

# Religious Freedom as a Technology of Modern Secular Governance

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Two marks of a mature field of inquiry are that its central problems are well-formulated and that its conventional wisdom is sound. Even in the most mature fields, however, the conventional wisdom can sometimes be misleading and the central problems poorly cast .... Progress can be made only if much of the conventional wisdom is displaced and its central questions are reframed.<sup>1</sup>

## I. INTRODUCTION

The conventional wisdom in religious freedom discourse rests on two core tenets: first, that sovereign authority must be secular in order to ensure *neutrality* towards religion and thus the separation of religion and state that is foundational to liberal democracy (the neutrality thesis); and second, that in order to ensure neutrality towards both religion and non-religion, political and legal authority must guarantee the *universal (human) right* to freedom of religion, conscience and belief so that individuals and communities may practice their faith freely without coercion or interference (the universality thesis).

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1. Jules L. Coleman, *The Architecture of Jurisprudence*, 121 YALE L. J. 2, 5 (2011).

The thesis of this chapter is that these two tenets of the conventional wisdom must be discarded if we are to gain a better grasp of the salience and structure of the contemporary politics of religious freedom. Recent scholarship on secularism has made clear that the neutrality thesis is no longer tenable. Rather than withdraw from the religious domain, the modern secular state has been shown constantly to intervene and seek to reconfigure substantive features of religious life by distinguishing between what is properly religious in order to render certain practices indifferent to religious doctrine and thus bring them legitimately under the domain of civil law. The result has been the constant intertwining of religion and governance as modern secular power operates incessantly to determine the scope of religion in the political order.

The universality thesis has been shown to be similarly untenable. In fields as disparate as legal anthropology and intellectual history, the idea that a universal right to religious freedom exists that is neutral towards *religion* or protects all *religions* equally is today broadly criticized. Rather, it is more accurate to say that the human right to religious freedom purports to treat all *rights-holders* equally. In this move, however, a seismic shift occurs in the relationship between notions of normativity and authority.

It is now the rational, autonomous human being, as opposed to heteronomous “religion,” that is the proper *subject* of normativity. The individual, now as a matter of right, decides for herself (as authority) questions of religion, conscience and belief (as object). Religion is hereby reformulated in accordance with a distinctive normative model of religiosity: as privatized belief in a set of creedal propositions to which an autonomous individual gives assent. This generates the distinctive and unstable co-imbrication of conscience and autonomy as the “buffered” self simultaneously chooses autonomously and believes freely.<sup>2</sup>

The genius and enduring appeal of modern discourse rests on the fact each thesis is defined in terms of the other. On the one hand, the neutrality of the political order is said to be secured by the guarantee to protect the universal right to religious liberty. In this move, the

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2. See Peter Danchin, *Islam in the Secular Nomos of the European Court of Human Rights*, 32 MICH. J. INT’L L. 663, 708 ff. (2011).

disciplinary structure and secular practices of the public sphere combine to *produce* the believing subject and concomitant post-Protestant conceptions of religion (especially in relation to scripture and rituals) and religious subjectivity (especially as regards moral and ethical sensibilities). On the other hand, the universality of the right is said to be secured by the neutrality of the public sphere towards religion. This requires the state constantly either to recognize or limit claims regarding the manifestation of religious belief and practice generating the distinctive entanglement of religion and law in different domains of the public and private spheres.

This double-structure necessarily generates two interrelated paradoxes. First, by defining the secular neutrality of the public sphere in terms of the universal right to religious freedom, the authority of religion is *privatized* relative to state authority and its normativity *interiorized* relative to individual subjectivity. Second and as a result, religious freedom is secured through subordination of religion to the secular power and public reason of the sovereign state. By defining the meaning and scope of freedom protected by the right in terms of secular neutrality, the claims of individuals and communities to religious liberty are in fact limited through a continuing praxis of legal recognition and regulation.

The chapter argues that this oscillating dialectic between secular neutrality and individual right defines how the right to religious freedom functions as a technology of secular governance and is integral to the power of the modern nation-state. This can be seen in three key areas. First, in the foundational distinction common to all contemporary formulations of the right between a *forum internum* on the one hand, defined as the *locus* of religious belief and conscience ostensibly protected absolutely by law, and a *forum externum* on the other, where the outward expression or manifestation of this belief is subject to state regulation. Second, in debates concerning the proper *subject* of the right and whether this can include collective subjects and actually-existing systems of religious law adhered to by both majority and minority religions. And third, in cases where conflicts of value arise between two or more claims *internal* to the right to religious liberty itself, *i.e.* where both sides to a dispute frame their arguments as a claim to religious freedom.

The argument proceeds in two parts. Part II outlines the two dominant genealogies that underlie the modern structure of the right to religious liberty and its twin theses of neutrality and universality. Part

III then illustrates the three themes discussed above by considering the recent decision of the U.K. Supreme Court in *R (on the application of E) v. The Governing Body of JFS* (the “JFS” or “Jews’ Free School” case).<sup>3</sup> Finally, Part IV concludes by noting how, counterintuitively, the three issues concerning the conceptual structure, subject and authority of the right cut across the Western and non-Western divide. Once the antinomies generated by these paradoxes are made visible, it thus becomes clear that the right to religious freedom is not a single, stable principle existing outside culture, spatial geographies or power, but instead is a contested, polyvalent concept existing and unfolding within historical political orders.

## II. RIVAL GENEALOGIES OF RELIGIOUS FREEDOM

There is a common origin story told about religious liberty in European history, namely, that “it helped establish the basis of political secularism by separating religion from politics and making the state indifferent [or in today’s language “neutral”] to claims of religious truth.”<sup>4</sup> On this view, “since its initial formulation in seventeenth-century political thought, religious liberty has continued progressively to expand its tolerant ambit to all religions far beyond its initial mandate to institute peace across Christian denominations.”<sup>5</sup>

In recent scholarship, however, this narrative has been critically revisited to show how religious liberty in its earliest formulation in European history was in reality “an unsteady and unstable concept, the result of a “‘circumstantial casuistry’ of historically embedded political concepts” rather than a principled commitment to the separation of church and state.”<sup>6</sup> Ian Hunter has argued that the “rival and incompatible conceptions of religious freedom that emerged in early modern Germany — both among the Christian confessions and then among them and the institutions of public law and politics — have proved inscrutable to both normative

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3. [2009] UKSC 15, [2010] 2 A.C. 728 (S.C.) (appeal taken from Eng.) [hereinafter *JFS*].

4. Saba Mahmood and Peter Danchin, *Politics of Religious Freedom: Contested Genealogies*, 113 SOUTH ATL. Q. 1, 2 (2014).

5. *Id.*

6. *Id.*

philosophical ordering and to sociohistorical reconciliation.”<sup>7</sup> On the basis of their regional and contingent nature,

the various philosophical attempts to ground religious liberty in transcendent principles — whether in Catholic and Protestant scholasticisms, Lockean and Kantian rationalisms, or Taylorean philosophical hermeneutics — have been unable to supersede the incompatibilities at the heart of these conceptions since their early history.<sup>8</sup>

The result is that the rights forms we see today embedded in constitutional and international human rights instruments derive from heterogeneous traditions and specific political projects. Accordingly, divergent genealogies coexist within the capacious language of religious freedom, always submerging or re-emerging in new ways to refract the political conflicts of the day.

Following Hunter’s work on civil and metaphysical philosophy in early modern Germany,<sup>9</sup> we can identify two main rival traditions internal to liberal thought which remain deeply entangled in the normative structure and jurisprudence of the right to religious liberty as formulated in provisions such as Article 9 of the European Convention on Human Rights.

#### *A. Civil Philosophy and Secular Neutrality*

In the first, older liberal tradition the public sphere was understood in terms of social peace and religious liberty conceived in jurisdictional terms.<sup>10</sup> This early conception, which predated the philosophical or “metaphysical” *Aufklärung* of Kant by more than a century, derived from a civil philosophy that sought to desacralize the state and led over time to both the churches losing their civil and political authority and to the gradual spiritualization of religion.<sup>11</sup>

7. Ian Hunter, *Religious Freedom in Early Modern Germany: Theology, Philosophy, and Legal Casuistry*, 113 *SOUTH ATL. Q.* 37, 39 (2014).

8. Mahmood and Danchin, *supra* note 4, at 2.

9. IAN HUNTER, *RIVAL ENLIGHTENMENTS: CIVIL AND METAPHYSICAL PHILOSOPHY IN EARLY MODERN GERMANY* (2001).

10. Although this “civil” jurisdictional conception differed markedly from the older “Two Realms” or “Two Kingdoms” tradition of church-state separation under which all authority was viewed as ultimately derived from God and only question was to demarcate what was properly God’s and what was Caesar’s.

11. Danchin, *supra* note 2, at 731.

The goal of this double-strategy was not to protect religious freedom as a natural right against the State but to end religious civil war by establishing a “neutral” juristic mode of governance over a multi-confessional society as the means of maintaining a legally enforced toleration between the rival religious communities. Central to this strategy was the notion of *adiaphora*: the old Stoic idea of actions that morality neither mandates nor forbids which within Christianity was understood to refer to matters regarded as inessential to faith but nevertheless permissible for Christians or allowed in the Church.

On this basis, the civil philosopher Christian Thomasius declared “virtually the entirety of the visible church — all of its liturgies, sacraments and theological doctrines — to be morally indifferent with regards to salvation” while at the same time holding that “forms of worship were a matter of ‘Christian freedom’ to be left to the disposition of individuals or groups to the extent they posed no threat to social peace.”<sup>12</sup> The result was that “should any form of worship pose a threat to public peace then, as something morally indifferent, it was legitimately subject to the civil sovereign, who had absolute authority over all matters capable of threatening public order.”<sup>13</sup>

In Thomasius’s late seventeenth century civil philosophy we already see the core features of modern secular power: the Statist drawing of a line between the religious and the secular through simultaneous demarcation of the *essentially-religious* (held to be absolutely free from sovereign interference) from the *religiously-permissible* (external manifestations of religiosity held to be publicly recognized but subject to limitation by the State on grounds of public peace and order).<sup>14</sup>

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12. Ian Hunter, *Religious Offences and Liberal Politics: From the Religious Settlements to Multi-cultural Society*, at 9.

13. *Ibid.* This employed a “juridical-ecclesial category to narrow the array of doctrine and liturgy where salvation was at stake and to expand the array that could be regarded as soteriologically indifferent and hence to be seen not from a sacramental-religious standpoint but from a juridical-political one.” Hunter, *supra* note 7, at 56.

14. Again, it is important to observe that this strategy was *not* rights-based. Modern accounts of neutrality as an objective principle in modern constitutionalism

How this occurred in practice, however, was infinitely varied, contested, and ultimately settled by local and contingent forms of negotiation and resolved, if at all, by legal casuistry and the coercive imposition of judgments within regional jurisdictions and national state-religion settlements. For this reason, the intellectual origins and meaning of the idea of political neutrality in religious freedom discourse is to be found not in philosophical foundations but in the horizon of “the religious, political, and juridical casuistries spawned by the national religious settlements themselves.”<sup>15</sup> As we shall see in Part III below, this remains an important insight for understanding the contemporary politics of religious freedom.

Before proceeding, it is helpful to observe how this double-strategy of spiritualizing religion and desacralizing the state stands in relation to the better-known argument for religious toleration also advanced by John Locke in the late seventeenth century. For Locke, toleration was a *right of individuals* against an intolerant state whereas for Thomasius and the civil philosophers it was a *right of the state* against intolerant religious communities.<sup>16</sup>

The juridical construction of religious freedom in German public law thus sought to establish political neutrality toward ultimate theological principles as “the condition of establishing parity of legal treatment for *rival religions as equally valid legal associations*.” This marked a shift in the understanding of religious authority as Erastian control of churches by the State was effected to deny the coercive authority of religious institutions in enforcing the demands of conscience. This was the condition of freedom in the private sphere – a sphere defined, protected, delimited and increasingly regulated by the State itself.

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thus refer to it as creating a kind of “subjectless right.” Christoph Möllers, *Limits of Differentiation: On the Role of Religion in Democratic Constitutionalism*, unpublished paper, presented at LAPA workshop, October 2014.

15. Hunter, *supra* note 7, at 40. The notion of negotiated and contingent relations between the state and actually-existing religious communities, groups and traditions is quite distinct from the notion of “a right” which implies a legal/moral relation between the state and an individual subject as rights-holder as well as a background justification not only of the right itself but its distinctive function of holding others to correlative duties.

16. *Ibid.* 52. Thus “Pufendorf’s and Thomasius’s conceptions were the instruments and effect of German imperial public law and the Brandenburg-Prussian settlement, whereas Locke’s was an instrument of political-theological dissent from the Anglican settlement.” *Id.*

Similarly, Locke's empiricist epistemology led to a conception of civil power as directed to the regulation of things that can be "objectively known," whereas religious belief was relegated to the status of "subjective conviction."<sup>17</sup> On this view, the neutrality of civil law with respect to religion and the truth of particular religious practices was guaranteed epistemologically by relegating religious belief to the "realm of speculation."<sup>18</sup>

### *B. Moral Philosophy and Universal Right*

The idea of religion as a "subjective belief" which is unable to be coerced because located in a private mental space marks the beginning of a new religious psychology and corresponding shift from the privatization of religious authority in the early modern period to its normative *interiorization* in modernity. As Talal Asad has suggested, it is the idea that the *mind* is the impregnable bastion of true religious experience that provides the modern view with its plausibility, *i.e.* that coercion of religious belief is irrational because impossible.

Given that force can only secure an insincere profession of faith and outward conformity, true authenticity rests on the modern subject's ability to choose her beliefs and act on them. This conception of belief as "singular and inaccessible to other locations" reinforces the idea of an autonomous "buffered" subject able to separate itself from objects by contemplation, reasoning and interpretation and choose from available beliefs.

This intellectual disposition and sensibility prefigures the second, later liberal tradition whereby the public sphere is reconceived

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17. Locke's theory of toleration thus equally relies on a particular conception of *adiaphora*: religious matters, properly understood, have no civil bearing as properly religious practices concern only a *care for salvation* and cannot harm the life, liberty or estate of civil subjects. Conversely, there can be no coercion in "religious matters" as one cannot correct *belief* which is a matter of private concern. Kirstie McClure, *Difference, Diversity, and the Limits of Toleration*, 18 POLITICAL THEORY 361, 377 (1990).

18. It is the "discursive separation from other-worldly concerns" that therefore underpins the capacity of civil discourse to convert incommensurable expressions of religious "difference" into a politically indifferent "diversity" of religious practices. McClure, *supra* note 17, at 385. On this account, religion as a matter of facticity loses its epistemological privilege joining other mundane objects subject to civil regulation.



in terms of a moral theory of justice and religious liberty grounded in a complex (and unstable) notion of a *right* to freedom of conscience and belief. This conception derived from a metaphysical (or more accurately “transcendental”) philosophical tradition that simultaneously sacralized reason and rationalized religion in a morally grounded State.

This Kantian scheme generated a new secular morality and theory of liberal political order premised on broadly Protestant conceptions of the individual, freedom and religion. Unlike the civil philosophy of the early modern period, the subject of this moral philosophy was not religion *per se*, but the individual as both the subject and bearer of rights. The category of religion was rationalized and naturalized into a generically Protestant notion of conscience or belief understood as internal to human subjectivity while the notion of autonomy was asserted as the universal basis for political authority.<sup>19</sup>

While Kant himself maintained the distinction between public and private spheres – reason for him being “submissive” in the private sphere on account of the moral duty to follow one’s conscience while “free” in the public sphere by virtue of the right to “use reason publicly in all matters”<sup>20</sup> – over the last two centuries these distinctions have substantially been reversed in the modern secular imaginary.<sup>21</sup>

This has had a profound effect on conceptualization of the public and private spheres. If for the civil philosophers and Kant alike a spiritualized notion of religion as faith or conscience characterized the private sphere, today the *duty* to follow conscience has been re-imagined as *freedom of* conscience now understood in terms of autonomy as an individual right to do what one believes is right.<sup>22</sup> The

19. Danchin, *supra* note 2, at 733-4.

20. Immanuel Kant, *An Answer to the Question: What Is Enlightenment?*, in *WHAT IS ENLIGHTENMENT? EIGHTEENTH-CENTURY ANSWERS AND TWENTIETH-CENTURY QUESTIONS* 58, 59–60 (James Schmidt ed., 1996).

21. As Foucault observed, Kant’s conception of public and private is “term for term, the opposite of what is ordinarily called freedom of conscience.” Michel Foucault, *What Is Enlightenment?*, in *THE FOUCAULT READER* 32, 36 (Paul Rabinow ed., 1984).

22. Thus, in *Religion Within the Boundaries of Mere Reason*, Kant develops the notion of a purely “rational religion,” which is premised on the exclusion of theology from theoretical reason and the grounding of faith in solely practical (moral) reason. In this way, religion is to be controlled by and be subject to the demands of (secular) morality. Immanuel Kant, *Religion within the Boundaries of Mere Reason*, in

private sphere remains a space of freedom from State interference, but the basis for this restraint is not respect for religion or conscience *per se*, but rather for the individual's right to *choose* not only the dictates of her religion or conscience but any belief at all. This is reflected in the contemporary formulation of the *forum internum* as "freedom of thought, conscience and religion" and comprises the modern category of the essentially-religious, *i.e.* as not subject to limitation by the State.

In this way, Kant's Copernican philosophical revolution had two main features: first, contrary to older traditions of Catholic natural law theory, it was *non-naturalist*: the ground of moral obligation was to be sought not in nature, human nature, external (clerical or traditional) authority, or any contingent circumstances of the moral agent; and second, contrary to Protestant theologies of God as the moral law-giver, it posited a new authoritative *source* of moral obligation now to be found *a priori* in transcendental concepts internal to pure reason alone.

Moral judgment was thus to be given autonomously by the agent to herself — imposed upon the world — under the rational discipline of the categorical imperative. The first move defined *enlightenment* in terms of a particular conception of rationality — the right to "think for oneself" and be free of *heteronomous* (especially religious) sources of moral obligation, while the second defined *freedom* as acceptance of what reason dictates as duty (one should always act in accordance with what one can simultaneously will as universal law).

The difficulty is that each of these moves involves fraught and contested claims not only about the phenomenal world, but about an imagined *noumenal* or transcendental realm internal to a particular (Protestant) conception of rationality.<sup>23</sup> This new moral economy marked the reversal in ethical thought in modernity as what was

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RELIGION WITHIN THE BOUNDARIES OF MERE REASON AND OTHER WRITINGS 31  
(Allen Wood & George di Giovanni eds., trans., 1998).

23. As Foucault observed regarding Kant's 1784 essay *An Answer to the Question: What is Enlightenment?*, the enlightenment as posited by Kant was the discovery of an exit, a "way out," a "process that releases us from the status of 'immaturity'" (a state where religious authority takes the place of our conscience) by a "modification of the preexisting relation linking will, authority, and the use of reason."

previously external and objective (the authority of God) now became internal and subjective (the unstable co-imbrication of autonomy and conscience in the double bind of “freely chosen conscience or belief,”) while what was previously internal and subject to God’s natural order (human reason) now itself became external and objective (universal reason in the disciplinary form of the categorical imperative). These reversals had the remarkable effect of simultaneously *rationalizing religion* and *sacralizing reason* – or what Kant himself in 1793 termed “Religion within the Boundaries of Mere Reason.”

In this sequence of moves, the concept of religion and its authority in political order were fundamentally altered. We can see this along three broad dimensions. First, it was now irrational (as defined by rationality itself) for religion to be a “source” of moral authority, as the only non-contingent, objective source of such authority is secular rationality which holds that no value other than freedom understood as autonomy (the right of each person to decide for themselves questions of moral value) is true.

Second, religion as a category now became understood not as an external aspect of reality but as an internal subjective “value” located in the “inner mind” or consciousness of the individual as subject. Religion was thus a set of beliefs, true if at all in only a non-naturalist conception of moral value. Such belief was not a genuine insight into the character of reality but only the subjective attitude of the thinker who proposed and adhered to it.

And third, the understanding of religion as belief or conscience became secondary to the master universal value of autonomy such that any genuine religious beliefs must be autonomously chosen and affirmatively assented to by the individual as a set of propositions (subject to the overarching discipline of rationality itself). This is what scholars such as Talal Asad and Saba Mahmood refer to as the modern conception of religion and religious subjectivity.

### III. THE JEWS’ FREE SCHOOL CASE

These early histories and antinomies are consequential for our understanding of the formulation of religious liberty in provisions such as Article 9 of the ECHR which, as Nehal Bhuta notes, represents a “bricolage of rights-forms derived from heterogeneous

traditions and specific political projects.”<sup>24</sup> The central argument in this Part is that this normative structure not only authorizes the state to intervene in what appear to be mere expressions of religious belief but in fact involve the State in making substantive judgments about religion, a domain toward which it claims to be neutral. This has two paradoxical effects: first, by authorizing the state’s intervention into the *forum internum* which it declares to be autonomous and sacrosanct; and second, by privileging the values and commitments of the religious majority as the norm against which the religious practices of minorities are judged and sanctioned in the *forum externum*.<sup>25</sup>

In order to see how these two paradoxes are generated, let us turn to consider the reasoning in the *JFS* case. The Jews’ Free School (“JFS”) was founded in 1732 and is today one of the best, state-funded schools in London. JFS gives preference to Jews in its admissions decisions and recognizes the authority of the Office of the Chief Rabbi, as head of the United Synagogue, to determine who is Jewish for these purposes. This is permitted under English law but only on the basis that the determination is made on grounds of “religious” belief, membership or practice. Under the Race Relations Act 1976 (“RRA 1976,”) there is no exemption for discrimination on grounds of “race” which is defined to include “ethnic or national origins.”

A 12-year old boy “M” applied for admission to the school. M’s mother, who was Italian Catholic by birth, had converted to Judaism under the supervision of a non-Orthodox (Masorti) rabbinate. M was living with his father at the time and they were both members of a Masorti synagogue. M was denied admission because he was not recognized as being Jewish according to Orthodox interpretation of *halakhah* according to which M would be considered Jewish only if his mother was Jewish (the matrilineal test) or if M underwent a conversion under the supervision of an Orthodox rabbi. Given that the Office of the Chief Rabbi did not recognize the conversion of M’s mother on the basis that it did not recognize the *halakhic* authority of the Masorti Rabbinic courts, and given that M himself did not wish to

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24. Nehal Bhuta, *Two Concepts of Religious Freedom in the European Court of Human Rights*, 113 STH. ATL. Q. 9, 10 (2014).

25. For detailed elaboration of this argument in a different context, see Saba Mahmood and Peter Danchin, *Immunity or Regulation? Antinomies of Religious Freedom*, 113 SOUTH ATL. Q. 129 (2014).

undergo an Orthodox conversion, M was denied admission to JFS (his family's practice of Judaism notwithstanding).

M's father sued JFS arguing that the school's use of the matrilineal test in its admission policy violated the RRA 1976. A court at first instance upheld the school's right to deny M admission. This was reversed on appeal and the case then came before the new U.K. Supreme Court. All nine judges wrote separate opinions reflecting striking differences in judicial reasoning and the complexity of the issues under consideration. Despite their differences, most expressed "sympathy" with the governors of the school and expressed anxiety about the Court's decision stating that they thought "something has gone wrong."<sup>26</sup>

A majority of five judges (Lords Phillips, Mance, Kerr, Clarke and Lady Hale) held that the admissions policy of JFS constituted direct racial discrimination under the RRA 1976 on the grounds that the criteria used by JFS to select pupils treated applicants differently on account of their "ethnic origins." Two judges (Lords Hope and Walker) concurred in this result but found instead that the admissions policy of JFS constituted permissible religious discrimination which had the unlawful effect of indirect racial or ethnic discrimination. The remaining two judges (Lords Rodger and Brown) dissented finding that JFS's admissions policy was neither directly nor indirectly discriminatory under the RRA 1976.

As a preliminary matter of history, there have been several ways to view neutrality and equality of treatment in religious matters. As Christopher McCrudden has observed, British legal policy towards majority and minority religious groups has moved through at least three phases: first, a phase in the early nineteenth century of political compromises accommodating conflicting interests; second, a mid-1960s "multicultural" phase which relied primarily on antidiscrimination law and accommodation of "new" ethnic groups, and third, a contemporary phase of "constitutional idealism" which focuses more on "principle" and the notion of fundamental rights as enacted in legislation such as the Human Rights Act 1998, which incorporated the European Convention on Human Rights into British domestic law.<sup>27</sup>

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26. See Heather Miller Rubens, "Something has Gone Wrong"; *The JFS Case and Defining Jewish Identity in the Courtroom*, 29 MD. J. INT'L L. 366 (2014).

27. Christopher McCrudden, *Multiculturalism, Freedom of Religion, Equality, and the British Constitution: the JFS Case Considered*, 9 INT'L J. CONST. L. (I-CON) 200 (2011).

This shift towards quasi-constitutional liberal principles has supplanted both the legislative contingency towards religious traditions and groups of the pre-multicultural phase and the integrationism and antidiscrimination focus of the multicultural phase. Consequently, it has been left to the judiciary to determine how to apply rights to conflicts involving religion, culture and ethnicity. Practices previously regarded as “ethnic” and raising correlative duties of non-discrimination are today often viewed as “religious” to be adjudicated as a matter of individual rights.<sup>28</sup> It was in context of this normative shift towards liberal rights discourse in British constitutionalism that the *JFS* case was both argued and ultimately decided by the U.K. Supreme Court.

Given this background, what does it mean for a nation-state to be neutral towards Judaism as a “religion”? If neutrality previously meant affirmative engagement by the state with existing Jewish communities on matters pertaining to Jewish belief and practice, and later protection of such minority communities from acts of unlawful racial or ethnic discrimination, then today neutrality is understood as the protection of the right to freedom of religion and belief. In this sequence of moves, neutrality towards *religion* understood as an institution, way of life, or tradition has shifted almost imperceptibly to the question of the *right* to religious freedom which suggests that the state adjudicates between competing rights and not neutrality toward competing religions. This is a shift fraught with consequences as evident in the three domains of the conceptual structure, subject and authority of the right. Let us consider each of these in turn.

#### A. *Forum Internum versus Forum Externum*

Recall again that the right to religious liberty is premised on the foundational distinction between the right to “freedom of thought, conscience and religion” in Article 9(1) and the right to “manifest one’s religion or beliefs” in Article 9(2). The former, referred to as the *forum internum*, is held to be absolute while the latter, the *forum*

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28. Cf. *Mandla v. Dowell Lee*, [1983] 2 AC 548 (wearing of the turban held to be an ethnic practice) with *R (Watkins–Singh) v. The Governing Body of Aberdare Girls’ High School* [2008] EWHC 1865 (Admin) (wearing of the Kara held to be both a religious and ethnic practice).

*externum*, is said to be subject to limitations where necessary to protect public order, morals, or the rights of others.

The European Court of Human Rights has long struggled with the issue of how to define the content and scope of Article 9(1) and its religious liberty jurisprudence provides no clear guidance on the proper object of the protected sphere of the *forum internum*. What is of interest here is how the different conceptions advanced in *JFS* by the majority, concurring and dissenting judgments respectively closely track the three approaches that have been adopted by the European Court of Human Rights of (1) autonomy, (2) conscience/belief, and (3) collective/institutional autonomy.

While *JFS* is framed and adjudicated as a race discrimination case involving unfair treatment by a school admissions board toward one of its applicants, the majority opinion begins neither by setting out the relevant criteria of antidiscrimination law nor explaining the relations and duties of justice owed by one party to the other. Rather, it begins by citing the seventh chapter of Deuteronomy, the fifth book of the Hebrew Bible and the Jewish Torah, locating the source of the matrilineal test in the “clear commandment against intermarriage” in the third and fourth verses which Lord Phillips reads to yield the self-evident conclusion that it is a “fundamental tenet of the Jewish religion ... that the child of a Jewish mother is automatically and inalienably Jewish.”<sup>29</sup>

A genuine ambiguity is thus presented at the outset regarding who or what exactly is on trial before the Court: is it *JFS*, for its treatment of *M*; or the ancient Israelite religion and its offspring, Judaism? This in turn generates deeper and deeply opposing anxieties. If the Court is to permit discrimination on the basis of race, ethnicity or descent solely because authorized by a religious tradition or justified on religious grounds, does this not pose a threat to the very foundations and conditions of our contemporary secularity and freedom? Conversely, if the Court is to prohibit such a long-standing practice internal to a religious tradition which entangles religious and descent-based criteria, does this not threaten the very idea of religious freedom which has long been understood to encompass the right of religious persons, groups and institutions to determine their own rules of belief, identity and membership free of state interference and regulation?

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29. *JFS*, [2009] UKSC 15, ¶ 2.

As the reasoning in the majority, concurring and dissenting judgments unfolds, we see the antinomies and contradictions characteristic of religious freedom discourse as the fundamental liberal premises of state neutrality towards religion and universality of the right to religious liberty are continually entangled with and defined in terms of their opposites. This is seen also in the arguments adduced by the parties. Having first claimed to be bound by immutable religious law, JFS and the OCR paradoxically invoke the right as a matter of religious freedom to decide for themselves matters of religious doctrine and orthodoxy. Conversely, having claimed the right to be free from racial and ethnic discrimination and to practice their religion freely, M and his parents paradoxically rely on a distinctly modern conception of religion understood in terms of individual belief regarded as freely chosen to apply to an Orthodox Jewish school.

But it is the divergences in reasoning in and across the nine separate judgments that best illustrate the modern politics of religious freedom. In contrast to his opening reference to Deuteronomy, Lord Phillips thereafter steadfastly claims no interest in any religious rationale for JFS's actions: the Court will rule on the *facts* alone, not on the basis of any "religious" motivation or reason. The implicit assumption is that the *forum internum* protects only the *right to choose* one's beliefs, not the *immunity* of the beliefs themselves.

For Lord Phillips, religious criteria are thus subjective, non-natural values or beliefs to which a person may choose to assent.<sup>30</sup> Religion is a matter of choice while race and ethnicity are immutable, unchosen characteristics. Whether the matrilineal test is assented to as a matter of religious *motive* or *belief* is thus irrelevant to the *objective fact* that M and his mother's ethnic origins were the factual ground that determined the admissions decision made by JFS.

This reasoning reverses the normative understanding of the relationship between immutability and autonomy advanced by JFS and OCR in their argument before the Court. The OCR acknowledged that "M was 'ethnically' Jewish, in the sense that he self-identified as Jewish, he was significantly involved with the Jewish community in various ways, and he was accepted as Jewish

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30. Lord Phillips further states that "[m]embership of a religion or faith indicates some degree of *conscious affiliation* with the religion or faith on the part of the member." *JFS*, [2009] UKSC 15, ¶ 44 (Lord Phillips) (emphasis added).



by at least parts of the community.”<sup>31</sup> Ethnicity for the OCR was thus not biological but sociological, involving deep historical practices of social choice and collective autonomy. On the other hand, the OCR did not acknowledge that M was “religiously” Jewish because this was not a matter of individual or social choice but rather was to be determined by an Orthodox interpretation of *halakhah* which, as revealed religious law, was in some vital sense immutable and unchosen. The telescopic reduction by the majority of an entire discursive tradition and its centuries-old traditions of reasoning and interpretation into a mere subjective “motive” (then held to be entirely irrelevant) in contradistinction to a discriminatory “fact” or “ground” calls for serious reflection.

The critical point, however, is that in arriving at this judgment, the majority draws a strong distinction between *racial* and *religious* grounds for exclusion, implicitly thus embracing a specific conception of religion as a non-racial and non-ethnic category which itself is authorized by a prior understanding of the essential nature of religion in terms of interiorized belief.

The distinctive bifurcation of the modern right to religious liberty between a *forum internum* of sovereign individual belief and a *forum externum* of manifestation of that belief open to limitation and regulation is in this way mapped onto the logic of antidiscrimination law: to discriminate *for any reason* (religious or not) on the *ground* of an immutable characteristic such as race, ethnicity or descent is axiomatically unjust because it irrationally denies the personal autonomy and valuable choices of others. In this moral economy, religion properly understood is reduced to a *state of mind* – belief in a set of creedal propositions to which a legal subject voluntarily assents – which is “individual and otherworldly” rather than constituting any form of activity in the world.

Judaism does not fit into these categories and contests this conception of immutable characteristics and valuable choices. As noted above, for JFS and the OCR, the relevant immutable characteristic is *religious* as constituted by Jewish religious law (*halakhah*) while it is ethnicity which is a matter of social choice. Indeed, it was central to OCR’s submissions before the Court that one

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31. McCrudden, *supra* note 27, at 13. On the reasoning of the House of Lords in *Mandla v. Dowell-Lee*, if M was refused admission to a non-faith based state school because he was Jewish, this would be racial discrimination because “he was being discriminated against on the grounds of his Jewish ethnicity.” *Id.*

could be Jewish according to religious law while explicitly rejecting *any conscious affiliation* with the Jewish religion or faith.

The veracity and rationality of these positions are reflected in the reasoning of the concurring and dissenting judgments taken together. These judgments reject the majority's interpretation of the distinction between racial and religious grounds finding not only that the religious motivations and reasons for the exclusionary actions of JFS *are* relevant to the determination of this question but that the exclusion of M was made on religious grounds as *required* by Orthodox religious Jewish law.

Unlike Lord Phillips, Lord Hope argues that both motive and reasons for action “may be highly relevant to the determination of the crucial question: was this discrimination on racial grounds.”<sup>32</sup> For Lord Hope, there is a distinction between the reasoning that follows from an obligation to comply with Orthodox religious law on the one hand and from a personal decision or “motive” to apply that law on the other.<sup>33</sup> This yields the first major divergence in reasoning in the case. In contrast to the majority's external, volitional and subjective stance towards Judaism and the obligation to comply with *halakhah*, the concurring judgments adopt an internal, cognitive and objective point of viewing in adjudicating the first level question of the distinction between racial and religious grounds. This opens the conceptual space for a different form of contestation as the exclusion of M is now adjudicated at the secondary level of indirect racial discrimination permitting JFS and the OCR to seek to justify the reasonableness of their actions towards M in the *forum externum*.

This, in turn, yields the second major divergence in reasoning in the case. In contrast to the cognitivist conception of religion adopted by the concurrence (albeit with its recognition of the objectivity of reasons and obligations deriving from a different source), the

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32. ¶ 195. However, “once that conclusion has been reached, the fact that there may have been a benign reason for the discrimination is beside the point.” *Id.*

33. A similar point is made by Lord Rodger in dissent:

[M's] mother could have been as Italian in origins 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, not the fact that her ethnic origins were Italian and Roman Catholic, which meant that M was not considered for admission.

*Id.* ¶ 227 (Lord Rodger, dissenting).

dissenting judgments respond to and are more sensitive to a conception of Judaism as a living discursive tradition which encompasses a way of life with its own established and internally contested sources, justifications and hermeneutics and thus its own conceptions of religious identity, authority, membership and practice. It is this recognition that underlies the dissent's reliance on more classical liberal ideas of negative liberty and judicial abstention which at the same time fail to take seriously or engage with the individual harm suffered by M as a result of the exclusionary actions of JFS and the OCR.

For the dissenting judges it is implicit that JFS and the OCR as collective subjects have the right to profess and maintain a discursive religious tradition free of sovereign interference, even if this fails to address harms caused to members internal to the tradition itself. Only the concurring judgments of Lord Hope and Lord Walker squarely address this issue seeking to balance the conflicting claims of right of both JFS and M using concepts common to both antidiscrimination and human rights law of *legitimate aim* and *proportionate means*. Implicit in this analysis is an assessment of the harms imposed by JFS's admissions policy on the valuable life choices and autonomy of M and his parents. Importantly, this is held to include their right to choose among Orthodox, Masorti, Reform and Liberal branches of Judaism which the concurrence implicitly weighs more heavily than the (collective) right of JFS to devise its own admissions policy and follow the advice of the OCR in basing criteria for membership on Orthodox Jewish religious law.

In doing so, the reasoning in the concurring judgments implicitly makes an assessment of the reasonableness *not* of the matrilineal test but of the application by JFS towards M of Orthodox conversion criteria which is found to be insufficiently inclusive and pluralistic. In this sequence of maneuvers, the question of indirect racial discrimination based on immutable characteristics is subtly transformed into a reason-based jurisprudence premised on liberal criteria and fundamental values of individual freedom and autonomy.

When this reasoning is considered alongside that of the majority, we see how Judaism is in fact indicted twice: first categorically by the majority in the *forum internum* for irrationally prescribing an immutable characteristic as part of the matrilineal descent test, and second by the concurrence in the *forum externum* for unreasonably denying the valuable choices of M and his parents regarding religion, a judgment which also implicitly scrutinizes and is suspicious of

beliefs and doctrines internal to the *forum internum* of the Jewish religion.<sup>34</sup>

In response to the Court's ruling that Orthodox Judaism's membership and conversion criteria were unlawful for use in its admissions policy, JFS amended the policy to accept students on the basis of a "Certificate of Religious Practice" which gauges synagogue attendance, formal Jewish education and community participation. This change in policy has removed the ability to accept children on the basis of the OCR's definition of Jewish membership criteria and substituted it with a state-supervised policy of religious practice which is non-discriminatory, cross-denominational and free of reference to ethnic or decent-based criteria. The school remains a faith-based school but if it employs Orthodox *halakhah* as its grounds for admission, it transgresses the boundaries of state law.

In this respect, the *JFS* case powerfully illustrates the distinctive modalities of the exercise of modern secular power. In defining the meaning, scope, and dialectical relationship between the public sphere and individual rights, the Court regulates and delimits what constitutes religion and a proper religious subjectivity as a matter of English law. This raises considerable anxieties amongst the judges themselves as the extent of intrusion of state law into the *forum internum* of the Jewish religion becomes visible whether axiomatically as a matter of direct discrimination or pursuant to the balancing of rights and interpretation of proportionality as a matter of indirect discrimination.

In this complex set of moves, we see how the concept of neutrality towards Judaism is defined in terms of the right to religious liberty which, in turn, is defined in terms of competing conceptions of neutrality as the majority, concurring and dissenting judgments

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34. The separation between private inner belief and public outer act or expression is in fact "reunited through a suspicion of motives of material interest or worldly power. In the context of the freedom of religious belief, it becomes imperative to determine whether acts or expressions of belief are genuinely religiously motivated. This presumes the power to pronounce upon, and if necessary probe into, the character of one's private convictions." Hussein Ali Agrama, *Religious Freedom and the Bind of Suspicion in Contemporary Secularity*, in *POLITICS OF RELIGIOUS FREEDOM* (Winnifred Fallers Sullivan, Elizabeth Shakman Hurd, Saba Mahmood and Peter Danchin eds., 2015). There is a sense in the concurring judgments that JFS and OCR are exercising their institutional authority on the issue of conversion in a way that is not entirely, or genuinely, or necessarily, religiously motivated.

each grapple with the implications of state authority *vis-a-vis* a competing normative system. The right to religious liberty is in this sense best viewed as a sophisticated technology of modern secular power which operates to discipline actually-existing religious traditions so they conform to those secular spaces and sensibilities religion properly should inhabit and express.

In each of the three sets of judgments, no matter how the content and scope of the *forum internum* is demarcated the Court must make substantive judgments on what constitutes or falls within the protected category. The paradoxical result is that the courts must make determinations that are inescapably entangled with and premised on religious criteria and precepts in order to define a sphere “free” from state authority—a private space of exception—which ostensibly limits legislative and other forms of governmental authority. This ever shifting and contested process of construction and demarcation of the *forum internum* is an integral part of the public order of the state itself.

As Agrama has observed, the ability to control these distinctions involves the fashioning of religion as an “object of continual management and intervention” and this constitutes a mode of discipline not always articulated in the practice of liberal governance.<sup>35</sup> The reasoning in *JFS*, however, allows us to see how such modes of discipline function using the technology of modern rights discourse. What becomes clear is that both the subject of the right and the scope of freedom it encompasses are indeterminate categories. Further, the reasoning in the majority, concurring and dissenting judgments alike inescapably entangles conceptions of the religious and the secular as part of the state’s power and authority “to decide what shall count as essentially religious and what scope it can have in social life.”<sup>36</sup>

This involves two critical determinations. First is the need to identify what about doctrine is “essentially a religious matter”. The Court’s five to four split on whether reliance by *JFS* and the OCR on the matrilineal test is a racial or religious ground of decision illustrates this first dilemma. Second is the need to distinguish between “the ‘civil’ and ‘religious’ dimensions of an act, and on that

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35. Hussein Ali Agrama, *Secularism, Sovereignty, Indeterminacy: Is Egypt a Secular or Religious State?* 52 COMP. STUD. SOC’Y & HIST. 495, 499 (2010).

36. *Id.* 503. For this reason, “secularism’s power may lie more in the underlying question it continually provokes and obliges us to answer, than in the normativity of the categories it proposes.” *Id.* 500.

basis decide whether the act is enforceable, punishable, or otherwise deserving of protection or exemption under the law.” The divergence between the concurring and dissenting judges on whether the exclusion of M constituted indirect racial discrimination and the ensuing lines of argument concerning the legitimacy of JFS’s aim and the proportionality of its means illustrate this second dilemma.

In both cases, the Court must make an assessment of the religious beliefs at issue. This necessarily generates a “modality of suspicion” as the Court considers whether acts or expressions of belief are “genuinely religiously motivated” and the nature of the “belief” itself.<sup>37</sup> What is critical to this liberal algebra is that religion be understood essentially as a type of subjective *belief* as opposed to any type of objective *knowledge*,<sup>38</sup> and that it not be allowed to express “material interests or drives towards worldly power” which are seen as potentially dangerous or threatening, especially to those values foundational to the public order of the state.

It is precisely the external, heteronomous, non-faith based imperative of matrilineal descent in the Jewish religion that violates these secular imperatives. On the one hand, an unchosen imperative is deeply irrational for contradicting the foundational value of individual autonomy and, on the other, potentially threatening for suggesting a source of ultimate authority other than secular reason itself.

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37. Agrama, *supra* note 34. A similar phenomenon can be traced in U.S. religious freedom jurisprudence where courts routinely determine whether “religious acts or expressions are sincerely held to be essential to one’s religion”, and whether “these acts and expressions are authorized and mandated by orthodox religious texts.” *Id* (citing WINNIFRED FALLERS SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* (2005)).

38. The “circumscribed sphere of religion already articulates the principle that it ought to be separated from material power.” It is this understanding of religion and religious subjectivity that underlies the idea of state neutrality between religious and non-religious but deeply held beliefs. If this were not the case, “it would be difficult to argue that the state should remain neutral between belief and what it sees as knowledge, especially in matters concerning public order and the governance of populations, when that knowledge is considered crucial to such governance.” Agrama, *supra* note 34.

*B. Individual versus Group or Associational Rights*

The second dilemma for the Court in *JFS*, as in all religious freedom cases, is the proper *subject* of the right. While the majority and concurrence differ on the nature of the *forum internum*, they both agree that the essence of religion is to be found in a cognitive or rationalistic framework internal to the consciousness of the individual, whether autonomously to choose one's beliefs (for the majority) or to have and maintain a certain category of belief (for the concurrence). This conceivably includes the fiction of a corporate entity such as JFS viewed as a legal subject acting as an individual decision-maker. For the dissenting judges, however, the proper subject of the right appears to encompass Judaism and Jewish religious practices more broadly construed.<sup>39</sup>

Over the last few decades, a rich albeit poorly theorized body of jurisprudence has been developed under Article 9 of the ECHR in which claims to collective religious autonomy have been adjudicated. The European Court has held in a series of cases that it has limited jurisdiction to review the processes, reasoning or substantive decisions made by religious bodies within an area covered by religious autonomy.<sup>40</sup> In similar terms, the U.S. Supreme Court has recently recognized a “ministerial exception” to generally applicable employment discrimination laws in the case of *EEOC v. Hosanna-Tabor*.

The premise of such jurisdictional approaches to issues of religious autonomy is the notion that it is not for secular courts to make determinations on matters “strictly ecclesiastical” or involving religious teachings or orthodoxy. This proposition, however, leaves open a number of puzzles and dilemmas for the courts. The first relates to how the relevant autonomous sphere is to be drawn. If the RRA 1976 was intended to apply to religious schools and domains

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39. While neither Lord Brown nor Lord Rodger squarely address the question, their judgments appear to follow Asad's conception of religion as a “lived” or “discursive” tradition which encompasses a practical mode of living and “techniques for teaching body and mind to cultivate specific virtues that have been authorized, passed on, and reformulated down the generations.” Talal Asad, *Re-reading a Modern Classic: W. C. Smith's 'The Meaning and End of Religion,'* in RELIGION AND THE MEDIA 216 (Hent de Vries & Samuel Weber eds., 2001). The danger of adopting a “pietistic conception of religion as faith that is essentially individual and otherworldly” is to situate religion ineluctably within a secular image of the world. *Id.* 220.

40. *Obst v. Germany*, no. 425/03 (Eur. Ct. H.R. Sept. 23, 2010); *Lombardi-Valluari v. Italy*, no. 39128/05 (Eur. Ct. H.R. Oct. 20, 2009); *Scüth v. Germany*, no. 1620/03 (Eur Ct. H.R. Sept. 23 2010).

such as employment, why should it not apply to the internal activities of religious organizations in the case of acts of racial or ethnic discrimination?

Conversely, if the right to religious freedom is interpreted to provide a form of collective immunity to religious organizations from legislative intervention in their internal affairs, on what basis does the RRA 1976 seek to regulate a religious school such as JFS which has the express purpose of effectuating the obligation imposed by Jewish religious law to educate those students regarded by the OCR as Jewish? Some argument is needed to justify this particular demarcation of spheres, an argument which itself must be neutral towards religion and respect the right to religious liberty.

A second dilemma concerns how the state and state law are to relate to and recognize actually-existing systems of religious law. There are a tremendous variety of constitutional arrangements in the world today prescribing different forms of relation between the State and religion(s)<sup>41</sup> and this includes a variety of forms of recognition of and formal relation to both majority and minority religions. In South Africa, for example, section 15(3)(a)(ii) of the post-apartheid 1996 Constitution expressly contemplates legislation recognizing “systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.” Various contingent forms of legal relation between the State and South Africa’s different religious communities, including groups living under customary law and religious minorities with their own family and personal status laws, have thus been developed through law reform efforts in the country over the last two decades.<sup>42</sup>

We have seen how British legal policy towards majority and minority religious groups has moved through at least two early phases of legislative accommodation and multicultural recognition. But what is striking in *JFS* is how the courts today are employing constitutional liberal principles and alternatively classical ideas of negative liberty and judicial abstention evident in the dissenting judgments to adjudicate these forms of legal relation.

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41. Peter G. Danchin, *Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law* 49 HARV. INT’L L.J. 249, 297–307 (2008).

42. Peter Danchin, *The Politics of Religious Establishment: Recognition of Muslim Marriages in South Africa*, in VARIETIES OF RELIGIOUS ESTABLISHMENT 165 (Lori G. Beaman & Winnifred Fallers Sullivan eds., 2013).



### C. *Conflicts of Rights*

The final and arguably most intractable dilemma in religious liberty discourse arises when two or more claims of right come into conflict with each other. The issue here is not the conflict *per se* between M's right to be free from racial discrimination and JFS's right to discriminate in its admissions policy on the basis of religion and belief. We saw how the majority decided this issue by defining the *forum internum* of the right to religious liberty narrowly as individual belief and interpreting the RRA 1976 as a valid limitation on the right to manifest religion in the *forum externum* in order to protect the rights of others.

Rather, it is the disagreement between the concurring and dissenting judgments on the question of indirect racial discrimination that exposes a genuine conflict of rights internal to the right to religious liberty itself. The need to justify issues of legitimate aim and proportionate means of achieving that aim opened the deliberative space for claims to religious liberty to be advanced, albeit indirectly, by *both* M and JFS as reasons either to permit or prohibit the adverse impact of the school's admissions policy on M and E (and other children not of Jewish ethnic origin in the maternal line).

What is striking is the disagreement between the concurring and dissenting judgments in interpreting the concept of proportionality as to whether to privilege either the individual autonomy of M and E in matters of religion (i.e. the right to choose conversion under the authority of a non-Orthodox (Masorti) rabbinate) or the collective autonomy of JFS and the OCR to determine their own rules of religious membership.

For the concurrence, JFS was found to have failed to consider whether admitting children recognized as Jewish by any of the branches of Judaism would undermine the religious ethos of the school. Having found at the first stage of analysis that the OCR was bound by and had the right to apply Orthodox Jewish religious law, the implicit suggestion at the second stage of analysis is that Orthodox rules on conversion are insufficiently pluralistic and inclusive and that JFS should interpret and apply these rules more sensitively to the values of individual freedom and choice.

This argument does not address issues of racial or ethnic discrimination (recall that JFS accepted that M was "ethnically Jewish") but rather substitutes the concurring judges' conception of what constitutes religion and a proper religious subjectivity for that of

JFS and the OCR. This in fact reverses the logic of their claims, which were premised on the notion that it is *halakhah* is immutable, while ethnicity is a social choice. It is precisely this danger of non-neutrality and interference in matters of religious doctrine and practice which drives the dissenting judgments towards judicial abstention and deference to the normative authority of JFS and the OCR which, in effect, privileges the right of JFS to collective freedom over the individual autonomy-based claims of M and E.

As a matter of justice, neither position seems entirely satisfactory. Regardless of the merits of the competing positions, the interesting question from the perspective of any theory of religious freedom is why such debates within religious communities create different normative claims to those between religious communities and the state. The idea of value pluralism allows us to see that there is in fact more than one substantive rights claim at issue. Because the right to freedom of religion is a complicated bundle of entitlements, each made up of a diversity of claims, it protects a range of human interests that are often at odds.<sup>43</sup> If this is correct, the critical question is why a majority of the U.K. Supreme Court so easily and at times without argument privileges one of the substantive rights claims at issue over the other. Further, if both claims are to be given their due, how should courts resolve such conflicts?

However approached, it is clear that the historical relationships between groups within particular societies and their complex interrelationship within the legal framework of the state are pivotal to any understanding of how and why conflicts raise concerns for the right to religious freedom. Such conflicts give rise to both moral and ethical questions that bear a complex relationship to different types of relations between individuals and groups.

The general point is that the conflicts which arose in *JFS* involving competing claims of religious freedom cannot meaningfully be addressed or properly understood without taking into account these collective dimensions of the question and the broader historical and inter-group context in which these forces and actors are operating. Paradoxically, this requires judges to turn to substantive (historical, cultural, religious) values and normative positions that transcend or lie beyond the competing rights claims themselves. This,

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43. Peter Danchin, *Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law*, 33 YALE J. INT'L L. 1 (2008).

of course, results in a constantly contested and thus oscillating series of antinomies in contradiction to the opening premises of neutrality towards religion and universality of the right.

#### IV. CONCLUSION

This chapter has argued that the dialectical architecture of the right to religious liberty is a far more ambiguous instrument than conventionally assumed that in practice often legitimates rather than alleviates discriminatory practices of the state against religious communities. This paradox haunts the jurisprudence of all contemporary legal systems which face irreconcilable conflicts in maintaining that religious belief is immune from state intervention on the one hand, while sanctioning its outward expression on the other.

What is striking in a wide variety of contexts is how courts have tended to privilege the values and sensibilities of the majority religion (on the basis of the universality thesis) and discriminate against minority religions through recourse to the secular concept of public order (on the basis of the neutrality thesis). As argued in Parts II and III, these two features are not a result of the misapplication of the right to religious liberty or the particular religious personality of certain states; they are instead a product of the contradictions and antinomies *internal* to the conceptual architecture of the right itself and emanate from the fraught and contested distinction between the *forum internum* and *forum externum*. It is for this reason that we see such striking similarities in the conundrums entailed in regulating religious minorities across the Western and non-Western divide.

What is most deeply at issue in such cases is not primarily the belief-action distinction as between the *forum internum* and *externum*, but the distinction between individual belief as an inner dimension of human consciousness and religion as a discursive tradition and collective identity of distinct communities. This is a question that goes beyond public order limitations imposed on religious rites and rituals and entails instead how the very category demarcated as “religious” in the *forum internum* is defined in the first place. Such a definition in cases such as *JFS* can be seen implicitly to challenge the equation of the *forum internum* with the “neutral” normativity of belief and the “universal” authority of the individual as subject alone.