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EUROPE'S SCHOOLHOUSE GATE? STRASBOURG, SCHOOLS, AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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Abstract
Yale law professor Justin Driver's 2018 book—The Schoolhouse Gate—argues that American public schools have served as the single most important sites of constitutional conflict in United States history. This Article, inspired by this work, argues that primary and secondary schools similarly serve as one of the most significant forums of human rights conflict in the Council of Europe. In support of this argument, the Article adopts a two-tiered analysis. The first is court-centric, focusing primarily on the European Court of Human Rights' schools jurisprudence. The second is societal-centric, and homes in on the crossroads at which the European Court of Human Rights, schools across the Council of Europe, and society meet. By making the above claim, the Article hopes to spur on further discussion not only about human rights within Europe's schoolhouse gate, but also to deepen the conversation regarding how schools as institutions interact with European supranational human rights protection.

Keywords
schools, Strasbourg, ECtHR, human rights

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EUROPE'S EUROPE'S SCHOOLHOUSE GATE? STRASBOURG, SCHOOLS, AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Patrick Leisure

1. Introduction

In a Croatian high school in 2011, a math teacher berated a group of high school seniors for being late to math class. He shouted at one of the late pupils, calling him a moron, an idiot, a fool, a hillbilly, and a stupid cop.[1] After the pupil reported the event that day to the head teacher, in class the following day, the teacher said to the pupil "... when you say to a fool that he is a fool, that should not be an insult for him…You don't know what the insults are, but you will see what the insults are."[2] In the third and final incident, eight days later, the teacher asked the pupil to turn to a page in his textbook. After the pupil had turned to the wrong page, the teacher said "[y]ou, fool, not that page. I didn't mean to insult you, because I know you will call your dad."[3] The question that eventually wound up before the European Court of Human Rights (ECtHR, Strasbourg Court) was whether this verbal abuse and the Croatian authorities' response amounted to a violation of the applicant's right to private life under the European Convention on Human Rights (ECHR, Convention).

Finding a violation of the applicant's Article 8 rights under the Convention, the Court noted early in the judgement that "in school…any form of violence, however light, is considered unacceptable."[4] In so doing, the Court was implicitly acknowledging what the US Supreme Court explicitly recognized in the US context in *Tinker v. Des Moines Independent Community School District* in 1969:[5] Students do not shed their rights when they enter the schoolhouse gate. In fact, this finding is nothing new—the ECtHR has been adjudicating human rights claims of students, parents and teachers involving the primary and secondary school context for some 54 years now.[6] Yet, sparse scholarship exists holistically examining the school as an important forum of supranational human rights protection in Europe. This Article, taking inspiration from Yale law professor Justin Driver's recent book *The Schoolhouse Gate*—arguing that schools have served as the most significant theater of constitutional conflict in the United States[7]—begins to bridge that gap through a broad-spectrum discussion of the intersection between two significant institutions in Europe: the ECtHR and schools.

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[1] *F.O. v. Croatia*, App. No. 29555/13, 22 April 2021, at Para 6.
[2] *Ibid.*, at Para 7.
[3] *Ibid.*, at Para 8.
[4] *Ibid.*, at Para 69.
[5] 393 U.S. 503 (1969).
[6] The first such case was the *Case 'Relating to certain aspects of the laws on the use of languages in education in Belgium'*, Application Nos 1474/62 et al., 23 July 1968.
[7] Justin Driver. THE SCHOOLHOUSE GATE (2018) ("At its core, this book argues that the public school has served as the single most significant site of constitutional interpretation within the nation's history."), at 12; see also, James Ryan, 'The Supreme Court and Public Schools'. 86 VIRGINIA LAW REVIEW 101 (2000).

Labelled as one of the most effective international human rights tribunals in existence,[8] the ECtHR sits in Strasbourg, has jurisdiction to adjudicate human rights claims of applicants from 46 different countries, and decides on issues with noteworthy legal, political, and societal consequence.[9] Likewise, schools are central institutions in people's lives across Europe.[10] Schools perform many key functions in society, not limited to teaching pupils necessary skills for life like mathematics, reading and writing, providing a significant social experience in which young people from different families learn and coexist together for long periods throughout the school day and school year, and, as the COVID-19 pandemic has brought back into the fore, delivering an important and diverse caring function.[11] According to the ECtHR itself, among the objectives of schools is "the development and moulding of the character and mental powers of its pupils."[12] In a narrow sense, the Court was sustaining what Jan Comenius—the father of modern education—said in the 17th century: "the school is the manufactory of humanity."[13] Yet, while existing scholarship has extensively examined important individual cases involving schools before the ECtHR, such as the *Belgian linguistics case*,[14] the *Lautsi* case,[15] and *O'keeffe v. Ireland*,[16] or has examined particular Convention rights in the school context,[17] no scholarship exists attempting to characterize in broad strokes the relationship between the ECtHR and schools in Europe.[18]

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[8] Laurence Helfer. 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime'. 19 EUROPEAN JOURNAL OF INTERNATIONAL LAW 125, at 126 (2008).

[9] David Kosař and Jan Petrov. 'The Architecture of the Strasbourg System of Human Rights: The Crucial Role of the Domestic Level and the Constitutional Courts in Particular'. 77 HEIDELBERG JOURNAL OF INTERNATIONAL LAW 585 (2017) (noting "the ECtHR delivers rulings which deal with crucial legal, political and societal issues of our day"), at 587.

[10] See, e.g., Bram Spruyt, Filip Van Droogenbroeck and Leandros Kavadias. 'The perceived quality, fairness of and corruption in education in Europe'. OXFORD REVIEW OF EDUCATION (2022) 1 (noting that "education is arguably one of the most central institutions in contemporary European societies.")

[11] See, e.g., Brett Warnick. 'Student Speech Rights and the Special Characteristics of the School Environment'. 38 EDUCATIONAL RESEARCHER 200 (2009); see also collection of articles in *What is School For?*, NEW YORK TIMES OPINION (Sep. 9, 2022), https://www.nytimes.com/interactive/2022/09/01/opinion/schools-education-america.html?action=click&pgtype=Article&state=default&module=opinion-what-is-school-for&variant=show®ion=TOP_BANNER&context=op-whatisschoolfor-topnav.

[12] *Campbell and Cosans v. The United Kingdom*, Appl. No. 7511/76, 25 February 1982, at Para. 33.

[13] Simon Somerville Laurie. JOHN AMOS COMENIUS, BISHOP OF THE MORAVIANS: HIS LIFE AND EDUCATIONAL WORKS (1899), at 231.

[14] See, Ed Bates. THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2010), at 225–238; Katherine Williams and Bernadette Rainey. 'Language, education and the European Convention on Human Rights in the twenty-first century'. 22 LEGAL STUDIES 625 (2002).

[15] See, e.g., Dominick McGoldrick. 'Religion in the European Public Square and in European Public Life—Crucifixes in the Classroom?' 11 HUMAN RIGHTS LAW REVIEW 451 (2011); Joseph Weiler. 'Freedom of Religion and Freedom from Religion: The European Model'. 65 MAINE LAW REVIEW 759 (2013); Pierre-Henri Prelot. 'The Lautsi Decision as Seen From (Christian) Europe'. 65 MAINE LAW REVIEW 783 (2013); Lorenzo Zucca. Lautsi: A Commentary on a decision by the ECtHR Grand Chamber'. 11 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 218 (2013).

[16] See, e.g., James Gallen. 'O'Keeffe v. Ireland: The Liability of States for Failure to Provide an Effective System for the Detection and Prevention of Child Sexual Abuse in Education'. 78 MODERN LAW REVIEW 151 (2015).

[17] See, e.g., discussing many of the cases decided by the ECtHR involving discrimination in schools against Roma children Noam Peleg. 'Marginalisation by the Court: The Case of Roma Children and the European Court of Human Rights'. 18 HUMAN RIGHTS LAW REVIEW 111 (2018).

[18] For the purposes of this article, school is defined as a primary or secondary school. My study does not include, for example, pre-schools, nurseries, crèches, and universities.

Based on a wholistic analysis of a novel body of international jurisprudence that I call "Strasbourg's schools jurisprudence",[19] the central argument of this Article is that schools have served as one of the most important sites of interpretation of the ECHR in the post-WWII history of Europe. It is likely that few other "domains" in which the ECHR may protect people from abuses of their rights by the state equal the size of interests in, the divergence of views and contestation in the judiciary and academia on correct interpretation of the ECHR, and significance for European societies in both the legal and social sphere than is the case for schools in the Council of Europe. In making this claim, the article advocates for the transposition of what Dean Heather Gerkin calls "domain-centered" constitutional law[20] to the European supranational context.[21] In other words, because judicial interpretation of rights may depend on judges' understanding of and views on the context, our understanding of the ECtHR's interpretation of the ECHR will improve by focusing on certain places or certain

[19] The author has identified 45 judgements issued by the ECtHR involving a close factual nexus with primary and secondary schools. These cases were identified using a combing method on the primary search engine of ECtHR case-law, HUDOC. Specific key terms were used to identify initial cases, such as school, education, primary, secondary, student, and teacher. Then, I identified the cases that the search results turned up that did not involve a close factual nexus with a primary or secondary school. Finally, the set of identified cases was cross-checked with the relevant literature, such as Claire Fenton-Glynn. CHILDREN AND THE EUROPEAN COURT OF HUMAN RIGHTS (2021). Admissibility decisions involving schooling were not included. This body of case law forms the basis for the article's analysis. Those cases are: *Belgian Linguistic case*, *supra* n. 6; *Kjeldsen, Busk Madsen and Pedersen v. Denmark* App. Nos 5095/71 et al., 7 December 1976; *Campbell and Cosans*, *supra* n. 11; *Costello-Roberts v. The UK* App. no 13134/87, 25 March 1993; *Efstratiou v. Greece* App. No. 21787/93, 18 December 1996; *Valsamis v. Greece* App. no 21787/93, 18 December 1996; *Cyprus v. Turkey* App. no. 25781/94, 10 May 2001; *Timishev v. Russia* Apps. Nos. 55762/00 et al., 13 December 2005; *D.H. and others v. Czech Republic*, App. No 57325/00, 7 February 2006; *Folgerø v. Norway* App. no 15472/02, 29 June 2007; *Hasan and Eylem Zengin v. Turkey* App. no 1448/04, 9 October 2007; *D.H. and others v. Czech Republic* (GC), App. No 57325/00, 13 November 2007 (*D.H. II*); *Sampanis v. Greece* App. no 32526/05, 5 June 2008; *Oršuš and Others v. Croatia* App. No 15766/03, 17 July 2008; *Dogru v. France* App. No 27058/05, 4 December 2008; *Kervanci v. France* App. No 31645/04, 4 December 2008; *Lautsi v. Italy* App. No 30814/06, 3 November 2009; *Oršuš and Others v. Croatia (GC)* App. No 15766/03, 16 March 2010 (*Oršuš II*); *Grzelak v. Poland* App. No. 7710/02, 15 June 2010; *Ali v. UK* App. No 40385/06, 11 January 2011; *Lautsi v. Italy (GC)*, App. No 30814/06, 18 March 2011 (*Lautsi II*); *Ponomaryovi v. Bulgaria* Appl. No 5335/05, 21 June 2011; *Vejdeland and Others v. Sweden* App. No. 1813/07, 9 February 2012; *İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey* App. No 19986/06, 10 April 2012; *Kayak v. Turkey* App. No. 60444/08, 10 July 2012; *Catan and Others v. Moldova and Russia* App. Nos 43370/04, et al., 19 October 2012; *Sampani v. Greece*, App. No 59608/09, 11 December 2012; *Horváth and Kiss v. Hungary*, App. No. 11146/11, 29 January 2013; *Lavida v. Greece* App. No, 7973/10, 30 May 2013; *Mansur Yalçin and others v. Turkey*, App. No. 21163/11, 19 September 2014; *O'keeffe v. Ireland* App. No. 35810/09, 28 January 2014; *Memlika v. Greece*, App. No. 37991/12, 6 October 2015; *Çam v. Turkey* App. No. 51500/08, 23 February 2016; *Osmanoğlu and Kocabaş v. Switzerland*, App. No 29086/12, 10 January 2017; *Papageorgiou and others v. Greece* App. Nos. 4762/18 et al., 31 October 2019; *G.L. v. Italy* App. No. 59751/15, 10 September 2020; *Perovy v. Russia*, App. No. 47429/09, 20 October 2020; *F.O. v. Croatia*, *supra* n. 1; *Stoian v. Romania*, App. no. 289/14, 25 June 2019; *Kurt v. Austria*, App. No. 62903/15, 4 July 2019; *Kurt v. Austria (GC)*, App. No. 62903/15, 15 June 2021 (Kurt II); *Tagayeva and others v. Russia*, App. No. 26562/07, 13 April 2017; *Ádám and others v. Romania*, App. No. 81114/17, 13 October 2020; *X and others v. Albania*, App. nos. 73548/17 and 45521/19, 31 May 2022; *Elmazova and others v. North Macedonia*, App. Nos. 11811/20 and 13550/20, 13 December 2022.

[20] Heather K. Gerken. 'Justice Kennedy and the Domains of Equal Protection'. 121 HARVARD LAW REVIEW 104 (2007), at 122.

[21] While the registry of the ECtHR produces case law handbooks that detail jurisprudence of certain Convention rights, such as the right to education, and a handbook of all cases involving prisoners' rights exists, no handbook or scholarly work has ever tried focus on the school as a specific institution or domain of rights protection at the ECtHR.

applicants, rather than only specific clauses of the Convention.[22] As this article shows, Convention interpretation is contextual; therefore, we should study it as such.[23]

In support of the above argumentation, the Article adopts a two-tiered approach.[24] The first, explored in part I, is court centric. It focuses on the ECtHR's case-law involving schools, and scholarly and judicial interpretations analyzing the ECHR's application in schooling cases. Considering a trio of observations—that the school context often plays a key role in how the ECtHR interprets the Convention, school cases recurrently involve highly contested questions about the correct judicial interpretation of the ECHR, and that the ECtHR has repeatedly confirmed that Strasbourg has a role to play in upholding human rights in schools across the Council of Europe and across various Convention rights—supports the Article's argument that schools serve as key sites for Convention interpretation in the Council of Europe. The second tier of the argument, in part II, takes a broader view and considers the societal implications of the intersection between schools and the Strasbourg Court. Considering the sheer size of interests in elementary and secondary schooling across the Council of Europe, the important contributions to European societies made in some of Strasbourg's schooling cases, and that the schooling cases before Strasbourg may be reflective of wider apprehensions inherent in Europe's system of human rights protection, lends credence to the notion that schools should be understood as key sites of human rights encounters in Europe. While there is some overlap between these two levels of analysis, the framework provides a meaningful distinction between jurisprudential analysis and broader societal considerations at the intersection between schools and the Strasbourg Court. Finally, by introducing the relationship between schools and the ECtHR and arguing that schools have served as key sites of Convention conflict, the article seeks to start a discussion, not to finish it. The observations and arguments therefore take the general form rather than the particular and suggest answers more than they conclude.

2. Strasbourg, Schools, and the European Convention on Human Rights

Part II takes a court-centric approach, arguing that a closer look at the ECtHR's jurisprudence involving primary and secondary schools supports the notion that the school has served as a key site of Convention interpretation. The ECtHR has repeatedly emphasized the importance of the school environment in shaping the way the Court interprets the ECHR in schooling cases, there is significant contestation both on and off the bench regarding the proper interpretation of the ECHR in schooling matters, and the Strasbourg Court has repeatedly confirmed over the last half century that it has an important, if debated, role to play in a diverse slate of schooling issues across the Council of Europe. This trio of observations illustrate the significance of schools as sites of human rights conflict and Convention interpretation in Europe.

2.1. Convention Interpretation and the School Context

[22] Emma Kaufman. 'The New Legal Liberalism'. 86 The University of Chicago Law Review 187 (2019), 207.
[23] *Ibid.*, at 207.
[24] My gratitude to a member of the Judicial Studies institute in Brno for suggesting this way of organizing the article's arguments.

While the ECtHR has stated that prisoners do not shed their Convention rights at the prison gate,[25] it has never made a similar statement regarding the school, as the US Supreme Court famously did in *Tinker*.[26] This is perhaps not surprising as the text of the Convention's Additional Protocol 1 Article 2 (P1-2), unlike the US constitution, directly mentions education. Yet, the ECtHR in its jurisprudence involving schools has repeatedly emphasized the importance of the school context in shaping the way that it interprets at least eight different Convention rights. Consider a few illustrative cases in Strasbourg's schools jurisprudence.

In 1976, in *Kjeldsen, Busk Madsen, and Pedersen v. Denmark*, 3 sets of Christian parents objected to Danish legislation making sex education classes compulsory in Danish schools in light of, amongst other things, a worrying rise in unwanted pregnancies. Finding no violation of the Convention, the Court emphasized that "the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner" and is forbidden from pursuing "an aim of indoctrination."[27] Most significantly, the Court linked P1-2 with Article 9, reasoning that the second sentence of P1-2 was essential for the preservation of democratic society in the Convention, which states achieve above all through *teaching*.[28] In light of this reasoning, the Court found that the Danish legislation mandating compulsory sex education, while of a moral order, did not overstep the bounds of what a democratic State might regard as in the public interest, particularly where "public authorities wish to enable pupils to take care of themselves and show considerations for others in that respect."[29] The fact that "the setting and planning of the curriculum fall in principle within the competence of the Contracting States"[30] and that the Danish legislation intended to prepare and protect pupils rather than indoctrinate pushed the Court towards finding no violation of the Convention. Thus, one of the earliest of Strasbourg's school cases evinces the tension between the Court's understanding of the school as an institution with specific societal functions—e.g. preserving democracy and empowering young people to be safe and autonomous in their sexual lives[31]—and how such functions ought to interact with the Court's interpretation of specific Convention rights.

Six years later, in *Campbell and Cosans v. UK*, dealing with corporal punishment in Scottish schools, the Court pointed out that:

> The use of corporal punishment may, in a sense, be said to belong to the internal administration of a school, but at the same time it is, when used, an integral part of the process whereby a school seeks to achieve the object for which it was established, including the development and moulding of the character and mental powers of its pupils.[32]

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[25] *Khodorkovskiy and Lebedev v. Russia*, App. Nos. 11082/06 and 13772/05, 25 July 2013, at Para. 836.
[26] *Tinker v. Des Moines Independent Community School District* 393 U.S. 503 (1969).
[27] Kjeldsen, *supra* n. 6, Para. 53.
[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*
[31] For an argument that "the schoolhouse is a site — perhaps the preeminent site — for the inculcation of values of sexual citizenship" see, Melissa Murray. 'Sex and the Schoolhouse'. 132 HARVARD LAW REVIEW 1445 (2019), at 1484.
[32] *Campbell and Cosans*, *supra* n. 19, at Para. 33.

Because of the understanding that "discipline is an integral, even indispensable, part of any education system," the Court found that the Campbell's and Cosans' claim fell squarely under P1-2's protection of respect for parents' philosophical convictions in the education of their children. 26 years later, in *Dogru v. France*, dealing solely with the Article 9 freedom of religion right of an eleven-year-old student who was expelled for not removing her veil on multiple occasions during PE class, the Court borrowed from the *Campbell and Cosans* case. The judgement stated that:

> The imposition of disciplinary penalties is an integral part of the process whereby a school seeks to achieve the object for which it was established, including the development and moulding of the character and mental powers of its pupils.[33]

As a result, the Court was able to sidestep some of the thornier interests of the child in relation to the minority religions question and find no Article 9 violation, in part because schools must enforce their own rules with disciplinary measures particularly when a pupil's objections to the terms of participation in certain school classes "had led to a general atmosphere of tension within the school."[34]

Similarly, in *Osmanoğlu and Kocabaş v. Switzerland*, concerning the ability of Muslim parents to obtain an exemption from mandatory mixed swimming classes for their daughters, the school played two key roles in how the ECtHR interpreted the Convention. First, the Court reiterated that "States enjoy a considerable margin of appreciation concerning matters relating to the relationship between the State and religions…*particularly where these matters arise in the sphere of teaching and State education*."[35] Secondly, the third section stated that "school plays a special role in the process of social integration, one that is all the more decisive where children of foreign origin are concerned."[36] The Court's statement speaks to its view of the school's role in preserving integration, which outweighed the parents' right to respect for their religious views in the education of their children in the case.

The Court similarly found the school context key to its interpretation of the Convention in *Ponomaryovi v. Bulgaria.* That case concerned the right of two Khazaki-born, Russian pupils legally living in Bulgaria with their mother, who had married a Bulgarian national, not to be subject to discriminatory fee payments to attend secondary school. Citing to *Leyla Sahin*, a case regarding wearing a veil in a Turkish medical school, the *Ponomaryovi* Court pointed out that "[i]n a democratic society, the right to education ... is indispensable to the furtherance of human rights."[37] Then, in the most important passage of the judgement, the Court stated that "the State's margin of appreciation in [the educational] domain increases with the level of education, in inverse proportion to the importance of that education for those concerned and for society at large."[38] Thus, the Court privileges primary schooling as deserving of the most restrictive margin of appreciation, in part because it "provides basic literacy and numeracy –

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[33] *Dogru*, *supra* n. 19, at Para. 83.
[34] *Ibid.*, at Para. 74.
[35] *Osmanoğlu*, *supra* n. 19 (emphasis added), at Para. 95.
[36] *Ibid.,* at Para. 96.
[37] *Ponomaryovi*, *supra* n. 19, at Para. 55.
[38] *Ibid.,* at Para. 56.

as well as integration into and first experiences of society – and is compulsory in most countries."[39] Likewise, secondary education, at issue in the case, "plays an ever-increasing role in successful personal development and in the social and professional integration of the individuals concerned."[40] Therefore, the school context was key to the Court's understanding of the Convention's level of protection for Article 14 taken together with P1-2. Finding in favor of the applicants, the school context played an influential role in the Court's interpretation of the scope of the Convention's protection.

The school has also played a significant role in the Court's understanding of the scope of protection offered in Article's two, three and eight of the Convention. Let us consider each in turn.

In a debated passage in *Kayak v. Turkey*, a case concerning the right to life of a 15-year-old who was stabbed by an 18-year-old pupil just outside of an Istanbul schoolhouse, the Strasbourg Court held that "the mission entrusted to the educational institution…implies the primordial duty to ensure the safety of the pupils in order protect them against all forms of violence of which they could be victims during the time when they are placed under its supervision."[41] Moreover, in *Ilbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, the ECtHR unanimously found a violation of the right to life when a seven-year-old student—who had not enrolled in the paid school bussing service—froze to death while attempting to walk the 4km home from school after school closed early due to an unexpected snowstorm. In delineating the scope of Article 2 positive obligations, the Court stated "that the State's duty to safeguard the right to life is also applicable to school authorities, who carry an obligation to protect the health and well-being of pupils, in particular young children who are especially vulnerable and are under the exclusive control of the authorities."[42] The school context thus played a key role for in defining the State's positive obligations under Article 2 ECHR's protection of the right to life.

Similarly, in *O'keeffe v. Ireland*, a case concerning Ireland's liability for not having set up an effective system of reporting and mechanism of detection of sexual abuse in primary schools, the Court stated regarding the nature of the rights protected in Article 3 ECHR's right not to be subjected to inhumane and degrading treatment:

> the primary-education context of the present case defines to a large extent the nature and importance of this obligation. The Court's case-law makes it clear that the positive obligation of protection assumes particular importance in the context of the provision of an important public service such as primary education, school authorities being obliged to protect the health and well-being of pupils and, in particular, of young children who are especially vulnerable and are under the exclusive control of those authorities[43]

[39] *Ibid.*
[40] *Ibid.*
[41] *Kayak*, *supra* n. 19, at Para. 59.
[42] *Kemaloğlu, supra* n. 19, at Para. 35.
[43] *O'keeffe*, *supra* n. 19, at Para. 145.

The school thus played a key role in the Grand Chamber of the Strasbourg Court's understanding of the scope of and obligations incumbent on the State regarding the right not to be subject to inhuman or degrading treatment or punishment.

In the recent case of *F.O. v. Croatia*, mentioned above, the Court expanded its jurisprudence under Article 8's right to privacy with respect to school safety. In that case, invoking teachers' duty of care and the dignity of students, the Court stated, "as a teacher, he should have been aware that any form of violence, including verbal abuse, towards students, however mild, is not acceptable in an educational setting and that he was required to interact with students with due respect for their dignity and moral integrity."[44] Thus, under this precedent, Europe's teachers may have responsibilities with respect to Article 8 ECHR regarding the language they use in interactions with their students.

Consider a case involving discrimination in school as well. In *G.L. v. Italy* the Court found a unanimous violation of Article 14 in conjunction with P1-2 where a 13-year-old girl with nonverbal autism, during her first two years of primary school, was not provided with specialized learning support, even though such support was provided for by law. Specifically rejecting the government's claim of a lack of financial resources, the case also relied on the educational context and cited to many of its prior decisions in this sphere. In a telling part of the judgement, the Court reflected that "the discrimination suffered by the applicant is all the more serious in that it took place within the framework of primary education, which provides the basis for education and social integration and the first experiences of living together – and which is mandatory in most countries."[45]

A final example, of many, of the school shaping the Court's interpretation of the Convention dealt with freedom of expression under Article 10 of the Convention. In *Vejdeland v. Sweden*, four Swedish nationals were convicted under the Swedish penal code for "agitation against a national or ethnic group" for having distributed homophobic pamphlets in approximately 100 lockers of students in an upper-secondary school. With a nod to the reasoning in the Swedish Supreme Court's decision to uphold the criminal conviction, the Court emphasized that "the distribution of the leaflets took place at a school which none of the applicants attended and to which they did not have free access" and that, citing to *Handeyside*,[46] "the leaflets were left in the lockers of young people who were at an impressionable and sensitive age and who had no possibility to decline to accept them."[47] Moreover, the concurring opinion of Judge Boštjan M. Zupančič would have placed the primary reasoning of the case on this fact because, "high-school grounds may not be seen primarily as the setting for a captive audience … yet they are definitely a protected setting where only those authorised to distribute any kind of information may do so."[48] In this context, Judge Zupančič cited to one of the key judgements in the US Supreme Court's schools jurisprudence, *Bethel School District v. Fraser*. In that case, the US Supreme Court upheld a school's suspension of star-student Mathew Fraser for a lewd speech at a school assembly in which he claimed his free speech rights allowed him to advocate for the election of his "firm" friend for student president at a school assembly. The

[44] *F.O.*, *supra* n. 19, at Para. 87.
[45] *G.L.*, *supra* n. 19.
[46] *Handyside v. United Kingdon* App. No. 5493/72, 7 December 1976.
[47] *Vejdeland*, *supra* n. 19, at Para. 56.
[48] *Ibid.*, Concurring Opinion of Judge Zupančič, at Para. 9.

key part of that ruling for Judge Zupančič was the US Supreme Court's finding that "the undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behaviour."[49]

What is clear from this brief discussion of select passages from Strasbourg's schools jurisprudence is that the school context often plays an important role in shaping the Strasbourg Court's understanding of the scope of protection offered by various Convention rights. A wholistic reading of Strasbourg's schools jurisprudence confirms what the smattering of case law explored above illustrates: in the vast majority of Strasbourg's schooling cases, the specific school context affects how the Strasbourg Court interprets the Convention; frequently in decisive ways.[50]

2.2. Judicial and Academic Contestation in Strasbourg's Schooling Cases

Disagreement over the proper interpretation of the ECHR in many of Strasbourg's schooling cases further supports the claim that the school has been a key site of Convention conflict before the ECtHR. There are several metrics by which one might measure the contested nature of these judgements, both within the walls of ECtHR and outside the building by the Marne-Rhine Canal. First consider judicial contestation in Strasbourg's school cases.

Dissenting opinions in many of the schooling judgements illustrate profound disagreement with the outcome in the case. Most ominously, dissents have labelled majority opinions in Strasbourg's schooling cases as "Kafkaesque,"[51] bordering "on the absurd,"[52] "like a Formula One car, hurtling at high speed into the new and difficult terrain of education,"[53] and "not necessarily advanc[ing] human rights protection."[54] Even where judges agree with the overall outcome in the case, some concurring opinions disagree profoundly with the majority's characterization of the ECHR's scope of protection in schools. Judge Tulkens stated in no uncertain terms that the level of protection mandated by the majority in the school setting in *Kayak v. Turkey* was "excessive, dangerous and contrary to our case law."[55] And in *Lautsi*, Judge Bonello's concurrence struck out at the dissent and the unanimous Chamber judgement by implying that they were suffering from "historical alzheimers."[56] Finally, in the recent *Perovy* judgement, the four-judge majority took the highly unusual move of issuing a joint concurring opinion specifically to respond to the three judges in dissent.[57] The majority's concurrence concluded that the dispute "could have been better solved by a constructive talk

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[49] *Bethel School District v. Fraser* 478 U.S. 675 (1986).
[50] For a more thorough discussion of the specific characteristics of the school environment that judges consider (including age, compulsory attendance, testing requirements, educational function, social design, rules-based and orderly, heightened safety considerations, multiple constituencies, etc.) and how this affects outcomes in schooling cases, see Patrick Leisure. 'The European Court of Human Rights' Schools Jurisprudence', unpublished manuscript.
[51] *O'keeffe*, *supra* n. 19, Partly Dissenting Opinion of Judges Zupančić, Gyulumyan, Kalaydjieva, De Gaetano and Wojtyczek, at Para. 9.
[52] *D.H. II*, *supra* n. 19, Dissenting Opinion of Judge Zupančič.
[53] *Ibid.*, Dissenting Opinion of Judge Borrego Borrego, at Para. 2.
[54] *F.O.*, *supra* n. 19, Dissenting Opinion of Judges Wojtyczek and Paczolay, at Para. 4.
[55] *Kayak*, *supra* n. 19, Concurring Opinion of Judge Tulkens, at Para. 3.
[56] *Lautsi II*, *supra* n. 19, Concurring Opinion of Judge Bonello, at Para. 1.
[57] *Perovy*, *supra* n. 19, Concurring Opinion of Judges Lemmens, Dedov, Schembri Orland and Guerra Martins.

between the parents and the school, rather than through bitter lawsuits brought before the domestic courts and the Strasbourg Court."[58] In short, Strasbourg's judges at times profoundly disagree on the outcome and reasoning in schooling cases.

Taking a global view, of the 43 novel judgements[59] issued by Strasbourg involving schools, less than half were unanimous judgements,[60] and two of those unanimous judgements were later overturned by the Grand Chamber.[61] A few of these unanimous judgements also came with important concurring opinions, such as in *Vejdeland v. Sweden*[62]*, G.L. v. Italy*, [63] and *Kurt v. Austria*.[64] Finally, of the 45 total judgements, six cases were split judgements, where one single judge made the difference in the case's outcome.

Consider in this regard, *Perovy v. Russia*. In a split four-to-three decision, the judges disagreed decisively on the precise role of the school environment in the interpretation of the scope of Convention rights. In that case, the seven-year-old son of a priest of the Church of the Community of Christ sat at his desk on his first day of school while the dad of one of his new classmates, a priest of the Russian Orthodox Church, performed the rite of blessing the classroom. Dressed in a cassock and priestly robes, this consisted of lighting incense and candles, distributing small paper icons to the children, singing prayers in Church Slavonic, sprinkling the classroom with holy water, certain students making the sign of the cross in line with the Russian Orthodox tradition, and then inviting the children to kiss a crucifix.

The dissent of Judges Keller, Serghides and Poláčková would have found a violation of the right to freedom from religion in conjunction with P1-2 in the case for four reasons, intimately connected with the school environment. First, the child was only 7-years-old at the time, and thus easily influenced and unable to "dissociate the school authorities from the rite."[65] Second, it was his first day of regular schooling—"a milestone in one's life"—and the ceremony consisted of active observance and interactions, like passing out icons meant to be taken home, that argued in favor of the event's more lasting impact on the applicant.[66] Third, the dissent—citing to the U.S. Supreme Court's *Lee v. Weisman* decision[67]—did not think that "mere presence" espoused by the majority accurately characterized the fact that attendance "signified more than respect *in a school context*."[68] Rather, "given *the particular school context* in which the facts took place," the majority's analysis should have taken account of the above

[58] *Ibid.,* at Para. 3.

[59] Two sets of cases in the corpus of judgements I call Strasbourg's school's jurisprudence were released on the same day, decided by the same judges, and containing the same reasoning. Those cases are, *Valsamis*, *supra* n. 19 and *Efsratiou*, *supra* n. 19; and *Dogru*, *supra* n. 19 and *Kervanci*, *supra* n. 19.

[60] For definition of unanimous, see Cass R. Sunstein. 'Unanimity and Disagreement on the Supreme Court'. 100 CORNELL LAW REVIEW 769 (2015), at 774 ("This definition includes decisions that contain concurrences in the judgment, which are not unanimous in the strictest sense.")

[61] *Lautsi*, *supra* n. 19; *Oršuš*, *supra* n. 19.

[62] *Vejdeland*, *supra* n. 19 (in that case were 3 separate concurring opinions by 5 judges).

[63] *G.L.*, *supra* n. 19.

[64] *Kurt I*, *supra* n. 19.

[65] *Perovy*, *supra* n. 19, Dissenting Opinion of Judges Keller, Serghides and Poláčková, at Para. 16 (emphasis added).

[66] *Ibid.,* (emphasis added).

[67] 505 U.S. 577 (1992).

[68] *Perovy*, *supra* n. 19, at Para. 20, Dissenting Opinion of Judges Keller, Serghides and Poláčková (emphasis added).

factors and the fact that students are in a "hierarchical relationship with the school authorities and their teachers "making them more likely to be influenced by witnessing a religious ceremony."[69] Finally, the Court pointed to the compulsory nature of schooling and the school environment in recognizing that the young boy "had virtually no possibility of escaping the religious act."[70] Thus, for the dissenting judges in *Perovy v. Russia*, the school was the crucial element that changed how they interpreted the Convention's articles to apply in the case.

Consider in more depth Judge Tulkens' concurrence in *Kayak v. Turkey*, in which she questioned what sort of educational model the majority's opinion encourages. The majority's emphasis on surveillance over the entry and exits to schools made Judge Tulkens wonder if the judgement encourages the "carcelization" of schools. She queries in her opinion, "do we really want to make schools and boarding schools into securitized zones with police patrols around them…?"[71] Citing to *Mastromatteo v. Italy*,[72] Judge Tulkens' model of education would rest neither on fear nor suspicion of students, but rather on engaging adolescents' sense of responsibility.

Similarly, dissenting Judges Sajó and Raimondi underscored the fact that the actual stabbing took place 150 meters from the garden of the school, and thus did not take place on school premises, nor did it involve a "cause-and-effect relationship with a structural defect in the educational system."[73] Finally, the case, involving a 15-year-old and nearly 18-year-old, did not involve typically "vulnerable children" that may be involved in other schooling cases. Thus, the concurring and dissenting judges took a different stance on how aspects of the school environment affected their view of the case, and what model of education the majority's opinion espoused.

Remaining in the school safety realm, the dissenting judges in *O'keeffe* also disagreed with placing such an exacting standard on countries with respect to pupil safety in school at the relevant time. The partly dissenting opinion of Judges Zupančić, Gyulumyan, Kalaydjieva, De Gaetano and Wojtyczek states that "the majority judgment imposes a positive obligation of constant and retrospective vigilance with regard to assumed inherent risks arising out of unpredictable human conduct 'in an educational context', which in our view amounts to imposing …an impossible and disproportionate burden."[74] Thus, rather than following the minimum severity test which the Court in *Costello-Roberts* rightfully clarified includes the *context* of the alleged degrading treatment, the dissent would have applied the reasoning in *Osman v. the United Kingdom*,[75] and found that States' positive obligations to protect individuals does not extend to unpredictable human behavior, even with respect to sexual abuse by a lay teacher in a primary school.

In the discrimination realm, we also see judges disagreeing according to their educational predilections. In *D.H. v. the Czech Republic*, dissenting Judge Jungwiert pointed out two

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[69] *Ibid.,* at Para. 21.
[70] *Ibid.,* at Para. 23.
[71] *Kayak v. Turkey*, *supra* n. 6 (author's own translation, the judgement only exists in French).
[72] *Mastromatteo v. Italy* (GC), App. No. 37703/97, 24 October 2002.
[73] *Ibid.*
[74] *Ibid.*
[75] *Osman v. the United Kingdom*, 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII.

aspects of education systems that in his view changed the outcome of the case. First, that schools must draw a distinction "between what is desirable and what one might term realistic, possible or simply feasible."[76] And second that "every school system entails not only education but also a process of assessment, differentiation, competition and selection."[77] In his view, the ECtHR cannot substitute desirability for feasibility, and an inherent part of schooling is tests, selection, and differentiation, making the Czech practice of placing Roma students in special schools in Ostrava simply a necessary evil inherent in all education systems, not a violation of the ECHR.

Moreover, in some judges' views, pedagogical reasons justify some level of segregation in schooling matters. In *Oršuš v. Croatia*, the dissent emphasized that separation in the "common school" may not always be harmful, reasoning that important pedagogical goals like language acquisition may actually be served by such a practice. Moreover, in *G.L. v. Italy*, not all the judges shared the majority's view of schools as places always requiring social integration of handicapped individuals. In his concurring opinion, Judge Wojtyczek pointed out that for certain children, notably some autistic children, scientific studies demonstrate that mainstream education can cause suffering and actually harm their development, whereas specialized (and separate) schools can provide a better environment for their specific educational and social needs.[78]

In addition to disagreement between judges on the same bench, judicial contest about the Convention's application in school cases is further evidenced by disagreement between judges on different benches. Of the nine Grand Chamber judgements in Strasbourg's schools cases, four included both section judgements and Grand Chamber judgements.[79] In three out of four of those cases, the Grand Chamber came to a dissimilar conclusion to that of the chamber. Moreover, in several school cases before the Strasbourg Court, the Court has diverged from the ruling of the constitutional court of the state in question. This was the case, for example, in *D.H. v. Czech Republic*,[80] *O'keeffe v. Ireland*,[81] *Oršuš v. Croatia*,[82] *Grzelak v. Poland*,[83] and *Folgerø v. Norway*.[84] Finally, the United Nations Human Rights Committee has come to the opposite conclusion to the ECtHR regarding the wearing of religious garments in French schools.[85]

Consider in this regard the different reasoning between the section and Grand Chamber judgements in the *Lautsi* case. One element of the *Lautsi* saga that has not—to this author's knowledge—been discussed in the vast literature on that case is that the difference in opinion

[76] *D.H. II*, *supra* n. 19.
[77] *Ibid.*
[78] *G.L.*, *supra* n. 6.
[79] *D.H. II*, *supra* n. 19, *Lautsi II*, *supra* n. 19, *Oršuš II*, *supra* n. 19, and *Kurt II*, *supra* n. 19.
[80] Decision of the Czech Constitutional Court No. I ÚS 279/99 (20 October 1999).
[81] O'Keeffe v. Hickey [2009] 2 IR 30.
[82] Decision no. U-III-3138/2002 of Croatian Constitutional Court, published in Official Gazette no. 22 (26 February 2007).
[83] Judgment of the Polish Constitutional Court of 20 April 1993 (case no. U 12/92); Judgment of the Constitutional Court of 2 December 2009 (case no. U 10/07).
[84] Supreme Court of Norway, Judgement of 22 August 2001.
[85] See, 'Freedom of Religion In Public Schools: Strasbourg Court v. UN Human Rights Committee'. STRASBOURG OBSERVERS (Feb. 13, 2014), https://strasbourgobservers.com/2013/02/14/freedom-of-religion-in-public-schools-strasbourg-court-v-un-human-rights-committee/.

between the unanimous second section and the 15-2 judgement of the Grand Chamber coming to the opposite conclusion was in large part due to the judges' different emphasis on the school context in interpreting the scope of protection afforded by the Convention in religious freedom matters. According to the second section, key to the analysis of the ECHR's negative protection of religious freedom was three characteristics of the school environment: the age of students,[86] the compulsory nature of school attendance,[87] and, with reference to *Dahlab v. Switzerland*, the classroom environment.[88] In contrast, the Grand Chamber utilized the school context for the opposite purpose. Finding that Italian authorities had acted within the limits of the margin of appreciation granted to States within the Convention system in the sphere of education and teaching, the Court rejected each of the second chamber's findings with respect to why the school environment mandated closer supervision by the Strasbourg Court, emphasizing rather the fact that, in general, "Italy opens up the school environment in parallel to other religions."[89] Whatever one thinks of the merits of the Second Section or the Grand Chamber's invocation of the school in interpreting the scope of protection afforded by the Convention, the school context did play a significant dividing role in how the Section judges and the Grand Chamber judges understood the Convention to apply in the case.

In addition to strong words on the bench, at least one judge has also taken to extrajudicial speech regarding a school case to signify their displeasure with the approach taken by the Court. Former ECtHR and Spanish Supreme Court Judge Borrego Borrego (who was not at the ECtHR during the Lautsi saga) called the *Lautsi* chamber judgement a "stilted decision that has much to do with pre-established opinions (not to speak of ideology) and very little with a judgment adopted by judges applying the Convention and its Protocols to a concrete case."[90] Thus, in Strasbourg's school cases, on the same judicial bench, between different benches, and sometimes even from off the bench, judges often disagree over the outcome and proper reasoning of Strasbourg's school cases.

Academic commentary on the outcome and judicial reasoning used in some of Strasbourg's schools cases has been intense and often divided. In his high profile academic exchange about *Lautsi v. Italy* with Professors Zucca,[91] Kyritsis and Tsakyrakis,[92] Professor Weiler summed up his critique of their position by querying "why all the rage" when "[t]he European Court of Human Rights is not a constitutional court—neither of Italy nor of Europe; and the European

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[86] *Lautsi I*, *supra* n. 19 (noting "the Court will take into account in particular the nature of the religious symbol and its impact on young pupils")

[87] *Ibid.,* (noting "[t]hat negative right deserves special protection if it is the State which expresses a belief and dissenters are placed in a situation from which they cannot extract themselves if not by making disproportionate efforts and acts of sacrifice…The State has a duty to uphold confessional neutrality in public education, where school attendance is compulsory regardless of religion, and which must seek to inculcate in pupils the habit of critical thought.)

[88] *Ibid.,* (stating "[i]t is impossible not to notice crucifixes in the classroom. In the context of public education they are necessarily perceived as an integral part of the school environment and may therefore be considered "powerful external symbols")

[89] *Lautsi II*, *supra* n. 53.

[90] J.C. Von Krempach. 'Does the European Court on Human Rights still have the confidence of the public? A former judge expresses his doubt'. TURTLE BAY AND BEYOND (Dec. 22, 2009), https://c-fam.org/turtle_bay/does-the-european-court-on-human-rights-still-have-the-confidence-of-the-public-a-former-judge-expresses-his-doubt/.

[91] Zucca, *supra* n. 14.

[92] Dimitrios Kyritsis and Stavros Tsakyrakis. 'Neutrality in the classroom'. 11 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 200 (2013).

Convention is not a constitution."[93] The volume of academic writing on, and critique of various aspects of the *Lautsi* case is in fact as immense as it is varied.[94]

Writing about the chamber judgement released in 2006 in *D.H. v. Czech Republic*, Morag Goodwin expressed severe critique of the 7-judge chamber judgement, stating:

> the Court has chosen to leave exposed the most vulnerable victims of a particularly vicious form of racial discrimination, and one that will have lasting effects for a generation. It is a hugely disappointing and flawed decision that is almost certain to be appealed to the Grand Chamber. In refusing to see the evil before it, the Court has not avoided doing evil itself.[95]

Yet, one year later, the Grand Chamber's judgement in *D.H. v. Czech Republic* also led to mixed reactions among the legal public. For example, while some American and European lawyers in the aftermath of the case positively likened the case to Europe's *Brown v. Board of Education*,[96] in the Czech legal blog forum Jiné Pravo, "opinions were both positive and negative towards the judgment, with a slight prevalence of critical views."[97] Meanwhile, other academics have critiqued not the reasoning or outcome in the case, but the length of time between when the Roma applicants lodged their complaint in *D.H.* in 2000 and when the Chamber and Grand Chamber judgements were released in 2006 and 2007 respectively.[98] In another Roma rights schooling case, Moria Paz critiqued the *Oršuš* judgement for taking "a narrowly utilitarian approach to the Romani language, forcing Croatia to accept the use of the minority language only in the process of its elimination."[99] As a result, "Romani is treated as an obstacle that Roma pupils must overcome in order to participate in the school environment, rather than as a valuable cultural possession worthy of legal protection" in and

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[93] Joseph Weiler. 'Lautsi: A reply'. 11 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 230 (2013), at 232

[94] See, e.g., Jeroen Temperman. THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM (2012); Susana Mancini. 'The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty'. 6 EUROPEAN CONSTITUTIONAL LAW REVIEW 6 (2010); Andrea Pin. 'Public Schools, the Italian Crucifix, and the European Court of Human Rights: The Italian Separation of Church and State'. 25 EMORY INTERNATIONAL LAW REVIEW 95 (2011); Carla Zoethnout. 'Religious Symbols in the Public School Classroom: A New Way to Tackle a Knotty Problem'. 6 RELIGION & HUMAN RIGHTS 285 (2011).

[95] Morag Goodwin. 'D.H. and Others v. Czech Republic: a major set-back for the development of non-discrimination norms in Europe'. 7 GERMAN LAW JOURNAL 421 (2006), at 432.

[96] Michael Goldhaber. A PEOPLE'S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS 159 (2008) (noting that the "case languished for so many years that it aroused suspicions…that it would be remembered as the *Brown v. Board of Education* that wasn't. But in November 2007 the Strasbourg tribunal found its voice, and showed itself to be the true successor of America's Warren Court."); see also, Jack Greenberg. 'Report on Roma Education Today: From Slavery to Segregation and Beyond'. 110 COLUMBIA LAW REVIEW 919 (2010), at 940 (noting that "After *D.H.* was decided, many European lawyers and Roma rights advocates referred immediately and primarily to *Brown v. Board of Education*.") (citations omitted).

[97] Hubert Smekal and Katarina Šipulová. 'DH v. Czech Republic Six Years Later: On The Power Of An International Human Rights Court To Push Through Systemic Change'. 32 NETHERLANDS QUARTERLY OF HUMAN RIGHTS 288 (2014), at 300.

[98] Rory O'Connell. 'Substantive Equality in the European Court of Human Rights? 107 MICHIGAN LAW REVIEW FIRST IMPRESSIONS 129 (2009), at 132 ("The children in DH were in special schools from 1996–1999, and they lodged a complaint in the ECtHR in 2000. The Chamber decision came down in 2006 and the Grand Chamber decision a year later. By the time the Chamber decided the case, the Czech Republic had already introduced legislation abolishing the special schools…").

[99] Moria Paz. 'The Failed Promise of Language Rights: A Critique of the International Language Rights Regime'. 54 HARVARD INTERNATIONAL LAW REVIEW 157 (2013), at 164.

of itself.[100] Moreover, in a general remark, Ian Leigh stated of the *Folgerø v. Norway* case, "the judgement of the Grand Chamber of the European Court of Human Rights is noteworthy for the serious division that it produced over fundamental questions."[101]

Division over and critique of the Court's schools jurisprudence is not limited to Grand Chamber decisions with divided benches. Consider just a few of many possible examples in the literature. Professor Milios has critiqued *Papageorgiou v. Greece* because of "the ECtHR dealt with the case merely from the exemption procedure perspective, avoiding more complex and controversial issues such as the mandatory nature of the religious courses or their actual content."[102] Similarly, Professor Orgad has critiqued *Osmanoglu v. Switzerland* as part of a number of court judgements in Europe that orient the principle of freedom "toward the majority's understanding of it" while often giving "little tolerance…in Europe toward the minority's perception of being free."[103] Critiquing the proportionality analysis in the same case, Fiona de Londras and Konstantsin Dzehtsiarou state of the Court's prioritization of integration over belief in school:

> One can imagine, however, the Court coming to precisely the other conclusion…Either outcome is possible, and the inability to predict which will be arrived at in a particular case makes the outcome of a complaint difficult to foresee, and thus calls into question the effectiveness of the Convention in ensuring practical protection of rights, including at the stage of making the kinds of policy that mandate mixed-sex swimming lessons regardless of the likely objection of people who follow a more conservative approach to religious beliefs and for whom this would likely cause real difficulties, such as Orthodox Jews or devout Muslims.[104]

Not an exhaustive survey of the academic commentary on specific Strasbourg schooling cases, it nonetheless illustrates that academic commentators, for a variety of reasons, have expressed critical assessments of how Strasbourg's judges have interpreted the Convention to apply in specific schooling cases.

Commentators have also criticized not only the outcomes and reasoning in certain specific Strasbourg schooling cases, but also the reasoning used in certain types of school cases more generally. Noam Peleg has argued that in cases involving discrimination against Roma children in schools "the Court consistently fails to treat children as agents in their own right" and that Roma children "are further discriminated against by the Court because of the overriding focus

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[100] *Ibid.*, at 187.

[101] Ian Leigh. 'New Trends in Religious Liberty and the European Court of Human Rights'. 12 ECCLESIASTICAL LAW JOURNAL 266 (2010), at 275.

[102] Georgios Milios. 'Schoolchildren's Right to Education and Freedom of Religion in the Case Law of the ECtHR: Comments on Papageorgiou v. Greece'. 16 VIENNA JOURNAL OF INTERNATIONAL CONSTITUTIONAL LAW 135 (2022), at 149 ("the ECtHR only considered the exemption procedure from the courses offered, and made no reference to, or examination of, the courses themselves. In addition, the perspective related to the right to private life is also missing. . . the judgment can mainly be criticized for not dealing with all case facts and human rights issues related to them").

[103] Liav Orgad. 'Forced to be Free: The Limits of European Tolerance'. 34 HARVARD HUMAN RIGHTS JOURNAL 1 (2021), at 35.

[104] Fiona de Londras and Kanstantsin Dzehtsiarou. GREAT DEBATES ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2018), at 100.

on their parents."[105] Regarding the cases of *G.L. v. Italy* and *Stoian v. Romania*, involving disability rights in schools, Marie Spinoy and Kurt Willems claim that the ECtHR conflates reasonable accommodation with inclusive education thus creating negative incentives for states more generally.[106] Moria Paz has also critiqued the ECtHR's four cases involving language rights, all from Strasbourg's schools jurisprudence. Paz describes "[t]he model of linguistic accommodation developed by the ECtHR" as "minimal and transitional," and one in which "[m]inority speakers are accommodated in the public school system, but only to promote their assimilation into the state and the market."[107] And Ioanna Tourkochoriti, discussing among other cases *Dogru v. France*,[108] *Kervanci v. France*,[109] and *Dahlab v. Switzerland*,[110] has argued that:

> The case law of the European Court of Human Rights (ECHR) regarding headscarf prohibitions reflects an understanding of the role of the state that legitimizes it in limiting freedom of religion rights for teachers and students. By deferring to the judgment of the member states of the European Convention of Human Rights as to the proper way of implementing secularism, the ECHR created a situation which allows the state to dictate the proper content of religious liberty, even in cases where no harm to others exists.[111]

Even some education scholars have entered the debate regarding Strasbourg's schooling cases. Nigel Fancourt of Oxford has stated regarding the educational competence of ECtHR judges:

> 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.[112]

Finally, even where academic commentators agree with a line of reasoning introduced in school cases of the ECtHR, commentators sometimes discuss the risks involved in the Court's approach.[113] As this brief literature overview indicates, academic commentary on Strasbourg's

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[105] Peleg, *supra* n. 17, at 111.

[106] Marie Spinoy and Kurt Willems. 'G.L. v. Italy: The ambiguous role of article 14 European court of human rights in inclusive education cases'. 22 INTERNATIONAL JOURNAL OF DISCRIMINATION AND THE LAW 192 (2022); for critique of the Stoian case, see also, Constantin Cojocariu. 'Stoian v. Romania: the court's drift on disability rights intensifies'. STRASBOURG OBSERVERS (Sep. 5, 2019), https://strasbourgobservers.com/2019/09/05/stoian-v-romania-the-courts-drift-on-disability-rights-intensifies/.

[107] Moria Paz. 'The Tower of Babel: Human Rights and the Paradox of Language'. 25 EUROPEAN JOURNAL OF INTERNATIONAL LAW 473 (2014), at 487.

[108] *Dogru v. France*, *supra* n. 19.

[109] *Kervanci v. France*, *supra* n. 19.

[110] *Dahlab v. Switzerland*, App. No. 42393/98, 15 February 2001 (declaring the application inadmissible).

[111] Ioanna Tourkochoriti. 'The Burka Ban: Divergent Approaches to Freedom of Religion in France and in the U.S.A.'. 20 WILLIAM & MARY BILL OF RIGHTS JOURNAL 799 (2012), at 804.

[112] Nigel Fancourt. 'The educational competence of the European Court of Human Rights: judicial pedagogies of religious symbols in classrooms'. 48 OXFORD REVIEW OF EDUCATION 131 (2022), at 142.

[113] See, e.g., Lourdes Peroni and Alexandra Timmer. 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law'. 11 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 1056 (2013), at 1057

schooling cases is, in short, sometimes harsh and at times deeply divided, signaling that the school context provides a key forum of discussion and debate over the proper interpretation of the ECHR, but one that is not always agreed upon.

2.3. Strasbourg's Role in Diverse Schooling Matters across the Council of Europe

The jurisprudential sketch above illustrates that the school context plays an important, if debated, role in how the ECtHR interprets the Convention. Yet, it also shows that Strasbourg plays an important role in schooling matters across the Council of Europe. The Strasbourg Court's role in schooling issues is neither limited to cases coming from only one state or region of the Council of Europe nor to cases concerning only one or even a few Convention rights. The geographical dispersion of Strasbourg's schools jurisprudence is reasonably uniform across many Council of Europe countries. The judgements comprising Strasbourg's schools jurisprudence come from 23 different countries,[114] spanning Western Europe, Northern Europe, Southern Europe, Central Europe, Eastern Europe, and the edges of the Asian continent. It is not true that Strasbourg's schools jurisprudence is dominated by one or even a few countries' education systems in the Council of Europe. Further, it is also not true that Strasbourg's schooling cases only concern one type of human rights conflict. Rather, these cases have involved issues concerning fundamentally important issues in European societies such as sex, race, crime, safety, terrorism, equality, religion, free speech, and language rights—spanning at least eight different Convention rights. In sum, the geographical distribution of Strasbourg's schools jurisprudence and the diversity of Convention rights involved in schooling cases suggests that the Court has a role to play at the intersection of various human rights and diverse schooling matters across *all* of the Council of Europe.

This broad view of Strasbourg's school cases illustrates that although Strasbourg has a key role to play in educational matters through its role as ultimate interpreter of Convention rights, the precise scope of Strasbourg's role in schooling matters remains debated. More specifically, there is an inherent tension in many of Strasbourg's schools cases between the margin of appreciation due member states in the education realm and effective protection of human rights, sometimes leading to unpredictability and inconsistency in judicial reasoning in schooling cases. The Strasbourg Court has set a strong role in combatting discrimination in schools and in upholding safety in schools, but the Court is not always consistent in its reasoning as to why. Moreover, the freedom of religion cases would seem to present somewhat of an enigma, as the school is generally considered deserving of a wide margin of appreciation where there is no European consensus on the relationship between religion and the state. Nonetheless, the religious education exemption cases show the Court taking a different stance, extensively examining school curricula, and finding violations in all of those cases of the Convention. What is the precise scope of the margin of appreciation in schooling matters before the European Court of Human Rights? And how do the Strasbourg Court's

(discussing the concept of vulnerable groups, including in Roma school discrimination cases, and arguing that "the emergence of the concept represents a positive development in the Court's case law. Yet, for all its power to further substantive equality, the concept also risks sustaining the very exclusion and inequality it aims to redress").

[114] They are: Austria, Italy, Norway, Sweden, Belgium, Denmark, the UK, Ireland, Greece, Turkey, Croatia, Poland, Czechia, Hungary, Bulgaria, France, Switzerland, Russia, Cyprus, Moldova, Albania, Romania, and North Macedonia.

other interpretation doctrines such as effective protection, living instrument, and European consensus interact in different spheres of schooling cases with the subsidiarity principle? As this Article's main argument is the broader importance of the school as a site of human rights conflict, it leaves the precise contours and nature of the deeper jurisprudential debate for future work.

3. Strasbourg, Schools, and European Societies

The second tier of the Article's analysis focuses on societal aspects of schooling in Europe, concentrating on the Council of Europe countries and the implications of the ECtHR's schooling cases more generally. The section argues that the magnitude of people and interests involved in primary and secondary education across the Council of Europe, the fact that Strasbourg's schooling cases have made important contributions to European societies more generally, and that these cases may be reflective of wider apprehensions related to supranational governance in, and common to, Europe support the notion that the school should be understood as a central site of human rights conflict and Convention interpretation in Europe.

3.1. The Magnitude of People and Interests Involved in Primary and Secondary Education

On any given school day, from Barcelona to Kyiv, Rome to Ankara, Prague to Athens, vast numbers of school-age children attend schools across the countries that make up the Council of Europe. My own estimate indicates that approximately 93 million pupils attend primary and secondary schools in the Council of Europe.[115] This estimate is profound as it corresponds to approximately 1/7 of the 675 million people living in the Council of Europe being primary or secondary school students. Despite the significant differences in education systems across the Council of Europe, the vast majority of the schools in the Council of Europe are provided for by the relevant state.[116] Moreover, the ECtHR has found that the Convention also applies in private schools[117] and where schooling arrangements are not purely run by the state.[118] Therefore, across the Council of Europe, the school is likely the most populous institution that Europeans inhabit—over a sustained period of their life and for significant hours during the

[115] I used a media-based data collection methodology to arrive at this figure. This data was very difficult to collect due to the fact that national school systems are all different across the Council of Europe, the huge number of different languages in the Council of Europe, and the fact that different terminology is used to describe education systems, e.g. folk schools in Finland. In my data collection, I erred on the side of caution and reported the lowest numbers available where there where multiple figures available, and I did not report private schools as part of this figure. The statistics that I collected are to be made available online.

[116] See, Eurydice. 'Private education in the European Union: Organisation, administration and the public authorities' role' (2000), https://op.europa.eu/en/publication-detail/-/publication/63e08105-bbf6-4412-8ead-ab3f66a487d1 (noting that "In all European Union countries, more than 90% of primary and lower secondary school pupils attend public sector institutions or those of the grant-aided private sector. Public authorities thus finance the compulsory schooling of the majority of pupils in the European Union.") My media-based data collection on the number of schools and pupils in the Council of Europe lead me to believe this figure holds across not only the European Union, but the wider Council of Europe.

[117] *Costello-Roberts*, *supra* n. 19, at Para. 27 (noting that "[t]he fundamental right of everyone to education is a right guaranteed equally to pupils in State and independent schools, no distinction being made between the two")

[118] See generally, *O'keeffe*, *supra* n. 19.

school-week and school-year—in which their rights under the ECHR protect them from abuses by the state.[119]

Moreover, these 93 million students are not the only ones who inhabit school premises during school days and school hours. Schools also employ teachers, administrators, leadership staff, and other support staff to function. Some schools possess employees with specific functions, like psychologists, nurses or doctors, librarians, food preparation staff—*e.g.* cooks or nutritional experts, school social workers, maintenance workers and custodial staff, and even safety personnel. Thus, the estimated 93 million students attending school in the Council of Europe does not account for those individuals that work in the schools that these students attend.

Widening further the number of interests involved in primary and secondary schooling in the Council of Europe, outside interests are part and parcel of the panoply of individuals that attend schools, either for work or to learn. Most prominently in this group are the parents of children who attend school, who remain in charge of the education of their children according to the ECtHR,[120] and who's interests must be respected under the text of the Convention.[121] Finally, the fact that schools can influence the direction of society more generally[122] lends support to the idea that, in the Council of Europe countries, all people have some interest in how the ECHR is interpreted to apply within the schoolhouse gate.

Additional considerations support the contention that Strasbourg's judgements arising from the primary and secondary school context carry important weight for human rights in Europe. First, many of Strasbourg's schools cases include a very large number of applicants. The *Belgian linguistics* case had over 800 applicants, *Tagayeva v. Russia*—also known as the Beslan school siege and considered the deadliest school shooting in human history[123]—had over 400 applicants, *Catan et al v. Moldova and Russia* had 170 applicants, and *Sampani et al. v. Greece* had 140 applicants. Approximately one third of Strasbourg's schools jurisprudence had more than 8 applicants, and Strasbourg's school judgements have involved in total over 1,800 applicants. Moreover, this number does not include the case of *Cyprus v. Turkey,* concerning the Turkish invasion of Cyprus and involving schooling issues for Greek Cypriot children living in the nearly entirely Turkish speaking Northern Cyprus.[124] Thus, the number of applicants in

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[119] By comparison, in 2020 there were 1,528,343 inmates in the Council of Europe countries. See, Marcelo F. Aebi and Mélanie M. Tiago. 'Prisons and Prisoners in Europe 2020: Key Findings of the SPACE I report'. COUNCIL OF EUROPE (Jun. 29, 2021), https://wp.unil.ch/space/files/2021/06/210329_Key_Findings_SPACE_I_2020.pdf. The number of prisoners in Europe is likely closer to the number of schools than the number of students.

[120] See *Kjeldsen*, *supra* n. 19, at Para. 52 ("It is in the discharge of a natural duty towards their children - parents being primarily responsible for the "education and teaching" of their children - that parents may require the State to respect their religious and philosophical convictions.")

[121] Additional Protocol 1, Article 2 states, "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."

[122] Driver, *supra* n. 7, at 62.

[123] 'Russian Children Return to School on 'Day of Knowledge'. THE MOSCOW TIMES (Sep. 1, 2021), https://www.themoscowtimes.com/2021/09/01/russian-police-detain-navalny-linked-doctors-alliance-head-a74951; see generally, Timothy Phillips. BESLAN: THE TRAGEDY OF SCHOOL NO. 1 (2007).

[124] *Cyprus v. Turkey*, *supra* n. 19.

Strasbourg judgements involving primary and secondary schools far outpace the simple number of judgements.

Moreover, many of Strasbourg's schools cases carry significant import for individuals beyond only those applicants involved directly involved in the case. Louise O'Keeffe, in her press conference after winning her case against Ireland before the ECtHR's Grand Chamber in 2014, said, "It's such good news for the children of Ireland…It's not just me. It's children attending our schools at the moment, children who will attend our schools in the future, and also, those who did attend in the past."[125] Moreover, as the Czech Judge Jungwiert said in *D.H. v. Czech Republic*, the judgement was not just about the rights of the 18 applicants from Ostrava, but about the "country's entire education system."[126] It is safe to say that in many of Strasbourg's school cases, the "footprint" of the case is far more expansive than only those applicants directly involved in the case.

Finally, the trend over time with school cases has been an exponential increase, in line with the general trend of the caseload of the Strasbourg Court. Therefore, it is, at the very least, safe to say that Strasbourg's schools jurisprudence is on the rise, and given the number of interests and people involved, may continue to increase with time. In other words, the immense number of people and interests in primary and secondary schools across the Council of Europe create enormous potential energy for human rights conflict in Europe. The upward trend in Strasbourg's school cases means that more and more of this potential energy may turn into kinetic energy, particularly when the ECtHR issues judgements upholding students and parents' rights in dynamic fashion.[127]

3.2. Schooling Cases and Broader Apprehensions Permeating Membership in the Council of Europe

Cases arising in the primary and secondary school setting frequently involve apprehensions that permeate membership in the European supranational system of human rights protection. Wider misgivings relating to membership in a supranational human rights regime emerge from this specific body of jurisprudence that reflect both shared concerns across the Council of Europe and the tensions inherent in belonging to an international human rights regime. One of the Council of Europe's stated goals is to "foster European identity and unity, based on shared fundamental values, respect for our common heritage and cultural diversity."[128] Despite the definitional difficulties relating to European identity, a significant number of cases involving primary and secondary schools before the Strasbourg Court appear to encapsulate these dynamics in a way worth examining.

Consider five concerns that encompass broader questions relating to membership in an international human rights protection regime that arise in Strasbourg's schools jurisprudence:

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[125] 'Louise O'Keefe wins case at European Court over childhood abuse'. IRISH EXAMINER (Jan. 28, 2014), https://www.irishexaminer.com/news/arid-30621010.html.

[126] *D.H. v. Czech Republic*, Dissenting opinion of Judge Jungwiert, at p. 75.

[127] See, e.g. *F.O. v. Croatia*, *supra* n. 1.

[128] Council of Europe. 'Warsaw declaration, Third Summit of Heads of State and Government of the Council of Europe'. (May 16-17, 2005), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804e45a4.

sovereignty,[129] linguistic diversity,[130] the individual-religion-state relationship,[131] immigration[132] and integration[133] in diverse societies, individual and family autonomy vis-à-vis collective interests,[134] and peace, order and safety.[135] These apprehensions—intertwined with an international human rights protection regime—have often flashed where law and education intersect. In other words, Strasbourg's schools jurisprudence may be illustrative of broader, foundational concerns encompassing questions relating to membership in an international human rights regime supervised by an international court.

Consider three prominent examples of this observation. In the arguments involving the *Belgian linguistic* case—perhaps the most well-known international legal case involving schooling[136]—the Belgian government argued vehemently that the case was outside the jurisdiction of the Court and was not covered by the Convention. It stated:

> linguistic and educational legislation is to a large extent an integral part of the State's political and social structure, which belongs pre-eminently to the reserved domain [of the Belgian State]; that the Convention, as a declaration of rights, is not concerned with the organisation of governmental authorities; that the Belgian conseil d'état and Parliament understood it this way when the question of ratification arose…that, therefore, there is in this case an inherent limit to the exercise of the Court's jurisdiction, this limit being so evident that it depends neither on an explicit clause of the Convention nor on a reservation under Article 64.[137]

In other words, states' social and political decisions, of which schooling would nearly always form a part, were internal to the member state, protected by sovereignty, and therefore simply not covered under the Convention. Yet Belgium's position went beyond just sovereignty. Belgium warned of "rashly extensive interpretations that would jeopardize not only internal peace in Belgium, but the also the legal security of all the High Contracting Parties and, thereby, the very fabric of this work, based on the loftiest political ideals, that we Europeans have managed to construct."[138] The case was not just about language in Belgium, or even language rights under the Convention, it was about sovereignty, national peace when "[l]anguage wars lie at the heart of Belgian history,"[139] and ultimately the legal security of the Council of Europe. Strasbourg disavowed this stance in its *Belgian linguistic* decision, emphasizing that State regulation "must never injure the substance of the right to education

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[129] See discussion *infra* nos. 124–127 and accompanying text.
[130] *Belgian Linguistic case*, *supra* n. 5; *Oršuš II*, *supra* n. 19; *Catan*, *supra* n. 19; *Cyprus*, *supra* n. 19.
[131] See, e.g., *Valsamis*, *supra* n. 19; *Efstratiou supra* n. 19; *Folgerø*, *supra* n. 19; *Lautsi II*, *supra* n. 19; *Grzelak*, *supra* n. 19; *Dogru*, *supra* n. 19, *Papageorgiou*, *supra* n. 19; *Perovy*, *supra* n. 19.
[132] *Ponomaryovi*, *supra* n. 19; *Timishev*, *supra* n. 19.
[133] See, e.g., *D.H. II*, *supra* n. 19; *Sampani*, *supra* n. 19; *Sampanis*, *supra* n. 19, *Lavida*, *supra* n. 19; *Horváth and Kiss*, *supra* n. 19.
[134] *Kjeldsen*, *supra* n. 19; *Osmanoglu*, *supra* n. 19; *Dogru*, *supra* n. 19.
[135] See, e.g., *Kayak*, *supra* n. 19; *Ali*, *supra* n. 19; *İlbeyi Kemaloğlu and Meriye Kemaloğlu*, *supra* n. 19; *O'keeffe*, *supra* n. 19; *F.O. supra* n. 13.
[136] Paz, *supra* n. 94, at 181.
[137] Case *"Relating To Certain Aspects of the Laws on the Use Of Languages in Education in Belgium" v. Belgium*, App. Nos 1474/62 et al., Preliminary Objection, 9 February 1967, at 10.
[138] Bates, *supra* n. 19, at 226 (citation omitted).
[139] Van Parijs. 'Bruxelles capitale de l'Europe : les nouveaux défis linguistiques'. 6 BRUSSELS STUDIES (2007) ("La guerre des langues est au cœur de l'histoire de Belgique.").

nor conflict with other rights enshrined in the Convention"[140] while at the same time outlining for the first time ever in the Strasbourg Court's case-law the foundational principles of interpretation of the ECHR of primarity and subsidiarity.[141] In short, the case is emblematic of broader concerns common to Europe and retained sovereignty more generally.

Consider two cases as well from Psari, Aspropyrgos in Greece involving the "Aspropyrgos Roma ghetto school"[142] that are illustrative of how Strasbourg's schooling cases sometimes involve important questions related to immigration, integration, and order in society. On September 13, 2005, about 200 non-Romani parents protested outside the primary school in Aspropyrgos against Roma pupils accessing the school their children attended. It was only with police escorts that the students were able to access school. As a result of these extreme tensions, Roma students were educated in an annex to the regular school in Aspropyrgos. The case eventually ended up before the ECtHR, which issued a judgement unanimously finding a violation in the *Sampanis v. Greece* case in 2008. However, the judgement did not end the tense situation in the community. The annex was transformed into a new school known as the 12th primary school of Aspropyrgos that only Roma students attended.

Despite a meeting, "organised by the Ombudsman, between the direction of this school, the prefecture, the association of parents of (non-Romani) students and the Ombudsman" with the purpose of convincing "the parents to renounce their opposition to the integration of Romani students in ordinary classes," no community consensus was found.[143] Moreover, in response to an invitation to merge the 11th and 12th primary schools of Aspropyrgos by the Greek Ministry of Education, the Mayor of Aspropyrgos in a joint letter with the parents of non-Romani students stated:

> The creation of the 12th primary school did not aim to (...) segregate Romani students from other students in the district schools. It has, however, become an inevitable necessity because Gypsies living in tents have chosen to live a nomadic life, in dumps they have created themselves, without worrying about basic standards of hygiene, and indulging in illegal activities which have a negative impact on vulnerable social groups and, more generally, on the inhabitants of Aspropyrgos. (...) in spite of all this, [the Romani children] dare to demand to share the same classrooms as the other students of Aspropyrgos, a considerable percentage of whom are sensitive social groups or children of economic immigrants (...)[144]

Given the intense community disagreement over integration of the Roma community, many of the same allegations made in the 2008 *Sampanis* case were repeated when, unusually, a follow-up case ended up before the ECtHR entitled *Sampani v. Greece* during the implementation phase of the prior *Sampanis* judgement. Four years after the Court's original judgement, the Court again unanimously found a violation of the Convention. It was not until 2017 that the Committee of Ministers was satisfied with the implementation of the judgement

[140] *Belgian Linguistic case*, *supra* n. 6, at Para. 5.

[141] See, Janneke Gerards. GENERAL PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2019), at 5.

[142] Sarah Montgomery. 'Case Watch: Take Two on Greek Roma School'. OPEN SOCIETY FOUNDATIONS (Apr. 11, 2011), https://www.justiceinitiative.org/voices/case-watch-take-two-greek-roma-school.

[143] *Sampani*, *supra* n. 19, at Para. 12.

[144] *Ibid.,* at Para. 19.

and closed the follow up examination.[145] In broad terms, these two cases are one of many illustrations of Strasbourg's school cases involving bitter contestation at the community level over immigration and integration in diverse societies, individual and family autonomy vis-à-vis collective interests, and order in society.

Finally, consider the case of *Catan and others v. Moldova and Russia*, decided in 2012. In the case, the Grand Chamber considered possible violations to P1-2, Article 8 and Article 14 arising from the Moldovan Republic of Transdniestria's (MRT) adoption and enforcement of a law/policy requiring all schools in Transdniestria to use Cyrillic instead of Latin-script, and the intimidation and violence that took place against some of those schools when they refused to comply. Complex in its jurisdictional and attributional aspects, the judgement found that Russia had violated its obligations under P1-2. The Court stated:

> it appears that the "MRT"'s language policy, as applied to these schools, was intended to enforce the Russification of the language and culture of the Moldovan community living in Transdniestria, in accordance with the "MRT"'s overall political objectives of uniting with Russia and separating from Moldova. *Given the fundamental importance of primary and secondary education for each child's personal development and future success*, it was impermissible to interrupt these children's schooling and force them and their parents to make such difficult choices with the sole purpose of entrenching the separatist ideology.[146]

This passage encapsulates an overlapping set of concerns common to European countries more generally. The case was certainly about language and education rights under the Convention. But it also involved other important concerns like sovereignty, cultural preservation, language, peace, and safety. It is worth remembering that the Council of Europe was created in the aftermath of WWII. As noted by Federico Fabbrini, "[t]he memory of the tragedies of the 20th century had made crystal clear to Europe's political elites that the protection of fundamental rights could not be confined solely to the states and that additional norms and institutions *beyond the state* were necessary to ensure liberty and peace in the European continent."[147] Still today, Strasbourg's school cases are illustrative of foundational expectations and misgivings related to belonging to an international human rights mechanism in a region with incredible linguistic, cultural, historical, and geographic diversity that was the primary locus of much of the fighting in two world wars in the last century.

3.3. Strasbourg's Schooling Cases and European Societies

Professors Fancourt and Hendek claim that in the religious education sphere in England and Turkey, the ECtHR's "decisions are deployed as catalysts for change as well as bulwarks of the status quo."[148] Expanding this hypothesis, one possible way of organizing Strasbourg's schools

[145] Council of Europe, Committee of Ministers. Final Resolution CM/ResDH(2017)96, 'Execution of the judgment of the European Court of Human Rights, Sampani and Others group v. Greece (App. No. 59608/09)', https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-172490%22]}.
[146] *Catan*, *supra* n. 19, at Para. 144 (emphasis added).
[147] Federico Fabbrini. FUNDAMENTAL RIGHTS IN EUROPE (2016), at 13.
[148] Abdurrahman Hendek and Nigel Fancourt. 'The Effects of Judgements by the European Court of Human Rights on Religious Education in England and Turkey'. 48 RELIGION & EDUCATION 436 (2021).

jurisprudence is attempting to divide the judgements into those that spurred on change and those that preserved the status quo, either in the specific country concerned in the case or beyond. In a number of Strasbourg's schooling cases, the ECtHR's ruling has served as a catalyst for both small and big change at the domestic legal level. In a few cases, it has spurred on change beyond the individual country in the case. Similarly, in several cases, Strasbourg's schooling judgements have preserved the status quo in schools in the country concerned. In a few cases, evidence suggests that the judgement preserved the status quo in other European countries as well. Below we consider a few examples of this typology as applied in Strasbourg's schooling cases. The baseline claim is that Strasbourg's schooling judgements have sometimes serve as catalysts or hindrances to broader societal change.

One example from Strasbourg's schools jurisprudence spurring on domestic change comes from *Campbell and Cosans v. UK*. In that case, the Court held that the existence of corporal punishment in the schools of their children violated the P1-2 rights of two Scottish mothers, as well as the P1-2 rights of Jeffrey Cosans for being suspended from school for refusing to submit to corporal punishment. While the judgement did not rule that corporal punishment was in all circumstances contrary to the Convention, the judgement did spur on important domestic legislative change. Four years after the case, the Education Act of 1986 preventing corporal punishment in State-funded schools was passed as "a direct response by the British Government to the decision of the European Court in Campbell and Cosans."[149] This is particularly significant as contemporaneous evidence suggests that the broader Scottish society at the time supported the use of corporal punishment in schools. As the judgement indicated, the majority of Scottish parents supported the use of corporal punishment in schools, and even some pupils reportedly preferred it to other forms of punishment.[150] *Campbell and Cosans v. UK* therefore suggests that the Strasbourg Court does sometimes act as a countermajoritarian institution and can spur on domestic legislative change despite opposition from segments of wider society.

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One example from Strasbourg's schools jurisprudence of the Court spurring on both domestic change and international change is *D.H. v. Czech Republic*. To be clear from the outset, other scholarship has addressed the extent to which a Court like Strasbourg can push through *systemic* change such as that at play in the *D.H.* case.[151] The claim here is broader and relates not to the success with which the Court can achieve systemic change and the factors that serve to help or hinder this process, but rather that the Court's judgements do in fact catalyze some important change.

In *D.H. v. Czech Republic*, the ECtHR held in favor of 18 Roma applicants from Ostrava who argued that their placement in special schools violated their rights under Article 14 and P1-2 of the ECHR. This judgement, although slowly and following its own trajectory, has catalyzed important change in the Czech Republic. Though the judgement is still being implemented some 15 years later, the most recent report of the Committee of Ministers welcomed several

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[149] Ralph Beddard. 'Corporal punishment in schools: recent decisions from Strasbourg'. 6 EDUCATION AND THE LAW 27 (1994), at 28.
[150] *Campbell and Cosans*, *supra* n. 19, at Para. 18.
[151] Smekal and Šipulová, *supra* n. 66.

positive developments regarding the situation of Roma in education, particularly following legislative reform in the Czech Republic in 2016.[152] Importantly, the general statistical trends regarding Roma pupils, if slow moving, show improvements over time. As was pointed out by Hubert Smekal and Katarína Šipulová in 2014, the ability of the ECtHR to push the overhaul of a domestic education system is as complicated as it is difficult and depends on many factors. Moreover, as David Kosař and Jan Petrov have noted in a study about domestic compliance with international human rights bodies' decisions including the *D.H.* case, "the level of compliance achieved depends on a repeated balancing exercise, in which domestic political actors balance domestic political costs of compliance, on the one hand, with the international reputational costs of non-compliance, on the other."[153] What is clear from this scholarship, and compliance scholarship more generally, is that domestic compliance with rulings of the ECtHR is complex and context-dependent. Nonetheless, while the Czech Republic is far from perfectly integrating the Roma minority into mainstream Czech education, it is reasonable to say that the *D.H.* judgement has spurred on important change at the domestic level in the Czech Republic.[154] In other words, that "there is much work to be done"[155] does not mean the ECtHR's *D.H.* ruling was not an important, and catalytic, first step towards change for the Roma in Czech education.

One commentator writing after the *D.H. v. Czechia* judgement was released said that "[t]hough the decision in D.H. and Others is binding only on the Czech Republic, in the months following the decision it has become clear that it is having an immediate and tangible effect on legal systems throughout Europe."[156] Empirically, this is a very difficult claim to assess. What may be said about the *D.H.* case within the framework of Strasbourg's schools jurisprudence is that the reasoning and holding in the case opened the door wide open for others, including strategic litigators, to challenge discriminatory practices against Roma in other countries in Europe, thereby spurring on change beyond the Czech Republic. The Grand Chamber in *D.H.* made several specific findings that propped open the door for future Roma discrimination cases. First, it charted new course by introducing a statistical burden shifting standard in Roma indirect discrimination cases. Second, it emphasized the importance of the educational context for combatting discrimination against Roma pupils. Third, the Court introduced a positive obligation on states to introduce safeguards in schools to protect Roma pupils from discrimination.

These findings served as the foundation on which strategic litigators brought cases in other European countries that ultimately ended up before the ECtHR. In all seven other cases

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[152] Communication DH-DD(2020)868 of 7 October 2020.

[153] David Kosař and Jan Petrov. 'Determinants of Compliance Difficulties among 'Good Compliers': Implementation of International Human Rights Rulings in the Czech Republic'. 29 EUROPEAN JOURNAL OF INTERNATIONAL LAW 397 (2018), at 422.

[154] One such important change was an apparent confidence that the ECtHR's judgement imparted to the Roma Community itself. See, Filip Sys. 'D.H. v. Czech Republic, Roma Educational Equality and the Vulnerability of Strategic Litigation'. 20 ACTA UNIVERSITATIS CAROLINAE STUDIA TERRITORIALIA 79 (2020), at 88.

[155] *Ibid.*

[156] Jennifer Devroye. 'The Case of D.H. and Others v. the Czech Republic'. 7 NORTHWESTERN JOURNAL OF INTERNATIONAL HUMAN RIGHTS 81 (2009), at 100 ("D.H. and Others is also likely to compel national constitutional courts across Europe to examine de facto situations of discrimination, rather than simply analyzing whether a law was facially neutral and being followed to the letter").

involving discrimination against Roma in schools,[157] the ECtHR has found a violation of Article 14 taken together with P1-2 on the basis of at least one of the three findings in *D.H*. mentioned above. The subsequent set of Roma discrimination cases in schools are, in a sense, the progeny of *D.H. v. Czech Republic*. Therefore, a robust argument exists that the *D.H.* case catalyzed further legal change outside the borders of the Czech Republic by opening the door for further legal action with respect to discrimination against Roma in schools. At the same time, it is true that many of *D.H.*'s progeny have also suffered from implementation difficulties, setbacks, and lackluster progress.[158] But despite these implementation difficulties, the baseline argument remains: these cases, relying on the reasoning in *D.H.*, have catalyzed change for Roma pupils beyond the borders of the Czech Republic.

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One example from Strasbourg's schools jurisprudence of the Court preserving the domestic status quo comes from mandatory sex education classes. In *Kjeldsen, Busk Madsen, and Pedersen v. Denmark* and several follow up admissibility decisions, the Court held that mandatory sex education classes, even in the case of young children, do not violate the Convention. Studies reveal that prior to the *Kjeldsen* case, in Western and Northern Europe, "[w]ith the exception of the Republic of Ireland (Eire), all countries of this region have accepted the need for sex education in schools in the interest of children's mental and physical health and of human rights."[159] Some countries introduced compulsory sexual education across the country and some left the decision to the local education authorities.[160] Denmark's legislature, concerned about the health of its young people, passed a law making sex education compulsory. Three sets of parents challenged this law, arguing that it infringed their right to respect for their religious convictions in the education of their children.

The *Kjeldsen* Court upheld Denmark's legislation, finding that the legislation "in itself in no way offends the applicants' religious and philosophical convictions to the extent forbidden by the second sentence of Article 2 of the Protocol (P1-2), interpreted in the light of its first sentence and of the whole of the Convention."[161] In particular, the Court placed the emphasis on the fact that:

> The public authorities wish to enable pupils, when the time comes, 'to take care of themselves and show consideration for others in that respect', 'not ... [to] land themselves or others in difficulties solely on account of lack of knowledge'....[162]

The Danish sex education legislation, passed with domestic democratic imprimatur, withstood a reasonable claim under the Convention. In rejecting the Christian parents' attempt to

[157] These cases are: *Horvath and Kiss*, *supra* n. 19, *Sampanis*, *supra* n. 19, *Sampani*, *supra* n. 19, *Lavida, supra* n. 19, and *Oršuš II, supra* n. 19; *X and others v. Albania*, *supra* n. 19; *Elmazova and others v. North Macedona*, *supra* n. 19.

[158] Smekal and Šipulová, *supra* n. 66 (noting that "It is claimed that ECtHR judgments concerning the Roma have the worst track record of implementation.") (citations omitted).

[159] Edmund H. Kellogg and Jan Stepan. 'Legal Aspects of Sex Education'. 26 AMERICAN JOURNAL OF COMPARATIVE LAW 573 (1978), at 608.

[160] *Ibid.*

[161] *Kjeldsen, supra* n. 19 at Para. 54.

[162] *Ibid.*

exempt their children from sex education, the Court preserved the newfound status quo in Denmark in which pupils must attend sex education classes to prepare them for, and protect them from, possible harms in that realm.

In two follow up admissibility decisions, the Strasbourg Court has upheld decisions to make sex education mandatory, even for very young pupils. In *Dojan and others v. Germany*, Christian Evangelical Baptist Church parents with children in school in Salzkotten, Germany objected to compulsory sex education classes, amongst other things, on account of their religious beliefs. In upholding Germany's practices as consistent with the Convention, the Court reasoned that the sex education class's purpose was the "neutral transmission of knowledge…with a view to enabling children to deal critically with influences from society instead of avoiding them and was aimed at educating responsible and emancipated citizens capable of participating in the democratic processes of a pluralistic society." [163]As such, Germany had not overstepped its margin of appreciation in the educational realm. Finally, in *A.R. and L.R. v. Switzerland*, the Court declared inadmissible the request of a mother to have her seven-year-old daughter exempted from mandatory sex education class in her primary school in Basle.[164] The Court again upheld the decision of the Swiss authorities, despite the sensitive nature of the case, in part to protect children's physical and mental health. This string of cases saw the Strasbourg Court refusing to overturn democratic decisions made at the national or local level regarding mandatory sex education, even in the case of young children. In so doing, the Court has preserved the national status quo with respect to mandatory sex education in schools in the countries concerned.[165]

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One example from Strasbourg's schools jurisprudence preserving the status quo, with important implications for the rest of the countries in the Council of Europe came in the well-known judgement *Lautsi v. Italy*. In that case, the Grand Chamber had to decide whether the presence of crucifixes on the wall of Italian classrooms violated the Lautsi family's religious rights under the Convention. Eight governments intervening in the case emphasized that the case went beyond just crucifixes in Italian classrooms. According to them, the "huge diversity of Church-State arrangements in Europe" meant that extending the Chamber's view "to the whole of Europe would represent the 'Americanisation' of Europe in that a single and unique rule and a rigid separation of Church and State would be binding on everyone."[166] In other words, precisely because the Council of Europe consists of sovereign nations, each with its own history, culture, religious personality, and language, the Court must tread very carefully and respect sovereign decisions of member states where the case is not extreme and there is no European consensus on the matter.

Likewise, Joseph Weiler's speech before the Grand Chamber in *Lautsi* representing those same eight states, elucidated:

[163] *Dojan and others v. Germany,* App. No. 319/08, 13 September 2011, at 14–15.
[164] *A.R. and L.R. v. Switzerland,* App. No. 22338/15, 19 December 2017.
[165] This may be particularly important as "[T]he school is likely the first place where students may witness firsthand the state's role in shaping attitudes toward sex, defining the parameters of acceptable sex and sexuality, and cultivating a robust understanding of sexual rights." Murray, *supra* n. 30, at 1485.
[166] *Lautsi II*, *supra* n. 19 at Para. 47.

> This case is not only about the crucifix. It is also about the tension between individual rights and collective identity, the tension between the role of courts and of political democratic institutions, and the tension between the uniform values which the Convention system espouses, and the rich diversity which characterizes the European legal landscape.[167]

The undertone of these sentiments before the Court was indeed that the case had implications for a religiously diverse Europe. As such, by granting Italy a wide margin of appreciation and overturning the Chamber judgement, the Grand Chamber in *Lautsi* halted what would have been a reckoning in many of the countries of the Council of Europe of the place of religion in public schools, and in the public sphere more generally. Questions arose during the case regarding the judgement's ultimate effect in Europe on religious holidays in various countries, the flag and national anthem of England, crosses on national currencies, reading the Irish or German constitution in classrooms, and the French conception of liacité. The Grand Chamber's judgement finding no violation of the Convention meant that no answer had to be provided for these questions in other countries and therefore preserved the status quo in Europe regarding religious symbols in schools specifically and in the public sphere more generally.

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Professor Justin Driver posits that US constitutional scholars who believe that the US Supreme Court can "achieve almost anything" and those who "suggest that it can accomplish virtually nothing" are both incorrect.[168] His reading of the US Supreme Court's jurisprudence in schools leads him to contend that the US Supreme Court's school cases illustrate that it "is neither omnipotent nor impotent, but, simply, unambiguously potent."[169] A wholistic reading of Strasbourg's schools jurisprudence might lead one to the same conclusion. The debate over the extent to which the ECtHR functions like a constitutional court continues.[170] Strasbourg's judgements do not have immediate and direct effect across the Council of Europe, nor does the Strasbourg Court have robust enforcement powers.[171] At the same time, this does not mean that the ECtHR has no power in real terms. Strasbourg's schools jurisprudence illustrates that the Court lies in the middle between these two poles, in some cases and countries ticking perhaps more towards impotency, and in others ticking more towards potency. The claim is sufficiently broad to encompass "the capacious middle ground"[172] of both a national constitutional court and an international human rights court's powers. Even if such institutions

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[167] 'Crucifix in the Classroom - Joseph Weiler before the European Court of Human Rights'. (Oct. 9, 2011), https://www.youtube.com/watch?v=ioyIyxM-gnM.
[168] Driver, *supra* n. 7, at 22.
[169] *Ibid.*, at 23.
[170] See, Wojciech Sadurski. 'Quasi-constitutional court of human rights for Europe? Comments on Geir Ulfstein'. 10 GLOBAL CONSTITUTIONALISM 175 (2021).
[171] Veronika Fikfak and Lora Izvorova. 'Language and Persuasion: Human Dignity at the European Court of Human Rights'. 22 HUMAN RIGHTS LAW REVIEW 22 (2022) (noting that "if the Court has the power to tell the state *what the law* is, as an international court it has very low enforcement authority and compliance with its decisions is always voluntary.")
[172] Driver, *supra* n. 7, at 22.

make contributions to the wider society in different ways, that they do at times make contributions to the wider society, as illustrated in Strasbourg's schooling cases, is clear.

In conclusion, when most people think of the contributions that the ECtHR has made to Europe, they are likely to think of foundational cases outside the school realm. They may think of end-of-life questions, reproductive rights, gay marriage, environmental issues, etc. More cases arising within Europe's schoolhouse gate should also make the list.

4. Conclusion

The school as a site of human rights conflict has been understudied in the European human right literature. Introducing "Strasbourg's schools jurisprudence" as a field of study, this article has started to make some steps towards bridging that gap, inspired by the arguments of Professor Driver's *The Schoolhouse Gate* in the United States context. In a sense, thus, the article is a call to arms for deeper consideration of the intersection between schools and human rights in Europe. More in depth-research on the knock-on effects, both legal, political and societal, of Strasbourg's schooling judgements would prove fruitful. Startlingly, in many of the legal discussions involving human rights at school, pedagogical experts and teachers are entirely left out of the discussion. Further academic research would do well to include their views on the intersection between pedagogy and rights in school. The relationship between schools, democracy, and the ECtHR could be further explored. This may be particularly so given the history of the Council of Europe and what occurred with respect to youth and schools during the Third Reich's tragic reign.[173] Finally, as stated in the introduction, there are important lessons to be gained by examining jurisprudence relating to specific institutions, like schools. As this article has suggested, it may not be unreasonable to think of "the Convention law of schools" as a distinct field of study. A domain-centered approach to understanding judicial interpretation of the ECHR moreover may help scholars to understand judicial interpretation of cases in specific institutional contexts, and perhaps might help judges to write a sharper and more consistent jurisprudence, clarifying how certain institutional characteristics interact with Convention interpretation. Greater understanding of the socio-legal effects of Strasbourg's judgements with respect to certain institutions would also prove valuable.

Whatever one thinks of how the ECtHR has addressed human rights claims involving elementary and secondary schools in the past, as this article has shown, schools have acted as significant sites of human rights conflict and Convention interpretation in the Council of Europe. Given that the trend over time shows the Strasbourg Court increasingly issuing judgements interpreting the ECHR in schooling matters and given the high threshold that the Court's case-law has set with respect to discrimination and safety in schools, the suspicion is that the story of human rights within Europe's schoolhouse gate is not yet over.

[173] See, e.g., Daniel Horn. 'The Hitler Youth and Educational Decline in the Third Reich'. 16 HISTORY OF EDUCATION QUARTERLY 425 (1976).