

The principle of revision and the struggle over symbolic meaning

A response to Myriam Hunter Henin's *Why Religious Freedom Matters for Democracy*

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Religious freedom is a [fragile](#) freedom. It is a concept riven with fault lines and fractures, with inconsistencies, with ambiguities that render it a lightning rod for controversy all over the world. In many cases the protections afforded to religious freedom by law run broad and deep, while others reveal law's blind spots: claims to land imbued with Indigenous spirituality, for instance, [may not fall](#) within this broad protection, nor will it necessarily assist Muslim women who wish to cover their hair or their face [in public settings](#). Questions around who benefits from religious freedom plague both legal and public discourse in the field. The right to freedom of religion seems to open up just as many questions as it resolves.

Myriam Hunter-Henin's thorough and incisive new [book](#) offers up a way of adjudicating religious freedom claims that acknowledges and even harnesses some of this uncertainty. She proposes a democratic model of church-state relations that rests on three principles: avoidance, inclusion, and revision. It is through the **principle of revision** that Hunter-Henin carves out space for dialogue and dissent over the appropriate limits to religious freedom. The adjudication of religious freedom disputes must not, she argues, rely on rigid or categorical thinking on either side. Religious believers must be willing to revisit their claims and modify their requirements for the exercise of their religious commitments in light of the demands required by their membership in a democratic community. In return, courts must not reject certain religious claims out of hand or automatically prioritise some interests over others, but must engage with the issue contextually and sensitively, balancing all competing interests in a robust proportionality exercise. By providing full and fair reasons for the decision reached, courts can ensure that any limits imposed on religious practice can be revised in subsequent cases. This acknowledges and works with, rather than against, the changeable and fractious nature of religious freedom claims in a liberal state.

The major fault lines in religious freedom cases often track disagreements over symbolic meaning. For example, many western jurisdictions have ceased to allow the recital of religious prayers or the display of religious symbols at civic council meetings. But the prayers and crosses in these cases cause little in the way of concrete, tangible harm; instead, courts are asking themselves what *message* these symbols and practices send. Do they signal that members of the majority religion are insiders, more worthy of participating in the political sphere? Or do they express something more innocuous about the cultural and political history of that polity? That courts have tended to adopt the [first interpretation](#) does not make the tussle over symbolic meaning any less of a challenge, as the [continual](#) litigation in this area attests.

Questions such as these introduce an inevitable level of abstraction to the adjudication of religious freedom claims. Hunter-Henin remarks, briefly, on the problem of abstraction in her critique of [Cécile Laborde's](#) approach to evaluating the legitimacy of particular state-church arrangements. Where Laborde notes that state establishment of religion may signal the lesser civic status of non-adherents (so long as religion remains a salient marker of social division), Hunter-Henin counters with a concern that the lack of evidence for this expressive effect weakens her theory by rendering it unduly abstract. However, Laborde and [others](#) who point to the risk of symbolic or expressive harm stemming from state establishment would not deny that it is difficult to ascertain and measure. [Expressive harm](#) – the harm resulting from what a given practice, action or symbol *says* as opposed to what it *does* – is by its very nature invisible, elusive, and often strongly contested.

This symbolic or expressive dimension of religious freedom is deeply embedded in the types of cases that find themselves before the courts, extending far beyond the issue of state

establishment to include, for instance, disputes over [sex-segregated religious schools](#), Islamic dress in [universities](#) and [courtrooms](#), and accommodations for government agents or businesses who try to shield themselves from perceived '[complicity](#)' in [same-sex unions](#). While Hunter-Henin is hardly arguing that the court's task in such cases is simply a matter of totting up and weighing the interests on each side of the dispute, the messy business of symbolic interpretation complicates any easy recourse to proportionality or balancing, however robust the exercise. Courts adjudicating religious freedom disputes [are actually making](#) profound normative judgments about religion, national identity, and social meaning.

All of this pushes up rather uncomfortably against Hunter-Henin's principle of revision. The inevitability of some level of abstraction and indeterminacy in matters of symbolic interpretation makes the ideal of clear, unrestricted dialogue on the limits of religious freedom seem out of reach. Claims of expressive harm, for instance, tend to be met with directly conflicting claims of a contrary harm, resulting in a deadlock of harm arguments – the antithesis to fruitful debate.

Moreover, the courts' conclusions on symbolic or expressive meaning are often not stated directly; they are concealed within other statements and doctrines which place them neatly out of reach for subsequent courts and litigants. Recall that central to Hunter-Henin's principle of revision is the need for courts to clearly state the rationale for their decisions, in order to foster public dialogue and allow the limits of religious freedom to be revisited in light of new facts or changing norms. As such, she critiques the decision of the European Court of Human Rights in [Ladele](#) for showing excessive deference to state interests and shrouding any real examination of the conflicting interests within the margin of appreciation doctrine. As Hunter-Henin notes, it is widely accepted that the court's decision was strongly influenced by a concern about expressive harm: that if the state were to accommodate a registrar who refused to celebrate same-sex unions for religious reasons, it would signal the state's endorsement of the differential treatment of same-sex couples, marking them out as less worthy of concern. However, this important line of thinking can only be gleaned by reading between the lines of the judgment. At no point does the court address this harm directly. Thus the problem Hunter-Henin identifies in *Ladele* might best be understood as not so much about the *amount* or degree of deference shown, but about the use of deference to shield the court's operative commitments and assumptions.

Courts would certainly do well to be more transparent about their understanding of expressive harm and the acts of symbolic interpretation they are engaged in. Expressive arguments should not 'sneak in through the back door' but should be subject to full examination and debate, enabling a more reflective, critical adjudication of contested meanings. Hunter-Henin's principle of revision thus makes an important contribution to the literature on law and religion. But while the principle acknowledges and reflects the lack of certainty around the appropriate limits to religious freedom, it may be that the nature of religious freedom adjudication as a deeply symbolic enterprise makes the principle of revision that much harder to attain in practice.