perversely perhaps, in swimming lessons in Switzerland, primary school Muslim girls can wear burkinis, without the burkinis having any such proselytising effects (Trotter, 2018). *Dahlab* intersects with other cases on employees' rights to wear religious symbols to work[16] (McCrea, 2014) – in which the employee's freedom of belief is balanced against the employee's right to set dress codes for all staff, and the customers' or service users' right to freedom from belief – but it is also different because it concerns the effects of dress as teaching.

Similar pedagogical assumptions appeared as *Lautsi* made its way through the courts; the crucifix was deemed to be directly didactic, but its particular message was debated – and was frequently held to be *non*-religious. The ECtHR summarised the Italian court's view . . .

> . . . that in Italy the crucifix symbolised the religious origin of values (tolerance, mutual respect, valorisation of the person, affirmation of one's rights, consideration for one's freedom, the autonomy of one's moral conscience vis-à-vis authority, human solidarity and the refusal of any form of discrimination) which characterised Italian civilisation. (para. 16)

As in *Dahlab*, the teacher did not have to add or do anything: the symbol innately carried this non-religious meaning. However, in the first ECtHR decision this particular

emitted meaning was rejected because the crucifix's main significance was considered religious:

> ... among the plurality of meanings the crucifix might have the religious meaning was predominant. It accordingly considered that the compulsory and highly visible presence of crucifixes in classrooms was capable not only of clashing with the secular convictions of the ... children .... but also of being emotionally disturbing for pupils of non-Christian religions or those who professed no religion. (para. 31)

This position differs slightly as the crucifix is polysemic but one meaning takes priority. It is both more nuanced in recognising the possibility of different meanings, but more obscure in that it is unclear when or how these meanings might come into play: when for example, might a secondary meaning become the most important – and how would one know? There is no reference to the teacher's or school's potential role in selecting different meanings, which might be important given that the critical question is whether there is an infringement of the ECHR, here identified as the clash of convictions and emotional disturbance.

Mediated didacticism

A more nuanced position was also evident, holding that although a symbol's meaning and effect was fixed, it nevertheless required the teacher's mediation, typically through language, in order to become teaching. In *Dahlab*, the ECtHR quoted from the Swiss federal court's finding that the appellant:

> ... is not accused of proselytising or even of talking to her pupils about her beliefs. However, the appellant can scarcely avoid the questions which her pupils have not missed the opportunity to ask. (section A)

Thus, the issue here was not that the hijab automatically emitted its message but that the teacher would almost inevitably have to explain her reasons for wearing it to pupils, and this explanation would be inappropriate. The hijab contained a meaning, and a teacher would have to present it. Whilst this is a more nuanced view of semiotic pedagogy, it assumes that teachers could neither avoid the questions, though much of teaching consists of not dealing with every question raised by pupils, nor provide a neutral explanation of why they might choose to wear or display religious symbols, when teachers may present neutral accounts of other personal decisions, e.g. voting and political allegiance, or sexuality – recalling Cumper and Lewis' (2018) claim that judges often lack empathy towards appellants. Here the judges simply decided for themselves that it is pedagogically impossible.

Mediated didacticism was strongest in the final judgment in *Lautsi*, in the notion of a 'passive symbol', when the Grand Chamber reversed the first Chamber's decision. Whilst agreeing that the crucifix could have multiple meanings, it maintained that the crucifix was fundamentally religious of itself and not a secular symbol; it was 'a sign which, whether or not it is accorded in addition a secular symbolic value, undoubtedly refers to Christianity'. However, the judges rejected the ensuing judgment of the Chamber that a crucifix was a 'powerful, external symbol', holding instead that:

> ... a crucifix on a wall is an essentially passive symbol ... It cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities. (para. 72)

Thus, other processes were required – language or physical involvement in ritual. It was therefore significant that:

> . . . the applicants did not assert that the presence of the crucifix in classrooms had encouraged the development of teaching practices with a proselytising tendency. (para. 74)

The object did not teach in and of itself, as it had to be mobilised within other pedagogical practices.

Contextual elements

Beyond these two categories, a third broad category was an awareness of the effect of wider contextual elements on the symbols' meanings. One factor was socio-spatial context. In *Lautsi*, the lower Italian courts suggested that the crucifix had different meanings in churches and schools:

> Quite clearly, the crucifix is in itself a symbol that may have various meanings and serve various purposes, above all for the place in which it has been displayed. In a place of worship, the crucifix is properly and exclusively a "religious symbol". (*Lautsi*, paragraph 16)

In a church, its meaning was solely religious to everyone. Then the Italian courts brought together the socio-spatial nature of institution with pupil identity and agency, continuing:

> . . . In a non-religious context like a school, used for the education of young people, the crucifix may still convey the above-mentioned values to believers, but for them and for non-believers its display is justified and possesses a non-discriminatory meaning from the religious point of view if it is capable of representing . . . values which are important for civil society. (*Lautsi*, para. 16)

Within a school, it could apparently have different meanings according to the pupils' beliefs. Pupils would read their own values into it – so that for Christian pupils it would convey both religious *and* civic values, whereas for non-Christian pupils it would only carry civic values. These comments seem to imply that the only believers are Christian; while arguably an atheist Italian-heritage pupil might read in uncontentious historic civic values, a Muslim or Jewish pupil might find this more complex as the symbol is bound up in a historic European or national Christian legacy in which other cultural backgrounds are not present, or in which this legacy is culturally problematic, a point raised by the first Chamber.

Further, this assumes that pupils have a clear sense of their beliefs, so that they know if the crucifix only has the civic meaning for them, or if for them there is the additional Christian meaning. Some would argue that pupils' identities are fluid and developing, in contradistinction to rigid, binary definitions of identity within human rights legislation (Quennerstedt & Quennerstedt, 2014). Pupil identity and agency affect how pupils' religious identity will affect the interpretation of symbols, and their ability to accept or reject the symbolic meaning presented to them. In *Dahlab*:

> The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. (*Dahlab*, The Law, section 1)

The court here assumes that younger pupils are more curious and have less agency, though one could query the suggestion that a non-Muslim primary pupil would meaningfully adopt Islam because of their teacher. The judgment also implies that a secondary school teacher could wear hijab in front of older, more sceptical pupils – though adolescent religiosity is arguably more likely to be in flux. In *Lautsi*, the first Chamber also identified the pupils' lack of agency, as they 'were placed in a situation from which they could not extract themselves if not by making disproportionate efforts and sacrifices' (Lautsi, para. 31). It is unclear what extraction means, or indeed what kinds of efforts and sacrifices are proportionate, as this suggests that the display of crucifixes might be permissible under certain conditions. The Grand Chamber made this point, suggesting that millions of Italian children had been taught 'under' a crucifix but had wholeheartedly rejected its influence, noting the lack of evidence that the crucifix had affected the appellant pupils at all. These contextual factors do not redefine teaching, but they point to limitations of its effects, implying that socio-spatial context and pupil agency were relevant.

Dialogical pedagogy

Finally, there were comments in the Grand Chamber in *Lautsi* which outlined the pedagogical effect of a range of different religious or non-religious symbols and activities. Schools could permit other religious symbols or celebrate a variety of festivals, e.g. Eid or Diwali. One judge (Rosakis) argued that a range of 'more tolerant' elements were 'a major factor in "neutralising" the symbolic importance of the presence of the crucifix in State schools' (*Lautsi*, Concurring Opinion), implying that neutrality was important and could be achieved through a proliferation of symbols, rather than their lack. This argument was articulated differently by Judge Power who does not even assume that neutrality is necessary, but rather that the proliferation of meanings with schooling is an educational good:

> Within such a pluralist and religiously tolerant context, a Christian symbol on a classroom wall presents yet another and a different world view. The presentation of and engagement with different points of view is an intrinsic part of the educative process. It acts as a stimulus to dialogue . . . Dialogue becomes possible and, perhaps, is at its most meaningful where there is a genuine difference of opinion and an honest exchange of views. (*Lautsi*, Concurring Opinion of Judge Power).

Here, Power (from Northern Ireland) argues for a dialogical pedagogy in a pluralist and tolerant setting, echoing the research outlined above (e.g. ter Avest et al., 2009) and she reconceives the process of teaching as an invitation to an exchange of views, of which the symbols form a part, within a visual syllabus. Teaching here is not seen as didactic, but rather learning is seen as engagement with different positions. Unfortunately, she does not consider whether teachers' religious dress (as in *Dahlab*) and therefore their religious identity could also be considered as part of this process, as an aspect of personal knowledge (e.g. Everington, 2012).

Discussion: educational competency and the ECtHR

This analysis has illuminated how the judges understand the pedagogical effect of religious symbols in classrooms, as a feature of educational competency. The two leading

cases point in different directions: the decision in *Dahlab* broadly adopts a position of unmediated didacticism with hints of contextual factors, while the Grand Chamber in *Lautsi* adopts a mediated didacticism with echoes of contextual dialogism, yet in both decisions, other assumptions seep through, and are present in the judgements of lower courts. Different judges hint at different pedagogies, but they do not do so consistently. These pedagogical variations are problematic since they mean that the judgements are educationally inconsistent, whatever their jurisprudential logic, and decisions affecting the whole of Europe have been based on often unquestioned assumptions about contextual and cultural variations across schools. As Judge Donello observed in Lautsi:

> . . . a court in a glass box a thousand kilometres away has been engaged to veto overnight what has survived countless generations. (*Lautsi*, para. 16)

The Strasbourg courtroom is another socio-spatial setting which struggles to make sense of the contextual settings of classrooms.

Overall, the courts' educational competency is uneven because judges hold different assumptions on whether and how religious symbols might be said to teach, and on whether the symbol's presence thereby constitutes a violation of anyone's rights. Whilst educationalists might prescriptively prefer one pedagogical interpretation over others, the issue here is the effect of this variability on educational competence. This analysis shows fluctuations across these cases, and between judges. Teaching is undefined, which leads to a lack of clarification, so decisions are often speculative or conjectural, and often pedagogically unclear – for instance, hinting at unexplained contextual limitations. Whilst the judges recognised that educational environment is as important as curriculum, indeed *Lautsi* depends upon it, they do not consider the effects of this point coherently or explicitly.

This has implications for the axis of effectiveness, since without clarity about what teaching is, other courts, governments and groups across Europe will interpret these decisions wildly differently. Quite apart from its place within later jurisprudence on education (e.g. *Osmanoğlu and Kocabaş*, on swimming lessons), in many countries *Lautsi* has been interpreted as permitting a range of religious activities in classrooms, and indeed supporting different models of religious education, both by those who agree with the judgements and those who do not; it could be deployed by both advocates of faith-based practices in schools (e.g. in *Perovy*), and those advocating dialogical approaches. These 'radiating' effects (Galanter, 1983) are themselves variable, because of the macro-level context of any state's religious establishment or type of secularity, the meso-level of national educational culture and organisation, and the micro-level of actual classroom practices. There is the risk of obfuscating wider issues of religious freedom in public places with the specific issues pertaining to schools, so that the question of 'teaching' is overlooked, and the classroom simply becomes another example of a public space. Teachers' classroom decision-making itself will be constrained by teachers' perceptions of what they think the law is on these issues, and a straightforward educational moment becomes overshadowed by judicial clouds, as professional practices of classroom impartiality (see Jackson & Everington, 2017) are obfuscated by the weight of the law. Human rights themselves are also not well served by this equivocation, as the judges' decisions can appear to be simply reactions to the particular religions in question.

Finally, this analysis helps advance the concept of educational 'competence', which Perry-Hazan briefly described as the 'ability to obtain, understand, and process the data that constitute the basis for complex policy decisions' (Perry-Hazan, 2015a, p. 719); here the complexities lying within the term 'data' have been explored, unravelling judicial perspectives on pedagogy within socio-spatial contexts. Educational competence can be said to require an understanding of the facts of the case, a nuanced insight into the parties' pedagogical intentions, reasoning and actions, and an explicit view on how the educational environment shapes and is shaped by these intentions, reasoning and actions. In the case of educational competence in relation to disputes concerning freedom of religion and belief, it would include an awareness of how these generic elements interact with theological or philosophical beliefs, convictions, and values, and how these are also affected by context. Further study of a wider range of cases, across both national and supranational courts, would extend this, not only in cases concerning religious symbols but more broadly across educational disputes.

Conclusion

This paper has drawn together educational policy studies of the courts' role in educational issues, socio-legal studies of the radiating effects of the ECtHR's decisions, socio-cultural studies of the socio-spatial dynamics of schools, and research on religions (and religious education) in schools. Deploying and developing the concept of educational competence provided an exploration of how supranational courts make sense of teaching, particularly when decisions cut across each other in other ways. The concept has proved valuable in combining both educational policy analysis and a socio-legal approach to education law because it focuses on judicial texts from an educational perspective, and thereby cuts across legal, theological, and constitutional debates. Judges have their own pedagogies, and these need to be taken seriously.

These discussions have broader educational implications as there is an underlying pedagogical question, whatever the constitutional or institutional position, which teachers, judges and policymakers must confront: constructing the classroom as a neutral or impartial space, through the religious education curriculum or the treatment of pupils' religious convictions or dress, is not simple, and schools' or teachers' use of symbols further problematises it. Teachers' symbolic acts, from wearing the five Ks, or putting up a poster of Hajj are pedagogically, culturally and religiously freighted – as is their absence. Any teacher or school would have to consider what they display, and under what conditions, and these decisions themselves are nested within broader questions about visual and spatial pedagogies, i.e. about how any object in a classroom can be said to teach anything, from the clothing allowed to be worn to the images on the wall. Indeed, there is an even wider question of public pedagogy, since the display of different religious symbols in any public space could itself be construed as potentially educative, in encouraging the recognition and acceptance of different religions and beliefs. The banning of them is not only a question of human rights, but also a question of their educative effect on those who live and work alongside them. Not to display them can be seen as a lost opportunity for public education – which also needs to be weighed in the balance by the courts in these cases.

Finally, for those seeking to develop more nuanced approaches to the place of religions in education, both the decisions and their effects point to how much work there is yet to do in developing more transparent wider understandings of pedagogy and symbols across Europe and European institutions.

Notes

1. ECtHR *Dahlab v Switzerland* (2001) Application No. 42393/98.
2. ECtHR Grand Chamber *Lautsi v Italy* (2011) Application no. 30814/06.
3. Brown v. Board of Education of Topeka, Kansas. 1954. 347 U.S. 483Brown v. Board of Education of Topeka, Kansas. 1955. 349 U.S. 284.
4. *Sahin v. Turkey*, Application no. 44774/98, ECtHR, 10 November 2005.
5. ECtHR 4 December 2008 (Applications Nos. 27058/05 & 31645/04).
6. ECtHR *Folgerø and others v Norway* (2008) 26 EHRR 47.
7. ECtHR *Zengin v Turkey* (2008) 26 EHRR 44.
8. ECtHR 15 June 2010 *Grzelak v Poland*, Application no. 7710/02
9. ECtHR *Perovy v Russia* (2020) Application No. 47429/09.
10. ECtHR *Keldsen, Busk Madsen and Pedersen v. Denmark* [1976] 1 EHRR 711.
11. ECtHR *Osmanoğlu and Kocabaş v Switzerland* [2017] 14.
12. *Sahin v. Turkey*, Application no. 44774/98, ECtHR, 10 November 2005.
13. *Akdaş v. Turkey*, no. 41056/04, 16 February 2010.
14. Normal font is used to designate the person, italics are used to designate the case.
15. surahs 24:30 33:59.
16. E.g. *Eweida and others v United Kingdom*. Application Nos 48420/10, 59842/10, 51571/10 and 36516/10, Judgement of 15 January 2013 (Fourth Section).

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