

A tale of two boys

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*'Educate a child according to his path, ...'*¹

1. Introduction

Two boys: one in Amsterdam and one in London. Their parents applied for their sons to be admitted to orthodox Jewish secondary schools: the *Maimonides Lyceum* in Amsterdam and the *JFS* (formerly called the *Jews' Free School*) in London. In both cases the boys were not admitted because they did not comply with standards applied by the schools. The boys were not considered to be Jewish according to the *Halacha*, the Jewish law, as applied by the Boards of the schools. This position was in conformity with guidelines of the rabbinical authorities concerned. The reasons were similar. Both boys were sons of a mother who was not considered to be Jewish according to orthodox Jewish standards. Their mothers, both married to Jewish husbands, had a non-Jewish (Roman Catholic) background. They had both converted to Judaism under the auspices of non-orthodox rabbis. These conversions were considered not to be valid by orthodox standards. Because their mothers were not considered to be Jewish, the boys were not Jewish either. According to Jewish law one is Jewish if one's mother is Jewish. This is the so-called *matrilineal test*. Alternatively, one may become Jewish by conversion to Judaism. The boys themselves had not converted. The parents did not acquiesce in the decisions of the school authorities. They resorted to the courts. In both cases they went all the way through the national judicial system, up to the highest courts in both countries. On 22 January 1988 the Dutch Supreme Court ruled in the *Maimonides* case that the School Board was entitled to follow its admission policy because it was based on a consistent application of the rules derived from the religious foundation of the school.² The Supreme Court of the

1 Mishlei/Proverbs 22:6.

2 HR 22 January 1988, ECLI:NL:HR:1988:AD0151, *Netherlands Yearbook of International Law*, Vol. XXII 1991, p. 410 (Maimonides); *NJ*, 891 m.n. E.A.A.; *NJCM-Bulletin: Nederlands tijdschrift voor de mensenrechten*, Vol. 13, No. 3, 1988 3, pp. 214-220, m.n. Reiner de Winter. See also DE BLOIS 2007.

UK, on the other hand, concluded on 16 December 2009, by majority, that the admission policy of the *JFS* qualified as direct racial discrimination, contrary to the Race Relations Act 1976.³ In this contribution I will reflect on the background of these different outcomes and tentatively explore some possible explanations, while realizing that, without inside information, it is impossible to come up with clear evidence for any of the options. I have thought of three possible ‘explanations’. Maybe the contradictory outcomes are simply the consequence of the differences between the applicable legal standards. Another possibility is that the differences in the historical backgrounds of the freedom of religion and education in both countries have played a decisive role. Finally, the developments in the Western world as to the relationship between law, society and religion in the period between 1988 and 2009 could have been the reason why the outcomes in the *Maimonides* and the *JFS* cases are diametrically opposed to each other. We will see.

2. Legal standards

2.1. *Maimonides*

In the *Maimonides* case the father of the boy concerned (Aram) held that the Board of the school, by not admitting his son, had acted unlawfully in terms of the central tort provision of the Civil Code (at that time Article 1401). In that connection he referred to several national and international provisions against discrimination: Article 1 of the Dutch Constitution, Articles 3 and 14 of the European Convention on Human Rights (ECHR) and Article 3 (b) of the Convention against Discrimination in Education.⁴ Next to that he also invoked Article 2 of the First Protocol. This provision obliges the State, in the exercise of its functions in relation to education, to respect the right of parents to ensure that the education and teaching of their children is in conformity with their own religious and philosophical

3 *R (on the application of E) v. The Governing Body of JFS and the Admissions Appeal Panel of JFS and others* [2009] U.K.S.C. 15. See also WEILER 2010; KIVIORG 2010; SCHWARZ 2010; MCCRUDDEN 2011; ORDENE 2012; PETTY 2014.

4 The text of the Convention against Discrimination in Education was adopted by the General Conference of the UNESCO on 14 December 1960. It entered into force on the 22nd of May 1962. The Netherlands has been a State party since the 25th of June 1966.

convictions. Initially the claimant held that the admission policy was based on a racial distinction. This claim was rejected by the court of first instance (the President of the Amsterdam District Court). An appeal against this finding was dismissed by the Amsterdam Court of Appeal, having regard to the fact that descent is not exclusively decisive for the determination of the Jewishness of a person, because according to orthodox standards conversion is also possible. The claimant did not lodge an appeal in cassation against this part of the judgment on appeal. The Supreme Court concluded that ‘it has therefore been established as common ground between the parties that there has been no discrimination on the ground of race in the present case.’⁵ This, notwithstanding the fact, referred to by the Advocate General in this case, that on behalf of the claimant in the oral proceedings before the Supreme Court the accusation of racial discrimination was repeated. Apart from the specific reference to racial discrimination, the claimant held that the School, by not admitting his son, had acted unlawfully against him, because he, as a parent, had the fundamental right to have his son follow the Jewish education he considered suitable for him. The other party in the conflict, the Foundation that had established the *Maimonides* Secondary School, also invoked human rights provisions: Article 23 (freedom to provide education) and Article 6 (freedom of religion) of the Constitution, as well as Article 27 of the International Covenant on Civil and Political Rights (ICCPR) (the rights of minorities). This last provision did not play any role in the final judgment of the Supreme Court. In that judgment, next to Articles 23 and 6 of the Constitution, also Article 9 ECHR (freedom of religion) was applied. The focus in the procedures before the Dutch courts was the conflicting claims based on the freedom to provide education, the freedom of religion and the equality principle. In other words, the legal framework of the Dutch case is a collision of human rights. In the judgment of the Court of Appeal and also in the Opinion of the Advocate General in the procedure before the Supreme Court, the balancing of the relevant rights was decided in favour of the claimant. Arguments in favour of tipping the balance were the affinity of the father with Judaism, his interest to have his son follow education at the

5 Para. 3.1.3 of the *Maimonides* judgment.

Maimonides school, the fact that there was no other orthodox Jewish school which could serve as an alternative and, finally, the fact that there were many other youngsters from the Liberal Jewish synagogue who were admitted to the school (because their mothers were considered to be Jewish). The final outcome of the case was, however, a decision by the Supreme Court in favour of the *Maimonides* Secondary school. This was because, first, the rights of parents to ensure that the education and teaching of their children is in conformity with their own religious and philosophical convictions (Article 2 of Protocol 1 and Article 23 of the Constitution) do not have horizontal effect. These rights only impose a duty on the State, while they do not create enforceable rights against a private institution, such as the school. Next to that, the Court observed that, in view of the freedom of religion, the right to provide education according to religious or other beliefs in Article 23 of the Constitution weighs so heavily that the board of the school had the right to refuse the admission of a child, in conformity with the religious criteria applied by it. That was so, even if the parents have a strong and reasonable preference for the education provided by the school, and the school is the only one providing education of this kind. The Court made only a proviso for ‘exceptional circumstances’, which did not occur here.⁶

2.2. *JFS*

The legal context of the *JFS* case is different. It is a judicial review procedure, initiated by the father of the boy concerned (M.), against the authorities of the *JFS*, which focused on the complaint that the *JFS* had been guilty of racial discrimination in terms of the Race Relations Act 1976. It was submitted that applying the matrilineal test implied discrimination on the basis of ethnic descent and, by that, racial discrimination, either direct or indirect. The opposite view was that the school applied religious, not racial criteria and therefore did not discriminate on racial grounds. Or, in case the submission of indirect discrimination was accepted, this was justified, because the school used proportionate means to achieve a legitimate goal. The majority of the Justices of the Supreme Court of the UK concluded that there was direct

⁶ Para. 3.6 of the *Maimonides* judgment.

racial discrimination, because, in the words of Lord Philips, the President of the Court, the matrilineal test ‘focuses on the race or ethnicity of the woman from whom the individual is descended.’⁷ He therefore concluded that this test ‘is a test of ethnic origin. By definition, discrimination that is based upon that test is discrimination on racial grounds under the Act.’⁸ The President seems to have realized the consequences of his approach, because his conclusions were preceded by the remark that the outcome may indicate that there may be a defect in the law on discrimination. He also gave the assurance that ‘Nothing that I say in this judgment should be read as giving rise to criticism on moral grounds of the admission policy of JFS in particular or of the policies of Jewish faith schools in general, let alone as suggesting that these policies are “racist” as that word is generally understood.’⁹ Titia Loenen aptly observed in this connection: ‘Apparently, he felt the need to distinguish the clear ‘wrong’ of racism from less objectionable distinctions on racial grounds. If anything, it shows the particular sensitivity of framing religious issues in terms of race.’¹⁰ And Weiler rightly held that ‘[i]t is not every day 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 Free School (JFS) case.’¹¹ Lord Philips represented the majority view. A minority of two Justices rejected the allegation of racial discrimination forthwith. Lord Rodger refuted the idea of racial discrimination because of the ethnic background of the boy by pointing at an appropriate comparator. In this case that would be a boy whose mother also had an Italian and Catholic background. If that mother would have been converted to Judaism under the auspices of an orthodox rabbi, he could have been admitted without any problem. This shows, according to Lord Rodger, that the criterion is religious (which is permissible for faith schools) and not racial.¹² Also Lord Brown observed that the differential treatment concerned ‘is plainly on the ground of religion

7 Para. 41 of the *JFS* judgment.

8 Para. 45 of the *JFS* judgment.

9 Para. 9 of the *JFS* judgment.

10 LOENEN 2012, at p. 485.

11 WEILER 2010.

12 Para. 229 and 230 of the *JFS* judgment.

rather than race.¹³ Two other Justices concluded that there was a case of – unjustified – indirect discrimination. The legal debate before the English courts was limited to an interpretation of the relevant provisions of the Race Relations Act. The only question was whether or not the admission policy could be qualified as racial discrimination. The possible human rights of the defendant were not seen as rights which, as a matter of fact, should be taken into account as counterbalancing interests. The religious freedom issues involved only indirectly informed the choices made by the Justices, who had to decide on the interpretation of the Race Relations Act. Lord Rodger, for example, remarked that ‘[t]he majority’s decision leads to such extraordinary results, and produces such manifest discrimination against Jewish schools in comparison with other faith schools, that one can’t help feeling that something has gone wrong.’¹⁴

2.3. Comparison

At first sight one might be inclined to think that the Dutch approach, focusing on the balancing of the relevant human rights, was indeed more likely to be in favour of the school. The legal issue in *Maimonides* was directly identified as an issue of colliding fundamental rights. The interests of both sides could be taken into account on an equal basis. On the other hand, in the English case, the legal framework was limited to the application of the Race Relations Act, more specifically to the question of whether or not there was a case of racial discrimination. In a case of direct discrimination, which according to the majority of the Justices of the Supreme Court was found in the *JFS* case, there was no room for balancing opposing rights or interests. That, one may think, made it easier to come to the conclusion that there was no room for the admission policy. That would be an easy explanation for the different approaches. However, as has been shown, also the balancing exercise could have led to a decision against the school, as is exemplified by the judgment of the Amsterdam Court of Appeal and the Opinion of the Advocate General. And also, the quest for a correct interpretation of

13 Para. 245 of the *JFS* judgment.

14 Para. 226 of the *JFS* judgment.

the relevant provision of the Race Relations Act could have resulted in a decision in favour of the school, as is clear from the minority judgments in the Supreme Court of the UK. In other words, it is arguable that the legal framework, as such, cannot have been a decisive explanation for the different outcomes.

3. State faith schools

We probably have to dig a little deeper and to focus on the constitutional background of both legal systems concerned, especially on the relationship between the realms of politics and religion. The explanation may possibly be found in the differences between the Netherlands and the United Kingdom as to the traditional approaches to faith schools in the constitutional structure of the State, having regard to the relationship between Church and State.

3.1. *The Netherlands*

The Netherlands, traditionally, had no official State Church. However, in the days of the Republic the Reformed Church was considered to be a privileged Church, which meant *inter alia* that in principle membership of this Church was a prerequisite for appointment as a public official. People outside the privileged Church, such as Roman Catholics, Mennonites and Jews, were, relatively speaking, better off in the rather tolerant Republic than in other European countries in the 17th and 18th centuries, although there was certainly not a case of equal treatment. That was only introduced after the Dutch ('Batavian') version of the French Revolution. The equal protection of citizens irrespective of their beliefs was to a great extent preserved after the Restoration which followed the departure of the French in 1813, although at that time there was, as yet, no separation of 'Church' and State. This was the result of the thorough adaptation of the Constitution in 1848. Gradually the separation of 'Church' and State became stricter, without, however, adopting the strong version prevailing in the United States or the ideology of secularity of the State, which is included in the French Constitution. The Dutch system has been qualified as a system of pluralistic cooperation.¹⁵ It allows

15 See BROEKSTEEG 2014, at p. 50.

for the manifestations of religions in the public sphere, not only individually, but also collectively. Traditionally, in Dutch society there were many collectivities which on the basis of religious or other ideological principles were active in society, claiming *sphere sovereignty* against the State. The Dutch state has always been willing to support (also financially) denominational institutions that are active in various social sectors, prominently in the field of education, while observing the principle of non-discrimination between various religions or other non-religious beliefs.

This brings us to the relationship between the State and the denominational schools. In the development of the Dutch constitutional traditions in the field of democracy and human rights, as from the 19th century onwards the relationship between faith schools and the State was a central issue. As from the beginning of the 19th century the education of children became increasingly the concern of the government. Many (mainly Christian) believers were not satisfied with the imprint of (moderate) Enlightenment ideals on public education.¹⁶ Their ideal became a school, based on religious principles, and free from any ideological control by the State. The freedom to establish private denominational schools was recognized in the Constitution in 1848. In practice, however, that was initially only an opportunity for the wealthy few. Therefore the so-called 'school struggle' focused, from then onwards, on financial support by the State for the denominational schools. It was seen as an injustice that parents, who wanted to send their children to a denominational school, had to pay double for education, compared to parents who opted for public schools. They not only had to pay for public schools via taxation, but next to that they had to support the private school from their own means. Eventually, in 1917, the 'school struggle' came to an end with the introduction of constitutional provisions which, next to the freedom of education along denominational lines, guaranteed financial support by the State for both public and private schools on an equal basis. This dual system of public and private schools is still the foundation of the Dutch – rather unique – educational system. It includes primary and secondary schools and some institutions of higher education with a great

16 For Jewish schools special arrangements were made as from 1817. See RIETVELD-VAN WINGERDEN and MIEDEMA 2003.

variety of denominational identities, such as Roman Catholic, Protestant, Jewish, Evangelical, Reformed, Islamic, Hindu and Anthroposophical. There has been for a long time, until recently, a fairly general acceptance of a high degree of autonomy of denominational schools as to the contents of the education, the appointment of teachers and the admission of pupils, all in the light of the religious or philosophical orientation of the school. In a sense the State is kept at a distance, although it may impose conditions of a qualitative nature on the education, provided the denominational identity of the school is respected. The judgment of the Supreme Court in the case of *Maimonides* fits nicely within this approach. The Court meticulously examined whether the – fixed – admission policy was based on grounds derived from the religious foundation of the school. That was the case. The school was based ‘on the *Torah* and the *Halacha*’,¹⁷ while the school refused, as a matter of policy, children ‘who were not in its view Jewish on religious grounds derived from the *Halacha*’.¹⁸ It concluded that, having regard to Articles 6 and 23 of the Constitution and Article 9 of the European Convention, the school was free to follow this fixed policy based on religious grounds, notwithstanding the strong and reasonable preference of the parents. In other words, it is not the State (whether or not in a judicial guise), but the board of the school which decides. This idea of restrictions on the authority of the State vis-à-vis entities based on religion or belief is traditionally relatively strong in the Dutch constitutional order, which has so far also refrained from the formulation of an official ideology, or a civil religion, which is not uncommon in other modern Western democracies (think of France or the US).¹⁹

3.2. *United Kingdom*

The United Kingdom is quite a different case. From the 16th century onwards the Reformation in England took shape by the separation of the English Church from the Roman Catholic Church. The Church of England, with a liturgy more akin to Catholicism and a doctrine similar to Calvinistic

17 Para. 3.1.1 of the *Maimonides* judgment.

18 Para. 3.1.2 of the *Maimonides* judgment.

19 See WALZER 1997, at pp. 76-80.

Protestantism, was created and the English Sovereign became the 'Defender of the Faith and Supreme Governor of the Church of England', which he or she remains to this very day. In other words: the Church of England was and is the Established Church or State Church. The State still has a say in internal Church affairs, such as the appointment of bishops or the text of the Book of Common Prayer. Those outside the Church of England (Roman Catholics, Protestant Dissenters) initially faced brutal persecution and later severe restrictions. Gradually, especially after the Glorious Revolution (1688), their situation improved and they could live and worship quietly. As of the second half of the 17th century, Jews were cautiously granted permission to settle in the Kingdom again (after their expulsion in 1290). A real equality between citizens of different faiths in most aspects of life had to wait until the 19th century, however. All this was brought about without the revolutionary sharp divide between old and new, which has been a common feature of the developments in many continental European States, following the example of the French Revolution. The British development, on the other hand, gradually went in the direction of religious freedom, while preserving the Established Church. As a consequence there was never a barrier between the spheres of the religious and the political, which for example is clearly distinguishable in the Netherlands, even if it is not as strict as in France. All this was also reflected in the field of education. Education was initially primarily provided by Churches and religious (Christian) societies. When the State became gradually involved in education, in terms of financing and control, the religious schools were incorporated into the system. There was no need for a 'school struggle' to ensure the public funding of denominational schools. The relationship with the State varied according to the degree of Government control and the corresponding extent of the financial support by

the State: voluntary controlled, voluntary aided, or a special arrangement.²⁰ The religious schools could preserve their religious character, while at the same time being part of the national educational system. That is exemplified by the *JFS*, which is a voluntary aided school. Other religious schools, not belonging to the three categories mentioned, opted for the status of a completely private and independent school, without State support. Against this background it is understandable that the debate on the admission policy of faith schools, which are incorporated in the national school system, is not primarily conducted in terms of the delimitation of the authority of the State and the board of the denominational school respectively. The British approach therefore significantly differs from the Dutch system based on Article 23 of the Constitution. The intertwining between ‘Church’ and State is so common a feature of the British constitutional order that interference with a school’s authority in the admission of pupils is not unusual, even if the policy is based on religious standards explicitly adopted by the school. For centuries the State was accustomed to rule over the Church, so why not rule over faith schools? The Church subjected to regulation by the State is a Christian Church, and for centuries those who ruled over this Church were themselves Christians, and it was assumed that they did not impose standards which were foreign to the Church. Nowadays, however, that common religious identity of ‘Church’ and State should no longer be taken for granted. It has been held that the majority of the members of the Supreme Court, by outlawing the typically Jewish admission policy, imposed standards on the school which were more akin to those applied by Christian schools, where it is not descent but the practising of a religion that is the criterion. It is precisely on this point that Weiler focuses his criticism; ‘What is troubling about the Majority is its sheer incomprehension and consequent intolerance

20 See on the school system the excellent survey by WADFORD 2000. In a publication of the Department of Education the different types of denominational schools are characterized as follows: ‘Voluntary aided school: Maintained by LEA [= Local Education Authority], with a (generally religious) foundation which appoints most of the governing body. Governing body generally responsible for admissions. Voluntary controlled school: Maintained by LEA, with a foundation which appoints some (but not majority) of the governing body. LEA generally responsible for admissions. Special agreement school: Maintained by LEA, with a foundation (generally religious) which appoints majority of governing body. Governing body generally responsible for admissions.’

of a religion whose self-understanding is different than that of Christianity. Their anthropological reading of ethnicity is suitable in the circumstances for which the Race Relations Act was intended. But when the law makes an exception for religion and the religion in question is Judaism, it should be understood on its own terms, not on Christian (or, more precisely, Protestant) terms.²¹

3.3. *Comparison*

By comparison it can be concluded that indeed the legal system in the Netherlands more than in the UK allows for respect for the self-understanding of a religion on its own terms, at least in the field of education. This difference between the Dutch and the British approaches to both the constitutional relationship between ‘Church’ and State, and more in particular between School and State, may therefore be helpful in explaining the difference in the outcome of both court cases.

4. 1988-2009

There is, however, a third possible explanation. Between the judgments in the cases of *Maimonides* and the *JFS*, more than twenty years had elapsed. These days this is a long period of time with regard to developments in the field of social values in general and of the law in particular, at least in the Netherlands and the United Kingdom. Two related developments seem to be illustrative of the rapid changes in the field of social values and the law in the period between 1988 and 2009. The first is that secularism has arguably become stronger in this period. Secondly, it is likely that the primacy of the principle of equality over religious freedom has been more widely accepted.

4.1. *Secularism*

To begin with *secularism*. It is, first of all, useful to clarify this concept. It has to be distinguished from the notion of *secularity*, which means the separation between the secular and the sacred, which finds its expression

21 WEILER 2010.

in the institutional separation between ‘Church’ and State and the respect for religious freedom. It should also be differentiated from the sociological concept of *secularization*, which refers to the decline of the role of religion in society, due to the process of modernization, although it helps us to understand the popularity of the idea of secularism.²² That brings us to *secularism*. This term refers to an ideology, which aims at the restriction of religion to the private realm.²³ This, far from being a neutral stance towards religion in society, has been defined ‘as an ideology [that] denotes a negative evaluation towards religion and might even be appropriately seen as a particular “religious position” in the sense that secularism adopts certain premises *a priori* and canvasses a normative (albeit negative) position about supernaturalism.’²⁴ Secularism is an idea which has been recognised within Western culture since the days of the Enlightenment, initially prominent within intellectual circles. Since the 1960s it has become more and more prominent, undoubtedly because of the general social trend of secularization, which resulted in a rapid decrease in not only church attendance but also in religious beliefs as such. This had important consequences for social values, for example in the fields of sexuality and personal relations, which were previously for many people determined by religious precepts. The principle of moral autonomy, or, in other words, individual self-determination, has become for many people the ultimate standard, instead of, let us say, the Ten Commandments. The growing resistance against the moralization of society by organized religion can be seen as the expression of the popularity of the ideology of secularism. This development was already strong in and before 1988. It did not fail to have its effects on the law, both in the Netherlands and the UK: one only has to think, for example, of the legalization of abortion (in the UK in 1968, in the Netherlands in 1984). It is submitted here that the trend of secularization and the related popularity of secularism became even stronger in the period between 1988 and 2009. And again this is reflected in the field of the law. A prominent example is matrimonial law. In 1988 the law in any part of the world, including the West, defined

22 See on secularization as a sociological concept: RIESEBRODT 2014.

23 See for the distinction between secularity and secularism DE GAAY FORTMAN 2008, at pp. 58-59.

24 Quotation from WILSON 1991, at p. 196; BOYLE 2004, at p. 14.

marriage as a relationship between a man and a woman, in accordance with the tenets of all the main religions and world views. In 2001 the Dutch legislature wrote world history by recognizing same-sex marriages. Gradually many other states followed. UK law accepted same-sex partnerships from 2004 onwards and in 2014 the full same-sex marriage. This acceptance illustrates the prevailing secularism, as the traditional concept of a marriage in law had been rooted in widespread religious views of marriage. That is the case, notwithstanding the fact that some liberal religious denominations in recent years have recognized same-sex marriages. The idea of secularism does not conflict with religious freedom if this latter concept is interpreted in a narrow sense, such as the freedom to attend religious ceremonies or prayer at home. If it includes, however, the right to manifest one's religion in (social) behaviour in the public sphere, then there may be tension between secularism and the manifestation of a religious belief. This is exemplified by the legal battles fought by those who invoke their religious freedom, in order to protect them against losing their jobs as a registrar of marriages when they have conscientious objections against solemnizing same-sex marriages.²⁵

It has to be added that the process of secularization presents not the whole picture of the development of religion in Western society and the idea of secularism has never been without opposition. It has been observed that since the late 1970s we can identify the resurgence of the traditional religions in the Western world.²⁶ Examples are the politicization of the evangelicals in the US, the success of Solidarnosc in Poland, supported by the Roman Catholic Church, and the rise of religious nationalism in Israel. There are no indications, however, that the resurgence of the traditional religions prevailing in the Western world has so far been forceful enough to turn the tide of secularization and the influence of secularism in the field of law significantly.

That is eventually also true for another development that initially proved a challenge to the prevailing trend of secularization and the popularity of the

25 See on this the Advice of the Dutch Commission on Equal Treatment: Commissie Gelijke Behandeling Advies 2008-04 'Trouwden? Geen bezwaar!' and the judgment of the (English) Court of Appeal in the case of *Ladele v London Borough of Islington* [2009] EWCA Civ 1357.

26 RIESEBRODT 2014.

idea of secularism. I am thinking of the immigration in the Western world, especially in Europe in the 1970s and 80s, of many adherents of Islam, which changed the picture to a certain extent. Initially, a popular answer was the idea of multiculturalism, which stressed the importance of a policy to prevent discrimination against immigrants, and to respect their religious and cultural otherness.²⁷ This ideal has been to a certain extent at odds with the idea of secularism. It is safe to assume that secularism was directed primarily against traditional religions in Western societies (mainly Christianity, but also Judaism). Multiculturalism was however mainly about the acceptance of other religions, such as Islam, which also had a long tradition, but were 'new' in Western society. It was not always without difficulties that they were able to enjoy the benefits of the freedom of religion, but at least they could successfully refer to existing standards in this field. And they could also benefit from the traditional approach to human rights, which took these rights to be of equal value. After 9/11, however, multiculturalism was looked upon more critically. So-called Western values – primarily of a secular brand – were assumed to be threatened. They were therefore invoked to oppose the recognition of the religious rights of minorities from other cultural backgrounds. Think of the debates on Islamic headscarves,²⁸ but also the religious slaughtering of animals.²⁹ The last example illustrates that the criticism of multiculturalism not only affected 'new' religions, but also a religion which has been present in the Western world for centuries (Judaism).

4.2. Prioritizing of equality over religious freedom

The second trend, related to secularism, is the prioritizing of equality over religious freedom. This has become stronger and stronger since 1988. Instead of seeing all human rights having equal value, there is a tendency to give priority to the right to equal treatment over the right to religious freedom. While the right to equal treatment has been part and parcel of human rights protection from its beginning, it is by now seen by some as a standard that should take precedence over other human rights. Against the background of

27 McCrudden 2011, especially at pp. 201-205.

28 Loenen 2012.

29 Lerner and Rabello 2006; de Blois 2014.

secularism this is understandable. If there is no longer a common opinion as to the sources of the ultimate values, which were traditionally embodied in a widely shared religious worldview, the notion remains that whatever may be of value should at least be obtainable or accessible on an equal basis. The formal nature of the principle of equality fits nicely within a society which no longer has a shared idea of the good. That implies that the right to equality, as the highest human rights standard, prevails over all other rights, including the freedom of religion. An even more radical stance is that religion as such, especially in its orthodox form, is a threat to human rights in general and the right to equal treatment in particular. It has been observed that 'the fundamental tenets of monotheistic religions are at odds with the basis of human rights doctrine'.³⁰ Therefore sometimes the question is posed whether or not religious freedom should be recognized as a human right at all.³¹ Even if this question is answered in the affirmative, the view of some is that the right to equal treatment prevails over other human rights, such as the freedom of religion. The Human Rights Committee, for example, held in its General Comment 28 on the equality between men and women without qualification that: 'Article 18 [ICCPR: freedom of religion] may not be relied upon to justify discrimination against women by reference to freedom of thought, conscience and religion'. Without further ado this Committee declares that the prohibition of discrimination prevails over the freedom of religion.³² This is illustrative of a tendency which sees religion as subordinate to the ideal of equality. A similar approach can be discerned in European discrimination law, where religious groups that do not accept the secular ideals of equality are restricted in applying their own moral standards in institutions that participate in society, such as in the field of education, health care and charity. They are seen as exceptional and therefore have to invoke exception clauses in order to preserve their ethos within their institution. An example of such a clause is Article 4 paragraph 2

30 RADAY 2003, at p. 668.

31 See for example VAN OOIJEN et al. 2008.

32 Titia Loenen referred to this General Comment in her annotation of the judgment of the The Hague District Court of 7 September 2005 in the case of the orthodox Christian political party SGP, that on religious grounds held that women could not stand for election on behalf of this party. See LOENEN 2005, at pp. 1121-1122.

of Directive 2000/78 of the Council of the European Union, establishing a general framework for equal treatment in employment and occupation.³³ The complex and reticent formulation of this provision is illustrative of the limited room left to religious organizations to function according to their own ethos in society. Also within the national jurisdictions concerned we see similar trends.

4.3. Comparison

So far I have reflected on developments in Western society and legal practice, epitomized as secularism and the priority of equality over religious freedom. It is not difficult to conclude that in this light the judgment in the *Maimonides* case might be considered to be ‘outdated’, even if it would still be seen as the guiding precedent in Dutch law when it comes to the admission policy of denominational schools.³⁴ The Dutch Supreme Court allowed for the priority of religious standards, as determined by religious bodies, independent from the State, over a claim based on the prohibition of discrimination. On the other hand, the *JFS* judgment, in coming to the opposite conclusion, nicely fits the new developments. The Supreme Court of the UK gave an extensive interpretation to the prohibition of racial discrimination, which overruled the tenets of religious law, as interpreted by a religious body. Secular standards were held to prevail over religious law. The legal rules concerned were about

33 ‘Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person’s religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person’s religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos. This difference of treatment shall be implemented taking account of Member States’ constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground. Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation’s ethos.’

34 In a judgment of 24 July 2007 the Amsterdam Court of Appeal applied the *Maimonides* ruling in a case on the admission of a pupil to an orthodox reformed college. See DE BLOIS 2008.

the elimination of discrimination. The idea of the protection of a religious minority did not outweigh the interest in upholding the secular standard set by the majority. Therefore the sketched developments in society and in the law, common to the Western world as such, make sense as an explanation for the differences between the two judgments.

5. Concluding remarks

Why do judgments in similar cases differ as to their outcome? For those of us who were not part of the bench in these cases the answer can only be speculative. Judges do have a considerable discretionary power, which will make the outcome of a court case always, or at least very often, unpredictable.³⁵ So it will be impossible to provide decisive evidence for an explanation as to why a court came to a specific conclusion. Nevertheless, the question remains an intriguing one, especially in cases where issues of colliding human rights principles are at stake. That is definitely so in the almost identical cases of the admission of the two boys to Jewish schools in respectively the Netherlands and the United Kingdom. I have explored three possible explanations. The first one, the different legal standards applied by the Supreme Courts involved, does not seem to provide a convincing answer, having regard to the fact that it was possible in both cases to develop a strong legal reasoning for an opposite outcome. Part of the explanation can be derived from the differences between the two legal systems concerned as to the relationship between the realms of religion and politics, specifically in the field of education. In that perspective both judgments fit their own constitutional environment. Finally, arguably, the difference between the outcomes in the *Maimonides* and the *JFS* cases has to be understood in the light of developments in society and the law between 1988 and 2009 which are characteristic of the whole Western world. From the perspective of pluralism and respect for religious minorities these developments may deserve a critical appraisal. But that is a topic for another article.

35 Cf. DE BLOIS 1994.

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