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Multiculturalism, freedom of religion, equality, and the British constitution: The JFS case considered

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In the JFS case, the Supreme Court of the United Kingdom held that the admissions policy of a Jewish faith school constituted unlawful racial discrimination because it used the Orthodox Jewish interpretation of who is Jewish as a criterion for determining admission to the school. A detailed discussion of the case is located in the context of two broader debates in Britain, which are characterized as constitutional in character or, at least, as possessing constitutional properties. The first is the debate concerning the treatment of minority groups, multiculturalism, and the changing perceptions in public policy of the role of race and religion in national life. It is suggested that this debate has become imbued with strong elements of what has been termed “post-multiculturalism”. The second debate is broader still, and pertains to shifting approaches to “constitutionalism” in Britain. It is suggested that, with the arrival of the European Convention on Human Rights and EU law, the U.K. has seen a shift from a pragmatic approach to constitutional thinking, in which legislative compromise played a key part, to the recognition of certain quasi-constitutional principles, allowing the judiciary greatly to expand its role in protecting individual rights while requiring the judges, at the same time, to articulate a principled basis for doing so. In both these debates, the principle of equality plays an important role. The JFS case is an important illustration of some of the implications of these developments.

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The *JFS* case¹ involved a challenge by E, by way of judicial review,² of the decision of a school in London known as JFS (formerly the Jews' Free School) to refuse to admit his son, M, to the school.³ JFS is a Jewish faith school. It is regarded as an excellent school academically and is very popular among the Jewish community in London. It is consistently oversubscribed. The school adopted as its oversubscription policy giving a preference in admission to those children recognized as Jewish by the Office of the Chief Rabbi of the United Hebrew Congregation of the Commonwealth (the OCR). The OCR is recognized as, effectively, the head of the Orthodox branch of Judaism in Britain. Operating on an Orthodox interpretation of Jewish law (*halacha*), the OCR only recognizes a person as Jewish if that person is descended in the matrilineal line from a woman whom the OCR would recognize as Jewish, or if the person has undertaken a course of conversion recognized by the Orthodox authorities. Applying this interpretation, M was not Jewish, according to the OCR. This admissions policy was held to constitute unlawful discrimination against M on the grounds of his ethnic origin.

1. *JFS* and the British debate about multiculturalism

The *JFS* case should be seen as the latest expression of the tensions between different approaches adopted in several phases of British legal policy regarding the complex relationship between ethnicity, religion, and the public sphere. First, beginning at least from the early nineteenth century, with Catholic Emancipation, if not earlier, a set of political compromises was worked out to accommodate the conflicting interests of the various Christian denominations, and subsequently Judaism, with an evolving liberal and secular society.

Two features of this first approach are of particular importance for our consideration of the *JFS* case. In the courts, there was a general hands-off approach taken to issues that were likely to drag the judges into areas of religious controversy; these issues were thought best left to the legislature, where the compromises reached were often highly technical and nuanced. This approach also concentrates heavily on negotiation between those considered to be the religious leaders of the communities concerned and civil society as represented by the government. The policy adopted in controversies regarding the role of religion in primary and second education is a case in point, as are the detailed rules relating to the way in which Jewish ritual animal slaughter is regulated. This first approach has proven to be relatively stable, if also relatively lacking in grand principle. The devil, as it might be put, is in the details. It might be thought to be a classic example of the traditional British approach to dealing

¹ R (on the application of E) v. The Governing Body of JFS and the Admissions Appeal Panel of JFS and others [2009] U.K.S.C. 15. A useful summary of the case is provided by the Court in a Press Summary, available at: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0105_PressSummary.pdf, which this article has drawn on extensively.

² Judicial review, in the context of British law and in this article, generally refers to judicial review of administrative action, not judicial review of legislation, except insofar as the Human Rights Act 1998 and the European Communities Act 1972 permit legislation to be directly or indirectly challenged.

³ The identity of neither the father nor the child was made public.

with what in other jurisdictions are considered to give rise to major issues of constitutional principle. In Britain, the (normative) constitutional tradition has been seen as one of pragmatic empiricism; if it works, it is constitutional.⁴

To this first approach was added a second approach based on a set of accommodations introduced in what can be called the “multicultural” phase of British politics, beginning around the mid-1960s. While agreeing that the meaning of “multiculturalism” is exceedingly difficult to pin down, for the purposes of this discussion we can define it as a “broad set of mutually reinforcing approaches or methodologies concerning the incorporation and participation of immigrants and ethnic minorities and their modes of cultural/religious difference.”⁵ This phase focused, in particular, on developing an approach to the integration of the new ethnic groups that were increasingly represented in the British population into British society. It relied on a combination of legally enforced antidiscrimination law, combined with legislative accommodation of what were considered to be ethno-cultural practices associated with the major new ethnic groups.

A classic example of the application of this second approach was the stance adopted toward the wearing of turbans by Sikh males. The antidiscrimination approach led to a prohibition by a Church of England school of a Sikh pupil’s wearing of a turban to school rather than the authorized school uniform of a school cap, being held to amount to unlawful ethnic discrimination. The legislative-accommodation approach led to an exemption for turban-wearing Sikhs from the otherwise compulsory wearing of helmets when riding a motorcycle. These were thought of as primarily racial or ethnic issues, and, because in practice (although not in theory) the application of this approach was confined to a relatively discrete set of ethnic practices and groups, they were not considered to have much, if any, relevance to the earlier, pre-multicultural types of accommodations involving Judeo-Christian practices and beliefs. These earlier approaches continued unaffected.

At least since the beginning of the twenty-first century, there have been several developments that have caused both the pre-multicultural and the later multicultural accommodations to be rethought, and for a third approach to be under development. There has, in particular, been a significant change in how the earlier ethnocultural practices, such as the wearing of turbans and the *kara* (a small steel bangle) by Sikhs, are now classified. The previous discourse, regarding such practices as “cultural” or “ethnic,” has shifted to focus much more on the *religious* dimension of the practices.⁶ This has been encouraged by the increased attention given to Islamic practices, which proved difficult to classify as “ethnic.” “British discourse on racialized minorities,”

⁴ For a more detailed discussion of the varieties of British constitutionalism, see Christopher McCrudden, *Northern Ireland, the Belfast Agreement, and the British Constitution*, in *THE CHANGING CONSTITUTION* (Jeffrey Jowell & Dawn Oliver eds., 5th ed., 2004).

⁵ Steven Vertovec & Susanne Wessendorf, *Introduction: Assessing the backlash against multiculturalism in Europe*, in *THE MULTICULTURALISM BACKLASH: EUROPEAN DISCOURSES, POLICIES AND PRACTICES 4* (Steven Vertovec & Susanne Wessendorf eds., 2010).

⁶ A good example is provided by contrasting *Mandla v. Dowell Lee* (turbans as ethnic) with *R (Watkins-Singh) v. The Governing Body of Aberdare Girls’ High School* [2008] E.W.H.C. 1865 (Admin) (*kara* as both religious and ethnic).

wrote Peach in 2005, “has mutated from ‘colour’ in the 1950s and 1960s, to ‘race’ in the 1960s–1980s, ‘ethnicity’ in the 1990s, and ‘religion’ in the present period.”⁷ As Ralph Grillo argues, this shift has been one that reflected the self-perception of minority ethnic groups themselves and coincided with a marked preference among policy makers in government. This was true not only in the context of the developments within and reactions to Islamic groups but also with respect to Hindus and Sikhs.⁸

Multiculturalism was downplayed by government, but the contribution of faith communities to public life was encouraged, not least because such communities were often used to provide public services.⁹ The increase in talk of human rights contributed to this, since it brought with it a recognition of freedom of religion. Legislatively, too, British antidiscrimination law was broadened beyond freedom from discrimination on grounds of race and ethnic origin to encompass freedom from discrimination on grounds of religion, and this was in part justified because of the protection this would bring to minority religious communities, such as Muslims, who were assumed to be outside the protection of the prohibition against racial discrimination. Ethnic minorities have increasingly been permitted to establish their own usually religiously based “faith” schools, often publicly financed. As Grillo writes:

Yet despite questioning multiculturalism, government policy has assigned an important role to “faith communities” as channels for representation, consultation and dialogue in the major conurbations. There has emerged a faith-based multiculturalism, evident in the favouring of “faith schools,” and measures making religious hatred . . . a crime. This faith-based multiculturalism is in accord with both government policy, based on communitarian theories, and claims by minorities increasingly defining themselves in religious terms.¹⁰

This change—viewing issues through the lens of religion rather than ethnicity—has been accompanied by a growing perception that the earlier approach to how far these beliefs or practices should be accommodated may be in tension with, or at least should be constrained by, core liberal principles. This is one of the strands of twenty-first-century British thinking that has been seen as contributing to the growth of “post-multiculturalism.” There has never been a shortage of British critics of multiculturalism, but it is clear that at least since the early years of this century, and certainly since the terrorist attacks of September 2001 in the United States and July 2005 in London, that multiculturalism has faced mounting criticism, which some have seen as amounting to the death of multiculturalism and the substitution of a new

⁷ Ceri Peach, *Muslims in the UK*, in *MUSLIM BRITAIN: COMMUNITIES UNDER PRESSURE* 18 (T. Abbas ed., 2005).

⁸ In addition to the cases cited above at footnote 6, see also *R (Ghai) v. Newcastle City Council* [2010] E.W.C.A. Civ 59, in which the claimant’s religious belief required that he be cremated using traditional fire rather than by using electricity and where sunlight could shine directly on his body while it was being cremated, and *Surayanda v. The Welsh Ministers* [2007] E.W.C.A. Civ 893, in which a Krishna community sought, unsuccessfully, to quash a decision of Welsh Ministers to order the slaughter of a Temple bullock.

⁹ See, e.g., *Catholic Care (Diocese of Leeds) v. The Charity Commission for England and Wales* [2010] E.W.H.C. 520 (Ch) (Catholic adoption agency providing adoption services for local authorities), at [107(i)].

¹⁰ Ralph Grillo, *British and Others: From “race” to “faith”*, in *THE MULTICULTURALISM BACKLASH: EUROPEAN DISCOURSES, POLICIES AND PRACTICES* 57–8 (Steven Vertovec & Susanne Wessendorf eds., 2010).

post-multiculturalism considerably more hostile to certain practices associated with ethnic minorities and immigrants.¹¹

Multiculturalism has been criticized from several different angles: that multiculturalism stifles debate, that it has fostered separateness, that it provides encouragement to terrorism, and that it denies economic and social problems associated with particular ethnic groups. Prominent among the criticisms, however, is the view that multiculturalism fosters cultural relativism and that it protects from criticism cultural and religious practices associated with particular ethnic minority groups in Britain that are viewed by these critics as inconsistent with British liberal values. Criticism of the supposed cultural relativism of multiculturalism has, on occasion, been used to criticize particular ethnic minorities for their supposed opposition to freedom of expression, in the wake of the Salman Rushdie affair. Most prominent among these criticisms have been attacks on the treatment of women, involving criticism of forced marriages, arranged marriages, honor killings, and female genital mutilation. So, too, the treatment of sexual minorities within particular ethnic minority groups has led to sustained criticism on the basis of their incompatibility with presumably liberal principles.

These developments are not confined to the scrutiny of what were earlier seen as ethnic, now ethnoreligious, practices. The increased attention to religion, as such, has also led to an increase in the scrutiny of those Judeo-Christian religious practices previously accommodated in the pre-multicultural phase but now also being questioned on the basis of their compatibility with liberal principles. In addition, a newly resurgent (if limited) Judeo-Christian religious commitment among sections of the population has encouraged individuals outside, as well as inside, the main ethnic groups to assert what they perceive as their religious identity in public. This, too, has led to the manifestation of practices or beliefs in the Judeo-Christian tradition in the public domain coming into conflict with liberal or simply secular values.¹² Sometimes, the contested belief or practice is one that is simply personal to the individual and not necessarily shared in common with an organized church. However, sometimes the practice or belief is one that is perceived to be central to an organized religion and is shared by significant numbers of those who identify as members of that organized religion. Sometimes, as in the *JFS* case, that challenge is one that goes to the definition of membership in the religion itself and, thus, may involve contesting the authority of the leadership of that religion to prescribe who is to be regarded as a member of that religion.

Criticism of multiculturalism, therefore, has become entwined with criticism of the role of religion in the public domain. Criticism of the attempt by the Archbishop of Canterbury to stimulate debate about the appropriateness of allowing aspects of Shari'a law to operate in Britain was frequently expressed in terms of the incompatibility

¹¹ It is perhaps noteworthy that in *R. (on the application of X) v. Headteachers and Governors of Y School* [2007] H.R.L.R. 20, there was a clear connection between increasing security concerns in the school and decreasing tolerance towards wearing Islamic dress.

¹² See, e.g., *Eweida v. British Airways Plc* [2010] E.W.C.A. Civ 80, in which the claimant argued, unsuccessfully, that by adopting a staff dress code, which forbade the wearing of visible neck adornment and thereby prevented the claimant, a Christian, from wearing a small, visible cross, her employer indirectly discriminated against her on grounds of religion or belief.

of Islam with liberal values of equality, as well as fears that the Archbishop was encouraging separateness. The shift to favor a wider variety of faith schools, particularly since 1997, has also been a central area of contention, with such schools criticized in much the same terms as multiculturalism more generally has been. They are seen as encouraging social division, promoting intolerance, operating as seedbeds of religious fundamentalism, and thus in conflict with current British liberal values.

2. *JFS* and the turn to ideals-based constitutionalism

The fact that these liberal principles have now been incorporated into British law—in the Human Rights Act 1998 and (partly as a result of European Union law) in equality law¹³—has also led to these tensions being addressed by the judiciary, and has led to the legislative compromises that were central to the pre-multicultural and multicultural phases being scrutinized by the judiciary on the basis of their compatibility with liberal principles. This has resulted in several religious or ethnic practices that would likely have been accommodated in the earlier phases now being questioned on the basis of their perceived conflict, for example, with the principle of women's equality. Most prominently, there have been several cases dealing with the wearing of Islamic dress and the acceptability of this in a society committed to the principle of gender equality.¹⁴

Indeed, there has been a shift in British constitutional thinking more generally, in which pragmatic empiricism has been supplemented, if not replaced, by a constitutional idealism that focuses to a greater extent on principles. This emphasis on viewing social problems, to some degree, through the lens of quasi-constitutional principles has been significantly encouraged by the enactment of, and judicial enthusiasm for, the Human Rights Act 1998, which effectively incorporated the European Convention on Human Rights, thus becoming a *de facto* British Bill of Rights. What might be thought simply as another piece of legislation has become a quasi-constitutional document, providing an opportunity for the judiciary to significantly expand its role in protecting individual rights.¹⁵

In attempting to understand the full significance of this shift in constitutional thinking, however, we need to go beyond the Human Rights Act. Too often, in comparing jurisdictions, there is an understandable concentration on how courts interpret bills of

¹³ See *Ladele v. London Borough of Islington* [2009] E.W.C.A. Civ 1357, per the Master of the Rolls at [73], describing how the legislature has decided “that the requirements of a modern liberal democracy, such as the United Kingdom, include outlawing discrimination. . . .” For a detailed discussion of the development and current content of British antidiscrimination and equality law, see, further, Christopher McCrudden, *Equality and Non-Discrimination*, in *ENGLISH PUBLIC LAW* (David Fedelman ed., 2nd ed. 2009).

¹⁴ See, in particular, *R (SB) v. Governors of Denbigh High School* [2007] 1 A.C. 100 at [65], where Lord Hoffmann refers to the “school’s wish to avoid clothes which were perceived by some Muslims (rightly or wrongly) as signifying adherence to an extremist version of the Muslim religion and to protect girls against external pressures.” See also *R. (on the application of X) v. Headteachers and Governors of Y School* [2007] H.R.L.R. 20.

¹⁵ The *JFS* case has constitutional importance in another way. It was among the first cases before the new United Kingdom Supreme Court, which was established by part 3 of the Constitutional Reform Act 2005 and started work on October 1, 2009, taking over the judicial functions of the House of Lords.

rights as encapsulating the values that the legal system holds dear. Too little attention is often paid to the enactment and interpretation of “ordinary” legislation. In Britain, for example, in addition to the Human Rights Act, there has also been a considerable expansion of the concept of equality to the point of it becoming a quasi-constitutional principle. This led to an expansion in the areas in which equality and nondiscrimination are thought to be important; for example, a set of equality duties of public authorities to promote women’s equality considerably expanded the areas to which gender equality applied. Similarly, in terms of the types of characteristics protected, this led to an expansion of the protections against discrimination on the grounds of religion, belief, and sexual orientation. The quasi-constitutional status of the equality principle further underpinned the incorporation into domestic law of the Human Rights Act and, with it, Article 14 ECHR, the Convention’s general prohibition against discrimination.

However, there has also been a significant change in the perceived function of the equality principle and not just its constitutional status. The sheer breadth of the characteristics protected by Article 14, together with the significant expansion of the number of characteristics covered by the protections of statutory antidiscrimination law (deriving, in part, from European Union legal obligations), has further pushed the courts into subtly changing the function of the equality principle. In some ways, popular and academic rationalizations as to the purpose of antidiscrimination law have mirrored political developments. When antidiscrimination law mostly involved just race and gender, the theoretical debate mostly concerned whether the law was intended to promote an ideal of individual or group justice. With the rise of multiculturalism and the expansion of the protectorate covered by antidiscrimination law, the debate concerned the extent to which issues of recognition, voice, participation, and the promotion of diversity should become the central rationales for antidiscrimination. As equality law in Britain is increasingly seen as a branch of human rights law, its purpose has more recently been articulated as advancing notions of human dignity.¹⁶

What is particularly problematic about this debate on the theoretical foundations of antidiscrimination law is the extent to which each generation appears to layer its understanding on top of the preexisting debates. There has been a significant shift in how the equality principle has come to be justified, with considerably greater emphasis on its role in protecting an individual’s self-identity and considerably less emphasis, for example, on seeing such legislation as essentially addressing the economic disadvantages of groups. And this, of course, is consistent with the trend toward the growth of identity politics in British society more broadly.

Since 2000, the role of the equality principle has also subtly changed from being initially concerned with protecting ethnic minority groups and individuals within these groups, to being used in limiting the activities of these groups and individuals

¹⁶ See R. Allen QC. & G. Moon, *Dignity Discourse in Discrimination Law: A Better Route to Equality*, 6 E.H.R.L.R. 610 (2006). See also, e.g. *McFarlane v Relate Avon Ltd*, Employment Appeal Tribunal, 2009 W.L. 4113826 at [3] describing the employer’s code of ethics on discrimination as a way to respect “the value and dignity of clients (and colleagues).” See also *Ladele v. London Borough of Islington* [2009] E.W.C.A. Civ 1357 at [8], where the council’s equality policy is called “Dignity for All.”

where they appear to conflict with others' claimed rights to equality, such as women or gays, or where the conflict is between the equality rights of the ethnic community and other values, which are seen to conflict with these. Mostly, resolving these tensions has required that carefully worked-out, indeed, sometimes elaborate compromises be incorporated into the emerging corpus of antidiscrimination legislation, whether at the EU level¹⁷ or in Westminster. Increasingly, policy statements have also stressed that the cultural and religious practices of ethnic minorities are limited by the need for such communities to conform to Western liberal values, including the protection of human rights. Antidiscrimination law has morphed significantly from being a central pillar of multiculturalism to becoming a central pillar of post-multiculturalism. So, too, the equality principle is becoming important for those who are skeptical of the role of religion in public life generally, enabling them to argue that particular religious beliefs or practices discriminate, in particular, on the grounds of gender and sexual orientation.¹⁸

No longer able to rely on political or legislative compromises based on negotiation between civil society and religious authorities, and forced into a judicial forum in which issues of principle are seen to arise, those who would defend particular minority ethnic or Judeo-Christian religious beliefs or practices are required to articulate their defense in liberal, principled terms. This has led to a renewed interest in, and use of, the principle of freedom of religion as a principle of equal or superior weight, when it comes to challenges to religious beliefs or practices based on equality¹⁹ or other human rights grounds.²⁰ The stage is thus set, in many of the most recent cases, for

¹⁷ European Union law now influences, more and more, both the distinction between, and the meaning of, direct and indirect discrimination because these concepts form the basis of EC antidiscrimination law. So, for example, in the context of gender discrimination, the European Court of Justice's decisions significantly influence the approach taken by British domestic courts, even where EU law does not apply. The *JFS* case did not, however, engage with EU law directly. Theoretically, EU antidiscrimination law might have been involved because the Race Relations Act 1976 implemented the Race Directive in British law and should, therefore, be interpreted in the light of Race Directive. However, in comparison with British law prohibiting race discrimination (which dates back to 1965), EC antidiscrimination law dates only from 2000, when the Race Directive was agreed, and this directive was to be implemented by 19 July 2003. By the time the *JFS* case was in the Supreme Court, there were no relevant decisions of the European Court of Justice concerning that directive. Perhaps correctly, the decisions of the domestic British courts were seen as likely to influence the interpretations of the ECJ in this area, rather than the reverse. The issue was seen as one involving the interpretation of British domestic race discrimination law.

¹⁸ See, e.g., *Catholic Care (Diocese of Leeds) v. The Charity Commission for England and Wales* [2010] E.W.H.C. 520 (Ch), in which the Charity Commission's decision to refuse to accept amendments to a Catholic adoption agency's charitable instruments that discriminated on grounds of sexual orientation was overturned. See also *Glasgow City Council v McNab* 2007 W.L. 555763, in which the claimant argued, successfully, that he, an atheist teacher working in a Roman Catholic school, had been unlawfully discriminated against on religious grounds by the City Council, which was responsible for making "pastoral care" appointments to the school.

¹⁹ See, e.g., *R. (on the application of X) v. Headteachers and Governors of Y School* [2007] H.R.L.R. 20, in which a Muslim girl unsuccessfully challenged the refusal of her school to allow her to wear a veil which covered the entire face apart from her eyes (the niqab) as contrary to her freedom of religion.

²⁰ See, in particular, *R (Williamson) v. Secretary of State for Education and Employment* [2005] 2 A.C. 246, in which parents and teachers at a Christian school challenged the ban on the use of corporal punishment in private schools as incompatible with their freedom of religion.

a legal conflict between freedom of religion and freedom from discrimination. As if that were not sufficiently complicated, there is a further legal complexity because the principle of freedom from discrimination now includes not just freedom from discrimination on the grounds of gender and sexual orientation—the grounds most likely to be used as the basis for liberal criticism of religious practices and beliefs—but also protection from discrimination on the basis of religion itself. Thus, there is a potential conflict between the different grounds of nondiscrimination,²¹ as well as between freedom of religion and nondiscrimination.

One of the effects, perhaps unintended, of these conflicts' public adjudication on the basis of principle is that the dispute frequently takes on a high degree of political significance for the groups and individuals concerned, and this may lead to significantly greater difficulties in achieving compromises before the issue reaches the point of litigation. In the *X* case, for example, it is noteworthy that *X*'s elder sisters had been allowed to wear exactly the same style of veil the use of which *X* was denied. Clashes of principle appear more likely to result in rules having to be introduced to attempt to resolve them, leading to greater inflexibility when the individual case is considered. In the *X* case, Justice Silber hints at this when he distinguishes the wearing of the niqab by the sisters, when there was no mention of whether niqabs may be worn, and a situation where it is expressly stated that niqabs may be worn, for the purposes of assessing the consequences. The latter gives rise both to more publicity and, by implication, to greater approval than the former informal permission.²²

3. *JFS* as a race discrimination case

The Jewish community in Britain has several branches, and the Orthodox branch is but one (albeit the largest), and these differ, among other things, on the interpretation of who is Jewish and on who has the authority to decide. There are branches that are both more “conservative,” and more “liberal.” *E* and *M* are both Masorti Jews, which is one of the more liberal branches of Judaism. *E*, the father, was recognized as Jewish by the OCR but *M*'s mother was not so recognized. She is Italian and originally Catholic, although she had converted to Judaism under the auspices of a non-Orthodox synagogue. However, her conversion was not recognized by the OCR. *M*'s application for admission to *JFS* was rejected as he did not satisfy the OCR requirement of being Jewish. According to the OCR, the mother was herself not Jewish by reason of matrilineal descent, nor had she converted according to Orthodox requirements.

²¹ See, e.g., *Ladele v. London Borough of Islington* [2009] E.W.C.A. Civ 1357, in which the claimant unsuccessfully claimed that the local authority discriminated against her on religious grounds by requiring her as a registrar to register “civil partnerships” between homosexual couples. See also *McFarlane v. Relate Avon Ltd.* [2010] E.W.C.A. Civ 880, in which the claimant (who believed that same-sex activity was sinful and that he should do nothing to endorse it) unsuccessfully claimed religious discrimination against his employer, which provided counseling services concerning sexual issues to heterosexual and homosexual couples and which was committed to nondiscrimination on grounds of sexual orientation.

²² *R. (on the application of X) v. Headteachers and Governors of Y School* [2007] H.R.L.R. 20, at [92].

M was not, therefore, Jewish by reason of descent from a Jewish mother. M was not himself converted according to Orthodox principles; nor was he undertaking a course of conversion according to Orthodox principles. M was, however, recognized as Jewish by the Masorti community on the basis of the conversion of his mother. M considered himself to be Jewish.

There are two aspects to the case that need to be clarified at this point, particularly for readers outside the United Kingdom, who may be less familiar with the context. All the parties to the case accepted that JFS had engaged in religious discrimination. The Equality Act 2006 had, indeed, introduced a prohibition on religious discrimination in school admissions, though that could not be the basis for the application for judicial review of the administrative actions of public authorities because JFS was designated as a Jewish faith school and, therefore, fell within an exception permitting religious discrimination in admissions incorporated in the 2006 Act. In the new United Kingdom Supreme Court, therefore, there was no further consideration given to the religious discrimination issue, as such, because of the statutory exception. It is conceivable that the exception might itself have been questioned under the Human Rights Act;²³ however, that was not the basis of E's case. There was neither an attempt to challenge the existence of faith schools themselves nor to challenge the ability of such schools to choose to admit members of the religion to which the school subscribed.

It may also be thought noteworthy that JFS is a school that receives government funding and that this should, in some way, have affected the outcome of the case. Some might be prepared to permit faith schools to exist but, nevertheless, would object to such schools' receiving public funding. This approach is not the approach adopted in Britain. Faith schools associated with several different religions receive a significant proportion of their funding from the public purse. Legally, however, this issue was, again, largely irrelevant legally. The legal result would have been the same whether or not the school was in receipt of public funds. The *JFS* case did not, ostensibly at least, involve what in the United States would be called an establishment issue in the First Amendment context, where the separation of church and state requires that religious schools should not receive state subsidies.

The case was fought, instead, on the basis of whether the school's admissions policy, favoring those who were Jewish as defined by the OCR, was discriminatory on grounds of ethnic origin. The Race Relations Act 1976 provided that discrimination in school admissions was prohibited if such discrimination was on racial grounds, and, unlike under the Equality Act 2006, there was no exception provided for faith schools from this provision. Discrimination on racial grounds was specifically defined in section 3 of the 1976 Act as including "colour, race, nationality or ethnic or national origins." This is, therefore, a broad approach to the meaning of "race"; it would include, as can be seen, discrimination on grounds of nationality and national origins, as well. No argument was made, therefore, on behalf of the school that selecting someone who

²³ Questioned, in the sense that it might conceivably have been interpreted narrowly under section 3 HRA 1998, in order to comply with Article 9, or have given rise to a declaration of incompatibility under section 4 HRA 1998.

was Jewish was selecting on the basis of “national origin,” as that would have been to concede that the school was acting unlawfully. The way the case was formulated was that the discrimination was on grounds of M’s “ethnic origin.”

The other major legal issue involved the meaning of “discrimination,” which is defined in the 1976 Act as including both “direct” discrimination and “indirect” discrimination on the basis of ethnic origin. The distinction between direct and indirect discrimination was originally intended to reflect the distinction between the “disparate treatment” and “disparate impact” tests of discrimination in the United States statutory context, where “direct discrimination” is seen as equivalent to “disparate treatment” and “indirect discrimination” is seen as equivalent to “disparate impact.” We shall see, however, that the meaning of both direct and indirect discrimination have steadily moved away from their roots in United States law and taken on a life of their own. E challenged the admissions policy of JFS as directly discriminating against M on the grounds of his ethnic origins contrary to section 1(1)(a) of the Race Relations Act 1976. Alternatively, E claimed that the policy was indirectly discriminatory. The High Court rejected both principal claims. The Court of Appeal unanimously reversed the High Court, holding that JFS directly discriminated against M on the grounds of his ethnic origins. JFS appealed to the Supreme Court, and the case was decided in December 2009 by a panel of nine justices.²⁴ The Supreme Court dismissed the appeal by JFS.

On the direct discrimination issue, the decision was by a majority of five (Lord Phillips, Lady Hale, Lord Mance, Lord Kerr, and Lord Clarke) to four (Lord Hope, Lord Rodger, Lord Walker, and Lord Brown). The majority held that JFS had directly discriminated against M on grounds of his ethnic origins.

We need to consider more carefully at this point the meaning that should be attributed to the notion of “being Jewish” in this context. In previous cases, lower courts had determined that discriminating against someone in recruitment to employment because that person was Jewish constituted discrimination on grounds of that person’s ethnic origins.²⁵ It was accepted on all sides in the *JFS* case that the protection from direct discrimination was symmetrical, that is, that it protected someone from being discriminated against on the basis that they were not Jewish in the same way that it protected someone from being discriminated against on the basis that they were Jewish. This appeared, therefore, to be a significant problem for the school. If discriminating in employment on the basis that someone were Jewish amounted to direct discrimination, then, surely, the school was equally and directly discriminating, in school’s admissions policy, because M was not Jewish, and that was, indeed, the gist of E’s case.

²⁴ Lord Phillips (president), Lord Hope (deputy president), Lord Rodger, Lord Walker, Lady Hale, Lord Brown, Lord Mance, Lord Kerr, Lord Clarke. The Judicial Committee of the House of Lords, which the Supreme Court replaced, usually sat in panels of five, so the appointment of a panel of nine legitimately can be seen as an indication either of the importance attached to the case by the Court or an indication of the potential legal difficulty of the case.

²⁵ *Seide v. Gillette Industries Ltd* [1980] I.R.L.R. 427.

In response, however, the school sought to make a distinction between two different ways in which someone might be regarded as Jewish. The school relied on a distinction between a person's being regarded as Jewish in the ethnic sense and a person's being considered Jewish in the religious sense. The two were not the same, said the school, and M was a perfect example of when the distinction applied. The OCR acknowledged that M was ethnically Jewish, in the sense that he self-identified as Jewish; he was significantly involved with the Jewish community in various ways, and he was accepted as Jewish by at least parts of the community. So, if, for example, an anti-Semitic admissions officer at a non-faith-based state school refused to admit him because he was Jewish, that should be regarded as race discrimination because he was being discriminated against on the grounds of his Jewish ethnicity. This approach to determining whether a person was ethnically Jewish was based on an earlier case decided by the House of Lords, *Mandla v. Dowell-Lee*,²⁶ in which the Court set out the criteria for determining whether a group was an "ethnic" group for the purposes of applying the concept of indirect discrimination in the Race Relations Act. In the *Mandla* case, the Court held that Sikhs were an "ethnic group." The House of Lords had emphasized in *Mandla* that, in determining the meaning of "ethnicity," the approach taken by the Court of Appeal in that case had been incorrect in emphasizing a biological approach, whereas the House of Lords adopted a broader sociological or anthropological approach.

Although the OCR acknowledged M as "ethnically Jewish," in the sense of *Mandla v. Dowell-Lee*,²⁷ the OCR did not acknowledge that he was "religiously Jewish," in the sense determined by *halacha*. Therefore, the school argued that it was not discriminating on the grounds of his ethnicity but on the grounds that he was not of the Jewish religion. Whether or not he claimed to be an adherent of the Jewish faith, and whether or not he practiced the Jewish faith by going to synagogue and keeping kosher, was irrelevant to whether he was of the Jewish religion, according to Orthodox principles.

The problem for the school (and the key to E's case) was that the school's approach inappropriately emphasized the absence of any *intention* on the OCR's part to discriminate on a basis of ethnicity. However, one of the major ways in which the British concept of "direct discrimination" has diverged from the American concept of "disparate treatment" discrimination relates to the relevance of the perpetrator's intention or motive. Whereas in the United States, the concept of "disparate treatment" clearly involves an examination into the purpose of the alleged perpetrator's actions, this has been an area of significant debate in the British courts. In *James v. Eastleigh Borough Council*,²⁸ the House of Lords held that a local authority was directly discriminating on grounds of gender when the council charged those who had passed retirement age less than those who had yet to reach retirement age for admission to a local facility controlled by the council. At that time, the retirement age for women was sixty, whereas that for men was sixty-five. The council's intention was not to disadvantage women

²⁶ [1983] 2 A.C. 548.

²⁷ [1983] 2 A.C. 548.

²⁸ *James v. Eastleigh Borough Council* [1990] 2 A.C. 751.

but to structure admission charges in a way that took into account that the employed were more likely to have more disposable income than those who were not. On the grounds of social justice, therefore, the council had introduced variable charges based on retirement age. The House of Lords held, however, that this amounted to direct discrimination. The test for direct discrimination, held the majority, was whether “but for” the gender of the person, they would have been treated less favorably than they were. Applied to the facts of *James*, then, the majority held that the man would not have been treated less favorably “but for” the fact of his gender, given that all men retired at sixty-five and all women at sixty.

The *James* case has been controversial, and the implications of its adoption of a “but for” test have been much debated. Unsurprisingly, M relied on the *James* approach, arguing that but for the fact that the OCR considered M not Jewish, he would have been admitted to the school. On the one hand, M sought to argue that the religious test of whether a person was Jewish was, in itself, a test of ethnicity because it relied on the idea of descent from the mother, and descent was, in itself, a test of ethnicity because it concentrated on a person’s origins. It was clearly open to the school in the *JFS* case to seek to have the *James* approach overturned, but this was not the tactic adopted. Instead, the approach taken by the school was to argue that the *James* case should be seen as involving a very specific set of facts, where there was a complete overlap between the category of being male and the category of not being retired. Without seeking to overturn the *James* approach, therefore, the school sought to distinguish *James* by saying that in the *JFS* context there was not a complete overlap between being “ethnically Jewish” and being “religiously Jewish.” An important aspect of this argument was the possibility of conversion, since a person could qualify as a member of the Jewish religion by himself or herself converting or by descent from a convert.

The minority of the Supreme Court, broadly speaking, adopted the approach advocated by the school. In identifying the grounds on which JFS refused to admit M to the school, the Court should adopt a subjective approach that takes account of the motive and intention of JFS, the OCR, and the Chief Rabbi.²⁹ JFS, the OCR, and the Chief Rabbi were subjectively concerned solely with M’s religious status, as determined by Jewish religious law. There was no cause to doubt the Chief Rabbi’s frankness or good faith in this matter.³⁰ The availability of conversion demonstrated that the test applied was inherently of a religious rather than racial character.³¹ It was inapt to describe the religious dimension of the test that was applied by JFS as a mere motive.³² The appropriate comparator for M in this case is a child whose mother had converted under Orthodox Jewish auspices. The basis for a difference in treatment between M and such a child would be that the latter’s mother had completed an approved course of Orthodox conversion.³³

²⁹ Para [195]–[197] per Lord Hope.

³⁰ Para [201] per Lord Hope.

³¹ Para [203] per Lord Hope.

³² Paras [201] per Lord Hope; [227] per Lord Rodger.

³³ Paras [229]–[230] per Lord Rodger.

The majority of the Supreme Court, however, held that in determining whether there is direct discrimination on grounds of ethnic origins for the purposes of the 1976 Act, the Court must determine, as a question of fact, whether the victim's ethnic origins are the *factual* criterion that determined the decision made by the discriminator.³⁴ If so, the motive for the discrimination and the reason why the discriminator considered the victim's ethnic origins significant are irrelevant.³⁵ Where the factual criteria upon which discriminatory treatment is based are unclear, unconscious, or subject to dispute the Court will consider the mental processes of the discriminator in order to infer, as a question of fact from the available evidence, whether there is discrimination on a prohibited ground.³⁶ It is only necessary, however, to consider the mental processes of the discriminator where the factual criteria underpinning the discrimination are unclear.³⁷ Direct discrimination does not require that the discriminator intends to behave in a discriminatory manner or that he realizes that he is doing so.³⁸

There was, according to the majority, no need for any consideration of mental processes in the *JFS* case since the factual criterion that determined the refusal to admit M to JFS was clear: namely, the fact that he was not descended in the matrilineal line from a woman recognized by the OCR as Jewish. The subjective state of mind of JFS, the OCR, and the Chief Rabbi was, therefore, irrelevant.³⁹ The crucial question to be determined was whether this requirement was properly characterized as referring to M's ethnic origins.⁴⁰ The test applied by JFS, in fact, focused on the ethnicity of the women from whom M is descended. Whether such women were themselves born as Jews or converted in a manner recognized by the OCR, the only basis upon which M would be deemed to satisfy the test for admission to JFS, would be that he was descended in the matrilineal line from a woman recognized by the OCR as Jewish.⁴¹

It was stressed by the majority that, while it was possible for women to convert to Judaism in a manner recognized by the OCR and thus confer Orthodox Jewish status on their offspring, the requirement of undergoing such conversion itself constituted a significant and onerous burden that was not applicable to those born with the requisite ethnic origins. This was seen as further illustrating the essentially ethnic nature of the OCR's test.⁴² The test of matrilineal descent adopted by JFS and the OCR was one of ethnic origins. The reason that M was denied admission to JFS was because of his mother's ethnic origins, which were not, according to *halacha*, Jewish. She was not descended in the matrilineal line from the original Jewish people. There can be no doubt that the Jewish people are an ethnic group within the meaning of the 1976 Act. While JFS and the OCR would have overlooked this fact if M's mother had undergone

³⁴ Paras [13], [16], [20] and [62].

³⁵ Paras [20], [22], [62] and [142].

³⁶ Paras [21], [64], [115] and [133].

³⁷ Para [114].

³⁸ Para [57].

³⁹ Paras [23], [26], [65], [78], [127], [132], [136], [141] and [147]–[148].

⁴⁰ Paras [27], [55] and [65].

⁴¹ Para [41] per Lord Phillips.

⁴² Para [42] per Lord Phillips.

an approved course of Orthodox conversion, this could not alter the fundamental nature of the test being applied. If M's mother herself was of the requisite ethnic origins in her matrilineal line no conversion requirement would be imposed. It could not be said that M was treated adversely because of *his* religious beliefs. JFS and the OCR were indifferent to these and focused solely on whether M satisfied the test of matrilineal descent.⁴³

Direct discrimination on grounds of ethnic origins under the 1976 Act not only encompasses adverse treatment based on membership in an ethnic group as defined in the terms elucidated by the House of Lords in *Mandla v. Dowell-Lee*.⁴⁴ The 1976 Act also prohibits discrimination with reference to ethnic origins in a narrower sense, where reference is made to a person's lineage or descent.⁴⁵ The test applied by JFS and the OCR focuses on genealogical descent from a particular people, enlarged from time to time by the assimilation of converts. Such a test is one that is based on ethnic origins.⁴⁶ This conclusion is buttressed by the underlying policy of the 1976 Act, which is that people must be treated as individuals and not assumed to be like other members of a group; thus, treating an individual less favorably because of his ancestry ignores his unique characteristics and attributes and fails to respect his autonomy and individuality. The reason for the refusal to admit M to JFS was his lack of the requisite ethnic origins, namely, the absence of a matrilineal connection to Orthodox Judaism.⁴⁷ M's ethnic origins encompass, among other things, his paternal Jewish lineage and his descent from an Italian Roman Catholic mother. In denying M admission on the basis that he lacks a matrilineal Orthodox Jewish antecedent, JFS discriminated against him on grounds of his ethnic origins.⁴⁸

Stepping back from the details of the judgments, we can see that the central feature of the *JFS* case is the complex relationship between ethnicity and religion in defining membership in the Jewish religion and in the use of such membership in the allocation of places at a Jewish school. The applicant in *JFS* used antidiscrimination law prohibiting race and ethnic discrimination, generated in the multicultural phase, to challenge successfully the use of religious-membership criteria that were thought protected by a political compromise reached during the pre-multicultural phase subsequently confirmed in the legislative compromises surrounding the scope of freedom from religious discrimination. The understanding of the function of this race-discrimination law, however, has changed subtly from its original understanding. In the *JFS* case, the race-discrimination law is seen through the lens of a post-multicultural skepticism regarding religious and ethnocultural beliefs that appear inconsistent with the liberal values of equality—when viewed as protecting individualized, self-defined identity.

⁴³ Paras [66] and [67] per Lady Hale.

⁴⁴ [1983] 2 AC 548.

⁴⁵ Paras [80]–[84] per Lord Mance.

⁴⁶ Para [86] per Lord Mance.

⁴⁷ Para [112] per Lord Kerr.

⁴⁸ Paras [121]–[122] per Lord Kerr.

4. JFS as a freedom-of-religion issue: The individual right to “manifest” one’s faith

Had the issue been fought entirely at the “constitutional” level, such as under the Human Rights Act, the liberal value of equality in Article 14 ECHR would have been balanced, to some extent at least,⁴⁹ by the liberal value of freedom of religion, protected in Article 9 ECHR, because discrimination under Article 14 may be “justified,” where it is necessary to secure the rights and freedoms of others. However, the defenders of the use of the contested-membership criteria were unable to balance the liberal value of equality, protected by the race-discrimination legislation, with the liberal value of freedom of religion, because the issue was presented as a question of the *statutory* interpretation of the race-discrimination legislation alone. Since the race-discrimination laws were devised before the turn from pragmatic empiricism to principled constitutionalism and at a time when race-discrimination legislation was, in any case, thought to *support* freedom of religion in so far as it protected minority ethno-religious groups (such as Sikhs) from discrimination and to qualify it, it is not surprising that any tensions between the two were not addressed in the drafting of the legislation. The exclusion of any ability to mount a general defense based on the justification of direct discrimination, unlike at the “constitutional” level, meant that the defenders of the use of the membership criteria were unable to use a freedom-of-religion argument to any real advantage in the interpretation of the race legislation and were forced, instead, to argue—unsuccessfully—that the use of these membership criteria simply did not constitute race or ethnic discrimination in the first place.

However, this is not to say that the different way in which a freedom of religion argument would have been argued would have led to different results. In the context of indirect discrimination, where the issue of justification arose, and freedom of religion was addressed directly, JFS was equally unsuccessful in defending its use of the contested-membership criteria. To understand why, we need to consider the understanding of freedom of religion that is emerging in British and European human rights law.

We can begin by distinguishing three different ways in which we may conceive of the relationship between religion and the public sphere. First, we can think of religion as an aspect of an individual’s identity and belief system. In that context, freedom of religion is understood as an individual right, and the issue often becomes one of how far the choices that an individual makes, based on this set of individual religious beliefs, are protected or constrained by law. For example, there has been a running controversy in Malaysia about whether a person classified as a Muslim should be allowed to convert to Christianity without the permission of the Shari’a court. Freedom of religion, seen from the point of view of the individual, can be viewed as encompassing two aspects: the freedom to believe what one’s religion teaches and the freedom to

⁴⁹ Although we shall see, subsequently, that the weight of Article 9 is reduced by the narrow interpretation to which it has been subject by the ECtHR. *See below*, at page 21ff. This section and the next draw on Christopher McCrudden, *RELIGION, HUMAN RIGHTS, EQUALITY, AND THE PUBLIC SPHERE*, 13 *ECCLESIASTICAL L.J.* 26-38 (2011), reprinted with permission.

manifest that belief in certain actions, such as wearing a turban, if one is a male Sikh, or wearing a veil, if one is a Muslim woman.

It is noteworthy that the claimant in *JFS* did not formulate his claim directly in terms of his freedom of religion, which was a conceivable basis of argument. However, had he done so, he would have been met with a set of decisions from the British courts and the European Court of Human Rights (ECtHR) that were considerably less favorable to a claimant than was the claim under the Race Relations Act. In particular, the issue would have arisen as to whether there was an “interference” with his freedom of religion. This, in part, involves a court’s considering whether there was an alternative available to the claimant that allowed him to manifest his religion. The British courts, following the ECtHR, have taken a relatively respondent-friendly approach, holding in several cases that there were alternatives available and that any inconvenience that the claimant suffered was a result of the claimant’s own choice, which the claimant should be prepared to accept. So, in *R(SB) v. Governors of Denbigh High School*, Lord Bingham accepted that the ECtHR has “. . . not been at all ready to find an interference with the right to manifest religious belief or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practise or observe his or her religion without undue hardship or inconvenience.”⁵⁰ So, in the *X* case, for example, it was held that the availability of an alternative school that would have permitted the claimant to wear the niqab meant that there was no interference with her freedom of religion when her present school refused her permission to do so.⁵¹

Not only is there no requirement under race-discrimination law to show the absence of an alternative, there has long been high authority that such an approach should *not* be adopted in the context of indirect discrimination.⁵² In that sense, race- and, possibly, religious-discrimination law based on ordinary statutes, somewhat ironically, is a much better bet for a claimant than a claim based on the “constitutionalized” freedom of religion protected by the HRA. One of the intriguing questions for the future is whether these “totally different”⁵³ approaches will continue or whether the pressures for consistency will lead to convergence.⁵⁴

⁵⁰ [2007] 1 A.C. 100, at [23].

⁵¹ *R (on the application of X) v. Headteachers and Governors of Y School* [2007] H.R.L.R. 20 at [40].

⁵² *Mandla v. Dowell Lee*, *supra*. See also *R. (Watkins-Singh) v. The Governing Body of Aberdare Girls’ High School* [2008] E.W.H.C. 1865 at [69], where Silber J accepts as a “particular disadvantage,” for the purposes of a race/religious discrimination claim, the refusal to allow the claimant to wear the kara without considering whether she might attend a different school.

⁵³ *R. (Watkins-Singh) v. The Governing Body of Aberdare Girls’ High School* [2008] E.W.H.C. 1865 at [3], per Silber J.

⁵⁴ In *Eweida v. British Airways Plc* [2010] E.W.C.A. Civ 80, Sedley LJ appears to want to distinguish protection from religious discrimination from protection from all other forms of (statutory) discrimination protections, perhaps thereby enabling a convergence between the interpretation of freedom from religious discrimination and freedom of religion, at [19] and [40]. So too, in *Ladele v. London Borough of Islington* [2009] E.W.C.A. Civ 1357, at [52], where the Court appears to have regard to similar issues in a context of indirect religious discrimination as would have been relevant in the context of freedom of religion.

We can think of religious freedom as having a second, associational aspect, and it is this aspect that features to a greater extent in the *JFS* case. In this sense, religion is seen as involving individuals associating together in formal or informal ways and practicing their religion in common with each other or, as we might say, in communion with each other. This relationship might or might not be formalized by the formation of a church. Seen in terms of rights, the issue becomes what rights a religious community or association or church have when they act in a way that impinges on the public domain. We have seen in Italy, for example, an issue arising as to how far a state-run school should be allowed to display the crucifix.⁵⁵ An important element in the German Constitutional Court's decision dealing with the display of the crucifix in Bavarian state schools was the desire of parents to be able to send their children to a school in which religious faith was manifested as something in common.⁵⁶

The European Court of Human Rights and, hence, British law have recognized Article 9 ECHR as encompassing the two dimensions to freedom of religion identified above. The right to freedom of religion in Article 9 has, according to the European Court, two complementary aspects: an individual aspect and a collective/community aspect. The Court, in *Hasan and Chaush v. Bulgaria*, said:

While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares. Article 9 lists a number of forms which manifestation of one's religion or belief may take, namely, worship, teaching, practice and observance.⁵⁷

The ECtHR regularly emphasizes that states should not underestimate the importance of the community dimension of the right.⁵⁸ As it said in *Hasan*, "The Court recalls that religious communities traditionally and universally exist in the form of organised structures. They abide by rules which are often seen by followers as being of a divine origin."⁵⁹ Article 9 ECHR must be interpreted and applied, "to allow a religious community "to associate freely, without arbitrary State intervention."⁶⁰ By way of example, it is uncontroversial that religious bodies and political parties can generally regulate their membership to include only those who share their beliefs and ideals.⁶¹

⁵⁵ *Lautsi v. Italy*, Grand Chamber, 18th March 2011.

⁵⁶ BVerfGE 93, 1; 1 BvR 1087/91, *Kruzifix-decision*, 12 May 1987, German Constitutional Court.

⁵⁷ (2002) 34 E.H.R.R. 55 at para [60].

⁵⁸ *Kokkinakis v. Greece* (1993) 17 E.H.R.R. 397, para [31].

⁵⁹ At para [62].

⁶⁰ *Moscow Branch of the Salvation Army v Russia* (2006) 44 E.H.R.R. 912 at paras [58] and [61].

⁶¹ *Associated Society of Locomotive Engineers and Firemen (ASLEF) v. United Kingdom* (2007) 45 E.H.R.R. 793, para [39]. See also *Taylor v. Kurtstag* 2005 (7) B.C.L.R. 705 (W), in which the High Court, Witwatersrand, held that the constitutional right to freedom of association meant that a Beth Din had the right to "excommunicate" (the court's term) a member of the local Jewish community as the court considered that there was no right to impose oneself on a religious community. Note, however, that in paragraph 40 of the *ASLEF* case, the court goes on to say: "This basic premise holds good where the association or trade union is a private and independent body, and is not, for example, through receipt of public funds or through the fulfillment of public duties imposed upon it, acting in a wider context, such as assisting the State in securing the enjoyment of rights and freedoms, where other considerations may well come into play" (emphasis added).

Moreover, the ECtHR has refused to permit states to interfere in the choice of leaders of particular churches. In a series of cases, the Court has held that the state must ensure that religious organizations retain their autonomy in relation to the selection of their own leaders.⁶² In *Hasan*, Article 9 was violated because of “an interference with the internal organization of the Muslim community.”⁶³

These two aspects of freedom of religion are often seen as involving different aspects of what American jurisprudence would call the “free exercise” of religion. We can, however, identify a third aspect of freedom of religion. This might be termed “freedom from religion,” or at least freedom from religion imposed as an exercise of state authority. In American constitutional terms, this can be seen as manifested in the requirement of the nonestablishment of religion. This concept comes in two different versions in Europe. The more limited version comes close to a requirement that the state simply should not favor one religion over another. The European Court of Human Rights has held that national governments cannot unreasonably discriminate between religions with regard to the requirements that the organized religions must fulfill.⁶⁴ Article 9 safeguards the right of one religion to be free to operate under conditions equal to other recognized churches, especially where the action of the state causes an unjustified restriction on the exercise of religious freedom in its collective dimension.⁶⁵ There is a rather stronger version of the nonestablishment principle: that the state should not be in the business of favoring religion over other beliefs. In France, *laïcité* is motivated by these concerns; the state should be neutral as between religion and other beliefs.

How to reconcile these three aspects of freedom of religion is enormously difficult, and the compromises that Western European nations made in the past are now under considerable strain, due, in part, to the growing importance of what we might, without meaning to be pejorative, call “marginal religions,” and the reception into Europe through migration of individuals from parts of the world in which religions other than Judaism and Christianity are dominant, in particular, Islam and Hinduism. Lord Walker in *Williamson* suggested that the “trend of authority (unsurprisingly in an age of increased multicultural societies and increasing respect for human rights) is towards a ‘newer, more expansive, reading’ of religion.”⁶⁶ The effect of attempting to rebalance the three aspects of freedom of religion to cope with these developments has, in turn, opened up considerable problems as to how we should view Judeo-Christian practices that, previously, had been relatively uncontroversial. When these developments are coupled with the growth of human rights thinking more generally, perhaps particularly ideas of equality, nondiscrimination, and multiculturalism, then it is unsurprising that the legal and political systems of several Western European countries are struggling.

⁶² See, e.g., *Metropolitan Church of Bessarabia v. Moldova* (2002) 35 E.H.R.R. 13, para. [117].

⁶³ *Hasan*, at para [82].

⁶⁴ *Canea Catholic Church v. Greece* (1997) 27 E.H.R.R. 521 (Commission Decision).

⁶⁵ *Metropolitan Church*, *supra* note 62.

⁶⁶ [2005] 2 A.C. 246 at [54] (internal citations omitted).

There are three recurring issues that typically arise in cases concerning freedom of religion. Each of these issues is indirectly considered in the *JFS* case. Even though the case was, as we have seen, primarily pleaded as a case concerning the interpretation of British antidiscrimination law, the potential for justifying indirect discrimination allowed arguments to be presented that freedom of religion constituted a valid reason why any adverse impact should nevertheless be permitted. The next sections consider how the different aspects of freedom of religion considered above were addressed in *JFS*.

5. Freedom of religion and the epistemological problem

The first issue typically involved in freedom-of-religion cases involves a set of closely related questions: What is a “religion” and what are “religious” beliefs and practices for the purposes of the protection of freedom of religion, together with the closely related issue of who decides these questions. Frequently, this set of questions boils down to the central question of whether the courts should decide if a particular practice is or is not central enough to what is claimed to be a religion in order to qualify for some degree of protection. This involves difficult questions relating to the institutional competence of the courts and the acceptable limits to the institutional autonomy of religious institutions. When the child in *Mandla v. Dowell-Lee*⁶⁷ wanted to wear his turban to a Church of England school, the Court decided that wearing a turban was an essential aspect of Sikhism. In practical terms, this often involves the difficulty of courts deciding what evidence is admissible and probative as to what practices or beliefs of a religion are central.⁶⁸

In the *JFS* case, however, the issue did not involve how central the issue was to the religion concerned (it was common ground that the criteria determining membership in the religion were central, if deeply contested, aspects of what constituted the Jewish religion) but, rather, how the Court should view the relationship between being Jewish as a matter of ethnicity and being Jewish as a matter of religion. The issues are similar, however. Both involve a potential conflict between the individualistic aspects of freedom of religion and the associational aspects. The child in the *JFS* case was denied admission to *JFS* because the OCR did not regard him as Jewish, although the boy considered himself Jewish. The Court considered detailed evidence regarding how the different branches of Judaism defined a person as Jewish and, indeed, how M himself viewed his relationship to the religion.

Attempting to resolve these disputes entails the difficult epistemological question of how courts can truly understand a normative system other than their own

⁶⁷ [1983] 2 A.C. 548.

⁶⁸ In *R. (on the application of X) v. Headteachers and Governors of Y School* [2007] H.R.L.R. 20, for example, the Court was called on to adjudicate between the evidence of two witnesses who disagreed as to whether Islam required that a woman’s face should be covered in the presence of a man, at [65]. A similar issue arose in *Watkins-Singh*, supra, at [28].

legal system. Until recently, English law was thought to embody a strong principle of abstention when these issues were raised. In several judicial decisions in the recent past the courts expressed a strong view that these issues were beyond their competence and authority. It is—or was—a basic principle of English law that the courts will not seek to intervene in relation to questions of religious law.⁶⁹ One of the noticeable changes in the last few years has been the extent to which this previous reticence has now been replaced with a much more self-confident willingness to adjudicate contested issues touching on the religious sphere.

Lawyers expect those writing about the law not just to adopt an external perspective, observing the law as a cultural phenomenon involving certain practices but also as a normative system that requires understanding from an internal perspective. Famously, H. L. A. Hart distinguished between external and internal points of view. Neil MacCormick subsequently distinguished between two components of Hart's internal point of view:

There is [the] “cognitively internal” point of view, from which conduct is appreciated and understood in terms of the standards which are being used by the agent as guiding standards: that is sufficient for an understanding of norms and the normative. But it is parasitic on—because it presupposes—the “volitionally internal” point of view: the point of view of an agent, who in some degree and for reasons which seem good to him has a volitional commitment to observance of a given pattern of conduct as a standard for himself or for other people or for both: his attitude includes, but is not included by, the “cognitively internal” attitude.⁷⁰

We should not, I think, expect judges to display a volitional commitment to religion in general, or to a particular religion, or to no religion. Indeed, we should expect judges *not* to display any such commitment. We can, however, legitimately expect the courts to adopt a “cognitively internal” point of view when considering religious issues. This point of view is missing, or only occasionally adopted, in several recent high-profile British judgments. Three examples must suffice, for the moment.

In *Surayanda v. The Welsh Ministers*,⁷¹ the Court of Appeal was asked to quash a ministerial decision to order the slaughter of a bullock, which was kept as a temple bullock by a community that followed the teachings of Krishna. The community believed that the slaughter of the bullock “would be a particularly sacrilegious act. A serious desecration of the temple, and comparable, in the Community's view, to the killing of a human being.”⁷² The community sought to have the court decide that the slaughter would be contrary to the community's freedom to manifest its religion as protected by Article 9. The Court of Appeal engaged in a proportionality analysis, attempting to balance the right to manifest a religion with the importance of preventing the spread

⁶⁹ See, for example, *R v. Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth ex parte Wachmann* [1992] 1 W.L.R. 1036, 1042G–1043B (Simon Brown J) approved by Lord Justice Hoffmann in the Court of Appeal in *R v. Disciplinary Committee of the Jockey Club ex parte The Aga Khan* [1993] 1 W.L.R. 909, 932G–H. See also *R. v. Rabbinical Commission for the Licensing of Shochetim, ex p Cohen*, (1987) TIMES, 22 December.

⁷⁰ NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 292 (1978).

⁷¹ [2007] E.W.C.A. Civ 893.

⁷² At [3].

of bovine tuberculosis. The community consistently argued that the ministers had failed to appreciate the full significance of its belief. Lord Justice Pill held that he had “no doubt that [the importance of these religious beliefs and practices] was brought home to the Minister,”⁷³ but one can legitimately doubt whether that can have been the case. It must surely be the case that if the minister had believed that the killing of the bullock was equivalent to the killing of a human being, the weight given to that belief would have been greater than it was.

Returning to the *JFS* case, Lord Phillips says this: “Membership of a religion or faith normally indicates some degree of conscious affiliation with the religion or faith on the part of the member” (emphasis added).⁷⁴ With respect, this seems to bear all the hallmarks of an external viewpoint, not a cognitively internal viewpoint. Evidence was presented on behalf of the Chief Rabbi that explicitly denied the need for any such “conscious affiliation” in Judaism. Indeed, a central aspect of the Chief Rabbi’s argument was that one could be Jewish according to religious law and explicitly reject any conscious affiliation with the Jewish religion or faith. A comparison between Judaism and “normal” religions is a significant (and somewhat surprising) development.

Perhaps even more noteworthy is the approach taken by Lord Justice Sedley, in the subsequent case of *Eweida v. British Airways*.⁷⁵ In that case, he contrasted, on the one hand, protection from discrimination on the grounds of age, disability, gender reassignment, marriage and civil partnership, race, gender, and sexual orientation with, on the other hand, protection from discrimination on grounds of religion or belief. He continued: “One cannot help observing that all of these apart from religion or belief are objective characteristics of individuals: *religion and belief alone are matters of choice*.”⁷⁶ Presumably, he does not intend, here, to refer to the choice of God, but to the choice of the individual. This, again, seems quite clearly to adopt an external viewpoint rather than a cognitively internal viewpoint. It is clear that several religions would simply not recognize themselves in this description, not least Orthodox Judaism. What appears to emerge is a somewhat Protestant view of religion. In moving to constitutional idealism, it seems, the courts must discipline other normative systems that may pose a challenge to the new normative ideals expressed by the courts. In moving to post-multiculturalism, it seems, the way to discipline these alternative normative systems is to be skeptical of religions that depart from an already accepted (and unthreatening) model.

6. Freedom of religion: Its rationale and the role of the “dignity” test

A second issue that commonly arises in freedom-of-religion litigation involves the question of what justification there is for a provision guaranteeing freedom of religion

⁷³ At [53].

⁷⁴ At [44].

⁷⁵ [2010] E.W.C.A. Civ 80.

⁷⁶ At [40] (emphasis added).

at all. For British courts, the challenge of constitutional idealism is that they are called on to articulate the ideals that underpin the new constitutional settlement. This appears to be particularly problematic when the courts have to consider the place of freedom of religion. Think of it this way. Assume, for the moment, that a bill of rights guaranteed freedom of association, freedom of speech, and freedom from discrimination (including on grounds of religion). Would anything be lost if there were no provision guaranteeing freedom of religion? We know, of course, of the origins of such protection. The idea dates at least from the need to resolve the religious wars in Europe that scarred much of the seventeenth and eighteenth centuries. Guaranteeing freedom of religion was seen as a means of maintaining civil peace.

For British courts, this appears to be more than merely a historical rationale. In *R (Williamson) v. Secretary of State for Education and Employment*, Lord Nicholls stressed that this reasoning remained significant. Respecting another's religious beliefs, he said, "enables [us] to live in harmony. This is one of the hallmarks of a civilized society. Unhappily, all too often this hallmark has been noticeable by its absence. Mutual tolerance has had a chequered history even in recent times. The history of most countries, if not all, has been marred by the evil consequences of religious and other intolerance."⁷⁷ The connection between religion and the potential for civil strife if religious passions are not moderated by mutual tolerance, therefore, provides an important background consideration against which to interpret the role of freedom of religion.

Where courts have a sense that a freedom-of-religion claim is likely to increase rather than decrease religious tensions, they tend to react negatively against those proposing change. It is noteworthy that in *R (SB) v. Governors of Denbigh High School*,⁷⁸ in upholding the compromise that the school had worked out over which types of Islamic dress to permit, Lord Bingham stressed the "period of harmony . . . to which the uniform policy was thought to contribute"; how the various styles were "acceptable to mainstream Muslim opinion"; that the changes proposed by the claimant "would or might have significant adverse repercussions"; and that the Court would be "irresponsible" to override the school "on a matter as sensitive as this." The "confrontational"⁷⁹ and the "threatening"⁸⁰ nature of the way in which the issue was raised by the claimants in the *Denbigh* case and the sense that an "extremist version of the Muslim religion"⁸¹ might be being promoted, will not have helped the applicant.

In *Eweida v. British Airways*, the claimant's case—that she be allowed to display a cross while wearing her uniform—can hardly have been helped by Lord Justice Sedley's "unease that a sectarian agenda appeared to underlie the claim."⁸² There is no sense in *JFS* that the claims made by the applicant were likely to generate sectarian tensions on the basis of religion (except within the Jewish community) or was, in any

⁷⁷ [2005] 2 A.C. 246, at [15], per Lord Nicholls.

⁷⁸ [2007] 1 A.C. at 34 (Lord Bingham).

⁷⁹ At [80], per Lord Scott.

⁸⁰ At [79], per Lord Scott.

⁸¹ At [65], per Lord Hoffmann.

⁸² [2010] E.W.C.A. Civ 80 at [25].

way, confrontational or extreme. Indeed, the opposite may be the case in the *JFS* case, where the OCR tended to be portrayed as the “extremists” and the applicants were portrayed as the modernizers. Lady Hale had said in the *Denbigh High School* case that: “The school’s task is . . . to promote the ability of people of diverse races, religions and cultures to live together in harmony.”⁸³ There is no sense that the majority in the Supreme Court in *JFS* accepted that the exclusionary approach adopted by the school would contribute to that end.

In *Williamson*, after all, Lord Nicholls had stressed the importance of the right of freedom of religion to the identity of the individual: “Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality.”⁸⁴ In *R (SB) v. Governors of Denbigh High School*, Lord Bingham⁸⁵ specifically approved the explanation by Justice Sachs in the South African Constitutional Court decision in *Christian Education South Africa v. Minister of Education*,⁸⁶ where he said:

There can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person’s dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer’s view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.

The European Court of Human Rights also considers that freedom of religion is important not only because it furthers the freedom of individuals but also because it is in the interests of the society as a whole. In *Moscow Branch of the Salvation Army v. Russia*, the Court stated: “It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.”⁸⁷ Seen from this perspective, the underpinnings of freedom of religion strengthened E’s claim, rather than the school’s.

It might be thought that the second, associational, aspect of freedom of religion would have strengthened the case for the OCR and the school. As the Court said in

⁸³ At [96].

⁸⁴ At [15].

⁸⁵ [2007] 1 A.C. at [20].

⁸⁶ *Christian Education South Africa v. Minister of Education* (CCT4/00) [2000] Z.A.C.C. 11; 2000 (4) S.A. 757; 2000 (10) B.C.L.R. 1051 (18 August 2000), at [36].

⁸⁷ (2007) 44 E.H.R.R. 46, at para [57].

Hasan: “Where the organisation of the religious community is at issue, Article 9 must be interpreted in the light of Article 11 of the Convention which safeguards associative life against unjustified State interference. Seen in this perspective, the believer’s right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention.”⁸⁸ The Court refers to this freedom from arbitrary intervention as the “autonomy” of the religious institution.⁸⁹

The importance of this organizational autonomy is stated by the Court to be derived from democracy. This emphasis on the collective dimension derived from democracy means that, for the ECtHR, it carries considerable weight:

Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual’s freedom of religion would become vulnerable.⁹⁰

For the Court of Human Rights, this “pluralism” is built “on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts.”⁹¹

However, this understanding of the purpose of freedom of religion has certain important implications for associational autonomy because the rationale of freedom of religion also incorporates its own limits. Certain manifestations of religious association are so unacceptable as to take the association outside the protection of Article 9 altogether. We can think of various examples in other jurisdictions of potentially unacceptable practices, such as the refusal of the Dutch Reformed Church in South Africa, until recently, to accept black members; or the practice, also now changed, of refusing to permit certain racial minorities to be confirmed as elders in the Mormon Church. It seems probable that the ECtHR would not be willing to accept an argument that Article 9 protects a racist religion. Such a religion is unlikely to survive the threshold requirement that the Court applied of “consistency with human dignity,” which is the test set out in *Campbell and Cosans v. United Kingdom*⁹² and accepted in the context of the British Human Rights Act by Lord Nicholls in *R (Williamson) v. Secretary of State for Education and Employment*.⁹³

This test is not uncontroversial and not fully tested. For example, when the ECtHR in *Campbell and Cosans* adopted this test, the Court developed the test in the context of

⁸⁸ At para [62].

⁸⁹ On the relationship between Article 9 and Article 11, see also *Church of Scientology Moscow v. Russia* (2008) 46 E.H.R.R. 16, at para [72].

⁹⁰ *Hasan*, para 62.

⁹¹ *Moscow Branch of the Salvation Army v. Russia* (2007) 44 E.H.R.R. 46, para 61.

⁹² (1982) 4 E.H.R.R. 293 at [36].

⁹³ [2005] 2 A.C. 246 at [23].

interpreting the limits of philosophical “convictions” in Article 2, Protocol 1, and not explicitly as a set of criteria by which to judge major world religions for the purposes of protection under Article 9. Some British judges have also expressed concern with the *Campbell and Cosans* threshold test. Lord Justice Rix has said that “[R]eligion is a controversial subject and there would be many who would argue that undoubted religious convictions are not worthy of respect or are not compatible with human dignity. It is in part to guard against such controversy that the Convention guarantees religious freedom.”⁹⁴ Lord Walker in *Williamson* has also said, more generally, that “the requirement that an opinion should be ‘worthy of respect in a “democratic society”’ begs too many questions, and that “in matters of human rights the court should not show liberal tolerance only to tolerant liberals.”⁹⁵ That unease, however, is unlikely to lead to a situation where religions are guaranteed significant degrees of autonomy in the way they organize themselves, if what they are attempting to protect shocks the conscience of the Court. It is more likely that the focus of attention will continue to fall on whether the religion’s practice is regarded as being “consistent . . . with human dignity.”

There is no clear meaning yet discernible as to what is or is not consistent with human dignity. We can say that there are several different conceptions of human dignity, and these differ significantly because there appears to be no consensus, politically or philosophically, on how the core of the concept is best understood.⁹⁶ They differ, in other words, in their understanding of what constitutes the intrinsic worth of the individual human being (the ontological claim); in their understanding of what forms of treatment between individuals are inconsistent with this worth (the relational claim); and in their understanding of what the detailed implications of accepting the ontological and relational claims are for the role of the state vis-à-vis the individual.

In the *JFS* case, there was no explicit application of the “dignity” test because Article 9 was relevant only to the interpretation of indirect discrimination. We have seen that there has been a consistent judicial interpretation that direct discrimination under the Race Relations Act cannot be “justified,” unlike with regard to indirect discrimination, and, therefore, Article 9 was not relevant. The majority held, therefore, that the fact that the rule adopted was of a religious character could not obscure or alter the fact that the content of the rule itself applied a test of ethnicity,⁹⁷ and the fact that a decision to discriminate on racial grounds was based upon a devout, venerable, and sincerely held religious belief or conviction could not inoculate or excuse such conduct from liability under the 1976 Act.⁹⁸ Much play was made in oral argument, however, of the undesirability of allowing illiberal religions to escape the restrictions

⁹⁴ (R (Williamson and others) v Secretary of State for Education and Employment [2003] Q.B. 1300 (CA) at [151].

⁹⁵ *Williamson*, at [60].

⁹⁶ Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655 (2008).

⁹⁷ Paras [129]–[131] per Lord Clarke)

⁹⁸ Paras [35], [92], [113] and [119]–[120]

of antidiscrimination law by claiming their practices were protected because they were religious.⁹⁹ We have seen earlier that the equality claim is now increasingly seen as an instantiation of human dignity. The dignity test for which manifestations of religious beliefs get to be recognized as legitimate enough even to be *prima facie* protected enables the courts to ground their move to post-multiculturalism on the central met-principle of human rights.

Yet, despite that, several members of the Court in *JFS*, who upheld the direct discrimination claim, were also clearly somewhat troubled by the implications of their decision, which was, in effect, to hold that the criteria for identifying membership in a major world religion were discriminatory under the Race Relations Act. Several justices emphasized that their judgments should not be read as criticizing the admissions policy of JFS on “moral” grounds or suggesting that any party to the case could be considered “racist,” in the commonly understood, pejorative sense.¹⁰⁰ Several also stated that it was arguable that an explicit statutory exemption should be provided from the provisions of the 1976 Act in order to allow Jewish faith schools to grant priority in admissions on the basis of matrilineal descent but that such an exemption was unquestionably a matter for Parliament, not for the courts,¹⁰¹ thus reverting to the (older) approach of regarding the appropriate place for accommodation to be in the legislature, a characteristic of the pre-constitutional idealist, and multicultural phases.

7. Freedom of religion and proportionality

The third issue most commonly confronted in freedom-of-religion litigation, at least in the United Kingdom, is the question of what weight should be given to freedom of religion when this freedom stands opposed to other values that we recognize to be important. In particular, given the prevalence of human rights talk, how should freedom of religion be balanced against other human rights, such as freedom of association and freedom from discrimination? The previous issue—what is the point of freedom of religion—is closely linked to this third issue, namely, the weight to be given to it when it conflicts with other rights. This is because the more the Court is convinced of the reasons why freedom of religion is important, the more likely it is to give it a strong weight.

Religions, even religions that are consistent with human dignity, are, of course, subject to constraints. However, the ECtHR has accepted that restrictions on the associational aspect of Article 9 should be strictly scrutinized: “The State’s power to protect its institutions and citizens from associations that might jeopardise them must be used sparingly, as exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that

⁹⁹ For an explicit acceptance of this argument, see *Ladele v. London Borough of Islington* [2009] E.W.C.A. Civ 1357, at [54]–[55], in which the prohibition of discrimination on grounds of sexual orientation was seen as promoting human dignity.

¹⁰⁰ Paras [9], [54], [124] and [156].

¹⁰¹ Paras [69]–[70] per Lady Hale.

freedom.”¹⁰² Indeed, in general, where there are conflicts between Article 9 and other rights protected by the European Convention on Human Rights, the ECtHR seems to give particular weight to the importance of the religious beliefs in relation to competing Convention provisions.¹⁰³

The ECtHR’s statements in *Manoussakis v. Greece* seem quite favorable to understanding Article 9 as an important interest to be weighed in the justifiability analysis without having to scrutinize the “acceptability” of the religion under the human dignity test. “The right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.”¹⁰⁴ This derives from the “State’s duty of neutrality and impartiality.”¹⁰⁵

As we have seen, this issue did not arise in the context of the direct discrimination claim in *JFS*, though it did arise in the context of the claim of indirect discrimination. The basic structure of the indirect discrimination claim involves several steps. The first step involves considering whether the policy had a greater adverse effect on particular ethnic groups rather than others (the prima facie issue); the second step involves considering whether, despite this greater adverse effect, the policy was nevertheless legitimate (the justification issue). The second stage opens up the possibility of arguing, as the school did, that the school’s freedom of religion should be weighed in the balance.

Only two of the justices clearly regarded the use of the contested-admissions criteria as justified. Lords Rodger and Brown would have allowed *JFS*’s appeal in its entirety and would have held that the policy was not indirectly discriminatory. The objective pursued by *JFS*’s admission policy, educating those children recognized by the OCR as Jewish, was irreconcilable with any approach that would give precedence to children not recognized as Jewish by the OCR in preference to children who were so recognized. *JFS*’s policy was, therefore, a rational way of giving effect to the legitimate aim pursued and could not be said to be disproportionate.¹⁰⁶ But Lords Rodger and Brown were alone.

Both Lord Phillips and Lady Hale held that since the admissions policy was directly discriminatory it could not be indirectly discriminatory, and they would not, or could not, go on to decide whether the policy would anyway have been indirectly discriminatory. For Lord Phillips, the case was one of impermissible direct discrimination, and thus it was unnecessary to address the claim of indirect discrimination.¹⁰⁷ For Lady Hale, direct and indirect discrimination were mutually exclusive; both concepts could not apply to a single case, concurrently; as this was a case of direct discrimination, it could not be one of indirect discrimination.¹⁰⁸

¹⁰² Para 62, Moscow Branch; para. [75], Church of Scientology.

¹⁰³ In both *Otto-Preminger-Institut v. Austria* 19 E.H.R.R. 34 and *Wingrove v. United Kingdom* 24 E.H.R.R. 1 the Court effectively gave precedence to freedom of religion over freedom of speech.

¹⁰⁴ 23 E.H.R.R. 387 at [47].

¹⁰⁵ *Church of Scientology Moscow v. Russia* (2008) 46 E.H.R.R. 16, at para [72].

¹⁰⁶ Para [233] per Lord Rodger; para [256] per Lord Brown.

¹⁰⁷ Para [51] per Lord Phillips.

¹⁰⁸ Para [57] per Lady Hale.

The other five members of the Supreme Court, however, were prepared to entertain the issue and considered that the contested-admissions criteria amounted to unjustified indirect discrimination. Lord Mance thought that, *ex hypothesi*, if the case was not direct discrimination, then the policy was indirectly discriminatory.¹⁰⁹ The policy pursued the legitimate aim of effectuating the obligation imposed by Jewish religious law to educate those regarded by the OCR as Jewish.¹¹⁰ However, JFS had not demonstrated and—on the basis of the evidence before the Court—could not demonstrate that the measures it adopted, given the gravity of their adverse effect upon individuals such as M, were a proportionate means of pursuing this aim.¹¹¹

Lords Hope and Walker, in the minority on the *direct* discrimination issue, also considered that JFS had *indirectly* discriminated against M as the school had failed to demonstrate that its policy was proportionate. Children who were not of Jewish ethnic origin in the matrilineal line were placed at a disadvantage by JFS's admission policy relative to those who did possess the requisite ethnic origins.¹¹² JFS's policy pursued the legitimate aim of educating those regarded as Jewish by the OCR within an educational environment espousing and practicing the tenets of Orthodox Judaism.¹¹³ The 1976 Act placed the onus on JFS to demonstrate that, in formulating its policy, it had considered carefully the adverse effect of its policy on M and other children in his position and had balanced this against what was required to give effect to the legitimate aim it sought to further.¹¹⁴ There was no evidence that JFS considered whether less discriminatory means might be adopted which would not undermine its religious ethos: the failure to consider alternate, potentially less discriminatory, admission policies means that JFS is not entitled to a finding that the means which it has employed are proportionate.¹¹⁵

Interestingly, no attention was paid to the earlier legislative attempt to increase the weight given to religion in this balancing exercise. Several organized religions in the United Kingdom had come together to press for increased weight to be given to religious sensitivities when Parliament was considering what became the Human Rights Act, and section 13(1) of the HRA was the result. This requires that particular "importance" should be accorded to Article 9.¹¹⁶ Early commentators tended to regard the provision as having no real content.¹¹⁷ Several judicial decisions since then have

¹⁰⁹ Para [103].

¹¹⁰ Paras [95]–[96].

¹¹¹ Paras [100]–[103], [123] and [154].

¹¹² Para [205].

¹¹³ Para [209].

¹¹⁴ Para [210].

¹¹⁵ Paras [212] and [214].

¹¹⁶ A similar requirement regarding Article 10 is to be found in section 12(4) of the HRA regarding freedom of expression. There have also been several decisions in which section 12(4) has been considered. *e.g.*, In re BBC; In re Attorney General's Reference (No 3 of 1999) [2009] U.K.H.L. 34 at [16] (Lord Hope); Campbell v. MGN Ltd [2004] 2 A.C. 457 at [111] (Lord Hope); Douglas v. Hello! Ltd [2001] Q.B. 967 at [133]; In re S (A Child) (Identification: Restrictions on Publication) [2004] Fam 43 at [52] (Hale LJ); Ashdown v. Telegraph Group Ltd [2002] Ch 149 at [27] (Lord Phillips).

¹¹⁷ Cf. David Pannick, in Lester and Pannick, 2nd ed, page 67, who regards it as having "no logical or legal justification."

considered section 13(1).¹¹⁸ The upshot of these cases can be set out in the form of two propositions: first, the provision does not give greater weight to Article 9 than it would otherwise enjoy under the Convention. Second, because the provision refers to the whole right (that is, including the exception in paragraph 2), the provision requires as much weight to be given to the limits of the right as to the prima facie right itself.

Rather than taking a rule-based approach to the weight given to a freedom-of-religion interest in the indirect discrimination context, the Supreme Court adopted a case-by-case proportionality approach. This has the effect of emphasizing the importance of interests, articulated in each case, but in a form that appeals to the judicial mind. This stance requires a heightened understanding of what constitutes appropriate reasons in any particular context. The decision of the school in *JFS* not even to consider whether there was an issue regarding the disparate impact on those disadvantaged by the school's admissions policy and to rely, effectively, on the earlier legislative compromise meant that it was difficult to present reasons of the type that would be likely to convince the Court.

8. Conclusion

In this article, I have examined the *JFS* case in some detail, using it as a case study of the transformation of the approach the courts in Britain now take to the freedom of religious organizations to organize their communities. In particular, antidiscrimination and equality law appears to be being used to embark on a much more interventionist approach. The sense that courts should take a hands-off approach to the internal organization of organized religions is evolving into a much more questioning approach toward organized religion, particularly when it comes up against equality values.

With the rise of post-multiculturalism, the quasi-constitutionalization of equality norms, and the Court's embrace of constitutional idealism, the scene is set for a shift in the role that antidiscrimination law plays. British antidiscrimination law is often now invoked to protect women or lesbians and gay men who feel threatened by ethnic or other community values or, to put it another way, to advance what are seen as cosmopolitan, individualistic, liberal values over what are seen as exclusive, irrational, and illiberal communitarian values. In this way, antidiscrimination law has partly come to reflect what has been termed post-multiculturalism rather than multiculturalism, forcing those who wish to defend particular religious or ethnic practices to do so in liberal, principled, constitutional terms rather than in terms of any legislative compromise. This trend, reflected in the *JFS* case and other cases, appears to be part of a more general movement in British society to embrace aspects of post-multiculturalism and to do so through the application of the equality principle, thus setting the stage for further court clashes between the principles of freedom from discrimination and freedom of religion, and also between freedom from discrimination on the grounds of religion and freedom from discrimination on the grounds of gender or sexual orientation.

¹¹⁸ *E.g.* *R (on the application of Swami Suyananda) v. Welsh Ministers* [2007] E.W.C.A. Civ at [77]; *R (on the application of Amicus) v. Secretary of State for Trade and Industry* [2007] 1 I.C.R. 1176 at [41], and *Williamson*, at [19] (Lord Nicholls) and [55] (Lord Walker).