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## COLLECTIVE RELIGIOUS AUTONOMY UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS: THE UK JEWISH FREE SCHOOL CASE IN INTERNATIONAL PERSPECTIVE

Merilin Kiviorg

**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**

**MAX WEBER PROGRAMME**

# *Collective Religious Autonomy under the European Convention on Human Rights: the UK Jewish Free School Case in International Perspective*

**MERILIN KIVIORG**

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## Abstract
What should the response be if a religious community (or an affiliated institution) violates the individual rights of either its own members or of others in society? This working paper analyses the UK Jewish Free School case, which raised a question of racial discrimination in the admission policy of the school from a theoretical and international law perspective with focus on the case law of the European Court of Human Rights. The aim is to address broader issues of collective freedom of religion or belief by giving some theoretical conceptualising points about collective religious autonomy. An attempt is also made to provide some hypothetical predictions as to how the JFS case would be decided under the European Court of Human Rights if ever submitted.

## Keywords
Religious freedom, religious autonomy, collective autonomy, conflict of individual rights, education, faith schools, denominational schools.

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*Merilin Kiviorg*
*Max Weber Fellow, 2009-2010*

## I. Introduction

In December 2009 the Supreme Court[1] in the UK delivered a decision on a case that, according to the *Guardian,* was described by lawyers to be the most controversial ruling since the court was created.[2] As noted by Weiler: 'It is not every day that the Chief Rabbi of Britain, Sir Jonathan Sacks, is found by the Supreme Court of the United Kingdom to be guilty of racial discrimination, but that is what happened in the recent Jewish Fee School (JFS) Case.'[3]

The JFS, founded in 1732, is designated by the Secretary of State under UK School Standards as having a Jewish religious character. It is a successful school. As the number of Jewish applications exceeds places available, non-Jews are excluded. The school gives precedence in admission to those children recognized as Jewish by the Office of the Chief Rabbi (OCR). For example, Catholic schools can give priority to Catholics, Muslim schools to Muslims. The law allows such schools to determine eligibility by reference to religious membership or practice.

The case was sparked by the fact that the JFS denied a Jewish boy (M) a place because M's mother (who is Italian) converted from Catholicism to Judaism under a non-Orthodox authority, meaning the Chief Rabbi did not recognize her as Jewish. It is a fundamental tenet of the Jewish religion that the child of a Jewish mother is Jewish (matrilineal test).[4] The OCR only recognises a person as Jewish if that person is descended in the matrilineal line from a woman whom the OCR would recognise as Jewish; or he or she has undertaken a qualifying course of Orthodox conversion. M's family are Masorti Jews. M's mother had chosen to convert under Masorti authorities. Masorti Judaism has its origins in Orthodox Judaism, but its beliefs and practices are no longer the same. The conversion of M's mothers is recognised by the Masorti and Reform synagogues, but not by Orthodox authorities. Consequently, M was treated as a non-Jewish applicant.

The boy's father brought an action against the JFS under section 1 of the Race Relations Act 1976 on the basis that the 'Jewish by birth' policy constituted either direct discrimination on the basis of M's ethnic[5] origin or indirect discrimination as it was disproportionate to the justifiable aim of ensuring that a faith based school serves a particular faith. The lower court upheld the school's right to deny M a place. However, this decision was reversed on appeal and came before the Supreme Court.

The majority of the Supreme Court found that the exclusion of M amounted to prohibited racial discrimination. Five Lords found direct discrimination, which by law cannot be justified or excused. Motive does not matter. Selection on the sole basis of genetic descent by the maternal line from a woman who is Jewish is, according to Lord Phillips, direct racial discrimination, irrespective of any overlying religious reasoning. Similarly, Lord Clark emphasized that: 'the fact that a decision to

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[1] In October 2009, The Supreme Court replaced the Appellate Committee of the House of Lords as the highest court in the United Kingdom. The Supreme Court's 12 Justices maintain the highest standards set by the Appellate Committee, but are now explicitly separate from both Government and Parliament. The Court hears appeals on arguable points of law of the greatest public importance, for the whole of the United Kingdom in civil cases, and for England, Wales and Northern Ireland in criminal cases. Additionally, it hears cases on devolution matters under the Scotland Act 1998, the Northern Ireland Act 1988 and the Government of Wales Act 2006. This jurisdiction was transferred to the Supreme Court from the Judicial Committee of the Privy Council. The Supreme Court, Available at http://www.supremecourt.gov.uk/about/the-supreme-court.html (12.03.2010).

[2] Jessica Shepherd and Riazat Butt, 'Jewish School Loses Appeal' *Guardian* 16. 12.2009, Available at: http://www.guardian.co.uk/education/2009/dec/16/jewish-school-loses-appeal (15.02.2010).

[3] JHH Weiler, Discrimination and Identity in London: The Jewish Free School Case (2010) Jewish Review of Books 1. Available at : http://www.jewishreviewofbooks.com (12.03.2010). JFS [2009] UKSC 15.

[4] There are nuances. Liberal Judaism in Britain regards a child as Jewish when either parent is Jewish. Liberal Judaism represents about 8 % of synagogue affiliations. 92 % of Jews follow the tradition of the maternal line. The Response to a request for information from the Treasury Solicitor by Rabbi Dr. Tony Bayfield (Head of the movement of Reform Judaism). Cited in Lord Phillips, para. 40.

[5] The law in the UK includes 'ethnic origins' as a proxy for race. Race is understood to be wider than the strictly racial or biological. The meaning of 'ethnic origins' were given in the case of *Mandla v Dowell Lee. Mandla v Dowell Lee* [1983] 2 AC 548 (HL).

discriminate on racial grounds is based upon a devout, venerable and sincerely held religious belief or conviction cannot inoculate or excuse such conduct from liability under the 1976 Act.' [6] In the eyes of the majority, thus, the JFS committed a statutory tort by selecting prospective pupils by reference to their 'ethnic origins'.

Differently from the majority, two Lords (Lord Hope and Walker) found indirect discrimination, which can be justified or excused, but was not justified in their eyes.[7] Lord Hope recognized the right of the OCR to define Jewish identity in the way it does as a matter of Jewish religious law: 'to say [its] ground was a racial one is to confuse the effect of the treatment with the ground itself'.[8] Lord Hope, together with Lord Walker, nonetheless found that the policy adopted by the OCR had the indirect effect of disadvantaging certain Jews. Whilst noting that the aim of the policy was wholly legitimate ('a faith school is entitled to pursue a policy which promotes the religious principles which underpin its faith'[9]) he concluded that it was a disproportionate means of securing the objective. 'In other words, a less discriminatory means could have been adopted which would still not have undermined the religious ethos of the school'.[10]

Only two Lords (Lord Rodger and Lord Brown) found for the School and Synagogue. Lord Rodger did not find that there was any discrimination involved on racial grounds. He argued that the crux of the matter was whether the governors actually treated M less favourably on grounds of his ethnic origins (race). He argued that M's mother 'could have been as Italian in origin as Sophia Loren, and as Roman Catholic as the Pope for all that the governors cared: the only thing that mattered was that she had not converted to Judaism under Orthodox auspices. It was her resulting non-Jewish religious status in the chief Rabbi's eyes that was deemed the most important factor in the decision making process, not the fact that her ethnic origins were Italian and Roman Catholic'.[11] In other words, she could have chosen to convert under the Orthodox authority, but she did not. As to indirect discrimination Lord Rodger and also Lord Brown argued that 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.[12] Lords Rodger and Brown also quite rightly pointed out an interesting fact regarding how much the religious side of the story was downplayed - denigrated into 'mere motivation' or even being irrelevant.[13]

The majority seemed to get entangled in the peculiarities of English anti-discrimination law and practice without giving any consideration to collective freedom of religion or belief as, for example, enshrined in Article 9 of the European Convention of Human Rights (hereinafter the ECHR) or as spelt out in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.[14] The issue of collective freedom of religion or belief was not raised in this case. The outcome of this case provokes general theoretical and practical questions about the scope of autonomy of religious organisations and their affiliated institutions (like schools); as well as the court's role in determining this scope.

This article will not explore peculiarities of anti-discrimination law in the UK. Rather, it will analyse the case from a theoretical and international law perspective with focus on the case law of the

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[6] Lord Clark [paras 129-131].

[7] Hope, Walker [para 212] and [para 214].

[8] Lord Hope [para 201]. See also M. Hill, 'What the JFS Ruling Meant' *Guardian,* Monday 21 December 2009.

[9] Lord Hope [para 209].

[10] M. Hill, 'What the JFS Ruling Meant' *Guardian,* 21 December 2009.

[11] Lord Rodger [para 228].

[12] Lord Rodger [para 233], Lord Brown [para 256].

[13] Lord Hope [para 201]. Lord Rodger [para 227].

[14] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (adopted 25 Nov 1981) UNGA Res 36/35.

European Court of Human Rights (hereinafter the ECtHR). The aim is to address broader issues of collective freedom of religion or belief by first giving some theoretical conceptualising points about collective religious autonomy. It then analyses the scope of collective religious autonomy under the ECHR and finally it makes some hypothetical predictions as to how the JFS case would be decided under the ECHR if ever submitted.

## II. Theoretical Points of Departure

Freedom of religion or belief is important for one's identity and autonomy. The ECtHR has adopted certain principles which ought to guide the interpretation of the right to freedom of religion or belief. The principle of protection of one's identity as regards religion or belief and the principle of pluralism, spelled out in the *Kokkinakis* case[15] are probably the most important principles. These two important principles co-exist in the Court's jurisprudence with the other major principles developed by the Court, namely the principle of neutrality and principle of autonomy of religious communities, but also with other principles applicable to the interpretation of the Convention, such as margin of appreciation, effective protection of rights and non-discrimination.

As a fact, not only individuals, but also religious organisations are protected under today's human rights law, including the ECHR. The ECtHR appears to recognise collective religious autonomy, and also seems to understand collective autonomy as a liberal value or a right which enhances individual freedom.[16] In other words, collective religious autonomy as an instrumental right may be needed for more effective or full protection of individual rights. However, it can be argued that collective religious autonomy has intrinsic value as well. This value stems from the importance of the collective (community) dimension to an individual believer. To put it simply for the present context: the community dimension may be part of the religion or belief one has.

However, it is also clear that a conflict between individual and collective (others in the community) can occur. What should the response be if the religious community (or an affiliated institution) violates the individual rights of either its own members or of others in society? Should there be exceptions to general rules to accommodate religious beliefs? It needs to be emphasized that the institutional expression of religion is often the most important for individuals (individually or collectively). It is for this reason that institutional and/or collective autonomy is important. This in fact should make a strong argument for institutional autonomy in human rights discussion. As collective expression of freedom of religion or belief is often the most important for individual believers, overriding this freedom by courts without adequate balancing of different interests cannot be acceptable.

## III. Spheres of Individual and Collective Autonomy

Freedom of religion or belief in international human rights law and under the ECHR is generally perceived to include two interrelated elements: 1) freedom to adopt or have a religion or belief of one's own choice (*forum internum*), and 2) freedom to manifest that religion or belief (*forum externum*). Thus, the structure of Article 9 of the ECHR suggests that there is a divide between what a person believes and actions based on these beliefs. The structure used – 'to have' and 'to manifest' – also suggests that there is a private/public divide in understanding of religion or belief. This public/private divide is rooted in the liberal understanding of freedom of religion or belief. Neither of these divides is necessarily recognised by believers themselves. What is most valuable for a believer is usually the possibility of expressing one's convictions alone or with the community.

Further, the structure of Article 9 indicates that *forum internum* (the inner sphere – 'to have') is absolute. Freedom to adopt or have a religion or belief is generally considered as an absolute right and cannot be subjected to State interference. Thus, religious autonomy to determine one's beliefs should theoretically be absolute in this sphere. However, the freedom to manifest one's religion or

[15] *Kokkinakis v Greece* (App no 14307/88) (1993) 17 EHRR 397 para 31.

[16] See e.g. *Hasan and Chaush v Bulgaria* (App no 30985/96) 34 EHRR 35 para 62.

belief is not absolute: it can be limited under Article 9 (2). Autonomy cannot be absolute in this sphere as external restrictions ultimately affect the scope of one's autonomy.

As argued above, collective religious autonomy is necessary since it may be intrinsically and instrumentally important for the individual believer. Another substantial question relating to spheres of religious autonomy is thus whether there is, in the case of collective autonomy, a *forum internum* corresponding to that of the individual, and similarly untouchable: such an untouchable *forum internum* would be a sphere which is completely (theoretically) shielded off from State interference. It would be the sphere of collective autonomy which could not be limited under Article 9 (2) of the ECHR.

Boundaries between *forum internum* and *forum externum,* already difficult to define on an individual level, are even more muddled when we are talking about religious communities. One could argue that at the collective level everything constitutes a manifestation of religion or belief - whether by individuals collectively, or by an institution finding its legitimacy (in human rights terms) in the collective will/choice of individuals. If everything at the collective level constitutes a manifestation of religion or belief, then it should be subject to limitations under Article 9 (2). Nevertheless, there is a tendency to think that certain matters (such as teachings, offices, structure and membership) fall completely (or mostly) within the control of the religious community.[17] These are issues which touch upon core doctrinal matters of religious communities, so that interference in these matters would seem to affect not only collective religious autonomy, but also the autonomy of individual believers in *forum internum* and *forum externum*.

With regard to the issue that collective religious autonomy is important for individual believers one should at least entertain the idea that there may be absolute freedom of communities in certain cases and in some areas. Determining what these areas are, is not, however, an easy matter. At first glance the easiest solution here would be to delineate a set of issues deemed to be internal matters of the community, and which may consequently be fully shielded from State interference: 'Render unto Caesar the things which are Caesar's, and unto God the things that are God's'.[18] This Biblical quotation has a multitude of interpretations and in modern-day terms links up to the idea of separation of State and Church. Locke, for example, esteemed it 'above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and other'.[19] However, McConnell has rightly pointed out that:

> The flaw in Locke's prescription is not with its desirability but with its congruence to reality...Even conceding, with Locke, that "the care of souls is not committed to the civil magistrate," there remain numerous and inevitable potential conflicts between the demands of civil society and demands of faith. Indeed, the very boundary between sacred and secular is a point of contention on which persons of various religious and secular persuasions will inevitably disagree.[20]

Another approach is to identify possible fully-protected core areas by comparing practices in several democratic countries. The idea is that consolidated practice, if shared across a range of democratic countries, would be a criterion to establish what falls within *forum internum* of religious communities.

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[17] This approach may have several explanations, one of which is the historical or traditional understanding of Church autonomy with its philosophical roots in natural law. From a slightly different angle, Professor van der Vyver, for example, has explored religious (church, institutional) autonomy from the perspective of sphere sovereignty. Sphere sovereignty stipulates that different social entities (incl. Church and State), 'do not derive their respective competencies from one another, but are in each instance endowed with an internal enclave of domestic powers that emanate from the typical structure of the social entity concerned and as conditioned by the particular function that constitutes the special destiny of that social entity'. JD van der Vyver, 'Sphere Sovereignty of Religious Institutions' in G Robbers (ed), *Church Autonomy: A Comparative Survey* (Peter Lang, Frankfurt am Main 2001) 655.

[18] Matthew 22:21.

[19] J Locke, 'Essay on Toleration' in Vol 6 of The Works of John Locke (1823; photo reprint, 1963) 1, 9.

[20] MW McConnell, 'Believers as Equal Citizens' in NL Rosenblum (ed), *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies* (Princeton University Press, Princeton 2000) 94.

Durham, Jr., for example, has tried, to map out common core areas where collective autonomy is absolute or near absolute by comparing different European countries, the United States and OSCE.[21]

> Balancing of some kind, either express or tacit, may be inevitable at boundaries, but are there clear cases?...If there is a fairly well established domain of protected religious autonomy that is discernible in several credible democratic countries, it becomes very difficult to argue that state interference that imposes limitations on autonomy in such a domain is "necessary in a democratic society". It would accordingly appear to follow, under Article 9 (2) of the European Convention, that it is not permissible to limit manifestation of religion, including institutional manifestations, in the area in question.[22]

Durham identifies in fact three main areas of possibly exclusive matters of a religious community (the core areas or what in Germany is known as 'own affairs'):
(1) The inner domain of faith, doctrine and polity: for example, dogma, teaching, ecclesiastical polity (constitution and organisation), authority and legislation;
(2) The core ministry: for example, matters of worship, ritual, liturgy, inviolability of places of worship, confidential counselling, confession, education (teaching the faith), education and teaching of clergy, dissemination of beliefs to others, temporal care for members/others;
(3) The core administration: the right to appoint and dismiss religious/ministerial employees, employees/volunteers contributing to religious mission, secular employees/volunteers; church discipline; financial issues, etc.[23]

Durham points out that his map of core areas corresponds in many respects to the OSCE commitments recorded in the 1989 Vienna Concluding Document.[24] For example, principle 16 (4) of the document in question specifies that participating States have committed themselves to respect the rights of religious communities to establish and maintain places of worship, to organise themselves according to their own hierarchical and institutional structure, to select, appoint, and replace their personnel according to their own rules and needs, and to receive financial contributions. Principle 16 (6) also commits States to protect the right to receive and dispense religious education individually or in association with others. It also urges States to allow religious ministers to be trained in appropriate schools and to respect the right of believers and communities to possess books or objects needed for religious practice (16 (8) and 16 (9)). Principle 16 (10) stresses the right of religious faiths, institutions and organisations to produce and import and disseminate religious publications and materials.[25] As Minnerath has observed 'this document in effect constitutes a manifesto of corporate rights of religious organizations. The general right to self-government is implied and specified in considerable detail'[26]. It should be noted, however, that although the Vienna Concluding Document is an important political standard setting it is not a legally binding document.

From Durham's discussion and synthesis of country reports it seems there is some common ground on collective religious autonomy in Europe. He points out that:

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[21] W Cole Durham Jr, 'The Right to Autonomy in Religious Affairs: A Comparative View' in G Robbers (ed), *Church Autonomy: A Comparative Survey* (Peter Lang, Frankfurt am Main 2001) 686-714. Durham's article summarises contributions provided for the conference on church autonomy bringing together experts on state-church relations from Europe and the United States. As he points out himself, the map of core matters is incomplete and *ad hoc* following the information discerned from these contributions.

[22] Ibid 693.

[23] Ibid 697.

[24] Ibid 694. See Concluding Document of the Vienna Follow-up Meeting of Representatives of the Participating States of the Conference on Security and Cooperation in Europe (adopted 17 Jan 1989). Similar commitments are recorded in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (adopted 25 Nov 1981) UNGA Res 36/35.

[25] Concluding Document of the Vienna Follow-up Meeting (n 25 above), Principle 16.

[26] R Minnerath, 'The Right to Autonomy in Religious Affairs' in T Lindholm, W Cole Durham Jr, BG Thazib-Lie (eds), *Facilitation Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, Leiden 2004) 311.

> There is no doubt that religious organizations enjoy strong protection in their core "inner domains": with respect to matters of doctrine, ecclesiastical polity, and core ministry. Moreover, a variety of constitutional and international commitments point toward assurance of broad autonomy protections in a range of practical areas critical to administration of religious organizations.[27]

Durham, however, does not *expressis verbis* conclude anything definitive on absolute autonomy in some areas of communal religious activity which could emerge as a principle or norm at the European level. He uses 'strong protection' and 'broad autonomy protections' to describe the situation in compared countries. Durham further elaborates that the difficulty with any chart of core areas is that it necessarily oversimplifies. In reality many core religious activities radiate outward into adjacent non-core domains. For example, educational and charitable activities shade into arguably secular matters of education, social services and culture. Similarly, different countries disagree on the scope of exemptions that should be allowed to religious organisations.[28] It should be added that the question of autonomy not only arises in the context of the main religious body, but also in the context of all kinds of affiliated entities (like hospitals, schools, rehabilitation centres, publishing houses), which may enjoy different degrees of autonomy in different countries. Tradition, history, societal attitudes seem to affect the scope of autonomy attributed to communities. Moreover, there are various examples of negative responses to autonomy, even in these areas where there are strong international commitments.[29] Durham Jr., for example, points out restrictive laws and practices in Russia, Italy, Spain and even Belgium.[30] Consequently, it can be discerned from the above discussion that there is some common European consensus as to the areas of collective religious autonomy which should have broad/strong protection. However, the actual practice varies. There is no explicit consensus as to the absolute sphere of collective religious autonomy.

The third approach to determine the *forum internum* of religious communities, in fact, presumes that we already know what falls within the competence of religious communities. Von Campenhausen, for example, argues from the German context that in practice today it is not difficult to determine (define) religious communities' (churches) own matters.

> Today it is mostly agreed upon what the so called "own matters" are and where the line has to be drawn between state matters, church matters and such matters, in which both claim competence, the so called *common matters*.…Today the conviction prevails that "the drawing of the line" is not a question of arbitrariness, but has to be done in accordance with different functions of the state and the religious communities.[31]

While this may be true in regard to traditional religious communities, it does not necessarily apply to minority religions (or beliefs). On another point, however, Campenhausen is undoubtedly rightly, i.e. contending that in determining the religious communities' own matters, due respect and great weight ought to be given to ecclesiastical self-understanding: as he observes, '…the point of view of the churches and religious communities is decisive.'[32] However, he is also right in contending that, the State cannot let religious communities determine States field of competence either.

> A "law that applies to all", thus limiting the ecclesiastical self-determination, ought to be acceptable, if that law is a mandatory requirement of the peaceful coexistence of state and church

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[27] W Cole Durham Jr (n 22 above) 714.

[28] Ibid 694.

[29] Like the ones listed in the OSCE documents or in the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief. However it has to be noted, like the 1989 Vienna Concluding Document, the 1981 Declaration is a politically binding and not a legally binding document.

[30] W Cole Durham Jr (n 22 above) 696.

[31] A Freiherr von Campenhausen, 'Church Autonomy in Germany' in G Robbers (ed), *Church Autonomy: A Comparative Survey* (Peter Lang, Frankfurt am Main 2001) 79.

[32] Ibid 80.

> in a religiously and ideologically neutral political community. This is also laid down by the European Convention on Human Rights and Fundamental Freedoms in Art. 9 II.[33]

Campenhausen suggests that the legislator needs to find a careful balance between the self-determination right of religious communities and the law that applies to all. When limiting the right to self-determination for churches through a law that applies to all, the self-understanding of the church has to be given special consideration.[34] How closely the right which risks being infringed relates to the central mission of the church is an important consideration: '[t]he more pronouncedly a matter displays the religious witnessing, the more respect the infringing legislator has to pay'.[35] Thus, this kind of broad autonomy of religious communities allows only limited, qualified interference (mandatory, least restrictive). A similar view was expressed by the ECtHR, for example, in the case of *Serif v Greece* where the Court held that unless there is a pressing social need the State is not permitted to interfere in a purely religious question that has been decided by a religious community, even when that community has become divided by opposite views on the issue and social tension might subsequently rise.[36] Campenhausen, for example, also points out that the legislator may attach more importance to the right to self-determination than to legal interest, which was supposed to be protected through the law. In such a case the legislator may provide an exemption.[37] Thus, due respect and great weight ought to be given to religious communities' self-understanding and only qualified interference is acceptable. As Minnerath contends that:

> …individual freedom of conscience for most is intimately tied to a community of belief, and if that community is not free to shape itself, the conscience of its individual believers is inevitably compromised. Religious authenticity, for both the individual and the community, cannot be fully achieved if communal autonomy is impaired.[38]

Thus, collective religious autonomy is important. It follows that there may be areas where broad collective religious autonomy is needed. However, it is argued here that deciding which (completely fixed) sets of issues fall under the exclusive competences of religious communities' risks coming into conflict with individual rights, and is thus not desirable. Nevertheless, in practice (and taking into account historical traditions and divisions) it is possible to carve out areas of competence where religious communities have broad, but not absolute autonomy. As was shown above this has already been attempted, for example, in the practice of the OSCE. As collective expression of religion or belief (including institutional expression) is often the most important for individual believers, it is important (in order to maximise religious freedom) that States respect collective religious autonomy as far as possible. It is not appropriate for the Court to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed communally ('due respect to religious communities' self-understanding'). However, it is appropriate to limit those beliefs when necessary in a democratic society on the grounds listed in Article 9 (2).

As to the practice of the ECtHR, it should be recognised that there are certain areas where collective religious autonomy seems to have gained strong (although probably not absolute) protection. Minnerath highlights two of these: access to legal entity status and rejection of attempts by States to intervene in internal religious disputes. As regards the first area, Minnerath observes that: 'the Court has recognised the importance of a crucial threshold condition for autonomy by recognising

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[33] Ibid.

[34] Ibid 85; BVerfGE 53, 366 (401); 66, 1 (22); 72, 278 (289).

[35] A Freiherr von Campenhausen (n 32 above) 85.

[36] *Serif v Greece* (App no 38178/97) (2001) 31 EHRR 20.

[37] A Freiherr von Campenhausen (n 32 above) 84. The exemptions from generally applicable laws will be discussed in Ch IV of this thesis.

[38] R Minnarath (n 27 above) 293.

the right of religious organisations to acquire legal entity status'.[39] In a series of cases under Article 11 (freedom of association) and under Article 9, the Court has stressed the importance of this right. The close synergy between these articles is now well established.[40] The ECtHR has clearly recognised that the individual is enriched by association. The Court has emphasised that the individual right to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. '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.'[41]

Minnerath further argues that the second and 'deeper' level of protection of religious autonomy is evident in cases which have overturned States' efforts to intervene or otherwise take sides in religious disputes.[42] The European Court of Human Rights has repeatedly emphasised that the State has a duty to remain neutral and impartial in relation to various religions and beliefs, which is important for the preservation of pluralism and the proper functioning of democracy.[43] The Court has also elaborated what this means. It has said that a State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed.[44] The latter makes a very strong point about autonomy of religious individuals or communities and is also relevant for the purposes of this article.

In addition to Minnerath's observations, strong protection of internal matters can be also seen in cases in which an individual has claimed that his or her rights have been infringed by the religious association itself. According to the case law of the ECtHR, internal dissent is usually protected by the right to leave the community.[45]

There are several cases, instead, in which the Court has not recognised collective religious autonomy. For example, State interference into doctrinal matters (which could be considered as needing strong protection), has been considered to be justified in the case where the State refused to grant approval necessary for access to slaughterhouses with a view to performing ritual slaughter in accordance with the ultra-orthodox religious prescriptions.[46] The core administration issues[47] have received fluctuating degrees of protection as well. The appointment of ministers had seemed to be

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[39] Ibid, 311; *Serif v Greece* (App no 38178/97) (2001) 31 EHRR 20; *Metropolitan Church of Bessarabia and Others v Moldova* (App no 45701/99) (2002) 35 EHRR 13*; The Holy Synod of the Bulgarian Orthodox Church and Others v Bulgaria* (App nos 421/03; 35677/04) ECHR 22 May 2007.

[40] M. D. Evans, *Manual on the Wearing of Religious symbols in Public Areas* ( Martinus Nijhoff Publishers, Leiden 2009) 31.

[41] *Metropolitan Church of Bessarabia and Others v Moldova,* para 118; *Hasan and Chaush v Bulgaria* (App no 30985/96) (2000) 34 EHRR 35 para 62.

[42] *Serif v Greece* (App no 38178/97) (2001) 31 EHRR 20; *Metropolitan Church of Bessarabia and Others v Moldova* (App no 45701/99) (2002) 35 EHRR 13*; Hasan and Chaush v Bulgaria* (App no 30985/96) (2000) 34 EHRR 35.

[43] *Leyla Sahin v Turkey* (App no 44774/98) (2005) 41 EHRR 8 para 107; *Manoussakis and Others v Greece* (App no 18748/91) (1996) 23 EHRR 387 para 47; *Hasan and Chaush v Bulgaria* (App no 30985/96) (2000) 34 EHRR 35 para 78; *Refah Partisi (The Welfare Party) and Others v Turkey* (App nos 41340/98, 41342/98, 41343/98 and 41344/98) (2003) 37 EHRR 1.

[44] *Church of Scientology Moscow v Russia* (App no 18147/02) ECHR 24 Sept 2007 para 72; *Metropolitan Church of Bessarabia v Moldova,* para 123.

[45] *X v Denmark* (App no 7374/76) (1976) 5 DR 157. See also *E/GR v Austria* concerning the levying contributions from church members, *E/GR v Austria* (App no 9781/82) (1984) 37 DR 42; *Williamson v UK* concerning a Church of England priest opposing the decision of the Church to ordain women, *Williamson v UK* (App no 00027008/95) 17 May 1995; and *Karlsson v Sweden* in which the applicant priest's views on the priesthood of women were incompatible with the view generally held by the Church. In consequence, the Church was not obliged to accept the applicants candidacy for a post of vicar, *Karlsson v Sweden* (App no 12356/86) (1988) 57 DR 172; *Rommelfanger v the Federal Republic of Germany* (App no 12242/86) (1989) 62 DR 151.

[46] *The Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (App no 27417/95) ECHR 27 June 2000.

[47] Like the ones described by Durham. W Cole Durham Jr (n 22 above) 697.

within (almost exclusive) autonomy of religious communities until the case of *El Majjaoui and Stichting Touba Moskee v the Netherlands* in which a work permit was refused to an imam of the Stichting Touba Moskee on the grounds that the job vacancy was not advertised and reported as prescribed by law to consider priority labour.[48] The Court found that the fact that the religious organisation had to comply with certain requirements before it was able to employ the applicant did not as such raise an issue under Article 9. It appears that in the Court's view the restrictions on appointment of an imam do not necessarily involve autonomy of a religious community.

Thus, there are areas of collective religious autonomy which have obtained strong protection by the European Court of Human Rights. However, there are inconsistencies in the case law, which do not make it possible to assert with full confidence what the position of the ECtHR is. The inconsistency in the Court's case law demonstrates that there is a fluctuating degree of protection in areas where religious communities could enjoy broad autonomy according to the lists developed, for example, by the OSCE. It is also impossible at this stage of case law to determine whether in the ECtHR's view, there is *forum internum* of religious communities, which is completely shielded off from State interference. In fact, there is no explicit reference to absolute sphere of freedom of religious communities. If this is the Court's approach then it is in conformity with the ideas developed in this article. However, as collective expression of religion or belief (including institutional expression) is often the most important for individual believers, it is important (in order to maximise religious freedom) that States respect collective religious autonomy as far as possible. Thus, broad autonomy in certain areas may be necessary. With this consideration in mind, a balancing of interests needs to be carried out.

## IV. The Hypothetical case: The JFS Case in the European Court of Human Rights

There were radically different reactions to the JFS case. The United Synagogue, which represents Orthodox Jews in the UK, announced it was extremely disappointed with the ruling. It stated further that the decision interfered with the Torah-based imperative on the education of Jewish children, regardless of their background. A Different reaction came from the Equality and Human Rights Commission, which said that the verdict confirmed that no school will be allowed to discriminate based on the ethnic origin of an individual. The British Humanist Association (BHA) went even further controversially arguing the verdict should trigger an investigation into all state faith schools' admission policies. Andrew Copson, the BHA's director of education and public affairs stated that: 'There's absolutely no reason why what is essentially a public service should be denied to any children, whatever their beliefs or the beliefs of their parents.'[49] The arguments have been advanced for faith schools to be more inclusive generally. The awkward question here is to what extent faith schools should be required to give up their autonomy and ethos as regards admissions to meet the needs of the larger community. One aspect which seems to create debate (and not only in the UK) is the public financing of faith schools. All the above concerns have been channelled into broader questions regarding the aims of education in a multi-religious/cultural society generally and religious education specifically.

Further, as a result of the UK Supreme Court case, the JFS and other Jewish schools had to change their admission policies. Faith schools still have relative freedom as to their ethos and admission. However, now they have to base their admission policies on genuine religious adherence and practice (hereinafter 'sincerity test'). Some experts have welcomed this solution.[50] Some authors have considered this contradictory and challenging. Brawder points out that Orthodox Judaism has always defined its members on the basis of birth to a Jewish mother or sincere conversion through a recognized rabbinical court, which is a very arduous process. He further argues:

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[48] *Lamaiz El Majjaoui and Stichting Touba Moskee v the Netherlands* (App no 25525/03) ECHR 20 Dec 2007.

[49] J Shepherd & R Butt, 'Jewish School Racially Discriminated against Boy, Court Rules', *Guardian* 17 December 2009.

[50] M Hill, 'What the JFS Ruling Meant' *Guardian,* Monday 21 December 2009.

> Even if we could conceivably devise a test that would encompass the full range of Jewish practice it would in no way help to define who is a Jew. That is because Judaism is a state of being…It is not conferred on the basis of ticking boxes on a form. Nor for that matter does the inability to tick such boxes, due to lack of practice, mean that a born Jew is to lose his or her Jewishness. Any practice test would be devised simply to comply with what had become the law. No one remotely acquainted with Orthodox Jewish theology believed for even a moment that it was a genuine method of determining Jewish identity.[51]

Professor Weiler, for example, takes it even further and argues that the UK Supreme Court's reasoning was underwritten by a profoundly Christian understanding of religion and religious membership: '…you are Christian if and only if you believe in Christ. This idea of religion as a matter of doctrinal conviction has shaped the Western sensibility as to what religious membership means'.[52] Weiler argues that what is troubling about the majority is its sheer incomprehension and consequent intolerance of a religion whose self-understanding is different from that of Christianity. Furthermore, as McClean notes from a different perspective, church schools (faith schools) of all types are very popular with parents and there are often more applications for admissions than there are places available. 'It is often said that parents will attend church solely to enhance their children's chances of admission to a popular church school'.[53]

Thus, there are broader (substantial and structural) issues involved regarding education and faith schools generally and the admission policies of these schools specifically. These broader issues have to be addressed somewhere else considering the limited scope of this article.

As to the possible application of the ECHR in this case, it is difficult to predict with certainty how the ECtHR would decide this case. This is because its case law has not been consistent regarding freedom of religion or belief. However, some arguments can be put forward as to how it may decide the case taking into account the principles developed by the Court itself and the existing case law.

If the JFS submits its case to the ECtHR it should be brought under Article 9 (freedom of religion or belief) of the ECHR and possibly under Article 14 (non-discrimination).[54] The focus below will be on the possible application of Article 9. Under Article 9, only freedom to manifest ones religion or belief can be limited. The limits can only be imposed if they meet three sets of requirements. Article 9 (2) reads as follows:

> Freedom to manifest one's religion or belief shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[55]

Thus, under the ECHR restrictions on manifestation of religion or belief must be prescribed by law, they have to be necessary in a democratic society and they have to have a legitimate aim listed in Article 9 (2). However, the restrictions are mainly assessed through the test of being necessary in a democratic society. The latter is primarily determined through the principle of proportionality and

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[51] N Brawder, 'There's much to Regret in this Ruling', Guardian 17 December 2009.

[52] JHH Weiler, Discrimination and Identity in London: The Jewish Free School Case (2010) Jewish Review of Books 1. Available at : http://www.jewishreviewofbooks.com (12.03.2010).

[53] D Mcclean, 'Religion in Public Education – United Kingdom', Paper given at the European Consortium for Church and State Research Conference on Religious Education, Trier 11-14 Nov 2010.

[54] Lord Rodger, for example, pointed out that the majority decision 'produces such manifest discrimination against Jewish schools in comparison with other faith schools, that one can't help feeling that something has gone wrong'. Lord Rodger [para 26]. The issue of possible discrimination of Jewish faith schools should definitely be investigated in greater depth somewhere else.

[55] ECHR Art 9 (2).

margin of appreciation. Neither of these principles can be found in the text of the ECHR. These are principles introduced to the Convention system by the European Court of Human Rights.[56]

The proportionality principle permeates the whole interpretation of the Convention and implies the need to strike a proper balance between various competing interests.[57] It has acquired the status of a general principle, which requires that deviations from the fundamental rights are not excessive in relation to the legitimate interests and needs that have occasioned it.[58] In a narrower sense it means assessment of proportionality between means employed and ends (legitimate aims) to be achieved. The Court has often stated that the adjective 'necessary', implies the existence of a 'pressing social need'.[59] The idea is that a State should demonstrate a pressing social need, that the right should be interfered with in the particular public interest (in this case rights and freedoms of others).

As to the principle (or doctrine) of margin of appreciation, it can be seen as a tool to deal with the tensions between universality of human rights and state sovereignty.[60] In the *Handyside* case the Court stated that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights.[61] The margin of appreciation has been assumed to have importance as a major tool of adjudication in many cases and at any point when the Court assesses the proportionality of State interference with a right.[62] The idea is that State authorities are in a better position to evaluate the need for measures which negatively affect the enjoyment of the Convention rights and freedoms. However, the Court has also repeatedly stated that the final say in interpretation and application of the ECHR is in principle with the European Court of Human Rights.[63]

In the present hypothetical case, the Court will first need to decide whether this case is admissible at all. It is assumed here that the case will be submitted by the JFS. There is also an option that the case might be submitted by the Chief Rabbi and the Orthodox Synagogue. Considering the limits of this article only the first option will be considered.

It has been long established in case law that both petitions from individuals and religious associations can be accepted. Not only is the religious freedom of an individual protected, but also a religious community under Article 9.[64] Although there is no case law under the ECHR where a religious school has submitted an application because of the infringement of its convention rights, it would go against the grid of the case law regarding religious organisations if the application is declared inadmissible on that ground. After all the JFS is a faith school.

Assuming that all other requirements for the admission are fulfilled the second question would be whether the matter falls under Article 9 of the Convention. The JFS could argue that by deciding that its admission policy was directly discriminative on racial grounds the State violated its freedom of

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[56] P van Dijk, GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn Kluwer Law International, The Hague 1998) 80-81; See eg *Soering v UK* (App no 14038/88) (1989) 11 EHRR 439. However, proportionality principle *per se* is not a creation of the ECtHR, the traces of it can be found as far back as in ancient Greece. See eg TJ Gunn, 'Deconstructing Proportionality in Limitations Analysis' (2005) 19 Emory Int Law Rev 465.

[57] P van Dijk and GJH van Hoof (n 57 above) 80.

[58] Ibid.

[59] *Refah Partisi (The Welfare Party) and Others v Turkey* (App nos 41340/98, 41342/98, 41343/98 and 41344/98) (2003) 37EHRR 1 para 53.

[60] For a comprehensive account on the doctrine see Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, Oxford 2002).

[61] *Handyside v UK* (App no 5493/72) (1979) 1 EHRR 737, para 48; This view was in principle expressed earlier in the judgment of 23 July 1968 on the merits of the 'Belgian Linguistic' case. *Belgian Linguistics Case* (App nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64) (1968) 1 EHRR 252 para 10.

[62] T Lewis, 'What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) 56 ICLQ 397.

[63] *Handyside v UK* (n 62 above) para 23.

[64] It has not always been the case. In early case law the Commission considered applications from religious associations inadmissible. Eg *Church of X v UK* (App no 3798/68) (1968) 29 CD 70. Subsequently it adopted a position that 'when a church body lodges an application under the convention it does, in reality, on behalf of its members.' *X and Church of Scientology v Sweden* (App no 7805/77) (1979) 16 DR 68. It seems to have clearly moved on from these early approaches, accepting applications from religious communities in their own right.

religion or belief. It could further be argued that their admission policy discriminated against non-Jews (according to Orthodox terms) on grounds of religion and not race. In essence the matter was an internal religious dispute between different strands of Judaism. In this regard, it can be argued that the State violated the principle of neutrality by interfering with an internal matter of the religious community. It can be further argued that the interference was also not justified as at the crux of the case was the fact that M's mother did not chose to convert to Judaism under the Orthodox authority.

The European Court of Human Rights and Commission have stated several times that the terms, 'manifestation' or 'practice' do not cover every act which is motivated by religion or belief. Acts which do not actually express a belief cannot be considered to be protected by Article 9.[65] As the matrilineal test is a well known fundamental tenet of the Jewish religion, it would most likely be considered as a religion or belief for the purposes of Article 9.

However, some scholars have also rightly suggested 'that there are some forms of belief (manifestations) which might be considered incompatible with Convention values altogether and so cannot benefit from its protection at all.'[66] MD Evans, for example, points in this regard to Article 17 which expressly seeks to prevent Convention provisions being used to undermine essential convention values.[67] Although the Court has not used Article 17 to deny protection of Article 9 to (religious or non-religious) believers, this remains possible in appropriate cases.[68]

In the case of the JFS it could be argued that racial discrimination is exactly one of these 'beliefs' which is by its very nature incompatible with convention values and does not deserve its protection. However, at the crux of this case was exactly the question whether racial discrimination was involved at all. Moreover, when it comes to freedom of religion or belief the matter can be more appropriately decided not at the definitional stage, but at the second stage when limits to restrictions are assessed under the second paragraph of Article 9. There is a danger otherwise that any religious community, whose beliefs can be broadly construed not to comply with democratic values like non-discrimination (e.g. on grounds of gender), tolerance etc., will be automatically excluded from the protection of Article 9. The definition should not become a matter of convenience in Convention practice to avoid (disregard) difficult questions relating to balancing freedom of religion and other interests. Moreover, as was emphasised above, whether racial discrimination was at issue at all was at the crux of this case.

The JFS can further argue that the State has breached its neutrality requirement. The ECtHR has emphasised the State's role as the neutral and impartial organiser of the exercising of various religions, faiths and beliefs and has pointed out that this role is conducive to public order, harmony and tolerance in a democratic society. The neutrality has been interpreted by the ECtHR as impartiality, that is, as an obligation to respect the religious choices of citizens, whether or not they adapt to the widespread religious beliefs in the country, and whether such beliefs are popular or unpopular.[69] As noted above, the Court has also emphasised that a State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious

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[65] See also P van Dijk, GJH van Hoof (n 57 above) 549.

[66] MD Evans, *Manual on the Wearing of Religious symbols in Public Areas* (Martinus Nijhoff Publishers, 2009) 9-10.

[67] Ibid 10. Article 17 'Abuse of Rights' states that: No one may use the rights guaranteed by the Convention to seek the abolition or limitation of rights guaranteed in the Convention. This addresses instances where states seek to restrict a human right in the name of another human right, or where individuals rely on a human right to undermine other human rights (for example where an individual issues a death threat).

[68] For example, in the case of *Norwood v the United Kingdom* the Court found that the display of a poster by a member of an extreme right wing party that identified Islam as a religion with terrorism amounted to a 'vehement attack on a religious group' was incompatible with the values proclaimed and guaranteed by the convention, notably tolerance, social peace and non-discrimination' and as such, could not benefit from the protection of Article 10 (freedom of expression). *Norwood v the United Kingdom* (App no 23131/03) ECHR 2004-XL.

[69] See also J Martínes Torrón, 'Religious Liberty in European Jurisprudence' in M Hill (ed), *Religious Liberty & Human Rights* (University of Wales Press, Cardiff 2002) 106-107.

beliefs or the ways in which those beliefs are expressed.[70] Further relevance to the JFS case can be found in the abovementioned case *Serif v Greece* where the Court held that unless there is a pressing social need the State is not permitted to interfere in a purely religious question that has been decided by a religious community, even when that community has become divided by opposite views on the issue and social tension might subsequently rise.[71]

Translating this for the purposes of this article it can be argued that the very right to the religious autonomy of a community requires that the community can determine what is essential to carry out its mission. No other institution can say what is doctrinally important for a religious community other than a religious community itself. However, the State can restrict certain manifestations of freedom of religion or belief when necessary in a democratic society. Thus, the Court needs to assess the proportionality of the measure in this case by giving special consideration to the facts that the matrilineal test is a fundamental tenet of the Jewish religion (despite the different approaches within the community), and to the fact that its racial nature is strongly arguable. It may well be that the Court needs to suggest that an exemption needs to be made in domestic law.[72] The possibility of the exemption was also hinted at by one of the majority justices in the JFS case (Lady Hale). She pointed out that it may be arguable that an explicit 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 decent. However, formulating this exemption is a matter for Parliament not for the Court.[73]

As to the extent of margin of appreciation in this case, the ECHR case law does not give firm answers to make predictions for the JFS case. In cases concerning Article 9 the Court has predominantly left a wide margin of appreciation to States. Some recent cases indicate that the Court may be keen to change this approach in certain circumstances.[74] However, the Court has no systematic or well articulated approach in this regard. In the present case the Court may need to take into account the above mentioned broader structural and substantial issues regarding faith schools in the UK.

One final aspect of ECHR case law, and probably the most determinative aspect for the JFS case, needs to be pointed out. There is no case law relevant if one wants to become a member of the community and is refused on religious grounds. On the basis of the case law, membership would most likely fall under the competences of a religious community. There is also no case law under the ECHR relating to refusal of a place in a faith school. According to the limited case law, internal dissent is usually protected by the right to leave the community. Thus, in most cases where an individual has claimed his rights against a religious community under the ECHR, a solution is based on what can be called the principle of voluntarism. This means that by accepting membership in the community, a person waives certain rights.[75] Based on this case law the JFS could argue that the fact that M's mother or M himself have not chosen to convert under Orthodox Jewish authority has made it clear that they do not want to belong to this (Orthodox) community. Thus, it was their own decision (based on their beliefs as Masorti Jews) which deprived M the possibility of being admitted to the JFS. As pointed out by Lord Rodgers, conversion under Orthodox auspices would have involved M adhering to a set of beliefs that are materially different from those of Masorti Judaism.[76] Moreover, the ECtHR

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[70] *Church of Scientology Moscow v Russia* (App no 18147/02) ECHR 24 Sept 2007 para 72; *Metropolitan Church of Bessarabia v Moldova,* para 123.

[71] *Serif v Greece* (n 43 above).

[72] Cf *Thlimmenos v Greece* (App no 34369/97) (2001) 31 EHRR 411.

[73] Lady Hale, [para 69-70]

[74] *Lautsi v Italy* (App no 30814/06) ECHR 3 Nov 2009.

[75] However, from a legal, human rights point of view it cannot be accepted that a person renders his fundamental rights and freedoms in totality. One has human rights simply because one is a human being. As long as a human being exists, he has some inalienable rights.

[76] Lord Rodger [para 222].

practice is very clear that 'in democratic societies the State does not need to take measures to ensure that religious communities remain or are brought under a unified leadership.[77]

## V. Conclusion

The JFS case has brought into light once again that there are more controversial issues related to freedom of religion or belief than just the Islamic veil, which has been dominating the debate in recent years. It has also highlighted questions of individual or collective autonomy that can arise regarding religious communities themselves and also regarding their schools. Conflicts can occur between individual rights (including non-discrimination) and collective religious autonomy. In such cases, due regard needs to be given to collective self-determination. The collective dimension is often the dimension which is the most important for individual believers individually or collectively. Without the autonomy of a religious community many aspects of individual religious freedom may be jeopardized. However, drawing the line in the case of a conflict between an individual and religious community is not an easy task. Principled assessment of the facts of the case is crucial. Moreover, Courts may well be ill-equipped to make decisions in areas which are essentially a matter of policy. As to the hypothetical case of the JFS in the ECtHR, no ultimate predictions can be made as to the outcome given the inconsistencies in the ECtHR's own case law.

[77] *Metropolitan Church of Bessarabia and Others v Moldova,* para 117.


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