

SCHOOLS AND RELIGIONS: THE LAW AND THE COURTS

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The place of religions within schooling is almost inevitably bound up in various legal requirements, both national, often in constitutional arrangements, and supranational, such as human rights obligations. At a national level, constitutions can vary across a spectrum, from complete theocracy, such as contemporary Iran, to aggressive anti-religious atheism, notably in Communist states, such as the former Soviet Union or Maoist China. In between, there are more moderated forms of secularity, such as the paradigmatic case of *laïcité* in France, to an established religion, such as Greece. These positions are however not static, and countries adjust either constitutionally or simply administratively to political and social changes. One example has been the shift in post-Soviet States, such as Poland or Russia, towards greater recognition of religions. Other states have had to adjust to a decline in national religiosity, and/or to increasing religious diversity: Great Britain exemplifies both. However, in many states, constitutional changes are somewhat tectonic, requiring considerable explicit political energy and agreement to be approved, and instead, there are often new legal requirements that cover particular domains of public life, of which education is one. These are themselves sometimes in response to the organic changes in practice which schools and teachers make, and which governments then seek to make legally compulsory in all schools - or indeed to prohibit if they disapprove of them.

The law is at one level part of policy, but in educational research is often subsumed within it. For instance, Bowe, Ball & Gold (1992) 'approach legislation as but one aspect of a continual process in which the locii of power are constantly shifting' (p. 13), to argue that 'in

effect [an Act of Parliament] is being constantly rewritten as different kinds of “official” texts and utterances are produced by key actors or agencies of government’ (p. 12). However, this overlooks its significance as *law* and therefore also the courts’ formal involvement in imposing and interpreting it in democratic states where the rule of law applies; while clearly the administration or religious authorities will have their own views of what the law means, which may be noteworthy, these views are not legally binding on others - and certainly not on the courts. Governments can amend softer policy on a whim but a change in the law requires legislative approval. The intermediate role of the law as being less than constitutional but more than government policy needs further exploration. In states where litigation is common, there is often a distinctive focus on the study of education law, particularly as a catalyst for educational reform, such as the United States (e.g., Superfine, 2013) or Israel (e.g., Perry-Hazan 2015).

Laws are enacted in practice, and obviously are not automatically obeyed – often more honoured in the breach – so they require constant monitoring. Indeed, laws are usually enacted either to enforce some action that is not part of current practice, or to prohibit some action that is. Matemba (2015) has explored the mismatch between legislation and practice in Scotland on the legal requirement to teach religious education, particularly pointing out how softer policy documents can encourage non-compliance, by subsuming the subject within Citizenship, or only requiring teaching about Christianity and no other religions. In the first instance, the legal regulation of compliance is typically the role of external agencies, such as local or district government, and state or religious inspection agencies. The issue of inspection has been a surprisingly long-standing legal requirement in the United Kingdom; the introduction of compulsory schooling in 1870s (e.g., UK Government 1870) sparked an ongoing discussion about who should be legally responsible for inspection of ‘secular’ and

religious education (Smith 1870; see also Edmonds 1958). These inspection agencies themselves have a ‘mediatory role’ in the softer interpretation of the law (Scholes 2022, p.1).

Some legal obligations and courts are supranational, particularly around human rights (e.g., Temperman 2010). Most states have adopted global human rights conventions, notably the Universal Declaration of Human Rights (United Nations, undated), the United Nations (undated) UN Convention on the Rights of the Child, or more regional variants, such as European Convention on Human Rights (European Court of Human Rights, undated). These obligations are then incorporated into domestic law, typically through legislation that sets out how they are to apply, including identifying the jurisdiction of the relevant human rights courts. These declarations have their own forms of language and interpretation, and these courts have their own processes and procedures for hearing cases and making judgements. The right to education and the right to freedom of belief are particularly relevant when considering the place of religions and nonreligions in school, and the intersection of them has generated considerable litigation over the decades, not just about religious education, but also for instance about sex education,ⁱ and physical education.ⁱⁱ Supranational organisations also take on monitoring roles in relation to human rights, commenting on crises, changes or progress, such as the United Nations’ Human Rights Council.ⁱⁱⁱ Thus these supranational demands can impinge on the place of religions in schools through both the wording of the conventions, the courts’ decisions and other monitoring organisations.

This chapter will firstly consider three distinctive features of the impact of the law and the courts: statutory wording and interpretation; litigation and judicial decision-making; and radiating effects through public perception. Some more general issues of education law will be included to show these features. Secondly, the chapter considers how these features play out comparatively across four classic issues: the legal and religious status of schools;

curriculum; pupils' religiosity and beliefs, and teachers' religiosity and professionalism. These are respectively compared across country pairings: England and France; Senegal and Turkey; South Africa and Italy; Costa Rica and Switzerland.

Distinctive features of the law

Statutory wording and interpretation

Laws are often considered to be opaque for the non-lawyer, and this is because they have a particular function in setting down what is compelled or prohibited. Whatever is to become mandatory should be clearly identified, and whatever is to become illegal should also be delimited precisely. Further, any new statute may: cover an issue hitherto unlegislated upon, such as the specific requirement to include Christianity and other world religions in religious education in England in 1988 when previously there was no curriculum specification (UK Government 1988); replace existing law, thereby revoking it, for instance in 1990, post-Soviet Russia set out extensive Western-style religious freedoms (Akhmetkarimov, 2019); add to or refine existing law, for example current changes in Wales to include nonreligious 'worldviews' alongside religions in the curriculum (Welsh Government 2020), or in Russia when the new found freedoms of 1990 were then restricted in 1997 to apply only to 'traditional religions' (Akhmetkarimov, 2019). It may also intersect with some other area of law, for example Spanish laws on the particular obligations on religious education teachers vis-à-vis the Catholic church are entangled with wider national and supranational employment law provisions (Gas-Aixendri 2021). Laws should be drafted to be as precise and coherent as possible in relation to wider laws, so that they do not accidentally overstep their legislative purpose.

States have different processes of interpretation, and different means of incorporating supranational obligations. Those with a written constitution will typically treat its principles as fundamental, not to be overridden by ordinary legislation, such as the United States (Greenawalt 2015). For states without a constitution, notably the different elements of the United Kingdom, there is almost no recourse to any core legal principles, nor indeed much recourse to any underlying purpose beyond the text itself. For example, under what is termed the literal rule, as Lord Diplock stated, ‘the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was and to give effect to it’.^{iv} For this rule, it is the letter of the law that matters, and not the spirit, and English jurisprudence still places much weight on this principle.

Litigation and judicial decision-making

The consequence of creating legal requirements is that they can be enforced through the courts, though litigation - whether civil or criminal. The courts’ role can be the most dramatic, notably when presented in the media, with decisions awaited with anticipation by the parties and their supporters, and with high expectations that a decision will lead to greater compliance. However, two decisions in the United States suggest that this compliance can be variable. The Scopes trial in 1925 – more formally, *The State of Tennessee v. John Thomas Scopes* - on whether it was legal to teach about evolution (Larson 1997) has long held a defining place in the science/religion debate both in school and more widely, even though it has been legally superseded. Many have cautioned against assuming that the courts can effectively initiate change, notably from the example of the *Brown* case^v, on discrimination, when despite the ruling, schools long continued to practice discrimination. Courts can only decide as and when an issue has become so serious, and the parties are so entrenched that it is only resolvable through litigation. Then, once a court has made its decision, it is not involved in any consequential consolidation in policy and practice; the courts will only be involved

when the same issue is re-litigated by different parties. A further issue is the court's 'educational competence' (Fancourt 2021), which is the judges' set of underlying assumptions about teaching and learning – their informal pedagogies. Their decisions around religious education will depend on what they think both religion and education are, possibly reflecting their own schooling; Cumper (2011) has shown how for a long while the European Court of Human Rights found it difficult to distinguish between religious instruction, as faith nurture, and religious education, as the study of religions; however, this is perhaps unsurprising given that the judges came from over twenty countries with very different educational arrangements.

The issue of enforcement is particularly problematic for supranational courts because there is no administration to act on their behalf. They are reliant on the signatory states to accept their decision and implement the judgement both for that case and more generally. Clearly if the state is the successful party, implementation will probably be swift and efficient, or the state will consider its approach vindicated, but there is a danger if the citizen appellant wins the case that the state will drag its heels or seek to qualify the decision, for instance holding that the issue has already been addressed in the delay in getting any matter to a supranational court, or only that it applies to a specific set of facts. Further, whilst the supranational courts' jurisdiction is wide, it is dependent on the different states to interpret and apply it contextually. For instance, the European Court of Human Rights' decision on the right to opt out of religious education in Norway affects all of Europe, but quite whether and how the right should apply may be slightly different in (for example) Portugal, Sweden, Scotland or Greece, depending on the constitutional arrangements, and the structure of schooling and curriculum.

Radiating effects in society

Over and beyond the actual text of any legislation, and the courts' decisions, the law has what Galanter (1983) termed 'radiating effects' (p, 117), which are the wider social or political assumption about or responses to the law. Laws and decisions become deployed in wider policy debates, as arguments for or against change, or indeed as targets of criticism and indeed this can lead to unintended consequences (Heise 2002). Laws and decisions can become the focus of interest groups, seeking their reversal or amendment, or deploying them in support of their cause. Lobby groups can mobilise wider arguments around a decision (Dolmage 1992), and Fokas (2019) shows how the Lautsi case, which was a decision of the European Court of Human Rights about the display of crucifixes in Italy (discussed below), was also deployed in debates in Greece, Romania, and Turkey. However, much depends on the esteem with which the courts themselves are held, and Hendek and Fancourt (2021) explain how the Turkish government's response to a second decision against it by the European Court of Human Rights on the opt-out clause was to criticise the court itself, as part of a broader political repositioning of Turkey against Europe (see Küçük 2014), reversing the previous government's pro-European integrationist position.

Key legal issues around religions and education

In this section, we explore how these requirements are played out within and alongside other educational laws or policies, and four issues are addressed: the legal and religious status of schools; curriculum; pupils' religiosity; teachers' religiosity and

professionalism. As noted above, more specific examples will be considered within each section.

The legal and religious status of schools

Howsoever the constitutional question of the state's attitude to and involvement with religions is resolved, there is inevitably a series of legal questions about how this religiosity is structured in schools. In the first place, there is the legal personality of schools: they could be simply governmental entities, local or national, with or without religious institutions, or they could be more autonomous, in which case their religiosity could be determined through individual legal structures. There may therefore be distinctions between; state-funded and private schools, since the latter will be legally independent, though subject to various general requirements; state funded schools with a religious affiliation, and those without, since there will be a negotiation of ethos, control and funding; differently established independent schools with more or less involvement of religious institutions. The overall pattern emerging from these differences will often reflect the historical development of education, from states where schools have been in existence since the medieval period, to those reflecting a revolutionary change in government, or those that bear colonial legacies.

A comparison of England and France is instructive, since for all their differences in approach, their legal provisions result in some similar arrangements. England has an extremely diversified approach to school status, for historical and political reasons (see Sandberg 2011), with different provisions for governance, staffing, curriculum and inspection. It is home to some famous historic independent schools, some with international reputations - and indeed brands – and are typically legal trusts (Sloan 2021). The constitution of the board of trustees can specify particular persons or officeholders to be trustees. Some of

the oldest include a local bishop in some capacity e.g., the Bishop of Winchester at Winchester College,^{vi} reflecting its medieval 14th Century origins (Leach 1899), and will also specify the founders' intentions, thereby determining the school's ethos and values. To depart from this would be in breach of the trust and therefore illegal. While aspects of governance have obviously changed over time, this legal historicity can prove valuable: a newly appointed headteacher of a Church of England independent school expressed concerns that his being a Roman Catholic might create a legal hurdle but was reassured that the school's pre-Reformation foundation meant that no denominational commitment was required, simply that 'the Christian religion grow hotter' (see Fancourt 2016). This approach is also found amongst more recently founded private faith schools. The Christian School, Takeley (2012) states that its trust objectives are: 'The advancement of the Christian religion and the advancement of education by such means as the Trustees shall consider necessary' (p. 3). In these examples, the private trust document sets the parameters for the school, for its religious and educational goals, and also for its funds and resources.

In the English state sector, individual schools have traditionally had less autonomy, with express legal demands on them around staffing and curriculum, but the complex 'dual system' of state funding for both state-run and faith-run schools has led to a set of possibilities; moreover, neoliberal approaches (Fancourt 2020) in recent decades have led to the creation of new legal types of state-funded schools. From 1944, there were essentially two main types, controlled and voluntary schools. The latter were mostly 'church' schools, and sub-divided into two varieties: voluntary-*aided* schools had more autonomy and more church involvement in their governors, staffing and curriculum, and voluntary-*controlled*, which had less (UK Government 1944). Half a century later, in 1998, a third, hybrid model – the foundation school – was added (UK Government 1998). 2010 marked the advent of academies and free schools, as quasi-independent schools within the state sector, unshackled

from local governmental control. These essentially replaced foundation schools, though the legal form remained, and particularly allowed for multi-academy trusts to manage several schools. However, in this Act, the statutory requirement to teach any form of religious education or indeed the national curriculum was removed (UK Government 2010). Instead, the standard funding agreement simply states that ‘the Academy Trust must ensure that the curriculum includes English, mathematics, science and...religious education’ (Department for Education 2020, clause 2.22; see also Department for Education 2012): the requirement becomes contractual.

These organisational changes have led to different forms of ‘faith’ schools, from the more traditional voluntary-aided Church of England or Roman Catholic school to church-run multi-academy trusts, and to a variety of ‘non-faith’ schools with different demands on religious education. Moreover, there have been new compromises: when a long-established voluntary-aided church school joins a group of community schools in a non-religious multi-academy trust, its trust deed will need to be accommodated in a redrafting of the trust deed for the whole multi-academy trust. The religious dimension of the voluntary-aided school cannot be lessened, but neither can the other schools’ religious dimensions be increased. The trust deed, once the preserve of the independent sector, has recently become vital in defining a school’s religious status in the state sector.

At first glance, the paradigmatic French constitutional principle of *laïcité* (Bauberot 2004; Raynaud 2019) might suggest that the religious and legal status of schools would be very different to the situation in England. However, the place of religiously established *écoles privées* in French education creates some surprising points of comparison. While the term would superficially translate as ‘private schools’, these schools have long been recipients of state funding; indeed, Bertola (2017) terms them ‘almost public private schools’ (p. 1).

Briefly, the legal background lies in the *loi Ferry* of 1881 and 1882;^{vii} named after the minister responsible (Jules Ferry), these established secular state education, which largely replaced the previous church-run education. Religious education was not included in the state school curriculum, under Article 1, but private schools were also permitted to operate, and were permitted to teach it, under Article 2. However, in 1959, the *loi Debré* created the legal conditions for greater cooperation between the two sectors, thereby developing or abrogating the constitutional principle of *laïcité*, depending on one's point of view. Its provisions remain in force, and indeed despite being under attack for a couple of decades, is now seen as being stronger than ever; Pons et al. (2017) argue that there has been 'closer interaction between the authorities in charge of both systems' since the late 2000s (p. 57).

Under the *loi Debré*, two contractual models of private-state collaboration were established, 'simple' and 'association', with differing administrative and financial implications (Sawisz 1989). There are certain shared requirements for both: the school must be established at least five years, with suitable buildings and a sufficient number of pupils, and teachers should be formally qualified. A 'simple' contract would allow the school more autonomy; it applies to primary schools only, the school must follow 80% of the national curriculum, and the school and parents manage the budget themselves, with teachers' salaries being provided for by the state. An 'association' contract can apply to primary *and* secondary schools; it requires that the school follows the entire curriculum, and the state manages the budget and pays the staff directly as public employees. Under both arrangements, the schools can also provide religious education; for example, there has long been a network of Jewish schools (Cohen 2010), and more recently, Muslim schools (Bourget 2019). This arrangement has meant that there are four legal forms of schooling in France: fully private, simple

contract, association contract, state. The first three can offer religious education, and indeed can be religiously founded.

The French and English systems share nuanced legal arrangements for the state and religious institutions to work together to provide education, and both provide for a range of alternative models of cooperation. In England, this is achieved both through different organisational models, such as voluntary aided or controlled schools, or through contractual arrangements, such as free schools or academies. In France, there are no directly organisational models, but instead different contractual models are set out in the legislation.

Curriculum

The decision to prohibit, permit or require religious education in schools of any type is a legal one, and here is considered through two examples, Senegal, in which the legal status of religious education implicitly shifts the constitutional position, but without consideration of curriculum, and Turkey, which has been caught up in supranational concerns over the right to opt out of the subject.

Senegal's legal approach to religious education is built on both its Islamic pre-colonial traditions and its French colonial heritage (Kiné Camara & Seck 2012). Initially, post-Independence in 1960, it followed the French model of providing *laïc* public schools and permitting religious private schools but was considerably more open to the involvement of religious communities than France itself, mapping out overall educational provision across the new country from whatever institution (Anon 1960a; Anon 1960b), and providing in the Constitution that, 'The [state] institutions and the religious or non-religious communities are equally recognised as means of education'.^{viii} For religious education, this meant that:

‘national education is *laïc*: it respects and guarantees at all levels freedom of conscience to all citizens... [It is] favourable to private schools, which may provide religious education’.^{ix}

Legally therefore this followed the classic *laïc* interpretation of secularism by not banning religious education completely but placing it outside state education. In practice religious communities were considerably involved in education as in French colonies, religious communities – especially within the Catholic church - had been given a free reign to provide education: *laïcité* did not extend much beyond mainland France. In Senegal, they had operated alongside the pre-colonial Islamic education structure.

However, in 2004, a new law was passed which kept the first clause above, but amended the second to, ‘Within *public and* private schools, in respect of the principle of State *laïcité*, optional religious education can be offered. Parents freely choose to sign up their children for this teaching’^x (emphasis added). This meant that it is possible to offer religious education within a state school for those parents who request it. There are two points of note here. First, although religious education is now potentially part of the curriculum in all forms of education, curriculum, pedagogy and assessment are undefined and unlegislated, simply left to the schools and parents to determine. Second, this clause is tantamount to rewriting the constitution because it re-defines what is meant by state *laïcité*; for many Francophone countries, the exclusion of religious education from state education is its defining feature, but here it becomes essentially permissive – *laïcité* is not against religious education, it is just up to parents to ask and schools to offer it, almost like an after-school sports or arts club. Laws can therefore implicitly effect constitutional change but without actually redrafting the constitution.

In the Turkish example, the specific issue is how the legal question of a right of opt out from the subject led to judicial scrutiny of curriculum content, ultimately in the European Court of Human Rights. This court has often had to decide on whether a particular curriculum is in breach of human rights law, notably under the European Convention on Human Rights, of which 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, 2017)

Further, Article 2 of Protocol 1 sets out 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 ECtHR, 2019)

The particular issue concerns whether an inappropriate kind of religious education in school affects both the positive freedom to one's own beliefs and religious education and/or the negative freedom of not being subjected to different forms of religious education than one's

own. In many countries, there is a legal opt-out provision, permitting pupils not to attend the lessons provided, and even to attend their own form of religious education elsewhere instead.

Turkey has twice found itself entangled in the European Court on this issue, both concerning the representation of Alevism (Kaymakcan & Hendek 2022).^{xi} The legal position of religious education in Turkey has varied over several decades. In the Ottoman period, there was a strong Sunni tradition of schooling, but this was removed when Atatürk adopted a French-inspired model of *laïcité*, separating the state and religious institutions. However, from 1949 onwards, it was reintroduced, becoming compulsory in the 1982 Constitution. Article 24 decreed 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 (see Hendek & Fancourt 2021).

The title of the subject, as ‘religious culture’, may suggest a pluralistic approach, as was its intention. The European Court noted:

According to the syllabus for “religious culture and ethics” classes, the subject is to be taught in compliance with respect for the principles of secularism and freedom of thought, religion and conscience, and...to transmit knowledge concerning all of the major religions. One of the objectives of the syllabus is educate people “who are informed about the historical development of Judaism, Christianity, Hinduism and Buddhism, their main features and the content of their doctrine, and to be able to assess, using objective criteria, the position of Islam in relation to Judaism and Christianity”. (Zengin, para. 58)

The constitution however specifically provided for Christians and Jews to opt out, as these religions had long been formally recognised more generally, from the Ottoman period, in, e.g., establishing places of worship. By the early 2000s, the Alevite community were increasingly concerned with how they were mis- or underrepresented within the curriculum, since many of their beliefs and practices did not follow the Sunni norms portrayed there. Alevism has similarities with elements of both Sunni and Shia Islam, but there is an even wider theological question as to whether Alevism should be seen as a separate religion altogether rather than a branch of Islam, which is linked to historical questions about its origins in and debt to pre-Islamic traditions (Dressler 2008). These questions were not academic since if it was a separate religion then it arguably warranted the same legal protection as Judaism and Christianity, but if not then it should be covered reasonably within teaching on Islam.

The timing was significant on two counts. First, the emerging World Alevi Union had emboldened Alevi identities within and outside of Turkey (Özkul 2019). In 2001, Hasan and Eylem Zengin (father and daughter) started demanding an exemption from religious education in her school in Istanbul, which led to a Turkish court decision in 2003 against them, so in 2004 they lodged an application with ECtHR. Contemporaneously, Alevism was recognised as an official religion in Germany – specifically Berlin in 2002, thereby establishing the legal right to teach it in schools (Özyürek, 2009), so the legal curriculum questions were also bound up in transnational identity politics, as the Berlin decision had radiating effects beyond the municipality or even Germany. Second, the ECtHR was coincidentally hearing a similar case from Norway brought by a group of nine humanist parents and their children in relation to what they considered the overly Christian focus of the curriculum,^{xiii} so the court decided on the legal issue twice within a few months.

The ECtHR applied two tests. First, it considered if the content-matter of the subject was taught in a ‘objective, critical and pluralist manner’ (Zengin, para. 15), and thereby focused on the content rather than the overall aim and intentions. Second, if the content did not meet this requirement, it would consider the availability or appropriateness of any opt-out provisions. Thus, if it met the first criterion, there was no need to consider the opt-out requirement at all, and conversely, even if the curriculum were more narrowly orientated within one faith, this would be suitable if there was a right of withdrawal. On the first test, it considered that:

The syllabus for teaching in primary...and the first cycle of secondary school... gave greater priority to knowledge of Islam than to that of other religions and philosophies. In particular, the syllabus included study of the prophet Mohamed and the Koran. Pupils had to learn several *suras* from the Koran by heart and study, with the support of illustrations, daily prayers. The textbooks did not just give a general overview of religions but provided specific instruction in the major principles of the Muslim faith.

The court therefore considered in detail how Islam was represented, noting the lack of coverage of other religions, then moving onto considering the place of Alevism within this.

On the other hand, pupils received no teaching on the confessional or ritual specificities of the Alevi faith, even though its followers represented a large proportion of the Turkish population. Information about the Alevis was taught in the 9th Grade but the Court...considered that [this] was insufficient to compensate for the shortcomings of the primary and secondary school teaching.

Striking here is the extent to which the European Court attended to the details of curricular design, highlighting an over-focus on Islam in relation to other religions and then the lack of attention to Alevism across it, at different levels of schooling.

Given this decision, it then applied the second test, and found that the opt-out provisions were inappropriate and onerous, since under a ministerial decision in 1990, they only applied to pupils “of Turkish nationality who belong to the Christian or Jewish religion...provided they affirm their adherence to those religions” (Zengin, para. 18 & 77). It was wrong to limit the exemption to these types of pupils, and it was burdensome to demand such an affirmation from the pupils and parents. The right was denied to non-Turkish pupils even if they were Jewish or Christian, and to Alevites, atheists and pupils of other religions.

The Turkish government engaged in a flurry of curriculum reform; indeed, the reforms started before the decision had been made (Hendek & Fancourt 2021; Kaymakcan & Hendek 2022). However, some Sunni religious leaders were critical of how the court had taken it upon itself to determine what Islam was.

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 (Bardakoğlu, cited in Hendek and Fancourt 2015, p. 4).

The issue is not trivial, in that both courts, governments and schools may have to make these decisions. While the inclusion or exclusion of a major religion or a significant denomination is fairly apparent, the question of when and where different elements should appear on the curriculum is debateable, and there is no educational reason given to suggest that different religions or denominations should appear throughout schooling, especially if faith nurture is not the aim.

Despite these reforms, the next generation of Alevi families (*Yalçın and others v Turkey*) took exception to the new revised curriculum. This curriculum included several changes, notably the introduction of Alevi material throughout Years 4 to 11, on important historical figures such as Ali and Hacı Bektaş Veli, and on different practices of prayer and fasting. However, these families argued that this was insufficient. The European Court again scrutinised the curriculum in detail and noted that there had been a substantial shift ‘to facilitate the provision of information on the various faiths existing in Turkey, including the Alevi faith’ (*Yalçın* para. 68) but agreed with the parents because the curriculum presented features of Sunni Islam as normative, e.g., ‘the surahs of the Koran and the practice of prayer (Salat) were regarded as elements to be acquired’ (para. 68) and presented ‘the principal Alevi rites (notably the *cem* and the *semah*) ...as cultural activities or folk rituals rather than as religious rites, and the *cemevi* was not recognised as a place of worship in keeping with its status in the Alevi faith’ (para. 68). These assumptions and lacunae were ‘liable to create a conflict of allegiance for their children between their school and their own values’ (para. 71). Again, then curricular detail mattered, and although some relevant material had been included, the Court also considered what was said elsewhere about Islam generally, and how this new material was presented, as culture rather than religion.

These examples of Senegal and Turkey show differing treatment of how religious education and its curriculum can appear in the law and the courts. In Senegal, the term itself, devoid of specific curricular content, can appear in legislation so that it creates new freedoms for curricular development in public schools; in Turkey, the European Court can scrutinise the minutiae of curriculum documents to decide if freedoms are being infringed.

Pupils' religiosity and beliefs

In many legal systems the right to freedom of belief is enshrined in many countries' constitutions or laws, and is also key in many human rights conventions. This has often been the other face of the curriculum issue, notably the Turkish example above. However, other aspects of schooling can also jar with this right, so we review two different examples. The first is from South Africa and concerns the pupils' right to display religious or cultural symbols in school, i.e., what pupils want to manifest in school; the second is from Italy, and concerns whether a school's display of religious symbols violates pupils' freedom of belief, i.e., what schools want to manifest to pupils.

First, there are numerous cases from different jurisdictions on whether pupils are entitled to wear religious symbols to school. The pupils' right to display their beliefs can rub up against constitutional notions of schools as secular or *laic* spaces, or against school uniform policies, though also there can be questions about whether the symbolic object is genuinely religious. These can be seen in the South African case of MEC for Education KwaZulu Natal et al. v Pillay.^{xiii} and concerns whether a pupil could wear a nose-stud to school, but played out against the country's ongoing challenges of achieving equality of belief (Burkhardt 2017; Davids & Orchard 2022).

The events concerned Sunali Pillay, who was attending Durban Girls' High School which had a strict policy on jewellery (one ear stud or sleeper in each ear, and a watch), in line with government regulations on school uniform. Late in the summer holidays in 2004, Sunali had her nose pierced, but was exceptionally permitted to wear the stud in school until the end of October while it was healing. In January 2005, Sunali was still wearing it, and so the school wrote to her mother, who replied to the effect that that:

[They] came from a South Indian family that intends to maintain cultural identity by upholding the traditions of the women before them. The insertion of the nose stud was part of a time-honoured family tradition. It entailed that a young woman's nose was pierced and a stud inserted when she reached physical maturity as an indication that she had become eligible for marriage...When Sunali turned sixteen, her grandmother would replace the gold stud with a diamond stud...as part of a religious ritual to honour and bless Sunali...[It] was not for fashion purposes but as part of a long-standing family tradition and for cultural reasons.

The school then consulted with Hindu experts, who disagreed with the mother's claim that this was a recognised Hindu practice, so mother and daughter were informed that the nose-stud should be removed. The matter escalated through the educational district, which supported the school, and into the Equalities Court. This court also found in favour of the school, since the mother had agreed to the school policies, had not consulted with the school first, and initially only asked for a month's grace. The mother appealed to the High Court, which agreed with her, overturning the Equalities Court, because South African equalities law protected religion and/or culture, so as long as it constituted one of these it had legal protection. It especially noted 'the vulnerable and marginalised status of Hindus and Indians

in South Africa's past and present, the demeaning effect of denying Sunali's religion — and hence her identity — and the systemic nature of the discrimination' (para. 17).

The matter then went to the Constitutional Court, since beyond a question of uniform, or even an educational question, there was a question of the nature and limits of discrimination – highly charged in South Africa. For discrimination, the individual has to be unfairly treated because of their membership of a particular group. This court held that:

Even on the most restrictive understanding of culture, Sunali is part of the South Indian, Tamil and Hindu groups which are defined by a combination of religion, language, geographical origin, ethnicity and artistic tradition. Whether those groups operate together or separately matters not; combined or separate, they are an identifiable culture of which Sunali is a part (para. 50).

However, the next question was in determining whether wearing a nose-stud was a genuine cultural or religious tradition, rather than being simply a fashion choice. There were two types of test, objective and subjective. The Court identified widespread acceptance in South Africa and internationally that the test for religion was subjective, in that if someone claimed an activity or practice was religious then they should be believed, but there was debate as to whether cultural traditions should be decided upon more objectively, requiring an expert to determine if the practice or activity was cultural. The Court considered that either way the answer would be the same, since cultural convictions can be as strongly held as religious beliefs, and that cultures 'are not monolithic' (para. 54), and thus the test was subjective for both religious and cultural traditions. The conclusion therefore was that there had been discrimination on cultural/religious grounds. This example throws into sharp relief both the legal and practical challenges of recognising pupils' beliefs in school when they rub against

schools' organisational practices, notably what it means to hold a particular conviction about dress of jewellery, the types of legal tests that might apply, and the previous behaviour of the individuals involved.

The contrasting example concerns two atheist pupils who objected to the school's display of a religious symbol, *Lautsi v Italy*,^{xiv} which also went to the ECtHR. Two brothers attended the primary school in the Italian town of Abano Terme, which displayed a crucifix in every classroom, as required under Italian law. Their mother complained under their familial right to freedom of belief (Article 9 and Protocol 1, ECHR), arguing that the symbol was a form of religious teaching, so she demanded that all crucifixes should be removed from the school. The school refused, citing the Italian law, so she proceeded through various courts, which all supported the school. She then appealed to the ECtHR, which initially supported her; it was then heard by a Grand Chamber (of seventeen judges), which supported the school. The different courts' decisions covered various issues (see Fancourt 2022a), including whether and what a crucifix could be said to teach. The Italian courts had held that it did teach, but that this was not religious in a school setting:

...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)

Since a crucifix had this humanistic tone, it did not infringe the brothers' beliefs. The ECtHR initially also held that it had a direct effect, but that this was essentially religious:

[A]mong 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 court therefore presented the argument that a crucifix might have a variety of meanings but a religious one prevailed. However, the fuller hearing reversed this. It rejected the underlying assumption throughout that it directly taught, by holding that, as ‘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). On this account, it could not breach the pupils’ negative freedom from inappropriate forms of religious instruction, and they were not being asked to learn or give assent to beliefs that they did not accept.

These two cases reveal the complexities of recognising or honouring pupil’s beliefs in schools, particularly beyond the curriculum, in regulations about pupils’ dress or jewellery, or in classroom displays. The lines between personal choice, culture and religion are also at play – and indeed can raise procedural legal issues such as the appropriate test in court.

Teachers' religiosity and professionalism

The last contentious topic is teachers’ religiosity and professionalism. Teachers are both employees of schools, religious organisations or the state itself, enacting and fulfilling their contractual duties towards these institutions, but they are also individuals with the right

to freedom of belief themselves. The issue of freedom of belief is contested within employment law generally (Vickers 2016), for instance the right to display religious symbols such as whether an air steward can wear a cross ^{xv} or a lawyer wear the hijab^{xvi}, or indeed to refuse to perform aspects of the role, such as work involving medical ethics or LGBTQ+ rights, but in an educational setting, employees' rights are embroiled in other constitutional or human rights issues in more complex ways.

The first example is when the provision of religious education is handed over to religious institutions, which then have legal oversight not only of the curriculum but of teachers too. In Costa Rica, as in many Hispanic countries (Gas-Aixendri 2021; Vaggione & Morán, 2016), the Catholic church is constitutionally or quasi-constitutionally the state religion (Fuentes Belgrade 2016); it is legally implicated in the formation and selection of teachers of religious education, and therefore is identified at different phases of qualification and selection. Costa Rican legislation in 1970 on 'The Teaching Career'^{xvii} set out the professional requirements for and obligations on teachers. At that time, religious education in schools was a form of Catholic nurture, and so two provisions were included. First, delegates of various listed had to meet as a 'jury' to establish the minimum qualifications for teachers, but for 'teachers of religion', and extra body, the National Episcopal Conference, was also listed (section 87). Since the jury could include any 'other conditions', this meant that aspects of potential teachers' personal life, e.g., as a divorcee, or their views on controversial issues, e.g., abortion or liberation theology, could be included. Second, when identifying suitable qualifications for entry into teaching, the statute lists 'priests', rather than university graduates, as in other subjects (section 122e), so that the church effectively controlled the training of religious education teachers since they operated the seminaries. The broad issue was raised by the United Nations Human Rights Committee in its periodic report for 1994, especially objecting to the role of the National Episcopal Conference and the church's 'power

to bar non-Catholics from teaching religion in the public school curricula'.^{xviii} The law was altered, but only by removing the role of the National Episcopal Conference, and the Catholic priesthood remains a viable route into specialist religious education teaching, with implications for views of professionalism and vocation - and indeed gender, since Catholic priests will all be men.

In the second example the issue was not that teachers' religiosity and professionalism would be shaped by a religious institution, but that the school as an educational institution would seek to shape or restrict teachers' religiosity. This example of litigation also went to the European Court of Human Rights: *Dahlab v Switzerland*. Lucia Dahlab was a Swiss-born primary teacher who converted to Islam and started wearing hijab in her classroom. She was required by the educational administration to remove it as it was not compatible with Swiss principles of secularity, so she took the matter through the Swiss courts of appeal and onto the European Courts (see Fancourt 2022b). At stake was a potential clash between her positive right to freedom of belief, and the pupils' and their parents' negative right not to be exposed to religious teaching other than their own. The ECtHR held that:

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)

And it went on to hold 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)

The two statements are instructive. The first links the hijab directly to the issues of proselytization, and this is a difference with other employment law cases about wearing religious symbols at work. There was no question that she had attempted to proselytise the pupils verbally, only that the hijab might have this consequence of itself. The second links teaching with a set of democratic values that a teacher should uphold and argues that the hijab - of itself and without verbal explanation – would deny these values.

Taken together these two examples reveal how legislation and legal processes shape teachers' professionalism and religiosity. In Costa Rica, professionalism was bound up with religiosity, demanded even, and one's personal life and opinions could be part of the criteria for selection. In Switzerland, the opposite was the case, and religiosity was legally required to be left outside of the school setting, and even the wearing of a symbol without giving any explicit explanation was inappropriate.

Conclusion

In conclusion, an understanding of the place of religions in schools requires attention to its specifically legal features, especially being poised between policy and constitution. Laws are different to softer policy documents, as they have a legal form that affects their

wording, their effect, and their duration; laws have distinctive features, in statutory wording and interpretation, the role of the courts, and the radiating effects of judgements. These features can be seen to play across some shared issues in many countries – the organisation of schools, the curriculum, pupils’ religiosity and belief, teachers’ religiosity and professionalism. As the examples have shown, the approaches to these issues obviously differ, and thus, for example, teachers’ religiosity could be legally enforced or else prohibited.

The law can affect constitutional requirements, as in France and Senegal, where the constitutional claims for *laïcité* are effectively softened by financing arrangements or the provision of choice. Legal changes are more demanding to effect than other policy changes but are usually easier to effect than constitutional change. The *loi Debré* has remained in place since 1959, and although there were campaigns to amend or revoke it in the 1970s and early 1980s, these failed, so that its provisions have increasingly become adopted across French schooling: there has however not been any formal change to the constitution itself. Further, the examples given also point to the tension between national legislation and supranational human rights obligations, and as shown in the Costa Rican, Swiss and especially Turkish examples, these cut right across national policy, and politics.

Finally, the entanglement of legal and educational issues in questions of religions and beliefs within schools are both important, but often overlooked in broader educational analyses, which prioritise policies, and in legal analyses, which often prioritise jurisprudential reasoning or wider constitutional issues. The intersection of legal and educational research has much more to offer in this respect. More focus on these issues and more, wider interdisciplinary discussions are only to be welcomed.

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