

# A Common Denominator: The Role of the Anti-Exclusion Principle in Freedom of Religion Cases

Lucy Vickers\*

In his article, Suhrit Parthasarathy explores the Indian Supreme Court's response to an issue that has troubled courts in many jurisdictions: how to reconcile the protection of freedom of religion with protection of other fundamental rights? The *Sabarimala*<sup>1</sup> case under discussion is the September 2018 judgment ending the ban on the entry of women into the Sabarimala temple in the state of Kerala, and its particular focus on the approach to the constitutional dilemma taken by Justice Chandrachud. In the article, Parthasarathy commends Chandrachud J's approach to balancing religious freedom with principles of equality and dignity by using an anti-exclusion principle, which is identified as the transformative principle underpinning the Indian Constitution. The anti-exclusion principle proposes that principles of freedom of religion will not protect a practice if that practice impairs the dignity of an individual or hampers an individual's access to a basic good. In the context of women's access to the temple, the anti-exclusion principle results in religious freedom giving way to the dignity and equality interests of the excluded women. The article then argues that a corollary of the use of the anti-exclusion principle is that courts will need to engage in a measure of fact finding, in particular, to determine the extent to which dignity is infringed by the religious practice in question.

My response to the article is in two parts. First, I respond with some comments comparing the approach of the Indian Supreme Court to balancing competing rights with the approach of courts in Europe and, more briefly, the US; and comparing the approach of the different courts to the question of fact finding regarding essential practices of religion. Second, I respond to the author's recommendation that the anti-exclusion principle adopted by Chandrachud J offers a solution to conflicts between

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\* Professor of Law, Oxford Brookes University.

<sup>1</sup> *Indian Young Lawyers Association v The State of Kerala* 2018 SCC OnLine SC 1690.

religious autonomy and concerns of dignity and equal treatment. Although some might argue that any comparison between jurisdictions will flounder because of the vastly different role played by religion in the different sociocultural contexts,<sup>2</sup> nonetheless I suggest that the anti-exclusion principle could usefully be part of a more general response to the enduring legal challenge of reconciling competing fundamental rights.

## 1. Comparative Comments

### A. Court Intervention in Questions of Religious Autonomy

In ruling in favour of women's entry to the Sabarimala temple, the Indian Supreme Court took a much more interventionist position towards resolving conflicts between religious autonomy and other competing interests than has been seen in Europe and the US. In Europe, greater tolerance is afforded to religious autonomy in conflicts between religion and equality. For example, the exclusion of women from Mount Athos in Greece continues to be lawful, despite calls from the European Parliament to reconsider the position,<sup>3</sup> and the autonomy of religious groups is afforded significant protection with regard to the choice of clergy or others who officiate at religious ceremonies.<sup>4</sup>

In contexts other than sacred spaces and the employment of religious officiants, the European Court of Human Rights (ECtHR) has also been deferential to religious autonomy. In *Fernández Martínez v Spain*<sup>5</sup> a teacher of Catholic religion and ethics was a Catholic priest and was married with children. The ECtHR upheld the decision not to renew his contract of employment when his position was publicised, on the basis that the domestic court had reached a fair balance between interests of privacy, freedom of religion and freedom of association. In *Lautsi v Italy*,<sup>6</sup> concerning a complaint against the display of the crucifix in Italian

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<sup>2</sup> For a comparison of the US and India, see Gary Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (PUP 2003).

<sup>3</sup> 'European Parliament resolution on the situation concerning basic rights in the European Union' (2001/2014(INI)) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P5-TA-2003-0012+0+DOC+PDF+V0//EN>> accessed 29 January 2020.

<sup>4</sup> See *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 55 [62]; *Serif v Greece* (2001) 31 EHRR 20.

<sup>5</sup> *Fernandez Martínez v Spain* [2014] ECHR 615.

<sup>6</sup> *Lautsi v Italy* [2011] ECHR 2412.

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classrooms, the Grand Chamber held that the display of the crucifix in state schools could be continued.

Despite the deference to religious autonomy seen in these cases, religious autonomy is not given automatic preference, and religious rules have been successfully challenged in the employment context. So, for example, in *Schüth v Germany*,<sup>7</sup> a church organist was dismissed for failing to comply with religious teaching following an extra-marital relationship. The ECtHR found Schüth’s dismissal infringed under Article 8 of the European Convention on Human Rights (ECHR), on the basis that the domestic court had focussed primarily on the interests of the Church and the employer, and had not considered, in particular, Schüth’s right to private and family life.

Although the effect of the ECtHR decision in *Schüth* was to override the autonomy of the religious employer in favour of an individual’s right, the focus of the decision was very much on procedural matters. Thus, the ECtHR remains willing to uphold religious autonomy as long as all interests have been properly considered. So, for example, in *Obst v Germany*,<sup>8</sup> heard with *Schüth*, the same Chamber upheld the dismissal of the Mormon Church’s Public Relations director, also dismissed for an extra-marital relationship in breach of the church’s teaching. The decision was based on the fact that the domestic court had, in *Obst*, properly considered the relevant factors. In effect, although the ECtHR has been willing to challenge the autonomy of religious bodies, it has tended to review the process of decision making rather than intervening directly to overturn religious autonomy in favour of other competing interests.

Turning to EU law, the Court of Justice of the European Union (CJEU) has also intervened to limit religious autonomy in the employment context, involving a departure by an employee from religious rules regarding remarriage. In *IR v JQ* a Roman Catholic doctor was dismissed from his post at a Roman Catholic hospital after he remarried without having his previous marriage annulled. In determining the case, the CJEU acknowledged the importance of the coexisting legal protection of religious freedom and autonomy, and its legal obligations in EU law to uphold religious autonomy, but was also firm that this had to be held in balance with the principle of equality.<sup>10</sup> In terms of balancing equality and autonomy, the CJEU required that any dispute as to where the balance should lie should be capable of review by a court,<sup>11</sup> to ensure that any occupational requirement is justified as a proportionate means of

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<sup>7</sup> *Schüth v Germany* (Application No 1620/03) decision of 23 September 2010.

<sup>8</sup> *Obst v Germany* (Application No 425/03) decision of 23 September 2010.

<sup>9</sup> *IR v JQ* (Application No 68/17) decision of 11 September 2018.

<sup>10</sup> *ibid* [45].

<sup>11</sup> *ibid* [56].

achieving a legitimate aim. Although on the facts of the case, the CJEU suggested that it was not proportionate to dismiss JQ (holding particular views on marriage is not a genuine requirement for being a doctor;<sup>12</sup> and the fact that non-Catholic doctors were employed in similar positions showed that the job did not need to be performed by someone loyal to the religion),<sup>13</sup> nonetheless the decision of the CJEU was that religious groups cannot themselves determine where the balance between autonomy and equality lies.

In effect, the CJEU and ECtHR take the same approach to the need to balance equality and religious autonomy. Both courts recognise an interest in religious autonomy but see a need for checks on that autonomy in order for equality interests to be protected. Yet both Courts have remained deferential to the autonomy of religious bodies, such that as long as they are satisfied that equality concerns have been given due consideration, then they are likely to uphold decisions in favour of religious autonomy, rather than to intervene so that equality will prevail. Thus, although in the European case law we can see some faint echoes of the Indian approach, in its willingness to intervene in some of the employment claims, the dominant theme in Europe is for greater deference to religious autonomy. Where religious autonomy is curbed, it is done indirectly, often on procedural grounds.

In the US, we see even greater deference to religious autonomy as the courts do not interfere with the autonomy of religious groups to define their own parameters of authority, in contrast to the position in Europe. The “free exercise” provisions of the US Constitution require that religious groups be free to choose their leaders, resulting in a “ministerial exemption” to equality laws.<sup>14</sup> Moreover, categorization as a minister is determined by the religious organization itself. Thus, in *Hosanna-Tabor Evangelical Lutheran Church and School v EEOC*,<sup>15</sup> a religious school successfully relied on the ministerial exception to defend itself from a disability discrimination claim by a teacher. The US Supreme Court would not challenge the school’s designation of the teacher as a minister, even though the school employed both teachers who shared its religious ethos and those who did not, with only the teachers who shared the religion being refused equality law protection.

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<sup>12</sup> *ibid* [58].

<sup>13</sup> *ibid* [59].

<sup>14</sup> *Kendroff v St Nicholas Cathedral of the Russian Orthodox Church of North America* 344 US 94 (1952).

<sup>15</sup> 565 US 171 (2012).

## *B. Courts’ Role in Fact Finding*

Turning to the role of courts in fact finding, in contrast to the Indian position discussed in Parthasarathy’s article, courts in Europe have generally shied away from determining the content of religious rules, such as what constitutes their ‘essential practices’. In *Hasan and Chaush v Bulgaria*<sup>16</sup> the ECtHR confirmed that ‘but for very exceptional cases, the right to freedom of religion...excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate,’ suggesting that an approach which allowed courts to require beliefs and practices to be essential before protecting them would not be supported. Similarly, in *Eweida v UK*<sup>17</sup> the ECtHR confirmed that ‘there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question.’<sup>18</sup> The CJEU has made plain that it will follow the lead of the ECtHR on questions of the definition of religion.<sup>19</sup>

Although some examples can be found in UK domestic law of courts veering towards an essential practices test (see Buxton LJ in the CA, and Elias J in the first instance hearing in *Williamson v Secretary of State for Education and Employment*<sup>20</sup>) generally domestic courts have remained firm that theological questions are not within courts’ jurisdiction. The position was made clear by the House of Lords in *Williamson* which stated that ‘the court is not equipped to weigh the cogency, seriousness and coherence of theological doctrines’<sup>21</sup> and by the Supreme Court in *Shergill v Khaira*<sup>22</sup> stating ‘the courts do not adjudicate on the truth of religious beliefs *or on the validity of particular rites*’.<sup>23</sup> The only exception has been where there is no other way to resolve a case, as seen in *Shergill*, where it was accepted that a court may have to adjudicate on matters of religious doctrine and practice in order to determine who are the trustees entitled to administer a trust.<sup>24</sup>

Thus, the position in Europe has been to avoid, where possible, judicial involvement in determining religious issues, rather than using tests

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<sup>16</sup> [2002] 34 EHRR 55.

<sup>17</sup> [2013] ECHR 37.

<sup>18</sup> *ibid* [82].

<sup>19</sup> Case C-157/15 *Achbita v GAS Secure Solutions NV* 14 March 2017 [28]; C-188/15 *Bougnouti and Association de défense des droits de l’homme (ADDH) v Micropole SA*, 14 March 2017 [30].

<sup>20</sup> [2005] UKHL 15.

<sup>21</sup> *ibid* [60].

<sup>22</sup> [2014] UKSC 33.

<sup>23</sup> *ibid* [45] (emphasis added).

<sup>24</sup> *ibid* [59].

such as the essential practices test to determine the boundaries of protection for religion and belief.

In the article, Parthasarathy suggests that the reluctance to engage in fact finding with regard to religion and belief results in religion and belief enjoying a position of privilege. However, it can be argued that this refusal does not so much bestow privilege on religion and belief issues, but instead is necessary to remove what might otherwise result in disadvantage.

There are two ways in which religious interests can be disadvantaged where courts assume a more interventionist approach to fact finding. First, courts may vary in their knowledge of religions with the result that different religions are treated differently. In the case of new or minority religions or beliefs, where principles may not be well developed, it may be difficult to determine with authority the content of the belief system.<sup>25</sup> Dominant religions may also experience unequal treatment if courts too readily assume that the religious teaching is known and understood: whereas in *Williamson* some judges were prepared to determine what was and what was not required of Christianity, it is unlikely that an English court or tribunal would assume expert knowledge of any other religion. In effect then, an interventionist approach can create risks for both majority and minority religions.

Where courts take a more interventionist approach, this risks unequal treatment of religions because they may be more confident to determine religious questions related to the majority religion. In effect, the level of intervention is likely to be higher in respect of majority religions, as can be seen in the lower courts in *Williamson* and in *Sabarimala* itself. Equally, interventions in minority religions are inherently inappropriate in the absence of religious knowledge.

Second, assuming that a reluctance to find facts in religion cases reflects a position of privilege ignores the fact that, without protection from courts' fact finding, religion and belief interests could be disadvantaged compared to other competing interests. Indeed, it has been argued that it is the very insusceptibility of religious matters to fact finding that explains the existence of legal protection for religion and belief in the first place.

Timothy Macklem<sup>26</sup> addresses the question of why religion is given special legal protection. His answer (in short, that religious views are of value because of the role they play in believers' lives, through their ability to help believers deal with the unknowable in life, and thereby increase their sense of well-being) explains why limiting factual review does not so much privilege religion as remedy what would otherwise be a disadvantage.

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<sup>25</sup> See Peter Cumper, 'The Public Manifestation of Religion or Belief: Challenges for a Multi-faith Society in the Twenty-first Century' in Andrew Lewis and Richard O'Dair (eds), *Current Legal Issues* (Volume 4, OUP 2000) 325.

<sup>26</sup> Timothy Macklem, 'Faith as a Secular Value' (2000) 45 *McGill Law Journal* 1.

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The difficulty for those with religious beliefs is that the beliefs are based on faith rather than reason, and so cannot be tested according to the usual rules of the legal system, a system which is based purely on rational argument. Consequently, when tested within the rational legal system, religious beliefs are vulnerable to being disregarded. Thus, the reason for limiting factual review of religious questions is not to privilege religion, but to allow non-rational views about the nature of the world, views that have an effect on some individuals' ability to make sense of the world, to be protected through an otherwise rational legal system.

### ***2. Does the Anti-Exclusion Principle Offer a Solution to Conflicts Between Religious Autonomy and Concern of Dignity and Equal Treatment?***

In the article, Suhrith Parthasarathy commends the anti-exclusion principle as a means to resolve disputes between individuals and religious communities. The principle allows Indian courts to take a more interventionist approach in religious disputes, as shown in *Sabarimala*. Here, in assessing the exclusion of women from the temple, women's status as a disadvantaged group enabled their interests to prevail over the religious autonomy of the denomination running the temple. In effect, the anti-exclusion principle allows for the interests of disadvantaged groups, particularly groups with a history of social exclusion, to be given precedence over the religious autonomy claims, particularly those of dominant religious groups.

Such an approach has much to commend it as a mechanism to promote the achievement of substantive or transformative conceptions of equality, extending beyond recognising individual dignity and identity to include redressing disadvantage and overcoming social exclusion.<sup>27</sup>

It is arguable that it is a particularly apposite approach in the specific sociocultural circumstances of India, in which religion plays a more dominant role in society.<sup>28</sup> However, such an approach would not necessarily lead to different outcomes in the examples used above from the European context, in which the role of religion in society is somewhat different. In the employment context of the ECtHR decisions in *Fernandez Martinez* and *Obst*, individual dignity may well have been

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<sup>27</sup> Sandra Fredman, 'Substantive Equality Revisited' (2016) 14(3) *International Journal of Constitutional Law* 712. See also, Hugh Collins 'Discrimination, Equality and Social Inclusion' (2003) 66 *Modern Law Review* 16.

<sup>28</sup> See Jacobsohn (n 2).

infringed when the employment relationship ended, but group disadvantage is harder to identify. Married priests and employees who have been unfaithful are not groups that generally suffer disadvantage and exclusion in access to public goods, and there is no historic sense of having suffered “untouchability” etc. Thus, the application of the anti-exclusion approach would not inevitably mean that religious autonomy will need to give way to individual claims.

The anti-exclusion principle is thus not determinative of any particular outcome as between group autonomy rights and individual rights to dignity and inclusion. Nor is it only of use in particular sociocultural contexts. Instead it provides a device for balancing interests in a meaningful way. Often when courts balance competing rights, such as rights to religious autonomy and equality, they are faced with resolving what can appear to be unequal equations, with irreconcilable concepts on either side of the equation. Using principles such as the anti-exclusion principle provides a method to approach such questions, akin to finding a common denominator to resolve a mathematically unequal equation. By translating the competing interests into their common or shared component parts, a more objective method to reconcile the conflict is offered. In the case of the anti-exclusion principle, the interests of religious groups and the equality interests of women are considered on more equal terms. If the religious autonomy interest is then understood not as a group right, but as an amalgam of individual dignity rights, then a more objective balancing exercise can be undertaken. In *Sabarimala*, the Indian Supreme Court determined that the balance lay in favour of women’s dignity rights. Applied to *Fernandez Martinez*, the balance might lie differently.

As Parthasarathy posits, such an approach does require courts to engage in greater levels of fact finding than they may be used to, but this does not necessarily mean encroaching on issues viewed as non-justiciable in the European courts, such as whether particular tenets of faith are essential. Instead, the anti-exclusion principle can allow courts to determine quite different types of fact: for example, are the beliefs actually held, and by how many people? And does the group suffer exclusion—from public good more generally, and specifically through the exercise of religious autonomy?

The anti-exclusion principle is helpful as a common denominator for considering cases of conflict between religious autonomy and equality claims. Of course, it may not be the only principle that can help. Sandra Fredman<sup>29</sup> identifies a multi-dimensional approach to equality as a framework for assessing the weight of the different aspects of equality in any particular factual scenario. She proposes that equality should aim to:

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<sup>29</sup> Fredman (n 27).

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redress disadvantage; recognise the importance of individual dignity and identity and tackle stereotype and stigma; address social exclusion and promote participation; and achieve structural change to accommodate difference. As an additional dimension, in this multi-dimensional approach, the anti-exclusion principle can provide an additional ‘common denominator’ enabling courts to balance what are otherwise irreconcilable issues.