Supreme Court of the United Kingdom

To Be or Not To Be Jewish: The UK Supreme Court Answers the Question; Judgment of 16 December 2009, *R* v *The Governing Body of JFS*, 2009 UKSC 15

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Introduction

On 16 December 2009, the UK Supreme Court held a state-funded Jewish school to be guilty of discrimination based on ethnic origin in the way it operated its admissions policies.[1] The Jewish Free School (JFS), one of the top-performing schools in the country, refused a place to a thirteen year old boy, M., because it did not consider him Jewish. It is a fundamental tenet of traditional Judaism that to be Jewish one must be born of Jewish mother or to a woman who converted into Judaism prior to his/her birth. M.'s father was Jewish by birth, but his mother, who was originally an Italian Catholic, had converted to Judaism with the criteria set by a non-orthodox branch of Judaism. The School's admissions standards only recognized orthodox criteria for conversion as valid, hence deeming neither M. nor his mother to be Jewish.[2] The Supreme Court held that the School breached

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[1] *R* v. *The Governing Body of JFS* (2009 UKSC 15).

[2] According to the Orthodox interpretation of the Jewish religion, M. could have converted separately from his mother. In fact, it was the JFS's policy 'to admit up to the standard admissions number children who are recognised as being Jewish by the Office of the Chief Rabbi of the United Hebrew Congregation of the Commonwealth (OCR) *or who have already enrolled upon or who have undertaken, with the consent of their parents, to follow any course of conversion* to Judaism under the approval of the OCR.' (Par. 24 p. 10). According to Lord Phillips, however, 'The passage … placed in italics was introduced in the 2007/8 year for the first time. No candidate has yet satisfied that criterion, and for present purposes it can be disregarded.' M's family, in any case, claimed that M. had to be considered as Jewish, due to his mother's non-Orthodox conversion.

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section 1 of the Race Relations Act 1976[3] because its admission criteria were based on the ancestral origins of the pupil's mother, and not on his perception of himself as a Jew and on his practising of the Jewish religion. Therefore the admission test was not considered to be religious in nature, but ethnic-based. The Supreme Court instructed JFS to establish a new test that did not make determinations of Jewish identity based on ethnicity.

The rationale of this 5-4 decision[4] is based on three assumptions, all of which are highly problematic. The first one is that Jews constitute an 'ethnic group', at least within the scope of application of the Race Relation Act. The second assumption is the ethnic nature of the school's admission test. Given that the test mirrored the traditional rule of Jewish membership, the real question, however, is whether the latter is ultimately ethnic rather than religious. Finally, the last assumption is that denominational preference is not immunized from the application of anti-discrimination law and that the power to decide over religious membership rules might be subject to a strict scrutiny by state courts.

The case is made particularly convoluted by a number of added complexities. In the first place, the Race Relation Act is interpreted here by the Court in an inflexible, categorical way, that leaves no room for proportionality. According to the Court, direct discrimination, under British Law, can never be justified or excused, regardless of the different interests and values involved.[5] This is not the case in most jurisdictions, where non-discrimination provisions are usually subject to a proportionality analysis by courts.

[3] Section 1 Race Relation Act 1976: '(1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if- (a) On racial grounds he treats the other less favourably than he treats or would treat other persons….'

[4] The minority judgment is also divided. While Lord Rodger and Lord Brown reached the conclusion that discrimination took place on religious grounds, Lord Hope and Lord Walker held that the JFS's admission policy indirectly discriminated against M. and other similarly situated children. The difference between direct and indirect discrimination can be conceptualized as follows: 'direct discrimination is discrimination on one of the grounds selected for heightened scrutiny under the antidiscrimination approach, such as gender or religion, or on a list contained in a constitutional provision, such as Sec. 15(1) of the Canadian Constitution Indirect discrimination, on the other hand, occurs when a law that is non-discriminatory on its face has: (1) a discriminatory effect on a singled out ground such as those referred to above; and (2) after the burden of proof is shifted from the plaintiff to the defendant, the latter cannot offer persuasive proof that the discriminatory impact is solely a byproduct of an objectively justifiable purpose (e.g., a law that requires clear vision as a prerequisite to driving an automobile at night has a discriminatory impact on blind persons, but is fully objectively justifiable as a safety measure).' N. Dorsen et al., *Comparative Constitutionalism. Cases and Materials* (St. Paul, Thomson – West 2010), p. 757.

[5] This is actually acknowledged by some of the Lords. *See*, for example, the opinion by Lord Phillips, according to whom 'In contrast to the law in many countries, where English law forbids direct discrimination it provides no defence of justification' (*R* v. *The Governing Body of JFS* (2009 UKSC 15), § 9, p. 4.

In the second place, the membership rule the Court focuses on is far from straightforward, because the nature of the matrilinear test is not *solely* racial. Had it been purely racial, the case would have been an easy one, although the result might still have not been desirable. The Court takes the position that distinctions made on blood relations are *prima facie* racial/ethnic. In this case, however, the ethnic origin of the mother is not decisive, or, at least, it is made less relevant by the circumstance that anybody, of whatever ethnic/racial background, can convert into Judaism, and thus acquire the same status of an 'ethnic' Jew, i.e., one born to a Jewish mother. The Court is forced to go into the analysis of what is 'ethnic' and what is 'religious', when in the case of Judaism the two partially overlap and are ultimately impossible to disentangle. Moreover, the dispute in the *JFS* case took place between two streams of Judaism, Orthodox and the Masorti, both of which believe in the matrilinear test, but disagree on the appropriate conversion standards. The Supreme Court ended up deciding over an internal disagreement within a religious minority,[6] making a decision having to do with Jewish law and setting new criteria for admission that did not make determinations of Jewish identity based on ethnicity. The ultimate irony is that such criteria are neither the Orthodox nor the Masorti ones, but, rather, they mirror a Christian understanding of religious membership. Understandably, the United Synagogue, which represents Orthodox Jews in the UK, was 'extremely disappointed' with the ruling, which 'interfered' with the 'Torah-based imperative … to educate Jewish children, regardless of their background.'[7] The Synagogue's President, Simon Hochhauser, said: 'Essentially, we must now apply a non-Jewish definition of who is Jewish.'[8]

This case raises a large, complex and intricately intertwined set of issues, including equality and non-discrimination issues, the relationship between the state and religion and diverging standards within minority groups affecting the relationship between the group and the state. It is beyond the scope of the present article to provide a comprehensive account of all of these. Therefore I will concentrate my remarks on three issues, namely, the categorization of Jews in ethnic terms,

[6] The Court acknowledges that: 'The dissatisfaction of E and M has not been with the policy of JFS in giving preference in admission to Jews, but with the application of Orthodox standards of conversion which has led to the OCR declining to recognise M as a Jew. Yet this appeal necessarily raises the broader issue of whether, by giving preference to those with Jewish status, JFS is, and for many years has been, in breach of section 1 of the 1976 Act. The implications of that question extend to other Jewish faith schools and the resolution of the bone of contention between the parties risks upsetting a policy of admission to Jewish schools that, over many years, has not been considered to be open to objection. (*R* v. *The Governing Body of JFS* (2009 UKSC 15), § 8, p. 4.

[7] J. Shepherd, R. Butt, 'Jewish school loses appeal. Supreme court finds admissions policy at JFS discriminates on the grounds of ethnicity', *The Guardian,* 16 Dec. 2009 <http://www.guardian.co.uk/education/2009/dec/16/jewish-school-loses-appeal>, visited 25 June 2010.

[8] Ibid.

the nature of the Jewish membership rule, and the justifiability of discriminatory conduct that is motivated by religion. I will do so in terms of the treatment of religious diversity in a constitutional democracy, without dealing with issues exclusively involving questions of British law, but rather those within the broader context of European constitutionalism.

Are Jews an ethnic group?

According to the UK Supreme Court, Jews constitute an 'ethnic group'. In legal terms, there exists no definition of what that is. Both in international as well as in domestic law, the problem of defining ethnicity is often, although not exclusively, connected with that of defining minorities, for the majority automatically falls within the category of 'peoples', which has a political connotation. If the people of a state is composed of two or more major groups, these are also usually referred to as 'peoples', as in the case of Canada's two founding peoples. 'Ethnicity', on the other hand, is used, by and large, when, alongside the people(s) that constitute the majority, there are smaller groups that share certain characteristics. What are the characteristics that make a (minority) group an 'ethnic' one is, however, disputed. International bodies, courts and legislators have struggled with the definition of 'peoples', 'minorities' and 'ethnic groups' without ever producing an agreed-upon definition. In the *Gorzelik* case,[9] which dealt with the claim of an 'ethnic group' to be registered as a 'national minority', the European Court of Human Rights pointed out that such definitions 'would be very difficult to formulate. In particular, the notion is not defined in any international treaty, including the Council of Europe's Framework Convention … Article 27 of the UN International Covenant on Civil and Political Rights; Article 39 of the UN Convention on the Rights of the Child; the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.'. The Court concluded that, while respect for such groups is a fundamental principle in all democratic systems, 'practice regarding official recognition by States of national, ethnic or other minorities within their population varies from country to country or even within countries. The choice as to what form such recognition should take … must, by the nature of things, be left largely to the State concerned … .'[10]

According to the British Race Relation Act, a 'racial group' is a 'group of persons defined by reference to colour, race, nationality or ethnic or national origins.' The statute prohibits both direct and indirect discrimination on such grounds, irrespective of whether the affected group constitutes the majority or a minority. Thus, in the past, the Act has led to a series of convictions of individuals belong-

[9] ECtHR (Grand Chamber), 17 Feb. 2004, Case no. 44158/98, *Gorzelik and Others* v. *Poland.*
[10] *Idem*, § 67.

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ing to traditionally discriminated-against minorities, For example, in *Regina* v. *Malik,*[11] a black defendant was convicted and sentenced to a year in prison for having uttered offensive and violent words against whites. The defendant admitted that his speech was offensive to whites but argued that he had a right to respond to the evils that whites had perpetrated against blacks. This kind of cases raises 'disturbing questions if not about the law itself, at least about its enforcement.'[12] In effect, the purpose of legal tools fashioned to combat race-based or ethnic-based discrimination is clearly to protect vulnerable groups *from* mainstream racist attitudes, but not to unwillingly label groups as racial or ethnic. Jews certainly should be entitled to the protection of the Race Relation Act because anti-Semitism is a form of racism. However, the fact that Jews are in the position of potentially benefiting from the application of a law that prohibits discrimination on the ground of ethnicity does not automatically make them into an ethnic group.

In this regard, one can take Muslims as an example. In Britain, Muslims are not considered as an ethnic group, with regard to the application of the Race Relation Act. However, during the examination of the state report by the UK[13] by the Committee on the Elimination of Racial Discrimination (CERD), the issue was raised and CERD made the observation that 'the State party recognizes the "intersectionality" of racial and religious discrimination, as illustrated by the prohibition of discrimination on ethnic grounds against such communities as Jews and Sikhs', and recommended that 'religious discrimination against *other immigrant* religious minorities be likewise prohibited.' It is difficult not to understand this statement as referring to the Muslim minority in the UK, also in the light of the fact that the CERD, among other international bodies,[14] has in recent years expressed concern for the growing number of hate crimes perpetrated in Europe against Muslims.

Despite the highly diverse mix of ethnicities, religious affiliations, philosophical beliefs, political persuasions, secular tendencies, languages and cultural traditions of European Muslims, the latter are increasingly the objects of stereotypical generalizations. The term 'Muslim' is often used to refer to individuals who originate from Arab and Asian countries, irrespective of their religious beliefs. In January 2001 at the 'Stockholm International Forum on Combating Intolerance', Islamophobia was recognized as a form of intolerance alongside anti-Semitism

[11] *Regina* v. *Malik* [1968] 1 All E.R.582 (C.A.1967).

[12] M. Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: a Comparative Analysis', 24 *Cardozo Law Review* (2003), p. 1523.

[13] UN Doc. CERD/C/63/CO/11 (2003), para. 20 (United Kingdom).

[14] *See* The Annual Report on the Situation regarding Racism and Xenophobia in the Member States of the EU, EUMC 2006 <http://fra.europa.eu/fraWebsite/attachments/ar06p2_en.pdf>, visited 8 Aug. 2010.

and xenophobia.[15] 'Muslims', thus, are certainly the victims of a specific kind of racist attitude, and it seems reasonable that they should enjoy the protection of a law, such as the Race Relation Act, that targets racist offences. However, should the Race Relation Act apply one day to the Muslims, this would not make the latter an ethnic group in 'positive' terms. On the contrary, 'In Europe most Muslims have a foreign ethnic background, but the distinction between ethnicity and religion is increasing: there are converts both ways; there are atheist "Arabs" and "Turks", and more and more Muslims want to be acknowledged as believers belonging to a faith community, but not necessarily as members of a different cultural community.'[16] This would be particularly true for British natives raised Christian who convert to Islam.

The focus of anti-discrimination laws should not be *ethnicity*, but rather *ethnic discrimination*.[17] In other terms, anti-Muslim and anti-Semitic attitudes should be subject to the application of anti-racist laws and treaties irrespective of whether Muslims and Jews actually constitute an ethnic group or a race, on the grounds that racist conduct against such groups is motivated by the belief that a Muslim or Jewish ethnicity actually exists and by the intention to exclude, humiliate, hurt or discriminate individuals on the ground of their membership. Thus, if an individual is mistakenly perceived as a Muslim or as a Jew and discriminated against on such grounds, anti-racist laws should be applied, because the focus of the law is not the actual ethnicity of the victim, but the racist intent of the offender. In the *JFS* case, the UK Supreme Court did acknowledge this 'external' aspect of ethnic discrimination: 'The man in the street would recognise a member of this group as a Jew, and discrimination of the group as racial discrimination.'[18] The Court, however, went further in order to determine whether Jews actually possess certain characteristics that *objectively* make a group an ethnic one. The Court applied the pattern established by House of Lords in the *Mandla* v. *Dowell Lee* case of 1983. In that occasion, the Lords set out the main characteristics that are shared by, and constitute the touchstone of, members of an ethnic group. The crucial elements are (1) a long shared history, of which the group is conscious as distinguishing it

[15] A.S. Roald, *New Muslims in the European Context: The Experience of Scandinavian Converts* (Leiden/Boston, Brill 2004), p. 53.

[16] O. Roy, 'We understand Nothing About the New Religiosities', <http://www.mo.be/index.php?id=340&no_cache=1&tx_uwnews_pi2[art_id]=27620>, visited 8 Aug. 2010.

[17] *See* P. Thornberry, 'Racial Discrimination – The Committee on the Elimination of Racial Discrimination – Questions of Concept and Practice', in R.F. Joergensen and K. Slavensky (eds.), *Implementing Human Rights* (Copenhagen, Danish Institute for Human Rights 2007), p. 318-336, p. 321, commenting on the 1965 UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which defines the latter as 'any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin.'

[18] *R* v. *The Governing Body of JFS* (2009 UKSC 15), § 30, p. 12.

from other groups, and the memory of which it keeps alive; and (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the House of Lords added other elements that are not critical, but certainly relevant: (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community.[19] Applying this scheme to the Jews, the Court concluded that:

> The cohort identified by the *Mandla* criteria forms the Jewish ethnic group. They no longer have a common geographical origin or descent from a small number of common ancestors, but they share what Lord Fraser [in the *Mandla* case] regarded as the essentials, a long shared history, of which the group is conscious as distinguishing it from other groups and the memory of which it keeps alive and a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.[20]

The Court, not being able to rely on a legal definition of ethnicity, had to venture into the field of sociology and anthropology. Sociologists and anthropologists, however, alongside legal scholars, have not produced an agreed-upon definition of what constitutes an ethnic group. Some thinkers posit that the crucial factor that enables a group to be qualified as 'ethnic' is the sense of unity and solidarity shared by its members. According to Walzer Connor, for example, the resilience of ethno-national solidarity is an expression of a deep emotional feeling associated with ethnicity that has psychological roots in kinship bonds. Therefore, phenomenologically, ethnic feeling is a descent-oriented, quasi-kinship sense of belonging, incorporating a sense of shared blood.[21] Others, like Anthony Smith, identify the core of ethnicity in the quartet of 'myths, memories, values and symbols and in the characteristic forms or styles and genres of certain historical configurations of populations.'[22] Smith defines: 'Ethnic as clusters of population with similar perceptions and sentiments generated by, and encoded in, specific beliefs, values and practices…. The demographic elements are important, but secondary

[19] *Mandla* v. *Dowell Lee* [1983] 2 AC 548.

[20] *R* v. *The Governing Body of JFS* (2009 UKSC 15), § 30, p. 12.

[21] W. Connor,. *Ethno-nationalism: The Quest for Understanding* (Princeton, Princeton Univ. Press 1994), p. 74, 93, 197.

[22] A.D. Smith, *The Ethnic Origins of Nations* (Oxford, Basil Blackwell 1986), p. 15.

to the cultural.'[23] Other anthropologists view ethnicity as a 'distinctive type of "thin" concept which always requires additional content, and locate it as one factor among many, which, depending on the tightness or looseness of their interlinkages and mutual feedback mechanisms, may form a path dependent self-reproductive system.'[24]

Jews certainly do not fit all of these schemes. In fact, defining what constitutes Jewish identity is particularly complex, given the history, the geography and the internal diversity of this group, which Jean-Paul Sartre described as 'neither national nor international, neither religious nor ethnic', but rather as a 'quasi-historical community'.[25] Ashkenazi Jews originate in Eastern and Central Europe; Sephardic Jews from the Near East, North Africa, Yemen, Ethiopia, the Balkans, Iran, Iraq, India, and the Muslim republics of the former Soviet Union. Traditional Jewish law has established presumptive personal Jewish status on the basis of matrilineal descent or formal conversion according to strict religious standards. However, that body of law and custom is widely ignored by the great majority of Jews living in Western democracies in virtually all facets of their lives.[26] Many Jews today adhere to no creed nor choose to affiliate with any religious community.[27] Those who practice the Jewish faith, do so according to different rules, as contemporary Judaism is not a unitary movement with a central religious authority. There also are separate branches of Judaism including the Orthodox, the Conservative (Masorti) and the Reform branches. While the Orthodox branch is the dominant one worldwide, in the USA, and to a lesser extent, the UK, the other branches play a significant role. The approach to Jewish law deeply differs among such groups. Orthodox and Conservative Judaism maintain that Jewish law should be strictly followed, although Conservative Judaism promotes a more 'modern' interpretation of its requirements than Orthodox Judaism. Reform Judaism – by far the largest branch in the USA but not in Europe – is more liberal than these other two movements, and its position is that Jewish law should be viewed as a set of general guidelines rather than as a list of prescriptions whose literal observance is required of all Jews. Together with smaller movements as the Reconstructionist movement, Reform Judaism formally abandoned the matrilineal standards of Jewish status assignment decades ago and has radically altered, as well, the criteria for conversion to Judaism.[28] In 1990, the USA National Jewish Population Survey

[23] *Idem*, p. 97.

[24] J. Ruane, J. Todd, 'The roots of intense ethnic conflict may not in fact be ethnic: categories, communities and path dependence', *Archives Européenes de Sociologie/European J. of Sociology*, 45.2 (2004).

[25] J.P. Sartre, *Anti-Semite and Jew* (New York, Schocken Books Inc 1948).

[26] E. Mayer et al., *Jewish Identity Survey*, at <http://www.gc.cuny.edu/faculty/research_studies/ajis.pdf>, visited 8 Aug. 2010, p. 10.

[27] Ibid.

[28] *Idem*.

revealed that a substantial number of individuals declared themselves as 'Jewish' even in the absence of a genealogical basis to such a claim or lack of formal conversion.[29]

Ultimately, any effort aimed at defining the Jewish universe in a way that truly captures its internal richness and diversity, is meant to fail, and for a national Court, in a country where Jews constitute a minority, trying to define them in terms of their shared characteristics is not just a hopeless task, but also one that seems quite inappropriate.

Is the matrilinear test ethnic or religious?

As I have pointed out in the previous section, Jewish identity is very diverse. 'Cultural Jews' might not be 'religious Jews'; those who are unquestionably Jewish under Jewish law as interpreted by the Orthodox (halachical Jews) might lead completely secular lives, while the Jewish religion might play a primary role in the life of individuals who consider themselves as full-fledged Jews, but are not halachically so. However, in the *JFS* case, the Court had to deal with the Orthodox religious criteria of membership, that is, with a simple and strict rule: to be Jewish, one must be born to a woman who is Jewish by birth or by Orthodox conversion. The High Court judge who heard the case in first instance, actually dismissed the allegations of racial discrimination, on the basis that the admissions criteria were religious and not racial.[30] The school policy was therefore in keeping with government regulations that permit faith schools to favour adherents to their designated faith. This decision lead to a certainly more desirable result; it did not, however, capture the complexity of the matrilinear rule. As it emerges from the *JFS* case, there is an undeniable disadvantage in not being born to a Jewish mother, and the availability of conversion does not fully eliminate this problem, because, *inter alia,* it is not within the control of the applicant. Lord Rodgers, in his dissenting opin-

[29] *Idem.*

[30] *E* v. *The Governing Body of JFS & Anor* [2008] EWHC 1535 (Admin) (3 July 2008). According to the Court: 'there has been no direct race discrimination. The discrimination is based on religion not on race or ethnic origin. And the discrimination does not become discrimination on grounds of race (ethnic origin) merely because the relevant religious belief defines membership of the group by reference to descent' (§ 174). Moreover, 'it is legitimate for a Muslim school to give preference to those who are born Muslim, or for a Catholic school to give preference to those who have been baptised, even if they have fallen away from the faith, with the aim of educating them in an appropriate religious ethos – perhaps with the view of bringing them back within the fold – then why should it not be equally legitimate for a school like JFS to give preference to those whom it treats as Jews even if they have fallen away from or have never known the faith? There is, in my judgment, no material difference at all; certainly it can make no difference that in the one case 'membership' of the religion depends upon the father's status, in another upon a religious rite conducted in infancy and in the third upon the mother's status' (§ 194).

ion, only partially captures this aspect, when he states that M.'s correct comparator is not another applicant born to an ('ethnic') Jewish mother, but one born to an Italian Catholic one, who converted into Judaism via Orthodox criteria.[31] Conversion certainly dilutes the 'ethnic' nature of the test, but it does not change the key aspect of it, i.e., the fact that Orthodox criteria of membership in the first place are not based on an individual choice, but on certain characteristics that one's mother must possess. M. is discriminated against in his access to the JFS *because* of his mother's status as a non-Jew. The child of another Italian Catholic woman converted by an Orthodox rabbi into Judaism would have been admitted to the JFS *thanks* to his mother's status as a 'Jew by choice.' Given the irrelevance of the racial/ethnic origins of the Jewish mother, what conversion actually does is to render the test based on *descent* rather than on ethnicity.

Discrimination based on descent falls within the scope of application of the Race Relation Act, as well as of the principal international instrument combating racial discrimination, the 1965 UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). According to the aforementioned CERD, this kind of discrimination includes discrimination against members of groups based on forms of social stratification, such as caste and analogous systems of inherited status, which nullify or impair their equal enjoyment of human rights.[32]

The problem with traditional Judaism is that religious membership is defined precisely on the basis of descent. In a world largely dominated by liberalism and cultural Christianity, this might be difficult to understand. For example, the definition of racial discrimination in Article 1 of the ICERD does not include *religion*. Discrimination based on religion and on race/ethnicity, however, often overlap, therefore it would have been logical to keep all of these grounds together, also in the light of the fact that CERD subsequently adopted an openly intersectional approach.[33] The reason for the exclusion of religion probably had to do with the fact that religion, unlike the grounds listed in the ICERD – race, colour, descent or national or ethnic origin – was understood as having a predominantly voluntarist dimension.[34] In other words, while individuals have no choice whether to belong to a certain race or ethnicity, religion is understood by and large as a matter of individual choice.

Orthodox Judaism, however, is not based on a voluntarist notion of belonging: a Jew by birth remains a Jew even if he or she does not practice the Jewish religion,

[31] *R* v. *The Governing Body of JFS* (2009 UKSC 15), § 229, p. 84.

[32] General Recommendation no. 29 (2002) on Article 1, para. 1, of the Convention (descent), UN Doc. HRI/GEN/1/Rev. 8, p. 267-272.

[33] *See*, for example, UN Doc. CERD/C/NGA/CO/18 (2005), para. 20 (Nigeria).

[34] Thornberry, *supra* n. 17, p. 322 et seq.

marries outside of the faith and even converts to another denomination. As Raphael Cohen-Almagor puts it, 'Against the liberal values of autonomy, personal development, individualism and self-government there is the deep Jewish belief in shared communality, shared destiny.'[35] Halachically, Jews are Jews because of their matrilinear descent, irrespective of their will, and non-Jews are excluded, unless they successfully undergo the conversion process. The voluntarist aspect, therefore, is the exception, as conversion is admitted, but does not constitute the rule.

Moreover, outsiders are not automatically welcome into the Orthodox Jewish religious community: activities aimed at proselytising Gentiles are forbidden, and the duty of a rabbi facing a request from a Gentile to convert into Judaism, is to first try and discourage him or her from doing so. If then the conversion takes place, it is by no means a downhill path. As Lord Jonathan Sacks, Chief Rabbi of the United Hebrew Congregation of the Commonwealth, stated:

> Converting to Judaism is a serious undertaking, because Judaism is not a mere creed. It involves a distinctive, detailed way of life. When people ask me why conversion to Judaism takes so long, I ask them to consider other cases of changed identity. How long does it take for a Briton to become an Italian, not just legally but linguistically, culturally, behaviourally? It takes time.[36]

In the Western legal world, it is difficult to reason in terms of 'religion' and 'religious freedom' without applying a Christian understanding of the concept, and, as a consequence, a Christian logic of belonging. Lady Hale's opinion in the *JFS* case is, in this respect, very revealing. Lady Hale writes that:

> M was rejected, not because of who he is, but because of who his mother is. … It was because his mother was not descended in the matrilineal line from the original Jewish people that he was rejected. This was because of his lack of descent from a particular ethnic group. In this respect, there can be no doubt that his ethnic origins were different from those of the pupils who were admitted. It was not because of *his* religious beliefs. The school was completely indifferent to these. They admit pupils who practise all denominations of Judaism, or none at all, or even other religions entirely, as long as they are halachically Jewish, descended from the original Jewish people in the matrilineal line.[37]

Moreover, 'As far as we know, no other faith schools in this country adopt descent-based criteria for admission. Other religions allow infants to be admitted as

[35] R. Cohen-Almagor, 'Israel and International Human Rights', in F. P. Forsythe (ed)., *Encyclopedia of Human Rights* (New York, Oxford University Press 2009), p. 2.

[36] Quoted in *R* v. *The Governing Body of JFS* (2009 UKSC 15), § 88, p. 34.

[37] Ibid., § 66, p. 24

a result of their parents' decision. But they do not apply an ethnic criterion to those parents. The Christian Church will admit children regardless of who their parents are.'[38] This comparison however makes little sense, as the task of an Orthodox Jewish school is to educate (halachically) Jewish children, and no autonomous parents' decision can turn a Gentile child into a Jewish one.

Discriminatory admissions policies in state-funded faith schools are defended in Britain as being necessary for the preservation of the appropriate school's religious ethos. It seems from the reasoning of the Court that their Lordships believe that JFS's ethos could not have been damaged by a more inclusive admissions policy, i.e., one that admits practicing 'non-Jews'. For example, Lady Hale writes that: 'They admit pupils who practise all denominations of Judaism, or none at all, or even other religions entirely, as long as they are halachically Jewish.'[39] Again the Court's reasoning, totally imbued with a Christian notion of religion, fails to see the logic of a faith school that admits applicants who do not practise their faith, while at the same time denies admission to those who do practice solely on ethnic grounds. Judaism, however, is not concerned with those who *feel* Jewish but rather, with the Jewish community as a whole and with the individual destiny of all Jews irrespective of whether they practice their faith. In order to preserve its ethos, an Orthodox Jewish School must therefore admit Jewish children, of whatever religious background. The Court, however, seems to assume as objective that the ethos of *any* faith school is preserved by the presence of children who are active in their religious beliefs and practice, and hence imposed to the JFS to consider for admission applicants who feel deeply committed to the Jewish religion, irrespective of them being halachically Jewish. This is precisely the result of not being able to intellectually abandon the Christian, universalistic, logic of belonging, which accords a primary role to faith and individual commitment.

The Court's incapacity to reason in terms of 'religion' and not of 'a given religion' led to extraordinary results. In the first place, the Court, despite its emphasis of the fact that nothing in the judgment should be understood as accusing the Chief rabbi and the Jewish religious tradition in general, of a 'racist' attitude in the negative sense commonly attributed to this term,[40] did in fact set the principle

[38] *Idem.*

[39] *Idem.*

[40] For example, according to Lord Phillips, 'Nothing that I say in this judgment should be read as giving rise to criticism on moral grounds of the admissions policy of JFS in particular or the policies of Jewish faith schools in general, let alone as suggesting that these policies are "racist" as that word is generally understood.' (*R* v. *The Governing Body of JFS* (2009 UKSC 15), § 9 p. 4. Moreover, according to Lady Hale: 'No-one in this case is accusing JFS (as the Jews' Free School is now named) or the Office of the Chief Rabbi of discrimination on grounds of race as such. Any suggestion or implication that they are 'racist' in the popular sense of that term can be dismissed' (*R* v. *The Governing Body of JFS* (2009 UKSC 15), § 54, p. 19.

that the basic premise of the Jewish religion is 'racist', or, at least, incompatible with British anti-discrimination law, while Christianity is not. Moreover, by imposing different criteria for admission to the JFS, the Court did not only choose sides in an inter-denominational debate on the validity of conversions, but it also 'corrected' the (assumed) discriminatory element of Jewish membership, altering it in a Christian direction, when it ruled that a Jew is someone who participates in the observance of the Jewish religion. As Lord Rodger pointed out in his dissenting opinion,

> The decision of the majority means that there can in future be no Jewish faith schools which give preference to children because they are Jewish according to Jewish religious law and belief…Instead, Jewish schools will be forced to apply a concocted test for deciding who is to be admitted. That test might appeal to this secular court but it has no basis whatsoever in 3,500 years of Jewish law and teaching. The majority's decision leads to such extraordinary results, and produces such manifest discrimination against Jewish schools in comparison with other faith schools, that one can't help feeling that something has gone wrong.[41]

Not surprisingly, a few months after the JFS decision, a new problem arose. As a consequence of the Supreme Court's ruling, the JFS, alongside other maintained Orthodox Jewish schools in the UK, had to establish a new test that did not make determinations of Jewish identity based on ethnicity. Each school thus created a 'Jewish Religious Practice Test'. A young girl, K. C., who had applied to King David High School in Liverpool, was the only Jewish applicant denied admission. K. C. was born of a Jewish mother, who had actually even been an alumna of King David High School. However, her family is not religiously observant and it was therefore not able to satisfy the 'Jewish Religious Practice Test.'[42]

Can religion shield ethnic discrimination?

According to the Supreme Court, under British law, direct discrimination, when it is based on ethnicity, can never be justified or excused, whereas discrimination grounded on religion is subject to a less stringent scrutiny. However, in the *JFS* case, religion and ethnicity (or, better, descent) are so strictly intertwined that there is no possible way to disentangle them.

[41] Ibid., § 225-226, p. 83.

[42] J. Kalmus, 'Jewish girl's King David place goes to non-Jew', *The Jewish Chronicle* (11 June 2010) <http://www.thejc.com/node/32947>, visited 8 Aug. 2010.

The Israeli Supreme Court recently decided a case which is in many ways analogous to the JFS one. The case, known as the 'Immanuel parents' decision,[43] dealt with the admission policy of a state-subsidized religious school, the Beis Yaakov Girls' School in the small town of Immanuel. In 2007 changes were made to the school, and a new 'Hassidic track' was introduced alongside the general track. In effect, what took place was a complete split into two different schools, as the new 'Hassidic track' was housed in a separate wing of the school, with a separate playground, a separate teachers' room, a wall separating the two tracks and a different uniform. The Hassidic track was stricter than the general one, in terms of dress, exposure to media, etc. It satisfied the desire of the Hassidic families of Immanuel to move back towards the original narrower interpretation of the Israeli Haredi lifestyle,[44] which, they thought, the school had abandoned as a consequence of demographics changes that took place in the town, from where many members of the Hassidic community moved out.

An investigation found that 73% of the girls in the new 'Hassidic track' were of Ashkenazi origin whereas only 27% were of Oriental or Sephardic origin. In the old school (the 'general track') only 23% of the girls were of Ashkenazi origin. The investigation found no evidence that there were any girls who were refused admission into the Hassidic track. However, the proposed draft regulations for the Hassidic track, which was sent for the approval of the Ministry of Education, together with an appendix that was intended to be read only by the parents of the students, contained the following clauses:

(a) The prayers and the studies in the school are conducted in the holy language (Ashkenazi pronunciation). In order to make it easier for girls who are not accustomed to pray at home with this pronunciation, the parents will ensure that even at home the students will become accustomed to pray as they do at school.
(b) The spiritual authority for the Hassidic track will be Rabbi Barlev [an Ashkenazi religious authority], who will guide the students of the school in matters of conduct and Jewish law. The parents undertake not to allow a situation in which there will be a conflict between the spiritual authority practised in their homes and the one adopted by the school.

[43] HCJ 1067/08 *Noar KeHalacha* v. *Ministry of Education*. This decision is mentioned by Lord Hope (minority judgment) in the JFS decision: *R* v. *The Governing Body of JFS* (2009 UKSC 15), § 159, p. 58.

[44] Haredi ('Ultra-Orthodox') Judaism is the most theologically conservative form of Judaism. Haredim live in closed communities with limited contact to the outside world. Television, films, secular publications and the Internet are forbidden. *See* S.C. Heilman and M. Friedman, 'Religious Fundamentalism and Religious Jews: The Case of the Haredim', in M.E. Marty and S.R. Appleby (eds.), *Fundamentalism Observed* (The Fundamentalism Project, vol. 1), (Chicago and London, 1991), p. 197-264.

(c) For reasons of modesty, the girls will not be allowed to ride bicycles outside the home.
(d) The parents shall ensure that the friends that their daughters meet in the afternoon will only be from homes that accord with the spirit of 'Beit Yaakov' education in every respect.
(e) The parents shall act with regard to clothing in accordance with the determination of the Rabbinical Committee on Matters of Clothing at the Rabbinical Court of Rabbi Vozner.
(f) No radio shall be played in the home at all. No computer that can play films of any kind shall be allowed in the home. Obviously no connection to the Internet shall be allowed.
(g) The girls should not be taken to hotels or any kind of holiday resorts. They should not visit the homes of relatives or friends who do not observe the Torah and the commandments.[45]

The 'Immanuel Parents', who established the Hassidic track, argued that all of these requirements were meant to preserve the school's Hassidic religious ethos. According to the Supreme Court, however,

> A study of the various regulations shows that we are not dealing with a track whose purpose is the study of the Hassidic way of life, but with an attempt to separate different sectors of the population on an ethnic basis, under the cloak of a cultural difference. The preference of students from a certain ethnic group in admissions to the Hassidic track, while placing bureaucratic difficulties in the path of parents of students from another ethnic group who want to register their daughters for the track, seriously undermines the right to equality. The same is true with regard to the school's requirement that parents of the students should act in accordance with the lifestyle practised in the school, and the request … that the prayers should be recited solely in accordance with the Ashkenazi pronunciation. All of these merely serve an improper purpose, which is to exclude from the Hassidic track students from the Sephardic community, solely because of their origin.[46]

In this case, as in the JFS one, there is certainly an overlap between religion and ethnicity. The Hassidim, who are of Ashkenazi origins, interpret Judaism according to their own rules, therefore, their claim that exclusion from the Beis Yaakov Hassidic track did not take place on ethnic grounds cannot be automatically dismissed. In fact, this case is a good comparator for two controversies mentioned in

[45] Quoted by Justice Levy, HCJ 1067/08 *Noar KeHalacha* v. *Ministry of Education*, § 7, p. 94.
[46] *Idem,* Justice Levy, § 26, at 115.

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the *JFS* case.[47] The first is that of a South African church that held on to the sincere believe that God had made people of colour inferior and had destined them to live separately from whites. The second is the *Bob Jones* case,[48] in which the US Supreme Court revoked the tax-exempt status of a school that, based of its interpretation of Biblical principles, instituted a racially discriminatory admissions process against African Americans. According to the US Court, the Government's had a *fundamental* and *overriding* interest in eradicating racial discrimination in education, which substantially outweighed whatever burden denial of tax benefits placed on petitioners' exercise of their religious beliefs. In other words, religious belief could not be used as an excuse for engaging in behaviour that violated a compelling governmental interest, also in the light of the fact that no less restrictive means were available to achieve the latter.[49]

In the South African case, in the Bob Jones University case, as well as in the Immanuel Parents case a group (blacks in the USA and South Africa, the Sephardim in Israel) is discriminated against on religious grounds. In all three cases the discriminated against group happens to be a traditionally marginalized one and the discrimination is by the traditionally dominant group (whites in South Africa and the USA, Ashkenazim in Israel). This kind of discrimination is hardly coincidental. Instead, though motivated by sincere religious beliefs, it has roots in a social structure of marginalization that is reflected at different levels in the social, economic and cultural life of the country in question. Thus, tolerating this kind of discrimination on account of its being linked to genuine religious beliefs, ends up reinforcing generalized marginalization, negative stereotyping, and the understanding that racism has 'acceptable' justifications.

Unlike in these cases, in the *JFS* case the 'ethnic' character of the test fully and completely overlaps with the religious one and not with any other kind of mainstream discriminatory attitude. In fact, in the *JFS* case those who discriminate are a historically marginalized minority (the Jews), and those who are discriminated against are some of those who belong to or identify with that minority. Moreover, in the specific case, the consequences of the discrimination policy practiced by the Jewish Free School are very limited as Jews belonging to non-Orthodox streams of Judaism have many other educational opportunities in the UK, including that of establishing their own faith schools.

In the case of Israel, where Jews constitute the majority, and there is a strong formal and substantial entanglement between the state and the Jewish religion,[50]

[47] *R* v. *The Governing Body of JFS* (2009 UKSC 15), § 150, p. 55.

[48] *Bob Jones University* v. *United States,* 461 U.S. 574 (1983).

[49] *Idem,* 602-604.

[50] H. Lerner, 'Entrenching the Status-Quo: Religion and State in Israel's Constitutional Proposals', in 16,3 *Constellations* (2009) p. 445.

the intervention of secular courts in circumstances similar to those of the *JFS* case might have a plausible justification. In 2002, for example, a decision of the Israeli Supreme Court compelled the Ministry of Interior to register as Jews in the Population Registry 24 plaintiffs who had converted via non-Orthodox standards.[51] In Israel, however, the issue of conversion has profound consequences in terms of access to citizenship and civil status. The fact that prior to this decision only conversions to Orthodox Judaism were recognized by the Israeli state meant that only those who converted via Orthodox standards were granted the right to immigrate to Israel under the Law of Return and to be registered in the state's population registry as a Jew.[52]

The *JFS* case demonstrates that the strict application of non-discrimination provisions, irrespective of the actual circumstances of the case at hand, can produce undesirable results. The UK is a party to the ECHR, and has incorporated most of its substantive provisions into domestic law through adoption of the Human Rights Act. The ECHR contains Article 14 that prohibits discrimination in the enjoyment of the rights guaranteed under the Convention on the ground of, *inter alia*, race and religion.[53] The European Court of Human Rights in its jurisprudence, in order to establish what constitutes a prohibited case of discrimination, always takes into consideration whether there is an objective and reasonable justification to the differential treatment of equal cases, and whether there is proportionality between aim and means. Moreover, in the *Thlimmenos* v. *Greece* case, the ECtHR has 'considered that the right under Article 14 not to be discriminated against … is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification.'[54] The Court concluded that States have a duty, under the Convention to 'introduce appropriate exceptions'[55] and treat differently persons whose situations are significantly different.

Conclusion: From religious tolerance towards cultural homogenization?

As I mentioned initially, the *JFS* case was decided on the basis of three main factors. My analysis has sought to prove that all of them are highly contestable.

[51] *Naamat and Others* v. *Minister of the Interior and Others* [2002] IsrSC 56(2).

[52] Cohen-Almagor *supra* n. 35, p. 10.

[53] Art. 14 – Convention for the Protection of Human Rights and Fundamental Freedoms: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

[54] ECtHR (Grand Chamber), 6 April 2000, case No. 34369/97, *Thlimmenos* v. *Greece,* § 44. Although the facts of the case are not analogous of thee ones in JFS, the Court applied proportionality to a claim of discrimination.

[55] Ibid., § 48.

First, the Court decided, on very questionable grounds, that Jews constitute an 'ethnic group'. Next, it proceeded to declare that the matrilinear test on which Jews have based their membership rule for over 3.500 years, is ethnic in nature, which is hardly obvious. Finally, the Court applied a non-discrimination statute in a totally strict fashion, leaving no room for proportionality analysis, which is contrary to Western standards of judicial interpretation, as well as out of step with the jurisprudence of the European Court of Human Rights.

The combination of these factors leads to a very problematic result, as the Court actually openly admits. Lord Phillips, for example, writes that this case 'demonstrates that there may well be a defect in our law of discrimination.'[56] According to Lady Hale:

> Yet the Jewish law has enabled the Jewish people and the Jewish religion to survive throughout centuries of discrimination and persecution. The world would undoubtedly be a poorer place if they had not. Perhaps they should be allowed to continue to follow that law. But if such allowance is to be made, it should be made by Parliament and not by the courts' departing from the long-established principles of the anti-discrimination legislation…. We must not allow our reluctance to enter into that debate, or to be seen to be imposing our will upon a well meaning religious body, to distort the well settled principles of our discrimination law. That is to allow the result to dictate the reasoning.[57]

Contrary to their Lordships, however, I do not think that the unsatisfactory result reached by the Court in the *JFS* case is solely the consequence of the complexity of the case at hand, and of the characteristics of British anti-discrimination law. I believe that at the core of the JFS decision there is a major difficulty, that affects the treatment of religious diversity in all European democracies in an era of globalization and mass-scale migration.

Despite their deep divergences, all European models for managing the relationship between the state and religion[58] share a common feature, i.e., a degree of

[56] *R* v. *The Governing Body of JFS* (2009 UKSC 15), § 9, p. 4.

[57] Ibid., § 70, p. 25.

[58] In Europe, there are essentially three different models. These are: 1) the militant secularist model bent on keeping religion completely out of the public sphere (e.g., French and Turkish '*laicité*'); 2) the confessional secular model, which incorporates elements of the polity's mainstream majority religion, primarily for identitarian purposes, and projects them as part of the polity's constitutional secularism rather than as inextricably linked to the country's main religion (e.g., Italy's or Bavaria's adoption of the crucifix as a secular symbol of national identity); 3) and the official religion with institutionalized tolerance for minority religions model (e.g., the UK, Scandinavian countries, Greece). For a critique of such model, *see* S. Mancini, M. Rosenfeld, 'Unveiling the Limits of Tolerance. Comparing the Treatment of Majority and Minority Religious Symbols In the Public Sphere', C. Ungureanu, L. Zucca (eds.), Law, *State and Religion in the New Europe: Debates and Dilemmas* (Cambridge, Cambridge University Press, forthcoming 2010).

entanglement between national identity and the polity's Christian heritage. In Europe, the process of secularization and the transition to liberalism did result in a state model that no longer endorsed a conception of the good related to a particular religion, but it thereby raised a key question concerning the powers of integration of a secularized society. The nation-state, with its emphasis on a distinct national identity anchored in a common history, language, tradition and culture, came to displace religious belief as the source of integration of the polity. The explicit removal of religion as the glue that binds together did not, however, preclude its persistent survival as an implicit mainstay engrained in the secular nation's tradition and culture. And because Europe had been overwhelmingly Christian, even after the state has removed all or most Christian religious vestiges, Christianity has endured by permeating the different European national cultures and the traditions. 'As a consequence of these developments, religious tolerance [became] relegated from the level of religious beliefs to the level of merely religiously permeated national traditions that remain, albeit in different ways, infused with Christian values.'[59] Moreover, one has to bear in mind that historically, secularization has implied a process of separation between the state and Christian churches, and hence it had naturally entailed the accommodation of the majority's (Christian) religion. Religious tolerance, thus, was bent on keeping religious diversity within the private sphere, while the public sphere was imbued in cultural Christianity. When Jews were granted equal citizenship, for example, the price they were asked to pay was to keep their religious singularity within the private sphere.[60]

Trends towards globalization pose two major challenges to the traditional European approaches to reconciling constitutionalism and religion. One is the effect of large-scale migration, which has rendered European democracies much more religiously diverse. The second is the increasing blurring of the line between the public sphere and the private sphere, to which the concurrent process of globalization and privatization has led. In this connection, religion (*all* religions) has become 'deprivatized', and seeks a much increased role in the public sphere. The traditional model of tolerance for religious minorities in a religiously homogeneous Europe, characterized by a strict separation between 'private' and 'public', fails to meet the needs of today's multi-religious continent, where the private and public spheres collapse into one another, and religious diversity can no longer be confined to the private one.

The *JFS* case is symptomatic of such difficulties, in that it deals with the claim of a non-Christian denomination to be placed on an equal footing with Christian-

[59] D. Augenstein, *A European Culture of Religious Tolerance,* European University Institute Working Paper LAW 2008/04, p. 7.

[60] P. Birnbaum, 'On the Secularization of the Public Square: Jews in France and in The United States', 30 *Cardozo Law Review* (2009) p. 2431.

ity in the field of education, that is, *within the public sphere*. Government funding of religious schools, by implying an obvious entanglement between religion and the state, is one of those fields where public and private inevitably overlap. This need not necessary be problematic if a country is religiously homogeneous, because the entanglement takes place exclusively between the state and *the* religion that contributes to the shaping of the whole country's mainstream culture. The situation is different in countries characterized by religious diversity, where government funding of state schools not only can amount to inequitable discrepancies among different denominations, but also to clashes between state law and minority religious systems. It is not by chance that in the USA, with its characteristic religious diversity, direct funding of faith schools is strictly forbidden. The English education system, in contrast, developed in partnership with the mainstream Christian churches, whose involvement in education actually pre-dated that of the state. In England, since 1944 denominational communities can apply to set up schools in the state sector in response to demand from parents. Today a significant number (almost 7000 out of 20000) of state funded schools are faith schools. The overwhelming majority of them are Christian: around 68% of maintained faith schools are Church of England schools and 30% are Catholic. However, 58% of the maintained faith schools are not associated with the major Christian denominations.[61]

What is the price that those 58% minority schools are expected to pay to be on an equal financial footing with mainstream Christian schools, that is, to be subsidized by the state? The answer given to that question by the Supreme Court in *JFS* case is a troubling one. The Court instructed JFS to admit religiously committed applicants regardless of their being Jewish, that is, to alter its admission criteria according to Christian standards of belonging. The price to pay for religious minorities to be 'equal' in the public sphere, thus, seems to be their homogenization and adaptation to the mainstream religious culture, i.e., the incorporation of Christian attributes.

There are many signs of a trend towards the 'Christianization' of minority religions in various European countries. Olivier Roy has emphasized how in France the accommodation of the Muslim minority has been largely shaped according to a predominantly Christian logic, for example, through the process of 'parochialization' of the mosque, or the establishment of Muslim army chaplains, which do not exist in the Islamic tradition.[62] Obviously, minority denominations may spontaneously absorb and or accept certain Christian elements, as a result of

[61] The 58 schools are comprised of: Jewish (38); Muslim (11), Sikh (4), Greek Orthodox (1), Hindu (1), Quaker (1), Seventh Day Adventist (1), United Reform Church (1). *See* <http://www.teachernet.gov.uk/wholeschool/faithschools/>, visited 20 Aug. 2010.

[62] O. Roy, *L'Islam mondialisé* (Paris, Editions du Seuil 2002).

their exposure to a dominantly Christian environment. However, this is clearly not the case in the JFS dispute. Here the Court makes a direct comparison between Christian and Jewish membership rules and concludes that while the first are fully compatible with the legal system of the state, the latter are not ('Other religions allow infants to be admitted as a result of their parents' decision. But they do not apply an ethnic criterion to those parents. The Christian Church will admit children regardless of who their parents are'[63]). The Court then proceeds to instruct JFS to adopt a new admission test, based on autonomous individual decisions and on the irrelevance of descent, i.e., on a basis compatible with Christian logic. The *JFS* case arose from the religiously pluralistic character of today's British society. By assuming the Christian rule of membership to be universal and imposing it on a religious minority, the Court has shown a tendency to counter or minimize pluralism, rather than to seek a reasonable accommodation for the different religious perspectives within the polity.

In this respect, one could draw an analogy between the treatment of Judaism in the *JFS* case and that of Islam in the countless bills, laws and cases banning or limiting the display of Muslim clothing in various European jurisdictions. In the vast majority of these cases, Muslim traditional garments are interpreted as clashing with gender equality, understood as a singularly Western value,[64] and on this basis their display within the public sphere is subject to various degrees of limitations.[65] In all of these cases, just as in the JFS decision, non-Christian minorities are offered the choice between preserving their diversity by keeping it strictly within the private sphere, or accessing the public sphere under the condition of assimilating to a significant degree into the majority religious culture, thus reinforcing the culturally/religiously homogeneous character of European societies.[66] This

[63] *R* v. *The Governing Body of JFS* (2009 UKSC 15), § 68, p. 24.

[64] The argument that the wearing of Muslim traditional clothing clashes with gender equality is widespread. It appears, *inter alia,* in cases decided by the European Court of Human Rights (ECtHR 15 Jan. 2001, Case No. 42393/98, *Dahlab* v. *Switzerland;* ECtHR, 29 June 2004, Case No. 44774/98, *Sahin* v. *Turkey*), in the French Stasi Report (COMMISSION DE REFLEXION SUR L'APPLICATION DU PRINCIPE DE LAÏCITE DANS LA REPUBLIQUE, RAPPORT AU PRESIDENT DE LA REPUBLIQUE (2003), as well as in the French National Assembly's Resolution on the full veil of 2010 (ASSEMBLÉE NATIONALE, RAPPORT D'INFORMATION n. 2262, AU NOM DE LA MISSION D'INFORMATION SUR LA PRATIQUE DU PORT DU VOILE INTÉGRAL SUR LE TERRITOIRE NATIONAL, 26 JAN. 2010), in a decision of the House of Lords (*Regina ex rel. Begum* v. *Governors of Denbigh High Sch.* [2006] UKHL 15, [2007] 1 A.C. 100 (H.L.) (appeal taken from Eng.).

[65] For a comprehensive analysis of such cases, *see* S. Mancini, 'The Power of Symbols and Symbols as Power. Secularism and Religion as Guarantors of Cultural Homogeneity', 30 *Cardozo Law Review* (2009) p. 2629.

[66] Contrast this trend with the claim that Christian symbols hold a special place In the European public sphere because they must be interpreted as in 'cultural' terms, as indicia of the historical and cultural dimensions of national identity: S. Mancini, 'The Crucifix Rage: Supra-national Constitutionalism Bumps Against the Counter-Majoritarian Difficulty', in 6 *EuConst* (2010) p. 6-27.

trend, which is spreading across Europe, has a strong destructive potential, because, by applying a concept of equality that implies a homogenization of behaviours and values, it ends up restricting the room for diversity that is necessary for the preservation of a genuinely pluralistic society.