



**University of
Sunderland**

Ali, Lyndsey (2020) The Racial and Religious Hatred Act 2006 and the Freedom of Anti-Muslim Social Media Personalities to Incite Religious Hatred. *Sunderland Student Law Journal*, 2020 (1). pp. 5-20. ISSN 2634 -193X

Downloaded from: <http://sure.sunderland.ac.uk/id/eprint/12051/>

Usage guidelines

Please refer to the usage guidelines at <http://sure.sunderland.ac.uk/policies.html> or alternatively contact sure@sunderland.ac.uk.

The Racial and Religious Hatred Act 2006 and the Freedom of Anti-Muslim Social Media Personalities to Incite Religious Hatred

Lyndsey Ali (2020) SSLJ 1, 5-20

LLM Student, University of Sunderland

Abstract

This article identifies that hate crime involving religious hatred is increasing at an unprecedented rate in the United Kingdom (UK) but successful prosecution for incitement to religious hatred is virtually impossible.¹ It identifies the internet and anti-Muslim social media personalities as a reason for this increase and S.29J of the Public Order Act 1986 as the reason they can incite religious hatred without retribution. Using far-right social media personality Tommy Robinson as a medium, it evidences that actions of the far-right merit at least a realistic chance of prosecution. It identifies that to do this, freedom of speech needs to be limited and proposes this is lawful as per Article 10.2 of the ECHR; for public safety, national security, preventing disorder or crime and protecting other people's reputation or rights. It demonstrates that central arguments for the inclusion of S.29J namely that satire, discussion and criticism of religion would be an offence without it are unfounded and the justification that religion and race are separate entities is flawed. It concludes that S.29J should be revisited as limitation of the freedom of hate speech is lawful, justified and required.

Keywords

Religious hatred, Public Order, Free Speech, Human Rights

¹ Home Office Statistical Bulletin 2017/2018, 'Hate Crime England and Wales' (Home Office, Oct 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/748598/hate-crime-1718-hosb2018.pdf> Accessed 10 March 2019.

Introduction

Until 2014, extreme right-wing activity was confined to small established groups with older membership promoting anti-immigration and white supremacist views who presented a very low risk to national security.¹ Austerity, Brexit and terrorist attacks by Muslims provide a vast disillusioned audience for the far-right of today.² A new breed of far-right social media personality has emerged with the unparalleled platform of the internet to promote their anti-Muslim rhetoric. Accordingly, religious hate crime across England and Wales is increasing at an unprecedented rate;³ rising by 40 per cent in 2017, yet only 18 people have ever been prosecuted for inciting religious hatred in England and Wales.⁴

Religious hatred law in England and Wales has two main branches: religious 'hate crime' is criminal behaviour motivated by or demonstrated by hostility towards the victim's religion;⁵ Religious 'hate speech' describes expressions which incite violence, hatred or discrimination against persons and groups by reference to their religion.⁶ Inciting religious hatred is an offence under Part 3A of the Public Order Act 1986 (POA) which prohibits hatred against a group of persons defined by reference to religious belief or lack of religious belief (29A), by threatening words or behaviour or display of written material (29B), publication or distribution of written material (29C), public performance of a play (29D), distributing, showing or playing a recording (29E), or broadcasting or including a programme in programme service (29F). The actions must be threatening and performed with the intention

¹ Home Office, 'Fact Sheet Right-Wing Media' (Home Office, 19 March 2019 <<https://homeofficemedia.blog.gov.uk/2019/03/19/factsheet-right-wing-terrorism/>> accessed 19 March 2019.

² Omar Khan, Farah Elahi, 'Islamophobia, still a Challenge for us All' (The Runnymede Trust 2017) <<https://www.unboundphilanthropy.org/sites/default/files/Runnymede%20Islamophobia%20Report%202018.pdf>> accessed 4 February 2019.

³ See, n.1 Home Office and Daniel Trilling, 'Tommy Robinson and The Far-Rights New Playbook' (The Guardian 25 Oct 2018) <<https://www.theguardian.com/world/2018/oct/25/tommy-robinson-and-the-far-rights-new-playbook>> Accessed 10 April 2019; J Martinho, 'The impact of austerity – and the alternatives', (Oxfam Blogs, 2013) <www.oxfam.org.uk/blogs/2013/09/the-impact-of-austerity> Accessed 4 March 2019.

³ See, n.1 Home Office.

⁴ Michael Segalov, 'For right-wing hypocrisy on free speech, look at Anjem Choudary' (The Guardian Sept 2018) <<https://www.theguardian.com/commentisfree/2018/sep/21/free-speech-anjem-choudary-no-platform-hate-speech-far-right-islamic-extremists>> accessed 1 November 2018; M Rowley, 'Four far-right attacks foiled last year' (BBC News, Feb 2018) BBC News <www.bbcnews.co.uk> Accessed 4 April 2019.

⁵ The Crown Prosecution Service, 'Hate Crime' (CPS) <<https://www.cps.gov.uk/hate-crime>> Accessed 2 January 2019.

⁶ Committee of Ministers of Council of Europe, 'Recommendation No. R(97) 20 on Hate Speech October 1997.

to incite religious hatred. Despite far-right social media personalities meeting this criterion they remain largely unprosecuted because of S.29J:

‘Nothing in this Part (3A) shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system’.

Antipathy is a synonym of hatred therefore Part 3A prohibits inciting hatred but S.29J allows the expression and proselytising of hatred rendering prosecution virtually impossible.

The reason for the Racial and Religious Hatred HC Bill (2005) [54/1] (the Bill) was because case law has developed to include some religions from incitement to racial hatred but not others, including Muslims, who do not meet the criterion for inclusion¹. The objective of the original Bill was to correct this disparity by giving all religion equal protection via the addition of religious hatred to the existing racial hatred provision in S.29 of the POA. Opponents disagreed that religion should receive the same protection as race due to the importance placed on freedom of speech provided by Article 10 of the European Convention on Human Rights (ECHR).² A separate diluted section of the POA was instead added for incitement to religious hatred (Part 3A) which does not meet the objective of the original Bill. A broad freedom of speech clause (S.29J) was borne from the reticence of the House of Lords to restrict freedom of speech, specifically that criminalising incitement to religious hatred would prevent religion from being criticised or ridiculed. This was justified by their belief that religion does not afford the same protection as race because religion is a choice whereas race is not.³ However, there is a clear distinction between satire and criticism and the actions of the far-right and Article 10 can be limited in the case of hate speech which incites religious hatred if; limitation is covered by law, is necessary and proportionate, or for one or more of the following aims: national security, territorial integrity or public safety, preventing disorder or crime, protecting health, protecting other people's reputation or rights, preventing the

¹ Mandla (Sewa Singh) v Dowell Lee [1983] 2 AC 548 and Dawkins v Crown Suppliers PSA [1993] IRLR 284 CA.

² Gary Slapper, ‘The legality of assaulting ideas’ (2007) 71 (4) JCL 279.

³ Ibid.

disclosure of information received in confidence, maintaining the authority and impartiality of the judiciary.⁴ It is proposed that the actions of far-right social media personalities meet the criteria for limitation of Article 10 rights thus facilitating prosecution and preventing S.29J from being used to freely stir up religious hatred without fear of retribution.

The Emergence of a Useless Law

Current legislation outlawing incitement of religious hatred is widely accepted as 'useless'.⁵ The Bill was the fourth attempt by the then Government at legislation with previous attempts encountering opposition in the Lords due to consequential restrictions on freedom of speech.⁶ On each occasion incitement to religious hatred proposals were withdrawn so the remainder of the Bill was passed.⁷ The Bill's 'success' is bureaucratic: It was introduced as a result of the 2005 Labour Party Manifesto⁸ so veto by the Lords would have breached the Salisbury Convention which constitutionally requires the Lords do not vote down at second or third reading a Government Bill mentioned in an election manifesto.⁹ The Government also stated The Parliament Act 1949 would be used to force the Bill through in the event of a veto.¹⁰ As the Bill was going to be passed regardless, the Lords heavily amended it to ensure free speech was not curtailed with the resulting Bill failing to provide equal protection to all religious groups.

Instead of adding religious hatred to Part 3, the resultant Racial and Religious Hatred Act 2006 (RRHA) inserted a separate part, 3A, giving religion less protection than race. This facilitates the Lords' belief that religion is chosen so can be legitimately criticised whereas race is not.¹¹ Amendments removed the abusive and insulting elements included in Part 3 and a requirement for intention was added.¹² A broad freedom of speech provision was also added

⁴ Article 10(2_ European Convention on Human Rights and Fundamental Freedoms 1951.

⁵ Francis Elliott, 'Lord Goldsmith backs Brown in feud with Reid', (*Independent on Sunday*, 26 November 2006) and HC Deb 31 January 2006, cols 189-190.

⁶ HC Deb 19 November 2001, vol 375, cols 21-118; HL Deb 30 January 2002, vol 631, cols 314-40; and HL Deb 14 March 2005, vol 670, cols 1106-98.

⁷ Neil Addison, *Religious Discrimination and Hatred Law* (Routledge-Cavendish 2007) 139.

⁸ The Labour Party, '*Manifesto for England and Wales*' (The Labour Party, 2005).

⁹ Parliament, 'Salisbury Doctrine' (Parliament)

<<https://www.parliament.uk/site-information/glossary/salisbury-doctrine/>> accessed 20 January 2019.

¹⁰ HC Deb 19 November 2001, vol 375, cols 21-118.

¹¹ Parliament, *Memorandum to the Home Affairs Committee, Post Legislative, Scrutiny of the Racial and Religious Hatred Act 2006* (Cmd 8164).

¹² HL Deb 25 October 2005, vol 674, cols 1070-1102.

(S.29J), resulting in ‘essentially symbolic’ legislation.¹ The principal aim of symbolic legislation is reassurance rather than redress, prevention or punishment, and the RRHA was enforced on the assumption it would rarely, if ever be used. Although the RRHA sent a signal from the Government to Muslims that concerns were being taken seriously,² the Attorney General warned “It would be virtually impossible to bring a successful prosecution,” branding the RRHA ‘practically useless.’³ Most recent Post Legislative Scrutiny of the RRHA in 2011 reinforced this when deeming legislation acceptable because 3A “offers a level of protection that religious groups did not have before”.⁴ However, the report stated “The Government will continue to monitor use of this legislation” which has not happened.⁵ It has been confirmed by the Home Office that when the RRHA was scrutinised, extreme right-wing activity was confined to small groups presenting a very low risk to national security⁶ which is no longer the case.⁷ Since the report reports of religious hate crime have risen by 415%.⁸ This continuing rise in religious hate crimes, the emergence of the internet and the scope, speed and ease it provides to the far-right renders the ‘symbolic law’ unfit for purpose in modern day illustrating that the Government should follow up on their promise and revisit S.29 in light of the modern-day phenomenon of anti-Muslim social media personalities.

The Lawfulness of curtailing freedom of speech

Far-right social media personalities have stated that everyone has the “God given right to freedom of speech” but this is untrue.⁹ Article 10 of the European Convention on Human Rights (ECHR) provides the right to freedom of expression, freedom to hold opinions and to

¹ HC Deb 31 January 2006, vol 678, cols 189-190.

² Jamie Bartlett and Jonathan Birdwell, ‘Cumulative Radicalisation Between the Far Right and Islamist Groups in the UK: A review of evidence’ (Demos, 5 November 2013)

<<https://www.demos.co.uk/files/File/Prospectfeb.pdf>>accessed 3 February 2019

³ See, *Ibid* and Francis Elliott, ‘Lord Goldsmith backs Brown in feud with Reid’, (*Independent on Sunday*, 26 November 2006).

⁴ Home Office Affairs Committee, *Post Legislative Scrutiny of the Racial and Religious Hatred Act 2016* (Cmd 8164, 32).

⁵ Home Office Affairs Committee, *Post Legislative Scrutiny of the Racial and Religious Hatred Act 2016* (Cmd 8164, 32).

⁶ See, n.2 Home Office.

⁷ See, n.22 Elliot.

⁸ See, n.1 Home Office.

⁹ RT Question More, ‘The Tommy Robinson problem: Does everyone have the right to free speech’ (RT Question More, 29 March 2018) <<https://www.rt.com/uk/422709-tommy-robinson-free-speech/>> Accessed 10 March 2019.

receive and impart information and ideas without interference by public authority and regardless of frontiers, but these can be limited if prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. Article 10 rights also need to be balanced with other convention rights as per Article 14 of the ECHR which in particular prohibits religious discrimination. However, Article 9 which provides the right to freedom of thought, conscience and religion has been emphasised by the European Court of Human Rights (ECtHR) as one of the foundations of democratic society; a vital factor in forming the identity of believers and their conception of life. Accordingly, Article 20(2) of the International Covenant on Civil and Political Rights requires 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.¹

This is all confirmation that the right to freedom of expression does not protect expression which seeks to incite violence, hatred or discrimination against others.² The ECtHR has confirmed that it may be considered necessary in certain democratic societies to limit expression which spreads, incites or justifies hatred based on intolerance'.³ In balancing convention rights, the right to freedom of thought, conscience and religion has particular importance as an absolute right whereas freedom of speech can be limited. Discriminating against some religions by affording them less protection than others could be in breach of Article 14, and the scope of S.29J a breach of Article 20(2) of the International Covenant on Civil and Political Rights.⁴ When dealing with cases of incitement to hatred and freedom of expression, two approaches are available as provided for by the ECHR: Exclusion from the protection of the Convention, provided for by Article 17 if the comments in question amount to hate speech and negate the fundamental values of the Convention, and setting restrictions on protection, provided for by Article 10.2 where the speech in question, although it is hate

¹ See also Article 4 of the Convention for the Elimination of All Forms of Discrimination of Racial Discrimination 1969.

² *Vejdeland and others v Sweden* (2014) 58 EHRR 15.

³ *Erbakan v. Turkey* (application no. 59405/00) (ECHR, 6 July 2006).

⁴ See also Article 4 of the Convention for the Elimination of All Forms of Discrimination of Racial Discrimination 1969.

speech, is not appropriate to destroy the fundamental values of the Convention.¹ Either way, this illustrates that the freedom of speech of Anti-Muslim social media personalities is not absolute and can, and should, be limited.

A Legal Loophole – The Wrong Turban

It is currently possible to incite a person to direct hatred towards a Muslim for wearing a turban but prohibited to incite a person to direct hatred towards a Sikh for wearing a turban. S.3 of The POA is discriminating by giving more protection to certain religions from incitement to racial hatred than others; Muslims do not meet the criteria for inclusion.² This creates a loophole in the law allowing the incitement of hatred towards any religion apart from those covered by S.3. This has been openly exploited by the far-right as illustrated when Nick Griffin and Mark Collet of the British National Party (BNP) were acquitted of inciting racial hatred under S.3 of the POA despite freely admitting inciting hatred of Muslims.³ Griffin and Collet's behaviour was able to continue with Griffin's website subsequently displaying guidelines to followers such as: 'We can sometimes get away with criticising Zionists, but any criticism of Jews is likely to be legal and political suicide.'⁴ The original RRH Bill would have closed this loophole. Although it is because far right activists successfully exploited the distinction between 'racial' and 'religious' that the RRHA was required, this problem was not solved by new legislation. The main justification for creating a separate section of the law for religious hatred is that race affords limitation to freedom of expression whereas religion does not, however this is contradicted by S.10 of the Equality Act 2010 in which Parliament gave religion protected characteristic status thus prohibiting discrimination of Muslims. In continuing to exclude a Muslim from the same protection as a Sikh for wearing a turban, discrimination is freely being allowed. This is further evidence that re-evaluation of S.29 of the POA is required by law as legislation does not align with subsequent developments.

¹ EC Europa, 'Code of Conduct on Countering Illegal Hate Speech Online' (EC Europa) <https://ec.europa.eu/info/sites/info/files/code_of_conduct_on_countering_illegal_hate_speech_online_en.pdf> Accessed 4 March 2019.

² Dawkins v Crown Suppliers PSA [1993] IRLR 284 CA.

³ BBC News, 'BNP leader cleared of race hate' (BBC News, 10 November 2006) <<http://news.bbc.co.uk/1/hi/england/bradford/6135060.stm>> accessed 10 March 2019.

⁴ British National Party, 'Guidelines' (BNP) <www.BNP.co.uk/guidelines> Accessed 10 December 2018.

Furthermore, although the argument that religion does not afford the same protection as race is valid as religion is a choice whereas race is not, this distinction is not made by haters. Hatred of Muslims has been prevalent in the UK for generations in the form of 'Paki' which has been used for decades to generalise the most recognisable Muslims of South Asian ancestry.¹ Despite being an abbreviation for "Pakistani", 'Paki's' proponents tend to direct it towards anyone with a dark complexion.² Rather than 9/11 being a catalyst for Islamophobia, it is proposed that Islamophobia is actually 'Paki' hating in a new guise, thus incitement to racial and religious hatred is more intertwined than the law gives credit. This is evidenced when Sikhs and others with an 'Arab' appearance are attacked for 'looking like Bin Laden'.³ This level of correlation between racial and religious hatred by the far-right was demonstrated when at an anti-Muslim gathering an English Defence League speaker was cheered when broadcasting "Send the black cunts home" referring to Muslims.⁴ This is evidence that when hating, race and religion are not separated as they are in law and the virtual impossibility of prosecution for religion means racism in the form of Islamophobia, or 'Paki' hating in its new guise, can flow without likely retribution. This is clear evidence that religion affords more protection than it currently has and further evidence that S.29 should be revisited.

The Problem in Context

Stephen Yaxley-Lennon also known as Tommy Robinson is part of a Counter-Jihad Movement who believe the Western world is being taken over by Muslims,⁵ with the refugee crisis being nothing but "a Muslim invasion of Europe."⁶ Yaxley-Lennon fails to differentiate between violent and peaceful Muslims as per his statement outside a mosque in Manchester broadcast on YouTube: "When you see these communities...you might think this is a British community or you might have British Muslims;...In these houses are enemy combatants who

¹ Scott Poynting, Victoria Mason, 'The resistible rise of Islamophobia: Anti-Muslim racism in the UK and Australia before 11 September 2001' (2007) 43 JoS 61.

² Rajni Bhatia, 'After the N-Word, the P-Word' (BBC News, 11 June 2007) <<http://news.bbc.co.uk/1/hi/magazine/6740445.stm>> Accessed 10 March 2019.

³ Hugh Muir, Laura Smith, *Islamophobia: Issues, challenges and action* (Trentham Books 2004).

⁴ YouTube <[video.https://www.youtube.com/watch?time_continue=20&v=AoIV-_dQH30](https://www.youtube.com/watch?time_continue=20&v=AoIV-_dQH30)>.

⁵ Benjamin Lee, 'Why We Fight: Understanding the Counter-Jihad Movement' (2016) 10 Religion Compass 10, 257.

⁶ Ibid.

want to kill you, maim you and destroy you. They want to destroy our way of life." ¹ Yaxley-Lennon's behaviour fits the classification provided by Camus and Lebourg: "Far-Right movements challenge the political system in place, both its institutions and its values... They feel that society is in a state of decay, which is exacerbated by the state: accordingly, they take on what they perceive to be a redemptive mission"² and is Islamophobic; displaying dislike of or prejudice against Islam or Muslims, especially as a political force constructing a static Muslim identity, which is attributed in negative terms and generalised for all Muslims.³ It is not this ideology that justifies limitation of freedom of speech, it is not unlawful to hate, but, it is proposed, the action of spreading this via the internet.

In 2018, on-line Yaxley-Lennon stories generated an average of 1,164 interactions each compared with then Prime Minister Theresa May's 177.⁴ He has been described by supporters as: 'admirable, confident, informative, stands up for ordinary people and brave'.⁵ Yaxley-Lennon takes advantage of this persona together with the size of the audience and the fact that people generally believe what they read, and it is proposed that this is where religious hatred is incited.⁶ In October 2018 Yaxley-Lennon posted a video subsequently shared millions of times on Facebook falsely claiming that a Muslim child was the victim of bullying because he previously attacked two English schoolgirls.⁷ Yaxley-Lennon's actions clearly incited hatred as per 3A; the boy's family were forced to relocate as: "the level of abuse the children have received has become too much..."⁸ there are people who hang around outside my house and video me on their phones. They call me 'little rat' if I go outside. One of my neighbours threatened me outside my house just yesterday."⁹ Yaxley

¹ Joe Mulhall, 'The British Counter-Jihad Movement no longer really exists but its impact can still be felt' (LSE Blogs, 2016) <<https://blogs.lse.ac.uk/religionglobalsociety/2016/12/the-british-counter-jihad-movement-no-longer-really-exists-but-its-impact-can-still-be-felt/>> Accessed 10 January 2019.

² Jean-Yves Camus, Nicolas Lebourg, *Far Right Politics in Europe* (2017 Harvard University Press) 22: Josh Lowe, 'Pegida UK: What does the Tommy Robinson's anti-Islam group want?' (2 June 2016) <<https://www.newsweek.com/tommy-robinson-edl-pegida-uk-423623>> Accessed 10 March 2019.

³ Foundation for Political, Economic and Social Research (SETA).

⁴ As reported on www.newswhip.com.

⁵ As reported on www.yougov.com.

⁶ Nick Davies, *Flat Earth News* (Random House 2009).

⁷ J Halliday, 'Bullied Syrian schoolboy to sue Facebook over Tommy Robinson claims' (The Guardian, 2019) <<https://www.theguardian.com/technology/2019/jan/21/bullied-syrian-schoolboy-to-sue-facebook-over-tommy-robinson-claims>> Accessed 20 April 2019.

⁸ Ibid.

⁹ Ibid.

Lennon's postings made the boy "the focus of countless messages of hate and threats from the extreme right wing" and led to a police safety warning.¹ Yet Yaxley-Lennon was not prosecuted which can only be assumed to be because of the protection provided by S.29J.

In 2017, Darren Osborne received an e-mail from Yaxley-Lennon stating:

"What Salman Abedi (the Manchester Bomber) did is not the beginning and it won't be the end. There is a nation within a nation forming just beneath the surface of the UK...built on hatred, violence and Islam...Politicians have failed to take the necessary steps to keep us safe. It has now been left to us, the ordinary people of the UK, to step up and say 'no more.'"²

The next day Osborne purposely drove a heavy goods vehicle into a crowd of people gathered outside of a North London mosque, killing one and injuring twelve. It was confirmed in Court that over one month, Osborne's mind was "poisoned by those who claim to be leaders and was inspired to carry out an attack on innocent members of the public." Justice Cheema-Grubb confirmed Osborne had been "rapidly radicalised over the internet by those determined to spread hatred of Muslims" and that he had become "infatuated with Tommy Robinson and the Britain First organisation".³ Scotland Yard's counter-terrorism command stated that online material from Yaxley-Lennon played a "significant role" in Darren Osborne's radicalisation and the UK's most senior counter-terror officer stated there was "no doubt" that material posted online by people including Yaxley-Lennon drove Osborne to target Muslims.⁴

There is nothing wrong with opposing or criticising Islam, but it is proposed that the size of the audience now available to anti-Muslim social media personalities via the internet renders it so likely that at least one person will be incited, that Anti-Muslim social media personalities are inciting religious hatred but avoiding prosecution because of S.29J. It is not only the effect

¹ Ibid.

² Lizzie Dearden, 'Finsbury Park as it happened: Messages sent by Tommy Robinson to Terror Suspect Darren Osborne Revealed in Court' (The Independent, 23 January 2018) <<https://www.independent.co.uk/news/uk/crime/finsbury-park-attack-trial-live-darren-osborne-court-muslims-mosque-van-latest-news-updates-a8173496.html>> Accessed 10 March 2019.

³ R v Darren Osborne [2018] Woolwich Crown Court Sentencing remarks at 7.B.

⁴ M Rowley, 'Four far-right attacks foiled last year' (BBC News, Feb 2018) <www.bbcnews.co.uk> Accessed 20 April 2019.

on the victim which renders S.29J no longer fit for purpose; the Yellow Jacket protests in France began with an online petition and aside from casualties and rioting, trade losses of €2 billion were reported simply as a result of the blocked roundabouts leading to commercial zones.¹ Therefore not only is limitation of Yaxley-Lennon necessary and proportionate, it can also be limited in the aim of national security, public safety, preventing disorder or crime and protecting other people's reputation or rights. It is therefore proposed that the actions of the far-right justify re-evaluation of S.29J to facilitate at least a chance of successful prosecution under 3A.

Flawed justification

It is also proposed that 'hate-speech' as an umbrella-term was too broad a definition on which to base the free speech argument during the passage of the RRH Bill as there is a wide and clear gap between free speech and hate speech. By using the term hate speech broadly when discussing the RRH Bill, comedians feared it would be impossible to satirise religion; the National Secular Society feared it would be impossible to criticise religion; and Christians feared restriction of their ability to preach Christianity thus S.29J emerged. However, hate speech and freedom of speech are two different entities and before the introduction of the Bill the ECtHR had already recognised that the term 'hate speech' is broad and the right to free expression should not be curtailed simply because other people may find it offensive or insulting.

In *I.A. v. Turkey* in 2005² the Court held that there had been no violation of Article 10 in criticising the Prophet Muhammad reinforcing the comments in *Otto-Preminger Institut v Austria*³ that those who chose to exercise the freedom to manifest their religion cannot reasonably expect to be exempt from all criticism. In 2003 *Gündüz v. Turkey* confirmed taking an active part in an animated public discussion without calling for violence is not regarded as hate speech, and in 1994 *Jersild v Denmark* had confirmed that speech intended to inform rather than offend attracts greater protection, even if construed as hatred.⁴ This is evidence

¹ Juliette Garnier, 'Gilets jaunes le manque à gagner serait de 2 milliards d'euros pour le commerce' (Le Monde, 14 December 2018).

² [2005] 9 WLUK 194.

³ (1994) 19 EHRR 34 at 47.

⁴ [2003] 12 WLUK 127 and [1994] 9 WLUK 124.

that hate speech does not include satire and criticism, the ECtHR embraces this in its decisions, and a clear line is drawn. In 2004 *Norwood v the United Kingdom* illustrated that behaviour such as Yaxley-Lennon linking a group as a whole with an act of terrorism is incompatible with the values of tolerance, social peace and non-discrimination guaranteed by the Convention.⁶⁰ *Norwood* displayed a poster in a window depicting the flaming twin towers and the words ‘Get Islam out of Britain’ constituting an act within the meaning of Article 17 (prohibition of abuse of rights) and so was not protected by Article 10. Yaxley-Lennon’s broadcast relating to the terrorist attack in London when soldier Lee Rigby was murdered fits neatly with the outcome in *Norwood*. Yaxley-Lennon stated:

“Islam is not a religion of peace. Islam is fascist and it's violent and we've had enough! They're chopping our soldiers' heads off. This is Islam. That's what we've seen today. They've cut off one of our Army's heads off on the streets of London. Our next generation are being taught through schools that Islam is a religion of peace. It's not. It never has been. What you saw today is Islam. Everyone's had enough. There has to be a reaction, for the government to listen, for the police to listen, to understand how angry this British public are.”⁶¹

Yaxley-Lennon’s actions went above those of *Norwood*. He linked Islam as a whole to a terrorist attack but rather than displaying his views in a window he broadcast them to millions of people over the internet. This is clear evidence that limitation of Yaxley-Lennon’s freedom of speech would be lawful whilst satire and criticism would not be affected.

These views still stand as the 2018 case of *ES v Austria* demonstrates.⁶² In *ES* it was held that “a religious group must tolerate the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith, as long as the statements at issue do not incite hatred or religious intolerance.” *ES* had given a seminar to 30 people questioning whether Muhammad was a model for Muslim males to emulate. *ES* had “essentially conveyed the message that Muhammad had had paedophilic tendencies”. The ECtHR found that *ES*’s remarks had been capable of arousing justified indignation, were not aimed at contributing

⁶⁰ [2004] 11 WLUK 444.

⁶¹ Ben Quinn, Conal Urquhart, ‘Anti-Muslim reprisals after Woolwich attack’ (*The Guardian*, 23 May 2013) <<https://www.theguardian.com/uk/2013/may/23/woolwich-attack-anti-muslim-reprisals>> Accessed 20 April 2019.

⁶² [2018] ECHR 891.

to a debate of public interest, and could only be understood as aiming to demonstrate that Muhammad was not a worthy subject of worship. ES was found guilty of “publicly disparaging an object of veneration of a domestic church or religious society, in a manner capable of arousing justified indignation”. In contrast, UK law allowed UKIP leader Gerard Batten to pronounce “Muhammad is a paedophile” at a Tommy Robinson protest attended by thousands and broadcast over the internet to millions.⁶³

Additionally, there is a safeguard to ensure only appropriate hate speech is curtailed in the form of the most recent “definitive” statement of proportionality of Human Rights by Lord Sumption in *Bank Mellat v HM Treasury*.⁶⁴ Lord Sumption laid down that in limiting a fundamental right the following questions should be answered to the affirmative: Is the objective sufficiently important to justify the limitation of a fundamental right? Is the measure rationally connected to the objective? Could a less intrusive measure have been used and has a fair balance been struck between the individual’s rights and the interests of the community (taking account of the consequences of the measure for the individual)? This is evidence that comparing satire and criticism was not a valid justification for the insertion of S.29J therefore it must be revisited.

The ECtHR also acknowledges the wide divergence between the national traditions and societal values of the different Member States in relation to convention rights and the political sensitivities surrounding those rights. Accordingly, it gives Member States a wide margin of appreciation in relation to the balancing exercise.⁶⁵ The fact that there have been eighteen successful prosecutions means that S.29J must have limits, but as none of these have been reported publicly, it is difficult to elucidate what level religious hatred needs to reach before freedom of speech can be curtailed in the UK. This threshold is obviously higher than that of the ECtHR as Yaxley-Lennon and Batten remain unprosecuted, however, UK courts have indicated they do support limitation of freedom of speech. As Lord Steyn in *Simms*, stated: “Not all types of speech have an equal value. For example, no prisoner would ever be permitted to have interviews with a journalist to publish pornographic material or to give vent to so-called

⁶³ Eleanor Busby, ‘UKIP Leader Gerard Batten calls Muhammad is a paedophile at Tommy Robinson Rally’ (The Independent, 15 July 2018) <<https://www.independent.co.uk/news/uk/politics/gerard-batten-ukip-mohamed-paedophile-tommy-robinson-protests-muslims-a8447741.html>> Accessed 10 November 2018.

⁶⁴ *Bank Mellat v HM Treasury* [2013] UKSC 39 (Sumption LJ).

⁶⁵ James Dingemans, Can Yeginsu, Tom Cross, Hafsa Masood, *The Protections for Religious Rights*, (OUP 2013).

hate speech”⁶⁶ and The Solicitor General has acknowledged that “We need to strike a balance between the freedom of speech on religious matters and stopping extremists stirring up hatred about individuals based on their religion”.⁶⁷ As Waldron stated:

“Accepting critique as a public good is not the same as accepting that it should always be permitted. In particular, critique can have an individualised cost borne by those subject to the critique. Taking proper account of these costs means that it does not always follow that victims “who detest hate speech should just learn to live with it’.”⁶⁸

This is evidence that, more of a balance needs to be struck between UK and EU law which would ensure any limitation is proportional. This will also reassure the critics of the RRHA that the exercise of the powers of the Court will be exercised responsibly and is further evidence that freedom of speech can lawfully be limited.

Outdated Academic Opinion

Although there is clear evidence that the S.29J should be revisited, academic opinion generally conflicts with this. Hare sums up general academic consensus that “the Religious Hatred Act should be opposed by those who value free speech.”⁶⁹ Furthermore, human rights experts consistently put the limited Article 10 rights of the hate speaker above the Article 9 rights and safety of Muslims. Dr Harris, from the Joint Select Committee on Human Rights, said:

"Although I am disappointed these members of a racist party (Griffin and Collet) were not successfully prosecuted...Parliament must resist the temptation for more restrictions on freedom of expression...There must be room in a free society to allow even offensive criticism of religions and their followers." ⁷⁰

However, Dr Harris’s argument that there are "enough laws to deal with speech which actually incites to violence or other criminal offences, or which uses threatening language" is

⁶⁶ R v Simms, [2000] 2 AC 115 at 127.

⁶⁷ European Court of Human Rights, ‘Factsheet – Hate Speech’ (ECtHR, March 2019) <https://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf> Accessed 1 April 2018.

⁶⁸ J Waldron, *The Harm in Hate Speech* (2012 Cambridge, MA) 3.

⁶⁹ Ivan Hare, *Extreme Speech and Democracy* (OUP 2010).

⁷⁰ BBC News, ‘Tougher race hate laws considered’ (BBC News 2006)< <http://news.bbc.co.uk/2/hi/6137722.stm>> Accessed 20 February 2019.

fundamentally flawed.⁷¹ It has been evidenced that it is not unlawful to feel hatred, so incitement to hatred is not in itself an offence. Prior to the commencement of the RRHA, when someone incited religious hatred, the loophole appeared. Incitement to religious hatred is only unlawful because of the RRHA. It is therefore proposed that academic comment, summed up by Dworkin's opinion that no limit should be placed on the hate speakers' ability to hate speech, is no longer fit for purpose in the current climate and is further evidence that 3A, and research into it, needs to be modernised.⁷²

Conclusion

This article has provided clear evidence of incitement of religious hatred by anti-Muslim social media personalities providing examples of the Muslim child, and confirmation by the Court of their part in Osborne's radicalisation. It has illustrated that anti-Muslim social media personalities can act this way because of the protection provided by S.29J and that S.29J renders 3A unfit for purpose. In 2006 when the RRHA was implemented the extreme right-wing presented a very low risk to national security, but the rate that hate crimes are rising together with the evidence that incitement to religious hatred is going unprosecuted, prove that the symbolic nature of 3A is no longer acceptable due to the rise of the internet. In accepting 3A is essentially symbolic and failing to improve this, the Government are freely allowing incitement of religious hatred. This is all evidence that S.29J needs to be revisited and this is justified and required.

It has also illustrated that freedom of speech can be limited lawfully; in the interests of national security, public safety, for the prevention of disorder or crime, and for the protection of the reputation or rights of others. Limitation is in line with Article 14 which prevents discrimination and Article 9 which provides freedom of thought, conscience and religion. Limitation would align with the importance placed on Article 9 as evidenced by Article 20(2) of the International Covenant on Civil and Political Rights which requires that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or

⁷¹ Ibid.

⁷² Ronald Dworkin, 'Even bigots and Holocaust deniers must have their say', (The Guardian, 14, Feb 2006) <<https://www.theguardian.com/world/2006/feb/14/muhammadcartoons.comment>> Accessed 10 March 2018.

violence shall be prohibited by law'. The similarities of Yaxley-Lennon's actions with Norwood and EC in which limitation was deemed lawful, is also evidence that limitation of the freedom of speech of anti-Muslim social media personalities would be lawful.

It strengthens the case that S.29J should be revisited by illustrating that the arguments justifying the inclusion of S.29J are unfounded: Inciting hatred to race and religion are more intertwined than the law gives credit with Islamophobia being socially ingrained 'Paki hating' in a new guise thus religion does afford more protection than the law provides and in failing to revisit S.29, the Government are facilitating racism. The argument that satire and criticism would be prohibited without S.29J is unfounded: EU case law is fair, the ECtHR hold the same view as the critics, that the right to free expression should not be curtailed because it may be offensive or insulting, and allow and encourage, discussion and criticism of religion. The UK courts have supported limitation recognising that not all types of speech have an equal value but to quell the concerns of the critics, could strike more of a balance with EU case law where the power of the court is evidenced to have been exercised responsibly.

Overall, this article has evidenced that the level of the anti-Muslim social media personality 'problem' proves it is necessary to revisit S.29J, the actions of anti-Muslim social media personalities justifies revisiting S.29J, and that limiting freedom of speech would be lawful in the circumstances. It has further evidenced that justifications for the inclusion of S.29J are flawed and in balancing UK and EU case law more evenly the concern of critics can be quelled.