

## ***Are Laws Proscribing Incitement to Religious Hatred Compatible with Freedom of Speech?***

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Freedom of expression and religion are rightly viewed as two fundamental cornerstones of any modern liberal democracy. Both represent vital components in the realisation of personal autonomy, provide an important basis for the determination of political structures and may ultimately advance the Millian truth principle. Yet despite these shared utilities an undoubted tension exists between the individual's expressive capacity to disparage and denigrate the views of others and the right of religious communities to manifest their beliefs. In an era where societies attempt to embrace multiculturalism the conflict between these two values is of particular resonance. It is with this tension in mind that this essay will seek to analyse whether an incitement to religious hatred law can ever be reconciled with the effective protection of free expression. In answering this question, an examination of the guiding rationale justifying the need for an incitement to religious hatred law will first be examined. Focus will then turn to whether such laws can in theory be specifically tailored to ensure that free speech values are not unduly sacrificed. Finally attention will centre on the practical safeguards required to ensure an incitement law strikes the appropriate balance between religious and expressive freedoms.

### ***The Justification for Religious Hate Speech Restrictions***

At its extremes, hate speech represents a particularly malicious form of expression that causes direct psychological harm to its victims and incites others to commit acts of violence against the targeted group.<sup>1</sup> The free dissemination of ideas representing certain communities as inferior creates a social climate that is conducive to the spread of xenophobia and racism.<sup>2</sup> This can strip marginalised individuals of a sense of self-esteem and undermine their ability to fully participate in a society where progress is impeded by derogatory stereotypes and discrimination.<sup>3</sup> An entrenchment

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<sup>1</sup> T M. Massaro, 'Equality and Freedom of Expression: the Hate Speech Dilemma' (1991) 32 *W & Mary L Rev* 211, 221.

<sup>2</sup> A Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 *Santa Clara L Rev* 729, 740.

<sup>3</sup> L Sumner, Hate Propaganda and Charter Rights in WJ Waluchow (ed), *Free Expression: Essays in Philosophy and Law* (Clarendon Press Oxford 1994) 153-154.

of a lower social and economic status of some may also result from prolonged exposure to an idea that those targeted are not of equal value to other members of society.<sup>4</sup> This is especially problematic where vulnerable individuals accept prevailing discriminatory attitudes as representative of an unalterable state of affairs. In this regard, it is the children of marginalised communities who are most at risk of being disadvantaged from the intemperate propagation of hate speech:

‘...they may lack a healthy sense of self-worth, have low estimates of their prospects for a decent and contented life and may tend to remove themselves from competitive situations and thus from attaining vocational and educational success.’<sup>5</sup>

It is with these concerns in mind that a number of jurisdictions have long recognised that it is a legitimate curtailment of free expression to proscribe hate speech targeted at racial distinctions.<sup>6</sup> A coherent justification for this protection is often advanced on the basis that race is an immutable characteristic which underpins the core of an individual’s identity.<sup>7</sup> Therefore an assault on an individual’s race targets the very foundations upon which that individual’s self-esteem is built and arguably amounts to a ‘complete affront to personal dignity.’<sup>8</sup>

An argument for a similar prohibition of religious hate speech is generally dismissed on the grounds that, unlike race, a belief structure does not constitute an unalterable aspect of an individual’s identity.<sup>9</sup> This contention asserts that a religion can be freely changed and represents an essentially externalised life choice for an adherent.<sup>10</sup> This however, is a questionable assumption given that to many believers religion is intrinsically linked to both their individual and communal identities.<sup>11</sup> A reality which has been acknowledged in the United Kingdom by the Select Committee on Religious Offences in England and Wales:

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<sup>4</sup> K Goodall, ‘Incitement to Religious Hatred: All Talk and No Substance?’ (2007) 70(1) *MLR* 89, 96.

<sup>5</sup> M Idriss, ‘Religion and the Anti-Terrorism, Crime and Security Act 2001’ [2002] *Crim LR* 890, 892.

<sup>6</sup> European States have largely embraced race hate legislation. See E Barendt, Free Speech and Religion: Secular and Religious Perspectives on Truth in A Sajo (ed), *Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World* (Eleven International Publishing 2007) 36.

<sup>7</sup> Goodall (n 4) 97.

<sup>8</sup> S Vance, ‘The Permissibility of Incitement to Religious Hatred Offences under European Convention Principles’ [2004] *Transnat’l L. & Contemp Probs* 201, 244.

<sup>9</sup> A Myers, ‘A Crime to Tell the Truth’ (2005) 155 *NLJ* 957.

<sup>10</sup> I Hare, ‘Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred’ [2006] *PL* 521, 534.

<sup>11</sup> See the Commission for Racial Equalities comments in the House of Lords ‘*Select Committee report on Religious Offences in England and Wales*’ (2003) Chapter 2 para [9].

‘It is not true that a distinction between race and religion will depend on characteristics which cannot be changed as a matter of choice: it is of course true that people cannot alter their racial origin, but there are communities in the UK where it is inconceivable that anyone could change their professed religion and continue to live within the community concerned.’<sup>12</sup>

If it is therefore accepted that religion may constitute a ‘defining’<sup>13</sup> characteristic of a person’s identity then attacks based on religious distinctions necessarily raise similar dignity concerns as to those which justify the proscription of race hate speech.

It may also be argued that to make distinctions based solely on whether hate speech is religiously or racially motivated is liable to create arbitrary results. Where race is inextricably linked to a particular religious community, abusers may view either aspect of a group’s identity as directly interchangeable.<sup>14</sup> A dangerous situation arises when, despite the targeted group and harm remaining the same, the law offers no protection because of semantic phrasing on the part of the abuser. Indeed, prior to the enactment of the Race and Religious Hatred Act 2006, this artificial distinction was successfully exploited by far right groups in the United Kingdom who simply used religious terminology as a ‘surrogate’ for race.<sup>15</sup> When faced with such abuse the UK courts attempted on occasion to extend existing race provisions to cover specific religious groups.<sup>16</sup> This was, however, limited by legislation to religions whose adherents could show a common ethnic background and thus excluded the larger faiths with more diverse memberships.<sup>17</sup> Such a gap in protection must be viewed as deeply unsatisfactory when it is considered that despite a diversity of ethnic origin many adherents of the major religions are markedly identifiable within society.<sup>18</sup> In contrast, an approach including religious followers as part of an ‘identifiable group’ who are protected from hate speech is far more inclusive of the likely targets of racist and xenophobic expression. This has been the path adopted in Canada<sup>19</sup> and emphasises a societal desire to place a high degree of value on multiculturalism.<sup>20</sup>

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<sup>12</sup> *Ibid.* Chapter 8 para [100].

<sup>13</sup> J Garland, B Spalek and N Chakraborti et al, ‘Hearing Lost Voices - Issues in Researching ‘Hidden’ Minority Ethnic Communities’ (2006) 46(3) *Br J Crim* 423, 428.

<sup>14</sup> *Goodall* (n 4) 98.

<sup>15</sup> *Select Committee Report* (n 11) Chapter 2 para [16].

<sup>16</sup> *Mandla v Dowell Lee* [1983] 2 AC 548 (HL) (Lord Fraser) and *Seide v Gillette Industries Ltd* [1980] IRLR 427 (EAT) (Lord Slynn).

<sup>17</sup> *Hare* (n 10) 525.

<sup>18</sup> *Goodall* (n 4) 97-98.

<sup>19</sup> Section 319 of the Criminal Code of Canada 1985.

<sup>20</sup> Section 27 of the Canadian Charter of Rights and Freedoms.

The need for a broader approach to hate speech regulation is reflected in a modern reality which increasingly finds States faced with ever more culturally diverse populaces.<sup>21</sup> The harmonious inter play between different religious groups, as with racial tensions, is often directly hindered by the free propagation of hate filled invectives.<sup>22</sup> A societal cost is not only paid by violent confrontation but is also evidenced in the long term damage to community relations:

‘Even if the message of hate propaganda is outwardly rejected, there is evidence that its premise of racial or religious inferiority may persist in a recipient's mind as an idea that holds some truth, an incipient effect not to be entirely discounted.’<sup>23</sup>

As recognised by the Canadian Supreme Court, the net effect of such conceptions potentially leads to discrimination,<sup>24</sup> ‘serious discord between various cultural groups’<sup>25</sup> and ultimately violence against minorities.<sup>26</sup> These issues have particular resonance for the United States and a number of European countries which have witnessed an alarming growth in abuse of religious communities since the World Trade Centre attacks in 2001.<sup>27</sup> Indeed such concerns have informed recent legislative change in the UK, mirroring the type of justification relied upon to introduce similar racial hatred restrictions in the mid 1960s and 1970s.<sup>28</sup> The adoption of laws proscribing the use of religiously motivated hate speech may therefore be viewed as a legitimate curtailment of reactionary expression threatening the pluralistic interests of society.

### ***The Appropriate Theoretical Limitations of a Religious Hate Speech Law***

The harm caused by religious hatred may legitimately be viewed as directly comparable to those concerns which ensure that race hate restrictions often enjoy a special exception from free speech principles. However, a more cogent criticism of religious hatred legislation is to be found in the very nature of the concepts which the law potentially shields from abuse. Whilst rhetoric targeted at racial distinctions may frequently be described as

<sup>21</sup> See the comments of B Jenkins in M Gerrard, ‘Faith in the Law’ [2002] *LS Gaz*, 27 Jun, 22.

<sup>22</sup> *Sumner* (n 3) 153.

<sup>23</sup> *R v Keegstra* (1990) 3 SCR 697 para [66].

<sup>24</sup> *Ibid.* para [67].

<sup>25</sup> *Ibid.* para [66].

<sup>26</sup> *Ibid.* para [67].

<sup>27</sup> E MacAskill, ‘US Group Claims Hate Crime Rising in Europe’ *The Guardian* (June 5 2007) World News and ‘Concern Over Revenge Attacks on Western Asians’ *The Guardian* (September 18 2001) UK News.

<sup>28</sup> D Nash and C Bakalis, ‘Incitement to Religious Hatred and the *Symbolic*:’ How Will the Racial and Religious Hatred Act 2006 Work?’ (2007) 28 *Liverpool LR* 349, 368.

‘thinking without content,’<sup>29</sup> anti-religious speech is often laden with attacks on an abstract set of beliefs rather than purely seeking to vilify a group of adherents.<sup>30</sup> This is perhaps understandably at issue when two religious sects clash via the espousal of mutually conflicting views as to the very nature of existence and salvation. Not only may a desire to convert new followers create a competitive climate between religions, but the mere espousal of counter claims as to divine truths may also be highly insulting to the beliefs of others.<sup>31</sup> A tension therefore exists between the desire of religious adherents to enjoy their beliefs free from insult and the legitimate proselytising activities of other faiths.

The introduction of religious hatred legislation into this competitive climate thus potentially favours the status quo by limiting the strength of religious counter claims that may deeply offend the existing views of believers. Certainly from the perspective of the Millian truth principle this is a serious infringement on an individual’s ability to discover and challenge theories which are represented as unalterable truths.<sup>32</sup> Whilst scientific and empirical reasoning may be of little assistance in the determination of philosophical truths,<sup>33</sup> open discourse offers perhaps the only rational tool available to humanity which can challenge misguided and poorly informed perspectives. Aside from certain core tenants, religions are rarely set in stone and have tended to evolve according to the tides of human history.<sup>34</sup> Views which were once perceived as heretical can, with time, become accepted as legitimate interpretations of religious texts.<sup>35</sup> To therefore draw a line preventing the espousal of alternative doctrines, even when these are highly blasphemous to the views of others, undermines one of the great utilities of free expression.

Coupled with this perspective is an acknowledgement that religious ideas can overlap with political discourse to a greater degree than speech focused on racial hatred.<sup>36</sup> Profound questions are often asked, particularly in non-secular States, as to what extent legal and social structures should correspond to religious doctrines:

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<sup>29</sup> *Vance* (n 8) 244.

<sup>30</sup> See the views of Richard Dworkin and Galileo Galilei discussed in B Block, ‘Beware the Whirligig of Time’ (2007) 171 (51/52) *JP* 902.

<sup>31</sup> *Hare* (n 10) 534.

<sup>32</sup> The Millian truth principle is explained in E Barendt, *Freedom of Speech* (2<sup>nd</sup> edn OUP 2005) 7-13.

<sup>33</sup> *Barendt* (n 6) 32.

<sup>34</sup> M Mahlmann, Free Speech and the Rights of Religion in A Sajo (ed), *Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World* (Eleven International Publishing 2007) 43.

<sup>35</sup> For example, even Jesus Christ according to the Gospel of St John was accused of blasphemy. See J Oliva, ‘The Legal Protection of Believers and Beliefs in the United Kingdom’ (2007) 40 *Ecc LJ* 66, 68.

<sup>36</sup> *Vance* (n 8) 205.

‘...religious groups make influential, voluntary contributions to debate on matters of profound public controversy, including abortion, homosexuality and the place of women in society.’<sup>37</sup>

It would certainly be excessive for the law to allow religious groups the freedom to advocate contentious viewpoints whilst at the same time preventing the dissemination of counter arguments that are deemed offensive to these perspectives.<sup>38</sup> To do so runs a substantial risk of stifling those important debates which guide and shape the contours of a fully functioning democracy.

A more difficult issue to resolve is when speech directly intended to incite hate against the followers of a religion, rather than its beliefs, is heavily laced with political comment. This is a growing concern in an era which has witnessed frequent acts of terrorism in the name of religion.<sup>39</sup> Reaction to such highly emotive events has often ‘melded religious doctrine and political threat in the minds of many commentators’<sup>40</sup> leading to rhetoric which is extremely inflammatory. The Italian prosecution of Orianna Fallaci,<sup>41</sup> not long after the World Trade Centre attacks, typifies the difficulties faced in this area. Here the author’s book despite a predominantly political focus makes an accusation that Muslims ‘multiply like rats.’<sup>42</sup> To leave such commentary unchecked certainly represents a dangerous mix for societies faced with the dual concerns of multicultural tolerance and religious extremism.<sup>43</sup> A legitimate question is therefore asked as to whether a balance can be struck between free speech principles and the protection of religious hate speech victims in a global climate of rising tensions.

In response, a suitable compromise may be reached by ensuring that a regulatory system prevents the espousal of hatred against adherents of a faith whilst not proscribing insulting speech focused merely on the tenets of a religion. In this manner, the utility of free speech is largely preserved and those seeking to manifest their beliefs are protected against scurrilous attacks. The difficulty this presents, however, is that it asks courts to make

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<sup>37</sup> *Hare* (n 10) 535.

<sup>38</sup> *Ibid.* at 534.

<sup>39</sup> E MacAskill, ‘Russia and China Lead the Way as Coalition Against Islamic Extremism Takes Shape’ *The Guardian* (14 September 2001) World News. See also U. Khan, ‘Young British and Muslim: One Woman’s Journey to the Home of the 7/7 Bombers’ *The Guardian* (18 June 2006) Politics.

<sup>40</sup> *Vance* (n 8) 246.

<sup>41</sup> ‘French Court Hears Call for Ban on *Anti-Muslim* Book’ *Agence France-Presse* (Oct. 9 2002) available at 2002 WL 23620832 as cited in *Vance* (n 8) 245.

<sup>42</sup> *Vance* (n 8) 245.

<sup>43</sup> An issue particularly relevant in the United Kingdom. See M Riddell, ‘Integrate? Tell that to the Christian Church, Mr Blair’ *The Guardian* (10 December 2006) Comment is Free and N Klein, ‘Racism is the Terrorists’ Greatest Recruitment Tool’ *The Guardian* (13 August 2005) World News, Religion.

distinctions which are not always apparent on the facts of a case.<sup>44</sup> Attacks against individuals are frequently enmeshed with legitimate criticisms of dogma;<sup>45</sup> whilst rhetoric condemning particular tenets of a religion may be so closely linked to the practices of adherents that such comments are perceived as incitement of hatred against the faithful.<sup>46</sup> The interpretive task left for the courts is consequently not an easy one, but if free speech principles are to truly retain their value belief structures must be exposed to open discourse that potentially insults the existing views of believers.

Where a system is protective of the believer rather than the faith an additional question arises as to how far conceptions of tolerance can be advanced to ensure the civility of discourse within society.<sup>47</sup> Although a natural interpretation of ‘hatred’ suggests only a serious form of vilification,<sup>48</sup> a broader definition might be welcomed as a useful filter against insensitive and offensive language:

‘...no one defending freedom of expression can be happy defending a cultural climate in which freedom exposes religious minorities to a daily drizzle of cheap jokes on television, ignorant remarks in the supermarket and the public house, and the occasional taunt or epithet on the way to the mosque or temple...’<sup>49</sup>

Yet to extend hate speech prohibitions in this manner runs the danger of overly censoring public debate. Personal autonomy is unduly restricted when the nuances of insulting terminology are sacrificed for more temperate language.<sup>50</sup> Basing hate speech regulation on a desire to simply avoid offending others ensures that contentious views can only safely be espoused by the most erudite within society capable of fully asserting their position in moderate language.<sup>51</sup> This potentially restricts contributions to the marketplace of ideas to the intellectual elite.<sup>52</sup> Moreover, attempts to sanitise public discourse may also re-enforce an air of political correctness in which

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<sup>44</sup> A Jeremy, ‘Practical Implications of the Enactment of the Racial and Religious Hatred Act 2006’ (2007) 9 *Ecc LJ* 187, 190, 196-197.

<sup>45</sup> See Polly Toynbee’s comments cited in F Bennion, ‘Religious Hate Bill’ (Goggins A Gogo) (2006) 170 *JPN* 87, 90.

<sup>46</sup> See Rowan Atkinson’s comments cited in Bennion *ibid.* at 90.

<sup>47</sup> *Vance* (n 8) 248.

<sup>48</sup> A Samuels, ‘Stirring up Religious Hatred – Racial and Religious Hatred Act 2005’ (2006) 170(36) *JP* 695, 695.

<sup>49</sup> As per Michael Ignatieff referenced in H Fenwick & G Phillipson, ‘Publication Review: Media Freedom under the Human Rights Act’ [2007] *PL Win* 852.

<sup>50</sup> *Hare* (n 10) 527.

<sup>51</sup> Although no doubt far right groups would continue to provide guidance as to how to circumvent legal restrictions. See *Goodall* (n 4) 93.

<sup>52</sup> See James Fitz-James Stephens comments cited in A Jeremy, ‘Religious Offences’ (2003) 7(33) *Ecc LJ* 127, 137.

valuable contributions to debate are withdrawn for fear of offending others.<sup>53</sup> The open ended nature of an ‘offence’ based law, especially in the context specific realm of religious sensibilities,<sup>54</sup> would thus create a far too proscriptive environment for the effective expression of individual views.

Yet if value is placed on autonomy and a fully contested marketplace of ideas then it may be viewed as a double standard to welcome offensive rhetoric whilst simultaneously proscribing the extremes of hate speech. An argument adopted in the United States is that truth is best tested by the rigours of public debate free from government intervention.<sup>55</sup> It follows from this that the espousal of hate speech is most effectively combated by the counter speech of ridicule and scorn rather than by regulation.<sup>56</sup> Unlike speech which is merely offensive the expression of hatred could be seen as directly prohibitive to the realisation of the autonomy interests of others and the effective operation of the marketplace doctrine:

‘...it is very difficult to encourage open and free dialogue, involving people of faith communities who may feel insecure and may actually have a sense of fear in relation to their own religious identity.’<sup>57</sup>

Extreme forms of marginalisation may thus strip hate speech victims of any meaningful conception of free expression.<sup>58</sup> As a consequence, the dissenting views of vilified communities may be silenced and hatred spread without the full contestation of alternative perspectives.

With this in mind the utility of the market is more successfully preserved by the establishment of boundaries which accord to a social contract theory of governance. Under this approach, governments are tasked with ensuring an equality of respect for the fundamental rights of each citizen. It is therefore legitimate to proscribe hate speech when it abrogates the free expression rights of others. This is broadly consonant with the Article 17 jurisprudence of the European Court of Human Rights, which allows for hate speech restrictions when the underlying principles of the Convention are jeopardised.<sup>59</sup> Not only does this approach promote equal access to the marketplace of ideas but it also safeguards the ability of vulnerable religious groups to voice political concerns at times of heightened tension. Moreover if it is accepted that democracy is the ‘procedural expression of the strict

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<sup>53</sup> *Barendt* (n 6) 40.

<sup>54</sup> *Blocke* (n 30).

<sup>55</sup> See the dissent of Holmes J in *Abrams v United States* [1919] 250 US 616 (US Supreme Court) 630. See also *RAV v St Paul* [1992] 505 US 377 (US Supreme Court) 387.

<sup>56</sup> B Block, ‘Freedom to Offend?’ (2006) 170(11) *JP* 193, 194.

<sup>57</sup> Inter Faith Network cited in the *Select Committee Report* (n 15) para [9].

<sup>58</sup> *Goodall* (n 4) 113.

<sup>59</sup> *Norwood v United Kingdom* (2004) 40 EHRR SE 111 (App No 23131/03) 113.

equality of human worth<sup>60</sup> then it is counterintuitive for democratic free speech rationales to allow expression which promotes hatred of others. The predominant utilities of free speech are therefore best served by legal regimes with well tailored hate speech provisions that ensure the tolerant acceptance of alternative cultures.

### ***Practical Safeguards for a Religious Hate Speech Regulation***

From the preceding analysis it is apparent that a well tailored prohibition on religious hate speech is compatible with and even helps to promote free expression in a multicultural society. However a balance must be struck so that such provisions are not open to misuse in practice. If the vitality of free speech is to be preserved it is essential that legislation does not become a tool of reactionary religious bias or stifle expression because it is impermissibly vague. The following section will therefore consider the practical limitations and safeguards required to establish an acceptable legal framework.

An area of notable difficulty is the definition to be attributed to the term 'religion' under an incitement statute. The vast array of beliefs present in modern society ensures that almost any group may band together to form a 'religion.'<sup>61</sup> Consequently where legislation adopts a subjective definition allowing an individual to simply assert that their particular belief structure constitutes a religion, the ability to adequately foresee which philosophical perspectives will be protected is severely restricted. Whilst hate speech in general is to be abhorred there are some instances when it would be illegitimate to place restraints on the 'trenchant and hostile criticism'<sup>62</sup> of such an array of belief structures. This is particularly the case where quasi-religious organisations, more readily described as 'cults,' harm and exploit individuals within society.<sup>63</sup> Although incitement provisions should protect the believer rather than the faith, the often contentious practices of some groups may blur the line between the two: Critics of Scientology speak of its *victims*, rather than *catechumens* and of young people being *brainwashed*.<sup>64</sup>

Even if rhetoric of this nature is deemed permissible by the courts, the ability of such organisations to pressure for the criminal prosecution of their detractors may in itself chill free expression.<sup>65</sup> When it is considered that some 'cults' exploit vulnerable individuals by isolating them from their family and extracting their possessions,<sup>66</sup> it becomes all the more unpalatable to allow the criminal law to be used as a shield to silence criticism of these

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<sup>60</sup> *Mahlmann* (n 34) 60.

<sup>61</sup> B Block, 'A Hard Act to Follow' (2007) 171(18) *JPN* 321, 322.

<sup>62</sup> *Select Committee Report* (n 11) on the acceptability of such comments under Article 10(1) of the ECHR, Chapter 8 para [111].

<sup>63</sup> See criticism of Scientology in *Re B and G (Minors) (Custody)* (1985) Fam Law 127 (CA).

<sup>64</sup> *Jeremy* (n 44) 199.

<sup>65</sup> *Myers* (n 9).

<sup>66</sup> *Select Committee Report* (n 11) Chapter 8 para [111].

adherents.<sup>67</sup> Yet such difficulties are not necessarily resolved with the formulation of an objective definition of religion. The varying belief structures of the major faiths indicate that even a simple definition may not be workable in this context. Whilst an emphasis may be placed on monotheism, the existence of religious creeds such as Buddhism suggests that a more expansive approach should be taken.<sup>68</sup> However, a broader definition is likely to include the very organisations that make a subjective approach undesirable.<sup>69</sup>

In response to these difficulties the United Kingdom's religious hatred legislation has notably left religion as a question of fact for the courts to develop.<sup>70</sup> This potentially creates a more flexible approach that allows the courts to determine whether socially harmful groups fall within the statute's ambit.<sup>71</sup> Yet it does not provide a suitable basis upon which an individual may regulate his conduct with sufficient clarity. Although guidance may be found in the determinations of charitable tax law cases, the objects of an incitement statute are sufficiently different to require an independent approach from this jurisprudence.<sup>72</sup> Nor may an individual gain much assistance from an analysis of comparative jurisdictions because of a wide divergence in the range of determinations in this area. Germany for example considers Scientology to be a cult,<sup>73</sup> whilst the ECHR and Australia have both accepted that it is a legitimate religion.<sup>74</sup> As prosecutions are likely to be infrequent, higher courts will be given little opportunity in the short term to determine the full scope of the regulations.<sup>75</sup> Therefore it would be preferable for an exhaustive list of religions to be contained within the provisions of religious hate speech statutes.<sup>76</sup> This would help establish the scope of restricted expression without the need for expensive or prolonged court action and ensures that criminal convictions are only given to those who could reasonably have ascertained that their conduct would be illegal.

In line with this ethos it would similarly be unjust to curtail speech where the speaker is unaware that his comments are likely to incite hatred. The very notion of 'hate' is subjective to the individual and the natural consequence of expressing a particular view, especially in the realm of religious sensitivities, is often difficult to predict.<sup>77</sup> To ensure that expression

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<sup>67</sup> *Myers* (n 9).

<sup>68</sup> *Jeremy* (n 44) 198.

<sup>69</sup> D Feldman, *Civil Liberties and Human Rights in England and Wales* (2<sup>nd</sup> edn OUP 2002) 921.

<sup>70</sup> Section 1(29A) of the Racial and Religious Hatred Act 2006

<sup>71</sup> *Feldman* (n 69) 921.

<sup>72</sup> P Edge, 'Extending Hate Crime to Religion' (2003) 8 *J Civ Lib* 5, 19.

<sup>73</sup> M Evans, *Religious Liberty and International Law in Europe* (CUP 1997) 290.

<sup>74</sup> *Church of Scientology and 128 of its members v Sweden* No 8282/78 21 DR 109 (1980). See also *Church of the New Faith v Commissioner of Pay-roll Tax* (1983) 154 CLR 120.

<sup>75</sup> *Select Committee Report* (n 15) Chapter 4 para [50].

<sup>76</sup> Suggested in 'Offences against Religion and Public Worship' Law Commission No 145, 1985, para [44].

<sup>77</sup> J Scriven, 'Comment: Hate Law Crosses the Fine Line' [2004] *LS Gaz*, 17 Dec, 6 (2).

is not dampened by the uncertain effect of religious commentary it is essential that an incitement statute include an intention element.<sup>78</sup> In this regard, French penal provisions<sup>79</sup> which define incitement only according to its effect on others has been strongly criticised as effectively operating *ex post facto*.<sup>80</sup> In jurisdictions bound by the European Convention on Human Rights this is particularly problematic as legal restrictions must not be unduly vague or operate retrospectively.<sup>81</sup>

The disadvantage of an intention element is that it may result in few convictions because of evidentiary difficulties. Where a jurisdiction requires a high degree of proof to establish the offence, the ability of prosecutors to adduce sufficient evidence for a conviction will be significantly hampered.<sup>82</sup> This has been a notable difficulty under the United Kingdom's race hate laws whereby careful phrasing has enabled racist organisations to circumvent the legislation.<sup>83</sup> Similar problems may well be experienced under the 2006 provisions<sup>84</sup> which require that an individual must intend to stir up religious hatred:

‘Juries are expected to require proof beyond reasonable doubt that this intention existed and it would be easy for any defendants to hide this intention behind temperate and reasonable criticism of someone’s religion...’<sup>85</sup>

Yet even if successful prosecutions are limited legislation may be deemed effective where it forces intolerant groups to replace invectives that incite hatred against adherents with more viable criticism of religious tenants.<sup>86</sup> The value of an intention element is also enhanced in the context of groups who seek to organise excessive reactions to religious insensitivities.<sup>87</sup> In such situations there is a danger that a contrived furore may be used to demonstrate that otherwise unknowing comments are of sufficient gravity to amount to hate speech.<sup>88</sup> Therefore an intention element safeguards innocent expression by focusing on the mental state of the defendant rather than the unpredictable actions of third parties.

Religious hatred legislation also becomes problematic when religious groups are able to utilise these provisions to silence the proselytising of rival

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<sup>78</sup> *Vance* (n 8) 248.

<sup>79</sup> Pleven Law 1972.

<sup>80</sup> *Vance* (n 8) 227.

<sup>81</sup> *Ibid.* at 227.

<sup>82</sup> *Nash and Bakalis* (n 28) 357.

<sup>83</sup> *Religious Offences* (n 52) 134-135.

<sup>84</sup> Race and Religious Hatred Act 2006.

<sup>85</sup> *Nash and Bakalis* (n 28) 357.

<sup>86</sup> *Select Committee Report* (n 11) Chapter 8 para [101].

<sup>87</sup> See the Danish cartoon incident discussed in *Block* (n 30).

<sup>88</sup> *Hare* (n 10) 528.

faiths. Attempts to convert new adherents often result in the espousal of views which are highly controversial to the existing beliefs of others.<sup>89</sup> In such situations hate speech legislation may be used as a ‘weapon’<sup>90</sup> by rival groups seeking to argue that the manifestation of belief in this manner should be prohibited. Problems of this nature have notably been experienced within India where the effect of incitement laws has been to encourage ‘intolerance, divisiveness and unreasonable interference with freedom of expression.’<sup>91</sup> This is largely due to an excess of vexatious litigation based on social quarrels rather than the propagation of genuine religious hate rhetoric.<sup>92</sup> To prevent the abuse of the legal system in this manner, incitement laws should contain a procedural filter to avert ill-founded private prosecutions. In the United Kingdom this has been achieved via the Attorney General’s fiat which determines whether an action may proceed in any particular case.<sup>93</sup> Although this prevents frivolous litigation it should be noted that to vest such power in a member of the executive potentially raises accusations of political bias,<sup>94</sup> especially when decisions are not reviewable by the courts.<sup>95</sup> A more satisfactory approach is to place a consent requirement with a wholly independent body to maintain an appearance of neutrality in such decisions.<sup>96</sup>

With the above safeguards and limitations in place it is suggested that an incitement statute would adequately preserve the vitality of free speech within society. Where jurisdictions seek to go further by deeply entrenching the protection of freedom of expression there is a danger that the utility of hate speech regulations may be undermined. Indicative of this is the United States’ approach of restricting speech only when there is an imminent danger of violence.<sup>97</sup> Although exceptionally protective of expression, the stringent requirements in place do little to dissuade the growth of extreme intolerance:

‘Because of American exceptionalism in regard to hate speech, the United States has become the centre for production of some particularly ugly propaganda. For example, Nebraska became a

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<sup>89</sup> *Myers* (n 9).

<sup>90</sup> *Scriven* (n77).

<sup>91</sup> See the comments of the Indian Attorney General in the *Select Committee Report* (n 15) Chapter 4 para [52].

<sup>92</sup> RJ Dhavan, ‘Religious Freedom in India’ (1987) 35(1) *AJCL* 209, 221.

<sup>93</sup> Section 1 (29L) of the Racial and Religious Hatred Act 2006.

<sup>94</sup> *Select Committee Report* (n 11) Chapter 7 para [86] see the comments of the Muslim Council of Britain stating that the Attorney General should publish his criteria for decisions if his independence is to be preserved.

<sup>95</sup> *Jeremy* (n 44) 200.

<sup>96</sup> *Select Committee Report on Religious Offences* (n 11) Chapter 7 para [92].

<sup>97</sup> *Brandenburg v. Ohio* [1969] 395 US 444, 447.

world-wide centre for the production and distribution of neo-Nazi propaganda.<sup>98</sup>

To reduce a religious hate speech law to the status of a public order regulation effectively ignores expression that leads to the long term marginalisation of vulnerable groups. Whilst the tangible harms of hate speech are sometimes difficult to establish the spread of hostility towards religious adherents can with time lead to violent outbursts.<sup>99</sup> It would certainly be remiss of governments to wait for this eventual manifestation of hate when preventative legislation may be available. As a consequence hate laws must strike a delicate balance that maximises free expression whilst not allowing for the creation of a climate in which the voices of minorities are lost.

### **Conclusion**

It is a reality of any multicultural society that religion plays a pivotal role in the development of social and political interactions. If the values of tolerance and democratic freedom are to retain meaning the boundaries of acceptable conduct must exclude expression which promotes religious hatred. Although legislation may not result in a large number of convictions, the symbolic condemnation of extreme intolerance serves to formally enshrine the importance of pluralism to society. This is particularly important when opinions are polarised by acts of terrorism perpetrated by religious extremists. To allow xenophobic and racist groups to capitalise on heightened sensitivities at such times jeopardises the continuing maintenance of non violent and cohesive relations. Religious hate speech laws thus prevent a situation in which the most forceful and bigoted voices in society suppress a true diversity of opinion. Well tailored restrictions of speech consequently do not overstep the mark when they ensure that expressive contributions are equally valued throughout society.

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<sup>98</sup> D Smolin, 'Exporting the First Amendment? Evangelism, Proselytism, and the International Religious Freedom Act' (2001) 31 *Cumb L Rev* 685, 695.

<sup>99</sup> *Tsesis* (n 2) 763.

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