

ARTICLES

HUMAN RIGHTS

The protection of Muslim minorities against cyber hate in Europe - a critique of the European Court of Human Rights protection of religious followers against hate expression

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Introduction

Peaceful co-existence and reconciliation of significantly distinct legal systems, such as Islamic law and secularism, can only have a real potential of harmony if they engage in debating the possibility of harmonisation. One crucial aspect this article critically analyses is the impact of using digital media as a medium to disseminating anti-religious (mainly Islamic) expression and how this fits within the European Court of Human Rights (the ECtHR) general approach to anti-hate speech. Doing so will contribute towards debating a more consistent and clearer regulation of the limitations of freedom of expression under the European Convention on Human Rights (the ECHR). The overarching aim of doing so is to argue that unless the ECtHR reconsiders the limits of what constitutes hate speech so that Muslim (and other religious) minorities are afforded further protection against Islamophobia in general and the harm of cyber hate in particular, the main objective of international human rights law to combat discrimination against vulnerable minorities will be undermined. This takes into consideration the far-reaching powers of digital media today.¹ According to the UN Secretary General of the Council of Europe, Marija Buric, this, is the leading cause of the upsurge in offline discrimination, hate, and violence in Europe and worldwide.² As noted by Calvin, considering the growth of social media platforms as arbiters of truth through developing mechanisms that remove content that goes against community standards and safety, they remain malleable enough to generate unfavourable views regarding their regulation of freedom of expression.³

The article will first provide evidence of the prevalent role social media plays in the upsurge of hate expression, mainly anti-Islamic rhetoric, political or otherwise. This includes inciting discrimination and hate against Muslim minorities by negatively portraying, falsifying, and grossly offending the reputation of Islam and its ideals. Reports produced by UN agencies, and regional/international NGOs - such as Human Rights Watch, Amnesty International and the Council of Europe - will be used to establish cyber hate as a contemporary leading cause of Islamophobia today, including anti-Islamic offline and/or online acts of discrimination, hate, and violence in (mainly European) countries where Muslims live as dispersed minorities. The message of this article this will be aided by a brief reference

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¹ Sarah Sharma, "The Techno-Logics of Digital Islamophobia", (2021) ISJ 6, 8-10

² The European Commission against Racism and Intolerance where the UN Secretary General Marija Buric emphasised the importance of combatting hatred and offensive speech to protect disadvantaged communities against ultra-nationalism, anti-Semitic and anti-Islamic rhetoric. Access via <https://www.coe.int/en/web/portal/-/ultra-nationalism-anti-semitism-anti-muslim-hatred-anti-racism-commission-raises-alarm-over-situation-in-europe>

³ Clayton Calvin, "Ministries of Truth: Free Speech and the Tech Giants", (2019) JBE&L 13, 35. This particular point also warrants an in-depth discussion of hatred against Muslims and its interrelation with state actors and digital infrastructure. See Vecellio Segate, "Channelled Beneath International Law: Mapping Infrastructure and Regulatory Capture as Israeli-American Hegemonic Reinforcers in Palestine" (2023) *Communication Law and Policy* 28(4), 353.

to similar forms of expression that other minority groups endured throughout history,⁴ which international human rights law in the wake of WWII was reintroduced to combat.⁵

Second, this will be followed by a critical overview of the limitations of Article 10 and the protection of Article 17 of the ECHR, while introducing the Western notion to “shock, offend and disturb” as essential to Western society and its claim to broadmindedness, autonomy, and democracy. Intertwined into this critical overview are the notions of proportionality and the margin of appreciation as additional mechanisms utilised by the ECtHR in an attempt to determine whether State Members have fairly balanced various competing interests. This denotes the intersectional nature of this enquiry that is likely to engage other rights and duties, especially since Muslims are defined and targeted by their religious affiliation and ethnicity. Therefore, an anti-religious expression could engage, *inter alia*, the rights and protection of others, such as their freedom of religion under Article 9 of the ECHR and their right to non-discrimination under Article 14 of the ECtHR. This theoretical overview will be followed by a practical and chronological critique of the ECtHR’s case law in order to argue that religions and their followers are becoming less significant in a manner that contradicts the objectives of international human rights law, tolerance towards minorities and their right to the effective enjoyment of substantive fundamental rights.⁶

Finally, the author will use the above findings to argue that a more consistent and protective approach by the ECtHR will, in addition to protecting Muslim minorities against the ostensible upsurge in Islamophobia, provide further guidance to national authorities in combatting the use of digital platforms to disseminate anti-Islamic hateful expression that has often translated into offline discrimination, hate, and violence. The article will conclude by arguing that a stricter approach is needed to further protect Muslims who live as scattered minorities in Western/European societies against the early signs of religious intolerance that frequently starts in the form of online hate. This justifies the article’s focus on the regional jurisdiction of the ECtHR, which is where the majority of cases occur.

The internet, cyber hate, and Islamophobia

In the Preamble of the Convention on Cybercrime (in promoting unity among Member States), the Council of Europe emphasised, as a matter of priority, the need to (nationally) implement criminal measures to protect society from the use of computer systems to disseminate written, spoken or drawn racist and xenophobic material against any individuals, including religious followers.⁷ This emphasis acknowledges the intersectional relationship between religion and race, and the major role religion plays in xenophobia. In recognising the negative and grave impact of online platforms, the Council of Europe also included in its advisory text the need to criminally legislate against the public insult of individuals (among other characteristics) race or religion using internet systems. This, according to evidence produced by William et al., has helped in facilitating the spread of hateful rhetoric against minority groups,⁸ including Islamophobia. Although the author acknowledges the lack of a consensus on what Islamophobia exactly means, the term here refers to prejudice against Muslims because of their race

⁴ This will be briefly referred to here, but is used in my thesis research entitled “Conceptual and legal harmonisation of offensive anti-religious speech: Reconciling the jurisprudence of the European Court of Human Rights with the approach of Muslim States for the protection of Islamic beliefs, and Muslim and non-Muslim minority groups” in more depth in chapter 5.

⁵ Such as the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the European Convention on Human Rights

⁶ For example, Article 55(3) of the UN Charter, among other things, calls for “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”. See also The Framework Convention for the Protection of National Minorities.

⁷ Article 2 of the Convention on Cybercrime. Full text can be accessed via <https://edoc.coe.int/en/cybercrime/11019-convention-on-cybercrime-protocol-on-xenophobia-and-racism-second-protocol-on-enhanced-co-operation-and-disclosure-of-electronic-evidence.html>

⁸ *Ibid*, at Article 5. See also Matthew Williams et al, “Hate in the Machine: Anti-Black and Anti-Muslim Social Media Posts as Predictors of Offline Racially and Religiously Aggravated Crime” (2020) BJC 60, 94

and belief, and how such prejudice may influence the national legislation of discriminatory policies and practices.⁹

According to the European Islamophobia Report, shortly after the 09/11 attacks,¹⁰ the “war on terror” and the anti-Islamic baseless propagation of “the Islamisation of Europe”,¹¹ significantly aggravated hate and intolerance against Muslims worldwide, primarily in Western (mainly European) States.¹² This, according to Beydoun, has led to a more aggressive form of private and public Islamophobia.¹³ In countries such as Germany, Austria, the UK, Norway, and France, physical and verbal, including far-right abuse against Muslims has been growing sharply, with a large proportion of offline violence starting on the internet.¹⁴ Between 2017 and 2018, the UK’s Home Office, reported a sharp increase in online hate,¹⁵ supported by evidence from the UK’s Crown Prosecutor Service, which attributed the majority of cases to cyber hate.¹⁶ For example, the controversial comment made by the former UK Prime Minister, Boris Johnson, in which he compared Muslim women who wear the veil to “letter boxes”, led to a staggering 350 per cent increase in online anti-Islamic hate and discrimination, with a significant ‘dark figure’ of incidents remaining unreported.¹⁷ More detrimentally to the reputation of Islam and Muslims, the comments led to a significant increase in the publication of online articles and podcasts portraying Islam and Muslims negatively.¹⁸ Evidence presented by DEMOS (Demonstrate or Demonstration) at the Mayor of London’s Policing and Crime Summit in 2017 confirmed that for 12 months, large numbers of tweets sent from the UK were derogatory and anti-Islamic.¹⁹ DEMOS found that most of the tweets insulted Muslims,²⁰ conflated Muslims with terrorism, and accused Muslims with the desire to destroy the West.²¹

On an institutional level, in 2021 the French Government passed its 'Anti-Separatism' laws'.²² The new laws have been accused of legalising Islamophobia under the name of “the battle against Islamic extremism”, affecting the basic human rights of more than 5.4 million Muslims living in France.²³ By virtue of these provisions, the French Government has been granted the power to shut down anti-Islamophobic charitable organisations,²⁴ and limit Islamic religious practices in the name of ‘anti-radicalisation’.²⁵ These initiatives rendered it the French citizens' mission to report Islamic practices (such as praying at work) as early signs of religious extremism.²⁶ The Commission Nationale Consultative Des Droits De L’homme, confirmed that since 2019, religious and racial hate (online and

⁹ Kristin Henrard, “State Obligations to Counter Islamophobia: Comparing Fault Lines in the International Supervisory Practice of the HRC/ICCPR, the ECtHR and the AC/FCNM” (2020) ELR 3, 2

¹⁰ This is where a series of airline hijackings by 19 militants associated with the Islamic extremist group al-Qaeda attacked different locations in the USA.

¹¹ For an expansive discussion of these particular initiatives, see Kleiner (2010), 101-105

¹² The full text can be accessed via https://www.islamophobiaeurope.com/wp-content/uploads/2020/06/EIR_2019.pdf

¹³ See in particular Khaled Beydoun, “Islamophobia, Internationalism, and the Expanse Between”, (2021) BJA 28, 101.

¹⁴ Rebecca Melnitsky, Islamophobia Surges in the U.S. Due to Global and National Tensions (2023) Access via <https://nysba.org/islamophobia-surges-in-the-u-s-due-to-global-and-national-tensions/>

¹⁵ Hate Crime, England and Wales, 2017/18, Statistical Bulletin 20/18 16 October 2018. For full text, visit https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/748598/hate-crime-1718-hosb2018.pdf

¹⁶ Can be accessed via <https://www.cps.gov.uk/publication/hate-crime-report-2017-2018>

¹⁷ Full report can be downloaded via <https://cfmm.org.uk/resources/publication/cfmm-report-british-medias-coverage-of-muslims-and-islam-2018-2020-launched/>

¹⁸ Full report can be downloaded via <https://cfmm.org.uk/resources/publication/cfmm-report-british-medias-coverage-of-muslims-and-islam-2018-2020-launched/>

¹⁹ From March 2016 to March 2017

²⁰ For the full statement, visit <https://demos.co.uk/project/anti-islamic-content-on-twitter/>

²¹ For captured tweets, visit https://committees.parliament.uk/writtenevidence/70035/html/#_ftn1

²² Passed on the July 23, 2021. Legally known as the “Strengthening Respect for Republican Principles”.

²³ See in particular Ahmed Waraich, “France's Anti-Separatism Bill: Systemic Institutionalisation of Islamophobia in the French Republic”, CSP [2022] https://issi.org.pk/wp-content/uploads/2022/08/IB_-Ahmed_Waraich-_Aug_24_2022.pdf.

²⁴ Examples on anti-Islamophobic NGOs being shut down, please visit <https://policyexchange.org.uk/french-highest-court-confirms-closure-of-islamist-groups-barakacity-and-ccif/>

²⁵ *Ibid.*

²⁶ Leonard Faytre, “Islamophobia in France: National Report 2019”, cited in Enes Bayraklı & Farid Hafez, Law, Istanbul, 291

offline) crimes against Muslims in France significantly increased.²⁷ Although beyond the scope of this article, prejudice in France can be demonstrated further by the imposed anti-Islamic dress restrictions triggering three grounds of discrimination: race, religion and gender.²⁸

On a private level, far-right individuals, such as the Danish-Swedish politician Rasmus Paludan, utilise digital media and their right to freedom of expression to organise and execute their malicious anti-Islamic agenda of desecrating the Qur'an. Since 2017, Paludan, has (under the protection of the Swedish police) burnt the Holy Quran across Europe.²⁹ Intending to cause the gravest level of offence and provocation he possibly could, Paludan live-streamed the events of burning the Qur'an near Muslim neighbourhoods and mosques during the Holy month of Ramadan. Each live-streamed incident was followed by violence where mosques were defaced and Muslims were attacked.³⁰ Azra Muranovic, a Swedish and Social Democratic Party politician emphasised that the burning of the Qur'an was a planned anti-Islamic act under the protection of freedom of expression, which aimed at provoking riots.³¹ Controversially, in January 2023, the Swedish authorities (who cited national and regional freedom of expression laws),³² prevented a planned event of burning the Jewish Holy Torah outside of the Israeli Embassy in Stockholm by a Muslim protestor.³³ The 'Torah Burning' applicant admitted that burning other holy books contravenes Islam and that he never really intended to burn the Torah or cause offence to the Jewish minorities in Sweden, but rather to generate debate about the Swedish authorities' lack of equality and inconsistent use of freedom of expression laws.³⁴

Among other politicians who are inspired by these events are Le Pen and Matteo Salvini, far-right politicians whose political parties arguably stand as a major spreader of institutionalised online and offline Islamophobia. By utilising social media as a way of promoting her election campaigns, Le Pen called for ethnic civil wars as a way of resolving the issues between secularism and Islam, while promising to fine Muslims for wearing religious attires. On the other hand, Matteo Salvini's party (Lega Nord) used veiled Muslim women's images during far-right campaigns to portray oppressed women.³⁵ Alarmingly, Le Pen who utilised digital media to openly use anti-Islamic material and rhetoric to promote her political campaigns was very close to winning the elections in France, while anti-Islam populist, Geert Wilders, has succeeded in the Netherlands.³⁶ This demonstrates the significant growth in public support for far-right Islamophobic, racist, and xenophobic ideology in Europe. This may have contributed to the increase of hate crimes against Muslims worldwide by private individuals who are inspired by the anti-Islamic far-right political agenda.³⁷ A recent example is self-confessed online-bred far right Australian fascist, Brenton Tarrant. Tarrant, who travelled the world and used digital media to smear and insult Islam and its followers, and who was driven by the (mainly political) online negative anti-Islamic propagation. Minutes after sending an email to New Zealand Prime Minister, Jacinda

²⁷ <https://www.hrw.org/world-report/2021/country-chapters/france> [last accessed 31st May 2022]

²⁸ *Supra*, note 9, at 3

²⁹ Most recently outside a mosque in Denmark For full account, visit <https://www.aa.com.tr/en/europe/far-right-politician-paludan-burns-quran-in-front-of-denmark-mosque/2799500> [last accessed 3rd Dec 2023]

³⁰ See for example, Nils Adler, Quran desecrated at Sweden mosque during Eid al-Adha, Aljazeera, 2023. <https://www.aljazeera.com/news/2023/6/28/quran-desecrated-in-sweden-during-eid-al-adha-holiday>

³¹ There were a number of reactions by Swedish politicians, visit <http://serateshgh.com/international/what-you-need-to-know-about-quran-burning-in-sweden/>

³² In addition to their duties under Article 10 of the ECHR, there are four laws that are enshrined within the Swedish Constitution – 1- The Instrument of Government, 2- The Act of Succession, 3- The Freedom of the Press Act, and 4- The Fundamental Law on Freedom of Expression.

³³ See <https://www.aa.com.tr/en/middle-east/torah-burning-in-front-of-israeli-embassy-in-stockholm-prevented-says-israeli-envoy/2799443>

³⁴ <https://www.jordannews.jo/Section-109/News/Swedish-authorities-stop-planned-Torah-burning-26682>

³⁵ Marine Le Pen goes on trial for inciting hatred against French-Muslims, access via <https://www.theguardian.com/world/2015/oct/20/marine-le-pen-trial-charged-anti-muslims-hate-speech> see also <https://www.theguardian.com/world/article/2024/may/08/model-legal-advice-matteo-salvini-the-league-party-image-anti-islam-poster>

³⁶ Some a brief discussion of Geert Wilders election win, visit <https://www.bbc.co.uk/news/world-europe-67504272>

³⁷ For an archive of deleted tweets of offline and online of anti-Muslim hostility, visit <https://tellmamauk.org/wp-content/uploads/resources/We%20Fear%20For%20Our%20Lives.pdf>

Ardern,³⁸ Tarrant used digital media to live stream his ‘36 minutes’ cold assassination of over 50 Muslim worshipers and civilians at (and outside) two Mosques in New Zealand.³⁹

Historical relevance of anti-Semitism to Islamophobia

Before examining the ECtHR’s approach towards forms of anti-religious expression, the detriment of anti-religious (Islamophobic) expression and intolerance, is better justified by briefly overviewing anti-Semitism.

It is important, therefore, to assert that Islamophobia largely replicates the intolerance the Jewish community endured throughout history. This is not to undermine the importance of other anti-minority/indigenous violations, but engaging in this comparative and analytical overview will hopefully generate debate that anti-Islamic hate largely starts as a digital insult and negative derogation, similar in intention and action to anti-Semitism. It is argued, therefore, that online expressions that intentionally portray Islam negatively, falsely defame, and insult its ideals are arguably the leading cause of offline discrimination, hate, and violence.

The Jewish struggle throughout history was not always a racial one but only developed as such shortly before the 20th Century.⁴⁰ Before this, the Jewish community was displaced and persecuted for refusing to yield to the Christian demands (Romans before this) to discard their religious attire and practices and follow the Christian way of living. By refusing to do so, Jews were labelled, discriminated against, falsely accused, had their places of worship demolished, and were left with no choice but to live as scattered minorities across Europe.⁴¹ This further emphasises the intersectional relationship between religion and race. Therefore, anti-religious perpetrators (political or otherwise) and their over-reliance on freedom of expression as a protective tool to promote their far-right ideology to discriminate, derogate, and harm is not novel. Whether this is Nazi Germany against the Jews, or Marine Le Pen and others against Muslims today, they all disguise their hatred towards minority groups behind their right to freedom of expression and democracy, which they bolster by the notion to “shock, offend and disturb”.⁴² It is undeniable that debating and critiquing the truth about religions, even if their followers may be offended and shocked, is necessary in a democratic society for the cognitive development of citizens and the discovery of truth. However, falsifying facts and defaming the character of religions to incite hatred against minority groups, fragments society by creating a social hierarchy characterised by inferiority.

Hitler’s hatred towards the Jews was founded on two millennia of groundless publications, disparaging sarcasm, and religious discrimination.⁴³ This was despite the fact that the Jews played a key role in defending Germany before and during WWI, leading to Walther Rathenau becoming Germany’s first Jewish Foreign Minister.⁴⁴ Similar to the American-led propagation of the “war against terror” and “Islamisation of the West” since the 9/11 attacks, “The Protocols of the Elders of Zion” was a 1900 Russian fabricated and circulated document, allegedly signed by Jewish leaders expressing their intention to dominate the world.⁴⁵ Furthermore, similar to Muslims living under policies that advocate

³⁸ For a critical overview, see in particular, Kazi (2020), pp. 210–213. This is disclosed to be a 16,000-word “manifesto”, but the authorities stressed that it did not contain any information that would have presented the attacks.

³⁹ For a full timeline of the attack, see Boaz Ganor, “Terrorism Is Terrorism: The Christchurch Terror Attack from an Israeli CT Perspective”, (2020) ASPI 1, 7–12.

⁴⁰ The Second Reich (1871 – 1919) and the Third Reich represents the leading period to the Holocaust (January 1933 to May 1945).

⁴¹ See in full Albert Lindemann *Anti-Semitism before the Holocaust*, (Routledge, 2000)

⁴² *Handyside v The United Kingdom* Application no. 5493/72, [1976]

⁴³ See in particular Attila Pok, “Atonement and Sacrifice: Scapegoats in Modern Eastern and Central Europe”, (1999) EEQ 4, 533–6

⁴⁴ Jews, due to their faithfulness to Germany and willingness to fight their battle gained the recognition of Germans and they even won awards. Starting in 1914, the German Empire prevented the press from disseminating any anti-Semitic material and clamped down on anti-Semitic movements. *Supra*, note 69 at 76.

⁴⁵ For more on the detriment of this publication, visit <https://encyclopedia.ushmm.org/content/en/article/protocols-of-the-elders-of-zion>

for “togetherness”, such as the French 'Anti-Separatism' laws, and the USA Patriot Act,⁴⁶ Jews were always targeted as “the other” group because of their different religious ideals and culture.⁴⁷ Similar to contemporary online and offline anti-Islamic satirical, negative, and hateful publications/acts, such as the 12 Danish cartoons, the desecration of Islamic texts, and Rushdie’s ‘Satanic Verses’,⁴⁸ the 1800s witnessed a sharp rise in anti-Jewish publications.⁴⁹ As a result of the unfettered use of freedom of expression to disseminate anti-Jewish negative propagation for refusing to discard their religion, Jewish temples were destroyed; their sacred religious texts were burnt. Further, they were referred to as “Aliens” in European national policies,⁵⁰ were ridiculed because of their religious and cultural customs and practices,⁵¹ were stripped of their citizenships and eventually (leading to the tragedies of the Holocaust) were incarcerated and offered by Nazi Germany to the world.⁵² This is similar to what Muslim minorities have been experiencing, such as the Qur’an burning, mosques burning,⁵³ being portrayed as terrorists, the Uyghur camps in China, and, more recently, the controversy surrounding the deportation of Muslim asylum seekers from the United Kingdom to Rwanda,⁵⁴ accompanied by controversial comments that only white Ukrainian refugees are welcome to Europe.⁵⁵

The use of digital media as a political and private platform to exercise freedom of expression to negatively portray and disparage Islam, its followers, and sentiments, has made it onerous for Muslims today to manifest their religion freely and be highly susceptible to discrimination, hatred, and violence.⁵⁶

The scope of Articles 10 and 17 of the ECHR

Those who disseminate hateful expression (including using the digital media) rely on the rights and limitations enshrined under Article 10 of the ECHR to hold their states accountable for disproportionately interfering with their expression. The next section will critically discuss the consistency of the ECtHR’s interpretation and application of the limitations of Article 10(2) and its reference to Article 17 of the ECHR in cases of anti-religious expression.

Now that the need for further (cyber) hate regulation in the context of disseminating offensive and derogatory anti-religious expressions has been outlined, a brief critical overview of the jurisprudence of ECtHR when balancing the right to freedom of expression against its limitations and other freedoms will assist in understanding the author’s critique of the ECtHR’s approach. This overview will, on the

⁴⁶ The Act was introduced on the 26th of October 2001 as a mechanism of deterring terrorism, which then arguably made it lawful to enforcement agencies to search and detain Muslims without probable cause. For example, a contested section is Section 215, which allows the Federal Bureau of Investigation to “make an application for an order requiring the production of any tangible things for an investigation to obtain foreign intelligence information...providing that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.”

⁴⁷ See in particular European Monitoring Centre on Racism and Xenophobia (2003), p. 61 For full report, visit https://fra.europa.eu/sites/default/files/fra_uploads/178-Report-RT3-en.pdf

⁴⁸ A 1988 notorious publication that falsified and denigrated established facts Islamic facts and figures.

⁴⁹ Most notably, ‘La France Juive’ by Edouard Drumont. Inspired by anti-Jewishness, Drumont collated negative and false facts about the Jews, which led to a further upsurge in discrimination and violence against the group. For the full impact of this publication, see in particular, Robert. F. Byrnes, Edouard Drumont and La France Juive.” 1948, *Jewish Social Studies* 10(2), 165.

⁵⁰ See, for example, the UK Police statement referring to Russian-Jews as aliens. See Routledge (2016), p. 131

⁵¹ As reported by the United States Holocaust Museum. Access via <https://www.ushmm.org/antisemitism/what-is-antisemitism/why-the-jews-history-of-antisemitism>

⁵² See William Brustein and Ryan King, “Anti-Semitism in Europe before the Holocaust”, (2004) *IPSR* 25, 35

⁵³ For example, Rambouillet Mosque in the Yvelines department of the Ile-de-France region was completely burnt in an arson attack. <https://www.aa.com.tr/en/europe/fire-burns-down-mosque-in-northern-france-report/2676150>

⁵⁴ Deportation of mainly Muslim/Arab asylum seekers was deemed lawful by the English High Court despite being blocked by the ECtHR as a human rights matter considering the poor human rights record of Rwanda. See *N.S.K. v. United Kingdom* application no.28774/22 [2022]

⁵⁵ Examples include far right Vox party Santiago Abascal and Bulgarian President Rumen Radev.

<https://www.middleeasteye.net/news/russia-ukraine-war-right-wing-welcome-refugees-not-muslims>

⁵⁶ Despite being blocked by the ECtHR. Rights that are guaranteed under the ECHR, among other international treaties. Article 9 (Freedom of Thought, Conscience and Religion) and Article 14 (Prohibition of Discrimination) of the ECHR. See also the Article 19 Universal Declaration of Human Rights, Article and the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief

one hand, appreciate the Court's commendable stance against anti-Semitic intolerance, but, on the other hand, raise concerns regarding its stance towards other minority groups. This will debate whether certain anti-religious expressions that intend to falsify, negatively portray, and disparage religions and their followers should be curtailed, using the same approach as anti-Semitism, especially if such expressions could escalate to discrimination, hate, and/or violence. The author concurs that religions are different from race due to their non-inherent nature, which automatically open them to criticism.⁵⁷ However, it needs to be noted that over-inflating the value of free speech will automatically diminish the importance of marginalised vulnerable groups and the relationship between their race and religious identities.⁵⁸

The ECHR emerged as a regional human rights treaty to ensure that human rights are safeguarded from disproportionate state interference by imposing legally binding positive and negative obligations.⁵⁹ To further regulate freedom of expression, the ECHR enshrined, on the one hand, Article 10 and its limitations under Article 10(2) to assess the proportionality of a disputed State Member's interference with expression. On the other hand, Article 17 takes away the protection of Article 10 when:

“...engaging in any activity or performing any act aimed at the destruction of any of the rights and freedoms set forth herein...”⁶⁰

Following the overview below, the author will critically examine the consistency and rationale of the ECtHR when deciding between the use of Articles 10 and 17 of the ECHR. As previously stated, this aims to argue that, similar to anti-Semitic expressions, certain forms of anti-Islamic expressions that can lead to discrimination, hate and violence (which goes beyond criticism and mere offence) should be afforded the protection of Article 17.⁶¹ In doing so, the author will argue that the ECtHR's approach – together with Western states' widespread abolition of blasphemy laws – has become less sympathetic to religious ideals, to the detriment of marginalised religious/Muslim minorities.⁶²

Under Article 10, the right to freedom of expression includes the “freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers”, which includes the use of digital media. However, the exercise of this freedom is subject to limitations and can be limited by State Members if such interference is prescribed by law, for a legitimate aim (such as the protection of the reputation and rights of others, and public morals) and is necessary in a democratic society.⁶³ Even if such limitations are met, the Court will still assess whether the interference was proportionate to the legitimate aim pursued and within the prescribed margin of appreciation (with political or press expressions being subject to a narrower margin of appreciation in comparison to anti-moral or commercial expressions).⁶⁴

As was demonstrated in *Handyside v United Kingdom*,⁶⁵ the UK was afforded a wide margin of appreciation in restricting obscene speech, which would have been narrower if the expression in

⁵⁷ For example, the Islamic opposition against Christianity that Jesus is not the son of God, logically renders Islam prone to attacks regarding its own ideals. See in particular Tommaso Virgili, “Respect for Religious Feelings’: As the Italian Case Shows, Fresh Paint Can’t Fix the Crumbling Wall of Blasphemy’. (2022) *European Public Law* 28(2), 303

⁵⁸ Dylan Asafo, “Confronting the Lies That Protect Racist Hate Speech: Towards Honest Hate Speech Laws in New Zealand and the United States”, (2021) *PBLJ* 38, 1-31

⁵⁹ The preamble of the ECHR

⁶⁰ Article 17 of the ECHR entitled ‘Prohibition of abuse of rights’

⁶¹ In support, see UN Resolution 16/18 “Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief”.

⁶² Western/secular States, such as the UK, Denmark, Norway, Iceland, Malta, France, New Zealand, Canada, Greece, Scotland and the Republic of Ireland have abolished blasphemy laws. For a detailed discussion on this issue, see Rummy Hasan *Modern Europe and the Enlightenment* (Sussex Academic Press, 2021), 49

⁶³ Article 10(2) of the ECHR lists a number of other legitimate aims, such as “territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”

⁶⁴ Political and press expressions much harder to interfere with due to being regarded in the public interest. For more details, see Steve Foster *Human Rights and Civil Liberties* (3rd ed Pearson Press, 2011), 55-60

⁶⁵ Application No. 5493/72 [1976]. For a detailed discussion on the operation. Of the margin of appreciation, see Leigh, (2011), 55.

question was political, which is generally upheld unless it incites hate, discrimination and/or violence. Nevertheless, the judgement reiterated the importance of freedom of expression as the cornerstone of democracy, tolerance and broadmindedness; including expression that others, including religious groups, may find undesirable, shocking, offensive, and/or disturbing.⁶⁶ In the author's view, *Handyside* is often used as a shield against claims of anti-religious hate or as a sword to attack religious practices that are considered to be contrary to Western ideals.

Introduction to the European Court's approach

Where the ECtHR believes that an impugned expression incites hate and, therefore, aims to destroy any of the rights enshrined within the ECHR, Article 17 will be applied. In making those decisions, the ECtHR has treated online and offline expressions equally in terms of being subjected to the same limitations and expectations. This article will now provide a critical overview of key decisions and their rationale when the ECtHR decides between Articles 10(2) and 17 of the ECHR. This will be used to demonstrate that the ECtHR is inconsistent and becoming less sympathetic when deciding on forms of anti-religious/Islamic expression that in the author's views should fall within hate and be accordingly dismissed under Article 17.

The ECtHR approach to racial hatred and satire

The author applauds the ECtHR's consistent and strict stance against anti-Semitic expression to protect the reputation and honour of the Holocaust victims and their families against the harm such expression might incite. In doing so, the ECtHR has consistently applied Article 17 of the ECHR on any form of expression regardless of their political or satirical nature,⁶⁷ and whether they were said privately or in public, verbally or in writing; online or offline. This is further demonstrated in cases where even if the Holocaust itself was not directly denied, the identity of the perpetrators and/or events that led to the Holocaust were disputed.⁶⁸ In *Garaudy v France*,⁶⁹ the ECtHR stressed that tolerating any form of anti-Semitic expression or any form of Holocaust denial (even remotely) is tantamount to "denying the survivors the true reasons for their suffering and the dead the true reasons for their death." A point of inconsistency that is worthy of note here is that the ECtHR has only offered this unwavering level of protection against anti-Semitic expression. For example, in *Perincek v Switzerland*,⁷⁰ the Court subjected an expression that denied the Armenian Genocide by calling it "an international lie" to the assessment of Article 10(2). The Court found that the Swiss authorities were in breach of Article 10 for applying a disproportionate and unnecessary restriction. The Court in *Perincek* was prepared to examine many factors, such as the intention of the perpetrator, the educational nature of the expression, the public interest element, and the proximity between the Armenian Genocide and the time the statement was made. Conversely, in *B.H., M.W., H.P and G.K v Austria (B.H. hereafter)*,⁷¹ the ECtHR used Article 17 in finding manifestly ill-founded an expression that disputed the number of the Jews who died leading up to (and during) the Holocaust.⁷² This inconsistency was highlighted by Judges Vucinic and Pinto de Albuquerque: that while it is important to support the ECtHR for preserving the memory and dignity of the Jewish victims and their families, failing to offer the same to the Armenian victims and their families undermines their reputation.⁷³

This demonstrates that the Court is inconsistent, not just when determining the legitimacy of expression that is anti-religious, but of a racial nature too. This will be used to support the argument that such inconsistency is further supported by evidence that the Court is also becoming gradually less

⁶⁶ *Ibid*, at para 45. Is also worth mentioning that the judgment has been by the American Supreme Court in *Boos v Barry* 485 U.S. 312 (1988) to emphasise the importance of freedom of expression to public debate, the discovery of truth.

⁶⁷ *M'Bala v France* Application No. 25239/13 [2015].

⁶⁸ *Witzsch v Germany* Application No. 7485/03, [2005].

⁶⁹ Application No. 65831/01 [2003].

⁷⁰ Application no. 27510/08, [2015].

⁷¹ Application no. 12774/87 12 October 1989

⁷² Similar controversy can be found in *Sürek v Turkey* (no. 1) [GC], no. 26682/95 [1999], at para 62 and *Faber v Hungary* Application no. 40721/08 [2012].

⁷³ Application no. 12774/87, [1989], at 22.

sympathetic when considering religions and the sensibilities of their followers. As previously stated, while it is sensible to argue that religions cannot expect to be protected from all forms of offensive expression, a more consistent approach to the application of Article 17 to further combat anti-Islamic expressions, followed by an upsurge in discrimination, hate, and/or violence, is needed.⁷⁴

The ECtHR approach to hateful anti-religious expressions: Case studies

The chronological order of the case law below supports the claim that the ECtHR is yielding to the pressure of critics by becoming less sympathetic toward Islamic sensibilities, to the detriment of the safety of Muslim minorities. The findings will be used later to conclude that a more consistent and strict approach will help to combat the early stages of discrimination, hate, and/or violence, a link that has already been historically established.⁷⁵

In *Norwood v The United Kingdom*,⁷⁶ the ECtHR was highly protective of the welfare of religious minorities. The applicant, who is a regional organiser for the British National Party, and who lived in a first floor flat, displayed a sign stating: “*Islam out of Britain, Protect the British People*”, the crescent and star (Islamic symbols) in a prohibition sign, while displaying a photograph of the Twin Towers in flame. After being found in violation of s.5 of the Public Order Act 1986, for inciting hostility and causing distress to a religious group by displaying threatening, abusive, or insulting signs, Norwood accused the national authorities of violating his right to freedom of expression under Article 10 of the ECHR. While describing the applicant’s conduct as a “vehement attack against all Muslims in Britain”, the ECtHR found his claim to Article 10 to be incompatible *ratione materiae* with the provisions and values of the ECHR, mainly tolerance, social peace, and non-discrimination.⁷⁷ In response to the applicant’s argument that the signs were displayed in a private dwelling and there being no evidence to suggest that a single Muslim had seen them, the Court emphasised that Article 17 will not allow the exploitation of totalitarian personal interests that undermine the principles enshrined within the Convention.⁷⁸

Although it is commendable that the ECtHR took such a strict stance against the conflation of Muslims and their identity with terrorism, it remained unclear how the national authorities in the UK or the ECtHR found that the impugned expression caused distress, hate, or violence when they were not seen by potential victims. Additionally, it was also unclear whether the upsurge in Islamophobia after the 9/11 attacks played any role in such a decision. A clarification would have guided subsequent courts of what was the exact criteria it used to reach its decision. The decision was unfavourably received by free speech advocates who argued that it undermined the importance of political expression and blurred the line between protected offensive expression (as per the *Handyside* principles),⁷⁹ and expression that constituted hate.⁸⁰ Notwithstanding this, it appears that the ECtHR in *Norwood* set a clear anti-religious blanket prohibition that is tantamount to those found in anti-Semitic case law, regardless of whether there were victims, whether the expression was political, or whether it was displayed publicly or in private.⁸¹

In other cases, however, the Court had engaged Article 10 rights of the speaker and sought justification for its interference. In *Soulas and Others v France*,⁸² three applicants were convicted by the French

⁷⁴ Many Western writers regard the “religious feelings” argument to be weak and undermines democracy and individuals’ right to freedom of expression. See, for example, *supra*, note 57 at 297–318.

⁷⁵ Of course, there are opposing views that anti-blasphemy laws undermine freedom of expression and should never be linked to hate, and that the ECtHR has been inconsistent in this regard. See for example, Hauksdóttir (2021), 75-118.

⁷⁶ Application no. 23131/03, [2004].

⁷⁷ *Ibid.*

⁷⁸ The Court made reference to a number of relevant cases, such as *W.P. and Others v. Poland*, Application no. 42264/98, [2004]; *Garaudy v. France*, Application no. 65831/01, [2003]; *Schimaneck v. Austria*, Application no. 32307/96, [2000].

⁷⁹ *Supra*, note 70.

⁸⁰ *Supra*, note 3, at 297–318.

⁸¹ See for example *Perinçek v Switzerland*, Application no. 27510/08, [2015] and *Williamson v Germany* Application No. 64496/17 [2019].

⁸² Application no. 15948/03.

authorities for inciting religious hatred through online and offline publications entitled “The Colonisation of Europe: True Speech on Immigration and Islam.” The book called for ethnic civil wars against Muslims as a way of resolving the conflict between Islam and the West; it described Islam as encouraging the ritual rape of young white girls.⁸³ Local NGOs, such as the League against Racism and Anti-Semitism, filed national proceedings against the applicants for inciting hatred and violence against racial and religious groups.⁸⁴ In contrast to the private nature of the expression made in *Norwood*, the publication here was disseminated widely among the public, who readily comprehended the anti-Islamic and racist message directed at non-Western migrants and their efforts to Islamise Europe.

Rather than following the approach adopted in *Norwood*, the ECtHR engaged in a comprehensive assessment of Article 10 to determine whether the French interference was prescribed by law, necessary in a democratic society, and pursued a legitimate aim. Although the Court found no violation of Article 10 by the French authorities, it remained ambiguous how the anti-Islamic expression made in the impugned publications - which by the Court’s admission incited racism, hate, and violence - were any different from the less impactful expressions made in *Norwood*. Islam and the Muslim Community in *Soulas* were portrayed negatively, denigrated as rapists, and calls for war crimes against them were made.⁸⁵ These are comments that are being normalised and used frequently by politicians worldwide today.⁸⁶ Nevertheless, a year later the same approach was followed in *Feret v Belgium*,⁸⁷ where anti-Islamic rhetoric, such as “save Belgium from the threat of Islam”, was employed as part of a national anti-immigration and racist event. Again, the only reference made to Article 17 was its inapplicability, despite clear incitement to anti-religious hatred and violence. This demonstrates a clear departure from its strict stance in *Norwood*, reflecting a less sympathetic to religion and a more lenient approach to speech.

This approach – employing Article 10(2) to justify interference - has been followed in other cases. In *E.S. v. Austria*,⁸⁸ the applicant held several seminars entitled ‘Basic Information on Islam’ at the far-right ‘Freedom Party Education’ Institute. Online and offline platforms were used to disseminate leaflets, mainly among young voters. During her seminars, the applicant referred to Prophet Muhammed Peace be upon Him as a “warlord, who had many women, to put it like this, and liked to do it with children”, who is a role model to all Muslim men.⁸⁹ In convicting the applicant of religious hatred under Article 283(1) of the Austrian Criminal Code, the prosecutor emphasised the scope of the provision, which penalises anyone who incites religious hatred towards any religion or religious community, race, or tribe. Nevertheless, the Vienna Regional Criminal Court dismissed the prosecutor’s invocation of Article 283 by finding that the defendant was guilty of violating Article 188 instead. This Article prohibits the disparagement of religious ideals in a manner capable of inciting outrage among a religious community.⁹⁰ In arriving at this judgment, the Regional Court emphasised that had the matter been confined to criticising child marriage, no charges would have been filed. However, accusing someone of being a paedophile is fundamentally different. In doing so, the Regional Court acknowledged that the right to be safeguarded against groundless claims to protect religious peace is enshrined in Article 10 of the ECHR.

Endorsing the decision of the national court, the ECtHR rejected the applicant’s defence that the statements made were grounded in established historical facts. It stressed that the right to freedom of expression carries responsibilities towards the rights and reputation of others.⁹¹ Therefore, the ECtHR, after balancing the applicant's right under Article 10(1) against the limitations under Article 10(2) found

⁸³ *Ibid*, at para 43.

⁸⁴ *Ibid*, para 40 as interpreted by The Future of Free speech <https://futurefreespeech.com/soulas-and-others-v-france/>

⁸⁵ *Ibid*, at 41.

⁸⁶ *Supra*, notes 24-26.

⁸⁷ Application No. 15615/07, [2009].

⁸⁸ Application no. 38450/12, [2018].

⁸⁹ *Ibid*, at para 13.

⁹⁰ *Ibid*, at para 12.

⁹¹ *Ibid*, at para(s) 54 and 55. The Court also cited a number of other case law to support its decision, such as *Medžlis Islamske Zajednice Brčko v. Bosnia and Herzegovina* Application no. 17224/11, [2017], *Von Hannover v. Germany* (No 2) Application no(s). 40660/08 and 6041/08, [2012].

that the Austrian interference “corresponded to a pressing social need and was proportionate to the legitimate aim pursued.”⁹² The decision elicited fierce opposition from academics and human rights advocates. The European Centre for Law and Justice accused the national and regional decision of creating a “chilling effect” on free speech, considering the restriction unnecessary in a democratic society.⁹³ Critics contended that the Court’s ruling against the applicant’s use of defamatory language against Islamic figures granted State Members a “too wide margin of appreciation” and disregarded key facts, such as the limited attendance of 30 participants of the seminars.⁹⁴ In Temperman’s view, in cases of religious insults or gratuitous offences, the issue is better considered under religious hatred instead of religious feelings.⁹⁵

What can be observed here is that such views would rather protect the freedom to defame religious figures and use false and baseless allegations to negatively portray a whole community in return for political gain. It is worth remembering that Brenton Tarrant’s motivation to assassinate over 50 innocent Muslims was a result of false and baseless information he obtained online. Following this case, the Office for Documenting Islamophobia and anti-Islamic racism in Austria recorded an increase in Islamophobic attacks in 2018, mostly occurring online and against women.⁹⁶ Therefore, it is suggested that expression that transcends mere criticism by grossly insulting, falsifying facts and negatively portraying religions and their ideals is a matter that played a key role in the suffering of minority groups throughout history. Therefore, such expression - considering evidence of subsequent intolerance - should be dismissed through the application of Article 17 for attempting to rely on the protection of the Convention to destroy the rights enshrined within, *inter alia*, non-discrimination and the rights and reputation of others.

Puppincck and Bauer observed that shortly after the *E.S.* case, the mounting pressure and criticism directed at the ECtHR marked a notable decline in the Strasbourg Court’s inclination to protect religious sensibilities against hate expression that is defamatory and negatively portrays religions.⁹⁷ For example, in *Tagiyev and Huseynov v Azerbaijan*,⁹⁸ the ECtHR found that the state breached the applicant’s right to freedom of expression for being unnecessary in a democratic society and disproportionate to the legitimate aim pursued. In this case, the applicants authored and published articles that incited hatred against Islam, which mirrored the issues that were discussed in *Norwood*. For example, among other comments, Muslims were referred to as ‘the others’ in Europe, their identity was conflated with terrorism, and comments suggesting a reduction in the number of Muslims - by implying violence and civil wars - were made.⁹⁹ In contrast to the *E.S.* case, the Court reminded State Members that online and/or offline political and/or artistic expressions are of public interest and that State Members only enjoy a very narrow margin of appreciation when considering imposing restrictions. Once again, the Court appeared to establish a new threshold, prioritising baseless political anti-religious expressions that negatively portray religious groups as a matter of public interest, over the rights and reputation of others. This is despite the evidence previously discussed, demonstrating that expressions of such nature are widely used online by politicians, such as Le Pen, Zemmour, Matteo Salvini and Boris Johnson, to gain political advantage. Consequently, anti-Islamic cyber hate and offline discrimination, hate, and violence significantly increased. For example, online commercials have been aired depicting non-Western immigrants as societal parasites, while another presented an immigrant called Ali who is no longer able to cheat the new welfare system due to the new identification system.¹⁰⁰

⁹² *Ibid*, at 57.

⁹³ *Supra*, note 94, at 38.

⁹⁴ *Ibid*, at 77.

⁹⁵ Jeroen Temperman, ‘Blasphemy, Defamation of Religions and Human Rights Law’ (2008) NQHR 26, 517

⁹⁶ Cited in Enes Bayrakli and Farid Hafez. European Islamophobia Report 2019, 89 - 93

⁹⁷ Grégor Puppincck and Nicolas Bauer, Criticism of Islam: the ECHR (Finally) Upholds Freedom of Expression, can be accessed via <https://eclj.org/free-speech/echr/critique-radical-de-lislam-la-cedh-defend-enfin-la-liberte-d-expression>

⁹⁸ Application no. 13274/08, [2019].

⁹⁹ *Ibid*, at para 11.

¹⁰⁰ The new system in Austria has the photo of the person making a claim. For more details, visit <https://www.trtworld.com/europe/austrian-right-wing-party-sparks-controversy-with-racist-video-21668>

Religious disrespect as a trend in Europe

Considering the widespread abolition of blasphemy as a criminal offence in Europe, there appears to be greater societal tolerance towards disrespectful and disparaging anti-religious expression. This, in the author's view, has fostered anti-religious negative stereotyping and grave disrespect, which Muslim minorities consider integral to their identity, akin to race. This is not to suggest that all forms of religious criticism that followers find offensive should be prohibited in all forms. However, the rapid proliferation of such expressions, aided by social media, has rendered religious minorities more vulnerable to hate by normalising religious insults.

For example, in *Bouton v France*,¹⁰¹ a feminist activist received a one-month suspended sentence by the French authorities for protesting topless in a church in December 2013 against the Catholic Church's stance against abortion. While depicting the cross sign using her full body, the applicant exposed her breasts with the slogan 'slut' written on them.¹⁰² In finding the French interference disproportionate, the ECtHR defended being naked as a form of political and artistic expression, stating that it falls within the protection of Article 10 of the ECHR. The ECtHR found that the national authorities failed to adequately consider several factors: the exposure was part of a protest, the protest related to a topic of public interest, the words written were not shouted or directed as insults towards others, and the applicant left the scene when was requested to do so. In other words, the ECtHR found that the French authorities failed to "strike a fair balance between the competing interests sufficiently and following the criteria established in its case law."¹⁰³ Conversely, in *Gough v United Kingdom*,¹⁰⁴ a man who walked from England to Scotland naked was arrested, prosecuted, convicted, and imprisoned 30 times (totalling 7 years in prison between 2003 and 2012).¹⁰⁵ Although the Court struggled to fully fathom the severity of the penalties imposed, it found no violation of Article 10 and reiterated that the public morals and their protection from nuisance anti-social behaviour outweighed the applicant's claim to freedom of expression.¹⁰⁶

What remains unclear is whether the Court's failure to consider insult and overly focus on the importance of public morals in *Gough* (contrary to *Bouton*) is to emphasise a progressive view that State Members enjoy a wider margin of appreciation when restricting freedom of expression in the context of religious (as opposed to public) morals. This argument illustrates that what is tolerable in the name of freedom of expression today would have been dismissed in 2014 or before. This highlights the progressively diminishing value religions, and their followers by affiliation, hold in Europe. This trend might not pose an equally significant detriment to followers of the majority religion in Europe as it does for followers of minority religions, such as Muslims, who have chosen to uphold their religious practices in a region where blasphemy is not a criminal offence. In the same vein, in *Rabczewska v Poland*,¹⁰⁷ the ECtHR appeared to demonstrate the progressively inferior status of religions against the right to offend, shock, and disturb. In this case, Polish pop singer, Dorota Aqualiteja Rabczewska (known as Doda), made blasphemous comments about the bible during an interview with an online newspaper. Replying to questions about her private life, Doda stated that the Bible's authors wrote it while "drinking wine and smoking some weed." In her defence, Doda argued that the language used was frivolous and colourful rather than hateful or intolerant of religions. Doda contended that such an approach would be more readily comprehensible to her young fans. In finding the Polish authorities in violation of Article 10, the ECtHR did not find the expression in question to disturb public peace.

Although this article does not intend to allude to offensive expressions that merely hurt religious feelings, it is worth noting that the Court established a four-stage connection to distinguish expressions

¹⁰¹ App. No. 22636/19 Judgment [2022].

¹⁰² For the news report of the incident, see <https://www.businessinsider.com/france-catholic-church-topless-slut-protester-wins-human-rights-case-2022-10?r=US&IR=T>

¹⁰³ The case can be accessed in English via <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%222002-13834%22%7D>

¹⁰⁴ Application no 49327/11, [2014].

¹⁰⁵ *Ibid*, at para 174.

¹⁰⁶ *Ibid*, at para 176.

¹⁰⁷ Application no. 8257/13, [2022]

that must be restricted from expressions that must be tolerated. In doing so, the Court required a nexus between expressions that are provocative to religious followers, that such provocation hurt their religious feelings, that both provocation and hurt are expressed in an intolerant manner, and that such intolerance has incited hate or violence towards the religious followers.¹⁰⁸ The Court expounded that the lack of a uniform standard in Europe regarding blasphemous expressions allows State Members a wide margin of appreciation to ensure the peaceful coexistence of all religions.¹⁰⁹ Nevertheless, hurting religious feelings in a way that can lead to discrimination, negative and pointless stereotyping does not appear to be regarded as part of protecting the rights of others, which was previously identified in the landmark decision of *Otto-Preminger-Institut v Austria*.¹¹⁰ This raises the question of whether mocking religion and its sentimental figures truly serves the public interest and whether such derogatory comments achieve any purpose worthy of debate.

In response to questions regarding the normalisation of anti-Islam hate expressions in Europe, the 2022 decision of the ECtHR *Zemmour v France*,¹¹¹ in Ghaleb Bencheikh's view, attempted to provide an answer.¹¹² During a TV interview in 2016, a well-known French politician and journalist, Eric Zemmour, appeared on a TV show to discuss his latest book "*Un quinquennat pour rien*" - "A Five-Year Term for Nothing." The controversy arose regarding his comments on a subheading within the book entitled "*La France au défi de l'Islam*" - "France and the challenge of Islam."¹¹³ Among Zemmour's comments were that terrorism and Islam are the same, there are no Muslims who live in peace or are fully integrated in France, Muslims in France need to choose between France and Islam, and they need to discard their religion if they want to live in France. He concluded that France was being invaded and colonised, as evidenced by the veil-wearing Muslim women on the outskirts of the country.¹¹⁴ The French Criminal Court found Zemmour guilty of inciting discrimination, hatred, and violence against a minority religion and its followers.¹¹⁵ Zemmour was ordered to pay 5000 Euros, which was later reduced to 3000 Euros by the Court of Appeal. While the ECtHR recognised that the impugned expressions were political and formed part of a wide public debate, it emphasised that as a journalist who is capable of assessing the impact of his words, he was not exempt from the duties and responsibilities enshrined within the ECHR. Following from detailed assessment of the limitations of Article 10, the ECtHR emphasised the wider margin of appreciation State Members enjoy, while rejecting that the French interference in this instance is disproportionate. The decision does, therefore show some appreciation of religious protection, although the applicant's position as a responsible journalist appeared relevant.

Conclusion

Due to their controversial nature and views towards opposing ideologies, religions inherently subject themselves to a high level of critique from sceptical individuals. In doing so, it needs to be acknowledged that such critique may involve denying and disputing established religious facts, which many may find grossly offensive and insulting. However, these expressions need to be tolerated and debated to facilitate the discovery of truth and enhance the citizens' engagement in democracy and their cognitive abilities. On the other hand, the internet has been increasingly used to disseminate expressions that negatively portray and insult religions, akin to the historic anti-Jewish expressions. Certain expressions that involve labelling and defacing religious articles were followed by an upsurge in online and/or offline discrimination and hate. These forms of expression, in the author's view, need to be afforded the highest level of protection under the ECtHR jurisdiction, specifically the application of

¹⁰⁸ *Ibid*, at para 51.

¹⁰⁹ *Ibid*, at para 52.

¹¹⁰ Application no 13470/87, [1995].

¹¹¹ Application no. 63539/19, [2022]. The case summarised by Frank Cranmer via <https://lawandreligionuk.com/2022/12/21/article-10-echr-and-inciting-religious-hatred-zemmour/>

¹¹² The President of the French Foundation of Islam. Visit <https://www.euractiv.com/section/non-discrimination/news/zemmour-v-france-echr-ruling-points-to-normalisation-of-anti-islam-hate-speech/>

¹¹³ Application no. 63539/19, [2022], at para 5.

¹¹⁴ *Ibid*, at 6.

¹¹⁵ Section 4 of the 1881 Act.

Article 17 of the ECHR. Doing so will hopefully mitigate their escalation into offline discrimination, hate, and violence.

One further way to regulate this is by arguing that the ECtHR is inconsistent in applying the limitations of Articles 10(2) and 17 of the ECHR. The examined case law demonstrated that the Court initially demonstrated high dismissiveness of expressions that negatively portray religions and their followers. However, it has progressively become less sympathetic towards religious ideals and expressions that impact religious followers. From the cases examined, it was clear that the Court insufficiently rationalised the disparity in outcomes between cases that fall within the remit of Article 10 against those that were dismissed under Article 17. While safeguarding the right to freedom of expression is paramount and requires a thorough assessment of Article 10 to determine the legitimacy of state interference, online and offline expressions that have led to discrimination, (cyber) hate, and violence go against the underpinning principles of the ECHR of tolerance, broad-mindedness and equality. Consequently, such expressions must be curtailed through the application of Article 17.

The evidence supports the claim that there is a sharp increase in anti-Islamic hate, similar to what the Jewish and other communities endured throughout history. This necessitates a more stringent approach to prevent history from repeating itself, particularly given that signs have expeditiously surfaced, especially with the utilisation of modern technology as a medium. Certainly, this is a case-sensitive inquiry but an initial step of spreading awareness should start at a societal level by fostering debate about the value of religions to their followers. This also requires educational institutions to play a more active role by teaching more extensively the impact of colonisation and drawing parallels between historic catastrophes and their re-emergence today against present minority groups.