THE UNIVERSITY OF HULL

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Freedom of Speech as a Universal Value

(A Comparative Approach from International Human Rights Law, the First Amendment, and Islamic Law)

by

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Abstract

The issue of universalism in the human right of freedom of speech is one of several that continue to be debated among Muslims and Westerners. As evidence of incompatibility of Islamic law with the international law of freedom of speech, Westerners, on the basis of Muslims' reactions towards *the Satanic Verses* and Danish cartoons, point to the blasphemy law in Islam *(Sab Allah wa Sab al-Rasul)*. Four other controversial areas are often raised as an indication of differences between these two laws, namely, speech threatening nation security (*Fitnah*), defamatory speech (*Qadhf* and *Iftira*), obscenity (*al-Fihsh*), and hate speech. This study examines the important question of whether or not the Islamic law of freedom of speech is compatible with the international law of freedom of speech. The study argues that the Islamic law of freedom of speech is not contrary to the international law of freedom of speech, represented in two of the most significant legal sources of the right to freedom of speech, namely, Article 19 of the ICCPR and Article 10 of the ECHR, both based on the Universal Declaration of Human Rights, which this study presumes to be the standard of the human right of freedom of speech. Rather, the study goes further and concludes that Islamic law, as embedded in the *Quran* and *Sunnah*, urges the international concept of freedom of speech and calls for it. This compatibility between Islamic law, on the one hand, and international law, on the other, is not restricted to the level of the concept of freedom of speech. Rather, even the interpretation and application of freedom of speech in the light of Islamic law are, to a considerable degree, consistent with the interpretation and application of the international law of freedom of speech by the Human Rights Committee and European Court. Although there are some differences in interpretation and implementation of moral limitations on freedom of speech between Islamic Law and the international law of freedom of speech, this does not create a general state of dissonance between them. The study argues that such differences are even more pronounced among liberal democracies. In order to demonstrate the differences among liberal democracies in this regard, American law of freedom of speech (the First Amendment) is analysed in depth. The discussion of these free speech laws reveals that although there is universality of freedom of speech among liberal democracies (which refers to the universal quality or global acceptance of the idea of freedom of speech), universalism in the right to free speech (referring to a universally applicable interpretation of freedom of speech) has not been achieved.

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Chapter One

I. Introductory Chapter

I.1. Statement of the Problem

On 30th of September 2005, the *Jyllands-Posten*, a Danish daily newspaper, published an article entitled "The face of Muhammad."[1] The article consisted of twelve editorial cartoons, most of which portrayed Muslims' most sacred symbols and values, the Prophet of Islam, in a satirical manner. The one with his headdress shaped like a bomb has provoked the most anger, as it gives the impression for non-Muslims that Islam is a religion of terrorism, since the Prophet Muhammed symbolizes the religion.[2] In fact, not only is the depiction of the Prophet as a terrorist alleged to promote discrimination against Muslims by likening them to terrorists, but portrayal of any of image of Muhammad evokes an angry response as no image of Muhammad is allowed in Islam. According to Muslim scholar, Tariq Ramadan, "In Islam, representations of all prophets are strictly forbidden."[3] However, as the controversy grew, examples of the offensive cartoons, defended on the grounds of freedom of speech, were reprinted in newspapers in many other countries, especially European, which led to violent as well as peaceful protests, including rioting in both Muslim and Western countries, some resulting in deaths.

Similar to the case of Salman Rushdie's *Satanic Verses*, a novel that took an irreverent view of the Prophet Muhammad, the essence of this debate is a clash between two opposed views of freedom of speech. Supporters of the cartoons claimed that their publication was a legitimate exercise of the right of free speech, which is central to the effective working of democratic society.[4] These cartoons, as a form of freedom of speech, illustrated an important issue in a period of extremist terrorism.[5] Commenting on this issue, Professor David Unterhalter argues that "at the heart of free speech is the

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[1] Rose, F., "Muhammeds ansigt", Jyllands-Posten (Danish) September 30, 2005.

[2] For the analysis of the cartoons crisis, see Post, R., "Religion and Freedom of Speech: Portraits of Muhammad", *Constellations* 14 (2007) pp. 72-90; Pethick, S., "Why Freedom of Expression Defence is Questionable in the Muslim Dispute with a Danish Publication", *Global Research*, February 2, 2006, at URL <http://www.GlobalResearch.ca>

[3] Ramadan, T., "Cartoon conflicts", *The Guardian*, February 6, 2006.

[4] See Sturges, P., "Limits to Freedom of Expression? Considerations arising from the Danish cartoons affair", *IFLA Journal*, 32.3 (2006) pp. 181-188, p. 181.

[5] Rose, F., "Why I Published Those Cartoons", *Washington Post*, February 19, 2006; Leader, "The limits to free speech-Cartoon wars", *The Economist* February 9, 2006; Marshall, P., "The Muhammed Cartoons: Western Governments Have Nothing to Apologize For", *The Weekly Standard*, February 9, 2006.

right to say things that others find offensive. No belief system can claim exemption from mockery," he asserts: "freedoms are all or nothing."[6] This view is fully consistent with Justice Black from the US Supreme Court, who believes that all expressions should be protected with no exceptions, "without any ifs, buts, or whereases."[7] The Danish government, however, claimed that they could not interfere with the right to freedom of speech. This response, according to some,[8] was not without a basis as the right to freedom of speech is enshrined in a range of international human rights instruments such as the Universal Declaration of Human Rights,[9] the International Covenant on Civil and Political Rights,[10] the European Convention on Human Rights,[11] and the African Charter on Human and Peoples' Rights.[12]

Critics of these "outrageous cartoons against Islam," to use Bill Clinton's words,[13] believe that such offensive speech toward the Prophet is not an isolated incident.[14] Describing the cartoons as Islamophobic, they argue that they were blasphemous to people of the Muslim faith[15] because, according to Ibn Taymiyyah and others, for a Muslim to insult the Prophet Muhammad is one of the most serious crimes anyone could commit.[16] As Kamali says, all scoffing at Muhammad is to be regarded in Islam as blasphemy.[17] To the critics of the cartoons, though freedom of speech is an important right and should be respected and enforced strictly to ensure a free press, nobody should in the garb of this right, encroach upon the honour of others. As Gary Younge remarks in *The Guardian*, "The right to freedom of speech equates to neither an obligation to offend nor a duty to be insensitive."[18] Moreover, it is certain that the universal free speech law is not without exception. International human rights law recognizes that there is a spectrum of expression, ranging from that which should be protected to that

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[6] Unterhalter, D., "In a free society, no belief system can claim immunity from mockery", *The Times* February12, 2006, at URL, <http://sundaytimes.co.za>

[7] *New York Times v. Sullivan*, 376 US 254 (1964)

[8] See Sturges, P (2006) op. cit. p. 181.

[9] Hereinafter cited as the UDHR and the Universal Declaration.

[10] Hereinafter cited as the ICCPR, the UN Covenant, and the Covenant.

[11] Hereinafter cited as the ECHR, the European Convention and the Convention.

[12] Hereinafter cited as the ACHPR and the African Charter.

[13] AFP (Agence France Press) "Clinton warns of rising anti-Islamic feeling." January 30, 2006.

[14] Ulph, S., "Danish Cartoons Focus the Jihadi Lens on History", *Terrorism Focus*, 3.10 (2006) p. 3.

[15] Esposito, J., "Muslims and the West: A Culture War?" *Islamica Magazine Issue*, 14 (2006) IslamOnline.net, Wajhat, poll.gallup.com.

[16] See generally, Ibn Taymiyyah, *al-Sarim al-Maslul ala Shatim al-Rasul* (Beirut: Dar Ibn Hazm, 1997); Ibn Qudamah, *al-Mughni*, no. 8 (Cairo, Maktabat Al- Jumhuriyah Al-Arabiyyah, n.d.) p. 232.

[17] Kamali, M., *Freedom of Expression in Islam* (Cambridge: Islamic Texts Society, 1997) p. 214.

[18] Hensher, P., and Gary Younge, "Does the right to freedom of speech justify printing the Danish cartoons?" *The Guardian*, February 4, 2006.

which should be punished.[19] The UDHR, for example, restricts this right under Article 29 (2) under the conditions that such restrictions should be determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. The two widely ratified human rights treaties (ICCPR) and (ECHR) accepted that the right to free speech is not absolute and may legitimately be curtailed when trumped by competing considerations of sufficient weight. Likewise, Article 9(2) of the African Charter on Human and Peoples' Rights clearly states that the individual's right to express and disseminate his/her opinion can be restricted.[20]

It is worth noting that the issue of members of religious groups, protesting vehemently that they have suffered offence, is certainly not confined to the Muslim community.[21] Five examples from liberal democratic countries such as Britain, France Australia and the U.S. illustrate the point. By liberal democracies in the context of freedom of speech, I mean a form of government based on self-governance, respect for a multiplicity of views, and the right of individuals to develop their minds and fortunes as they please, as long as others are not harmed. The United States, many Western European nations, Australia, New Zealand, and Canada are examples of liberal democracies, and these countries permit and defend free speech.[22] The first example, however, is from Britain, in which the play, *Behzti* (Dishonour) at the Birmingham Repertory Theater became the centre of a major controversy in 2004. The play provoked violent protests for depicting a rape in a Sikh temple. The theatre was forced to cancel the play on safety grounds.[23] In France, when Faurisson, a French university Professor, made public his sceptical views about the Holocaust extermination story in articles published in 1978 in the French daily, *Le Monde*, his articles provoked associations of French resistance fighters and of deportees to German concentration camps to file a private criminal action against him.[24] Again in the U.K, the show, *Jerry Springer: The Opera*, which is notable for its profanity and disrespectful portrayal of Christ, is considered by its critics as a blasphemous.[25] Likewise, in the U.S., *Piss Christ*, which

[19] Cerone, J., "The Danish Cartoon Row and The International Regulation of Expression", *ASIL Insight*, 10.2 (2006).
[20] Article 9 states that "1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law."
[21] Sturges, P (2006) op. cit. p. 181.
[22] Trager, R., and Donna Dickerson, *Freedom of Expression in the 21st Century* (Thousand Oaks: Pine Forge Press, 1999) p. 1.
[23] Branigan, T., "Tale of rape at the temple sparks riot at theatre", *The Guardian*, December 20, 2004.
[24] *Robert Faurisson v. France*, CCPR/C/58/D/550/1993 (1996).
[25] Lee, S., "Christian Voice is outside, Praying for our Souls... ", *The Guardian*, 15 February 2006.

depicts a small plastic crucifix supporting the body of Jesus Christ submerged in a glass of the artist's urine, caused a scandal when it was exhibited in 1989. The artist Andres Serrano, however, was accused by some of blasphemy.[26] Very recently, artwork containing a portrait of Osama Ibn Laden which, viewed from an angle, morphs into an image of Christ and depicts the Virgin Mary shrouded by a Muslim burqa caused a chorus of outrage from Christians.[27] What these examples show is that the Danish cartoons, or *Satanic Verses*, or even Pope Benedict XVI's speech, at the University of Regensburg, attacking the Prophet of Islam, are not unique in turning attention to the idea that the giving of offence might be considered as a kind of harm in its own right.[28] However, what is important for this study is that the controversy over these kinds of publication raises profound questions about freedom of speech.[29] Here the study seeks answers to the following five study questions:

The first question is whether free speech includes within its category artistic speech such as the Danish cartoons or confines itself to spoken and written words. For example, can the publishers of the cartoons claim that their publications fall within the free speech umbrella? What if the two most offensive cartoons were not just published in a newspaper but hung on giant billboards in all major cities in Denmark, would the offence be judged differently? In addition, for months after the publication of the cartoons, numerous notable demonstrations and other protests against the cartoons took place worldwide. Whether Muslims were thoroughly justified in protesting or not, the protests were not confined to demonstrations, the Danish embassies in Damascus and Beirut were set ablaze.[30] Could burning the Danish Embassy, or even the Danish flag, be considered free speech? Whether yes or no, then, where should the line be drawn between speech and conduct? The aim of this question is to determine a general framework for the words and actions that could be considered as speech, without confining ourselves to the example of the cartoons. This is very important because as a practical matter, it may make a difference as when it comes to conduct, the limitation of the right will usually be considered reasonable and demonstrably justified in the

[26] Casey, D., "Sacrifice, Piss Christ and Liberal Excess", Part 1, *Arts and Opinion*, 3.3 (2004); Casey, M., Fisher, A., OP, and Haydan Ramsay, "Sacrifice, Piss Christ and Liberal Excess", Part 2, The Rebuttal, *Arts and Opinion*, 3.4 (2004).
[27] Shears, R., "The religious art show where Jesus Bin Laden meets Mary in a burqa", *Daily Mail*, August 30, 2007.
[28] Sturges, P., (2006) op. cit. p. 181.
[29] Schauer, F., "The Freedom of Expression, The Harm of Expression, and The Danish Cartoons," Discussion Draft for the Transatlantic Lecture Series of the Robert Schuman Centre of the European University Institute in Florence, Italy, 26 May 2006.
[30] Zand, B., "The Inciters and the Incited", *Der Spiegel International Edition*, February 10, 2006, at URL, <http:// www. spiegel.de >

circumstance. The idea of the necessity of making a distinction between speech and conduct has been strongly adopted by free speech philosopher Thomas Emerson in his book *The System of Freedom of Expression*. Emerson insisted that:

> The central idea of a system of freedom of speech is that a fundamental distinction must be drawn between conduct which consists of "expression" and conduct which consists of "action". "Expression must be freely allowed and encouraged. "Action" can be controlled... [31]

Secondly, what is the importance, if any, of these types of cartoons in particular and of freedom of speech in general? What values do these cartoons seek to promote? Do they seek to spread the truth about Islam or the Prophet of Islam? Or was it is only the self-fulfilment of the *Jyllands-Posten* that justified the publishing of these cartoons? Can democracy and its requirements be considered a reason for permitting such publications? As the author of *Contested Words*, Ian Cram, puts it: Do courts in liberal democracies conceive of expression as primarily concerned with maintaining the conditions of informed popular sovereignty, as means of promoting democratic accountability over public office holders, or as a necessary mechanism for enabling the intellectual and emotional growth of persons? [32] Although there is some level of consensus about its value in helping people to participate effectively as members of the nation in the political life, the question is, does speech have some value or values that are important nationally and internationally? If so, are those values the same? Why do some nations protect certain kinds of speech, whereas others do not? Why, for example, is denying the Holocaust protected speech in some nations, where it is illegal in a number of European countries?

Thirdly, the controversy over the publication of the Danish cartoons causes us to consider what kind of harms and offences, if any, the publication of these cartoons, and other types of speech, may have produced, and how those harms and offences relate to the theory and the practice of freedom of speech. How can we identify the boundaries of what might legitimately be considered harmful or offensive? Furthermore, freedom of speech protection is usually accompanied by the protection of other fundamental rights and freedoms such as a commitment to equality, dignity and diversity, what relationship, if any, do these guarantees have to freedom of speech? [33]

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[31] Emerson, T., *The System of Freedom of Expression* (New York: Random House, 1969) p. 17-18.
[32] Cram, I., *Contested Words: Legal Restrictions on Freedom of Speech in Liberal Democracies* (Ashgate Publishing, 2006) p. 1.
[33] Cram, I., (2006) op. cit. p. 1-2.

The fourth question relates to important differences among liberal democracies in the nature of the protection of freedom of speech, differences that, according to Professor Frederick Schauer, are often ignored as Westerners often only compare freedom of speech in liberal democracies, such as Western systems, in the aggregate, with freedom of speech, in the aggregate, in totalitarian or otherwise non-liberal and non-democratic societies, such as the Muslim world.[34] The problem with this approach is that it pays no attention to the differences, in structure as well as in substance, between freedom of speech in the United States and the other side of the Atlantic, such as Europe. Explaining this, Arch Puddington comments, "If the cartoon wars forced to the surface tensions between certain international institutions and freedom of expression advocates, they also reminded us of the different attitudes toward press freedom and freedom of expression in the United States and Europe."[35] The treatment of hate speech, for instance, has been far from uniform as the boundaries between impermissible propagation of hatred and protected speech vary from one setting to the next.[36] Rightly so: in the United States, hate speech is given wide constitutional protection while under international human rights covenants and conventions such as ICCPR and ECHR it is largely prohibited and subjected to criminal sanctions.[37] Most European countries, as noted by Georg Nolte, have enacted special legislation, in conformity with international human rights requirements, to ban incitement to racial hatred, and even to ban certain right-wing insignia and propaganda.[38] Therefore, it is important for any study concerns the universal free speech law to examined comparatively freedom of speech laws in the U.S. on the one hand and the ICCPR and ECHR on the other to demonstrate that though all these systems share similar interests in pursuing freedom of speech, their courts' rulings on free speech cases are uniquely different.

Fifthly, sometime shortly after the publication of the Danish cartoons, when the world had suddenly turned into a place where it became much more clear how large was the gap in the nature of freedom of speech between the West and Islam, I started wondering about prejudice and incompatibility between these two cultures. The reaction

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[34] See Schauer, F., (2006) op. cit. p. 2.
[35] Puddington, A., "Freedom of Expression after the Cartoon Wars", Freedom House, 2006, p. 5, online at <http://www.freedomhouse.org/uploads/fop/FOP2006cartoonessay.pdf>
[36] See Sumner, L., "Hate Propaganda and Charter Rights", in Wilfrid Waluchow, *Free Expression: Essays in Law and Philosophy* (Oxford: Oxford University Press, 1994) p. 153-174.
[37] See *Collin v. Smith*, 587 F. 2d 1197 (1978); *Village of Skokie v. National Socialist Party of America*, 432 US 43 (1977); *R.A.V. v. St. Paul*, 505 US 377 (1992). For more see Rosenfeld, M., "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis", *Cardozo Law School*, (2001) Public Law Research Paper 41, p. 1523.
[38] Nolte, G., *European and US Constitutionalism* (Cambridge: Cambridge University Press, 2005) p. 7.

to the Danish cartoons controversy in much of the Muslim World compels me to confront the question, if there is a freedom of speech discourse in the Islam, what does this freedom mean in the Islamic perspective? How does Islamic law value the right to freedom of speech? Does Islam impose restrictions on freedom of speech? How true is the claim raised by some scholars, such as Anna Elizabeth Mayer[39] Jack Donnelly,[40] Rhoda Howard,[41] and Bassam Tibi,[42] that human rights, including the right to free speech, are a recent and modern achievement and they are quite foreign to Islamic culture? Or can Islam be the main source of human rights, including freedom of speech, as Mawdudi and Ghazali considered?[43]

Answering all these sub-questions will help in finding an answer to the study's main question, which has often been raised but has not been answered by writers in the field, which revolves around the universalism of the right of freedom of speech in the light of Islamic Law. Is Islamic human right of freedom of speech compatible with the universal value of freedom of speech, embedded in international law of free speech, or is Islam with its teachings stated in *Qu'ran* and *Sunnah* inimical to the universal formulation of this freedom or not? Is Islam an obstacle to the adoption of universal free speech law, or can it be interpreted in a way that accepts such norms?

An important point needs to be clarified here. When discussing whether Islamic law of freedom of speech is compatible with the universal value of freedom of speech, I do not mean the universality of this freedom, but what I mean is the universalism in freedom of speech law. One should differentiate between the two concepts, though they are inter-related. An appreciation of the distinction between the two concepts, as Professor Mashood Baderin emphasises, is very important for a realistic approach to the question of universalism in international human rights law.[44] The universality of the

[39] Mayer, comparing Islamic cultural norms and international human rights, argues that "human rights ... were developed in Western culture from eighteenth century onward and later via their formulation ... in the International Bill of Human Rights". Mayer, A., "Current Islamic Thinking on Human Rights." *In* An-Na'im, A., and Francis Deng (eds), *Human Rights in Africa* (Washington: Brookings Institute, 1990a) p. 148

[40] Donnelly argues that human rights in the sense in which Westerners understand are quite foreign to Islamic culture. Donnelly, J., *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 1989) p. 303.

[41] Howard argues that human rights are a modern concept and that most known human societies did not and do not have conceptions of human rights. "Dignity, Community, and Human Rights." in An-Na'im, A., *Human Rights in Cross-Cultural Perspectives, A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992) p. 81

[42] Tibi considers human rights are a Western achievement. See "The European Tradition of Human Rights and the Culture of Islam", in An-Na'im, A., and Francis Deng (eds), (1990a) op. cit. p. 130-131.

[43] See generally Al-Ghazali, M., *Huquq al-Insan fil-Islam* (Cairo: al-Maktabah al-Tejarriyyah, 1963); Mawdudi, A., *Human Rights in Islam* (Leicester: The Islamic Foundation, 1987).

[44] Baderin, M., *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2003) p. 23.

right to freedom of speech does not pose a question; it refers to the universal quality or global acceptance of the idea of freedom of speech, which has been achieved over the years since adoption of the Article 19 of the Universal Declaration of Human Rights, and is evidenced by the fact that there is no State today that will unequivocally accept that it is a violator of freedom of speech, at least in theory. Today, all nations and societies do generally acknowledge the idea of the human right of freedom of speech, thereby establishing its universality. According to Professor Schachter, few governments today admit that they violate central human rights. Violations of human rights are denied or excused, but seldom defended.[45] Agreeing with Schachter, Rafi Ibn Ashur claims that there is consensus about the universality of human rights.[46] All international and regional declarations and conventions, constitutions and domestic laws, and political and philosophical theories admit the necessity of protecting human rights. Nowadays, as Ibn Ashur points out, no country rejects the human rights; rather, all of them declare the importance of the Universal Declaration.[47] Modern Muslim States, Baderin argues, are conscious of that and they demonstrate acknowledgment of the importance of human rights. They acknowledge the universality of human rights and their reports challenge neither the binding nature of international human rights treaties nor their obligations under treaties ratified by them.[48]

In contrast to the universality of freedom of speech, universalism in freedom of speech relates to the interpretation and application of freedom of speech. It connotes the existence of a common universal value consensus for the interpretation and application of international law freedom of speech. Many believe that, as there is an ongoing discussion, not only in Muslim countries, dealing with the universalism of human rights, universalism in human rights has not been achieved. Universalism, in other words, continues to be a subject of debate and disagreement. An example can be given here in order to illustrate the concepts of universality and universalism. There is a consensus nowadays about the universality of freedom of speech. We can consider that there is a consensus among cultures, but this consensus is not an evidence of the existence of universalism in freedom of speech. The controversy of the universalism does not relate to the question: Is freedom of speech is one of the morals rights which is of "a

[45] Schachter, O., "International Law in Theory and Practice: General Course in Public International Law." *Recueil Des Cours* 178.5 (1982) pp. 1-395, p. 336.
[46] Ashur, R., *"Huquq al-Insan bayn al-Alamiyyah wal-kososiyyah." Majallat al-Tawheed*, no. 84, n.d. p. 68.
[47] *Ibid.*
[48] Baderin, M., "Modern Muslim States Between Islamic Law and International Human Rights Law." (PhD Thesis, The University of Nottingham, 2001) p. 337.

fundamental important kind held equally by all human being, unconditionally and unalterably."[49] It relates, however, to the following question: Is there an agreement among all societies about the interpretation and implementation of Article 19 of the UDHR? Three examples can be given here in order to prove that particular applications of freedom of speech may not be consistent, even among liberal democracies. First, France banned a book written about former president Francois Mitterrand's battle with cancer. The book, released after Mitterrand's death, was stopped because of the unflattering portrayal of a man who had attained almost godlike status in France. In contrast, in the United States, a recent book about President John F. Kennedy offered details about his sex life and became a best-seller.[50] Second, Article 19 (2) ICCPR provides that the exercise of the freedom of expression carries with it special duties and responsibilities. It may therefore be subject to certain restrictions such for the protection of morals. There is agreement that protecting public morals justifies the state interference in restricting some types of speech (universality). The dispute here is about the interpretation of morals (universalism). Whether this restriction in that clause includes any sexually explicit speech or only hard-core and violent pornography such as bestiality and child pornography. Thirdly, Article 20(2) ICCPR requires that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." Indirectly, the Universal Declaration on Human Rights prohibits hate speech by stating in its Article 30 that "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein." Such requirements have been applied in by the Human Rights Committee and Strasbourg institutions in several cases. In contrast, such requirements have been rejected in the United States, where free speech includes even hate speech. Commenting on this point, Jack Donnelly argues that particular rights concepts, such as freedom of speech, have multiple defensible conceptions, introducing a significant element of legitimate variation/relativity. Any particular conception then will have many defensible implementations.[51]

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[49] Friedman, J., "Human Rights Internationalism: A Tentative Critique," in Jack Nelson and Vera M. Green (eds), *International Human Rights: Contemporary Issues* (Stanfordville, N.Y.: Human Rights Publishing Group, Earl M. Coleman, 1980) p. 29-30.

[50] Trager, R., and Donna Dickerson, (1999) op. cit. p. 2.

[51] Donnelly, J., "The Relative University of Human Rights." *Human Rights and Human Welfare* (2006) p. 23. The article available also in Donnelly, J., *International Human Rights* (Boulder, Colo: Westview Press, 2007) p. 37-58.

So, the consensus about the necessity of protecting the right to freedom of speech cannot enable us to overcome the main problem of universalism, although it solves the problem of universality, if it exists at all. Therefore, in order to provide an answer to the study's main question concerning the concept of universalism in the right of freedom of speech in the light of Islamic Law of free speech, I emphasise the importance of examining the above five related issues in this regard. Without such examination of all these five issues, it is difficult, in my view to judge universalism in freedom of speech in the light of Islamic law.

I.2. The Objective and Significance of the Study

First of all, I shall highlight some of the aims that the study does not seek to fulfil. It is not within my aims to promote Western or un-Islamic values and norms by giving them Islamic credentials. My aim is to avoid both apologetics and simplistic answers to complex questions. To illustrate more, different schools of Islamic law have produced many opinions on a given issue. Some Muslim scholars say that Islamic law does not clash with universal law of freedom of speech. Others deny all conflicts between tradition and modernity, thereby simply merging the language of universal freedom of speech with the classical *Shariah*. They merely harmonize freedom of speech with the traditional *Shariah* without addressing the possible tensions and conflicts between the two.[52] This claim, in my view, cannot be taken at face value without returning to and examining both international and modern free speech laws and Islamic sources. Such an approach has been criticised by some Westerners and described as a "superficial and uncritical Islamization of human rights" that fails to address tension between human rights and *Shariah*.[53] This approach, in the view Katerina Dalacoura, falls into the mistake of a historical claim which fails to distinguish between having a right (to freedom of speech) and what is right (of freedom of speech).[54] The goal of this study, again, is different from those aims, as this study will not try to make clear-cut differences disappear. This study will address tension between international law of freedom of speech and *Shariah*, in theory and in practice, through examining five controversial areas which are often raised by Westerners as evidence of incompatibility of Islamic law with international law, namely, speech threatening national security

[52] See in Baderin, M., (2003) op. cit. p. 13.
[53] Bielefeldt, H., "Western versus Islamic Human Rights Conceptions? A Critique of Cultural Essentialism in the Discussion on Human Rights", *Political Theory* 28.1 (2000) pp. 90-121, p. 104.
[54] Dalacoura, K., *Islam, Liberalism and Human Rights*, revised edition (London; New York: I.B. Tauris, 2003) p. 57.

(*fitnah*); blasphemy law in Islam (*sab Allah wa sab al-Rasul*); defamatory speech (*qadhf* and *iftira*); obscenity (*al-fihsh*) and hate speech.

It is also not within this study's aims to make Islamic law of freedom of speech palatable to Western (either European or American) system of freedom of speech or to subject Islamic law to the jurisprudence of international law of freedom of speech, disregarding any Islamic jurisprudential justifications, as some non-Muslim scholars[55] and Muslim scholars urge.[56] In the view of one of this school of thought, Abdulahi An-Na'im,[57] several aspects of the *Shariah* should be reformed to fall in line with present interpretations of international human rights law.[58] This approach has a very small influence in the Muslim world, to the extent that Professor An-Na'im, himself, confesses that only a tiny minority of contemporary Muslims appreciates his view.[59] According to Muqtedar Khan, those who may even seek to reform, reject, or recast revelation have no impact whatsoever on the Muslim society, regardless of their success with non- Muslim audiences[60]

Now, I shall set out the aims that the study seeks to fulfil. The study aims to:

Firstly: discuss and critically analyse the meaning and justifications of freedom of speech together with the limitations of this freedom, theoretically and practically. This aim is of significant importance in order to avoid a vague and imprecise definition of free speech meaning and scope that prevails nowadays in some countries, especially in the Muslim world. Ant failure in adequately defining a coherent position concerning the scope of freedom of speech will allow the government to abridge this precious right.

Secondly, study different free speech laws, in particular, American, and European and conduct a comparison between them in order, firstly, to identify their similarities and differences and, secondly, to explore whether the dimension of international law of free speech is visible in these laws.

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[55] Bielefeldt, H., "Muslim Voices in the Human Rights Debate", *Human Rights Quarterly* 17.4 (1995) pp. 587-617 p. 608

[56] For examples of Muslim writers who adopt this approach, see Dalacoura, K., (2003) op. cit. p. 60-64.

[57] An-Na'im, A., *Towards an Islamic Reformation, Civil Liberties, Human Rights, and International law* (Syracuse, N.Y.: Syracuse University Press, 1990b) 57-60; "Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman or Degrading Treatment or Punishment" in An-Na'im, A., (1992), op. cit. pp. 19-43; "University of Human Rights: An Islamic Perspective" in Nisuke Andeo (ed.) *Japan and International Law: Past, Present and Future* (The Hague; Boston: Kluwer Law International, 1999). pp. 311-325.

[58] An-Na'im, A., (1990a) op. cit. p. 52-75.

[59] An-Na'im, A., "Human Rights in the Muslim World", *Harvard Human Rights Journal* 3, (1990c) p. 21. See in this regard Roberts, G., *Islamic Human Rights & International Law* (Florida: Roca Raton, 2003) p. 45-46.

[60] Khan, M., "Islamic Democracy and Moderate Muslims: The Straight Path Runs through the Middle", *American Journal of Islamic Social Sciences*, 22.3 (2005) p. 45.

Thirdly, derive lessons on freedom of speech as it has been developed by the West. It should be admitted that although several other cultures have known human rights in general and freedom of speech in particular for a long time, the modern concept of such rights emerged from the uterus of Western societies.[61] This is not to say that human rights or freedom of speech are a by-product of modern life or an innovation of the West, so much as to say that Western culture has changed the meaning, justifications, and limitations of free speech in a pioneering way. Therefore, one of this study's aims is to benefit from the ideal model representing freedom of speech in these statutes that embody, according to Mohammad Al-Ghazali, a long historical struggle against tyranny.[62] Such objective that the study aim to reach is, according to teachings of Islam, recommended since it brings advantage (*maslahah*) to human beings, especially in Muslim states.

Fourthly, analyse the concept of freedom of speech in an Islamic context. The study will examine the roots and principles of what Muslim scholars regard as a sacred right and a fundamental religious duty, according to Islam's two primary sources of legislation, an unchanging *Quran* and *Sunnah*. The emphasis is to derive from these sources those doctrines and commandments which challenge the popular notion that Islam is not reconcilable with the international right to free speech or that Islam's perception of freedom of speech is irrelevant to modern understanding and practice of free speech. The importance of this aim, first, is because there has been a growing interest in the West in Islam and Muslims. Much of this interest has been focused, however, on a few subjects such as blasphemy law in Islam, the law of apostasy, the Salman Rushdie Affair, and the Danish cartoons, rather than on understanding the law of free speech in Islam.[63] The importance of analysing the concept of freedom of speech in an Islamic context, thus, is in terms of finding out whether the argument that the Western liberal emphasis on freedom of speech is alien to Islam is true or not,[64] whether there is a clash between Western values, freedom of speech in particular, and Islam, such that there is no place for these values and rights in Islamic societies, as Joseph Schacht,[65] Henry Siegman[66] and most Westerners believe,[67] or whether the roots of

[61] Bielefeldt, H., (1995) op. cit. p. 587; Hegarty, A., and Siobhan Leonard, *Human Rights, An Agenda for the 21 St Century* (London: Sydney: Gavendish Publishing Limited, 1999) p. 21.
[62] See Al-Ghazali, M., *al-Islam wa Huquq al-Insan* (Qatar: Wizarat al-Ta'lim, 1983) p. 7.
[63] See, for example, Mayer, A., (2007) op. cit. p. 167-176.
[64] See Said, A., and Jamil Nasser, "The Use and Abuse of Democracy in Islam," in Jack Nelson & Vera Green (eds), (1980) op. cit. p. 76-77.
[65] According to Schacht, Islamic Law is a system of duties, of ritual, legal and moral obligations, all of which are sanctioned by the authority of the same religious command. Schacht, J., "Law and Justice", *in*

these indispensable principles can be also found in the main sources of Islam, namely, the *Qur'an* and *Sunnah*, as John Esposito,[68] Robin Wright,[69] and others believe,[70] so there would be no meaning or reason for Samuel Huntington's predicted clash[71] or for Fukuyama's theory "*The End of History and the Last Man*."[72] This aim is important, secondly, because most researches done by Muslim scholars have not tried or have avoided making a comparison between freedom of speech in Islam and its meaning, justifications and limitations in the contemporary world. Comparative studies in this field are of significant importance because as Professor Lepaulle comments, "To see things in their true light, we must see them from a certain distance, as strangers."[73] Comparison, in short, as Professor Jackson[74] and ulama Qaradawi say,[75] is inevitable. This study, therefore, while rejecting the idea that comparative analyses engender controversies,[76] will examine the limitation of freedom of speech in Islam in the light of international and modern free speech laws.

Fifthly: provide recommendations, solutions and suggestions in relation to the issues raised in the study.

P. M. Holt, Ann Lambton and Bernard Lewis (eds.) *Cambridge History of Islam*. II (Cambridge University Press, 1970) p. 541.

[66] Siegman stated, "no such abstractions as individual rights could have existed in Islam ... In such a system the individual cannot have rights and liberties ... [Muslim] have only the obligation." Siegman, H., "The State and Individual in Sunni Islam", *The Muslim World*, 54.1 (1964) pp. 14–26, p. 23.

[67] Public opinion polls conducted in the United States during the 1990s, even before September 11, revealed a consistent pattern of Americans labeling Muslims as "religious fanatics" and considering Islam's ethos as fundamentally "anti-democratic." See Ahmad, A., "Islam and Democracy: Text, Tradition, and History", *American Journal of Islamic Social Sciences*, 20.1 (2003), p. 20.

[68] Esposito, J., "Islamic Values Are Compatible with Western Values," article in Hurley, J., (ed) *Islam: Opposing Viewpoints* (San Diego: Greenhaven Press, 2000) p. 27-33.

[69] Wright, R., "Islam Does Not Present an Obstacle to Democracy", in Hurley, J., (2000) op. cit. p. 45.

[70] See Ahmad, A., (2003) op. cit. p. 20-45.

[71] Huntington, S., *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1996)

[72] Fukuyama is the one who very simply heralds the end of history because of the victory of Western liberalism. See in general Francis Fukuyama. *The End of History and the Last Man* (Penguin Books, 1993).

[73] Lepaulle, P., "The Function of Comparative Law", *Harvard Law Review* 35 (1922) p. 858

[74] Jackson, talks about comparison in American law. Jackson, V., "Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on 'Proportionality,' Rights and Federalism", *U. Pa. J. Const. L.* 1(1999) p. 600-601.

[75] Qaradawi, *al-Fiqh al-Islami Bayn al-Asala wal-Tajdid*. 2nd edition (Cairo: Maktabat Wahba. 1999) p. 39-40.

[76] See Mayer, A., *Islam and Human Rights: Tradition and Politics*. 4th edition (Colorado, Oxford: Westview 2007) p. 3-4.

I.3. In Search of the Universal Concept of Freedom of Speech: The Difficulties (Method and Disposition)

Of all the human rights, the freedom to speak one's mind, it is said, is the most important.[77] Many believe that freedom of speech, which is defined as "any act that is intended by its agent to communicate to one or more persons some proposition or attitude,[78]" is a sacred right guaranteed by international declaration and conventions and national constitutions and this right is above any other right.[79] Writers and thinkers have recognised the importance of freedom of speech for centuries. As Milton wrote in 1644 "The liberty to know, to utter, and to argue freely according to conscience, [is] above all liberties."[80] This importance of freedom of speech, as one of the most precious rights of man, to use the French Declaration description,[81] is not only because it is a necessary condition of survival and a means of enriching and expanding the meaning and scope of life itself,[82] but also because it is the "matrix, the indispensable condition, of nearly every other form of freedom."[83] Without freedom of speech it may not be possible to enjoy many of the other rights protected by human rights standards.[84] Article 19 of the Universal Declaration on Human Rights considers freedom of expression as a cornerstone right- one that enables other rights to be protected and exercised.[85] In its first session in 1946, the UN General Assembly adopted resolution 59(I) stating, "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated." Ironically, even governments in non-liberal, non-democratic societies, such as in the Muslim World, which violate this

[77] See Haiman, F., *Freedom of Speech* (New York: National Textbook Company and American Civil Liberties Union, 1979) p. xi.
[78] Scanlon, T., "A Theory of Freedom of Expression", *Philosophy & Public Affairs* 1.2 (1972).
[79] See Black, H., "The Bill of Rights," *New York Law Review* 35 (1960) pp. 865-81; Meiklejohn, A., "Freedom of Speech", in Peter Radcliff (ed.) *Limits of Liberty* (Belmont, California: Wadsworth Publishing Co., 1966) pp. 19-26; Dorson, N., Is There a Right to Stop Offensive Speech? The Case of Nazis at Skokie, in Larry Gostin (ed.), *Civil Liberties in Conflict* (London: Routledge, 1988) pp. 122-35; Wellington, H., "On Freedom of Expression"; *The Yale Law Journal*. 88 (1979) pp. 1105-42; Richards, D., *Foundations of American Constitutionalism* (New York: Oxford University Press, 1989) p. 172.
[80] Milton, J., *Areopagitica,* (1644), reprint (Oxford: Oxford University Press, 1973) p. 38.
[81] Article 11 of French Declaration of the Rights of Man and of Citizens (1789).
[82] Allan, T., "Common Law Constitutionalism and Freedom of Speech" in Jack Beatson and Yvonne Cripps (eds), *Freedom of Expression and Freedom of Information, Essays in Honour of Sir David Williams* (Oxford: University of Oxford Press, 2000) p. 17.
[83] *Curtis Publishing Co. v. Butts*, 338 US 130 (1967); *Palko v. Connecticut*, 302 US 319 (1937).
[84] See Partsch, K., "Freedom of Conscience and Expression, and Political Freedoms." in Louis Henkin (ed), *The International Bill of Rights: The International Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) p. 216; Office for Democratic Institutions and Human Rights (ODIHR), "Background Paper on Human Rights Considerations in Combating Incitement to Terrorism and Related Offences", Vienna, 19-20 October 2006, p. 6.
[85] Callamard, A., "Development, Poverty and Freedom of Expression", article written for the UNESCO Conference on Freedom of the Media and Development, on the occasion of the World Press Freedom Day, May 2006 - Colombo, Sri Lanka, p. 7.

precious freedom continually, agree about this importance of freedom of speech.[86] In the context of European human rights law, freedom of speech is not only important in its own right but because it has a central part to play in the protection of other rights under the ECHR.[87] In the history of American law, many jurists have recognized that the First Amendment is the most precious freedom.[88] As Justice Black commented, "I have always believed that the First Amendment is the keystone of our Government, that the freedoms it guarantees provide the best insurance against destruction of all freedom."[89] It is, as one Justices from New zealandian says, in *Hosking v. Runting* case, the first and last trench in the protection of liberty.[90] The importance of freedom of speech also emerges from its indispensable role in today's societies, firstly, in discovering the truth;[91] secondly, in terms of upholding human dignity;[92] thirdly, as one of the essential foundations of a democratic society.[93] Taking into consideration the above points, one can safely say that the importance of this freedom is unquestionable. However, what is questionable is the meaning and scope of this freedom.

While most people understand that free speech, at its basic level, means an individual's right to express an opinion without fear of censorship by the government, understanding what constitutes "free speech" is, still, complicated.[94] As one writer has described, "of the most disputed areas in contemporary human rights law is that of freedom of expression".[95] It is, whether in theory or in practice, an inherently ambiguous concept that requires definition, determination, and interpretation. We tend to think of freedom of speech mainly in terms of the right to criticise authority or reveal iniquity and malpractice, but it includes too the creation of works of art or literature

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[86] See freedom of speech provisions in the Constitutions of the Arabic States. See also Brown, N., *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (State University of New York Press, 2001); Ayubi, N., *Over-stating the Arab State: Politics and Society in the Middle East* (New York, London: I. B. Tauris; New Ed edition, 1996).

[87] Harris, D., Michael O'Boyle, and Chris Warbrick, Law of the *European Convention on Human Rights* (London: Butterworths, 1995) p. 372.

[88] See *Yates v. United States*, 354 US 298, 344 (1957); *Palko v. Connecticut*, 302 US 319 (1937). See Fiss, O., *Liberalism Divided: freedom of speech and the many uses of State power* (Boulder; Oxford: Westview, 1996) p. 9.

[89] *Dennis v. United States*, 341 U.S. 494, 580 (1951).

[90] *Hosking v Runting* [2005] 1 NZLR 1.

[91] Milton, J., (1644); Mill, J., Mill, J., *On Liberty* (1859), edited with an introduction by Gertrude Himmelfarb (London: Penguin, 1982); Oliver Wendell Holmes, dissenting, in *Abrams v. United States*, 250 US 616 (1919).

[92] Emerson, T., "Toward a General Theory of the First Amendment", *Yale Law Journal* 72 (1963) pp. 877-956, p. 879.

[93] Meiklejohn, A., *Political Freedom: The Constitutional Powers of the People* (Oxford University Press, 1965); Meiklejohn, A., "The First Amendment is an Absolute", *Supreme Court Review* (1961) pp. 245-266; Fiss, O., "Free Speech and Social Structure", *Iowa Law Review* 71 (1986) p. 1405-25.

[94] Duggal, K., and Shreyas Sridhar (2006) op. cit. p. 141.

[95] Welch, C.E., "The African Charter and Freedom of Expression in Africa", *Buffalo Human Rights Law* 4 (1998), pp. 103-122.

without censorship, a system of open justice "seen to be done" and the protection of journalists' sources.[96] While discussing whether free speech extends to accommodate acts of desecration of symbols such as the flag, Kabir Duggal and Shreyas Sridhar described free speech as a fluid term and commented that its ambit has been and continues to be prone not only to expand, but also to shrink in certain jurisdictions.[97]

Therefore, Professor Eric Barendt, the author of *Freedom of speech*, believes the debate in democratic countries about freedom of speech is, nowadays, concerned with the scope and meaning of free speech rather than with the merits of the general principle.[98] Such a debate, as Robert Trager and Donna Dickerson suggest, is not only of concern to political philosophers, but has to be answered by courts and committees, such as the U.S. Supreme Court and the Strasbourg institutions, and the U.N. Committee.[99] Determining what exactly free speech is, has proven to be a difficult problem for them, according to Frank Morrow, who believes that the problem which has plagued both men of law and philosophers of law is determining the meaning and scope of the phrase freedom of speech.[100] In addition to the difficulty of finding a comprehensive meaning and scope of speech because the concept of speech itself is so capacious,[101] diversity of legal systems from one region to another makes the attempts at finding a universal standard of free speech more complicated. The differing positions of nations and their internal jurisprudence with regard to freedom of speech brings to the fore the difficulty of attempting to arrive at a generalization when trying to determine the meaning and scope of freedom of speech. Different governments, different societies, and different people construe the right of speech differently and it is therefore impossible to define the scope in a strait-jacket formula.[102] These differences between constitutional and human rights are not only in their substance, but also in their structure. In some documents, free speech as a human right is worded broadly and vaguely, while in others it is written in narrow and precise terms; in some, the right to free speech seems absolute, yet others allow for overrides; in some, free speech is universally applicable within their jurisdictional scope, while others design free speech

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[96] Berlins, M., "Law on Trial: Free Expression, More Equal Than Others", 2003, Euro zone web page, p. 1, available at <http://eurozine.com/pdf/2003-10-15-berlins-en.pdf >
[97] Duggal, K., and Shreyas Sridhar (2006) op. cit. p. 141.
[98] Barendt, E., (2005) op. cit. p. 1.
[99] Trager, R., and Donna Dickerson, (1999) op. cit. p. 28
[100] Morrow, F., (1975) op. cit. p. 235-236.
[101] Schauer, F., "Freedom of Expression Adjudication in Europe and America: A Case Study in Comparative Constitutional Architecture," (2005), p. 1, online at SSRN: <http://ssrn.com/abstract=668523 >, also available in Nolte, G., (2005) op. cit. p. 49-69.
[102] Trager, R., and Donna Dickerson, (1999) op. cit. p. 4.

to apply only to some people, or at some times, or in some places.[103] Although such differences in the structure of rights pervade the topic of constitutional and human rights, the architectural issues, according to Professor Frederick Schauer, have been especially visible and especially contested with respect to the rights variously described as freedom of communication.[104]

Moreover, many meanings, or several other protected rights and freedoms, such as freedom of thought, opinion, conscience, religion, assembly, and association, have aspects of freedom of speech within their merits, and thus overlap with the meaning and scope of freedom of speech. One also must distinguish between three different though related notions: freedom of speech, freedom of the press, and freedom of information.[105] It is essential to keep the three separate, even though they are often used interchangeably. Although they relate to similar things, they are not identical. Further, freedom of speech, according to Merrills and Robertson, may frequently overlap with other interests, and indeed with other protected rights, for example the right to a fair trial, the right to respect for private life, and other rights.[106]

One more difficulty can be added in any attempt to determine the meaning and scope of freedom of speech. By examining free speech provisions in international and national laws and legislations, it can be observed that although these provisions emphasise the importance of freedom of speech and provide that governments should not infringe the right of people to free speech, they do not determine what free speech means, or what sort of activities come under the free speech coverage. For instance, Article 19 ICCPR, headed "Freedom of opinion, expression, and information", provides that: "*Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers*" and in whatever medium, "*either orally, in writing or in print, in the form of art, or through any other media of his choice.*" David Harris and Sarah Joseph pointed out that although a number of matters are specifically included within the scope of freedom of expression, it is not defined by the ICCPR.[107] Even though the HRC has decided a number of important cases involving expressive conduct, and is agreed that the right to freedom of expression does not depend on the mode of expression or on the contents of the message

[103] Schauer, F., (2005) op. cit. p. 49-69.
[104] *Ibid.*
[105] See Bezanson, R., "The New Free Press Guarantee", *Virginia Law Review* 63 (1977) p. 731-88; David Lange, "The Speech and Press Clauses", *UCLA Law Review* 23, (1975) p. 77-119.
[106] Robertson, A., and J.G. Merrills, *Human Rights in Europe, A study of the European Convention on Human Rights*, 4th Edition (Juris Publishing, Manchester University Press, 2001) 167-180.
[107] Harris, D., and Sarah Joseph (1995) op. cit. p. 394.

thus expressed,[108] the HRC has never announced any standards, for example, for distinguishing pure speech from conduct on the one hand, and expressive conduct from conduct without communicative value on the other. Other examples can be given here of non-determination of the meaning and scope of free speech, but here at regional levels. In ECHR, although Article 10 confirms that everyone has the right to freedom of expression and lists the rights and responsibilities of people and institutions in terms of the right of free speech, this article does not mention the form of activities to which free speech can apply or types of speech that are protected: "*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers*." According to some, "the European Commission and Court have been less concerned with the definition of freedom of expression, but rather with states' justification for interference." [109] Indeed, the Strasbourg institutions have never attempted to offer a general definition of free speech, but have simply decided on a case-by-case basis whether the words involved are of a free speech nature. In ACHPR, the vagueness of the clause defining and limiting the individual's right to express his/her opinions is obvious. Article 9, which concerns the right to free speech, states: "1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law." In his reading of this article, which is drafted in very general terms, Fatsah Ouguergouz, the author of *The African Charter on Human and Peoples' Rights*, has indicated several shortcomings of the article that make the meaning and scope of the right unclear.[110] A fourth example can be given here. Neither in the USA First Amendment nor in the Fourteenth Amendment, articles which are concerned with freedom of speech, does the lawmaker specify the meaning of freedom of speech: "Congress shall make no law ..., abridging the freedom of speech... " While the language of the First Amendment seems clear, the purpose, scope, and function of its meaning have been subject to dispute.[111] No specific meaning of freedom of speech and scope can be found in the First Amendment

[108] *Kivenmaa v. Finland*, CCPR/C/50/D/412/1990 (1994).
[109] Janis, M., Richard Kay, and Anthony Bradley, *European Human Rights Law, Text and Material*, 2nd edition (Oxford: Clarendon Press, 2000) p. 170. See also Burnheim, S., "Freedom of Expression on Trial: Case Law under European Convention on Human Rights", (1997), online at URL <www.derechos.org>.
[110] Ouguergouz, F., *The African Charter on Human and Peoples' Rights : a comprehensive agenda for human dignity and sustainable democracy in Africa*, (The Hague : Martinus Nijhoff Publishers, 2003), p. 160-164.
[111] Hemmer, J., *Communication Law, The Supreme Court and the First Amendment* (Lanham: Md, Austin and Winfield, 2000) p. 1.

clause.[112] According to Meiklejohn, the phrases of the First Amendment are not "plain words, easily understood."[113]

The above point shows clearly the difficulties that might face any attempt to determine a universal concept of freedom of speech. It shows that the vagueness or ambiguity of the term freedom of speech is not the only problem. The diversity of legal and political systems on the one hand, and the overlap between this freedom and other freedoms, rights, and interests on the other hand also contribute to complexity of the issue. Thus, to reach a universal concept of freedom of speech requires, in addition to a careful analysis of the laws governing freedom of speech and an extensive examination of courts' and committees' decisions with regard to freedom of speech cases, an in-depth study of the philosophical theories that have been formulated in this regard. It must be remembered that the whole concept of free speech set out in declarations, conventions, treaties, constitutions and laws is essentially a distillation of centuries of philosophical discussion and debate. There are, as said, reasons behind free speech and they remain open to discussion and reinterpretation.[114] As a result, the scope of this study will not be confined to the legal definition of free speech, but will be extended to examination of the philosophical principles of free speech. Here I am not saying that the concept of free speech must be set in stone by philosophical principles, because it is, as Professor Fish says, the world of politics and law that also decide what we can and cannot say, not only the world of abstract philosophy.[115] So in order to examine to how the world of politics and law has shaped the law of free speech, a detailed comparison will be drawn between these free speech provisions, particularly with regard to the justifications and limitations of freedom of speech in order to clarify the theme of the universal system on this subject. The opinions formed by free speech scholars will also be examined and critically analysed. The reports of international organisations will be very helpful for this study; numerous free speech cases and communications of the Human Rights Committee[116] the European Court on Human Right and the European Commission,[117] and the United States Supreme Court[118] will be examined.[119]

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[112] BeVier, L., "The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle", *Stanford Law Review* 30 (1978) pp. 299-358.

[113] Meiklejohn, A., (1961) op. cit p. 247. See also Sunstein, C., *Democracy and the Problem of Free Speech* (New York: Free Press, 1993) p. xii, xvi. p. 307; Chafee, Z., Freedom *of Speech and Press* (New York: The Carrie Chapman Catt Memorial Fund, INC, 1955) p. 42.

[114] Sturges, P (2006) op. cit. p. 184.

[115] Fish, S., *There's No Such Thing as Free Speech and It's a Good Thing, Too* (New York: Oxford University Press, 1994) p. 116.

[116] Hereinafter HRC or the Committee. The view and comments of HRC are accessible online through (1) the United Nation High Commissioner for Human Rights at URL

So, the examination in this study of free speech as a universal value, actually consists of two related, yet discrete, topics and discussions: 1) the general subject of "free speech" as a matter of philosophy and an exercise in logic entirely divorced from the realities of international law of free speech 2) the reality of 'free speech' as a matter of international law within the context of speech protected by the free speech provisions, represented in two of most significant legal sources of the right to freedom of expression, namely, Article 19 of the ICCPR and Article 10 of the ECHR, both are based on the UDHR, which this study presumes it to be the standard of the human right of freedom of speech.[120] In examining these two topics, I will try to establish a generalised standpoint on free speech in the light of international law and analyses its compatibility with the concept of freedom of speech in the American law of freedom of speech and Islamic law of freedom of speech. The Islamic concept of freedom of speech I will apply, as the foundation of comparison, will be that embedded in the Holy *Quran* and *Sunnah*, the "Magna Carta" of human rights in Islam. This is because in a human rights context, the primary source of human rights in Islam comes from Islamic law. According to Mulism scholars, Islamic law, commonly known as *Shariah*, is based on the *Quran* and on *Sunnah*, or the traditions of the Prophet Muhammad.[121] This means the *Quran* and *Sunnah* are the only criteria that the study will rely on in order to understand Islam's view towards freedom of speech. It also means that the study will neglect the historical and current reality of freedom of speech in Muslim states, because no serious room for Islamic law, as some observe, do exists in any current legal system.[122] The mandates of Islam, according to the Iranian Nobel laureate Shirin Ebadi, have been wrongly conflated with old customs and traditions that are incompatible with

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>http://www.unhchr.ch/html/menu2/6/hrc.htm >; (2) the University of Minnesota Human Rights Library at URL <http://www1.umn.edu/humanrts/undocs/html >.

[117] Hereinafter the ECtHR, the European Court, EComHR, the European Commission and the Strasbourg institutions. Online access to the case-law of the European Court of Human Rights and the European Commission of Human Rights though The European Court of Human Rights HUDOC Portal at URL <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database >

[118] Hereinafter the Supreme Court. For the Court's decisions, see FindLaw for Legal Professionals at URL <http://www.findlaw.com/casecode/supreme.html >

[119] Due to time and space limitations, the study will not discuss in detail Article 9 of the Charter, although some reference to it will be made whenever necessary.

[120] The universality of rights and freedoms declared in the Universal Declaration is unquestionable according to a World Conference on Human Rights in Vienna in 1993, where 171 states reasserted the universality of all human rights as the birthright of all human beings. Some, however, assume that the evidence of universal acceptance of universal rights appears more in ICCPR than UDHR, which has been declared by only 56 States whereas the number is double in the former. See Smith, *R., Textbook on International Human Rights* (Oxford: Oxford University Press, 2007) p. 29.

[121] An-Na'im, A., (1992) op. cit. p. 33. Kamali, M., (1997) op. cit. p. 327.

[122] Khan, M., *Human Rights in the Muslim World: Fundamentalism, Constitutionalism, and International Politic* (Durham, N.C.: Carolina Academic Press, 2003) p. 143.

human rights.[123] Moreover, in the view of Professor Kamali, historical reality is not a good indicator of normative values and the history of Islamic government is no exception.[124] A distinction, thus, must be made, as Mahjabeen Islam-Husain demands, between what Islam teaches as opposed to what Muslims have made of Islam.[125] In this regard al-Mawdudi says:

> Most people in the West generally treat Islam and Muslims as synonymous and mutually interchangeable terms, often saying 'Islam' where they ought to say `Muslims', and vice versa. We must, therefore, be clear in our minds at the very outset that `Islam today' does not signify the present condition of the Muslims. Nor, indeed, could it mean Islam of the present age, for Islam is an eternal reality that does not change with the passage of time, and cannot therefore, be different in any age from what it was or will be at any other period of time.[126]

Abid Ullah Jan comments that "it is not Islam that is impoverishing the land of Islam. "It should be clear to everyone that there is no Islamic state; *ergo*, there is no purely Islamic society in existence."[127] Likewise, Asad insisted that "there has never existed a truly Islamic state after the time of the Prophet and of the Madinah Caliphate,"[128] so that "the past thousand years or so of Muslim history can offer us no guidance."[129] A seminar on Human Rights in Islam held in Kuwait in 1980 insisted in the above point by concluding that:

> It is unfair to judge Islamic law (*Shariah*) by the political systems which prevailed in various periods of Islamic history. It ought to be judged by the general principles which are derived from its sources... Regrettably enough, contemporary Islamic practices cannot be said to conform in many aspects with the true principles of Islam. Further, it is wrong to abuse Islam by seeking to justify certain political systems in the face of obvious contradictions between those systems and Islamic law...[130]

The argument concerning freedom of speech in Islam, therefore, unlike the viewpoint of Daniel Pipes, who believes that the answer to the question whether Muslims will

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[123] Pal, A., "Shirin Ebadi Interview", *The Progressive Interview*, September 2004, Issue, at <http://www.progressive.org/mag_intv0904>
[124] Kamali, M., (1997) op. cit. p. 14.
[125] Islam-Husain, M., "Islam Supports Gender Equality", *in* Hurley, J., (2000) op. cit p. 77.
[126] Mawdudi, A., *Islam Today*, online at URL <http://www.masmn.org/documents/Books/>
[127] *Jan, A.*, "Though Muslims Exist Today, Islam Does Not", *American Journal of Islamic Social Sciences*, 22.3 (2005) p. 69.
[128] Asad, M., *The Principles of State and Government* (University of California Press 1980) p. v.
[129] Ibid, p. vi.
[130] See International Commission of Jurisits, Human Rights in Islam: Report of a Siminar held in Kuwait in December 1980 (1982) p. 7. Cited in Baderin, M., (2001) op. cit. p. 37. See also p. 221-222 of Javaid Rehman's book, *Islamic state practices, international law and the threat from terrorism: a critique of the 'Clash of civilizations' in the new world order* (Oxford: Hart publishing, 2005)

modernise or not lies not in the *Quran* or in the Islamic religion,[131] and unlike Ali Abdul-Wahed Wafi, who argues that neither the *Quran* nor the *Sunnah* explicitly mention anything about the right of freedom of speech, nor its implementation or practice,[132] will be developed through an examination of the Basic Code, (1) Islamic text (the *Qur'an*,) [133] and (2) prophetic traditions (the *Sunnah*.) [134] This method of dealing with the examination of human rights in Islam was adopted also by United Nations High Commissioner for Human Rights, in a letter before the event called "Enriching the University of Human Rights: Islamic Perspectives on the Universal Declaration of Human Rights" in November 1998. According to this letter, "Islam is understood in terms of *Shariah* (*Qur'an* and *Sunnah*) and not in terms of traditions or practices that may vary and mix with historical heritages."[135] The purpose of such an attitude was to "allow the seminar to focus on the Islamic perspective with a minimum of potential controversy which could overshadow the central purpose." My purpose, in fact, is not much different than the mentioned purpose.

It is is worth noting that consideration will also be paid to some select periods of Islamic history, in particular the era of the four Rightly-Guided Caliphs (*Khulafa al-Rashidun*),[136] about whom the Prophet Muhammad said, "Follow my *Sunnah* and the *Sunnah* of my Rightly-Guided Caliphs. Hold to it and stick fast to it."[137] This era of

[131] Pipes, D., "The Muslims are Coming! The Muslims are Coming!" *National Review*. November 19, 1990.

[132] Wafi, A., *Huquq al-Insan fil-Islam*. 5th edition (Cairo: Dar al-Nahdha Al-Misriyyah, 1979) p. 238.

[133] The *Quran* is the Holy Book of Muslims. It t the basic source of Islamic law. The *Quran*, the revealed speech of God, is an immutable text therefore there is consensus among Muslims that each word of the *Quran* is sacred. The *Quran* is aimed at establishing basic standards for Muslim societies and guiding Muslims in terms of their rights and obligations. For more see, Niyazi, A., *al-Quran al-Karim, Mu'ajiza wa Ta'shri* (Mecca: Matbu'at Nadi Mecca al-Thakafi al-Adabai, 1991) p. 27-29, 67, 203; Ali Goraish, *Al-Mashroiyyah al-Islamiyyah Al-Ulia*, 4th edition (Cairo: Maktabat Wahbah, 1991) p. 90; Khan, A., (2003) op. cit. p. 350. The *Quran*ic quotations in this study are normally from Yousif Ali, *The Meaning of Holy Quran* 9th Rev edition (US: Amana Books Inc., 1998)

[134] The *Sunnah* is the second source of the Islamic law. It represents model behavior and is referred to as the tradition and practices of Prophet Muhammad. The *Sunnah* explains, clarifies, applies, and interprets the *Quran*'s text in the contexts of concrete cases that arose during the period of prophecy. The *Sunna* is subordinated to the *Quran*. Yet the two together constitute the Basic Code. See Al-Nimer, A., *Fi Rihab al-Sira wal-Sunnah*, No. 1 Al-*Sunnah wal-Tashri* (Cairo: Dar al-Kutob al-Islamiyyah, n.d.) p. 8.-9; al-Qaradawi, Y., Al-*Sunnah, Masdar lil-Ma'arifa wal-Hadhara* (Qatar: Markz Buhuth al-*Sunnah* wal-Sirah, 1995); See Irshad Abdal Haqq. "Islamic Law: An Overview of Its Origin and Elements". *The Journal of Islamic Law and Culture*, 7.1 (2002) pp. 27-82.

[135] Littman, D., "Universal Human Rights and Human Rights in Islam", *The Midstream Magazine*, February/March 1999.

[136] The Rightly-Guided Caliphs refers to the first four caliphs who took office following the demise of the Prophet Muhammad and laid down the foundations of republican Islam, namely, Abu Bakr al-Siddiq (died 12 A.H./634), Umar ibn al-Khattab (died.23 A.H./643), Uthman ibn Affan (died. 35 A.H./656) and Ali ibn Abi Talib, (died. 40 A.H./661). Al-Suyuti, *Tarikh al-Khulafah* (Beirut: Dar Ibn Hazm, 2003) p. 26-150; Al-Buti, M., *Fiqh al-Sira m'a Mujiz li Tarikh al-Khilafa al-Rashidah*, 10th edition (Beirut: Dar al-Fikr al-Mu'asir, Damascus: Dar al-Fikr, 1996) pp. 509-558.

[137] Reported by Abu Dawud, *Sunnan Abu-Dawud*, no. 4, *hadith* no. 4607, p. 200.

Rightly-Guided Caliphs is considered by many scholars as an ideal Islamic political model, because in that era, Mashood Baderin says, there was a whole lot of recorded practice which supports the view that freedom of speech was an acknowledged right from the inception of Islamic law.[138] It is, as Shaikh Taha al-Saboonji says, a distinguished period in Islamic history.[139] The fundamental principles of democracy in Islam, Abdul Aziz Said and Jamil Nasser say, were practised throughout the era of the Prophet Muhammad and his four Rightly-Guided Caliphs.[140] According to Kamali, "the first four decades of Islamic government under the Rightly-Guided Caliphs was closely guided by the normative teachings of the *Quran* and *Sunnah*, but then dynastic and political interests began to dominate government practices in Muslim lands."[141] The argument, thus, will be developed through an examination of the Islamic text (the *Quran*) and tradition (Prophetic *Sunnah*), and a consideration of some select periods of Islamic history (the eras of the Rightly-Guided Caliphs). In addition, the interpretations of earlier schools of law of these two sources of Islamic Law, besides the more recent contributions by Muslim jurists who have advanced fresh interpretations of freedom of speech in the light of the changing realities of contemporary Muslims societies, will also be discussed.

I.4. Study Limitations

Generally speaking, this study will examine the major points that can help in understanding the views of modern and international law and Islamic law on the right of freedom of speech. However, any study concerned with freedom of speech can be very broad. As with every study, time and space impose limitations, it is not the purpose of this study to provide a comprehensive review of all the legal aspects relating to the right to freedom of speech. Therefore, the study will concentrate on, analyse and discuss only the aspects of freedom of speech that are stated in the outline of the chapters below.

Moreover, it is imperative to say that although an example of hate speech, the Danish cartoons, cited above, this study will not confine its scope to hate speech cases. The example of the Danish cartoons was no more than a starting point. The problem with

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[138] Baderin, M., (2003) op. cit. 127. See also Al-Mulaigi, Y., *Mabadi al-Shura fil-Islam* 2nd edition (Alexandria: Muasassat al-Thakafi al-Jami'ah, 1980) p. 11; Al-Nasser, K., "*Azmat al-Democratya fil-Watan al-Arabi*", *al-Democratya wa Huquq al-Insan al-Arabi*, 2nd edition (Beirut: Markz Derasat al-Wihdah al-Arabiyyah, 1986) p. 38.
[139] In Hamad al-Samad, *Nizam al-Hukm Fi A'hd al-Khulafah al-Rashdeen* (Beirut: al-Mu'assasat al-Jamiiyyah, 1994) p. 11.7.
[140] See Said A., and Jamil Nasser, (1980) op. cit. p. 77.
[141] Kamali, M., (1997) op. cit. p. 14; Ibn Ashur, I. *al-Taswurat al-Dusturiyyah fil-Islam al-Sunni* (Morocco: Dar al-Fanak 1999) p. 6-10.

regard to freedom of speech between the West and Islam cannot be simplified to a difference in how to deal with speech that contains hatred. Thus, this study will try to look at the big picture, not a small one, and to identify the common ground between West and Islam with regard to free speech issues in general.

Furthermore, it is necessary to specify another important point concerning the scope of this study: while the term 'expression' is not found in the texts of some of free speech laws such as the First Amendment: "Congress shall make no law ..., abridging freedom of speech", in fact, it is commonly used in declarations, conventions and laws. For example, it found in Article 19 of the UDHR, Article 19 of the ICCPR, Article 10 of the ECHR. This raises a major question, whether the term expression has the same meaning as the term speech. Linguistically, expression is showing thoughts, when one says what one thinks or shows how one feels using words actions, while speech is someone's ability to talk, or an example of someone talking. Free speech/freedom of speech is the right to say or write what one wants.[142] While some, however, argue that there is no evidence that courts draw any distinction between freedom of speech and freedom of expression,[143] others believe that there is some difference between them on the base of the latter the term being somewhat broader.[144] For example, altogether, there are six rights guaranteed by the First Amendment: religion, speech, press, assembly, association, and petition. Collectively, they protect what is known as the freedom of expression. This means that term speech in the U.S. constitution does not include freedom of media or press whereas speech, opinion, press, and media clauses may be analysed under an umbrella "expression" standard, in the above Human Rights laws. The aim of this clarification is to say that freedom of thought, freedom of opinion, freedom of media, and freedom of religion are outside the scope of this study. In other words, this study deals with the right to free speech, or what is more commonly referred to as freedom of speech.[145] Accordingly, this study does not concern itself with analysing the full scope of ICCPR's Article 19 or ECHR's Article 10; it is only concerned with how these provisions protect the right to free speech.

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[142] *Cambridge Learner's Dictionary*, under letter [E] p. 233-letter [S] p.614. (Cambridge, Cambridge University Press, 2003)

[143] Barendt, E., *Freedom of Speech* (Oxford: Clarendon, 2005) p. 75.

[144] Schauer, F., Free *Speech: a Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982) p. 52; Duggal, K., and Shreyas Sridhar, "Reconciling Freedom of Expression and Flag Desecration: a Comparative Study." *Hanse Law Review*, 2.1 (2006) p. 142; Harris, D., and Sarah Joseph, *The International Covenant on Civil and Political Rights and United Kingdom law* (Oxford: Clarendon Press, 1995) p. 394.

[145] Schauer, F., (2006) op. cit. p. 8, f. 7. See also, Schauer, F., "The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience." *Harvard Law Review*, 117 (2004) pp. 1765-1809.

This should not lead us to conclude that the word speech in the First Amendment or in this study has a completely different meaning than the word expression, which is used in other laws. It is common in Europe, unlike in the United States, to refer to "freedom of expression" rather than to "freedom of speech," presumably because the word "speech" seems too narrow, except in a technical sense, to encompass writing, printing, publishing, painting, photography, and all of the other things that the right seems plainly to include.[146] Though there is no indication that courts believe in this classification, some believe that freedom of speech clauses protect expression but not action.[147] Freedom of expression, according to this view, contains many of the basic elements of free speech, but it is a consciously broader and more expansive notion. It clearly embraces the freedom to speak, write, print, and publish but it also means that pure physical acts can attract the same kind of protection. Freedom of expression may also protect the communication of ideas or opinions through purely physical acts.

This claim cannot be taken for granted. The fact is that the term speech in the U.S. has been extended to a generous sense of 'expression'- verbal, non-verbal, visual, symbolic. The artistic work includes a variety of types of expression enjoying this broad protection. Recently, freedom of speech has been commonly understood as encompassing full freedom of expression, including the freedom to create and distribute movies, pictures, songs, dances, and all other forms of expressive communication. According to Joshua Waldman, "When the First Amendment refers to "speech" it does not do so in a strictly literal sense. That is, it does not refer only to vocal communication."[148] In this regard, Frederick Schauer explained, "I used the word 'speech' to mark my inquiry, but nothing turns on the ordinary language extension of that term. When we refer to a principle of free speech, we commonly assume it encompasses conduct that is not 'speech' in ordinary language, such as displaying an oil painting, carrying a banner, or wearing a political button."[149] Therefore, it can be concluded that free speech protects not only oral and written words, but it also protects forms of communication including parades, dances, artistic expression, picketing, wearing armbands, burning flags, and crosses, commercial advertising, charitable

[146] Schauer, F., (2006) op. cit. p. 8, f. 7.
[147] Morrow, F., "Speech, Expression, and the Constitution", *Ethics*, 85.3 (1975) pp. 235-242. p. 239; Feldman, D., *Civil Liberties and Human Rights in England and Wales*, 2nd edition (Oxford University Press, 2002) p. 754.
[148] Waldman, J., "Symbolic Speech and Social Meaning", *Columbia Law Review*, 97.6 (1997) pp. 1844-1894, p. 1847. See more details regarding the difference between speech and expression in Morrow, F., (1975) op. cit. p. 236.
[149] Schauer, F., "The phenomenology of speech and harm", *Ethics* 103.4 (1993) p. 635; Schauer, F., "Towards an Institutional First Amendment", *Minnesota Law Review* 89 (2005b) p. 3. n. 10.

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solicitation, rock music, sleeping in a public park.[150] So, the term speech in this study should be understood according to its meaning in American free speech law. Thus, it can be said that at this point I agree with the Professor Eric Barendt's statement that the term freedom of speech has not a narrower scope than the term freedom of expression. Otherwise, as Barendt says, one would expect courts such as the European Human Rights Court to give coverage to a wider range of expressive conduct than U.S. courts, since the former are required to apply 'freedom of expression' provisions; the latter, freedom of speech limb of the First Amendment. According to Barendt, there is no evidence that courts draw any distinction between the two concepts, so the two words are used interchangeably in this study.[151] In short, this study uses the terms 'free speech' and 'freedom of expression' synonymously, though use of the term 'speech' will prevail in this study except if the word 'expression' is mentioned in laws, conventions and courts' decisions.

I.5. Study Outline

There are four parts which make up the bulk of the study. These four parts, each consisting of two chapters, are preceded by this introductory chapter and are followed by a concluding chapter. In Part One, I examine the modern concept of the meaning of speech by shedding some light on how different human rights laws and courts have interpreted the meaning of speech. The part aims to create a framework for understanding the meaning of speech (the Study's first Question). The second part is devoted to freedom of speech theories. In the first chapter of this part, I examine three philosophical justifications for the protection of freedom of speech, namely, the truth theory, the self-fulfilment theory and the democracy theory (the Study's second Question). The second discusses the philosophical grounds for limiting freedom of speech. It focuses on three criteria that provide adequate reason for limiting freedom of speech (the Study's third Question). It starts with an examination of one of the first, and best, defences of free speech, based on the harm principle. The discussion moves on to an assessment of the argument that speech can be limited because it causes offence rather than direct harm. I then examine arguments that suggest speech can be limited for reasons of democratic values. Part three of the study illustrates the argument developed initially by examining freedom of speech limitations according to international of freedom of speech, on the one hand, and the First Amendment, in the other hand (the

[150] Stevens, J., "Freedom of speech --The Elliott Lecture Series", *Yale Law Journal* 102.6 (1993) p. 1298.
[151] Barendt, E., (2005) op. cit. p. 75.

Study's fourth Question). In the last part of the study, I search for the concept of freedom of speech in Islamic doctrine and examine whether this perspective is compatible with the system of freedom of speech in the modern world (the Study's Fifth Question). The concluding chapter offers a summary, conclusion, and recommendations (the Study's main Question).

Part One

In Search of the Universal Meaning of Speech

Part One Outline

For any society to operate under a system of freedom of speech, it must define two important issues. Firstly, what is the meaning of speech or what forms of activities should be considered as speech and subsequently be coverage by free speech law? Secondly, what is the scope of freedom of speech, in other words, what sort of speech should be covered by a rule protecting freedom of speech? Thus, there are two principal issues here. The first concerns the meaning of speech and the second involves the scope of freedom of speech. The first concerns the form and the mode or vehicle of speech and the ideas expressed and the second the content of freedom of speech. While the former cases present questions of coverage, we usually ask coverage questions in the form, is that speech;[152] the latter, of protection.[153] Because the second issue is concerned with types of speech that are protected by free speech law, thus, I have decided to discuss it in the third part of this study which discusses unprotected types of speech- limitations of freedom of speech, in other words. The discussion of this part of the study, then, revolves around the question, what is the meaning of speech? It is important at this stage to determine which type of activities should be guaranteed, and which restraints should be imposed on speech.[154] Although separating speech and conduct requires "an analytical scalpel",[155] the focus of this part must be direct towards ascertaining what is speech; consequently to be given the protection of speech, and what is non speech; to be subject to laws[156] The methodology adopted here will be as follows: the jurisprudence of the international human rights law (ICCPR and ECHR) and the American First Amendment will be analysed so as to determine the meaning of speech. However, because the volume of case-law that address and determine the meaning of speech of the former is so small, in contrast with the cases of limitations of free speech, and the period of time in which they have come about is so short (ICCPR 1966-ECHR 1951,) drawing reliable conclusions about the meaning of speech is clearly not feasible.

[152] Tien, L., "Publishing Software as a Speech Act", *Berkeley Technology Law Journal* 15.2 (2000) pp. 629-712, p. 630.
[153] Schauer, F., "Categories and the First Amendment: A Play in Three Acts", *Vanderbilt Law Review* 34,(1981) pp. 265-307, p. 265, 267-68
[154] Scanlon, T., *The Difficulty of Tolerance, Essays in Political Philosophy* (Cambridge University Press, 2003) p. 9. Hemmer, J., (2000) op. cit. p. 1.
[155] *Mabey v. Reagan*, 537 F. 2d 1036, 1045 (9th Cir. 1976). See also Ely, J., "Flag Desecration: A Case Study in the Roles of Categorisation and Balancing in First Amendment Analysis", *Harvard Law Review* 88.7 (1975) p. 1482, 1495. "The... Court thus quite wisely dropped the 'speech-conduct' distinction as quickly as it had picked it up"; Henkin, L., "The Supreme Court, 1967 Term-Forward: On Drawing Lines." *Harvard Law Review* 82 (1986) p. 63, 79-80.
[156] Emerson, T., (1963) op. cit. p. 917.

It might be possible in America, using the much greater volume of data available in that country. The US courts have grappled at length with the meaning of speech. This is why in some parts of this chapter the reliance will be more on the American freedom of speech law by using the rich case-law arising under the First Amendment.[157] Further, Article 19 ICCPR or Article 10 ECHR focus neither on the philosophy of protecting the right nor on the definition of freedom of expression as the US legal system does. Finally, in contrast to both, HRC and ECcHR, the US Courts tend not to address the facts in a communicative conduct case at the case-specific level, but rather approach the issue at a much broader level of generality. This has helped the US Courts to draw a clear line between speech, in its pure form, on the one hand, and communicative conduct on the other.

Generally speaking, declarations, conventions, treaties, constitutions and human rights laws, on the one hand, and courts and legal commentators, on the other hand, are agreed that a verbal or printed attack on government and other institutions of states and people should be considered as a speech which is covered by free speech law. The ICCPR, for example, was very clear in stating that speech might be expressed "either orally, in writing or in print, in the form of art." This is called "Pure Speech," where the speech does not include any sort of action. The first chapter of this part examines pure speech as a traditional form of free of speech. However, communication of political, economic, social, religious and other views and information is not accomplished solely by face to face speech, broadcast speech, or writing in newspapers, periodicals, and pamphlets. Ideas and information may be conveyed through means other than writing and speaking. There is, for example, "Speech Plus," which includes demonstrating, picketing, marching, distribution of leaflets and pamphlets and addresses to publicly assembled audiences, and many forms of "sit-ins." There is also a class of conduct now only vaguely defined which has been denominated "Symbolic Speech or Symbolic Conduct," which includes actions and symbols such as flag desecration and draft-card burnings. The last two are known in free speech law as 'expressive or communicative conduct' or conduct which conveys ideas. Chapter Two of this part explores how the legal nature of conduct, such as symbolic speech and speech plus, have affected the protection of conduct in freedom of speech law. The chapter explains the courts' general expansion of freedom of speech protection to conduct.

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[157] For the same opinion see, Chesterman, M., *Freedom of Speech in Australian Law: A Delicate Plant?* (Burlington, VT: Ashgate Publishing Co., 2000) p. 308.

Chapter Two

II. Pure Speech

II.1. Written and Spoken Words

Pure speech is the most common form of speech. In its simple definition, it is speech that lacks any action[158] or it is speech which conveys ideas through speaking or writing.[159] Face-to-face discussions, speech at public meetings, classroom debates, and most things said on television and radio, telephone, books, magazines, newspapers and internet are examples of pure speech. People communicate ideas more through the spoken word[160] than they do through the written (printed) word. Both oral and written speech, however, are classified into the pure speech category. In spite of the fact that the term speech commonly refers to oral communications in ordinary usage,[161] and the printed word is not speech in the ordinary sense of that term,[162] and though written words have some differences from spoken words,[163] they are covered by rules protecting freedom of speech.

Words, whether spoken or written, are ways to exchange thought, as the philosopher John Locke said. It is through words, that one person conveys her/his thoughts to another person. To Locke, an idea was anything the mind could think about. Thoughts, then, are expressed in words to transfer the ideas from one person to another. When we hear or read words, we are being given pictures of the ideas in the other person's mind-

[158] Although some, Sadurski in particular, believe that speech is never pure, it always has a plus (conduct) which makes the speech possible. Sadurski, W., *Freedom of Speech and its Limits* (London: Kluwer Academic Publishers, 1999) p. 44. Emerson as well believes that "the clearest manifestations of expression involve some action, as in cases of holding a meeting, publishing newspaper, or merely talking". Emerson, T., (1969) op. cit. p. 18. See Barendt, E., (2005) op. cit. p. 78. John Austin in his book *How to Do Things with Words* concludes that every utterance (with a few limited exceptions) is really an act, and that what we originally thought of as a "performative" is simply a verb that makes performing an act explicit (Oxford: The Clarendon Press, 1962) p. 6-11.

[159] According to Black's Law Dictionary, pure speech is words or conduct limited in form to what is necessary to convey the idea. This type of speech is given the greatest Constitutional protection. Bryan Garner (ed), *Black's Law Dictionary*, 8th edition (U.S.: Thomson West, 2004) p. 1436.

[160] The paradigm of speech is the spoken word. Moon, R., (2000) op. cit. p. 28.

[161] Stevens, J., (1993) op. cit. p. 1296

[162] See Barendt, E., (2005) op. cit. p. 75.

[163] According to Christopher Shumway, the difference is that "On the one hand, reading is typically performed privately through a method of "silent scanning", which tends to draw people apart. You are probably not communicating directly with anyone else as you read this paper, nor are you likely to be reading two newspapers at once. Further, it can be argued that the writer subjects the reader to a monologue, I "speak" to you through the words on the page, but there is no way for you to give direct feedback-it is one-way communication. On the other hand, speaking draws people together. It is participatory in that it requires both speakers and listeners and it offers opportunities for dialogue." See Shumway, C., 'Freedom Without Opportunity': A Critical History of the First Amendment and the Mass Media" Union for Democratic Communications, State College, Pennsylvania (October 2002). Moon, R., (2000) op. cit. p. 28.

the person's thoughts.[164] Commenting on Locke's theory, Frederick Copleston says that ideas are the immediate object of thought; and to communicate our ideas to others and to learn others' ideas we stand in need of 'sensible' and public signs. This need is fulfilled by words.[165] It should be noted, however, that when we do not exercise our freedom of expression in troublesome ways, we may atrophy our best impulses.[166] Accordingly, the fact that views are expressed in polemical language does not take them outside the scope of freedom of speech.[167] Further, words that transfer ideas must be understood in the broad sense. In *Muller and others v. Switzerland*, the ECtHR ruled: "Article 10 does not ... distinguish between the various forms of expression.[168] Similar to Article 10 ECHR, freedom of expression laid down in Article 19 ICCPR must be understood in the broad sense.[169] According to the HRC, in *Ballantyne v. Canada*, freedom of expression "must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others, which are compatible with Article 20 of the ICCPR, of news and information, of commercial expression and advertising, of works of art, etc.; it should not be confined to means of political, cultural or artistic expression." [170] As in the case of the international human rights law, the First Amendment's protection of freedom to convey ideas is not confined to political speech, though it has been given a preferred position. A wide range of speech is protected by the First Amendment, even profane words.[171]

II.2. Artistic Speech

Besides spoken and written words, which may convey opinions or information, the category of pure speech also includes artistic speech. Artistic speech is a form of speech that uses images instead of words, although the meaning of the term has been expanded broadly recently. [172] Examples of artistic speech are pictures, drawing, paintings,

[164] See Locke, J., *An Essay Concerning Human Understanding*, edited by Maurice Cranston (N.Y.: Collier, 1965) p. 231-233; Kretzmann, N., "The Main Thesis of Locke's Semantic Theory" in Tipton, I.C., *Locke on Human Understanding: Selected Essays* (Oxford: Oxford University Press, 1977) pp. 123-140.
[165] Copleston, F., *A History of Philosophy*, vol. 5 (London: Burns and Oathe Ltd., 1961) p. 102.
[166] Marlette, D., "Freedom of Speech and the Editorial Cartoon: 'Cartoons are the acid test of the First Amendment", *Nieman Reports,* Winter 2004, p. 23.
[167] *Jersild v. Denmark* - 15890/89 [1994] ECHR 33.
[168] *Muller v. Switzerland,* 10737/84 [1988] ECHR 5.
[169] Rishworth, P., Grant Huscroft, Scott Optican, and Richard Mahoney, *The New Zealand Bill of Rights* (Melbourne: Oxford University Press, 2003) p. 311.
[170] *Ballantyne v. Canada,* CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993).
[171] *Gooding v. Wilson,* 405 US 518 (1972).
[172] See generally Becker, H., *Art Worlds* (Berkeley; London: University of California Press, 1982)

cartoons, charts, graphs, diagrams, sculpture, carving, and musical compositions.[173] Just like speech that uses words, artistic speech has the power to sway public opinion and is often used to do so. As Doug Marlette comments, cartoonists reach the reading public in a place where words just cannot go.[174] Cartoonists have made genuine contributions to beneficial change by pointing out the abuses, hypocrisies and absurdities of those in power.[175] Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society.[176] The Danish cartoons, published recently, were a means, according to *Jyllands-Posten*, to convey political messages.[177]

This category of speech has a strong claim to free speech coverage. In international human rights law, the word speech has been extended to include artistic speech. Article 19 ICCPR provides that speech need not be in the form of words to be protected, it might be "in the form of art." In *Hak-Chul Shin v. Republic of Korea Communication*, the author, a professional artist, who painted a canvas-mounted picture, was arrested on a warrant by the Security Command of the National Police Agency. The painting, entitled "Rice Planting (Monaeki)" was subsequently described by the Supreme Court as "enemy-benefiting expression." The HRC, however, observed that the picture plainly fell within the scope of the right of freedom of expression protected by Article 19, paragraph 2; it recalled that this provision specifically refers to ideas imparted "in the form of art."[178] Although the ECtHR has been rather less inclined to stand out in favour of artistic expression,[179] according to the Court's interpretations of Article 10 ECHR, all forms of expression, through any medium, including painting,[180] image,[181] poems,[182] books,[183] press,[184] films,[185] videos,[186] and statements in radio interviews,[187] are covered by the freedom of expression clause. The coverage, then, is not limited to the written or

[173] Trager, R., and Donna Dickerson, (1999) op. cit. p. 23.
[174] Marlette, D., "Freedom of Speech and the Editorial Cartoon: 'Cartoons are the acid test of the First Amendment." *Nieman Reports,* Winter 2004, p. 22.
[175] Sturges, P., (2006) op. cit. p.186. Spiegelman, A"Drawing Blood: Outrageous Cartoons and the At of Outrage." *Harper's Magazine,* June 2006, p. 43–52.
[176] *Muller v. Switzerland,* 10737/84 [1988] ECHR 5.
[177] See *supra* Introductory Chapter, p. 1-2.
[178] *Hak Chul Shin v. Republic of Korea* CCPR/C/80/D/926/2000 (2000).
[179] Harris, O'Boyle, Warbrick, (1995) op. cit. p. 401.
[180] *Muller v. Switzerland,* 10737/84 [1988] ECHR 5.
[181] *Chorherr v. Austria,* 13308/87(1993) ECHR 36.
[182] *Karata v. Turkey,* 23168/94 (1999) ECHR 47.
[183] *Handyside* v. *United Kingdom,* 5493/72 [1976] ECHR 5.
[184] *Spycatcher* case, *Observer and Guardian v. United Kingdom,* 13585/88 (1991) ECHR 49. *The Sunday Times v. United Kingdom* (No 2) - 13166/87 (1991) ECHR 50.
[185] *Otto-Preminger Institute v. Austria,* 13470/87 [1994] ECHR 26.
[186] *Wingrove v. the United Kingdom* - 17419/90 [1996] ECHR 60.
[187] *Barthold v. Germany,* -8734/79 [1985] ECHR 3.

spoken word, but has also been held to cover artistic expression. In *Muller and others v. Switzerland*,[188] the Court, partly relying on Article 19 ICCPR,[189] stated:

> Article 10 does not specify that freedom of artistic expression, in issue here, comes within its ambit; but neither, on the other hand, does it distinguish between the various forms of expression. As those appearing before the Court all acknowledged, it includes freedom of artistic expression- notably within freedom to receive and impart information and ideas- which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Confirmation, if any were needed, that this interpretation is correct, is provided by the second sentence of paragraph 1 of Article 10, which refers to 'broadcasting, television or cinema enterprises', media whose activities extend to the field of art.

As is the situation in international law of free speech, art or artistic speech is considered "speech" and is thus constitutionally covered by the First Amendment. No Supreme Court Justice, according to Baker, has accepted view that first amendment does not protect artistic speech.[190] The U.S. Supreme Court has been unequivocal that the First Amendment "looks beyond written and spoken words as mediums of expression" that deserve constitutional protection.[191]Although the Court in *Mutual Film Corp. v. Industrial Commission* had said that the exhibition of moving pictures was not to be regarded as part of the press of the country or as organs of public opinion, this decision was overruled by *Joseph Burstyn, Inc v. Wilson*, in which the Court decided that:

> Films are an important medium for communicating ideas in society, something not lessened by the fact that they are also designed to entertain. Expression by means of film thus deserves the same protections of liberty under the First Amendment as those for newspapers, books, magazines, etc.[192]

In fact, the Supreme Court has interpreted the First Amendment's protection of artistic speech very broadly. It extends not only to books, theatrical works and paintings, but also to posters, television, music, videos, comic books and computer software[193]- whatever the human creative impulse produces, as Justice David Souter listed in *NEA v. Finley*.[194]

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[188] *Muller v. Switzerland*, 10737/84 [1988] ECHR 5.
[189] Harris, O'Boyle, Warbrick, (1995) op. cit. p. 377.
[190] See Baker, E., *Human Liberty and Freedom of Speech* (Oxford; New York: Oxford University Press) 1989, p. 26, 27.
[191] *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 US 557 (1995).
[192] *Joseph Burstyn, Inc v. Wilson*, 343 US 495 (1952).
[193] Halpern, S., "Harmonizing the Convergence of Medium, Expression & Functionality: A Study of the Speech Interest in Computer Software", *Harvard Journal of Law & Technology* 14.1 (2000) p. 151.
[194] *NEA v. Finley* 524 US 569 (1998)

II.3. The Preferred Position of Pure Speech

"There is America, hit by God in one of its softest spots. Its greatest buildings were destroyed, thank God for that. There is America, full of fear from its north to its south, from its west to its east. Thank God for that," Osama Ibn Laden said in spoken words broadcast on Al-Jazeera TV, praising the tragic events of September 11, 2001.[195] Three years later, Robert Kilroy-Silk wrote in his article "We Owe The Arabs Nothing" in *the Sunday Express*. "We're told that the Arabs loathe us. Really? ... What do they think we feel about them? That we admire them for being suicide bombers, limb-amputators, women-repressors?"[196] While these remarks might strongly and widely be condemned because these words, whether spoken or written, would incite hatred, inspire violence, and cause real harm as well as offence to people, champions of freedom of speech tended to assume too quickly the 'sticks and stones' principle: "Sticks and stones may break my bones but words will never hurt me," and so freedom of speech is absolute or at least in a preferred position.[197] A similar claim might be raised against the protesters of Danish cartoons, most of which depicted the Islamic Prophet Muhammad. Likewise, the speech delivered by Pope Benedict XVI at the University of Regensburg in Germany. The Pope quoted a passage that originally appeared in the "*Dialogue Held With A Certain Persian, the Worthy Mouterizes, in Anakara of Galatia*", written in 1391,[198] which says: "Show me just what Muhammad brought that was new and there you will find things only evil and inhuman, such as his command to spread by the sword the faith he preached."[199] Very recently, the 'sticks and stones' principle might be raised against the racist sentences directed by the white British contestants in the television show "Big Brother" against an Indian actress and Bollywood star, Shilba Shetty.[200]

By the 'sticks and stones' principle is meant that people cannot hurt you with bad things they say or write about you. The saying unintentionally captures an essential distinction made in the law of free speech: the law properly concerns itself with punishing violent actions rather than mere violent expression or even the advocacy of

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[195] Osama bin Laden Speeches - Broadcast on Qatar's Al-Jazeera TV, on October 7, November 3, and 26, 2001, at URL <http://www.september11news.com/OsamaSpeeches.htm>.
[196] Kilroy, R., "We owe Arabs nothing," *Sunday Express*, January 4, 2004.
[197] For the discussion of 'sticks and stones' principle, see Schauer, F., "Uncoupling Free Speech." *Columbia Law Review*, 92 (1992) pp. 1321-57; Alexander, L., "Banning Hate Speech and the Sticks and Stones Defense", *Constitutional Commentatory*, 13 (1996) pp. 71-100.
[198] Bostom, A., "The Pope, Jihad and "Dialogue", *The American Thinker*, September 19, 2005.
[199] Lecture of the Holy Father - "Faith, Reason and the University Memories and Reflections," *Libreria Editrice Vaticana*, September 12, 2006, at URL <http://www.vatican.va/>.
[200] Lawson, D., "Jade is Crude and Abusive, but her Freedom of Speech Extends to the Right to be Rude", *The Independent*, January 21, 2007.

violence. [201] This method of communication, in contrast to pure conduct and communicative conduct, receives some form of heightened free speech protection. Therefore, determining where speech ends and action begins, or drawing a clear distinction between pure speech and communicative conduct, [202] helps speech as counterpart to conduct, in general, or pure speech as counterpart to communicative conduct, in particular, to be fully covered by a rule protecting freedom of speech. According to Robert Trager and Donna Dickerson, countries granting freedom of speech regulate actions more than they limit speech.[203] This preferred position depends, as said, on drawing a line between "speech" and "conduct."[204] It is worth indicating that this preferred position of pure speech, as Chapter Eight will show, is greatly welcomed by some Muslim scholars who try to confine freedom of speech only in its pure form so they can exclude demonstrations and other types of public protests from free speech realm. Likewise, in the West, some who distinguish speech from communicative conduct, such as Justice Black, whom it was said that freedom of speech in the U.S., "bears his personal trademark," [205] do this in order to give, ostensibly, "absolute" protection to pure speech.[206] Justice Black, however, went further than claiming a preferred position for pure speech. He demanded no less than absolute protection for ideas and information which deliver through pure speech forms. According to Justice Black's absolute doctrine, there is no any halfway mark. The choice is between an absolute status for freedom of speech and an absolute infringement of the same freedom.[207] Justice Black believes that if freedom of speech is treated as something less than an absolute, the constitutional protection for free speech will cease to afford any protection at all. [208] Accordingly, all expressions should be protected with no

[201] Peck, R., "The First Amendment and Advocacy of Violence: An Overview", First Amendment Centre, <http://www.firstamendmentcenter.org>

[202] See Baer, S., "Violence: Dilemmas of Democracy and the Law, in Kretzmer, D., and Francine Kershman Hazan (eds). *Freedom of Speech and Incitement Against Democracy* (Boston: Kluwer, 2000) p. 88.

[203] (1999) op. cit. p. 18.

[204] Smith, S., (2002) op. cit. p. 1296.

[205] Kalven, H., "Upon Reading Mr. Justice Black on the First Amendment." *U.C.L.A L. Rev.* 14 (1967) p. 428, 429. Magee, J., *Mr. Justice Black: Absolutist on the Court* (Charlottesville: University Press of Virginia, 1979) p. xii.

[206] See *Speiser v. Randall*, 357 U.S. 513 (1958).

[207] See Black's Book, *A Constitutional Faith* (New York, Knopf, 1968) p. 45; Cahn, "Justice Black and First Amendment 'Absolutes': A Public Interview." *N.Y.U. Law Review* 37 (1962) p. 552-53; Cahn, "The Firstness of the First Amendment," *Yale Law Journal*, 65 (1965) p. 262, 275; Mendelson, W., "On the Meaning of the First Amendment: Absolutes in the Balance." *California Law Review* 50 (1962); Beth, L., "Mr. Justice Black and the First Amendment: Comments on the Dilemma of Constitutional Interpretation." *The Journal of Politics*, 41.4 (1979) pp. 1105-1124,

[208] Magee, J., (1979) op. cit. p. 6; Black, (1960) op. cit. p. 874,875.

exceptions,[209] "whatever the subjects discussed,"[210] and whether they incite to action whether legal or illegal against government,[211] incite racial hatred,[212] interfere with fair trial,[213] contain pornography and obscenity,[214] or constitute defemation,[215] "without any ifs, buts, or whereases."[216] In his dissenting in the case of *Carlson against London*, Black was very clear in expressing his idea of absolute status of First Amendment, he said: "My belief is that we must have freedom of speech, press and religion for all or we may eventually have it for none. I further believe that the First Amendment grants an absolute right to believe in any governmental system, discuss all governmental affairs, and argue for desired changes in the existing order."[217] However, this does not mean, according to Justice Black's doctrine, that the free speech law also grant the right to engage in the conduct of picketing or patrolling whether on publicly owned streets or on privately owned property."[218] While maintaining an 'absolutist' position, Black drew sharp a line between 'speech' and "conduct which involved communication."[219] The American law of free speech, Black says:

> take away from government, state and federal, all power to restrict freedom of speech, press, and assembly here people have a right to be for such purposes. This does not mean, however, that these amendments also grant a constitutional right to engage in the conduct of picketing or patrolling, whether on publicly owned streets or on privately owned property[220]

If the meaning of absolute protection of pure speech is clear, the question here is: What does the preferred position of freedom of speech mean? In a very simple answer it means that other values, which are almost equally precious as freedom of speech, must on occasion be sacrificed in order to preserve free speech. This approach offers a very simple and plain answer to this question by assuming that freedom of speech is the most

[209] See *Konigsberg v. California*, 366 US 36 (1961); *Braden v. United States*, 365 US 431 (1961); *Wilkinson v. United States*, 365 US 399 (1961); *American Communications Ass'n v. Douds*, 339 US 382 (1950); *Communist Party v. SACB*, 367 US 1 (1961); *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *New York Times Co. v. United States*, 403 U.S. 713 (1971).
[210] *Mishkin v. New York*, 383 U.S. 502 (1966).
[211] Mendelson, W., "Black, H., and Judicial Discretion." *Political Science Quarterly*, 85.1 (1970) pp. 17-39, p. 27. See also Black's opinion in *Konigsberg v. California*, 366 US 36 (1961); *Yates v. United States*, 354 US 298 (1957); *Dennis v. United States*, 341 US 494 (1951).
[212] *Beauharnois v. Illinois*, 343 US 250 (1952).
[213] *Bridges v. California*, 314 US 252 (1941).
[214] *Smith v. California*, 361 US 147 (1959); *Mishkin v. New York*, 383 US 502 (1966); *Roth v. United States*, 354 US 476 (1957).
[215] See his dissenting in *Curtis Publishing Co. V. Butts*, 388 US 130 (1967).
[216] *New York Times v. Sullivan*, 376 US 254, 1964
[217] *Carlson v. London*, 342 US 524 (1952).
[218] *Cox v. Louisiana*, 379 US 559 (1965).
[219] *Brown v. Louisiana*, 383 US 131 (1966); *Adderley v. Florida*, 385 US 39 (1966).
[220] *Cox v. Louisiana*, 379 US 536 (1965).

important right among all the rights listed in the any human rights document and it must stand in a preferred position, because without it we could not have true democracy and all other freedoms would lack foundation and might well not survive.[221] The concept of preferred position, as McKay argues, implies a balancing of the preferred freedom at issue against any other interest which stands in opposing counterbalance.[222] This approach assumes that when one of those other freedoms or rights such as freedom of privacy, or right to a fair trial contradicts with freedom of speech, the court should give the latter freedom a preferred position relative to all other rights. The answer, according to one of the supporters of this approach, Robert McKay, "really should be that easy, that it has always been so, and that there now remains no room for doubt that it is so."[223]

In the context of the ECHR, the fact that the form of publication was a novel (written words) was taken into account when assessing whether it was necessary in a democratic society for the author's words to be censored. In the recent case of *Alinak v. Turkey*, the applicant wrote a novel, using fictional characters, based on the real events concerning the ill-treatment of residents of an actual village by members of the Turkish security forces. The copies of the book was seized in accordance with an order published by the State Security Court, because it creates in the mind of the reader powerful hostility towards the injustice to which the villagers were subjected in the tale. In deciding whether certain passages might be construed as inciting readers to hatred, the Court ruled that the seizure of the book amounted to a violation of freedom of speech "even though some of the passages from the book seem very hostile in tone." The Court considered that "their artistic nature and limited impact reduced them to an expression of deep distress in the face of tragic events, rather than a call to violence."[224] A similar consideration also can be found in *Arslan* v. *Turkey*.[225]

To give an example from the American free speech law, when speech is classified as pure speech, the preliminary injunction before the courts must be subjected to the most rigorous level of the First Amendment. This means that the court will presume that any attempt by the government to suppress freedom of speech is unconstitutional unless it can meet the "heavy burden" of proof that free speech is outweighed by other interests. Accordingly, any government regulation of pure speech is presumptively invalid and

[221] McKay, R., "The Preference for Freedom", *New York University Law Review* 34, (1959) pp. 1182-1227, p. 1182, 1188.
[222] *Ibid.* p. 1193-4.
[223] *Ibid.* p. 1182, 1222.
[224] *Alinak v. Turkey* 40287/98 [2005] ECHR 188.
[225] *Arslan v. Turkey* 23462/94 [1999] ECHR 41.

reviewed with strict judicial scrutiny.[226] In order to withstand strict scrutiny, the regulation must be both in furtherance of a compelling state interest and narrowly tailored to the furtherance of that interest. In contrast, when we review under the intermediate scrutiny standard, such as in the case of communicative conduct, the existence of an important or substantial government interest might justify the regulation.[227] For example, if a state passes a law banning certain publication, the Court will strictly scrutinize the law and ask: Is there a compelling government interest in regulating the publication? Does the ban further that state interest? And, is the rule "narrowly tailored" to serve the state interest or is it more extensive than necessary? It is important to indicate several cases which have been examined by the courts which prove this favourable position. In *Cox v. Louisiana*, as an example of a speech plus case, the Supreme Court confirmed the idea of not equalising the treatment of speech plus with pure speech by rejecting the notion urged by appellant that the First Amendment affords the same kinds of freedom to those who would communicate ideas by conduct, such as patrolling (marching, and picketing on streets and highways) as this amendment affords to those who communicate ideas by pure speech.[228] Likewise in *Giboney v. Empire Storage & Ice Co*, the Supreme Court adopted the same approach by deciding:

> It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.[229]

Even in the case of symbolic speech, which is closely akin to pure speech,[230] the Court decided that a government must have a sufficiently important interest to impose restriction on symbolic speech cases.[231] In the *Street v. New York* case, which concerned a symbolic speech (burning the state's flag,) Justice Black, in his dissent, confirmed the distinction between pure speech on the one hand and symbolic speech and speech plus on the other.[232] In *Wisconsin v. Mitchell*, the Supreme Court unanimously upheld a statute that imposed stiffer sentences for racially motivated assaults than for other types of assaults. The Court reasoned that the statute did not violate the First Amendment

[226] See *Simon & Schuster v. Crime Victims Board*, 502 US 105 (1991)
[227] *United States v. O'Brien* 391 US 367 (1968).
[228] *Cox v. Louisiana*, 379 US 536 (1965).
[229] *Giboney v. Embire Storage & ICE CO*, 336 US 490 (1949).
[230] *Tinker v. Des Moines School District*, 393 US 503 (1969)
[231] *United States v. O'Brien*, 391 US 367 (1968).
[232] *Street v. New York*, 394 US 576 (1969).

because it was aimed primarily at regulating conduct, not speech.[233] The Supreme Court adopted the same perspective also in *Shuttlesworth v. City of Birmingham*.[234]

It is concluded from these cases that "if it is communication that is to be protected, then linguistic communication, spoken and written words comprises the largest proportion of what we are protecting."[235] Professor Eric Barendt gives an apt description of the privileged position of pure speech. According to Barendt, "Speech [spoken and written words] which offends the majority of people could not legitimately be prohibited, while there would be no comparable inhabitation in restraining public conduct - love-making or leaving litter in Hyde Park - which has similar offensive characteristics."[236]

So, what is the reason that lies behind this favoured position? What was in the mind of Professor Frederick Schauer, when he asserted that "non-speech forms of self-expression or self-realisation or exercise of autonomy or acts of dissent are commonly bounded by the harm principle (my freedom to swing my arm ends at the tip of your nose), but apparently harmful speech is not,"[237] or when he wrote that speech is less subject of regulation than other forms of conduct having the same or equivalent effect, therefore, according to him, any governmental action to achieve a goal ... must provide a stringer justification when the attainment of that goal requires the restriction of speech when no limitations on speech are employed."[238] There is a view that there is an important categorical distinction between people talking and arguing and people coercing one another through some kind of action. This distinction should be in favour of the former because it is a harmless activity.[239] According to free speech advocate Franklyn Haiman, the special protection for freedom of speech is because words, pictures, and other symbolic behaviour are, by their very nature, far less likely than physical conduct to reach that level of harmfulness, that we must presume in our minds and the minds of those who make and administer our laws, the distinction between speech and action.[240] While limitations on a person's action are usually imposed to avoid physically harmful impact upon others or the society, speech has, at most, only

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233 *Wisconsin v. Mitchell,* 508 U.S. 476 (1993).
234 See *Shuttlesworth v. City of Birmingham*, 394 US 147 (1969).
235 Schauer, F., (1982) op. cit. p. 96.
236 Barendt, E., *Freedom of Speech* (Oxford, Clarendon, 1985) p. 1.
237 Schauer, F., (1993) op. cit. p. 641.
238 Schauer, F., (1982) op. cit p. 7-8. See also Lawrence, F., "Speech, Behaviour, and the Interdependence of Fact and Value," in Kretzmer, D., and Francine Kershman Hazan (2000) op. cit. p. 45.
239 Scanlon, T., (1972) op. cit. p. 204-223; Brison, S., "The Autonomy Defense of Free Speech", *Ethics* 108.2 (1998a) pp. 312-339, p. 319.
240 Haiman, F., *Speech Acts and the First Amendment* (Carbondale: Southern Illinois Press, 1993) p. 85.

mental impact and is therefore harmless.[241] In the view of Professor Edwin Baker, the reason behind the claim of special protection for speech is "related to the implicit recognition that speech behaviour is normally non-coercive. Speech typically depends for its power on increasing the speaker's own awareness or voluntary acceptance of listeners."[242]

Others believe that speech is privileged over other liberties, not because it has no harmful impacts on others -it certainly has- but because of the "lesser harm hypothesis."[243] The lesser harm hypothesis "is about the likelihood that speech will be a necessary condition for the harmful acts of others less often than conduct will be a necessary condition for the harmful acts of others."[244] Accordingly, "the class of speech should be comparatively immunised from control because its consequences are less than the consequences of other forms of conduct."[245] The exercise of freedom of speech, suggests Michael Bayles, "is less likely to interfere with the exercise of other liberties than is, say, liberty of action."[246] In *Freedom of Expression: A Critical Analysis*, Professor Martin Redish adopted the same view as Michael Bayles regarding the lesser harm hypothesis. He wrote, "It is almost certainly true in the overwhelming majority of cases that speech is less immediately dangerous than conduct."[247]

There is also another opinion which recognizes that the principle of freedom of speech does not depend on denying that speech causes harm to others; speech is not self-regarding action. According to this viewpoint, if speech did not harm others, it would not need special protection, but would fall under the general liberal presumption in favour of liberty except where harm to others is caused. But speech can harm others; the principle of freedom of speech makes an exception to the exception concerning harm to others. Even when speech does cause harm to others it is given special protection from regulation.[248] Illustrating this point, Susan Brison comments, "Given that a background assumption of our constitutional democracy is a general principle of

[241] Moon, R., (2000) op. cit. p. 19.
[242] Baker, E., (1989) op. cit. p. 56.
[243] Schauer, F., (1993) op. cit. p. 639.
[244] *Ibid.* p. 635.
[245] *Ibid.* p. 639.
[246] Bayles, M., "Mid-Level Principles and Justification," in Pennock, J., and John Chapman (eds), *Nomos XXVIII: Justification* (New York: New York University Press, 1986) p. 54.
[247] Redish, M., *Freedom of Expression: A Critical Analysis* (Charlottesville, Va: Michie Co, 1984) p. 5. See also Dworkin, R., *A Matter of Principle* (Cambridge, Mass: Harvard University Press, 1985) p. 386; Dworkin, R., *Taking Rights Seriously* (London: Duckworth, 1978) p. 200-203; Shiffrin, S., *The First Amendment, Democracy and Romance* (Harvard University Press, 1990); Raz, J., "Free Expression and Personal Identification", *Oxford Journal of Legal Studies*, 11.3 (1991) pp. 303-24, p. 304.
[248] Hurley, S., "Imitation, Media Violence, and Freedom of Speech", *Philosophical Studies*, 117.1/2 (2004) pp. 165-218, p. 191.

liberty stating that the government may justifiably interfere with individual liberties only to prevent people from harming others, if speech is harmless there is no need to give it special protection"[249] One of the people primarily associated with the "harm" principle is the philosopher John Stuart Mill, who argued in his famous work *On Liberty* that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[250] Mill applied this principle in a far broader context than speech, of course, but he applied an especially strict scrutiny to claims of harm with relation to speech, and argued that nearly every manner of speech ought to be outside the regulation of law. What Mill meant by his principle "harm" is that, as Caroline West explains, "levels of harm that would normally be sufficient to justify regulating the conduct which causes them may be not be sufficiently great to justify restrictions in cases where the harm is caused by speech or expression."[251] The view presented by Mill and others about the harm theory will be discussed in depth in Chapter Five of this study, which provide more than one justification for restricting speech even in its pure form.

II.4. Regulating Pure Speech

Although the view that deviant pure speech is less actually or potentially harmful than deviant conduct, or communicative conduct, has a certain prima facie validity,[252] this does not, and should not, mean that a particular communication -even pure speech- should be protected from regulation.[253] The restriction of pure speech, spoken or written material, or artistic speech is possible.[254] There is no room for absolutism in freedom of speech world, Professor Archibald Cox says.[255] According to Edwin Baker, coverage by the free speech principle does not mean that a particular communication should be

249 Brison, S., "Speech, Harm, and the Mind-Body Problem in First Amendment Jurisprudence", *Legal Theory* 4 (1998b) p. 39-61. p. 40; Brison, S. (1998a) op. cit. p. 314-316; Schauer, F., (1982) op. cit. p. 63-65, Schauer, F., (1984) op. cit. p. 1292-1293.
250 Mill, J., (1859) op. cit. 86.
251 West, C., "Pornography and Censorship", *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.), 2005, at <http://plato.stanford.edu/archives/fall2005/entries/pornography-censorship>.
252 See Crawford, M., "Free speech: the Canadian model" (PhD Thesis, Oxford University, 1996) p. 23.
253 Baker, E., (1989) op. cit. p. 125.
254 See Turk, D., and Louis Joinet, "The right of freedom of opinion and expression: Current problem of its realisation and measures necessary for its strengthening and promotion" In Sandra,C., *Striking a Balance: Hate speech, Freedom of Expression and Non-discrimination* (International Centre Against Censorship, Human Rights Centre, University of Essex, 1990) p. 35. See also, Greenawalt, K., *Speech, Crime and the Uses of Language* (Oxford University Press, 1989) p. 90-104; Greenawalt, K., "Insults and Epithets: Are They Protected Speech?" *Rutgers Law Review*. 42 (1990) p. 298.
255 Cox, A., *Freedom of Expression* (Harvard University Press, 1981) p. 4; Sadurski, W., (1999) op. cit. p. 37.

protected from regulation in the circumstances of the case.[256] In 1982, in *Brown v. Hartlage*, the US Supreme Court ruled that liability for criminal solicitation is not prevented by the First Amendment even if the solicitation was accomplished by pure speech.[257] Before this, a long time ago, in 1949 to be exact, in *Giboney v. Empire Storage & Ice Co.*, the Court ruled that criminal conduct is not immunized simply because the conduct was accomplished by pure speech.[258] In the case of *Rice v. Paladin*, the defendant had published instructional literature on how to successfully commit assassination and evade police detection. A reader of the book murdered someone in a fashion identical to the methods advocated in the book. Based on the specific language of the text and the surrounding circumstances, the Court of Appeals for the Fifth Circuit held that the criminal aiding and abetting doctrine could apply to hold the publisher liable for assisting in the murder. The Court first recognized that the First Amendment is not a defence to criminal aiding and abetting simply because the culpable conduct was in the form of speech. The court then observed that speech may be punished if it is intended to facilitate unlawful conduct and such conduct is likely.[259] This means that there is no distinction between speech and conduct, so long as the act of speaking is sufficiently imbued with the requisite level of *intent* to assist in the commission of a crime.[260] As Professor Frederick Lawrence pointed out, behaviour designed to instil serious fear certainly may be criminalised, and it does not matter whether it takes the form of spoken words alone, physical conduct alone, or some combinations of the two.[261]

Regulating speech is the topic of coming chapters of this study; therefore, here, the study concentrates on demonstrating that even speech in its pure form might be regulated. Regulable pure speech shares a common thread in one or both of two ways. First, certain categories of pure speech are considered to be injurious (or imminently injurious) in the very utterance of the words.[262] For example, defamatory speech injures another's reputation,[263] while fighting words are inseparably linked to prospective

[256] Baker,E., (1989) op. cit. p. 125.
[257] 456 U.S. 45 (1982)
[258] 336 U.S. 490 (1949)
[259] 128 F.3d 233 (4th Cir. 1997). See Weissblum, L., "Incitement to Violence on the World Wide Web: Can Web Publishers Seek First Amendment Refuge?" *Mich. Tel. Tech. L. Rev.* 6 (2000), p. 35
[260] See *Freeman v. United States*, 761 F.2d 549, 552 (9th Cir. 1985)
[261] Lawrence, F., "Violence-Conducive Speech: Punishable Verbal Assault or Protected Political Speech?" in Kretzmer, D., and Francine Kershman Hazan, (2000) op. cit. 24.
[262] See *Chaplinsky v. New Hampshire*, 315 US 568 (1942).
[263] See *Milkovich v. Lorain Journal Co.*, 497 US 1 (1990) (stating that one's reputation is harmed by statements provably false).

violence.[264] According to Professor Alexander Bickel, some speech "may create a climate, an environment in which conduct and actions that were not possible before become possible... ."[265] The second rationale is that certain categories of speech contain negligible or diminished social value. Obscene speech is the most obvious type of speech that lacks social value.[266] Even when speech is not injurious and does not lack social value, it might be restricted. For example, copyright laws are permitted, even in a society that deeply values freedom of speech, such as American[267] or European.[268] I can not copy out Bob Woodward's latest book, *State of Denial: Bush at War,* and put my name on it and peddle it to the world at large. Such a restriction, in the view of Professor Nimmer, although it "in some degree encroaches upon freedom of speech ... is justified by the greater public good in the copyright encouragement of creative works."[269]

It can be said, then, that while it may be true that pure speech has some form of heightened free speech protection, it is equally true that not all pure speech is protected under the free speech law. A study of the policies underlying existing categories of speech that might be regulated, according to ECHR, reveals that, generally speaking, speech, even pure speech, can be regulated if its restrictions or penalties are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. A similar conclusion can be reached when studying Article 19 ICCPR. Chapter Seven of this study reveals how the HRC, in *Faurisson v. France*, considered that restriction on spoken words did not violate the right to freedom of expression in Article 19. Mr. Faurisson was fined for having said during an interview that: "No one will have me admit that two plus two make five, that the earth is flat, or that the Nuremberg Tribunal was infallible. I have excellent reasons

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[264] See *Chaplinsky*, 315 U.S. at 571-72 (stating that fighting words are categorically injurious or imminently injurious).
[265] Bickel, A *The Morality of Consent* (Yale University Press, 1975) p. 72.
[266] See *infra Miller* case. p. 157.
[267] See generally Erwin Chemerinsky, "Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act is Non-Constitutional", *University of Southern California Law School* 24 (2002) p. 83; Fraser, *S.*, "The Conflict Between the First Amendment and Copyright Law and Its Impact on the Internet." *Cardozo Arts and Entertainment Law Journal*, 16.1 (1998) p. 21-31.
[268] *De Geïllustreerde Pers N.V. v. The Netherlands*, (1976) 8 D & R 5, EComHR. See Bernt Hugenholtz, Copyright and Freedom of Expression in Europe", (2000) at <http://www.ivir.nl/publications/hugenholtz/PBH-Engelberg.doc>
[269] Nimmer, M., "Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?" *UCLA L. Rev.* 17 (1970) p. 1192.

not to believe in this policy of extermination of Jews or in the magic gas chamber [...] I would wish to see that 100 per cent of all French citizens realize that the myth of the gas chambers is a dishonest fabrication (*est une gredinerie*), endorsed by the victorious powers of Nuremberg in 1945-46."[270] The author claimed that his right to freedom of expression under Article 19 of the ICCPR protected such speech. This is, certainly, a pure speech case; however, the HRC held that the restriction was necessary under Art 19(3.)[271] In the context of American law of free speech, some categories of pure speech, as Chapter Six will show, are either completely outside the scope of First Amendment or afforded a lower level of protection.

II.5. Chapter Summary

Pure speech, which is defined as speech that lacks any action, is the most common form of speech. Words, whether spoken or written, have a higher protection than other kinds of speech. The ideas and information which are conveyed by an act of art has the same protection as spoken and written materials. However, this should not be interpreted to mean that pure speech is immunised from being regulated. The claim that speech is a harmless activity or causes a lesser harm is, as some say, a misguided claim which is disappearing from the more thoughtful legal literature, though it is still a common refrain in popular debates. The reasons given above explain why most free speech provisions provide for the possibility of lawfully restricting freedom of speech.[272] Words can hurt more than a punch directed to someone's face.[273] The message may be hurtful or offensive or contradict with other principle of democracy. In fact, all the proponents of the claim acknowledge that speech costs. The above point should not be understood as suggesting that a subtle verbal snub is identical to punching someone on the nose. I do not call criticising politicians and shooting them identical, though they might convey the same message. Nor do I disagree with the idea that restrictions on this form of speech receive strict scrutiny, and consequently, they should rarely be upheld. What I am saying is that even speech that consists merely of spoken or written words can be regulated on certain grounds, which will be illustrated in Chapter Five of this study.

[270] See Lipstadt, D., *Denying the Holocaust: The GrOweng Assault on Truth and Memory* (New York: Free Press, 1993) p. 16-17.
[271] *Faurisson v. France*, 550/1993.
[272] Hofmann, R., "Incitement to national and racial hatred: The legal situation in Germany" In Coliver, (1990) op. cit. p. 160.
[273] See Brison, S., (1998a) op. cit. p. 317.

This leads me to point out that to be covered by freedom of speech principle is different than to be protected. As Eric Barendt says, the distinction between the *coverage* and the *protection* of a free speech clause is relevant to questions about the meaning of speech.[274] It does not follow from the coverage of some type of communication by a free speech clause, as Frederick Schauer has pointed out, that a particular instance of it should be protected from regulation in the circumstances of the case.[275] For example, pure speech, which is often claimed by some scholars and some courts' decisions to have priority over other types of speech, can be excluded from the free speech protection. This happens, for instance, when spoken or written words or artistic speech pose a threat to national security, or public order, or destroy the reputation of others. The distinction between coverage and protection is significant. It enables courts to treat spoken and written words as speech, without thereby being committed to their protection in every situation.

[274] Barendt, E., (2005) op. cit. p. 75.
[275] Schauer, F., (1982) op. cit. p. 89-92. The distinction between coverage and protection can be found also in Baker, E., (1989) op. cit.

Chapter Three

III. Communicative Conduct

The television image of Iraqis dancing, waving and tearing down portraits of former Iraqi President Saddam Hussein, throwing shoes and chipping away at the base of the Saddam's statue became one of the enduring images of the war in Iraq and will be forever seared into the minds of viewers.[276] What this example is intended to show is that not all forms of expression involve spoken or written words; there is some conduct, such as demonstration, that contains no writing or speaking, but still expresses an opinion.[277] In other words, just as speech, which has a special protection, may consist of spoken or written words, so speech may sometimes be accompanied by conduct (i.e., demonstration), and sometimes consist solely of symbols (i.e., wearing a headscarf '*hijab*'). These activities are classified as communicative conduct, whether symbolic speech or speech plus. While pure speech, as Chapter Two demonstrated, does not arouse much dispute about its legal nature, whether it is speech or not and whether it should be covered by law or not, other types of speech, such as symbolic speech or speech plus, create more problem. The crucial question is not whether conduct that communicates ideas is protected or not, the question is whether it is speech. To formulate the question in a different way, does conduct such as symbolic speech and speech plus fall under the free speech guarantee? When, if ever, does speech lose its protection on the grounds that it is really just conduct?[278]

On the one hand, some, for example, Justices Black and Douglas, claim that the free speech law covers only speech and not actions.[279] According to Justice Douglas, "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulations."[280] Chief Justice William Rehnquist in *Street v. New York* dismissed the idea that flag burning was a form of symbolic speech. On the contrary, he stated, "Flag

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[276] Brockes, E., Behind the lines, *The Guardian*, 10-04-2003.
[277] Conduct, according to Black's Law Dictionary, means personal behaviour, deportment, mode of action, or any positive or negative acts. Black's Law Dictionary, (2004). However, in speech law, as the followeng pages illustrate, it is much more, according to Baer, S., (2000) op. cit. p. 87.
[278] Greenawalt, K., (1995) op. cit. p. 29.
[279] Black in his dissent in *Cox v. Louisiana*, 379 US 536 (1965).
[280] *Bakery & Pastry Drivers Local v. Wohl*, 315 US 769 (1942)

burning is the equivalent of an inarticulate grunt or roar that ... is most likely to be indulged in not to express any particular idea, but to antagonize others...."[281] In the same vein, Chief Justice Earl Warren takes the view that "an apparently limitless variety of conduct can be labelled speech whenever the person engaging in the conduct intends thereby to express his idea" is rejected.[282] On the other hand, others, such as Professor Stanley Fish, argue that speech is no different from conduct.[283] This view criticises the idea that there is a fundamental, categorical dichotomy between speech and conduct, that the dichotomy is clear and generalizable enough to form one of the principal structures of our law and democracy.[284] It argues that a distinction between speech and non-speech has no content, "Speech is conduct, and actions speak."[285] The collapse of the distinction between speech and conduct or speech and action, according to this view, is obvious. Nowadays the principle of freedom of speech gives *special* protection to a particular category of conduct, which is referred to as 'speech'. Therefore, some of freedom of speech scholars have often found the speech/conduct distinction hopelessly problematic.[286]

While the first view, adopted by Justice Black, by distinguishing pure speech from communicative conduct, aims to give the former absolute protection, the view that is expressed by Fish, by denying any distinction between speech and conduct, aims to remove any privilege of the right to free speech, whether in its pure form or communicative conduct form, over other liberties.[287] My viewpoint is completely different from both of the above views. I disagree with the above conclusion on three grounds. Firstly, there are no indications in law that freedom of speech inherits the legal protection only when people express their ideas through spoken and written words. Otherwise, a huge amount of free speech exercise would be excluded from the freedom of speech clause, which would make freedom of speech devoid of content. Secondly, we should not look whether the object of the restriction can be categorised as "speech" or

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[281] *Street v. New York*, 394 US 576 (1969). See Morrow, F., (1975) op. cit. p. 236.
[282] *United States v. O'Brien*, 391 US 367 (1968)
[283] Fish, S., *The Trouble with Principle* (Cambridge, Mass.: Harvard University Press, 1999) p. 106.
[284] Matsuda, M., Charles Lawrence III, Richard Delgado, and Kimberle Williams Crenshaw, *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder, Colorado: Westview Press, 1993)
[285] Henkin, L., (1986) op. cit. p. 63, 79. See also, Ely, J., (1975) op. cit. p. 1482, 1495.
[286] Schauer, F., "On Deriving Is-Not from Ought-Not." *U. Colo. L. Rev.* 64 (1993b) p. 1087, 1092. (agreeing with Fish, S. that "there is no coherent distinction between speech and action"); Schlag, P., "How to Do Things with the First Amendment." *U. Colo. L. Rev.* 64 (1993) p. 1095, 1099, 1100.
[287] Gates, H., "Truth or Consequences: Putting Limits on Limits, in The Limits of Expression in American Intellectual Life", ACLS Occasional Paper, No. 22-New York: American Council of Learned Societies, 1993, pp. 1-8.

as "conduct", but, rather, what the purposes of the restriction are.[288] Thirdly, to the degree that these actions are intended to communicate a point of view, the free speech law is relevant and protects some of them to a great extent. The scope of free speech, thus, in my view, must not be limited to verbal communication, but it must apply to conduct that conveys an idea, such as saluting, burning a flag, or demonstration.

However, because all communicative conduct involves conduct/action or conduct/symbol rather than mere speech, it is all much more subject to regulation and restriction than is simple speech. According to Justice Frankfurter, "a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy."[289] Here, I rely on a number of important cases involving symbolic speech and speech plus that have been decided by courts, such as the Supreme Court in US, the HRC, and the Strasbourg institutions. The aim of this chapter is to examine which conceptions of conduct constitute free speech, and to offer an account of non-verbal expression grounded in contemporary free speech theory. It seeks to make distinctions between conduct that is protected and illegal behaviour that is not. The central hypothesis of this chapter is that the significance of symbolic speech and speech plus can be explained by principles that explain important features of linguistic meaning.

III.1. Symbolic speech

III.1.1. Introduction

In today's society, Franklyn Haiman says, symbolic speech is a widely practised form of communication and may, in fact, convey a thought more effectively than sophisticated oratory.[290] The doctrine of symbolic speech holds that some conduct, for example, refusing to salute the flag, may be sufficiently communicative to warrant free speech coverage.[291] This type of speech is defined as an expression that transmits an opinion without involving verbal expression[292] or an "expression that takes the form of

[288] Sadurski, W., (1999) op. cit. p.52.
[289] *International Bhd. of Teamsters v. Vogt*, 354 US 284 (1957).
[290] Haiman, F., (1979) op. cit. P. 51.
[291] Waldman, J., (1997) op. cit. p. 1844-1894.
[292] Symbolic speech, however, can be called symbolic behaviour, chiefly because an individual uses conduct rather than words to convey a message or idea. James, D., "Texas v. Johnson: Symbolic Speech and Flag Desecration Under the First Amendment", *New Eng.L. Rev.* 25 (1991) p. 895; Arnold, L., "The Flag-Burning Case: Freedom of Speech When We Need It Most"; *N.C.L. Rev* 68 (1989) p. 165; Berckmans, P., "The Semantics of Symbolic Speech", *Law and Philosophy*, 16.2 (1997) pp. 145-176.

action that is not a common means of expression."[293] Symbolic speech is also defined as a non-verbal expression, whose main purpose is to communicate ideas,[294] or more clearly, it is when the speaker prefers to convey a message, which could be expressed in words, through using symbolic action, perhaps because the speaker believes that symbolic speech could be more effective than verbal or written words.[295] In the 1960s and 70s, anti-Vietnam war protesters were not so much saying things as doing things, like burning the flag, burning draft cards, holding sit-ins, love-ins, and the like. Opposition, say, to war in Iraq may be communicated not only by speeches at public meetings, as George Galloway does, and by newspapers, articles, such as *The Independent's* famous Middle East correspondent Robert Fisk writes, but by individuals wearing 'No War in Iraq' badges as they go about their daily business.[296] In the leading decision of the High Court of Australia, in *Levy v. Victoria*, Kirby J. said that a rudimentary knowledge of human behaviour teaches that people communicate ideas and opinions by means other than words spoken or written."[297] The reason for resort to symbolic speech is because this type of speech may catch the eye of the public much more powerfully than any string of words. Another reason is, according to Emerson, "the mass media of communication were not open to those lacking the necessary funds or established position, and hence such persons could convey their message effectively only by some kind of novel or dramatic conduct."[298]

III.1.2. Conditions of Symbolic Speech

Symbolic speech arouses several questions regarding the protection of freedom of speech law. The most important is whether symbolic speech is covered by the rules that protect freedom of speech. The answer to this question, according to Professor Greenawalt, can be found through answering three sub-questions:[299] Firstly, is there an intent to express a message? If no, then inquiry ends; the free speech rule is not implicated. If yes, then is there a likelihood the message will be understood by a witness? If no, again inquiry ends; the free speech rule is not implicated. If yes, is the

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[293] Greenawalt, K., (1995) op. cit. p. 21.
[294] Duggal, K., and Shreyas Sridhar, (2006) op. cit. p. 142. See also 'Freedom of Expression, The First Amendment', Freedom of Expression ACLU, Briefing Paper Number 10, Lectic Law Library, at: <http://www.lectlaw.com/files/con01.htm >
[295] See Sadurski, W., (1999) op. cit. p. 45.
[296] Barendt, E., (2005) op. cit. p. 74.
[297] *Levy v State of Victoria* (1997) 189 CLR 579.
[298] Emerson, T., (1969) op. cit. p. 80. See also Moon,R., (2000) op. cit. p. 171
[299] Greenawalt, K., (1989) op. cit. 22.

symbolic speech protected by law? If yes then any abridgment of such conduct constitutes abridgment of the right to freedom of speech.[300]

III.1.2.1. Is There an Intent to Express a Message?

The main problem that symbolic speech poses is the speaker's intention. In the words of Melville Nimmer, the crucial question is simply whether meaningful symbols of any type are being employed by one who wishes to communicate to others.[301] It is well known that for an utterance to qualify as speech, the speaker must intend to produce understanding in the hearer by resort to or in virtue of the social context, or conventional meaning, of what the speaker says. The intent is necessary to transform an utterance into a speech act. Thus, this definition roughly excludes acts for which the speaker does not intend to produce understanding.[302] However, this purpose in symbolic speech is foggy. The intention of the speaker to communicate his/her opinion in symbolic speech cases is not clear, as is in the case of pure speech or even as in speech plus. For example, there is little doubt that leafleting and demonstration aim to convey a message, whereas there are two possibilities in regard to wearing long hair; one may wear long hair to send a message through his hair style, or for example because the girls like it long.[303] The latter example, contrary to the first, is unrelated to speech.[304]

Accordingly, the casual desecration of a flag with no symbolic motive behind it cannot claim any coverage under the freedom of speech.[305] Similarly, one might wear bell-bottomed trousers, or not wear a bra, simply as an expression of one's personality. In the absence of any motive of protest or other intention to communicate or "make a point," there would be no symbolic speech case, according to Frank Morrow.[306] Professor Sadurski gives the reason why speech in some circumstances falls under the coverage of freedom of speech and in others it does not. As Sadurski observed:

> In a trivial sense, every human action is "communicative" or "expressive" in the sense that it "communicates" to other people something about the agent or "expresses" her preferences, values, character, etc. But not every action is intended to express something

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[300] These conditions are also called Spence's test, because they were first applied in *Spence v. Washington*. See Waldman, J., (1997) op. cit. p. 1849. Swanson, J., "Unholy Fire: Cross Burning, Symbolic Speech, and the First Amendment, *Virginia v. Black*", *Cato Supreme Court Review* (2002-2003) p. 96.

[301] Nimmer, M., "The Meaning of Symbolic Speech under the First Amendment", *UCLA Law Review* 21(1973) p. 61-62.

[302] Tien, L., (2000) op. cit. p. 633.

[303] *New Rider v. Board of Education*, 414 US 1097 (1974).

[304] Morrow, F., (1975) op. cit. p. 237.

[305] Duggal, K., and Shreyas Sridhar, (2006) op. cit. p. 152.

[306] Morrow, F., (1975) op. cit. p. 237.

> about the agent to others, and not every action is seen as aimed at communicative something about the agent to others.[307]

Greenawalt emphasised the importance of the speaker's intention by saying:

> Although it might be said that every action "expresses something" about the actor and is understood by other to do so, not every action raises a free speech problem. There must be a deliberate attempt to communicate a message.[308]

The United States Supreme Court has agreed with this view. This is shown in the contrasting decisions of the Supreme Court toward symbolic speech cases because of the unclear purpose or intention of the speaker. In *Tinker v. Des Moines school district*,[309] three public school pupils in Des Moines were suspended from school for wearing black armbands to protest against the Government's policy in the Vietnam War. This is a symbolic speech, according to Black's Law Dictionary's definition of symbolic speech: "Symbolic speech is conduct that expresses opinions or thoughts, such as a hunger strike or the wearing of a black armband."[310] The Court ruled that wearing a black armband for the purpose of expression is the type of symbolic act that is within the protection of the free speech clause of the First Amendment. This Supreme Court decision was in favour of symbolic speech, because the judges believed that there was a message that students wanted to convey by wearing black armbands and such expression was closely akin to pure speech. On the contrary, the Court, in *New Rider v. Board of Education*, adopted a different approach.[311] Symbolic speech was excluded from the coverage of the First Amendment protection, when the Supreme Court supported the decision made by the school administration about suspension of Indian students who sought to wear their hair parted in the middle with a long braid on each side. The Supreme Court refused to hear the case, although the students' action was a type of symbolic speech. Perhaps, as some pointed out, this was because in the view of the Supreme Court this conduct was not designed to communicate any idea or to convey any message.[312]

[307] Sadurski, W., (1999) op. cit. p. 46.
[308] Greenawalt, K., (1995) op. cit. p. 22.
[309] See 393 US 503 (1969). For more about this case see, Flanders, G., "Symbolic Student Speech Since Tinker." (PhD Thesis, University of Nevada, 1989); Dever, J., "Tinker Revisited: Fraser v. Bethel School District and Regulation of Speech in the Public Schools", *Duke Law Journal* 6 (1985) p. 1964.
[310] Black's Law Dictionary (2004) op. cit. p. 1436.
[311] See 414 US 1097 (1974).
[312] Likewise, in *Robert Olff v. East Side Union High School District*, Olff was suspended from school unless his hair style conformed with the standards of the school board. The Supreme Court refused to rehear this case. 404 US 1042 (1972). See Barendt, E., (2005) op. cit. p. 74-75.

This conclusion is confirmed by other examples of cases which demonstrate that the courts in the United States strongly consider the intention of the speaker as an indispensable factor in symbolic forms of speech.[313] From these cases, it can be concluded that conduct cannot be easily characterised as a mode of expression.[314] The intention of the speaker to communicate her/his message to others is necessary to bring any action within the scope of freedom of speech clause and the reverse is true.[315] In a case where a speaker takes an action which is categorised as symbolic speech without the intention to convey or send any message to others, his/her conduct should not be protected by a freedom of speech clause.

III.1.2.2. Is There A Likelihood The Message Will Be Understood By A Witness?

It is true that the speaker's intent to convey his message to others is an important element in terms of including symbolic speech into the free speech realm, but some commentators make this protection of symbolic speech dependent on another condition. This condition is that the message should be understood by a public "audience" as a communication. Joshua Waldman argues that while courts have focused on the actor's actual intent as the primary element of the *Spence* test, its relevance is minimized by the second element, audience-understanding.[316] What makes a waving of the hand in the air express the idea of farewell, or a vigorous shaking of the head express the idea of refusal or disbelief, according to Caroline West, is that those who receive the gestures are able to interpret them as such. In the absence of such abilities, the gestures are meaningless; and in the presence of different abilities in receivers, they may have a different meaning, or communicate a different idea, altogether.[317] This means that the audience should understand that there is a message that the speaker desires to deliver to them by using symbolic speech instead of spoken or written words. The communication act will be successful, according to Professor Richard Moon, only if the audience recognises the speaker's intention and is able to understand the meaning of the act.[318] This conclusion is confirmed in the *Spence v. Washington* case. The appellant, Spence, was convicted under Washington's 'improper use' statute forbidding the exhibition of a United States flag to which is attached or superimposed figures, symbols, or other

[313] *Jarnman v. Williams*, 753 F. 2d 76, 78 (8th Cir.1985).
[314] Barendt, E., (2005) op. cit. p. 74-83.
[315] Scanlon, T., (2003) op. cit. p. 8. Waldman, J., (1997) op. cit. p. 1844.
[316] Waldman, J., (1997) op. cit. p. 1851.
[317] West, C., "The Free Speech Argument Against Pornography", *Canadian Journal of Philosophy*, 33.3 (2003) pp. 391-422, p. 14-15.
[318] Moon, R., (2000) op. cit. p. 28; See also Schauer, F., (1982) op. cit p. 98; See Tien, L., (2000) op. cit. p. 635.

extraneous material. The appellant performed this action to send a message to the USA Government showing his protest against the recent actions in Cambodia and fatal events at Kent State University, and asserted that his purpose was to associate the American flag with peace instead of war and violence. The Supreme Court considered his action as speech which fell under the First Amendment protection because "an intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[319]

III.1.2.3. Is the symbolic speech protected by law?

Suppose, for example, that I was a Muslim racist in Riyadh or Tehran or a Kach member in Jerusalem, and decided to get a gun and shoot a few disbelievers. But then I could say: that's OK because it is only "symbolic speech," and political symbolic speech at that, because I'm trying to make a political argument against our current pro-disbelievers policy. Firing a bullet into Indian leader Mohandis Gandi (January 30, 1948) or Israeli Prime Minister Yitzhak Rabin (November 4, 1995) or exploding Lebanese Prime Minister Rafiq Hariri's motorcade with around 1000 kg of TNT (February 14, 2005), all acts of assassination, also communicate.[320] What these examples show is that many types of symbolic speech communicate an idea or information to their observers, and may be intended to influence the public in the same way as a political speech or publication. The question here is, are the above examples of conduct to be protected within the concept of free speech? Is the speaker's intention or audience's understanding sufficient to consider these activities as speech that is covered by free speech law?

Just because conduct can be expressive does not mean, of course, that all forms of symbolic speech are covered by free speech law. The intention of the speaker, though necessary, is not a sufficient determining factor for his/her symbolic speech to be treated as speech. Otherwise, political or terrorist assassination, and every terrorist act, should be considered as a symbolic speech, because it includes a substantial mixture of expression and there is the existence of the speaker's desire to show his/her rejection of the assassinated individual's policy or express his/her hostility towards the president's policies.[321] Otherwise, as Judge Posner pointed out, a political assassin like John Wilkes

[319] *Spence v. Washington*. 418 US 405 (1974).
[320] See Trager, R., and Donna Dickerson, (1999) op. cit. p. 18.
[321] See Emerson,T., (1969) op. cit. p.80; Scanlon, T., (2003) op. cit. p. 8; Swanson, J., (2002-2003) op. cit. p. 96; Sadurski, W., (1999) op. cit. p. 52.

Booth could claim that murdering Abraham Lincoln was protected 'speech.'[322] Otherwise, as Justice Stevens argued, vandals could deface the Lincoln Memorial or Washington Monument, or extinguish the eternal flame at John F. Kennedy's grave, and claim that their crimes were acts of protected political speech.[323] Otherwise, I would say, the suicide attacks by Islamic extremists on the United States on September 11, 2001, can be classified as a protected political speech because the suiciders aimed to deliver certain messages to the government in the White House.

Professor Eric Barendt believes that if the law were to extend the benefit of free speech protection in such cases, the state would have to justify in each case the application of criminal law as a necessary restriction on the exercise of free speech rights by terrorists. Violent conduct is rightly excluded from the coverage of a freedom of speech clause, even if it is partly intended by its perpetrators and understood by the public to convey a message. This is why Barendt referred to the IRA to demonstrate that assassination cannot be considered as a speech under any circumstance. Although Barendt admitted that the IRA organisation had a message that they wanted to deliver to people by committing the assassination operation, he rejected the suggestion that terrorism and political assassination are entitled to free speech protection.[324] According to Barendt:

> The actor's desire to communicate an idea cannot itself be sufficient to render the behaviour 'speech'- otherwise political assassination might be covered by a free speech provision.[325]

It follows, according to Barendt, that terrorism, as defined in section 1 of the UK Terrorism Act 2000, does not fall within the scope of freedom of speech, although it encompasses violent conduct, or its threat, which is designed to influence the government or to intimidate the general public.[326] The restriction upon such activities as assassination and terrorism can undoubtedly be supported, in the view of Sadurski, by reference to powerful, legitimate reasons, such as protecting life and promoting clean public moments.[327]

[322] *United States v. Soderna*, 82 F. 3d 1370, 1375 (7th Cir. 1996). ([K]illing a political opponent invades a right of personal liberty at the same time that it makes a political statement, as in the case of John Wilkes Booth's killing of Abraham Lincoln. The distinction is engraved in the case law interpreting the First Amendment.)
[323] *Texas v. Johnson*, 491 US 397 (1989).
[324] Barendt, E., (1985) op. cit. p. 41-43.
[325] Barendt, E., (2005) op. cit. p. 80.
[326] Barendt, E., (2005) op. cit. p. 80.
[327] Sadurski, W., (1999) op. cit. p. 52. For the same meaning, see Ibin Eser, "The Use of Speech to Incite Others, To Commit Criminal Acts: German Law in Comparative Perspective" in Kretzmer, D., and Francine Kershman Hazan, (2000) op. cit. p. 134

In the Supreme Court decision, in *Wisconsin v. Mitchell*, Chief Justice William Rehnquist said all conduct cannot be considered speech whenever the person engaging in the conduct intends to express an idea. The Court ruled that "a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment."[328] In *Roberts* v. *United States Jaycees*, the Court ruled that "[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection."[329] Justice Marshall, in his dissent to the US Supreme Court in *Clark v. Community for creative non violence*, criticised the idea that actions such as assassination of political figures and the bombing of government buildings can fairly be characterized as intended to convey a message that is readily perceived by the public. His crucial criticism was built not on the absence of the assassin's intention of delivering his message (hatred) of the person assassinated; indeed, his intent is all too clear. However, Justice Marshall's critique was based on the view that an action that can be defined as a speech must be 'balanced against government's interests.'[330]

The same rule was applied to the argument that physical homosexual relations are a mode of expressing feelings and therefore should be covered by freedom of speech protection. The EComHR has applied the spirit of ECHR by refusing to extend the coverage of Article 10 of Convention to physical homosexual relations. The decision is based on the fact that the sexual feeling between the participants is not really a free speech claim.[331] In its report on the merits of the case, the EComHR took the position, on the ground of the text of paragraph 2, that "the concept of expression in Article 10 concerns mainly the expression of opinion and receiving and imparting information and ideas ... It does not encompass any notion of physical expression of feelings in the sense submitted by the applicant."[332] Similarly, an abusive lover, or a person who holds a knife to another's back may have primarily intended to communicate something to the other, but their behaviour cannot be considered as a protected speech for the reasons given above.[333] In the context of ICCPR, although, according to Johann Bair, the right to freedom of expression under Article 19 extends to the choice of medium, it does not

[328] 508 U.S. 476, (1993).
[329] 468 U.S. 609, (1984)
[330] 468 US 288 (1984).
[331] *X v. UK* (1978) 19 D & R. 66, EComHR. See Barendt, E. (1985). op. cit. p. 28, 46-47 and 245; Fawcett, J., (1987) op. cit. p. 252; Dijk, P., and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (Kluwer Law and Taxation Publishers, Deventer/Netherlands, 1990) p. 309.
[332] *X v. UK* (1978) 19 D & R. 66, EComHR.
[333] See Baker, E., (1989) op. cit. p. 71. Scanlon, T., (2003) op. cit. p. 8.

amount unfettered right of any individual or group.[334] The defacing of road signs, though it might convey opinions to others, is not an exercise of freedom of expression, according to HRC. In *G. B. v. France*, the author was arrested on charges of having defaced a number of road signs. The HRC observed that the defacing of road signs does not raise any issues under Article 19.[335]

From the above three points we can conclude that not all symbolic speech is covered. If an individual uses a symbol with the intent to communicate a specific message and under circumstances in which the audience is likely to understand its meaning, the government may not regulate that expression unless the act that constitutes symbolic speech is not protected by law or the regulation serves a significant societal interest unrelated to the suppression of ideas.[336] Based on these principles, courts have held that many instances of symbolic speech were protected, even though the conduct ridiculed government or religious leaders, religious beliefs, or otherwise seriously offended many people. Accordingly, the Supreme Court ruled that wearing a black armband for the purpose of expression, against the Vietnam War, is the type of symbolic act that is within the protection of the free speech clause of the first amendment.[337] Further, the Courts have granted broad protection for clothes as a mode of freedom of expression, even if the clothes could be considered as a hate speech, such as in the *Collin v. Smith* case where Frank Collin, the "Fuhrer" of the National Socialist Party of America, planned to walk through the city and party members were intending to wear Nazi uniforms.[338]

III.1.3. Symbolic Speech Activities

The examples of symbolic speech are many. It may consist in flying a particular flag as a symbol;[339] in refusing to salute a flag as a symbol;[340] in wearing black armbands in protest at war;[341] in burning a draft-card,[342] in growing or cutting a person's hair;[343] in

[334] Bair, J., (2005) op. cit. p. 92.
[335] *G. B. v. France*, CCPR/C/43/D/348/1989 (1991). See also S. G. v. France, CCPR/C/43/D/347/1988 (1991).
[336] *Spence v. Washington*, 418 US 405 (1974); *United States v. O'Brien*, 391 US 367 (1968).
[337] *Tinker v. Des Moines School District*, 393 US 503 (1969).
[338] *Collin v. Smith* 578 F.2d 1197 (1978). *National Socialist Party of America v. Village of Skokie*, 432 US 43 (1977).
[339] *Stromberg v. California*, 383 US 359 (1931).
[340] *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).
[341] *Tinker v. Des Moines School District* 393 US 503 (1969).
[342] *United States v. O'Brien*. 391 US 367 (1986)
[343] *New Rider v. Board of Education* 414 US 1097 (1974).

wearing a headscarf (*hijab*),[344] in hanging a politician in effigy and so on. Professor James Carey uses the term gestural symbols and notes that people are able to interpret what is being said through behaviour, as well as through oral expression. Winks and fingers are meant to, and do, communicate, perhaps more effectively than words under some circumstances.[345] Many other examples can be given here; one can memorialise Hitler by saying the words "Hail Hitler", and equally well one can express one's idea toward Hitler by saluting his picture in museums or cinemas.[346] Freedom not to speak, or the right to be silent, in another form of symbolic speech which is protected by free speech law. In the context of ICCPR, in *Kang v. Republic of Korea*, the HRC considered the right not to speak as a protected right under Article 19.[347] In *West Virginia State Board of Education v. Barnette*, the US Supreme Court ruled that students who refused to say the pledge of allegiance to the United States flag were expressing their feeling, opinion, and faith. Therefore, their silence inherited the First Amendment protection.[348] As there are endless examples of types of speech that are considered to be classified as symbolic speech, some of which were mentioned above, others raise no much controversy, it is sufficient here to discuss the most controversial type of symbolic speech, namely, flag desecration.

III.1.3.1. Desecrating the flag

Of the various forms of symbolic speech, flag desecration, in particular, has posed serious questions concerning the ambit of freedom of speech. A national flag is, by its very nature, symbolic. Any form of disrespect, regardless of the motive or intent, is therefore bound to raise the issue of whether or not such an action falls within the scope of freedom of speech. Does freedom of speech allow the government to punish individuals who mutilate the flag or engage in other acts deemed disrespectful of patriotic symbols? Do people convicted for flag burning have a claim that they were

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[344] See *Raihon Hudoyberganova v. Uzbekistan*, CCPR/C/82/D/931/2000, though the Committee based theor view on Article 18 ICCPR. Compare this with ECHR's approach in *Sahin v. Turkey*, 31961/96 (2001) ECHR 551. See Skach, C., "Sahin v. Turkey. App. No. 44774/98; "Teacher Headscarf." Case no. 2BvR 1436/02." *The American Journal of International Law*. 100(1) 2006, pp. 186-196.
[345] Carey, J., *Communication as Culture* (London: Unwin Hyman, 1989) p. 61.
[346] Schauer, F., (1982) op. cit. p. 96.
[347] *Yong-Joo Kang v. Republic of Korea*, CCPR/C/78/D/878/1999 (2003). See also *Andre Alphonse Mpaka-Nsusu v. Zaire*, 157/1983, U.N. Doc. Supp. No. 40 (A/41/40) at 142 (1986); *Tshitenge Muteba v. Zaire*, 124/1982, U.N. Doc. CCPR/C/OP/2 at 158 (1990).
[348] *West Virginia State Board of Education v. Barnette*, 319 US 624 (1943). See Rotnem, V., and Folsom, F. "Recent Restriction Upon Religious Liberty", *The American Political Review*, 36 (1942) p. 1055. See also, Rice, G., "The Right to be Silent", *The Quarterly Journal of Speech*, XLVII.4 (1961) p. 349-354.

engaged in speech activity?[349] Could people in Britain express their feeling about the war declared by the former Prime Minister, Tony Blair, on Iraq through burning the United Kingdom's national flag in Trafalgar Square? Moreover, is there any difference if the same flag is being burned by hooligans as a form of celebration or at the end of a barbecue party?[350]

According to one viewpoint, the state should forbid any action to mutilate, destroy, or burn the state flag. This opinion is based on the ground that the national flag is an emblem of national sovereignty; the honour and integrity of the nation is captured by the flag; and as the history of every country shows, the national flag is uniquely capable of enlisting the aid of citizens, giving rise to sentiments of nationalism, and evoking the supreme sacrifice of death.[351] In some nations such as Saudi Arabia, Nepal and Pakistan, the flag depicts religious symbols.[352] The governments, as a result, have interests in preventing the state flag from being disrespected or desecrated.[353] Additionally, this party might argue that there are numerous ways that anti-war or anti-government policy can be communicated instead of burning the national flag. In addition, the public burning of the flag might have tendency to incite a breach of the peace.[354] Lastly, and most importantly, this party believes that flag desecration is a special case where speech and non-speech elements are combined in the same course of conduct, and because of the non-speech element there is a reasonable justification for government to restrict these kind of actions.[355] The European Parliament resolution on the right to freedom of expression and respect for religious beliefs, February 14, 2006, in response to the Danish Cartoons crisis, equated the acts of violence with flag burning, by condemning both acts and stressing that these acts can in no way be justified.

Only in two cases has the United States Supreme Court upheld this party's point of view and simultaneously constitutionalised the statutes which forbid disrespecting or desecrating the national flag or draft. In *Halter v. Nebraska*, the Court upheld the constitutionality of the Nebraska statute about the national flag, affirming the convictions of the appellants. The Court, however, considered the case only on the

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[349] Greenawalt, K., (1995) op. cit. p. 29.

[350] Barendt, E., (1985) op. cit. p. 45.

[351] Lal, V., "The National Flag: Status and Symbol", *Hindustan Times*, October 1995. According to Chief Justice Rehnquist "For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation... Millions and millions of Americans regard it with an almost mystical reverence." *Texas v. Johnson*, 491 US 397 (1989).

[352] Duggal, K., and Shreyas Sridhar, (2006) op. cit. p. 152.

[353] See Wall, J., "Flag Burning Revisited." *Christian Century*, 112.22 (1995); Ponnuru, R., "One Branch Among Three", *National Review* 54.14 (2002) p. 31. See also Cox, A., (1980) op. cit. p. 60-61.

[354] *Texas v. Johnson*, 491 US 397 (1989).

[355] *United States v. O'Brien*, 391 US 367 (1968).

question of property rights and not in regard to the First Amendment.[356] Likewise, in *United States v. O'Brien* (although it did not deal with flag desecration, it centred on the same issue.)[357] David Paul O'Brien and three companions burned their Selective Service registration certificates on the steps of the South Boston Courthouse. O'Brien admitted to burning the card as a means of expressing his anti-war beliefs and also as an attempt to persuade others to adopt his views. He argued that the act of burning his draft cart was protected "symbolic speech" within the First Amendment. The government argued that it could prohibit this conduct because it had a legitimate interest in requiring registrants to have draft cards always in their possession as a means of ensuring the proper functioning of the military draft. O'Brien alleged that his freedom of speech had been infringed. The Court rejected his claim because in the eyes of Court, it was unacceptable that an apparently limitless variety of conduct could be labelled 'speech' whenever the person engaging in the conduct intended thereby to express an idea.[358] The Court also held that even on the assumption that the alleged communicative element in O'Brien's conduct was sufficient to bring into play the First Amendment, it did not necessarily follow that the destruction of a registration certificate was a constitutionally protected activity.[359] The Court articulated the test to be applied by courts in determining the constitutionality of a governmental regulation which has the effect of suppressing some modes of speech, such as the statute that prohibited O'Brien's behaviour in relation to the card.[360] The *O'Brien* Court announced a new constitutional standard. According to the *O'Brien* test, a government regulation is sufficiently justified:

> [1] if it is within the constitutional power of Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that government interest.[361]

This viewpoint of the first party, which sees that the government has a substantial interest in forbidding the burn of the flag, has been criticised by the opposition party on

[356] 205 U.S. 34 (1907).
[357] *United States v. O'Brien*, 391 US 367 (1968). For further details regarding draft cart issue, see Harrison, M., and Steve Gilbert, *Freedom of Speech Decisions of the United State Supreme Court* (California, Excellent Books, 1996) p. 133. Hemmer, J., (2000) op. cit. p. 33-36.
[358] *United States v. O'Brien*, 391 US 367.
[359] 391 US 367.
[360] Schneider, R. G. "Hate speech in United States: Recent Legal Developments", in Coliver, S., (1990) op. cit. p. 277.
[361] *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

a number of grounds. According to the opposition party, burning the national flag does not intend to desecrate a national symbol so much as to send a particular message to others.[362] This party believes that someone who burns the national flag or takes similar action intends to convey a message to other people showing his disagreement with the government policy.[363] In short, flag desecration is a mode of political dissent. As a result of this, statutes which forbid burning or desecrating the national flag are unconstitutional, because they are enacted to limit free speech.[364] This is why the Court ruling in the *O'Brien* case, that O'Brien's action was conduct rather than speech, has been criticised by many commentators.[365] The criticisms are based on the ground that the court failed to draw a precise line between speech and conduct and therefore, it failed to articulate the location of O'Brien's activity.[366] Emerson criticised the Supreme Court decision because, according to Emerson, governmental control should be directed against the element of conduct, while in the *O'Brien* case the Court's decision was directed at the speech element and its purpose was to forbid a speech.[367] What Emerson meant by his criticism is that the government interest was not unrelated to the suppression of free expression. Such restriction was content-based restriction on expressive conduct which should receive strict scrutiny, not intermediate.

The U.S. Supreme Court, in several other cases, has regarded flag desecration as a form of political expression that should be protected. Many examples of cases can be given that show the Supreme Court's strong inclination to the latter party's opinion. In *Street v. New York*, the Supreme Court supported the appellant's argument that the New York Penal statute which forbids flag desecration violated his constitutional right to free expression.[368] The same approach was repeated five years later in *Smith v. Goguen*; the Court overturned the conviction of a teenager who wore a flag patch on his pants, determining that a Massachusetts law prohibiting "contemptuous" use of the flag was vague.[369] This happened again in *Spence v. Washington*.[370] According to Waldman, the court in this case avoided the criticisms which were directed to the *O'Brien* case by establishing criteria for determining whether an activity constituted mere conduct or

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[362] *Spence v. Washington* 418 US 405 (1974).
[363] *Spence v. Washington* 418 US 405 (1974).
[364] See O'Brien's claim in 391 US 367 (1968).
[365] See Smolla, R., *Free Speech in an Open Society* (Random House Inc, 1992) p. 89-102.
[366] Waldman,J., (1997) op. cit. p. 1844; Ely, J., (1975) op. cit. p. 1482, 1495; Henkin, L., (1986) op. cit. p. 63, 79.
[367] Emerson, T., (1969) op. cit. p. 84. See also Barendt's, E., criticism of the Supreme Court decision in the *United States v. O'Brien* case. Barendt, E., (2005) op. cit. p. 81-82.
[368] *Street v. New York*, 394 US 576 (1969).
[369] *Smith v. Goguen*, 415 US 566 (1974).
[370] *Spence v. Washington*, 418 US 405 (1974).

symbolic speech.[371] The determinations would be guided by three factors according to the Court: the speaker's intention, the audience's understanding, and the context of study.[372] Similarly, in *Texas v. Johnson*,[373] the Court, at the end, expanded free speech rights by concluding that the flag burning was speech "expressive conduct" and the Texas statute prohibiting the public burning of the American flag infringed Johnson's freedom of expression.[374] Months after the *Johnson's* decision, in *United States v. Eichman*, the Supreme Court held that the Flag Protection Act, which was designed to punish anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or tramples upon any US flag", was unconstitutional. The Court determined that the lawmakers' intent was to suppress free expression.[375]

To sum up, on the basis of the examples provided in this study, it is observe that two broad trends seem to exist. While some are in favour of statutes that forbid desecration of the flag, draft cards, or any national symbols, others permit flag desecration as a part of freedom of speech. My position toward this case is as follows: if the restriction is directed to suppressing freedom of speech, permitting communicative desecration of the flag is certainly better than forbidding it, provided that: (1) there must be an intent to express a message through burning the flag. If there is none, for example when burning the flag is merely for personal reasons with no real political consequence, then burning the flag does not constitute speech as the free speech rule is not implicated. In other words, the casual desecration of a flag with no symbolic motive behind it cannot claim any protection under the freedom of expression.[376] (2) There must be a likelihood that the message intended to be delivered through burning the flag will be understood by a witness If not, again inquiry ends; the free speech rule is not implicated. In the present of these two conditions, there should be no doubt that the flag salute is a form of utterance. Symbolism, as one Justices wrote, is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality is a short cut from mind to mind.[377]

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[371] Waldman, J., (1997) op. cit. p. 1845.
[372] *Spence v. Washington*, 418 US 405 (1974).
[373] *Texas v. Johnson*, 491 US 397 (1989). For more about this case, see Gerber, S., "The Politics of Free Speech", *Social Philosophy and Policy* 21 (2004) p. 24.
[374] *Texas v. Johnson*, 491 US 397 (1989).
[375] *United States v. Eichman*, 496 US 310 (1990).
[376] Duggal, K., and Shreyas Sridhar, (2006) op. cit. p. 152.
[377] *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)

III.2. Speech plus

III.2.1. Introduction

Demonstrations, marching, picketing, leafleting, addresses to publicly assembled audiences, sitting-ins and standing-ins are forms of speech which may effectively express a protest about certain things and known as speech plus or speech plus conduct.[378] Speech plus is a phrase often used to describe expression that is mixed with an element of conduct, or a form of expression in which behaviour is used by itself or in coordination with written or spoken words to convey an idea or message. Although it is said that speech plus is a form of speech that should receive free speech coverage, commentators believe that it would be wrong to treat speech plus as pure speech.[379] Commentators emphasise that there are dangers in trying to extend the scope of a free speech principle too far. The Supreme Court in the United States, as shown above, in the *Cox*; *Giboney*; *Street*; *Shuttlesworth and Collin* cases, made a clear distinction between pure speech (spoken and written words) and speech plus, in terms of the proportion of the constitutional protection of freedom of speech.[380] Likewise, in *Hughes v. Superior Court of California*,[381] the Court distinguished between picketing as a type of speech plus and pure speech, and in so doing gave a superiority to pure speech over speech plus and placed limitations on the right to speech plus activities (picketing). The Court ruled that "It has been recognised that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent". Justice Marshall, in *Amalgamated Food Employees v. Logan Valley Plaza*,[382] referred to the decision previously made by the Supreme Court regarding the difference between speech plus and pure speech which held "picketing [as a type of speech plus] can be amenable to controls that would not be constitutionally permissible in the cases of pure speech."

Several justifications have been given for not equating speech plus with pure speech. One of these justifications is built upon the idea that speech plus as a contemporary style of speech is less important than traditional modes of speech that appear in books, newspapers, magazines, and Hyde Park Corner orations.[383] A demonstration or picketing is more emotional than intellectual. Therefore, if we ban speech plus activities, there are alternative forums of speech such as in books and newspapers that

[378] The term first came from *Amalgamated Food Employees v. Logan Valley Plaza*, 391US 308 (1968).
[379] Barendt, E., (2005) op. cit. p. 79.
[380] Baker, E., (1989) op. cit. p. 128; Harrison, M., and Steve Gilbert (1996) op. cit. p. 117.
[381] *Hughes v. Superior Court of California*, 339 US 460 (1950).
[382] *Amalgamated Food Employees v. Logan Valley Plaza*, 391US 308 (1968).
[383] See Schauer, F., (1982) op. cit. p. 201.

could increase the value of freedom of speech and decrease the danger associated with the so-called contemporary style of speech. Rational and thoughtful argument, according to proponents of this view, comes from the traditional methods of communication such as books, newspapers, magazines, radio and television programmes rather than obstructive communicative such as is represented in speech plus forms.[384] While it is true that the effectiveness of spoken and written words as rational and intellectual types of communication, which have a positive impact on the whole society cannot be denied, it is also true that speech plus is of great importance.[385] Firstly, when one desires to attract the attention of a huge group of people and at the same time to convey a certain message regarding the government policy, demonstrations or distribution of leaflets and pamphlets are the best ways, if not the only ones, to gain a listener's attention.[386] Public meetings and demonstrations have been one of the chief methods of influencing public opinion on big issues.[387] Therefore, Frederick Schauer believes that a restriction on speech plus is, in fact, a restriction on the effectiveness of speech.[388] Even more, speech plus activities, sometimes, have publicity advantages over more conventional media of expression, since they attract extensive news coverage and widespread public interest; and for persons unpopular with or unknown to the general public, or without financial resources, speech plus activities, such as demonstrations, may be the only effective means to publicise a message or reach a desired audience.[389] Moreover, the emotional nature of speech plus, if that claim is correct, should not be considered as a disadvantage of speech plus. Important free speech values are served by emotive utterances.[390]

The distinguishing of speech plus from pure speech has another basis. The claim to this distinction, here, depends on the fact that the activities linked in conjunction with spoken or printed words in speech plus cases give the state a sufficient reason to restrict such activities, if these activities cause harmful impacts on government or public interests, even though such restriction also incidentally regulates associated speech.[391]

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[384] See in this regard, Schauer, F., (1982) op. cit. p. 201.
[385] Greenawalt, K., (1995) op. cit. p. 26.
[386] Schauer , F., (1982) op. cit. p. 202; Barendt, E., (2005) op. cit. p. 270.
[387] Street, H., *Freedom, the Individual and the Law* (England, Penguin Books, Fifth edition, 1982) p. 55.
[388] Schauer, F., (1982) op. cit. p. 202.
[389] *Cox v. Louisiana* 379 US 536 (1965). See generally Kalven, H., "The Concept of the Public Forum: *Cox v. Louisiana*", *Supreme Court Review*, (1965) p. 1, 22-25. Duggal, K., and Shreyas Sridhar, (2006) op. cit. p. 141; Moon, R., (2000) op. cit. p. 171.
[390] Schauer, F., (1982) op. cit. p. 202-203.
[391] Many commentators adopt this justification. See Barendt, E., (2005) op. cit. p. 78-83; Sadurski, W., (1999) op. cit. p. 47; Chafee, Z., *Free Speech in the United States* (Cambridge, Massachusetts, Harvard University Press, 1948) p. 525; Schauer, F., (1982) op. cit. p. 99.

For example, demonstration is an obvious instance of speech plus which consists of expression that is mixed with an element of conduct, which receives freedom of speech coverage. Demonstrations, like marching, picketing, and leafleting, usually happen in public places such as streets, sidewalks, and parks and so on. When the demonstration causes harm to society, such as obstructing traffic, blocking the street, breaching the peace, or damaging property, states have a significant reason to prohibit such demonstrations.[392] For instance, in a case when demonstrators lie down in front of troop trains, Emerson argued that such action should not be considered as a speech, otherwise any distinction between speech and pure action would be destroyed.[393] Similarly, it is reasonable to regulate or even prohibit leafleting in some areas, because of the obvious risk of litter on the street or in parks.[394] Likewise, picketing can be amenable to restriction when it causes violence, disorder, rioting, fisticuffs, and coercion.[395] In short, speech plus is subject to regulation even though intertwined with expression and association.[396]

It is understood from the above point that when there is a combination between speech and "plus", this means that we face a speech case, and the question here is not whether this is speech or not -this is unquestionable; the question which poses itself here is whether this speech should be protected or not. In other words, speech plus falls within the free speech guarantee,[397] and the difficulty in speech plus cases is that the governmental interest in restricting the expression may be much stronger because of the linked element of conduct.[398] The difficulty, hence, is in the "plus," not in "speech." "Plus," which is a physical activity according to the Supreme Court,[399] is "problematic from the point of view of a clash with other legitimate values or interests."[400] To illustrate, distributing leaflets and pamphlets, picketing, marching, and demonstrations and other forms of speech plus involve freedom of speech issues, and the restriction of such activities is not because these activities are not speech, but because of the interference of the linked activities with other legitimate values or interests. According to Justice William in *Amalgamated Food Employees v. Logan Valley Plaza*, "Picketing

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[392] See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (prohibition of sleep-in demonstration in area of park not designated for overnight camping). See also Mello, R., (2000) op. cit. p.154-155. Chafee, Z., (1948) op. cit. p. 525.
[393] Emerson, T., (1969) op. cit. p. 89.
[394] See Barendt, E., (2005) op. cit. p. 80.
[395] Schauer, F., (1982) op. cit. p. 99, 201.
[396] *Cox v. Louisiana*, 379 U.S. 536, 555 (1965).
[397] Mello, R., (2000) op. cit. p. 155.
[398] See Barendt, E., (2005) op. cit. p. 80.
[399] 391 US 308 (1968).
[400] Sadurski, W., (1999) op. cit. p. 47.

is free speech plus, the plus being physical activity that may implicate traffic and related matters. Hence the latter aspects of picketing may be regulated."[401] Therefore, it is totally wrong to equate "plus" with speech because "plus" in itself is not equivalent to communication but is a carrier or vehicle of communication.

III.2.3. Speech Plus and the Right of Assembly

There is an overlap between speech plus activities such as demonstration, picketing, distributing leaflets and pamphlets, patrolling, marching, and parading, on the one hand, and the right of assembly on the other. This overlapping with the right of assembly happens in those situations where several persons jointly express a given opinion. A demonstration, it can be said, always constitutes an expression of opinion, even if it has the character of a silent procession; but there is at the same time the question of an assembly.[402] In any form of picketing there is involved at least some element of expression.[403] The consequence of this overlapping is that the ICCPR, ECHR, and the US Constitution, provide twin guarantees for the right to make one's views known through speech plus activities. Both, freedom of speech and freedom of assembly protect the usage of behaviour by itself or in coordination with written or spoken words to convey an idea or message. This overlap led some to present or discuss the right to conscience, expression and assembly together because "the[ir] values...are at the foundations of democratic society...The protection of personal opinion afforded by arts 9 and 10 in the shape of freedom of thought, conscience and religion is one of the purposes of the freedom of association expressly guaranteed by art 11."[404] Because this study limited to the right to freedom of speech and therefore will only discuss how the provisions of the right to freedom of speech cover this method of speech.[405]

Although none of the speech plus activities are mentioned in the ICCPR, ECHR or the United States Constitution within the free speech clauses, the HRC, the Strasbourg institutions and the Supreme Court, have considered these activities as forms of speech that fall within the coverage of freedom of speech. For example, in the context of

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[401] *Amalgamated Food Employees v. Logan Valley Plaza*, 391US 308 (1968).
[402] See Dijk, P., and G. J. H. van Hoof, (1990), op. cit. p. 309.
[403] According to the Canadian Supreme Court, "the picketers would be conveying a message which at a very minimum would be classed as persuasion, aimed at deterring customers and prospective customers from doing business with the respondent." Justice McIntyre, delivering the Canadian Supreme Court in *RWDSU v. Dolphin delivery*, [1986] 2 S. C. R. 573.
[404] Lord Lester of Herne Hill and David Pannick, (eds), *Human Rights Law and Practice* (London: Butterworths, 1999) p. 4. 9.
[405] For the coverage of speech plus under the right of freedom of assembly, see Article 20 of the UDHR; Article 21 of the ICCPR; Article 11 of the ECHR and First Amendment.

ICCPR, the issue of political assembly has been dealt with exclusively within the context of allegations of violation of Article 19 of the ICCPR.[406] Protesters are protected by the freedom of expression. In the case of *Kivenmaa v. Finland*,[407] the State party argued that a demonstration necessarily entails the expression of an opinion, but, by its specific character, is to be regarded as an exercise of the right of peaceful assembly. In this connection, the State party argued that Article 21 of the Covenant must be seen in relation to Article 19 and that therefore the expression of an opinion in the context of a demonstration must be considered under Article 21, and not under Article 19 of the ICCPR. The majority of the HRC found breaches of Articles 19 and 21 in this case. It, thus, confirmed that non-verbal expression is protected under Article 19.[408] According to HRC:

> The right for an individual to express his political opinions, including obviously his opinions on the question of human rights, forms part of the freedom of expression guaranteed by Article 19 of the Covenant. In this particular case, the author of the communication exercised this right by raising a banner.[409]

Similarly, in *Dergachev v Belarus*, carrying a poster as a way to express an opinion was considered as an exercise of freedom of expression.[410] The author, Mr Alexander Dergachev, a member of the Popular Front of Belarus, a political party in the Republic of Belarus at the time, organized a picket and launched a poster with the words: "Followers of the current regime! In the five years you told the people to poverty. Enough to listen to the lies! Join the struggle led by the Popular Front for you Belarus!" In the Court's view, the text of the poster amounted to a call for insubordination against the existing government and/or to the destruction of the constitutional order of the Byelorussian Republic. The author argued that his rights under Article 19 had been violated by his conviction for expressing a political opinion and disseminating factual information. The HRC was of the view that the particular expression of political opinion expressed by the author in carrying the poster in question falls within the scope of freedom of expression protected under Article 19 of the ICCPR.[411] Likewise, in *Baban*

[406] Joseph, S., Jenny Schultz, and Melissa Castan, *The International Covenant on Civil and Political Rights: cases, materials, and commentary*, 2nd edn (Oxford: Oxford University Press, 2004) p. 517.; Conte, A., "Democratic and Civil Rights", in Alex Conte, Scott Davidson and Richard Burchill, (2004) op. cit. p. 65.

[407] *Kivenmaa v. Finland*, (1994).

[408] Joseph, S., Jenny Schultz, and Melissa Castan, (2004) op.cit. p. 520.

[409] *Kivenmaa v. Finland*, (1994). See *Baban v. Australia*, CCPR/C/78/D/1014/2001 (2003). *M.A. v. Italy* 117/1981 (1981), U.N. Doc. Supp. No. 40 (A/39/40) at 190 (1984)..

[410] *Dergachev v. Belarus*, CCPR/C/82/D/954/2000 (2004).

[411] *Dergachev v Belarus*, (2004)

v. Australia the State party did not consider a hunger strike as a form of expression protected by Article 19, paragraph 2. The HRC, however, put an assumption that a hunger strike may be subsumed under the right to freedom and expression protected by Article 19.[412]

The ECHR has granted this right to the public in Articles 10 and 11 respectively. Where a public demonstration occurs, this is both a form of "peaceful assembly" under Article 11 and a form of expression under Article 10.[413] In *Piermont v. France*, Mrs Piermont, who was a German citizen and a member of the European Parliament, took part in a public meeting and a traditional march, which were organised by French Polynesia's local independence and anti-nuclear movement during a local election campaign.[414] The French High Commissioner in Polynesia issued an order expelling the applicant for the reason that her statements during the activities were an attack on French policy. The ECtHR rejected the High Commissioner's order. According to the Court's opinion, the order which restrained the applicant's freedom of expression was not legitimate under Article 10 paragraph 2 and it did not strike a fair balance between the right of freedom of expression and the interests of "territorial integrity." The Court saw that the applicant's speech at no time provoked violence or disorder but simply supported anti-nuclear and independence demands, nor did the demonstration cause any disorder. It concluded that Mrs Piermont's speech was "a contribution to a democratic debate in Polynesia."[415] The Court's decision, in short, enhanced the protection of the right to freedom of expression.[416] In *Chorherr v. Austria*, a peaceful demonstration was held by Mr. Chorherr and a friend at a military ceremony with a distribution of leaflets that called for a referendum on the purchase of further aircraft by the Austrian armed forces. The demonstration was ceased because it disturbs public order. The applicant complained to the EComHR alleging a beach of his right to freedom of expression. The EComHR found a violation of this right. The Court, however, upheld the conviction and stated that the margin of appreciation extended in particular to the choice of the means used by the authorities "to ensure that lawful manifestations can take place

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[412] *Baban v. Australia*, CCPR/C/78/D/1014/2001 (2003).
[413] Clements, L., *European Human Rights, Taking a case under the Convention* (London: Sweet & Maxwell, 1994) p. 172.
[414] *Piermont v. France* - 15773/89; 15774/89 [1995] ECHR 14.
[415] This factor, the contribution to a democratic debate, has been given weight in other cases, namely *Incal v. Turkey* 22678/93 [1998] ECHR 48 & *Castells v. Spain* 11798/85 [1992] ECHR 48.
[416] Robertson, A., and J.G. Merrills, (2001) op. cit. p. 173; Saini, P., "Article 10-Freedom of Expression" in Lord Lester of Herne Hill and David Pannick, (1999) op. cit. p. 203; Liao, F., "The Legitimacy of Limiting of the Right to Freedom of Expression in the Jurisprudence of the European Convention on Human Rights" (Ph. D Thesis, Oxford University, 1999) p. 97.

peacefully."[417] In *Steel and others v. the United Kingdom*,[418] the Court showed its willingness to treat speech plus or physical behaviour as a form of expression falling within Article 10.[419]

The U.S. Supreme Court recognised this fact and strongly upheld the right of people to express their views through speech plus activities such as demonstration.[420] Picketing and parading are forms of speech entitled to some First Amendment protection.[421] In *Edwards v. South Carolina*, against protesting discriminatory practices against black, and feeling aggrieved by laws of South Carolina, which allegedly "prohibited Negro privileges," 200 negro high school students and college students peacefully assembled at the site of the State Government and there peacefully expressed their view regarding the discrimination against them. Some of the demonstrators held a sign, "Down with segregation!" Another sign read, "You may jail our bodies but not our souls." There were no threatening remarks, hostile gestures, or offensive language. However, the demonstrators were told by police officials that they must disperse within 15 minutes or face conviction for breaching the peace. They refused to leave, and therefore, were arrested and tried for breach of the peace. The Supreme Court rejected the conviction and upheld the right of citizens to demonstrate. The Court ruled that a peaceful march and demonstration was protected by the rights of free speech, free assembly, and freedom to petition for a redress of grievances and the state cannot ban a peaceful demonstration only because it reflects unpopular views.[422] The Supreme Court also guarantees the right to boycott, as a form of free speech, just as it grants the right to demonstrate or picket. In *NAAACP v. Claiborne Hardware Company*, the Supreme Court stressed that boycott which does not involve violence "is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments."[423]

The above discussion demonstrates that people who intend to show their support or opposition to a public policy can, under the umbrella of freedom of speech protection, gather peacefully in streets, sidewalks, parks, and other public places. As Thomas

[417] *Chorherr v. Austria*, 13308/87 (1993) ECHR 36.
[418] *Steel and others v. the United Kingdom*, 24838/94 (1998) ECHR 95.
[419] *Ibid.*
[420] Hemmer, J., (2000) op. cit. p. 54.
[421] *Hague v. CIO*, 307 U.S. 496 (1939); *Cox v. New Hampshire*, 312 U.S. 569 (1941).
[422] 372 U.S. 229 (1963).
[423] *NAAACP v. Claiborne Hardware Company*, 458 US 886 (1982).

Emerson says, all forms of verbal communication customarily used in public assemblies must be classified as "expression."[424]

III.3. Communicative Conduct Regulations

From the discussion of conduct or behaviour speech, it appears that symbolic speech and speech plus are covered by a rule protecting free speech. However, they may be subject to restrictions on grounds other than the pure speech grounds. For example, in contrast to the case with pure speech, where strict scrutiny is required, the US Supreme Court established an intermediate scrutiny test for determining whether an incidental restraint on communicative conduct violated the First Amendment. A sufficiently important governmental interest in regulating the non-speech element, according to *O'Brien* Court, can justify incidental limitations on First Amendment freedoms.[425] The limitation, as said above, must (1) be within the constitutional power of the government to enact, (2) further an important or substantial government interest, (3) that interest must be unrelated to the suppression of speech, or 'content neutral', as later cases have phrased it, and (4) prohibit no more speech than is essential to further that interest. As a result, it is unconstitutional to have a flag desecration law if the only reason for having it is that people should respect the flag; i.e., there must be other reasons such as traffic congestion, trespass, disorderly conduct, breach of peace. In the context of the ECHR, the Strasbourg institutions, though considering that demonstration constitutes expression of opinion within the meaning of Article 10, have ruled that some general regulations on demonstrations, such as permitting a demonstration within a fixed period of time,[426] or limiting the number of persons and requiring the payment of a fee,[427] comply with the requirements of Article 10. A similar approach can be concluded from the communication 412/1990, *Kivenmaa v. Finland* reviewed by the HRC. On the occasion of a visit of a foreign head of State and his meeting with the president of Finland, the author and about 25 members of her organization, amid a larger crowd, gathered across from the Presidential Palace where the leaders were meeting, distributed leaflets and raised a banner critical of the human rights record of the visiting head of State. The police immediately took the banner down and asked who was responsible. The author was charged with violating the Act on Public Meetings by holding a "public

[424] Emerson, T., (1969) op. cit. p. 293.
[425] *United States v. O'Brien,* 391 US 367 (1968). Stone, G., Content-Neutral Restrictions, *U. CHI. L. Rev.* 54.1 (1987) pp, 46-116, p. 114; 15-16.
[426] *G. and E. v. Norway*, (1983) 35 D R 30,HR.
[427] *Rune Anderson v. Sweden* (1988) 59 D R 165, EComHR.

meeting" without prior notification. The HRC found that a requirement to notify the police of an intended demonstration in a public place six hours before its commencement may be compatible with the permitted limitations laid down in Article 21 of the ICCPR. A requirement to pre-notify a demonstration would normally be for reasons of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.[428]

However, there are cases in which government sometimes might consider the viewpoint of the speech plus or symbolic speech, not the symbol or conduct. Here, the purpose of regulation can determine the standard of review. In other words, because the assertive line between "speech" and nonverbal "conduct" is impossible to draw, thus, the real emphasis should be placed on the motive behind the government regulation. The courts, thus, must determine whether the regulation is aimed primarily at conduct or whether instead the aim is to regulate content of speech. The US Court has had opportunities to formulate First Amendment standards in this area. The U.S. Supreme Court applies essentially two different tests to conduct conveys opinions, depending on the statute prohibiting such conduct, the "two-track analysis" of non-speech activities. If the statute is content-neutral, in which the restriction is placed on any speech regardless of what it says, as it was in *O'Brien*, then the *O'Brien* test will apply, which demands the standard of intermediate scrutiny. If the statute is content-based, in which the restriction is based on the content of a message, as it was in *Tinker*, *Johnson* and *Cox*, then the Court will review the statute with the more demanding standard of strict scrutiny.[429] In other words, content-neutral regulation of speech means the restrictions are placed on any speech regardless of what it says. For example, when the government bans flag burning, or regulates picketing that may interfere with the operation of a business or office, or regulates demonstrations which may prevent people from going where they wish to, or regulates anti-war demonstrations in Hyde Park because of the new constructions which the demonstrators may destroy, or when a state bans assembly which would conflict with the assembly of others, or when governing authorities prohibit a march because the street had previously been scheduled for repair on the day of marching, or when a government bans a meeting because of the harm that

[428] For more see, Conte, A., (2004) op. cit. p. 66; Harris, D., and Sarah Joseph (1995) op. cit. p. 443-444. Bair, J., (2005), op. cit. p. 96-97.
[429] See Stone, G., "Content Regulation and the First Amendment" *Wm. & Mary L. Rev.* 25, (1983) p. 189; Stone, G., "Content-Neutral Restrictions", (1987) op. cit. p. 46; Chemerinsky, E., "Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application." *S. Cal. L. Rev.* 74, (2000) p. 49, 51; Cohen, J., "Freedom of Expression", *Philosophy and public Affairs*, 22.3 (1993) p. 213.

may be caused to others, by moving about or making noise, government, in fact, in these cases is not regulating freedom of speech, because the government interest is unrelated to the speech itself.[430] The Supreme Court, accordingly, upheld a ban on residential picketing in *Frisby v. Shultz*, finding that the city ordinance was narrowly tailored to serve the 'significant' governmental interest in protecting residential privacy.[431]

On the other hand, the government, without providing compelling reasons, cannot, for example, validly ban the burning of the flag simply because it believes that burning of the flag is unpatriotic.[432] Applying this standard, the U.S. Supreme Court overturned the conviction of a person who burned the U.S. flag in protest over the policies of President Ronald Reagan.[433] The Supreme Court in *Texas v. Johnson* held that a law proscribing flag burning was content-based and therefore unconstitutional.[434] The same happened in the *Tinker* case. Justice Abe Fortas, in his majority opinion, rejected the idea that the school's response was "reasonable" because it was based on the fear that the wearing of the armbands would create a disturbance. Fortas ruled that the wearing of the armbands was "closely akin to 'pure speech' which ... is entitled to comprehensive protection under the First Amendment...." Public school officials could not ban expression out of the "mere desire to avoid discomfort and unpleasantness that always accompany an unpopular viewpoint."[435] In a series of decisions, the Court refused to permit restrictions on parades and demonstrations, and reversed convictions imposed for breach of the peace and similar offences, when, in the Court's view, disturbance had resulted from opposition to the messages being uttered by demonstrators.[436] The Court, thus, believing that such restriction was content-based, reversed the suspension of a high school student for wearing a black armband in protest against the Vietnam War.

In the context of ICCPR, it can be said that there is no specific rule concerning non-speech activities when restrictions target the expressive content. The communications reviewed by the HRC did not explicate the difference in application of freedom of expression principles which the difference between mere expression and communicative

[430] See *United States v. O'Brien*. 391 US 367 (1986). See Smolla, R., (1992) op. cit. p. 88; Baker, E., (1989) op. cit. p. 127; Schauer , F., (1982) op. cit. p. 203; Emerson, T., (1969) op. cit. p. 293.
[431] 487 U.S. 474 (1988).
[432] See Tribe, L., *American Constitutional Law* (Mineola, N.Y: Foundation Press, 1988) p. 791-92. See generally Ely, J., (1975) op. cit. p. 1482; Schauer, F., "The Aim and the Target in Free Speech Methodology." *Nw. U. L. Rev.* 83 (1989) p. 562.
[433] *Texas v. Johnson*, 491 US 397 (1989)
[434] *Texas v. Johnson*, 491 US 397 (1989).
[435] *Tinker v. Des Moines Independent School District*, 393 US 503 (1969).
[436] *Edwards v. South Carolina*, 372 US 229 (1963); *Cox v. Louisiana*, 379 US 536 (1965).

conduct would entail. Therefore, the exercise of these activities might be regulated if such regulations are provided by law and necessary for (a) respect of the rights or reputations of others; (b) the protection of national security or of public order (*ordre public*), or of public health or morals. Overall, through examining decisions of the ECtHR and EComHR it appears that both institutions put most emphasis on the role of freedom of expression in the democratic process[437] and consequently, have shown greater preference for political expression.[438] Thus, communicative conduct, which contains a political message, has greater protection than that with a message that contradicts public morals. In the latter example, the margin of appreciation given to the Convention' parties is greater than the margin of appreciation in the example of symbolic political speech. In addition, according to Clements, the Court and Commission in considering the degree to which interference with free expression is justified, has regard to the medium of communication.[439]

III.4. Chapter Summary

Just as speech, which has a special protection, may consist of speech whether spoken or written, so speech may sometimes be accompanied by conduct and sometimes consist solely of symbols These activities are classified, as mentioned above, as communicative conduct, whether symbolic speech or speech plus. The discussion of all these means of freedom of speech showed that, in general, pure speech does not arouse much dispute about its legal nature, whether it is speech or not and whether it should be covered by free speech law or not. Unsurprisingly, there is trouble in deciding whether hairstyle, silencing, flag burning, picketing or demonstration is "speech." The problem is that the government might claim, without examining the content that "speech" is not at issue. Therefore, though the boundary between communicative conduct, conduct that communicates and unprotected, non-communicative acts presents special difficulties for free speech law, it was necessary to see whether these methods of communication are within the scope of the free speech principle or whether freedom of speech law leaves uncovered by its umbrella some kinds of speech acts. The discussion reached the conclusion that the principle of freedom of speech gives special protection to a particular category of conduct, which is referred to as symbolic speech provided that (1)

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[437] Morrisson, C., *The dynamics of development in the European Human Rights Convention system* (The Hague: Nijhoff, 1981) p. 77.
[438] Burnheim, S., "Freedom of Expression on Trial: Case Law under European Convention on Human Rights." (1997).
[439] Clements, L., (1994) op. cit. p. 175-6.

there is an intent to express a message, (2) there a likelihood the message will be understood by a witness, and (3) the communicative conduct is covered by law. The discussion also concluded that speech plus such as demonstrations, canvassing, picketing, patrolling, and marching is covered by the principle of freedom of speech. The difficulty in speech plus cases is that the governmental interest in restricting the speech may be much stronger because of the linked element of conduct.[440] Overall, a broad meaning has been given to speech. In international and in most jurisprudence, the category of "speech" has been understood to encompass at least conventional speaking, writing, and publishing- activities that can easily be extended to modern technologies such as the Internet- and also certain less conventional forms of "symbolic" communications when these would be commonly understood to be expressive in character and purpose. This understanding of speech, which covers a vast domain of human activity, gives individuals a multitude of ways to manifest their beliefs. The scope of free speech, thus, must not be limited to verbal communication, but it must apply to conduct that conveys an idea, such as saluting, burning a flag, or demonstration.

The above discussion also showed while some free speech laws, such as the American First Amendment, have explicitly covered these types of speech in accordance with this classification, international law of free speech, such as ICCPR and ECHR, has explained the protection of communicative conduct by principles that explain important features of linguistic meaning, or the right to assemble. In contrast to both HRC and ECcHR, the US Courts tend not to address the facts in a communicative conduct case at the case-specific level, but rather approach the issue at a much broader level of generality. This has helped the US Courts to draw a clear line between speech, in its pure form, on the one hand, and communicative conduct on the other. It is, therefore, suggested that both the former institutions should follow a similar approach to the American Supreme Court. This classification of speech into pure speech and communication conduct is important in order to know the level of scrutiny in the U.S. law and the margin of appreciation in the European Human Rights Law.[441] In the context of the First Amendment, pure speech is viewed as being at the core of the free speech law. Restrictions on this form of speech receive strict scrutiny, and consequently, they are rarely upheld. Symbolic speech and speech plus are categories of speech that receive an intermediate level of freedom of speech protection. The

[440] See Barendt, E., (2005) op. cit. p. 80.
[441] Clements, L., (1994) op. cit. p. 175-6.

importance of this classification of the meaning of speech for the European free speech provision is because it determines the level of margin of appreciation that should be given to the state party. Unfortunately, in the context of ICCPR, there is no specific rule concerning non-speech activities. It is therefore, suggested that the HRC should follow a similar approach of the U.S. Courts and Strasbourg institutions in considering issues of communicative conduct. This cannot be done except through adopting the doctrine of margin of appreciation. The HRC should be aware that in the realm of free speech law, it is not sufficient, in order to assess whether a certain speech receives protection or not, to look solely at the content of the speech in question, whether it is public speech, such as a political one, or private, commercial speech for instance, but also one should look at the method used in delivering such speech.

Part Two

The Quest for the Universal Theories of Freedom of Speech

Part Two Outline

The first part of this study examined several provisions of freedom of speech, in order to find a universal meaning of speech through determining what can be considered as a speech and what should not inherit free speech protection. That part reached a conclusion that there are three modes or vehicles by which information and ideas, whether public or private, can be delivered, namely (1) pure speech (2) symbolic speech and (3) speech plus. After that attempt to determine the meaning of speech, the first question that might come to one's mind is: why do the free speech laws protect freedom of speech? Why, theorists have long tried to explain, is speech special?[442] Why protect speech and not golf, or driving, or the ability to pursue the occupation of one's choice, or . . . whatever? Steven Smith asks.[443] Why is it exempt from various types of regulation routinely applied to other activities? Daniel Farber inquires.[444] Designing the question differently, Susan Hurley says, in liberal societies, there is a general principle that protects freedom of action, so long as one's actions do not harm others. The question raised by Hurley is this: is there a distinctive right to freedom of speech that goes beyond this general liberal principle? That is, should freedom of speech have special protection, even when it does harm to others? If so, the theory of freedom of speech should tell us why.[445] Summarising all these questions, I ask: what are the justifications of the protection of freedom of speech? This is the question that Chapter Four of this study aims to answer.[446] The importance of answering the question of justifications of freedom of speechis that once free speech provisions or courts decide that free speech is justified by certain values, many questions are answered, as each of the free speech theories has its own merits, rules, applications, and consequences.[447] In other words, the purpose of discussing this topic is to provide a convincing justification for giving heightened legal protection to particular activities or concerns, in this case, to speech, beyond the generic protections afforded most human interests.

However, while recognising that we have the right to express ourselves, we also should inquire about the extent that such a costly freedom should be tolerated. To put the position more precisely, after discussing the justification for bearing the costs, we

[442] Schauer , F., (1984) op. cit. p. 1284-1306
[443] Smith, S., (2002) op. cit. p. 1245.
[444] Farber, D., (1991) op. cit. p. 554.
[445] Hurley, S., (2004) op. cit. p. 165.
[446] Note, that the question is related to the protection offered to all types of speech, not only spoken and written words, as Chapter One of the study indicated.
[447] Wallace, J., and Michael Green, (1977) op. cit. p. 711.

can, and should, ask about its limitations. Are there any limitations for freedom of speech? Chapter Five is devoted to answering this question. It examines the criteria that determine freedom of speech boundaries, such as harm, offence, and democratic principles. The modest aim in designing criteria that determine freedom of speech limitations should not be understood, under any circumstances, as an attempt to narrow the scope of free speech. The reverse is true. The aim is, as mentioned in the Introductory Chapter, to formulate the restrictions of freedom of speech in the clearest and most precise fashion possible, which could both serve as an evaluative guideline and be suitable for range of cases, covering different types of speech such as racist, ethnic, political, and religious.

Chapter Four

IV. Freedom of Speech Justifications

It is true that people have a tendency to believe that the freedom to express their opinions and beliefs is a basic part of what it means to be a human being, but most of them, even in liberal countries, do not understand why freedom of speech is so important. According to Robert Trager and Donna Dickerson, people in the democratic countries have failed to truly examine their belief in freedom of speech.[448] The fact is that freedom of speech is such a deeply embedded cultural norm or ideology that people rarely question it. The Professor of Law, Robert Post, laments the "palpable absence" in much recent legal scholarship of any "serious engagement with the question of why we really care about protecting freedom of expression."[449] He asserts that "this lack of engagement is a real and practical problem."[450] Although Post indicated this fact in order to deprecate 'single value' theories of the free speech, because such a 'lack of engagement,' according to him, is a natural corollary of the view that 'foundational' theorizing is unnecessary or futile,[451] I mention this, contrary to Post, to emphasise the importance of free speech theories and to encourage more engagement, whether at the academic level or public level, with the question of why we really care about protecting freedom of speech. Thus, this part takes as its starting point the philosophical or theoretical justifications given for freedom of speech. For each of these justifications I discuss the types of speech to which they apply. In this regard, I agree with Lee Bollinger in his argument that any sound theory of free speech must explain why we have a presumption against regulation of this one area of behaviour, that is, the behaviour of speech, when with few exceptions nowhere else in life do we insist in this way on such a level of self-restraint.[452]

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[448] Trager, R., and Donna Dickerson, (1999) op. cit. p. 91-2. Raz, J., described freedom of expression as a liberal puzzle. (1991) op. cit. p. 303.
[449] Post, R., Constitutional *Domains: Democracy, Community, Management* (Harvard University Press, 1995) p. 28.
[450] Post, R., (1995 a), op. cit. p. 298. Tien, L., (2000) op. cit. p. 633.
[451] For the same opinion see BeVier, L., (1978) op. cit. p. 301.
[452] Bollinger, L., *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (New York: Oxford University Press, 1986) p.120; Greenawalt, K., "Rationales for Freedom of Speech." In Deborah G. Johnson, Helen Nissenbaum (eds.), *Computers, Ethics and Social Values.*, (NJ: Prentice-Hall, 1995) p. 664-668.

Over the past years, several theoretical justifications for protecting free of speech have been offered by philosophers, historians, legal scholars, and judges.[453] While some believe that freedom of speech should be protected because of its role in leading society to the truth, whether political[454] or religious truth,[455] others see that without freedom of speech, the democracy in any society will be imperfect. Reaching self-fulfilment or self-realisation is the main purpose of freedom of speech in the eyes of a third party. There are also a variety of other different approaches regarding the reasons for protecting freedom of speech. Examples of these justifications are: the autonomy principle;[456] tolerance;[457] romantic tradition;[458] a new deal for free speech;[459] checking abuse of governmental power,[460] social change.[461] In addition to these positive justifications of freedom of speech, which explain why speech should be protected, there is another set of consequentialist arguments that relies on articulating the negative effects of banning or restricting speech. Examples of the latter set of justifications, which explain why, if speech is restricted, there will be negative impacts are: the chilling effect argument;[462] the evilness of censorship;[463] the slippery slope.[464] These justifications overlap, and it is difficult to draw a clear line between or among them. As Richard Moon, like most of the free speech scholars, remarks about free speech justifications, "all seem to focus on one

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[453] See generally, Hemmer, J., *The First Amendment:Theoretical Perspectives* (New Jew Jersey: Hampton Press, 2006); Summers, P., "Cultural Truth and the First Amendment, Your Truth Better Than Mine?" *Intercultural Communication Studies* X.2 (2001) p. 11.
[454] An example of political truth is the approach of Mill, J., See, *On Liberty* (1859) op. cit.
[455] An example of religious truth is the approach of Milton, J., See Milton, J., (1644) (Truth is strong, next to the Almighty.) See also Blasi, V., "Milton's Areopagitica and the Modern First Amendment". An edited and expanded version of a lecture Professor Blasi presented at Yale Law School Paper 6, March 1995. YLSOP, *Yale Law School Occasional Papers*, 1 (2001), p. 10.
[456] See Brison, S., (1998a) op. cit. p. 312; Schauer, F., (1982) op. cit. p. 69; Scanlon, T., (2003) op. cit. p. 14, 15; Richards, D., (1986) op. cit. p. 167-169.
[457] See Bollinger, L., (1986) op. cit.; Bollinger, L., "The Tolerant Society: A Response to Critics", *Columbia Law Review* 90 (1990) pp. 979-1001, p. 985. See also Bollinger, L., "Mill and Milquetoast." *Australian Journal of Philosophy* 67 (1989) pp. 152-71; Mowbray, M., "Philosophical Based Limitations to Freedom of speech in Virtual Communities." *Information Systems Frontiers*, 3.1 (2001) p. 126.
[458] See Shiffrin, S., (1990) op. cit. p. 140; Farber, D., "Free Speech without Romance: Public Choice and the First Amendment." *Harvard Law Review* 105.2 (1991) p. 554-583.
[459] Sunstein, C., "Free Speech Now." *The University of Chicago Law Review*. 59 (1992) pp. 255-316.
[460] Blasi, V., "The checking value of First Amendment Theory." *American Bar Foundation Research Journal* 2.3 (1977) pp. 521-550, p. 546. Stewart, P., (1975) op. cit. p. 631-43. See also, Black, H., in *New York Times v. United States* (1971).
[461] See Emerson, T., (1963) op. cit. p. 884-893; Emerson, T., (1969) op. cit. p. 6, 7.
[462] See DeCew, J., "Free Speech and Offensive Expression", *Social Philosophy and Policy*, 21.2 (2004) p. 81.
[463] Hargreaves, R., *The First Freedom: A History of Free Speech* (Phoenix Mill, UK: Sutton, 2002) p. 306.
[464] See DeCew, R., (2004) op. cit. p. 81. For more see, David Enoch: "Once You Start Using Slippery Slope Arguments, You're on a Very Slippery Slope", *Oxford Journal of Legal Studies* 21 (2001) pp. 629-647

or a combination of three values: truth, democracy, and individual autonomy."[465] Therefore, I plan to concentrate on these justifications here because other theories are no more than subtle variations on each theme.

IV. The Truth Theory

IV.1.1. Mill's argument

The justification from the pursuit of the truth originates in the utilitarian philosophy of an influential liberal thinker John Stuart Mill.[466] This traditional theory, which became the touchstone for practically every discussion of freedom of speech,[467] is based on the idea that allowing people to speak, hear, read, write, and get access freely to all views and information promotes a practical societal goal of discovering truth.[468] Only through free discussion can any society find the truth which it is looking for, Mill claims.[469] In contrast, when the state imposes censorship on society, ultimately, truth could be suppressed and disappear.

Mill, who propounded this theory, in his great treatise, *On Liberty*, gave an explanation of how the truth theory justifies freedom of speech.[470] Mill argues that society would be more likely to reach to truth if there is a possibility to hear all available views; even false information, or what is thought by some to be false.[471] In his view, censorship of opinion and information by humans, who are not infallible, will lead the state to restrict the knowledge of the truth, even when the censorship is performed in good faith.[472] The state, by imposing restrictions on speech and censoring views is

[465] Moon, R., (2000) op. cit. p. 8; Emerson, T., (1969) op. cit. p. 6, 7; Emerson, T., "First Amendment Doctrine and the Burger Court." *California Law Review*, 68 (1980), pp. 422-481; Redish, M., "The Value of Free Speech." *University of Pennsylvania Law Review*, 130.3 (1982) pp. 591-645; Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd Edition (Oxford University Press, 2002) p. 766; Baker, E., "Scope of the First Amendment freedom of speech" *UCLA Law Review*, 25.5 (1978) pp. 964-1040. Post, R., "Recuperating First Amendment Doctrine", *Stan. L. Rev*, 47 (1995) p. 1249, 1250.
[466] See in general, Mill, J., *On Liberty* (1859). See also O'Rourke, K., *John Stuart Mill and Freedom of Expression, The genesis of a theory* (London and New York: Routledge, 2001) p. 1; Vernon, R., "John Stuart Mill and Pornography: Beyond the Harm Principle." *Ethics*, 106.3 (1996) p. 622-623. McCloskey, H., "Mill's Liberalism." *The Philosophical Quarterly* 13.51, (1963) pp. 143-156, p. 145, 147.
[467] Schauer, F., (1982), op. cit. p. 15, Heath, G., and Jonathan Bendor, "When Truth Doesn't Win in the Marketplace of Ideas: Entrapping Schemas, Gore, and the Internet", *Entrapping schemas*, March 10, 2003, p. 2.
[468] Bracken, H., *Freedom of Speech, Words Are Not Deeds*, (Praeger Publishers, 1994) p. 11; 14; Barendt, E., "The First Amendment and the Media" in Ian Loveland (ed), *Importing the First Amendment, Freedom of Expression in American, English and European Law* Oxford: Hart Publishing, 1998, p. 43; Gray, J., *Mill on Liberty: A Defence* 2nd edition (London and New York: Routledge, 1996) p. 104; Hargreaves, (2002) op. cit. p. 302
[469] Mill, J., (1859) op. cit. p. 75-188; Sunstein, C., (1993) op. cit, p. 19.
[470] For details about what is the truth, see Summers, P., (2001) op. cit, p. 13-14.
[471] Mill, J., (1859) op. cit. p. 76.
[472] Mill, J., (1859) op. cit. p. 117, 120. Moon, R., (2000) op. cit. p. 9.

inhibiting society from recognising the truth because truth needs to be tested; otherwise it becomes prejudice or "dead dogma,"[473] and consequently inhibits the progress of human knowledge and obstructs autonomous thought.[474] Mill rejected the idea that the state, in censoring views, can distinguish truth from falsehood better than the general public. The contrary is true, according to Mill. The general public, he argued, are in a better position than the state to determine the truth and falsity. He believed that the judgement regarding what is true and what is not should be left to the general public by allowing them free and open discussion and debate and band any kind of state censorship or trusteeship.[475] Mill went further, and dismissed any advantage the state censorship of opinion as in his view that it can never be certain that the opinion which we are endeavouring to stifle is a false opinion.[476] As Mill wrote:

> The opinion which it is attempted to suppress by authority may possibly be true. Those who desire to suppress it, of course deny its truth; but they are not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means of judging. To refuse a hearing to an opinion, because they are sure that it is false, is to assume that their certainty is the same thing as absolute certainty.[477]

However, even if there is assurance that we face a false idea, this cannot, in Mill's doctrine, justify suppressing it, because a false idea often contains a grain of truth and by suppressing this false idea, this grain of truth will be suppressed.[478] Mill also observed that false heretical opinions will not disappear unless there is free speech in society, as without it, false ideas smoulder and fallacies are protected from exposure and opposition.[479] John Milton in 1644 reached the same conclusion as Mill, when he concluded that exposure to falsity is valuable to the appreciation of truth. Milton, who characterised erroneous opinions as "dust and cinders," considered them as servants who will polish and brighten the "armoury of truth."[480] Milton argues, "And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open

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473 Mill, J., (1859) op. cit. p. 97; McCloskey, H., (1963) op. cit. p. 145.
474 Gray, J., (1996) op. cit. p. 105, 107.
475 Mill, J., (1859) op. cit. p. 78; Dripps, D., "The Liberal Critique of the Harm Principle", *Criminal Justice Ethics*, 17.2 (1998) p. 3.
476 Mill, J., (1859) op. cit. p. 76, 77. Emerson, T., (1969) op. cit. p. 7.
477 Mill, J., (1859) op. cit. p. 76, 77.
478 Mill, J., (1859) op. cit. p. 116. Emerson, T., (1963) op. cit. p. 882
479 O'Rourke,K., (2001) op. cit. p. 85. Chip Heath and Jonathan Bendor, (2003) op. cit. p. 2.
480 Milton, J., (1644) op. cit. p. 41. See Anastaplo, G., *Reflections on Freedom of Speech And the First Amendment*, University Press of Kentucky, 2007, p. 20-25; Peters, J., *Courting the Abyss, Free Speech and the Liberal Tradition* (Chicago and London: The University of Chicago Press, 2005) p. 68-99.

encounter?"[481] To Milton, when something is suppressed it does not go away. It just takes on a romantic underground life and flourishes rather than being brought to the light of day where it might be refuted.[482]

It can be concluded from Mill's view that stifling a false opinion would be an improper act because without free discussion, "the shell and husk only of the meaning is retained, the finer essence being lost."[483] It also can be concluded that any ideas having even the slightest redeeming social value should enjoy full protection. Therefore, when we ask: Should we allow someone to advocate in public that Holocaust did not occur? the answer is "Yes" according to the truth theory. It also can be understood from the above brief analysis of Mill's views that minority opinions are essential to the search for truth. If minority opinion turns out to be right, then censorship will have deprived society of the opportunity to exchange its incorrect majority views for the correct view of the minority. If, on the other hand, the minority opinion is wrong, censorship robs society of the opportunity to better understand its own truth by engaging it in debate.[484] The fact that many minority views of the past are now majority views demonstrates Mill's own argument that no matter how strongly you hold your convictions today, tomorrow you could find yourself changing your mind.[485] It can also be concluded that Mill's concern was not only directed to the words of speakers, but also to the importance of the fact that people must be free to hear all views. The interests of hearers are the principal focus of concern in Mill's theory.[486]

Applying Mill and Milton's approach to the Danish cartoons example leads certainly to one conclusion: the principal remedy for that speech is more communication. In other words, the harms that come from false or misleading or offensive speech are largely eliminated, or at least better eliminated than by any other remedy, by true or accurate or non-offensive counter-speech, because the truth of true speech enables truth to prevail over falsity, good ideas to win out over bad ones, and sound arguments to triumph over unsound ones. So even if it is true that it is harmful or offensive to Muslims to portray them in the cartoons and elsewhere as terrorists or as backward or as sexist, and thus even if publication of the cartoons is, in isolation, harmful to Muslims because of the impressions of Muslims that the distribution of the cartoons will foster, an equal liberty

[481] Milton, J., (1644) op. cit. p. 38-39.

[482] See "There is no such thing as free speech," an interview with Fish, S., by Annemarie Jonson and Peter Lowe, *Australian Humanities Review*, Issue 9 February- April 1998.

[483] Mill, J., (1859) op. cit. p. 77. Chafee, Z., (1955) op. cit. p. 33.

[484] Trager, R., and Donna Dickerson, (1999) op. cit. p. 58.

[485] Trager, R., and Donna Dickerson, (1999) op. cit. p. 58.

[486] Chesterman, M., (2000) op. cit. p. 302.

for the opposing views, it is commonly argued, will enable truth to prevail in the long run.[487] For those who adopt the truth theory, more speech is viewed as a panacea, especially when efforts are mounted to regulate hate speech.[488] Dworkin, for example, has argued that racist and hate speech should not be prohibited but be treated in a more liberal way.[489] Tim Bakken suggests that maximising freedom of speech increases both equality and liberty.[490] Eric Barendt cited in his previously-mentioned book the opinion of the proponents of free expression who see that such speech is best met by more speech advocating the moral and cultural superiority of a multi-racial society. The suppression of racist and hate speech, in their view, is in the long run more likely to expose society to the risk of violence than is its dissemination.[491] Hutzler suggests that "lengthy discussion... is the most effective means" of dealing with hate speech issues.[492] Ortner agrees: "The best and perhaps the only recourse against racist and hate speech is to speak out against it."[493] It is, thus, the implementation of the truth theory which allows free distribute of hate speech in the United States, as will be shown while studying freedom of speech limitations.[494] Hate speech, such as denying the Holocaust, is given wide American constitutional protection while under international human rights law and on the other side of the Atlantic, for example in the ECHR it is largely prohibited and subjected to criminal sanctions.[495] Likewise, under existing and well-settled American constitutional doctrine, the publication of these cartoons, and in fact of images considerably more offensive than these, would present no serious legal issues, and their publication would plainly be, and in fact has been, permitted. Under American law, as Frederick Schauer sasy, these cartoons are not even close to the line, and similar images that were very highly sexually explicit and that used highly vulgar language would be equally protected.[496]

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[487] Schauer, F., (2006) op. cit. p. 8.
[488] Powell, C., "Mythological Marketplace of Ideas: R.A.V., Mitchell, and Beyond", *Harvard Blackletter Law Journal*, 12.1 (1995) pp. 1-48, p. 2.
[489] Dworkin, *Freedom's Law: the moral reading of the American Constitution* (New York: Oxford University Press, 1996) p. 225. See also Wolfson, N., *Hate Speech, Sex Speech, Free Speech* (Westport, Connecticut, London: Prager, 1997) p. 47.
[490] Bakken, T., "Liberty and Equality Through Freedom of Expression: The Human Rights Questions Behind 'Hate Crime'' Laws" *International Journal of Human Rights* 4.2 (2000) pp.1-12, p. 1.
[491] Barendt, E., (1985) op. cit. p. 161-2.
[492] C Hutzler, "A Paradoxical Approach to the First Amendment and Hate Speech", *Maryland Journal of Contemporary Legal Issues*, 4 (1993) 205-30.
[493] Ortner, W., "Jews, African-Americans, and the Crown Heights Riots: Applying Matsuda's Proposal to Restrict Racist Speech" *Boston University Law Review*, 73 (1993) p. 918.
[494] Occasionally the courts in the US refer to Mill's theory, see, for example *Abrams v. United States*, 250 U.S. 616 1919); *Whitney v. California*, 274 US 357 (1927); *New York Times v. Sullivan*, 376 US 255 (1964); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).
[495] Nolte, G., (2005) op. cit. p. 48.
[496] Schauer, F., (2006) op. cit. p. 3.

IV.1.2. The Evaluation of the Truth Argument

Many believe that the Millian justification has a fair claim to constitute the orthodox liberal defence of free speech. It has been described by the free speech scholars the "most prominent and most persevering" argument that has been employed to attempt to justify a principle of free speech. According to Schauer, Mill's argument has been "throughout modern history the ruling theory in respect of the philosophical underpinnings of the principle of free speech."[497] However, though recognition of the truth by society is a worthy goal which could be one of the free speech justifications, but not the only one, Mill's truth theory has been criticised on many grounds. Firstly, the assumption that a possibly true statement is the highest public good is not always correct.[498] Societies, in fact, would rather protect other values than the truth.[499] Let's take an example of words that incite violence. Even if this speech is completely true, people may prefer to save society from violence rather than hear such a true statement. Similarly, an immediate and clear danger could occur if the state allowed inflammatory speech by some disorder provokers. Society gives priority to preventing disorder over recognition the truth as will be seen when examining ICCPR, ECHR and Islamic law toward political inflammatory speech. Likewise, the legal system may protect a person's privacy against the publication of true facts.[500] As a result of this, the true statement that Mill thought to be the highest public good is not always so.[501]

Mill claimed that unless he or she is infallible, no one can have a rational assurance of the truth of any idea. According to James Stephen, this cannot be so. "There are innumerable propositions on which a man may have a rational assurance that he is right, whether others are or are not at liberty to contradict him, and although he does not claim infallibility."[502] In short, not all silencing of speech is an assumption of infallibility, according to McCloskey.[503] The critics of the truth argument also believe that Mill's theory does not clarify whether it applies to all types of speech equally. According to them, Mill's argument, which calls for society to be more tolerant, even regarding false

[497] Schauer, F., (1982) op. cit. p. 15.
[498] Mitchell, D., and Caroline West, (2004) op. cit. p. 441
[499] Barendt, E., (2005). op. cit. p. 8.
[500] Barendt, E., (2005). op. cit. p. 9.
[501] McClosky, R., *The American Supreme Court* (University of Chicago Press, 1960) p. 46; R. H. Coase, "The Market for Goods and the Market for Ideas" *American Economic Review*, 64.2 (1974) p. 384.
[502] Stephen, J., "Liberty, Equality, Fraternity" London 1873, article in Alexander, E., (ed). *On Liberty, John Stuart Mill* (Broadview Press 1999) p. 254.
[503] McCloskey, H., *John Stuart Mill: a Critical Study* (London: Macmillan, 1971) p. 119-120.

ideas in order to recognise the truth, is more relevant to political, moral, aesthetic, religious, and social affairs than to mathematics and scientific speech, for example.[504] Under the truth theory, some of the mentioned sorts of speech cannot be justified, whereas the free speech law protects them in the context of other rationales.[505] As Sadurski observed, "The purpose of seeking the truth supports a distressingly narrow scope for freedom of speech."[506] Furthermore, while it is well known that the absence of restrictions, whether prior or penal, is the substantive point in the theory of truth,[507] Mill did not explain how the state can restrict the publication of government secrets or confidential commercial information. By following Mill's theory, the state should not ban the disclosure of information by civil servants to the media, nor should the publication of bomb-making instructions be banned. However, this is unrealistic. As the following chapter will show, most free speech laws, even in most liberal democracies, outlaw such disclosure of government information, which can be regarded as a government's own property. [508] The ECtHR, for example, in the case of *Hadjianastassiou v. Greek* charged an aeronautical engineer and a captain in the Greek airforce with disclosing military secrets.[509] Thus, the truth theory is unable to justify this prohibition which is allowable by other theories.

Moreover, the "truth reveals itself" argument[510] has been contested by some who do not believe that truth can ever be proven absolutely. According to this opinion, there is no certainty that truth will always emerge from the free discussion or will be the usual winner.[511] Some false ideas and views may compete with the true one among the general public, who base their view, not only on their independent evaluation of evidence, but also on expert authority or emotional effects. In other words, there is a serious risk in accepting Mill's argument, "that the presence of false propositions helps to maintain the true views in a better shape, thanks to their collisions with errors."[512] Who can guarantee for us that false ideas or statements will not win the battle and defeat the truth, if those false statements have sufficient exposure in propaganda and mass

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[504] Barendt, E., (2005) op. cit. p. 9, 10, 11. O'Rourke, K., (2001) op. cit. p. 80.
[505] Barendt, E., (2005) op. cit. p. 9, 10.
[506] See Sadurski, W., (1999) op. cit. p. 8.
[507] See generally Mill, J., *Utilitarian, On Liberty and Considerations on Representative Government* (London: Dent, 1972) p, 83-122.
[508] See later on *Spycatcher* case, *Observer and Guardian v. United Kingdom*, 13585/88 (1991) ECHR 49. *The Sunday Times v. United Kingdom* (No 2) - 13166/87 (1991) ECHR 50.
[509] *Hadjianastassiou v. Greece* 12945/87 (1992) ECHR 78.
[510] Peters, J., (2005) op. cit. p. 15.
[511] See Baker, E., (1989) op. cit. p. 13.
[512] Sadurski, W., (1999) op. cit. p.12.

media?[513] There are instances where truth might be subverted by too many voices saying the same thing. One of these instances happened in the pre-World War II years, when Nazism was growing in Germany. What did exist was a well-coordinated propaganda campaign that literally overwhelmed in charisma and volume, a number of voices of moderation. The Holocaust happened by the Germans in World War, supported by propaganda claiming that the Holocaust was a hoax, the result of a deliberate Jewish conspiracy created to advance the interest of Jews at the expense of other peoples. During that period, cartoons appeared in newspapers, showing Jews to be evil, miserly mean communist types hoarding all the money, etc, etc (compare with cartoons of the Prophet of over a billion Muslims, who is being depicted as a "terrorist.")[514] The truth theory did not work at that period. This is the main reason why Germany, and other European Countries, passed laws prohibiting the existence of Nazi organisations and speech denying the Holocaust as, according to some, the marketplace of ideas theory does not always work.[515] The Holocaust example shows that more communication may not solve the problem of hate speech; it may, in fact, exacerbate the situation. More speech may lead to more hate speech. Some individuals, without any fear of sanction, may choose to utter hate epithets repeatedly in an attempt to demean and denigrate a hapless victim, who must remain subjected to such abuse.[516] To take another example, above, while discussing the Danish cartoons, it was said that although it is harmful to Muslims to portray them in the cartoons as terrorists or as backward or as sexist, an equal liberty for the opposing views will enable truth to prevail in the long run. To Fredrick Schauer, the problem with this argument, essentially an empirical and not a philosophical argument, is that it is false. According to Schauer:

> The question ... is whether the truth (or falsity) of a proposition has the greatest explanatory power in determining which propositions will be accepted and which rejected, at least when compared to other potential explanatory variables, including the charisma or other rhetorical power of the communicator of the proposition, the frequency with which the proposition is repeated, the antecedent beliefs of the audience about the truth or falsity of the proposition, and much else. And when put this way, it is clear that the romantic vision of the truth winning out because of its truth has little strong empirical support, and numerous

[513] See Sadurski, W., (1999) op. cit. p. 12.
[514] Aziz, S., "Viewpoint: Muslims, Cartoons and a Case of Bad Eyesight", *Middle East Times*, February 20, 2006.
[515] Trager, R., and Donna Dickerson, (1999) op. cit. p. 105.
[516] Hemmer, J., "Hate Speech Codes: A Narrow Perspective", *The North Dakota Journal of Speech & Theatre* 13 (2000b).

> anecdotal examples (to say nothing of the examples provided by the entire advertising industry) to suggest that it may very well be false.[517]

In addition, Mill assumed that people are basically rational; therefore he argues that the general public are in a better position than the state to determine the truth and falsity[518]. This statement, in some circumstances, cannot be acceptable. Let's take the example of a cigarette advertisement; only the state has sufficient resources to examine whether the statement released by the advertisement saying "Cigarettes XXX contain 0.5% tar" is true or false. Individual citizens, in fact, as Sadurski said "have insufficient resources to test the veracity of an advertisement which makes representations about the volume of tar in cigarettes."[519] Therefore, the theory will fail and the truth may not prevail unless the state intervenes.

This is why many modern critics are often sceptical about Mill's supposition that freedom from regulation promotes the acquisition of truth. Richard Moon believes that "we have plenty of reasons to be sceptical about the reliability of public reason when exercised in particular social/economic contexts."[520] David Strauss asserts that "[n]o matter how we define the ground rules, there is no theory that explains why competition in the realm of ideas will systematically produce good or truthful or otherwise desirable results." [521] Edwin Baker, likewise, criticised this supposition. [522] In sum, the consequentialist "truth rationale" for freedom of speech seems to rest on suppositions that are at least highly debatable.[523]

IV.1.3. The Application of the Truth Theory (The Marketplace of Ideas)

The marketplace of ideas is a model that is used- its usage has dramatically increased since the 1970s- in the United States to express the kind of truth-based argument made by Milton (1644) and Mill (1859).[524] It could be considered as another version of Mill's theory.[525] The notion of a marketplace of ideas, Georg Nolte maintains, is not

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[517] Schauer, F., (2006) op. cit. 9.
[518] See Baker, E., (1989) op. cit. p. 6, 7.
[519] Sadurski, W., (1999) op. cit. p. 9.
[520] Moon, R., (2000) op. cit. p. 10. Baker, E., (1989) op. cit. p. 6. See Sadurski, W., (1999) op. cit. p. 9, 10.
[521] Strauss, D., "Persuasion, Autonomy, and Freedom of Expression", *Colum. L. Rev.* 91 (1991) p. 334, 349
[522] Baker, E., (1989) op. cit. p. 12-17.
[523] Smith, S., (2002) op. cit. p. 1247.
[524] Rosenfeld, M., "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis", *Cardozo Law School*, (2001) Public Law Research Paper No. 41, p. 1533.
[525] Barendt, E., (2005) op. cit. p. 7. See Sadurski, W., (1999) op. cit. p. 8.

enunciated in Europe as it is in the USA.[526] The marketplace of ideas, as will appear later on from the examination of the case law of the First Amendment, ECHR and the ICCPR, is the basis of the divergence between the America law of freedom of speech and intentional law of free speech

The state, the marketplace of ideas metaphor assumes, should not restrain speech because "unrestrained speech aids listeners in finding truth and, thus, promotes wise decision making."[527] By allowing all views and ideas to compete each other, according to the marketplace theory, a marketplace will produce the truth.[528] In *Abrams v. US*, Justice Oliver Holmes assumed that all truths are relative and the only way to judge them is by applying the "marketplace of ideas." [529] According to Holmes, who introduced the marketplace of ideas metaphor into Supreme Court doctrine[530] and believed that the United States Constitution shared his approach,[531]

> The best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which men's wishes can be safely carried out.[532]

Since Holmes' opinion, which clearly displays the influence of John Stuart Mill,[533] the "marketplace image is both historically and doctrinally at the heart of modern First Amendment philosophy."[534] The metaphor has been used by justices in the U.S. in virtually every area of First Amendment jurisprudence.[535] Indeed, it "dominates First Amendment thinking both rhetorically and conceptually".[536] The courts in many cases have leaned heavily on the marketplace of ideas to justify free speech. Political speech is the main area in which the courts have applied the marketplace of ideas theory. Likewise, hate speech does in fact fall under the category of protected speech because of the application of this theory. A third area in which this theory justifies the

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[526] Nolte, G., (2005) op. cit. p. 48.
[527] See Baker, E., (1989) op. cit. p. 11. Sunstein, C., "The First Amendment in Cyberpace", *The Yale Law Journal*, 104 (1995a) p. 1760.
[528] Hemmer, J., (2006) op. Cit. p. 8-9.
[529] *Abrams v. US*, 250 US 616 (1919).
[530] See Sheldon M. Novick, "The Unrevised Holmes and Freedom of Expression", *The Supreme Court Review*. (1991) pp. 303-390; Blasi, V., "Reading Holmes Thought the Lens of Schauer: The Abrams Dissen", *Notre Dame Law Review* 72 (1997) p. 1343.
[531] Barendt, E., (2005) op. cit. p. 8.
[532] *Abrams v. United States*, 1919
[533] Pohlman, H., (1991) op. cit. p. 10.
[534] Weinberg, J., "Broadcasting and Speech." *California Law Review*. 81 (1993) p. 1103, n. 164-165.
[535] Many believe that the US Supreme Court prefers the "marketplace of ideas" over others. Baker, E., (1989) op. cit. p. 3, 7; Barendt, E., (2005) op. cit. p. 11; Wang, X., "Freedom of speech in the United States Constitution" *Perspectives*, 2.5 (2001); Wallace, J., and Michael Green, "Bridging the Analogy Gap: the Internet, the Printing Press and Freedom", *Seattle University Law Review* 20 (1977) p. 711.
[536] Baker, E., (1989) op. cit. p. 12.

constitutional protection is commercial speech[537] One should not be surprised, therefore, if this theory receives strong support from media owners, investors, advertisers, and *laissez-faire* media regulators.

IV.2. Self-fulfilment Theory

IV.2.1. The Argument

Dissatisfied with the truth justification, proponents of freedom of speech turn back to the individual speaker, emphasising the importance of "self-determination," "self-realization," "self-fulfilment," "personal autonomy," "human dignity" or simply "liberty."[538] This theory values freedom of speech not only as a means, as Mill assumes in the truth theory, but as an end in itself. As humans, we need not only to be able to think about all of the possibilities of life available to us, to imagine the future and to reflect on the past, but also to be able to express openly those possibilities through literature, clothing, dance, decoration, architecture, music, art, and literature.[539] Professor Redish claims that all functions of expression can be understood under the umbrella of self-realisation.[540] The legal scholar, Edwin Baker, points out that "any time a person engages in chosen meaningful conduct, whether public or private, the conduct usually expresses and further defines the actor's identity and contributes to his or her self-realisation."[541] The value of free speech in this case extends primarily from respect for individual autonomy, or liberty, and the degree to which speech allows individuals to define, develop, and express themselves. For example, the poet expresses her/his ideas through the publication and circulation of her or his poems. To prevent such feelings from being exteriorised through expression affects the poet's individual freedom and prevents him/her from having self-expression and self-fulfilment.[542]

As originally conceived, the justification for self-fulfilment seemed exclusively concerned with the self-expression needs of speakers. To put it another way, it is important to recognize that, within this particular value framework, the benefits of free

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[537] Shumway, C., (2002) op. cit. Feldman, D. (2002) op. cit. p. 765.
[538] Baker, E., (1989) op. cit. p. 47-48 ("self-fulfilment ," "self-realization," "self-determination"); Redish, M., (1984) op. cit. p. 9-13 ("self-realization"); Scanlon, T., (1972) op. cit. p. 214-15 (autonomy); David Strauss, (1991) op. cit. p. 335 (autonomy); Tribe, L., *Constitutional Choices* (Cambridge, MA: Harvard University Press, 1985) p. 94-198. Hemmer, J., (2006) op. cit. p. 65, 115, 149.
[539] Emerson, T., (1969) op. cit. p. 6.
[540] Redish, M., (1984) op. cit. p. 9-13.
[541] Baker, E., (1989) op. cit. p. 53; Baker "The Process of Change and the Liberty Theory of the First Amendment." *S. Cal. L. Rev.* 55 (1982) p. 293; Baker, "Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech" *U. Pa. L. Rev.* 130 (1982) p. 646.
[542] Emerson, T., (1963) op. cit. p. 879, 880.

speech exclusively involve its effects on the speaker, regardless of whether the speech reached, or had any effect on, other listeners.[543] Several examples can be provided here. The protestors against the Iraq war may explain that when they chant "Stop This War Now, Oh Bush and Blair" at a demonstration, they do so without any expectation that their speech will affect the continuance of war or even that it will communicate anything to people in power; rather, they participate and chant in order to define publicly their opposition to the war. This war protest provides a dramatic illustration of the importance of this self-expressive use of speech, independent of any effective communication to others, for self- fulfilment or self-realization. It illustrates that the importance of having self-expression and self-fulfilment is because only through communication with the rest of society can we tell them who we really are (self-expression), and only by communication with our fellow human beings, we can exercise our capacities (self-fulfilment.) [544] As another example, since hate speech could plausibly contribute to the fulfilment of the self-expression needs of its proponents, it would definitely seem to qualify for protection under the justification from self-fulfilment.[545] The same claim can be raised by the Danish cartoonists. Through these cartoons, it might be claimed, that they define publicly their opposition to Islam, independent of any effective communication to others. Likewise, sexually explicit speech, in the view of Ian Cram, is only justified by this theory. As such type of speech appears to have little if any connection to a well-functioning deliberative democracy, so any claims of sexually explicit speech, pornography for example, rest instead on arguments that connect to deeper-level libertarian arguments for self-fulfilments.[546] Similar to the example of sexually hate speech and explicit speech, artistic speech qualifies for protection under the justification from self-fulfilment. In fact, theorists sometimes ponder the justification for including paintings or music within the scope of protection.[547] They found their quest, not in the marketplace of ideas nor in democracy theory, but in the argument for self-fulfilment, which explains why the scope of freedom of speech is not confined to political speech, but also extends to other categories, such as artistic.[548] As all these forms of arts are not in ordinary usage "speech," therefore they depart from the model of "rational" discourse in a "marketplace of ideas." From the

[543] Redish, M., (1982) op. cit. p. 620.
[544] See Sadurski, W., (1999) op. cit. p. 17.
[545] Cram, I., (2006) op. cit. p. 112.
[546] Cram, I., (2006) op. cit. p. 139.
[547] Hamilton, M., (1996) op. cit. p. 73, 76.
[548] Smith, S., "Believing Persons, Personal Believings: The Neglected Centre of the First Amendment", *U. Ill. L. Rev.* (2002) p. 1311.

standpoint of a "democracy" rationale, most literature is somewhat removed from core "political speech."[549] Thus, Marci Hamilton remarks that "neither the Court nor legal scholars have felt compelled to provide a particularly well-suited theoretical justification for art's first amendment treatment."[550] The argument for self-fulfilment provides such protection and explains why the scope of freedom of speech is not confined to political speech, but also extends to other categories, such as artistic.[551] As the final example, the speaker's right to use the language of her/his own choice is only justified by this theory.[552] This is one of the important implications of this theory. Language, according to David Lewis, provides sets of conventions, regular ways of expressing and communicating thoughts and ideas shared by a group of speakers.[553] It may, according to Leslie Green, be an expression of political identity.[554] To deprive individuals of their right to use their own language is to deprive them of one of the basic characteristics by which they define themselves.[555] In this regard, Ahmed Shehu Abdussalam says, "Language rights are a part of human development. Any resistance to granting them will adversely affect man's honour."[556]

From the above argument it appears that unlike the truth and democracy theories, this theory is not utilitarian in form. By this I mean that it is totally unnecessary for freedom of speech to produce another value such as discovering the truth or maintaining democracy, for it to be justified. Fostering individual self-fulfilment and self-realisation can sufficiently justify the protection for freedom of speech.[557] In addition, the self-fulfilment theory, unlike the truth and democracy theories, is targeted primarily at the individual, given that it focuses on the value of free speech in enabling an individual to

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[549] Weinstein, J., "Hate Speech, Viewpoint Neutrality, and the American Conception of Democracy," *in* Thomas Hensley, (ed.,) *The Boundaries of Freedom of Expression and Order in a Democratic Society* (Kent State Press, 2001) p. 146, 150.

[550] Hamilton, M., "Art Speech", *Vand L, Rev* 49 (1996) p. 76.

[551] Smith, S., (2002) op. cit. p. 1311.

[552] Fernand 1994) pp. 163-186, p. 163.

[552] Varennes, F., "Language and Freedom of Expression in International Law", *Human Rights Quarterly*, 16.1 (1994) pp. 163-186, p. 163.

[553] Lewis, D., "Languages and Language", in *Philosophical Papers*, vol 1, (Oxford University Press, 1983) p. 164-66.

[554] Green, L., "Freedom of Expression and Choice of Language", *in* Wilfrid Waluchow, (1994) op. cit. p. 135-152.

[555] Higgins, N., "The Right to Equality and Non-Discrimination With Regard to Language", *Murdoch University Electronic Journal of Law*, 10.1 (2003).

[556] Abdussalam, A., "Human Language Rights: an Islamic Perspective", *Language Sciences*, 20.1 (1998) pp. 55-62, p. 57.

[557] Baker, E., (1989) op. cit. p. 5. Dworkin, R., (1996) op. cit. p. 200.

achieve happiness and self worth and become a better, more developed person.[558] Explaining this point, Professor Michel Rosenfeld says,

> Unlike ... [others] ...justifications, which are collective in nature, the ... justification for free speech that from autonomy is primarily individual regarding. Indeed, democracy ... and pursuit of the truth are collective goods designed to benefit society as a whole. In contrast, individual autonomy and well-being through self-expression are presumably always of benefit to the individual concerned, without in many cases necessarily producing any further societal good.[559]

Other theories focus on the value of freedom of speech for citizens as a collective. These theories all tend not to focus overtly on individual persons at all, but focus primarily on the functioning of social institutions, rather than the conduct and quality of individual lives or at best focus at both the individual and the collective levels.[560] The democracy rationale, likewise, speaks mainly in systemic terms.[561]

IV.2.2. Evaluation of Self-fulfilment Theory

Although some believe that this theory is the most adequate justification for free speech protection,[562] self-fulfilment theory has encountered difficulties. It is said, by its critics, that the theory does not convincingly explain why particular human activities, in particular, those involving speech, deserve special legal protection not afforded other activities.[563] It is well known that the person's right to self- fulfilment should not at the same time restrict another individual's dignity. Yet, this theory does not answer what happens if freedom of speech collides with the dignity of another person. There is no inherent reason to find speech to be a fundamental right compared with countless other activities that might be regarded as a part of autonomy or that could advance self-fulfilment. Which one of two would reasonably have to be put before the other? Some, Thomas Emerson, for instance, assumed that the society may prefer to achieve other values such as virtue, justice, equality rather than free speech.[564] Frederick Schauer wrote, "Although many liberal societies do treat speech specially, perhaps there is no good reason to do so, and we ought instead to require that an act of speech control meet

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[558] Scanlon, T., (1972) op. cit. p. 204, 214; Saba, R., "An Individuals Right to Access Information Held by the Government", *Comparative Media Law Journal* 3(2004) p. 80.
[559] Rosenfeld, M., (2001) op. cit. p. 1535.
[560] Emerson, T., (1963) op. cit. p. 877, 881.
[561] Fiss, O., *The Irony of Free Speech* (USA-Harvard University Press, 1998) p. 2.
[562] Baker, E., (1989) op. cit. p. 53. McIntosh, W., and Cynthia Cates., "Hard Travelin': Free Speech in the Age of the Information Super Highway", in Toulouse, C., and Timothy Luke (eds.) *The Politics of Cyberspace* (NY: Rutledge Press, 1998) p. 89.
[563] Smith, S., (2002) op. cit. p. 1248. Tien, L., (2000) op. cit. p. 633; Cram, I., (2006) op. cit. p. 141.
[564] Emerson, T., (1963) op. cit. p. 880.

the same but no higher threshold of justification than is required of an official act of running control or any other liberty-restricting action."[565] This theory, according to Barendt, does not determine the criterion that courts should follow when there is conflict between the freedom of speech, whose protection is grounded on fundamental background rights to human dignity and other freedoms which are equally supported by the same background.[566] Sadurski also believes that this theory "is incapable of supplying the reasons for subjecting speech to a more lenient system of legal control than many other aspect of individual behaviour which may also be essential to one's self-expression and self-realisation."[567] An American legal scholar Robert Bork, like others, directed strong criticisms toward such an approach because one cannot, on the ground of liberty theory, choose to protect speech that has the same function as other freedoms more than he/she protects other claimed freedoms.[568] Lawrence Alexander and Paul Horton have denied any philosophical ground for justifying a distinct status for free speech over other freedoms and rights.[569] Ian Cram accounted several other values than freedom of speech that are self-evidently relevant to self-fulfilment theory. As a result, discussing the protection of sexually explicit speech, he concluded that:

> Where a legislative restriction on speech interferes with individual self-fulfilment but is intended to further a conflicting constitutional value and regulates in a morally contested area, then constitutional courts would be justified in adopting a less hostile stance towards a clearly expressed policy choice of the legislature than would be appropriate in cases of majoritarian restriction of political speech[570]

It might be said that freedom of speech is primarily a liberty against the state, or a 'negative freedom', and largely for this reason is more capable of judicial interpretation and enforcement than a positive right.[571] According to Schauer's view, even conceding that speech is often very harmful, we have special reasons to be sceptical about the ways in which the state makes and enforces its judgment of the harms arising from speech; the state's self-serving tendency to repress speech critical of state policies, for example, provides one such reason.[572] However, this claim cannot be accepted. Although the

[565] Schauer, F., (1993) op. cit. p. 638.
[566] Barendt, E., (2005) op. cit. p. 14.
[567] See Sadurski, W., (1999) op. cit. p. 18.
[568] Bork, R., "Neutral Principle and Some First Amendment Problems", *Indiana Law Journal* 47 (1971) pp. 1-35. p. 25.
[569] Alexander, L., and Paul Horton in "The Impossibility of Free Speech Principle", *Northwestern University Law Review* 78 (1983) p. 1319-57.
[570] Cram, I., (2006) op. cit. p. 141.
[571] See Barendt, E., (2005) op. cit. p. 14.
[572] Schauer, F., (1984) op. cit. p. 1284. Schauer, F., (1982) op. cit. p. 12, 68, 83, 106. See also Richards, D., "Toleration and Free Speech", *Philosophy and Public Affairs* 17.4 (1988) p. 323-325, 342.

state, by its instrumentalities, in many circumstances, will try to stifle free and open debate and this is the oppressive face of the state, the state, in many other instances, might become the friend of freedom of speech, as it is a source of free speech.[573] Moreover, the violation of free speech can be caused by nongovernmental interference;[574] social pressures[575] or from advertisers.[576] As a result of this, considering freedom of speech as an enemy of the state cannot justify the special protection for freedom of speech.

Furthermore, linking free speech with self-fulfilment seems to be a kind of lenience and pampering for achieving personal pleasure. This "pleasure principle" is far too hedonistic, and too much licence will lead to moral anarchy and a brutalised and chaotic culture.[577] Society ultimately imposes restrictions on activities that individuals desire to pursue for the purpose of feeling pleasure, even if these activities are related to human dignity or personal autonomy. No one can say that everything that is conducive to a person's fulfilment or makes him feel autonomous should be allowed. For example, someone may feel autonomy and self-fulfilment by taking cocaine; others may enjoy having sexual intercourse with prostitutes in public.[578] Although these activities are related to some extent to self-fulfilment and may seem to some as a way for them to express themselves, traditionally, they are still under state control. As a result of this, some demand that the state should be allowed to regulate speech, as it regulates other activities that are looking for pleasure.[579]

In addition, speech cannot be valuable in itself. The importance of speech emerges as a means or an instrument to other values, such as truth and democracy. Stanley Fish, who rejects the possibility of speech being valuable in itself, wrote, "Speech, in short, is never and could not be an independent value, but is always asserted against a background of some assumed conception of the good to which it must yield in the event of conflict."[580] In other words, there have to be reasons behind the argument to allow speech; we cannot simply say that a free speech clause says it is so, therefore it must be so. The task is not to come up with a principle that always favours speech, but rather, to

[573] Fiss, O., (1998) op. cit. p. 2-4.
[574] Emerson, T., (1969) op. cit. p.19.
[575] It is worth noting that Mill formulated *On Liberty* not for the individual against the state, but rather for the individual against all forms of social pressure. See in general *On Liberty*, (1859) See also, Ryan, A., "Mr. McCloskey on Mill's Liberalism", *The Philosophical Quarterly*, 14.56 (1964) p. 254.
[576] See Baker,E., (1989) op. cit. 250
[577] Bork, R., (1971) op. cit. p. 140.
[578] Smolla, R., (1992) op. cit. p. 20.
[579] Smolla, R., (1992) op. cit. p. 20.
[580] Fish, S., (1994) op. cit. p. 102.

decide what is good speech and what is bad speech. A good policy "will not assume that the only relevant sphere of action is the head and larynx of the individual speaker."[581]

Finally, by considering human dignity as a background right for free speech, how can commercial speech such as advertisements for goods and services be justified? What justification is there for protecting freedom of speech for businesses or groups?[582] It is thus not surprising that commentators rely on the arguments from truth and democracy to justify a more deferential review of commercial speech cases. Moreover, if the self-fulfilment theory justifies the right of the speaker to disseminate ideas and opinions as an important aspect of achieving self-fulfilment or human dignity, it will be hard to justify the disclosure of information -which the law frequently considers as free speech-under the same principle. The dissemination of news and information could be better justified under the democracy theory which, contrary to fulfilment theory, emphasises not only the speaker's right to communicate, but similarly the interests of the recipients to communicate.[583]

IV.2.3. Self-fulfilment Theory in Practice

International free speech law, in contrast to its position with the truth theory, recognises the importance of self-fulfilment theory in justifying the protection of freedom of speech.[584] In the context of the ICCPR, freedom of speech is widely regarded as the most fundamental of fundamental human rights. Freedom of speech is thus fundamentally important in its own right and also key to the fulfilment of all other rights.[585] It is an integral part of the development of ideas and a sense of identity. This is evidence by the

Committee's opinion in *Singer v. Canada*, where it considered that the expression of ideas and information through spoken or written words can be done through any language that one chooses. The Communication involved the Charter of the French language (Bill No. 101), which the author claimed discriminated against him because it

[581] Fish, S., (1994) op. cit. p. 126.

[582] Trager, R., and Donna Dickerson, (1999) op. cit. p. 146.

[583] Barendt, E., (2005) op. cit. p. 15.

[584] Freedom of expression, according to the African Commission, "is a fundamental human right, essential to an individual personal development." Communication 212/98, *Amnesty International v. Zambia*. The African Commission on Human and Peoples' Rights, in its 32nd Ordinary Session Meeting reaffirmed "the fundamental importance of freedom of expression and information as an individual human right." See the resoluation on the adoption of the Declaration of Principles on Freedom of Expression in Africa by the African Commission on Human and Peoples' Rights, meeting at its 32nd Ordinary Session, in Banjul, the Gambia, from 17th to 23rd October 2002.

[585] Joseph, S., Jenny Schultz, and Melissa Castan, (2004) op.cit. p. 517; Conte, A., (2004) op. cit. p. 59.

restricted the use of English for commercial purposes. The Committee concluded that a state party to the Covenant is able to choose one or more official languages, but that it cannot exclude, outside the sphere of public life, the freedom to express oneself in a language of one's choice.[586] This means that to preventing people from expressing in language of their choice, in short, is preventing them from having self-expression and self-fulfilment. Similarly, in *Ballantyne v. Canada*, a challenge was raised to Canadian (Quebec) laws which restricted commercial advertising in a language other than French.[587] The Committee clearly indicated that legislation making French the exclusive language of outdoor commercial signs in Québec to the exclusion of all other languages in private matters breached the freedom of expression guaranteed to all by Article 19 of the ICCPR. [588] However, Chapter Seven of this study will show how the international law of freedom of speech adoption of self-fulfilment theory has influenced the HRC's opinion on certain type of speech, particular sexually explicit speech.

In the context of the ECHR, freedom of speech, together with similar freedoms guaranteed in Articles 8, 9 and 11 of the Convention, enjoys a central part in the system of protection of human rights. As the ECtHR observed in the *Handyside* judgement, and repeated in other subsequent judgements:[589] "Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man."[590] Freedom of expression, thus, according to ECtHR, is not only protected due to its importance for the democratic process, but also, as an essential condition for the thriving and development of men. The argument for self-fulfilment, according to Maya Randall, explains why the scope of freedom of expression, in European jurisprudence, is not confined to political speech, but also extends to other categories, such as artistic.[591]

In the First Amendment, the value of self-fulfilment is obvious in the protection which is given to freedom of speech.[592] Many First Amendment analysts have argued that freedom of speech is necessary for self-fulfilment, or, more specifically, for individuals to feel a sense of integrity and worth.[593] From this perspective, free speech is

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[586] *Singer v. Canada*, 455/1991, U.N. Doc. CCPR/C/51/D/455/1991 (1994).
[587] *Ballantyne, Davidson, McIntyre v. Canada*, CCPR/C/47/D/359/1989 (1993).
[588] See also *J.G.A. Diergaardt et al. v. Namibia*, CCPR/C/69/D/760/1997.
[589] *Janowski v. Poland*, -25716/94 (1999) ECHR 3.
[590] *Handyside* v. *United Kingdom*, 5493/72 [1976] ECHR 5.
[591] Randall, M., "Commercial Speech under the European Convention on Human Rights: Subordinate or Equal? *Human Rights Law Review* 6.1 (2006) p. 84-86
[592] Summers, P., (2001) op. cit. p. 15.
[593] Baker, E., (1978) op. cit. p. 964-1040; Edward Bloustein, "The origin, validity, and interrelationships of the political values served by freedom of expression", *Rutgers Law Review* 33 (1981) p. 372-396.

an important aspect of the "life, liberty, and pursuit of happiness" values expressed in the Declaration of Independence.[594] The Supreme Court in U.S. has applied self-fulfilment as a justification for free speech in cases dealing with possession of pornographic material because such protection cannot be justified by a philosophy of protecting the marketplace of ideas nor one of protecting democratic processes. Justice Thurgood Marshall, who delivered the court's opinion in *Stanley v. Georgia*,[595] used a self-fulfilment theory to reverse the Georgia Supreme Court's decision regarding the guiltlessness of the appellant who was arrested under the Georgia obscenity statute for possessing obscene films. The appellant contended that the Georgia obscenity statute is unconstitutional insofar as it punishes mere private possession of obscene matter. Justice Marshall's opinion on the First Amendment was: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."[596] The self-fulfilment theory was also applied by the Supreme Court of America Justice Louis Brandeis, in *Whitney v. California*, who emphasised the relationship that links free speech with human dignity and self-realisation when he ruled:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means.[597]

This adoption of the self-fulfilment theory whether by HRC, ECHR or by the US Supreme Court has an impact on widening the areas of permitted sexually explicit speech. Some kinds of sexually explicit material, as the subsequent chapters will demonstrate, are considered as protected speech.

IV.3. The Theory of Democracy

IV.3.1. The Argument

According to the most influential theory in modern democracies,[598] "speech is prized not as an end itself [self-fulfilment theory] nor as part of a broad emporium, the aim of

[594] Edward Bloustein, (1981), op. cit. p. 373.
[595] *Stanley v. Georgia*, 394 US 557 (1969).
[596] *Stanley v. Georgia*, 394 US 557 (1969).
[597] *Whitney v. California*, 274 v. 357 (1927).
[598] Barendt, E., (2005) op. cit. p. 18.

which is to pit competing ideas one against the other [marketplace of ideas theory], but rather as a specific crucial means to the end of popular sovereignty."[599] This theory, in more clear words, emphasises the value of freedom of speech to self-government in a democratic society. Democracy is an integrated system that begins with recognizing that the people is the source of all powers and it is integrated by guaranteeing freedom for all people, especially freedom of speech, and subsequently, freedom of information, that helps them to participate effectively as members of the nation in the political life.[600]

This theory, according to Lawrence Solum, maintains that the right to freedom of speech must encompass two essential prerequisites to effective democracy.[601] Firstly, citizens must be able to communicate their desires and opinions to government officials. Free speech, in this regard, is a means for participating; through free speech people can discuss their daily cases, cast a vote, and participate effectively in decision-making operations which formalise the society and government system.[602] Secondly, citizens must have access to all information, ideas and points of view. The precondition for a free society, very briefly, is an informed and enlightened citizenry.[603] Freedom of speech, in this regard, is a method that informs citizens about abuse of power and enables them to do something about it. This valuation of free speech, according to Blasi, focuses on the necessity of free speech for effectively "alerting the polity to the facts or implications of official behaviour, presumably triggering responses that will mitigate the ill effects of such behaviour."[604] This theory, thus, explains why freedom of speech laws includes within its realm, beside the right to convey and receive ideas, freedom of information. Neither of the first two theories, discussed previously, justifies the protection of both opinion and information as the democracy argument does.[605] While freedom of speech as a manifestation of autonomy, according to Roberto Saba, does not seem to place attention on the right to know, freedom of speech as a precondition for the decision-making process in a democratic system inevitably associates it with the right to

[599] McIntosh, W., and Cynthia Cates, (1998) op. cit. p. 89. Sunstein, C., (1995a) op. cit. p. 1762.
[600] Meiklejohn, A., (1961) op. cit p. 254, 363; Meiklejohn, "The Balancing of Self- Preservation Against Political Freedom", *California Law Review* 49 (1961) p. 4; Isaiah Berlin, "Two concepts of Liberty", in Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press, 1969) p. 118-172. Smolla, R., (1992) op. cit. p. 124-26; Sadurski, W., (1999) op. cit. p. 21; Baker, E., (1989) op. cit. p. 28; Meiklejohn, A., (1965) op. cit. p. 26; Bork, R., (1971) op. cit. p. 30; Alexis De Tocqueville, *Democracy in America* (New York: Harper & Row, 1966) p. 181. Blasi, (1977) op. cit. p. 521-527-42.
[601] Solum. L., "Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech", *Northwestern University Law Review* 83 (1989) p. 73.
[602] See Meiklejohn, A., (1965) op. cit. p. 26, 27. Sadurski, W., (1999) op. cit. p. 21.
[603] Cram, I., (2006) op. cit. p. 14.
[604] Blasi, (1977) op. cit. p. 546.
[605] Barendt, E., (2005) op. cit. p. 20.

access information.[606] Without freedom of speech, there is no information and without information, there is no democracy, understood as a system of citizen self-government.[607] In societies that do not allow people to speak and hear ideas and information freely, achieving democracy becomes farfetched or "the thinking process of the community will be distorted" as Meiklejohn believes,[608] "the government's democratic authority will be lost" as Moon says,[609] a form of government will be meaningless according to Bork,[610] and democracy itself becomes a sham, in Eric Barendt's view.[611]

IV.3.2. Political Speech

In their reading of the implications of the theory of democracy, some legal scholars, such as the most influential twentieth-century philosopher of free speech, Alexander Meiklejohn, have concluded that free speech is only important because it helps voters who receive information and ideas freely to be "as wise as possible."[612] Accordingly, political speech is the only speech that inherits the protection of freedom of speech.[613] It is alone should be entitled to the utmost protection, while "lower-value" speech can be more easily restricted. Speech, in Meiklejohn's view, whose influence is visible in the writings of a host of prominent modern theorists, such as Robert Bork, John Ely, Owen Fiss, and Cass Sunstein, should undoubtedly be protected, but only the speech that is relevant to the self-government process.[614] Therefore, "government intervention may be needed to ensure that people receive the information that they need to be effective citizens."[615]

This approach does not only claim the privileged position of political speech over other forms of speech,[616] but further, it claims, as Meiklejohn did, an absolute (or near absolute) protection for political speech.[617] Robert Bork takes the Meiklejohn approach even further by arguing that free speech protection is confined to political speech and

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[606] Saba, R., (2004) op. cit. p. 81-82.
[607] Saba, R., (2004) op. cit. 81-82.
[608] Meiklejohn, A., (1965) op. cit. p. 27.
[609] Moon, R., (2000) op. cit. p. 14.
[610] Bork, R., (1971) op. cit. p. 23.
[611] Barendt, E., (1988) op. cit. p. 47.
[612] Meiklejohn, A., (1965) op. cit. 26. See also Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment", *Harvard Law Review 79* (1965) pp. 1-20.
[613] See BeVier, L., (1978) op. cit. p. 300. Bollinger, L., (1986) op. cit. p. 47.
[614] Meiklejohn, A., (1965) op. cit. p. 39, 79.
[615] See Meiklejohn, A., (1961) op. cit. p. 255.
[616] Meiklejohn, A., (1965) op. cit. p. 24-27. BeVier, L., (1978) op. cit. p. 300.
[617] Meiklejohn, A., (1965) op. cit. p. 20, 120. Hemmer, J., (2006) op. cit. p. 29.

does not extend to art or literature or science at all. It is Bork's view that the protection of political speech should mark the limits of free speech protection and therefore its protection should not be extended to defamation, pornography, vituperation, and other socially undesirable forms of expression.[618] Professor Owen Fiss in *The Irony of Free Speech* shared Meiklejohn and Bork's viewpoint toward the superiority of the public debate over types of speech by claiming that speech is valuable because it is essential for "collective self-determination: to ensure the fullness and richness of public debate."[619] According to Professor Cass Sunstein, "Speech that concerns governmental processes is entitled to the highest level of protection; speech that has little or nothing to do with public affairs may be accorded less protection."[620] The true meaning of the law of free speech, according to Sunstein, should be determined, and limited, by matters having to do with the political process.[621] Harry Kalven has asserted that the primary purpose of the freedom of speech is to protect political speech.[622]

Two conclusions can be drawn from the above approach. Firstly, private speech, which is speech "that has a more selfish motivation behind it and is not directed at solving a public issue,"[623] do not deserve the same protection that the state provides for political speech.[624] According to Meiklejohn, "private speech", or private interest in speech has no claim whatever to the protection of the First Amendment."[625] This is why Redish and Lippman noted that Meiklejohn "expressed little concern over an individual's right to speak, other than as a means of providing information to the community."[626] What Meiklejohn is aiming at, according to Max Lerner, is the demolition of the individualist theory of free speech, and its replacement by an organic or collectivist theory.[627] The second, and related, conclusion from this approach is that some types of speech, such as hate speech and sexually explicit speech may justifiably

618 Bork says "The category [of freedom of speech] does not cover scientific, educational, commercial or literary expression... " Bork, R., (1971) op. cit. p. 20, 26-27.
619 Fiss, O., (1998) op. cit. 3, 41.
620 Sunstein, C., "Pornography and the First Amendment", *Duke Law Journal,* (1986) pp. 589-627, p. 603.
621 Sunstein, C., (1993) op. cit. p. 123, 135.
622 Kalven, H., "The New York Times Case: A Note on The Central Meaning of The First Amendment." *Supreme Court Review*, (1964) p. 209, 214. However, Kalven disagreed with Meiklejohn's view that the first amendment was confined to political speech, nor did he agree with an absolute protection of political speech. See Kalven, H., "The Reasonable Man and the First Amendment: Hill, Butts, and Walker" *Supreme Court Review* (1976) p. 267, 294, 304-305.
623 See Bollinger, L., (1986) op. cit. p. 258 n. 10.
624 Meiklejohn, A., (1965) op. cit. p. 37, 79. Moon, R., (2000) op. cit. p. 15.
625 Meiklejohn, A., (1965) op. cit. p. 245.
626 Redish, M., and Gary Lippman, "Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications", *California Law Review* 79.2 (1991) pp. 267-311, p. 270, 291.
627 Lerner, M., "Man and Social Man", *The New Republic*, 119 (1948) pp. 21-22.

curtailed because they inhibit participation by a section of the population in public decision-making. According to Ian Cram, "Where dominant modes of discourse ascribe negative characteristics to particular groups in a society, the goal of attaining an inclusive deliberative democracy requires the state to remove barriers to fuller participation.[628]

IV.3.3. The Evaluation of the Theory of Democracy

It is widely believed that the argument of democracy is the most attractive theory in today's modern society.[629] Its attraction might be due to the easiness of understanding it, as Barendt says.[630] In addition, the democracy argument, according to Barendt, causes less trouble for courts concerned with legal interpretation because, in contrast to the truth and self-fulfilment theory which are merely philosophical theories, its value is embodied in a particular constitutional document.[631] Moreover, because of the important role of political speech in today's society as a fundamental part of modern liberal democracy, as Thomas Emerson says[632] and because political speech is more likely to be suppressed by the government than other, arguably non-political speech, as Baker asserts,[633] this theory has gained some currency in courts and the legal and academic community.[634]

However, the advantages mentioned above do not mean that the democracy theory as a justification for freedom of speech is empty of any weakness. Several persuasive criticisms have been raised towards the democracy theory.[635] The democracy rationale is criticized for being too narrow in its scope, in more than one sense. Critics point out that a democracy rationale works only within a political regime that is, or is committed to being, democratic. So the rationale seems a poor candidate for supporting anything like free speech as a universal principle, or as a "human right."[636] Martin Redish, for example, argues that the democracy rationale for free speech "would have absolutely no

[628] Cram, I., (2006) op. cit. p. 139
[629] See Barendt, E., (2005) op. cit. p. 18.
[630] Barendt, E., (2005) op. cit. p. 18. Shiffrin, S., (1990) op. cit. p. 47.
[631] Barendt, E., (2005) op. cit. p. 18. Baker, E., (1989) op. cit. p. 25. Moon, R., (2000) op. cit. p. 14.
[632] Emerson, T., (1963) op. cit. p. 883.
[633] See Baker, E., (1989) op. cit. p. 33, 34.
[634] Donson, F. (2000) op. cit. p. 1, 2.
[635] For more regarding criticisms of Meiklejohn's theory, see Baker, E., (1989) op. cit. p. 25. Bollinger, L., (1986) op. cit. p. 46, 53, 145-158. Blasi, (1977) op. cit. p. 523, 554-567. Shiffrin, S., (1990) op. cit. p. 48.
[636] See Strauss, D., (1991) op. cit. p. 352.

relevance except in a democratic system."[637] Even within a regime with democratic commitments, its extreme concentration on political speech "by providing protection only to political speech *sensu strict*,"[638] as shown above, is another weak point.[639] Meiklejohn's rationale seems most obviously to provide a justification for protecting political speech; the case for protecting other kinds of speech not so plainly related to the processes of self-government is more problematic.[640] However, while no one can deny the importance of political speech as a basic part of our life, neither can it be denied that non-political speech has value. The sciences, arts, literature, ethics, doctrine, religion, law, business, engineering, medicine, sport and so on are important, just as political speech is. As Moon noted, "Other forms of expression -notably artistic, scientific, and even intimate expression- also figure in our intuitions about the freedom's scope."[641]Likewise, James Weinstein supports the democracy rationale but also concedes that it is too limited.[642] Shiffrin, similarly, argues that political speech is no better than other free speech values; otherwise, the work of Shakespeare, Aristotle, and Einstein would be excluded from speech protection.[643] Moreover, a bribe, a political bombing, and assassination often deal, as Baker acknowledges,[644] "explicitly and directly with politics" and no one can say that they should receive free speech protection, although they often aim to convey message to others.[645] Archibald Cox considers "that a court should not attempt to differentiate or allow the state to differentiate the value of particular message protected by the first amendment."[646] Cox, therefore, strongly rejected the classification of speech into high and low value speech, because of the risk of entrusting an authoritative body with the power of assigning different values to different categories of speech.[647] Larry Alexander also believes that we should "treat the realm of messages as an undifferentiated whole."[648]

Secondly, the supporters of this theory believe that political speech is more valuable than other types of speech, although they did not determine exactly the framework for

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[637] Redish, M., (1984) op. cit. p. 19.
[638] Meiklejohn, A., (1961) op. cit p. 263, Bork, R., (1971) op. cit. p. 20, 29-30.
[639] Smith, S., (2002) op. cit. p. 1250
[640] Meiklejohn, A., (1965) op. cit. p. 79. Moon, R., (2000) op. cit. p. 16, 22.
[641] Moon, R., (2000) op. cit. p. 15.
[642] Weinstein, J., (2001) op. cit 146, 150.
[643] Shiffrin, S., (1990) op. cit. p. 48; Chafee, Z., (1955) op. cit. p. 40, 41.
[644] Baker, E., (1989) op. cit. p. 7, 8.
[645] For more regarding free speech and assassination see Chapter Three of this study. See also Scanlon, T., (2003) op. cit. p. 8. Sadurski, W., (1999) op. cit. p. 52. Barendt, E., (2005) op. cit. p. 80-81.
[646] Cox, "The Supreme Court, 1979 Term- Foreword: Freedom of Expression in Burger Court", *Harvard Law Review* 94, (1980) pp. 1-73, p. 29; Sadurski, W., (1999) op. cit. p. 41.
[647] See Cox, A., (1980) op. cit. p 28.
[648] See Alexander, L., "Low Value Speech", *Nw. U. L. Rev* 83 (1989) p. 547-54.

political speech. The difficult question is "what is political," since political speech occupies the entire range of speech and that no speech is private. Nowadays it is almost impossible to find a topic that can be called non-political, or is not related to political speech or democracy.[649] Alexander Meiklejohn, who first adopted a narrow definition for political speech, realised this difficulty and retreated from this narrow definition after facing several criticisms. Thus, he extended the protection of free speech to include the achievements of philosophy, science, literature and the arts insofar as they contribute to the wisdom and sensitivity of voters.[650] According to his amended theory, "There are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgement which, so far as possible, a ballot should express."[651] This amended approach lumps a great deal under the term 'political' speech, including almost all literature and music. Any communication that is 'political' or deliberative in the widest sense should be accorded considerable, but never absolute, protection. By doing this, Meilkejohn broadened the meaning of the "political" so as to include in it every act of expression which deserves protection, regardless of its place in the political process.[652] This leads his theory to be virtually meaningless as Moon said.[653] No First Amendment commentator, according to Baker, has yet taken the political speech theory that far.[654]

Thirdly, while Meiklejohn claims that political speech should receive absolute protection, he fails to answer what happens if the political speech, as often happens, comes into conflict with other important interests of others.[655] Shiffrin, therefore, considered the absolute claim made by Meiklejohn to lack pragmatic success.[656] Fourthly, by following Meiklejohn's view that the government is the authority which has a right to decide whether speech is worth being said and, thus, being protected, who can guarantee that the government, in the name of protecting people from harmful speech, will not be biased and suppress criticism of its policies[657] or regulate speech that

[649] See Bork, R., (1971) op. cit. p. 27; Shiffrin, S., (1990) op. cit. p. 48, 49.
[650] Meiklejohn, A., (1961) op. cit. p. 256, 257. Redish, M., and Gary Lippman, (1991) op. cit. p. 270.
[651] Meiklejohn, A., (1961) op. cit. p. 256, 257.
[652] See Wright, G., "A rationale from J. S. Mill for the Free Speech Clause", *Supreme Court Review*. (1985) pp. 149-178, p. 152.
[653] Moon, R., (2000) op. cit. p. 22.
[654] Baker, E., (1989) op. cit. p. 26.
[655] Moon, R., (2000) op. cit. p. 16.
[656] Shiffrin, S., (1990) op. cit. p. 49; Brennan, W., "The Supreme Court and the Meiklejohn Interpretation of the First Amendment", *Harvard Law Review*, 79 (1965) p. 1, 16.
[657] Moon, R., (2000) op. cit. p. 15.

might harm its own interests?[658] The state, by determining what is manipulative or deceptive speech by itself and thus excluding it from freedom of speech protection, in fact, confiscates the right of audiences to make their own judgement regarding this speech, which implies limiting the opportunities of people to contribute to political discourse and to hear strongly held views.[659] Fifthly, there is no rationale in circulation which justifies that democracy theory requires individual treatment. In other words, the importance of democracy theory does not mean the necessity of ignoring the truth and self-fulfilment theories, as each of them has an important role to play in our life, such as helping people to recognise the truth by people and developing their personality.

The argument from democracy, therefore, should be recast to explain why, in contrast to Meiklejohn's approach, liberal systems do protect non-political speech, although criticism of government and its officials may enjoy a greater degree of protection than sexually explicit speech.[660] All free speech laws extend their protection to speech that does not seem obviously necessary to self-government, including artistic expression in the form of poems and plays. For example, the HRC view goes beyond the freedom of political communication, encompassing communication on all subjects, provided the rights and reputations of others; national security; public order; and public health and morals are protected.[661] As David Harris and Sarah Joseph say, it would be wrong to restrict the extensive meaning given to freedom of expression by limiting the protection of Article 19(2) to those expressive acts by which people seek, receive, or impart information and ideas.[662] According to the HRC, in *Ballantyne v. Canada*, freedom of expression must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others, which are compatible with Article 20 of the Covenant, of news and information, of commercial expression and advertising, of works of art, etc.; it should not be confined to means of political, cultural or artistic expression. This was the response of the HRC to the allegation of the Government of Quebec that "freedom of expression as referred to by the Covenant primarily concerns political, cultural and artistic expression and does not extend to the area of commercial advertising." There appears to be no expression which is not protected at all by Article 19 because of its content.[663]

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[658] Sunstein, C., (1993) op. cit. p. 134.
[659] Moon, R., (2000) op. cit. p. 17.
[660] Barendt, E., (2005) op. cit. p. 19.
[661] Walsh, T., "Defending Begging Offending", *Qut Law & Justice Journal* 4.1 (2004) p. 71.
[662] Harris, D., and Sarah Joseph (1995) op. cit. p. 395.
[663] *Ballantyne v. Canada* (1993).

Similar to Article 19 of the ICCPR, the freedom of expression laid down in paragraph 1 of Article 10 of the ECHR that covers freedom of opinion and of information must be understood in the broad sense, applying to all information and ideas, in respect for pluralism and tolerance. Based on their interpretation of this article, the Strasbourg institutions have extended Article 10 coverage to a broad range of expression or speech, from highly protected political speech to nominally protected valueless speech such as commercial speech.[664] In *Müller and others v. Switzerland*, the Court ruled: "Article 10 does not ... distinguish between the various forms of expression."[665] In *Market intern Verlag v. FRG*, the government argued that information in a trade magazine fell outside Article 10, being directed to the promotion of the economic interests of group of traders and, thus, an aspect of the right to carry on business. The Court although described the item as "information of a commercial nature", held that it was protected by Article 10 because that article did not apply "solely to certain types of information or ideas or forms of expression."[666] As in the case of the international law of free speech, the First Amendment's protection of freedom to impart and receive information and ideas, according to Professor Laurence Tribe, has not confined its coverage only to political speech, though it has been given a preferred position. A wide range of speech is protected by the First Amendment.[667] Indeed, the Supreme Court has announced, "[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters . . . is not entitled to full First Amendment protection."[668] The Supreme Court of the United States, then, extends the coverage of the First Amendment to commercial speech and advertising. According to Justice Brennan, "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs."[669]

Here, I am not saying that political speech is less valuable than other types of speech, nor am I even equalising the importance of political speech in today's societies with commercial speech, for example. I do believe that that regulation appears to be more dangerous in the political rather than in the commercial sphere, since governments will be particularly inclined to censor the speech of their political opponents. I also believe that most regulation in the field of consumer protection is based on the premise that

[664] Janis, M., and Richard Kay, *European Human Rights Law* (Hartford, Conn.: University of Connecticut Law School, 1990) p. 270-273.
[665] *Muller v. Switzerland*, 10737/84 [1988] ECHR 5.
[666] *Markt Intern Verlag Gmbh and Klaus Beermann v. Germany*-10572/83 (1989) ECHR 21.
[667] Tribe, L., (1988) op. cit. p. 787.
[668] *Abood v. Detroit Bd. Of Educ*, 431 U.S. 209,231 (1977).
[669] *Time v. Hill*, 385 U.S. 374 (1967).

commercial speech is easier to verify than political speech, since the producer is generally aware of the characteristics of his products. In contrast, legislation proscribing misleading political speech would be thoroughly incompatible with the idea of democratic pluralism.[670] What I aim to show from the above criticisms of Meiklejohn's approach is that other types of speech also deserve freedom of speech law protection, which is already provided by different human rights laws.

IV.3.5. Theory of Democracy in Practice

The significant influence of the democracy argument on freedom of speech laws in the twentieth century should be taken into account when we discuss the advantages and disadvantages of this argument. Although several persuasive criticisms have been raised towards democracy, although with an extreme concentration on political speech by providing protection only to political speech, this by no means implies that democracy-based argument is wrong, or that it has no value, but only that "democracy" serves awkwardly when it is conscripted to be exclusively confined to political speech. In fact, the democracy rationale may have considerable power, as its widespread appeal would indicate.[671] As the following points, as well as next chapters, will reveal, it is the argument from democracy that has found most favour in the jurisprudence of the HRC, in the case law of the ECHR, and in the US courts under the First Amendment.[672]

IV.3.4.1. The ICCPR and Theory of Democracy

According to HRC, "The right to freedom of expression is of paramount importance in any democratic society."[673] It is, together with freedom of assembly and association, not just integral to human dignity but also vital to the valid exercise of electoral rights and democratic participation.[674] The influence of theory of democracy can be evidenced by freedom of expression clause in Article 19 which includes within its realm, beside the right to convey and receive ideas, freedom of information. Freedom of information in

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[670] Randall, M., (2006) op. cit. p. 84-86

[671] In African free speech law, freedom of expression, according to the Commission, "is a fundamental human right, essential to ... political consciousness and participation in public affairs." See communication 212/98, *Amnesty International v. Zambia*. According to the resoluation on the adoption of the Declaration of Principles on Freedom of Expression in Africa the "respect for freedom of expression, as well as the right of access to information held by public bodies and companies, will lead to greater public transparency and accountability, as well as to good governance and the strengthening of democracy."

[672] Barendt, E., (2005) op. cit. p. 20.

[673] *Laptsevich v. Belarus*, CCPR/C/68/D/780/1997 (2000).

[674] General Comment 27.

Article 19 is not set out separately but as part of the fundamental right of freedom of expression.[675] The article defines the right to information as a fundamental ingredient of the right to freedom of expression.[676] In *Aduayom et al. v. Togo*, the HRC observed that "the freedoms of information and of expression are cornerstones in any free and democratic society. It is in the essence of such societies that its citizens must be allowed to inform themselves about alternatives to the political system/parties in power."[677] In *Laptsevich v. Belarus*, the HRC considered whether or not the application of Article 26 of the Press Act (publishers of periodicals as defined in Article 1 are required to include certain publication data, including index and registration numbers) to the author's case, resulting in the confiscation of the leaflets and the subsequent fine, constituted a restriction within the meaning of Article 19, paragraph 3, on the author's freedom of expression. The HRC noted that under the Act, which, according to the author, could only be obtained from the administrative authorities, the State party had established such obstacles as to restrict the author's freedom to *impart* information, protected by Article 19, paragraph 2.[678] The influence of theory of democracry can also be evidenced by numerous communications, for example *Mpandanjila et al v. Zaire*;[679] *Kalenga v. Zambia*;[680] *Jaona v. Madagascar*;[681] *Kivenmaa v. Finland*;[682] *Aduayom al v. Togo*;[683] *Kim v. Republic of Korea*;[684] and *Sohm v. Republic of Korea*,[685] in which the HRC has confirmed that protected freedom of speech included in particular political speech.[686] The HRC has recognised that the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential through a free press and other media that are able to comment on public issues without censorship or restraint.[687] However, it should be noted that political speech, which democracy assumes to be the more valuable type of speech, at least explicitly,

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[675] Dijk, P., and G. J. H. van Hoof, (1990) op. cit. p. 310-311; Mendel, T., "Freedom of Information as an Internationally Protected Human Right."*Comparative Media Law Journal* 1 (2003); Mendel, T., "The Public's Right to Know Principles on Freedom of Information Legislation," ARTICLE 19, June 1999, at URL <http://www.article19.org/pdfs/standards/righttoknow.pdf>

[676] Wieland, J., Freedom of Information, in Engel, C., and Kenneth H. Keller (eds.), "Governance of Global Networks in the Light of Differing Local Values", *Law and Economics of International Telecommunications* 43 (2000) p. 86-87.

[677] *Aduayom et al. v. Togo,* CCPR/C/51/D/422/1990.

[678] *Laptsevich v. Belarus*, CCPR/C/68/D/780/1997.

[679] (138/1983)

[680] (326/1988)

[681] (132/1982)

[682] (412/1990)

[683] (422-424/1990)

[684] (574/1994)

[685] (518/1992)

[686] Joseph, S., Jenny Schultz, and Melissa Castan, (2004) op.cit. p. 519.

[687] General Comment 25. For more, see Conte, A., (2004) op. cit. p. 59.

has not been given a preferred position by the HRC. To put it differently, while examining freedom of speech provisions, two methodologies can be envisaged.[688] The first approach consists of presumptively treating all categories of expression the same and balancing the different interests at stake in an *ad hoc* fashion. Accordingly, balancing here is done on a case-by-case basis, as there is generally no hierarchy of rights. The HRC, for example, has adopted this method. In its communication *John Ballantyne et al. v Canada*, it explicitly refused to subject any form of expression "to varying degrees of limitation, with the result that some forms of expression may suffer broader restrictions than others."[689] The second method is the very one rejected by the HRC. It consists of distinguishing between different categories of speech. The following discussion of the European case law, will demonstrate that the Strasbourg institutions have chosen this approach.[690]

IV.3.4.2. The ECHR and Theory of Democracy

The theory of democracy has had a great influence on the development of the concept of freedom of expression under the ECHR.[691] The justifications for strong protection of freedom of expression stressed by the Strasbourg jurisprudence, as said, centre on its role in the protection and fostering of democracy.[692] This can be demonstrated firstly by the ECHR's protection of freedom to impart and receive information, which neither of the first two theories, the truth and self-fulfilment justify its protection as the democracy argument does. Secondly, by a preference that is given for political expression in the Strasbourg institutions' doctrines. However, I will start with the first evidence.

Similar to Article 19 ICCPR, the ECHR's protection covers freedom to impart and receive information and ideas, although not to seek information.[693] Access to information is inextricably tied to freedom of expression. The clause "to impart and receive" is set out in the Convention as if it was the constituent parts of one indivisible

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[688] Randall, M., (2006) op. cit. p. 53.
[689] CCPR/C/47/D/359/1989 (1993).
[690] See Dijk, P., and van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3d edition (The Hague: Kluwer, 1998) p. 573; Jacq and Teitgen, 'The Press', in Delmas-Marty (ed.), *The European Convention for the Protection of Human Rights: International ProtectionVersus National Restrictions* (Dordrecht: Martinus Nijhoff, 1992) p. 64.
[691] Wieland, J., (2000) op. cit. p. 86-87.
[692] Lewis, T., "Democracy, Free Speech and TV: the case of the BBC and the ProLife Alliance." (2004) *Web Journal of Current Legal Issues*, 5 Web JCLI, at URL <http://webjcli.ncl.ac.uk/2004/issue5/tlewis5.html#Heading71>
[693] See *Appleby and other v. UK*, 44306/98 [2003] ECHR 222; *Leander v. Swedean* 9248/81 [1987] ECHR 4; Eur. Court HR, *Gaskin v. the United Kingdom* 10454/83 (1989) ECHR 13. See Malinverni, G., "Freedom of Information in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights", *Human Rights Law Journal* 4, (1983) p. 443.

right. In *Sunday Times v. UK*, the Court said that these were not simply the corollary of one another: there was a right to express opinions and information and there was an independent right of a willing hearer to hear such expression. The state may not stand between a speaker and his audience; each has a right to get to the other, for it is only in this way that the purposes for which expression is protected can be realised.[694] Article 10 protection of freedom to impart information aims to give citizens the right to distribute information through all possible lawful sources.[695] As said above, not only do the public have the task of imparting information and ideas: the public also has a right to receive them, which will help them to participate in public debate, which is the very core of a democratic society.[696]

The following cases give a clear indication of a preference for political expression in the Strasbourg institutions' doctrine, as, of course, an implication of the democracy argument. In *Handyside* v. *United Kingdom*, for example, the Court ruled that:

> Freedom of expression constitutes one of the essential foundations of [a democracy] ... Subject to paragraph 2 of Article 10, it is Applicable not only to information or ideas that are received or regarded inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.[697]

The *Handyside* judgment indicates the underlying reason why freedom of expression is considered to be essential.[698] Freedom of expression according to *Handyside* judgment is central to the functioning of a democratic society[699] In *Lingens* v. *Austria*, the ECtHR emphasised again the democracy theory when it stated:

> Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual.[700]

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[694] *The Sunday Times v. United Kingdom* (No 1) 6538/74 [1979] ECHR.
[695] *Autronic AG v. Switzland*, - 12726/87 [1990] ECHR 12. See, Alastair Mowbray, *Cases and Materials on the European Convention on Human Rights*, (New York: Oxford University Press, 2007) p. 682-687.
[696] Beddard, R., *Human rights and Europe*, 3d edition (Cambridge: Grotius, 1993) p. 120; Macovei, M., *Freedom of expression. A guide to the implementation of Article 10 of the European Convention on Human Rights*, 2nd edition (Human rights handbooks, No. 2, Council of Europe, 2004) p. 9.
[697] *Handyside* v. *United Kingdom*, 5493/72 [1976] ECHR 5; *Zana v. Turke* 18954/91 (1997) ECHR 94.
[698] Dijk, P., and G. J. H. van Hoof, (1990) op. cit. p. (1995) op. cit. p. 373.
[699] Janis, M., Richard Kay, and Anthony Bradley, (2000) op. cit. p.140.
[700] *Lingens* v. *Austria*, - 9815/82 [1986] ECHR 7.

In another case, which concerns the conviction of magazine editor, *Oberschlick*, for defaming the Secretary General of the Austrian Liberal Party and for alleging that the Secretary had unlawfully espoused views similar to Nazi policy, the ECtHR upholding *Oberschlick's* complaint that his right of freedom of speech under Article 10 of ECHR was violated, stated that "Political invective often spills over into the personal sphere, such are the hazards of politics and the free debate of ideas, which are the guarantees of a democratic society."[701] In *Bowman v. United Kingdom*, the Court's decision was also in favour of political speech.[702] This is because such speech, in the Court's opinion, is central to the working of the political process.[703] In *Ozgur Gundem v. Turkey*, the Court, while ruling that the government is under a positive obligation to protect newspaper in the exercise of its freedom of expression, recalled that "the key importance of freedom of expression as one of the preconditions for a functioning democracy."[704]

Even more, when artistic expression contains a significant political statement or message, such an artistic expression might be accorded greater latitude than other artistic expressions for example, those which contain sexually explicit speech, commercial speech. In *Karata v. Turkey*, the applicant, a Turk of Kurdish origin, published a collection of his own poems, entitled "The song of a rebellion-Dersim." The poems were described as disseminating propaganda against the 'indivisible unity of the State.' A majority of the Court did not consider that Karata's conviction was an appropriate response. According to the Court, "the poems had an obvious political dimension. Using colourful imagery, they expressed deep-rooted discontent with the lot of the population of Kurdish origin in Turkey. In that connection, the Court recalls that there is little scope under Article 10(2) of the Convention for restrictions on political or on debate on matters of public interest..."[705] However, in matters involving artistic expression, especially that which has raised suggestions of obscenity, the Court has allowed states a greater margin of appreciation to determine the restrictions necessary for the protection of morals than in cases involve political issues.[706]

Likewise, when advertisement contains a significant political statement or message, such an expression might be accorded greater latitude than advertisement with purely business/commercial interests. In a recent case, *VgT Verein Gegen Tierfabriken v*

[701] *Oberschlick* v. *Austria*, - 11662/85 (1991) ECHR.
[702] *Bowman v. United Kingdom*,- 24839/94 (1998) ECHR 4.
[703] For more regarding the European Court on Human Rights in this issue see *Vogt v. Germany*- 17851/91 (1995) ECHR29 *Castells v. Spain* 11798/85 [1992] ECHR 48; *Piermont v. France* - 15773/89; 15774/89 [1995] ECHR 14.
[704] *Ozgur Gundem v. Turkey*, 23144/93 [2000] ECHR 104.
[705] *Karata v. Turkey*, 23168/94 [1999] ECHR 47.
[706] Clements, L., op. cit. p. 180.

Switzerland, the ECtHR has considered the question of broadcast political expression, in the form of advertising.[707] Because the expression in that was not regular commercial advertising in the sense that it was intended to persuade the public to buy a particular product, rather it "reflected controversial opinions pertaining to modern society in general," the Court ruled that the State's margin of appreciation must necessarily be reduced, for what was at stake was "not a given individual's purely commercial interests, but his participation in a debate affecting the general interest." This judgment, as Alastair Mowbray, reveals that a narrow margin of appreciation is accorded to States to restrict advertisements of political nature compared to those concerned with purely business/commercial interests.[708]

It seems from these decisions, in which a greater preference for political expression has been shown, that the Court puts most emphasis on the role of freedom of expression in the democratic process.[709] This is because, as Harris, O'Boyle, and Warbrick believe, of "its role in the working of a democratic society."[710] The distinction is controversial, but, as Eric Barendt comments, it reflects the preferred position of speech concerned with political and public affairs.[711] To put it differently, the ECtHR's approach to balancing enables the judge to give particularly strong protection to political speech, or more generally for speech on matters of public concern. In the *Handyside* case, the Court said the guarantee of freedom of expression was primarily concerned to protect the dissemination of political ideas, subsequently, in the *Sunday Times* decision it stressed that the extent of each member state's discretion to determine the measures necessary to restrict free speech varies according to the character of the state interest involved. In particular, the state has a greater margin of appreciation in framing measures to protect morals than it does in the case of rules required to maintain confidence in the administration of justice.

IV.3.4.3. The First Amendment and Theory of Democracy

A glance at the US Supreme Court decisions proves the importance of free discussion in American democratic life.[712] In *Whitney v. California*, the Court emphasised the

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[707] *VgT Verein Gegen Tierfabriken v Switzerland* 24699/94 [2001] ECHR 412.
[708] (2007) op. cit. p. 651-652.
[709] Morrisson, C., (1981) op. cit. p. 77.
[710] Harris, O'Boyle, Warbrick, (1995) op. cit. p. 150. Feldman, D. (2002) op. cit. p. 753.
[711] Barendt, E., (1985) op. cit. p. 159.
[712] Dworkin, R., observes that "[i]t is the connection between free speech and democracy that has been the nerve of First Amendment jurisprudence." Dworkin, R., *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, Massachusetts, London: Harvard University Press, 2000) p. 354.
Shiffrin, S., (1990) op. cit. p. 46.

indispensability of free speech for American democracy by observing that "Freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile." [713] The same approach towards the relationship between free speech and democracy was adopted in *Mills v. Alabama*.[714] The Court emphasised that "whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." In *Buckley v. Valeo*, the court again emphasised Meiklejohn's demand when it stated that "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." [715] In *Landmark Communications, Inc v. Virginia*, [716] the Supreme Court considered a "free discussion of governmental affairs" as a major purpose of the First Amendment.[717] In *New York Times v. Sullivan*, Justice Brennan, who delivered the opinion of the Court, wrote that people's right to criticise the government without fear of reprisal is "the central meaning of the First Amendment."[718] As Brennan asserted, "Debate on public issues should be uninhibited, robust, wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." This is why authors, such as Owen Fiss, feel that this is the doctrine that should be taken into account for the correct interpretation of the First Amendment to the US Constitution.[719]

As in the case of Europe, the influence of democracy theory on American free speech law was, and is still great. James Madison, author of the First Amendment, once wrote, "A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both. Knowledge will forever govern ignorance. And people who mean to be their own governors, must arm themselves with the power knowledge gives."[720] An extract from Justice Black's famous observation in *United States v. Associated Pres*, illustrates the position of the right to freedom of information in the American law of free speech. The First Amendment, according to

[713] *Whitney v. California*, 274 v. 357 (1927).
[714] *Mills v. Alabama*, 384 US 214 (1966).
[715] *Buckley v. Valeo*, 424 US 1 (1976).
[716] *Landmark Communications, Inc v. Virginia*, 435 US 829 (1978).
[717] See also *FCC v. League of Women Voters*, 468 US 364 (1984).
[718] According to Sir John Laws "Justice Brennan's decision in *New York Times v. Sullivan*, 376 US 255, (1964) may be seen as a vindication of Meiklejohn's views". See Sir John Laws (1988) op. cit. p. 126.
[719] Fiss, O., (1998) op. cit. p. 73
[720] Madison, J. "A Letter to W. T. Barry", 4 Aug, 1822, cited in Shaw, J., "Where is the Proper Balance? Public Access to Government Information in an Era of Concern over National Security." Presentation to Leadership Link, National Management Association, Lincoln, NE February 7, 2006.

Black, "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[721] In *Kleindienst v. Mandel*, Justice Thurgood Marshall explained that:

> In a variety of contexts this Court has held that the First Amendment protects the right to receive information and ideas, the freedom to hear as well as the freedom to speak. The reason for this is that the First Amendment protects a process . . . and the right to speak and hear - including the right to inform others and be informed about public issues - are inextricably part of that process. The freedom to speak and the freedom to hear are inseparable: they are two sides of the same coin. But the coin itself is the process of thought and discussion."[722]

Thus, not only is freedom to impart to information covered by the First Amendment, but U.S. courts often have said free speech is based on the public's right to receive information. For example, the Supreme Court said, "it is the right of the viewers and listeners, not the right of broadcasters, which is paramount."[723]

Furthermore, the influence of the democracy argument explains why political speech is regarded as high value speech in the U.S. This preferred position of political speech can be demonstrated by looking on the standard of review which varies when one talks about speech of higher value.[724] Political speech, as the best example of speech that is regarded as high value speech, exacts standards such as the clear and present danger test and strict scrutiny, while for less valued forms of speech, such as commercial or indecent expression, intermediate levels of scrutiny apply.[725] Political speech has been regarded as the most valuable type of expression throughout the history of First Amendment jurisprudence because it enables an informed electorate to make proper decisions[726]. As Julie Hilden remarks,

> [S]peech advocating violence ... [is] at the very core of the First Amendment. Political speech - as opposed to artistic, cultural, or (especially) sexual speech - has always been seen as central to the First Amendment. And speech advocating violence is, in some sense, the most intensely political speech there is. ... Moreover, more valuable political speech is often likely to be intertwined with - or mistaken for - advocacy. Accordingly, a legal test that makes it easy to suppress advocacy will also make it easy to suppress important criticism of the government on the pretext that it is tantamount to advocacy.[727]

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[721] 326 U.S. 1 (1945)
[722] *Kleindienst v. Mandel*, 408 US 753, 775 (1972)
[723] *Red Lion Broadcasting Co.* v. *FCC* 395 U.S. 367 (1969).
[724] Cram, I., (2006) op. cit. p. 147.
[725] Weaver, R., and Donald Lively, *Understanding The First Amendment*, (Matthew Bender, 2003) p. 13.
[726] Fagan, B., Comment, "Rice v. Paladin Enterprises: why Hit Man is beyond the pale", *Chi.-Kent L. Rev*, 76 (2000) p. 618.
[727] Hilden, J., "September 11, The First Amendment, and the Advocacy of Violence", Find Law Legal Commentary, Thursday, December 27, 2001, at <http://writ.news.findlaw.com/hilden/20011227.html>

The fundamental rationale behind this preferred position of political speech in the U.S. may be found in Brennan J.'s much quoted dictum:

> [W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.[728]

At the end, it can be said that there is the connection between free speech and democracy that has been the nerve of First Amendment jurisprudence.[729] Chapter Six, through examining the clear and present danger test formulated by American Supreme Court, will demonstrate this connection.

IV.4. Chapter Summary

There are three justifications of freedom of speech which explain why speech should be protected. One approach, which applied by the U.S. courts, is based on the idea that free speech leads the society to recognise the truth. The second approach, which is adopted by the HRC, Strasbourg institutions and the U.S. courts, views freedom of speech as associated with the exercise of self-fulfilment. It is the justification of democracy that has the most significant role in shaping freedom of speech laws. In other words, it can be said that there is some level of consensus about this justifications of freedom of speech which values freedom of speech because its role in helping people to participate effectively as members of the nation in the political life. The consequence of this consensus is that political speech is entitled to a high level of constitutional/legal protection, more than other forms of speech such as commercial speech or sexually explicit speech.[730] Another justification of the preferred position of political speech is that because it is supported by all three philosophical justifications, thus, it has greater value than speech to which only one or two of these justifications apply. This explains why sexually offensive speech is classified as within low value speech, whereas political speech is usually placed by many on the top tier as most valuable and most worthy of protection.[731] So it is not only because of Meiklejohn's argument that speech is highly

[728] In *New York Times Co. v. Sullivan*.
[729] Dworkin, R., (2000) op. cit. p. 354.
[730] Hare, I., 'Is the Privileged Position of Political Speech Justified?' in Beatson, J., and Yvonne Cripps (eds), *Freedom of Expression and Freedom of Information*-Essays in Honour of Sir David Williams QC (Oxford: Clarendon Press, 2000), 105-121, p. 108.
[731] DeCew, J., (2004) op. cit. p. 100.

protected, but also because of the support of all three philosophical justifications. To illustrate more, it is plausible to claim that political argument is centrally captured by all three types of rationale. According to Susan Hurley, arguably, free political argument facilitates the discovery of the truth about the consequences of political policies; or at least, more cynically, government censorship of political argument would lead to an even worse result in these terms. Arguably, Susan Hurley points out, free political argument is necessary to provide voters in a democracy with the information they need and the abilities to criticize the government, and to protect minority political views against suppression by the majority.[732] She makes the case that free political argument respects and contributes to the deliberative autonomy of both speakers and audience, and if it results in harm to others it does so at least in significant part as a result of audiences autonomously deciding what to believe and weighing reasons for action in light of the arguments. If such claims can be defended, then the degree of capture of political argument by the rationales for special protection would be high, and the degree of special protection warranted would be correspondingly high. As a contrasting illustration of the special protection principle, Susan Hurley gives an example of nude dancing in a private club. It is at least more difficult to argue that this conduct is centrally captured by the truth and democracy rationales for special protection. Overall, it seems reasonable to say that the degree of capture of political argument by the rationales for special protection appears to be somewhat stronger than the degree of capture of nude dancing.[733]

Respectively, Chapters Six and Seven of this study will illustrate how these justifications affect protection of freedom of speech in practice. This is because, as I said before, the content of free speech is connected to the very point of having free speech in a society. Free speech is what is justified by its best justification, if anything. They are connected, because we have to use whatever reasons there may be for giving special protection to certain kinds of conduct to specify the kind of conduct that is specially protected.[734] More strictly: free speech is what is justified by the best argument in favour of something generally named 'free speech.' So, as Braddon-Mitchell and Caroline West urge: Do not try to establish what free speech is independently, and then

[732] Schauer, F., (1982) op. cit. p. 41.
[733] Hurley, S., (2004) op. cit. p. 193.
[734] Schauer, F., "Must Speech be Special?" *Northwestern University Law Review* 78 (1984) pp. 1284–1306, p. 1288, 1295.

see whether the standards arguments for it succeed. Instead, ask: what types of speech these arguments support?[735]

[735] Mitchell, D., and Caroline West, "What is free speech?" *Journal of Political Philosophy* 12.4 (2004) pp. 437–460, p. 437.

Chapter Five

V. Freedom of Speech Limitations (Theoretical Discussion)

No known society, ever, anywhere has adopted a standard of entirely free speech, meaning that literally anything can be written and/or said without risk of infringing that society's system of law. In societies both ancient and modern, crimes of heresy, apostasy, obscenity, and defemation, just to name a few, populate the codes of law.[736] Even in the today liberal democracies, except the U.S., the idea of free speech without qualification does not and has not ever existed. According to almost all free speech scholars, freedom of speech has long been held to have limits. I can publish lies about others, but I cannot get away with it by claiming this is free speech. If you walk into a mosque, or even a mall, wearing an obscene T-shirt, you have to expect that you might be forced to leave. As David Mill says, we should never allow any removal of government involvement with the speech of individuals[737] because once we do, we are on the slippery slope to anarchy, the state of nature, and a life that Hobbes described in *Leviathan* as "solitary, poore, nasty, brutish, and short."[738] This limitation of free speech is not applicable only to the ordinary citizen, but also, as the philosopher Kant argued, freedom of speech might need to be controlled and restricted when it came to its use by those in authority.[739]

Except very few, especially in the United States, who believe that freedom of speech is absolute,[740] there is a very long line of freedom of speech philosophers and scholars who have neglected no opportunity to emphasise that freedom of speech is not absolute, either in theory or in practice.[741] Although they all agree on the importance of free speech for discovering the truth, fostering individual self-fulfilment and self-realisation, and maintaining democracy, they also argue that words can wound and believe that unlimited free speech might prove counter-productive, spreading false statements, destroying democracy, allowing intolerance to flourish, and offending people's dignity and respect. According to Judith DeCew, "Despite all argument in favour of maximal

[736] Mill, D., "Freedom of Speech", *The Stanford Encyclopedia of Philosophy (2002 Edition)*, Edward N. Zalta (ed.), at URL <http://plato.stanford.edu/archives/win2002/entries/freedom-speech/>.
[737] Mill, D., "Freedom of Speech" (2002).
[738] Hobbes, T., and A. R. Waller. *Leviathan; Or, The Matter, Forme & Power of a Commonwealth, Ecclesiasticall and Civill* (Cambridge: University Press, 1904) p. 84.
[739] Kant, "An answer to the question 'What is enlightenment?" 'In: Reiss, H. *Kant's political writings* (Cambridge: University Press, 1970) 54-60.
[740] See *supra* Justice Black's view at p. 2, 35 and *infra* p. 154.
[741] Siegel, S., "The Death and Rebirth of the Clear and Present Danger Test", 2007, p. 42. Available at SSRN: <http://ssrn.com/abstract=964553>.

freedom of expression, both the positive effects of allowing maximal freedom of expression and the negative consequences of restriction and suppression, the First Amendment clearly does not guarantee protection for all expression."[742] Freedom of speech, according to John Esposito, like other core principles and values, cannot be compromised. However, freedoms do not exist in a vacuum; they do not function without limits.[743] It is, therefore, an error to assume that free speech is absolute. If some speech can cause harm, offence, or contradict other's freedoms and rights, then it follows that some speech can be prosecuted. Alexander Meiklejohn noted that freedom of speech does not grant the right to say whatever one pleases, whenever one pleases, wherever one pleases. According to Meiklejohn:

> [T]he common sense of any reasonable society would deny the existence of that unqualified right ... Anyone who would thus irresponsibly interrupt the activities of a lecture, a hospital, a concert hall, a church, a machine shop, a classroom, a football field or a home does not thereby exhibit his freedom. Rather he shows himself to be a boor, a public nuisance, who must be abated, by force if necessary.[744]

Sadurski emphasised severally that freedom of speech, though of great value, is not absolute because:

> There are words that hurt, and that produce harm to other people and to entire communities, and that damage produced by words may be very high; for example, public statements that express racial hate or contempt for an entire group of people hurt their victims more than many other unpleasant words.[745]

The following discussion, therefore, is not to argue for absolute protection of freedom of speech, such a concept cannot be defended. In other words, the question, then, is not 'should speech be restricted?' Speech is restricted, by law and otherwise, as a matter of course, and throughout human history it has been thus. The question that lies at the heart of a debate is how much speech should be restricted, by what standard, and by what means should that speech be restricted?

The wide variety of opinions stem from two major schools of thought and their opposing standards for restriction of free speech, standards often referred to as the standard of "harm" and the standard of "offence." One of the people primarily associated with the "harm" principle is the author John Stuart Mill, who argues, in his famous work *On Liberty*, "The only purpose for which power can be rightfully

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[742] DeCew, J., (2004) op. cit. p. 85.
[743] Esposito, J., "Muslims and the West" (2006).
[744] Meiklejohn, A., (1965) op. cit. p. 25.
[745] See Sadurski, W., (1999) op. cit. p. 37. See also Turk, D., & Joinet Louis, (1990) op. cit. p. 35.

exercised over any member of a civilized community, against his will, is to prevent harm to others."[746] Another school of thought holds that speech which causes "offence" should also be subject to the restriction of law, at least in some contexts and situations. Under the 'offence' standard, some classes of speech are considered to be so egregiously offensive, and so lacking in merit or value, that they should be regulated for reason of their offensiveness alone. It also can be said that there is a third school which argues that speech can be limited for the sake of other liberal values, particularly the concern for democratic equality. This chapter focuses on these three criteria that provide adequate reason for limiting freedom of speech. It starts with an examination of one of the first, and best, defences of free speech, based on the harm principle. This provides a useful starting point for further exposition on the subject. The discussion moves on to an assessment of the argument that speech can be limited because it causes offence rather than direct harm. I then examine arguments that suggest speech can be limited for reasons of democratic values.

V.1. Harm Principle

V.1.1. The Principle

In *On Liberty*, Mill emphasised that freedom of opinion and sentiment should exist in society for everyone,[747] on every subject matter, "practical or speculative, scientific, moral or theological"[748] ... "however immoral it may be considered."[749] Even if a person is alone against the whole of mankind in adopting certain opinions, even if he/she crosses the social red lines and discusses moral, political, or religious matters, and even if a person's opinion is shocking, unorthodox, or heretical, and false, all these do not provide a ground for prohibiting such speech.[750] "[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others," Mill says.[751] Only in this case, according to Feinberg, Mill believes in society's need for some rules of conduct that regulate the words of members of a political society.[752] In other words, speech should be free until it

[746] Mill, J., (1859) op. cit. 86.
[747] Mill, J., (1859) op. cit. 76.
[748] Mill, J., (1859) op. cit. 71.
[749] Mill, J., (1859) op. cit. p.75, footnote *.
[750] Mill, J., (1859) op. cit. 11, 16; Feinberg, J., Joel Feinberg, *Harm to Others* (New York, Oxford: Oxford University Press, 1984) p. 215-216.
[751] Mill, J., (1859) op. cit. 86.
[752] Feinberg, J., (1984) op. cit. p. 11; McCloskey, H., (1963) op. cit. p. 145.

unduly harms someone else.[753] Then the law properly prohibits it, just as it prohibits fraud, false advertising, defamation, libel, perjury, insider trading and other forms of harmful speech.

As there are several ways in which speech might cause harm, it is important to establish what harm actually is.[754] Not every kind of speech that causes harm can rightly be prohibited,[755] only speech that 'produces' or 'causes evil' to others, that results in 'definite damage,' or 'definite risk of damage' to them, such as speech which 'affects prejudicially the interest of others,' 'directly, and in the first instance,' that is injurious to 'certain interests, which ... ought to be considered as rights.'[756] In other words, the philosopher Joel Feinberg argues, only a wrongful set-back of others' interests is the meaning of the term 'harm' that should be considered when one talks about the harm principle. Accordingly, libel, blackmail, advertising blatant untruths about commercial products, and advertising dangerous products such as cigarettes to children can be restricted on the ground of harm they produce.[757] In most of these cases, it can be said, "it is possible to make an argument that harm has been committed and that rights have been violated."[758] To give an example here, defamation, according to Zelenzy, is the statement which tends to injure the plaintiff's reputation among respected segments of society.[759] Our right to freedom of speech, according to harm theory, is restricted when our expressions, whether a spoken slander or written libel, cause harm to the reputation of another person. Let's take a practical example, the cartoons of the Prophet, as some asserts, especially the one with his headdress shaped like a bomb, can be given three general interpretations in today's context: a) He was a terrorist. b) He supported terrorism. c) Islam is a religion of terrorism, since he symbolizes the religion. In the light of these interpretations, it can be concluded that if the cartoons are interpreted as a) and b), they are slanderous and libelous (which call into question an individual's

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[753] Mill, J., (1859) op. cit. 86.
[754] See in this regard, West, C., "Pornography and Censorship", *The Stanford Encyclopedia of Philosophy (Summer 2004 Edition)*, Edward N. Zalta (ed.); 2005, online available at URL <http://plato.stanford.edu/archives/fall2005/entries/pornography-censorship>; White, S., "How Free Should Speech be?" 2003, p. 2, at <http://www.politics.ox.ac.uk/teaching/ug/readinglist/203/203-3MT01.pdf>.
[755] Haiman, F., (1993) op. cit. p. 85. McCloskey, H., "Mill's Liberalism." *The Philosophical Quarterly*, 13.51(1963) pp. 143-156, p. 147.
[756] Mill, J., (1859) op. cit. p. 70-71, 141, 149; Jorge Menezes Oliveira, "Harm and Offence in Mill's Conception of Liberty", Faculty of Law, Oxford University, 2004, p. 13.
[757] *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).
[758] Mill, D., "Freedom of Speech" (2002).
[759] Zelenzy, J., *Communication Law*, 3d edition (USA: Wadsworth/Thomas Learning, 2001) p. 104; Haiman, F., *Speech and Law in a Free Society* (Chicago and London: The University of Chicago Press, 1979) p. 43.

honesty, integrity, sanity, solvency, morality or social refinement)[760] so they are unprotected. However, if they are interpreted as c), thus, promote hate by branding all followers of Islam as terrorists, and since no one likes terrorists, people will naturally be led to hate Muslims,[761] they might escape prosecution because hate speech is protected under the harm principle, as the following example of corn-dealers will show. This example poses a question of how we can distinguish between what is hate speech and therefore protected speech, and what is speech that incites to violence. Once we can answer this question, we have found the correct limits to free speech under the harm principle.

In his "very simple principle," as he believes,[762] and "very complex concept" as Feinberg sees it,[763] Mill non-systematically mentioned some necessary conditions that are required in harmful speech for it to be legitimately prohibited. Firstly, Mill required that the exercise of speech should cause or threaten "directly, and in the first instance" harm to others.[764] By this Mill meant, according to Almagor, that those to whom the speech is addressed must be urged to do something now or in the immediate future, rather than merely believe in something.[765] The distinction, thus, must be made between speech as a matter of ethical conviction and instigation. The advocacy that does not induce someone to take an action, but which is voiced as a matter of ethical conviction, is protected under Mill's theory. This is, in the view of Almagor, one of Mill's major contributions to the free speech literature.[766] Secondly, the harm caused by speech should be illegitimate harm; there is no room to abridge speech that causes legitimate harm.[767] Thirdly, the harm caused by speech should be directed to others; hence, harm principle does not apply to self-regarding speech which is absolute.[768]

In order to illustrate further the harm principle, Mill used the example of speech related to corn-dealers to distinguish between "instigation," as unprotected speech and

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[760] Zelenzy, J., (2001) op.cit. p. 104.
[761] Hashmi, S., "Danish Cartoons - Islam vs. Freedom of Expression?" Tuesday February 7, 2006, online at <http://www.bismikaallahuma.org>; Modood, T., Randall Hansen, Erik Bleich, Brendan O'Leary, and Joseph Carens. "The Danish Cartoon Affair: Free Speech, Racism, Islamism, and Integration." *International Migration*, 44.5 (2006) pp. 3-62.
[762] Mill, J., (1859) op. cit.
[763] Feinberg, J., (1984) op. cit. p. 214.
[764] Mill, J., (1859) op. cit. 71.
[765] See Almagor, R., *Speech, Media, and Ethics: The Limits of Free Expression* (Palgrave, Basingstoke, 2001) p. 5-6. McCloskey, H., (1963) op. cit. p. 146.
[766] Almagor, R., (2001) op. cit. p. 5.
[767] Mill, J., (1859) op. cit. 119.
[768] For more about the difference between self-regarding and other-regarding acts see Feinberg, J., (1984) op. cit. p. 70-79.

'advocacy' as a protected one.[769] "An opinion that corn-dealers are starvers of the poor," Mill says, "should be permissible if it is expressed through the medium of the printed page," but the same view "justly incurs punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard."[770] The difference between the two lies in the consideration which is paid to the above requirements, which without it, harm principle might be abused. While an opinion that is expressed through the press may cause corn-dealers to suffer severe financial hardship as a result, for instance, of confiscatory legislation passed following reasoned parliamentary debate, which is a legitimate harm,[771] an opinion expressed to an angry mob, ready to explode, gathered outside the house of the dealer "constitute[s] ... a positive instigation to some mischievous act", which may place the rights, possibly even the life, of the corn-dealer in danger, and this is illegitimate harm. Furthermore, while speech to an angry mob is closely linked to action, this is not true in an opinion published by the press, which will remain a topic of discussion.[772] An angry mob has no time for careful and rational reflection before it pursues the course of action urged on it, whereas the press article might, or might not, have direct, or more often indirect, influence on urging some to do harm to the others.

Given the above criteria, it goes without saying that not only would the Danish cartoonists, who drew images of Prophet Muhammad, escape prosecution under the above criteria, but also British historian David Irving and all Holocaust deniers as well. This is because, according to harm theory, law may regulate words that are "triggers to action" but not words that are "keys of persuasion."[773] The Danish cartoons constitute only "keys of persuasion," as their publication happened in circumstances no different than a printed attack on a corn-dealer. Accordingly, it may be difficult to qualify the *Jyllands-Posten* cartoons publication as 'inciting imminent violence under the principle, as the cartoon has a satirical purpose. This matter would be judged differently if these cartoons, which, very clearly, link Islam with terrorism, were distributed, in memory of the 7/7 terrorist act, by the leader of the British National Party (BNP), to an excited mob assembled before the house of the radical UK Muslim cleric Abu Hamza al-Masri.[774]

[769] Mill, J., (1859) op. cit. 119. For analysis of the corn-dealer example see, O'Rourke, K., (2001) op. cit. p. 126-129.
[770] Mill, J., (1859) op. cit. 119.
[771] O'Rourke, K., (2001) op. cit. p. 132.
[772] O'Rourke, K., (2001) op. cit. p. 129.
[773] *Masses Publishing Co. v. Patten*, 246 Fed. 24 (2d Cir. 1917). Haiman, F., *Speech and Law in a Free Society* (Chicago and London: The University of Chicago Press, 1979) p. 268.
[774] For details about Abu Hamza, see Dominic Casciani, Profile: Abu Hamza, 27 May 2004, available at BBC, UK version, <http://news.bbc.co.uk>

Here, people, victims' families in particular, are not in a position to receive an opinion rationally; the speaker, or the distributors, can be held responsible for their speech.[775]

Here I shall mention only one example, to cite others in the following chapters of the study, which discuss limitations of freedom of speech in free speech laws. This example shows how Mill's harm principle, or to be specific, Mill's corn-dealer example, has a strong influence on courts' decisions. Agreeing with Mill's corn-dealer example, Justice Holmes in *Schenck v. U.S.* ruled that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[776] Prohibition of yelling "fire" in a crowded theatre has to do with the actual harm that speech can cause -a panic-driven stampede of moviegoers towards the exit, possibly leaving trampled peers in their wake. The similarity between the Millian example and the Holmesian is that audiences, in both cases, have no opportunity to conduct a discussion in the open, and to bring contrasting considerations into play that may reduce the effects of the speech.[777]

V.1.2. The Evaluation of Harm Principle

The harm principle, in fact, is the most liberal theory that defends free speech, though it simultaneously constitutes a justification for limiting free speech.[778] Mill established the harm principle as conclusively as possible and the requirements are sufficiently stringent not to open avenues to further suppression of freedom of speech. Mill applies this principle in a far broader context than speech, of course, but he applies an especially strict scrutiny to claims of harm with relation to speech, and argues that nearly every manner of speech ought to be outside the regulation of law. As such, Mill is a favourite among more "liberal" participants in the speech debate. As one writer asserts, "the limits on free speech will be very narrow because it is difficult to support the claim that most speech actually causes harm to the rights of others."[779] Emphasising the same opinion, another comments, "Mill's aims to establish a principle that isolated the area of liability within which people are uninterfered with in developing their individuality through free choice and experiments in living."[780] His theory seeks to bar intrusive action justified on paternalistic or merely moralistic grounds. Some, such as

[775] O'Rourke, K., (2001) op. cit. p. 133.
[776] *Schenck v. U.S.* 249 U.S. 47 (1919).
[777] Almagor, R., (2001) op. cit. p. 6-7. Leader, S., "Free Speech and the Advocacy of Illegal Action in Law and Political Theory", *Columbia Law Review*, 82 (1982) p. 419.
[778] Mill, D., "Freedom of Speech" (2002).
[779] Mill, D., "Freedom of Speech" (2002).
[780] Jorge Menezes Oliveira, (2004) op. cit. p. 2.

O'Rourke, went further by assuming that Mill's harm principle is not concerned with the content of opinion, but with the circumstances in which an opinion is expressed.[781] They referred to Mill's own words where he stated, "Even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act."[782] Based on the same assumption, Sumner's careful reading of Mill led him to conclude that it is difficult for governments to justify restrictions on expressive content. He concludes that time; place and manner restrictions and restrictions against inciting harmful acts could be justified more easily.[783] This interpretation has led some to assume that Mill's harm principle only applies to instigative speech, not to freedom to think, to hear, and to express opinions.[784]

This stringent manner in which Mill formulated his harm principle can easily be demonstrated in the following lines.[785] By requiring a direct legitimate harm to others as the only case in which speech can be limited, Mill, in fact, excludes many types of speech that are thought to be socially unacceptable. Firstly, Mill dismisses moralist reasons, reasons to do with the enforcement of the positive or popular moral sentiments of a person's community, as legitimate reasons for limiting liberty.[786] Offensive speech, such as hate speech and pornography, therefore, are excluded from being subject to the harm principle.[787] Secondly, as an opponent of paternalism theory, Mill excluded harm to self from the application of his harm principle.[788] According to Mill, a person is free to act or express himself "according to his own inclination and judgment in things which concern himself."[789] He continues in another place, "No one but the person himself can judge of the sufficiency of the motive which may prompt him to incur the risk: in this case, therefore ... he ought, I conceive, to be only warned of the danger; not forcibly prevented from exposing himself to it."[790] Accordingly, the argument of conservatives who wish to prevent mentally competent adults from publishing and consuming pornography, on the grounds that the choice to consume pornography is

[781] O'Rourke, K., (2001) op. cit. p. 126.
[782] Mill, J., (1859) op. cit. 119.
[783] Riddell, T., Book Review, L.W. Sumner, "The Hateful and the Obscene: Studies in the Limits of Free Expression", *Law and Politics Book Review,* 15(4), (2005) pp. 289-294.
[784] O'Rourke, K., (2001) op. cit. p. 132.
[785] Gray, J., "Mill, J., Traditional and Revisionist Interpretations", *Literature of Liberty,* 2.2 (1979) pp. 7-37.
[786] Feinberg, J., (1984) op. cit. p. 13.
[787] Oliveira, J., (2004) op. cit. p. 3, 4.
[788] Laseva, S., "A Single Truth': Mill on *Harm*, Paternalism and Good Samaritanism", *Political Studies* 36.3 (1988) p. 488; Jorge Menezes Oliveira, (2004) op. cit. p. 20.
[789] Mill, J., (1859) op. cit. 119.
[790] Mill, J., (1859) op. cit. p. 165-166. Jorge Menezes Oliveira, (2004) op. cit. p. 13.

deeply morally misguided, has no weight because a person's own good, either physical or moral, is not a sufficient warrant, in Mill's doctrine. Thirdly, it is not enough that speech causes harm to others, it must "prejudice their interests, and not only any sort of interests, but certain interests, those that ought to be considered as rights."[791] This means that only a wrongful set-back of others' interests is the meaning of the term 'harm' that should be considered when one talks about the harm principle.[792] This interpretation, thus, excludes set-backs to interests produced by justified or excused speech ('harms' that are not wrongs), and violations of rights that do not set back interests (wrongs that are not 'harms').[793] Fourthly, speech that causes indirect harm was excluded by Mill from the harm principle. Where there is no probable connection between speaker's speech and harm caused by the receiver, the harm principle cannot be applied.[794] This is another reason that explains why pornography lies outside the harm principle, as it does not *directly* incite harm to women in rape cases, according to some.[795] The same reason is raised in the face of any allegation that hate speech causes violence. Finally, even if there is direct legitimate harm to others, Mill suggests not that such speech ought to be restricted, but that it is *eligible* for restriction.[796] Illustrating the latter point, Jorge Menezes Oliveira wrote, "The principle is not a sufficient condition for legitimate use of coercion against individuals, it specifies only a necessary condition: liberty of action may be restricted insomuch as it is harmful to others. It tells us when we might restrict liberty, not when we ought to do so."[797]

However, several criticisms have been directed to Mill's harm principle.[798] Some view Mill's principle as too broad because speech is 'only words', it cannot harm, thus

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[791] Mill, J., (1859) op. cit. 145.
[792] Feinberg, J., (1984) op. cit. p. 33-34, 36, 53. See Storey, M., "The Offence of Public Nudity", *Nude and Natural magazine*, 22.2 (2002).
[793] Feinberg, J., (1984) op. cit. p. 215; Feinberg, J., *The moral limits of the criminal law*, vol. 4, *Harmless Wrongdoing* (New York; Oxford: Oxford University Press, 1988) p. xxvii, xxix; Duff, R., "Harms and Wrongs." *Buffalo Criminal Law Review*, 5.13 (2001), p. 17;
[794] Mill, J., (1859) op. cit. p. 75-76; O'Rourke (2001) op. cit. p. 127.
[795] See Mahoney, K., "Destruction of women's rights through mass media", in K. E. Mahoney and P. Mahoney (Eds.), *Human Rights in the Twenty-First Century: A Global Challenge* (Dordrecht, The Netherlands: Martinus Nijhoff, 1993) p. 766; Dworkin, A., *Pornography: Men Possessing Women* (London: The Women's Press. 1981); Skipper, R., "Mill and Pornography", *Ethics*, 103.4, (1993) p. 726-730. For a different view, see Catharine Mackinnon, who believes that pornography causes multiple harms to women, (1993) op. cit. p. 15,18-20; Mackinnon, C., *Feminism Unmodified: Discourses on Life and Law* (Cambridge: MA, Harvard University Press, 1987) pp. 127-213; Mackinnon, C., *Toward a Feminist Theory of the State* (Cambridge: MA, Harvard University Press, 1989) pp. 195-214; David Dyzenhaus, "John Stuart Mill and the Harm of Pornography", *Ethics*, 102.3 (1992) p. 534-551.
[796] Almagor, R., (2001) op. cit. p. 7.
[797] Oliveira, J., (2004) op. cit. p. 3; O'Rourke, (2001) op. cit. p. 127
[798] Harcourt, B., "The Collapse of the Harm Principle", *Journal of Criminal Law and Criminology*, 90.1 (1999) p. 109-194; Knowles, D., "A Reformulation of the Harm Principle", *Political Theory*, 6.2 (1978) pp. 233-246.

free speech should be unlimited.[799] George Kateb, for example, argues that speech should not be restricted even if it causes harm. His conclusion is that the harm principle casts its net too far and we should allow almost unlimited speech.[800] Kateb's view, however, is not often expressed because, as already noted, the formulation of the principle in question in a most stringent manner refutes a viewpoint that the harm principle is too broad. Others believe that the harm principle is too narrow, and suggest that the harm principle can be defined in a less stringent manner than Mill's formulation, consequently, more options might become available for prohibiting hate speech and violent pornography.[801] This party claims that the harm principle should include within its scope psychological harm to others, as it includes physical harm, "just as we view the infliction of physical pain as a wrongful dead, seeing it as the right and the duty of the state to prohibit such an infliction."[802] As Raphael Cohen-Almagor suggests, there are grounds for abridging expression not only when the speech is intended to bring about physical harm, but also when it is designed to "inflict psychological offence."[803]

Regardless of these criticisms, though some are reasonable, the principle, however, still considered, by many, if not by nearly all writers, as one of the most influential theories in designing the boundaries for freedom of speech.[804] In fact, there is no controversy about this fact, but the controversy arises, as Feinberg says, when we consider whether it is the only valid liberty-limiting principle, as John Stuart Mill believed.[805] Many, myself included, contrary to Mill, believe that still there is space for other principles, namely, the offence principle, to play a significant role, alongside the harm principle, in determining the limits of freedom of speech.[806] Most liberal societies rely on the offence principle to regulate certain types of speech. Hate speech, as an obvious example of harmless offensive speech which escapes prosecution under the

[799] See absolutists' view above, p. 35

[800] George Kateb, "The Freedom of Worthless and Harmful Speech" in Bernard Yack (ed) *Liberalism without Illusions: Essays on Liberal Theory and the Political Vision of Judith N. Shklar* (Chicago: University of Chicago Press. 1996) p. 220-224.

[801] Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1965)

[802] Almagor, R., (2001) op. cit. p. 4.

[803] Almagor, R., (2001) op. cit. p. 4.

[804] Feinberg, J., *Harm to Self* (New York: Oxford University Press, 1986) p. ix. 3; Feinberg, J., (1988) op. cit. p. 323-324; Dworkin, R., "Lord Devlin and the Enforcement of Morals"; *Yale Law Journal* 75, (1966) p. 996.

[805] See Mill, J., (1859) op. cit. p. 86; Feinberg, J., "Limits to the Free Expression of Opinion," in Joel Feinberg & Hyman Gross, *Philosophy of Law* 5th edn, (Belmont, California: Wadsworth Publishing Company, 1995) pp. 262-281

[806] Feinberg, J., (1986) op. cit. p. 3.

harm principle,[807] is prohibited, or at least is regulated, by many international legal provisions such as the (ICCPR) at Article 20, (CERD) at Article 4 paragraph (a), and finally in continental Europe, where the legacy of the Second World is still strong, "[the] European legislation and practice are directed to penalising speech which it is feared might promote hatred."[808] This prohibition of hate speech cannot be justified without relying on the offence principle.

V.2. The Offence Principle

V.2.1. The Principle

Many societies, even liberal ones, except to some extent the United States, as study will show, have limitations on some harmless forms of speech that cause offence to others, such as open lewdness, solicitation, indecent exposure, public sexual activity, including very exotic kinds, distribution of materials offensive to religion or patriotic sensibilities, racial and ethnic slurs, displays of swastikas, Holocaust denial, and some sorts of pornography.[809] However, there is considerable doubt whether these can be justified by the harm principle, because certain sorts of unpleasant psychological states are not in themselves harms.[810] This led some, Joel Feinberg in particular, to adopt another theory that can, beside the harm principle, shoulder all of the work necessary for a principle that has to deal with free speech and set the bar a little lower than in the harm principle.[811] They found their quest in an additional principle called the offence principle, which permits the imposition of limitations on speech for its supposed offensiveness, rather than the harm that is caused.[812] Unlike the harm principle, it is not necessary for speech to set back our interests, for it to be prohibited under the offence principle.[813] Obscene remarks over a loudspeaker, pornographic handbills thrust into the hands of passing pedestrians, lurid billboards in Times Square, graphically advertising the joys of pederasty, the banner in the double-decker bus in London saying that "All Indians are Pigs", wandering around Harods in Knightsbridge naked, all these, though they would escape prosecution under the harm principle,[814] are examples of offensive

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[807] Barkham, P., "Free Speech on the Internet", *The Guardian,* Friday February 5, 1999.
[808] Darbishire, H. "Hate Speech: New European Perspectives," in *Roma Rights. Newsletter of the European Roma Rights Center* no. 4 (1999) at URL <http://errc.org>; Paulson, K., "The War on Internet: Can Europe and the United States Find Middle Ground?" *Michigan Bar Jouranl,* March 2003.
[809] Feinberg, J., (1984) op. cit. p. 13.
[810] West, C., (2005) op. cit.
[811] Feinberg, J., (1984) op. cit. p. 12, 15; Feinberg, J., (1986) op. cit. p. 3.
[812] Mill, D., "Freedom of Speech" (2002).
[813] Storey, M., (2002) op. cit. p. 82-88.
[814] See Storey, M., (2002) op. cit. p. 82-88.

speech that provide a good reason in support of a legal prohibition, such that it is probably necessary to prevent such offences to persons other than the actor and would probably be an effective means to that end if enacted.[815] Joel Feinberg, a respected scholar in the field of social philosophy,[816] illustrated how it is plausible to affirm that the prevention of harmless offence is among the legitimate purposes of the criminal law. In his great book *Offence to Others*, Feinberg wrote:

> To be forced to suffer an offence, be it an affront to the senses, disgust, shock, shame, annoyance, or humiliation, is an unpleasant inconvenience and hence an evil, even when it is by no means harmful. Offence, moreover, belongs to that class of evils that are directly suffered by specific persons, who then voice real grievances. Their victims are wronged even though they are not harmed. For that reason alone, it is morally legitimate for the criminal law to be concerned with their regulation.[817]

Many reject the offence as a ground for restricting free speech, because it opens avenues to further suppression of freedom of speech, as it is very easy to prove that some speech offends certain people. One person might be offended simply at the sight of a Hindu worshipping a cow. Another may feel gross revulsion when watching a Muslim girl wearing a veil in the Champs-Élysées in Paris. Saudis may find the celebrations of the New Year and the wearing of Christian clerical garb, even by foreigners and in private, offensive. Transcripts of speeches by Osama Ibn Laden may offend some.[818] People insisting that Israel should be erased from the face of the Earth, people saying the Holocaust never happened, also might cause offence to some. Photos from Abu Ghraib have offended many. Emphasising this point, the public nudity supporters, or naturists, said, "People will be offended by anything; offence thus should not be relevant to law."[819] As an American Judge said, "[O]ne man's vulgarity is another's lyric."[820] In the same vein, Salman Rushdie emphasises that "It has to be the thing you loathe that you tolerate, otherwise you don't believe in freedom of speech."[821]

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[815] Feinberg, J., *Offence to Others* (New York: Oxford University Press, 1985) p. xiii, 30, 32.
[816] He is famous for his four-volume series, *The Moral Limits of the Criminal Law*. Feinberg developed his discussion on offence in earlier works. See, for instance, "Harmless Immoralities and Offensive Nuisances," in Joel Feinberg, ed., *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton: Princeton University Press, 1980) pp. 69-109; and Feinberg, J., *Social Philosophy* (Upper Saddle River, N.J.: Prentice Hall, 1973), especially pp. 43-45.
[817] Feinberg, J., (1985) op. cit. p. 49.
[818] See *supra* p. 34.
[819] Storey, M., (2002) op. cit. p. 82-88.
[820] *Cohen v. California*, 403 U.S. 15 (1971).
[821] Rushdie, S., 'Secrecy and Censorship', in E. Hazelcom & P. Smyth (eds.), *Let in the Light: Censorship, Secrecy and Democracy* (Ireland: Brandon Book Publishers Ltd., 1993) pp. 26-38, p. 36.

The difficulty of extending the scope of the free speech restrictions to include offence principle has been expressed by many scholars.[822] Professor Ronald Dworkin has observed, "[I]t is the central, defining, premise of freedom of speech that the offensiveness of the ideas, or the challenge they offer to traditional ideas, cannot be a valid reason for censorship; once that premise is abandoned it is difficult to see what free speech means." [823] A similar viewpoint is taken by Sadurski who wrote, "Offensiveness itself is an insufficient reason to punish the speaker, and that the regime of liberty demands that we out up with expressions of unwelcome ideas, unpopular thoughts and offensive views."[824] Offence, according to Professor Joshua Cohen, does not suffice by itself to deprive speech of protection.[825] Laws punishing speech because it is simply offensive, according to some, pose perhaps the greatest risk to freedom of speech. [826] Offensive ideas are part of the price one must pay to protect these constitutional rights, David Brink says.[827] The American Civil Liberties Union claimed that "if only popular ideas were protected, we wouldn't need a First Amendment. History teaches that the first target of government repression is never the last. If we do not come to the defence of the free speech rights of the most unpopular among us, even if their views are antithetical to the very freedom the First Amendment stands for, then no one's liberty will be secure."[828] Unsurprisingly, the Supreme Court of the United States, differently from most other legal systems such as ICCPR and ECHR, attempted to exclude offensive speech from the category of unprotected speech, though sometimes sexually offensive speech has been given lower value.[829] Under the clause of protecting speech for the sake of public morals, the HRC's interpretation of such clause reinforces the necessity of offence principle. This can be clearly seen in *Hertzberg and Others v. Finland*, which will be discussed latter. The ECtHR, although in one of its leading cases ruled that Article 10 is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive but also to those that offend, shock or disturb the

[822] Almagor, R., (2001) op. cit. p. 22.
[823] Dworkin, R., *Freedom's Law* (New York: OUP, 1996) p. 206; Dworkin, R., "Do We Have a Right to Pornography?" in *A Matter of Principle* (1985) op. cit. p. 353.
[824] See, W. (1999) op. cit. p. 37.
[825] Cohen, J., (1993) op. cit. p. 215.
[826] Dougherty F., "A Panel Discussion: Potential Liability Arising from the Dissemination of Violent Music", *Loy. L.A. Ent. L. Rew.* 22 (2002) p. 256-61
[827] David Brink, "Millian Principles, Freedom of Expression, and Hate Speech", *Legal Theory* 7 (2001), p. 119-57.
[828] American Civil Liberties Union (ACLU) Position Paper, "Freedom of Expression", January 2, 1997, at URL <http://www.aclu.org/freespeech/gen/11178pub19970102.html>
[829] See *Young v. American Mini Theatres*, 427 U.S. 50 (1976). *Erznoznik v. City of Jacksonville* 422 U.S. 205 (1975) *Barnes v. Glen Theatre, Inc.* 501 U.S. 560 (1991).

State or any sector of the population,[830] has not hesitated in restricting speech that causes offence to others. Under the offence principle, obscene publications were restricted in *X. and the German Association of Z against the Federal Republic of Germany,*[831] *X. Y. and Z. v. Belgium,*[832] and *X. v. the United Kingdom.*[833] In the *Muller* case, the ECtHR had to draw a borderline between the protection of artist forms of expression and morals. Josef Felix Muller was a Swiss painter who had some artwork exhibited in a public exhibition in Fribourg. The exhibition was well known at the time and encouraged members of the public to attend. The exhibition also had no age restriction and offered free admission to all. Josef Felix Muller submitted three large paintings entitled "Drei Nachte, drei Bulder (Three Nights, Three Paintings). The paintings all concerned sexual activity, and as the judgment stated, "placed it in the foreground" of the painting. Various sexual practices were depicted, including images of sodomy, fellatio between males, bestiality, erect penises and masturbation. A man whose daughter, a minor, had been adversely affected by viewing the described paintings, and a man who had thrown down one of the paintings and trampled on it in disgust passed information about the paintings to the prosecutors. The applicants were prosecuted and fined for publishing obscene material. The Court's judgment found that the paintings depicted "in crude manner sexual relations and were liable grossly to offend the sense of sexual propriety of persons of ordinary sensibility". The ECtHR, therefore, upheld the prosecution and ruled that the limitations imposed on such expression were prescribed by law; the aim pursued was legitimate, and necessary for the protection of morals.[834] The influence of offence principle is more visible in cases such as *Otto-Preminger Institute v. Austria*[835] and *Wingrove v. the United Kingdom,*[836] in which the ECtHR upheld the laws which restrict blasphemous speech. In a recent case which, although it did not concerned blasphemy, concerned public morals, *Murphy v Ireland*, the ECtHR considered the Irish ban on broadcast religious advertising. The Court noted that a 'wider margin of appreciation is generally available when regulating

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[830] *Handyside* v. *United Kingdom*, 5493/72 [1976] ECHR 5.
[831] *X. and the German Association of Z against the Federal Republic of Germany*, (1963) 6 Y.B.E.C.H.R. 204, EComHR.
[832] *X. Y. and Z. v. Belgium* (1977) 9 D R 13, EComHR.
[833] *X. v. the United Kingdom*, (1978) 16 D R 32, EComHR. See also, *X. Company v. the United Kingdom*, (1983) 32 D R 231, EComHR.
[834] *Muller v. Switzerland*, 10737/84 [1988] ECHR 5.
[835] *Otto-Preminger Institute v. Austria*, 13470/87 [1994] ECHR 26.
[836] *Wingrove v. the United Kingdom* - 17419/90 [1996] ECHR 60.

expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially religion.'[837]

Contrary to the HRC and ECtHR position, the Supreme Court of US, in *FCC v. Pacifica Foundation*, ruled that "the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed it is the speaker's opinion that gives offence, that consequence is a reason for according it constitutional protection."[838] In *Texas v. Johnson* the Court said that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[839] In *Street v. New York* the Court ruled that "any shock effect . . . must be attributed to the content of the ideas expressed. It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[840] One of the main implications of American courts not adopting the offence principle by is that hate speech and blasphemous speech, which are restricted under the international law of freedom of speech, are allowed in the U.S.

In her article, *Free Speech and Offensive Expression*, Judith Wagner DeCew gave two reasons for excluding offence of being a sufficient justification for banning speech. The first reason, according to DeCew, "is the subjectivity of determining what expression is offensive and what is not."[841] What constitutes bad taste or discrimination or offensiveness is to a very great extent subjective. While a 'reasonable person' standard could be used, it is difficult to see how even that could provide an objective and consistent way to separate offensive from inoffensive expression. What is offensive? Who is to decide? How revolting must an expression be to be deemed offensive enough to ban it?" DeCew asks.[842] The second reason for protecting offensive speech is to avoid the 'slippery slope' of adding more categories to the list of excluded speech.[843] In short, the difficulty of the offence principle, as understood from the above opinions, is in its relativism, which might lead to suppression of unlimited speech under the allegation of its offensiveness. For example in the context of ECHR, the Strasbourg institutions prohibited not only those that pronounce Nazi and Fascist thoughts in a straightforward way, but also those that may risk even referring to these thoughts, but

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[837] *Murphy v Ireland* 44179/98 [2003] ECHR 352.
[838] 438 U.S. 726 (1987).
[839] *Texas v. Johnson*, 491 U.S. 397 (1989)
[840] *Street v. New York*, 394 U.S. 576 (1969); *Cohen v. California*, 403 U.S. 15, (1971); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).
[841] DeCew, J., (2004) op. cit. p. 91.
[842] DeCew, J., (2004) op. cit. p. 91.
[843] DeCew, J., (2004) op. cit. p. 92.

constrained on all expressions that have any relation to racist or hatred remarks. In fact, the institutions of Strasbourg prohibited every utterance referring to Nazi or Fascistic thoughts. It endorses restrictions upon an event if there is any risk of hatred speech.[844]

This difficulty and complexity in applying the offence principle should not lead us to exclude it from being one of the criteria that determine the boundaries of freedom of speech. The step that should be taken here is to attempt to find a compromise between the "slippery slope" effect of the offence principle and the danger of turning a blind eye to such kinds of speech. This can be done by formulating the principle in question as conclusively as possible and the requirements equally stringent. Joel Feinberg was aware of this problematic aspect of the offence principle when he argued, "The offence principle ... must be formulated in a such way as not open the door to wholesale and intuitively unwarranted repression."[845] Therefore, in order to avoid vagueness or impreciseness on the definition of the offence principle, which might bring emotional distress, inconvenience, embracement, or annoyance within its scope, and in order to make an offence principle an intelligible principle; Feinberg, outlined in clear detail many of the issues surrounding the legal prohibition of offending speech.[846] Firstly, Feinberg rejected a general meaning of the word 'offence' which includes "in its reference any or all of a miscellany of dislike mental states (disgust, shame, hurt, anxiety, etc.)" Only a specifically normative sense of the word 'offence,' according to Joel Feinberg, is intended in the offence principle. This means that only when "disgust, shame, hurt, anxiety, etc" are caused by the wrongful (right-violating) conduct of others can such conduct be restricted under the offence principle. In other words, the concpet of offence only covers some of annoying or offensive disturbances, which Feinberg divides into six general categories: 1) Affronts to the senses, 2) Disgust and revulsion, 3) Shock to moral, religious, or patriotic sensibilities, 4) Shame, embarrassment (including vicarious embarrassment), and anxiety, 5) Annoyance, boredom, frustration, 6) Fear, resentment, humiliation, anger.[847] Joel Feinberg, then, in order to define "a highly restricted version of the offence principle" maintained that the seriousness of the offensiveness will be determined by three factors: (a) The extent of the offensive standard; (b) The reasonable avoidability standard; and (c) The Volenti standard.[848]

[844] *Nationaldemokratische Partei Deutschlands, Bezirksverband Munchen-Oberbayern v. Germany* (1995) 84-A D R 149, 154, EComHR.
[845] Feinberg, J., 'Harmless Wrongdoings and Offensive Nuisances", in Feinberg, *Rights, Justice, and Bounds of Liberty: Essays in Social Philosophy* (Princeton, NJ. Princeton University Press, 1980) p. 86.
[846] Storey, M., (2002) op. cit. p. 82-88.
[847] Feinberg, J., (1985) op. cit. p. 10-13.
[848] Feinberg, J., (1985) op. cit. p. 26, 35. 115-117, 215; R. A. Duff, (2001) op. cit. p. 31.

These factors need to be taken into account when deciding whether speech can be limited by the offence principle or not because offensiveness alone may not be a sufficient reason to regulate speech. For example, pornography, even when it includes violent content, is not prohibited in the case of the absence of factors (b) and (c). Although factor (a), which looks at the intensity and durability of the repugnance produced, and the extent to which repugnance could be anticipated to be the general reaction of strangers to the conduct displayed, is present in such speech the intensity of the offence alone is not enough to transfer speech from a protected one to unprotected. The presence of factor (b) which refers to the ease with which unwilling witnesses can avoid the offensive displays transfers speech in question to a protected one. One can easily avoid being offended by not buying pornographic DVDs or by pressing the remote control to watch the latest news in Iraq or Oprah Winfrey's famous show, instead of continuing watch what offends one. According to Feinberg, "No one has a right to protection from the state against offensive experiences if he can easily and effectively avoid those experiences with no unreasonable effort or inconvenience."[849] The case is different with the public display of pornography, which may constitute an "offensive nuisance" to non-consenting adults who are involuntarily exposed to it.[850] Similarly, if one has freely decided to buy a pornographic DVDs or subscribe to a pornographic channel for pleasure, then the offence principle obviously does not apply, because of the presence of factor (c) which considers that voluntarily suffered offences do not count as offences at all.[851] Moreover, one cannot claim to be offended by merely knowing that a pornographic movie is being shown on another channel that one avoids. This is because simply knowing that such a movie exists is not as serious as being offended by something that one does not like and one cannot escape; otherwise, many forms of speech may be prohibited under such a claim.[852]

Given the above criteria, the Danish Cartoons, though they cause profound and personal offence, because the discomfort that is caused to Muslims who are the object of such attacks cannot easily be shrugged off, and though there seems to be almost universal agreement that these cartoons are offensive,[853] should never be banned for reasons of offence. There is no question the Danish cartoons are offensive on several

[849] Feinberg, J., 'Harmless Wrongdoings and Offensive Nuisances", in Feinberg, *Rights, Justice, and Bounds of Liberty*, (1980) op. cit. p. 89.
[850] West, C., (2005) op. cit.
[851] Feinberg, J., (1985) op. cit. p. 32, 33; Storey, M., (2002) op. cit. p. 82-88.
[852] Joel Feinberg discussed the problem of bare knowledge in details, for more see Feinberg, J., (1985) op. cit. p. 60-71.
[853] See Younge, G., The Right to Be Offended", *The Nation*, February 8, 2006, at URL <http://www.thenation.com>

grounds. First, they breach an Islamic bar on representation of Muhammad. Second, they make fun of the deepest beliefs of Muslims. Third, they feed racist stereotypes of Muslims as terrorists. However, having identified them as offensive does not settle the question either, as Franz Kruger argues.[854] It will not be sufficient to bring the claims before libertarians on the ground that the *Jyllands-Posten* publication should be prohibited because it offends Muslims. If one has freely decided to read the cartoons for pleasure, the offence principle obviously does not apply, and if one does not want to read it, it is easily avoidable. It would seem, then, that the offence principle outlined by Feinberg would not permit such prohibition because it is very easy to avoid being offended by the cartoons. This matter would be judged differently, in the view of Viskum, if the two most offensive cartoons were not just published in a newspaper but hung on giant billboards in all major cities in Denmark, the reason being that large billboards make the Muslim community a captive audience to pictures they are deeply offended by.[855]

At the next step, Joel Feinberg explains, these three factors that examine the seriousness of offensiveness must be weighed as a group, by the legislator or judge, against the reasonableness of the offending party's speech as determined by (a) its personal importance to the actors themselves; the more important the offending conduct is to the actor, the more reasonable is the actor's conduct. Thus, if speech offends others, but it provides needed economic, political, or social support for the speaker, then that provides prima facie grounds for allowing it. (b) Its social value; the greater the social utility of the kind of conduct of which actor's in an instance, the more reasonable is the actor's conduct. (c) The availability of alternative times and places where the conduct in question would cause less offence; the greater the availability of alternative times or places that would be equally satisfactory to the actor but less offensive to others, the less reasonable is conduct done in circumstances that render it offensive to others. Accordingly, if one has an opportunity to promote the publication of Salman Rushdie's *Satanic Verses* in Britain, he/she might be prohibited, according to this argument, from promoting such publication outside the central mosque in Bradford, a town with a large Muslim minority.[856] (d) The extent to which the offence is caused with spiteful motives. Thus, when speech is motivated by malice and spite, it loses

[854] See Kruger, F., "Freedom of expression has limits", *Mail and Guardian Online*, February 20, 2006, online at URL, <http://www.mg.co.za>
[855] Viskum, B., "Freedom of Speech: Halal or Haram?" October 2, 2006, p. 7, at URL, <http://www.cepos.dk>
[856] Almagor, R., (2001) op. cit. p. 23.

much of its reasonableness. Briefly speaking, to the degree that offending speech is reasonable, to that degree, the offending actor should have the legal right to the speech.[857] The result of balancing between the seriousness of the offensiveness and the reasonableness of the offending conduct, which might be very complex and uncertain, will determine whether the speech at issue is subjected to the offence principle or not.[858] The more serious the offence, the more grounds there are for the state to take action in discouraging it; the less serious the offence, the less warrant the state has for interfering with personal liberties. For example, when a person purchases a ticket to attend a film screening that includes sexual scenes, the seriousness of the offensive speech here has less value on the balancing scale because of the existence of the Volenti standard. Thus, the film distributor cannot be punished under the offence principle.[859] Moreover, to the degree that the offending conduct is reasonable; to that degree the offending actor should have the legal right to that conduct.[860] For instance, when the motive of the speaker is merely malicious or spiteful, the offensive speech cannot be reasonable in the eyes of the law, or the reasonableness of the offensive speech here has less value on the balancing scale.[861]

V.2.2. Reasonable Avoidability and the Offence Principle

Say a Muslim has not seen the Danish cartoons that the *Jyllands-Posten* has published, nor does he/she intend to; the cartoons do not sound like the sort of thing that he/she would find interesting or enjoyable in the slightest degree. How, then, can this Muslim claim that the cartoons constitute an "offence" to him/her? In other words, can cartoons that are easily avoided by the vast majority of society be said to be an "offence" to those that voluntarily see those cartoons?

As said above, the 'reasonable aviodability' standard is the crucial component of the offence principle in determining whether such speech is prohibited or not.[862] Many behaviour, which may cause profound offence, such as hate speech, and to some extent pornography as well, are not within the coverage of the offence principle, because they can easily be avoided.[863] Offensive language spoken in Speakers Corner in Hyde Park is

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[857] Storey, M., (2002) op. cit. p. 82-88.
[858] Feinberg, J., (1985) op. cit. p. 26, 44-47.
[859] Feinberg, J., (1985) op. cit. p. 45.
[860] Feinberg, J., (1985) op. cit. p. 25-49.
[861] Feinberg, J., (1985) op. cit. p. 41.
[862] Almagor, R., (2001) op. cit. p. 14.
[863] See also *Public Utilities Comm's v. Pollak*, 343 U.S. 451 (1952); *Erznoznik v. City of Jacksonville* 422 U.S. 205 (1975); *Spence v. Washington*, 418 U.S. 405 (1974).

protected under the principle, though it may annoy and irritate some listeners. Those who are offended can avoid such offence by simply leaving Hyde Park. The offence principle, as presented Joel Feinberg, is similar to the Supreme Court of the United States decision in what came to be known as the *Skokie* case.[864] The Illinois Supreme Court ruled in favour of Collin, the leader of the National Socialist Party of America, who decided to march displaying the Nazi uniform and the swastika and carrying placards with statements thereon such as "White Free Speech," "Free Speech for the White Man," and "Free Speech for White America", in Skokie, one of the suburbs of Chicago, inhabited mostly by Jews, 5,000 to 7,000 aged survivors of Nazi death camps.[865] The village had asked for the ban on grounds that the swastika represented "fighting words" to its citizens, who it said were predominately of "Jewish religion or Jewish ancestry," but the Court dismissed this argument and declared that the display of the swastika was protected "symbolic speech", even if this speech was offensive, because the Skokie residents were not a captive audience who could not practically avoid exposure.[866]A captive audience, which as said above, is similar to Joel Feinberg's 'reasonable aviodability' standard, are those who have little recourse against the invasion of other's speech into their privacy. The existence of a captive audience gives the government an ability to limit speech that would otherwise be protected if that speech is being imposed on a captive audience, which occurs when it would be impractical for the listener to be able to escape that speech.[867] The reverse is also true. Based on this point, the Court ruled that, "there is room under the First Amendment for the government to protect targeted listeners from offensive speech, but only when the speaker intrudes on the privacy of the home, or a captive audience cannot practically avoid exposure ... This case does not involve intrusion into people's homes. There need be no captive audience, as village residents may, if they wish, simply avoid the Village Hall for thirty minutes on a Sunday afternoon."[868] In his examination of the Court's

[864] Feinberg, J., (1985) op. cit. p. 92.

[865] *Collin v. Smith*, 587 F. 2d 1197 (1978); *Village of Skokie v. National Socialist Party of America*, 432 US 43 (1977).

[866] For more regarding the Skokie case, see Almagor, R., (2001) op. cit. p. 12-16; Dorson, N., "Is There a Right to Stop Offensive Speech? The Case of Nazis at Skokie", in Larry Gostin (ed.), *Civil Liberties in Conflict (*London: Routledge, 1988) pp. 122-35.

[867] *Eanes v. State*, 569 A.2d 604, 611 (1990) (defining a "captive audience" as "the unwilling listener or viewer who cannot readily escape from the undesired communication, or whose own rights are such that he or she should not be required to do so"). See, Strossen, N., "The Convergence of Feminist and Civil Liberties Principles in the Pornography Debate", *N.Y.U.L. Rev.* 62 (1987) p. 201, 211 n. 47; Bell, T., "Free Speech, Strict Scrutiny, and Self-Help: How Technology Upgrades Constitutional Jurisprudence", (2003), *U. Minn. L. Rew* 87, p. 753-759.

[868] *Collin v. Smith*, 587 F. 2d 1197 (1987). The captive audience was a main reason in several cases for restraining or permitting offensive speech. In *Frisby v. Schultz*, for example, the Court ruled that The First

decision, Joel Feinberg emphasised the importance of the existence of the 'captive audience' or 'reasonable avoidability' in deciding offensive speech cases. He wrote, "[d]espite the intense aversion felt by the offended parties, there was not an exceptionally weighty case for legal interference with the Nazis, given the relative ease by which their malicious and spiteful insults could be avoided."[869] He concluded, "the seriousness of the offence in the actual Skokie case had to be discounted by its relatively easy avoidability."[870] The bare knowledge of a such meeting, as we said before, is not a sufficient ground for prohibiting offensive speech according to this theory, because the same suffering is shared by Jews in Los Angles, Morocco, or Tel Aviv.

In fact, Feinberg's conclusion, together with the Supreme Court decision, and their extreme reliance on "reasonable avoidability" as a standard for examining the seriousness of offensiveness, needs to be reconsidered. Skokie's Jewish residents, in my view, could not avoid being offended, whether or not they chose to attend the demonstration, because they would be offended by seeing the swastika, and Nazi uniform, and so on; or they chose not to attend. In the latter case, "the avoidance of offensiveness speech in itself constitutes severe pain," as Raphael Cohen-Almagor believes.[871] Feinberg himself realised that avoiding such is not a solution:

> The feeling of an aged Jewish survivor of a Nazi death camp as a small band of American Nazis strut in full regalia down the main street of his or her town ... cannot be wholly escaped merely by withdrawing one's attention, by locking one's door, pulling the window blinds, and putting plugs in one's ears. The offended state of mind is at least to some degree independent of what is directly perceived.[872]

Almagor has a view, which is contrary to Feinberg's presupposition, with regard to the extent of offence standard. According to Almagor, it is true that Skokie could not fall within the confines of the harm principle. Nevertheless, if strong argument were provided that the very utterance of the Nazi speech constitutes psychological damage that could be equated with physical pain, then a strong case might be provided against tolerance under the offence principle.[873] He demands that we should bear in mind the content of speeches, and when they are designed to inflict psychological damage upon

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Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." 487 U.S. 474, (1988).

[869] Feinberg, J., (1985) op. cit. p. 87-88.

[870] Feinberg, J., (1985) op. cit. p. 88.

[871] Almagor, R., (2001) op. cit. p. 11.

[872] Feinberg, J., (1985) op. cit. p. 52.

[873] Almagor, R., (2001) op. cit. p. 16.

their target group, then there is a basis to consider their constraint.[874] However, if we are to examine all the factors that are set by Feinberg in order to determine whether certain speech is seriously offensive, we will conclude that: (1) the intensity of Collin's offensive speech was unquestionable and the number of people offended would be large; (2) it was difficult to avoid a given offence without serious inconvenience; (3) there is absence of 'the Volenti standard'; (4) the personal importance of such speech to the actor himself, Collin in our case, and its social value seem to be marginal, as Collin did not mean to persuade the Jews that he was right or that his ideas were justified; (5) there were available alternative times and places where Collin's march would cause less offence; (6) Collin's speech was motivated by malice and spite (Collin himself said that he had decided to march in Skokie in order to spite and offend the Jews), thus it loses much of its reasonableness.[875] In other words, Collin, in a Habermasian term, was engaged in a strategic action as he adopted the attitude that he will attempt to achieve success without the rational agreement to those persons whose actions he seeks to influence. The case would be totally difference if Collin sought at reaching understating, or engaged in a communicative action, to use Habermas's phrase.[876] It appears from this examination that the American Nazi demonstration should not be allowed to be held in Skokie.

The same allegation can be raised in the face of publishers of Danish cartoons.[877] Firstly, the intensity of *Jyllands-Posten's* offensive speech was unquestionable (If the mere image of the Prophet is prohibited and considered sacrilegious to the Muslim faith, what about accusing him of terrorism) and the number of people offended would be large (over a billion Muslims were offended, plus many non-Muslims.) Secondly, it was difficult to avoid the offence without serious inconvenience. Thirdly, there is absence of 'the Volenti standard', because as the controversy grew, examples of the blasphemous cartoons were reprinted in newspapers in more than fifty other countries. Fourthly, there were available alternative manners, times and places where the *Jyllands-Posten's* ideas would cause less offence. For example, the publishers of the cartoons claimed that these cartoons illustrated an important issue in a period of Islamic extremist terrorism and that their publication was a legitimate exercise of the right of free speech that is central to

[874] Almagor, R., (2001) op. cit. p. 18.
[875] Almagor, R., (2001) op. cit. p. 18.
[876] Solum, L., (1989) op. cit. pp. 54-135; Kihlsrtom, A., and Joakim Israel, "Communicative or strategic action- an examination of fundamental issues in the theory of communicative action", *International Journal of Social Welfare* 11.3 (2002), pp. 210-218.
[877] Hensher, P., and Gary Younge, (2006) op. cit.

the effective working of democratic society.[878] In fact, it is difficult to disagree with their goal. But the manner (offensive cartoons) and place (newspaper) that *Jyllands-Posten* chose to discuss such a topic is not only less than elegant but it contributed strongly in increasing the level of offence. Such a goal could have been achieved in a different manner that did not offend more than a billion people. Therefore, according to Professor Baderin, there is need in this realm to always carefully and objectively distinguish constructive reasonable intellectual critiques of religious interpretations from expression that insult or revile the sensibilities of reasonable adherents of particular religions under the guise of freedom of expression.[879] Finally, though Flemming Rose, the cultural editor at the newspaper, denied that the purpose had been to provoke Muslims,[880] such a claim cannot be taken for granted. *Jyllands-Posten's* publications were motivated by malice and spite; thus they lose much of their reasonableness. According to Professor John Esposito, "The cartoons seek to test and provoke; they are not ridiculing Osama Ibn Laden or Abu Musab al-Zarqawi, but mocking Muslims' most sacred symbols and values as they hide behind the facade of freedom of expression."[881] Several evidences, which are mentioned in article titled "The Danish Cartoon Affairs: From Islamophobia to War", can support this assertion.[882] Firstly, after the tragedy of September 11, *Jyllands-Posten* published an editorial stating that the attacks "demonstrate the truthfulness of the sensational thesis that Professor Samuel Huntington put forward ... in his book on *The Clash of Civilizations*." The editorial went on to tout the "freedom ideals of the West," and the "Middle-Ages-darkened perception of the world" of Islam.[883] Secondly, and paradoxically, in April 2003 Danish illustrator Christoffer Zieler submitted a series of unsolicited cartoons offering a light-hearted take on the resurrection of Christ to the *Jyllands-Posten*. Zieler received an e-mail from the paper's Sunday editor, Jens Kaiser, saying: "I don't think *Jyllands-Posten's* readers will enjoy the drawings. As a matter of fact, I think they will provoke an outcry. Therefore I will not use them."[884] On 8 February 2006, Flemming Rose said in interviews with CNN and TV 2 that Jyllands-Posten planned to reprint satirical cartoons depicting the Holocaust that the Iranian newspaper *Hamshahri* planned to publish. He told CNN "My newspaper is trying to establish a contact with

[878] Sturges, P., (2006) op. cit. p. 181.
[879] Baderin, M., (2003) op. cit. p. 128-129.
[880] Rose, F., (2006) op. cit.
[881] Esposito, J., "Muslims and the West" (2006).
[882] See Rasmussen, M., Tom Gillesberg, & Dean Andromidas, "The Danish Cartoon Affairs: From Islamophobia to War", *Executive Intelligence Review*, February 17, 2006.
[883] See editorial opinion of *Jyllands-Posten* 20-11-2001.
[884] Younge, G., (2006) op. cit.

that Iranian newspaper *Hamshahri*, and we would run the cartoons the same day as they publish them."[885] Later that day the paper's editor-in-chief said that Jyllands-posten under no circumstances would publish the Holocaust cartoons. Flemming Rose later said that "he had made a mistake."[886] At the end, because of all of the mentioned above, Flemming Rose's cartoons engaged in a strategic action in a *Habermasian* term, thus, lose much of their reasonableness.

V.2.3. Evaluation of the Offence Principle

There is no doubt that in today's world of mass media, where people can be offended easily through TV, tabloid newspapers and the Internet, for example, it is hard to maintain the position that offence never justifies restrictions on free speech or free speech restrictions should be confined to the harm principle only. Although "offence is surely a less serious thing than harm,"[887] metaphorically speaking, offence is an itch on the elbow, while a harm is a broken arm,[888] this does not erase the fact that there is a real and necessary need for the offence principle in the free speech world. In some instances, there is a need for an offence principle that can act as a guide to public censure, some say.[889] The importance of the offence principle, even in liberal societies, cannot be denied, as Chapters Six and Seven will demonstrate. Extremely offensive speech, for instance, is a greater wrong to its victims than trifling harms. Therefore, it is difficult and unfair, to include the latter within restricted speech, while leaving the former hurting people's feelings and producing mental distress to others. Accordingly, when the content and/or manner of a certain speech is/are designed to cause a psychological offence to a certain target group, and the objective circumstances are such that make the target group inescapably exposed to that offence, then the speech in question has to be restricted.[890] Even John Stuart Mill, surprisingly, added another exception that allows imposition of restrictions on acts that violate good manners and thus offend others even if they do not harm others.[891] Indecent conduct that is performed

[885] Plunkett, J., "Danish paper pursues Holocaust cartoons," *The Guardian*, Wednesday February 8, 2006.
[886] Juste, C., "No Holocaust Cartoons in Morgenavisen Jyllands-Posten." *Jyllands-Posten*, February 9, 2006; Fouché, G., "Danish paper in U-turn on Holocaust cartoons." *The Guardian*, Thursday February 9, 2006.
[887] Feinberg, J., (1985) op. cit. p. 2.
[888] Storey, M., (2002) op. cit. p. 82-88.
[889] Mill, D., "Freedom of Speech" (2002).
[890] Almagor, R., (2001) op. cit. p. 22.
[891] Feinberg, J., (1984) op. cit. p. 14; Skorupski, J., *John Stuart Mill*, London-Routledge, 1989, pp. 347-59; Raz, J., *The Morality of Freedom* (Oxford-Clarendon Press, 1988) p. 308-313, 373, 382, 391, 418-419; O'Rourke, (2001) op. cit. p. 136-142; McCloskey, H., "Mill's Liberalism--A Rejoinder To Mr. Ryan." The Philosophical Quarterly, 16.62 (1966), p. 68; Sumner, W., "Should Hare Speech be Free

in public has no protection, according to Mill. In his single exception with regard to advocacy, [892] Mill required two conditions; the acts should be done publicly (circumstances), and the existence of a branch of rules of good manners (consequences.)[893] Although such acts cause injury only to the agents themselves, not to others,[894] though they have no harmful consequences,[895] and though they have no instigative purpose, Mill excludes them from free speech protection. As Mill himself says about this restriction:

> Again, there are many acts which, being directly injurious only to the agents themselves, ought not to be legally interdicted, but which, if done publicly, are a violation of good manners and, coming thus within the category of offences against others, may rightly be prohibited.[896]

Even in the US, where the offence principle has insignificant influence in deciding free speech cases, several cases that involve offensive speech have been ruled in favour of prohibiting such speech, though the decisions had not been grounded directly on the offensiveness of speech.[897] In 1991, in a case involving nude dancing, the Kitty Kat Lounge sued to stop enforcement of the Indiana law regulating public nudity which required dancers to wear 'pasties' and a 'G-string' when they perform. The Court in a non-majority opinion ruled that the statute "furthers a substantial government interest in protecting order and morality."[898] A similar decision was reached in another nude dancing case, *Erie v. Pap's A. M*, a decade after the *Glen Theatre* case, when the Court upheld Erie's public indecency ordinance.[899] Some theorists, accordingly, argued that speech which is merely offensive to others should be another exception to the First Amendment.[900]

Here, we are not denying how diverse are the speeches thought to be offensive because of cultural and time changes, but the offence principle as presented by Joel Feinberg in "a very precise way" will not "open the door to wholesale and intuitively

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Speech? John Stuart Mill and the Limits of Tolerance", in Almagor, R., (ed.) *Liberal Democracy and the Limits of Tolerance* (Ann Arbor-University of Michigan, 2000); Samuel V. Laseva (1988) op. cit. p. 486; Riley, J., *Mill on Liberty* (London: Routledge, 1998) p. 178; See also Ten, C., *Mill on Liberty,* Oxford-Clarendon Press, 1980, p. 106-107.

[892] Almagor, R., (2001) op. cit. p. 9.

[893] Oliveira, J., (2004) op. cit. p. 24.

[894] Mill, J., (1859) op. cit. p. 145.

[895] Almagor, R., (2001) op. cit. p. 9.

[896] Mill, J., (1859) op. cit. p. 168.

[897] *Young v. American Mini Theatres*, 427 U.S. 50 (1976); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

[898] *Barnes v. Glen Theatre*, 501 U.S. 560 (1991).

[899] *Erie v. Pap's A. M*, 529 U.S. 277 (2000).

[900] See, e.g., Schwartz, L., "Morals Offences and the Model Penal Code," *Columbia Law Review* 63 (1963) p. 669

unwarranted legal interference."[901] The set of factors that help determine both the seriousness of the offence and the reasonableness of the offending speech, in my view, answer all the questions posed above by Judith Wagner DeCew: What offending speech is censurable and merits prohibition? When, and in what contexts?[902] Thus, it avoids the "slippery slope" of adding more categories to the list of excluded speech. Feinberg's answers, in short, narrow the scope of offensive speech in favour of wider protection of free speech. This stringency of the offence principle's formulation led some to search for another principle that can accommodate within its scope certain types of offensive speech which escape prosecution under the offence principle, such as avoidable pornography and hate speech. The consideration of democratic values is the relevant reason, of course beside the harm and offence principles, for restricting certain types of speech. The argument suggests speech can be limited for reasons of democratic equality. The basic idea is that the harm and offence principles set the bar too high and that we should prohibit some forms of expression for the sake of democratic equality.

V.3. Democratic Values Argument

V.3.1. The Argument

The problem with absolutists, or even with those who believe that freedom of speech has a preferred position, lies basically in their complete concentration on freedom of speech as an end in itself. Absolutists, in other words, treasure speech as an end in itself, without considering that free speech is a means as well. Therefore, they try to detach speech from any ends which it may be supposed to serve and to make it an end in itself. According to Francis Canvan, "Absolutists baldly assert that ... [freedom of speech] guarantee[s] everyone's right to express whatever he feels like expressing, without regard to the content, manner, or medium of expression, and without regard to the public health, safety, welfare, or morals, simply and solely because it is expression and expression deserves protection for its own sake."[903] This position only leads, as Canvan analysed, to one conclusion, no more; "[speech] is the end and the end is pursued without limit."[904] The conclusion, indeed, is consistent with the introduction that values free speech as an end in itself.

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[901] Feinberg, J., (1985) op. cit. p. 26.
[902] See *supra* p. 130.
[903] Canvan, F., "Speech That Matters", *Society* 36.6 (1999) p. 11-12.
[904] *Ibid.*

However, neither the introduction nor, consequently, its conclusion can be acceptable because it is based on half of the truth. The other half is that freedom of speech, as discussed in Chapter Four, is not only an end, but a means or an instrument to other values, such as truth and democracy.[905] As Justice Brandies said in the *Whitney* case, "free speech is valuable as an end and as a means."[906] Stanley Fish, the author of *There's No Such Thing as Free Speech and It's a Good Thing, Too* opposes the view which asserts that free speech is afforded for its own sake and considers, thus, speech is justified in reference to goals and so we will end up deciding hard cases by an assessment as to how well the contested speech subserves those goals.[907] In this regard Thomas Emerson says:

> The attainment of freedom of expression in not the sole aim of the good society. As the private right of the individual, freedom of expression is an end in itself, but it is not the only end of man as an individual. In its social and political aspects, freedom of expression is primarily a process or a method for reaching other gaols ... Any theory of freedom of expression must therefore take into account other values, such as public order, justice, equality and moral progress, and the end for substantive measures designed to promote those ideals.[908]

The democratic values argument suggests that certain types of speech might be banned for the sake of greater liberty of the community as a whole. Miranda Mowbray argues that "There should be a consideration of the balance between increased participation by the person speaking, and possible decreased participation resulting from their speech."[909] Cass Sunstein advocates that there should be restrictions on certain speech (i.e., hate speech, pornography, etc.) for the greater good, just as during the New Deal there were restrictions on the laissez-faire economy.[910] Supporting the limitations on violence pornography and hate speech, Sunstein considers that these limitations would facilitate democratic decision making.[911]

What the democratic values argument aims to say, according to David Mill, is that "when we are discussing free speech, we are not dealing with speech in isolation; what we are doing is comparing free speech with some other good."[912] Consequently, when one of speech's values contradicts with other values, no absolute status should be demanded for free speech, nor for other values. For instance, no one would deny the

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[905] *Ibid.*
[906] *Whitney v. California*, 274 v. 357 (1927).
[907] Fish, S., (1994) op. cit. p. 102.
[908] Emerson, T., (1963) op. cit. p. 907.
[909] Miranda Mowbray, (2001) op. cit. p. 124.
[910] Sunstein, C., (1993) op. cit. 198.
[911] *Ibid.*
[912] Mill, D., "Freedom of Speech" (2002).

importance of discovering the truth, which can only be reached through free discussion, but what if this value collides with the right of privacy of a married couple in their bedroom. Another example, freedom of speech, as said in the previous chapter, is an integral concept in modern liberal democracies. It is fundamental to the existence of democracy. But as the same time, it may through its application, similar to other rights, brings about its destruction. This is called, according to Natan Lerner and Zeev Segal, the "catch" of democracy. What about if speech, which is supposed to maintain democracy, aims to destroy a democracy through inciting people to overthrow the government by terrorist attacks?[913] Should the state "wait[s] until the putsch is about to be executed, the plans have been laid and the signal is awaited"? Justice Fred Vinson questions.[914] As Raphael Cohen-Almagor argues, "Tolerance, which conceives the right to freedom of expression as a *carte blanche* allowing any speech, in any circumstances, might prove counter productive, assisting the flourishing of anti-tolerant opinions and hate movements", and "transforming freedom of speech into a means for curtailing freedoms of others."[915] This is, according to Natan Lerner, the basis of the argument of those who accept the need to restrict the freedom of speech in those extreme cases when democracy, the rights or the good names of others, and public order are threatened by irresponsible individuals who could not care less about the rule of law and basic freedoms.[916] In a complete agreement with the above argument, the Constitutional Court South African stated in the case of *S* against *Mamabolo* that the right to freedom of expression

> Cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as is the right to freedom of expression. How these two rights are to be balanced, in principle and in any particular set of circumstances, is not a question that can or should be addressed here. What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law.[917]

It is obvious that those who support the democratic values argument try to extend the realm of free speech limitations further and argue that certain speech, such as hate speech and pornography, might be prohibited even if they do not cause harm or unavoidable offence to others. The ground on which they base this assumption is that

[913] Lerner, N., & Zeev Segal, "Protected Speech or Unlawful Incitement: An Israeli Perspective", *Human Rights Brief*, 3.2 (1996) p. 10.
[914] Justice Fred Vinson in *Dennis v. United States*, 341 U.S. 494 (1951).
[915] Almagor, R., (2001) op. cit. p. 18, 23.
[916] Lerner, N., and Zeev Segal, (1996) op. cit. 10.
[917] *S* v. *Mamabolo*, 2001 (3) SA 409(CC).

such speech is inconsistent with underlying values of liberal democracy. This argument assumes that when there is interference between freedom of speech, protection of which is grounded on conventional or constitutional text and the democratic values, and other people's freedoms and rights, which are equally supported by the same background, one has to dilute one's support for freedom of speech in favour of other principles, such as the value of equality, the value of privacy, and human dignity. I will give two examples of how such an argument works. The first example concerns the relation between free speech and pornography. According Mackinnon, who is at the forefront of the feminist anti-pornography movement, pornography is defined as

> The graphic sexually explicit subordination of women through pictures or words that also includes women dehumanized as sexual objects, things, or commodities; enjoying pain or humiliation or rape; being tied up, cut up, mutilated, bruised, or physically hurt; in postures of sexual submission or servility or display; reduced to body parts, penetrated by objects or animals, or presented in scenarios of degradation, injury, torture; shown as filthy or inferior; bleeding, bruised or hurt in a context which makes these conditions sexual.[918]

Giving consideration to this definition of pornography, the anti-pornography lobby argue that the liberal commitment to protecting individual autonomy, equality, freedom of speech and other liberal values may in fact support a policy that prohibits certain kinds of pornography.[919] They base their argument against pornography on the liberal premise of equal concern and respect. The argument, according to them, is about liberty and equality,[920] freedom of speech versus women's rights.[921] Rae Langton says that there is "reason to be concerned about pornography, not because it is morally suspect, but because we care about equality and the rights of women."[922] The problem with pornography, then, according to this argument, is not confined to its harmful consequences, though there are some, or due to its offensiveness, but because it portrays

[918] Mackinnon, C., (1987) op. cit. p. 176. See Mackinnon, C., "Not a Moral Issue" and "Francis Biddle's Sister: Pornography, Civil Rights, and Speech", both in Mackinnon, C., (1987) op. cit. p. 146-162, 163-197; Mackinnon, C., "Defamation and Discrimination" in Mackinnon, C., *Only Words* (Cambridge, Massachusetts-Harvard University Press, 1993) p. 1-28.

[919] See e.g., Dyzenhaus, D., (1992) op. cit. p. 534-51; Easton, S., *The Problem of Pornography: Regulation and the right to free speech* (London: Routledge, 1994) 42-51; Langton, R., "Whose Right? Dworkin, R., Women, and Pornographers", *Philosophy and Public Affairs*, 19.4 (1990) p. 311-359; Okin, S, "Justice and Gender", *Philosophy and Public Affairs*, 16.1 (1987), p. 42-72; West, C., (2003) op. cit. p. 391-422; Richards, D., "Liberalism, free speech, and justice for minorities", in Jules Coleman & Allen Buchanan (eds), *In Harm's way*, (Cambridge University Press, 1994) p. 103-114. For opposing view see, Strossen, N., *Defending Pornography* (London: Abacus, 1996) p. 14; Dworkin's, R., "Do We Have a Right to Pornography", *Oxford Journal of Legal Studies* 1 (1981) p. 177-212. Reprinted in *A Matter of Principle* (1985) op. cit. p. 335-372.

[920] Some believe that there can be no real conflict between equality and liberty. For more about this see, Dworkin, R., "What Is Equality? Part 3: The Place of Liberty", *Lowa Law Review* 73 (1987) p. 9.

[921] See West, C., (2005) op. cit.

[922] Langton, R., (1990) op. cit. p. 311.

women in a manner that undermines their equal status as citizens.[923] Cram concedes that a 'major difficulty . . . arises from our inexact understanding of the extent to which much sexually explicit literature inhibits participation in public decision-making structures.[924]

The second example is about hate speech. Those who are against hate speech believe that hate speech is inconsistent with the underlying values of liberal democracy because it brands some citizens as inferior to others on the ground of race.[925] This is, as said, because hate speech denies recognition of the inherent dignity of all human beings and their equal and inalienable rights.[926] In the Skokie case, for example, Collin and his colleagues in the American Nazi group were of the opinion that Jews are simply of less worth than other Americans, and their performance manifested this prejudice. Collin's right to freedom of speech here collides with American Jews' right of equal concern and respect. Commenting on this, Catharine Mackinnon argues that the Supreme Court has signally failed to recognise any implications for First Amendment discourse of the constitution's commitment to the value of equality.[927] For Owen Fiss, the principle of equality has already required the state to interfere in social structure to outlaw discriminatory practices in housing, education and other government programmes, why should free speech discourse not be mediated by this positive conception of equality? Further, Fiss argues that hate speech should be banned not only because it violates others' right of equal concern and respect, but also because it "interferes with their speech rights." It "discourages them from participating in deliberative activities of society." They feel less entitled and less inclined to voice their views in the public square, and withdraw into themselves. They are silenced almost as effectively as if the state intervened to silence them."[928] Ian Cram concludes that it is on balance right to prohibit hate speech directed at members of vulnerable racial communities, because otherwise they will be put off participation in political life. The contrary argument, according to Cram, is unwilling to acknowledge the more subtle ways in which hateful expression sustains group-based enmity and the marginalization of individuals within minority groups.[929] Cram contends that outlawing hate speech asserts the values of an inclusive community and identity which reject the inequalities expressed in hate

[923] Langton, R., (1990) op. cit. p. 333.
[924] Cram, I., (2006) op. cit. p. 142.
[925] See Richards, D., (1994) op. cit. p. 93-103. Mill, D., "Freedom of Speech" (2002).
[926] Sturges, P., (2006) op. cit. p. 184.
[927] Mackinnon, C., *Only Words*, (1993) op. cit. p. 71.
[928] Fiss, O., "The Right Kind of Neutrality", in Fiss, *Liberalism Divided* (Bounder, Westview, 1996) p. 117.
[929] Cram, I., (2006) op. cit. p. 137.

speech.[930] The problem with the U.S. First Amendment doctrine on hateful speech is in it concentrates on the damage inflicted on speech interest, according to Cram. Such focus on harms done to speech either denies completely the relevance of harms done to countervailing constitutional values such as equality or privacy.[931] In this regard, Roger Errera posits that "preeminence must be given to respect for the dignity of the individual and concern for the rights of minorities."[932]

In short, freedom of hate speech might be prohibited even when it is harmless or unoffensive, because it is inconsistent with underlying values of liberal democracy such as citizens' right of equal respect and concern or with others' right of freedom of speech, as Fiss believes. Under the democracy values argument, the Danish cartoons would not escape prosecution. Under the same argument, there would be a question whether the vilification of the Jews by the Nazis in *Der Stürmer*, the infamous anti-Semitic weekly, promote basic values or undermine them. However, it must be recognized that some speech which is undoubtedly offensive, does not constitute hate speech, even though, as Helen Darbishire argues, it may contribute to a climate of prejudice and discrimination against minorities.[933] Such speech, Darbishire assumes, would include the tendency by media to report the bad news about minorities when it affects the majority population, for example noting when the perpetrator of a crime is the member of a minority. The ECtHR in several cases, which Chapter Seven will discuss, ruled that the media should be free to report on hate speech and should not be prosecuted for transmitting expression.

V.3.2. The Evaluation of Democratic Values Argument

There is a fear that if the democracy values argument is adopted, there will be too little protection of freedom of speech and too much latitude to the state. This fear, however, seems to be meaningless when one realises that the democratic values argument does not claim that speech should always lose out when it clashes with other fundamental principles that underpin modern liberal democracies, but it only claims that speech should not be automatically privileged. As Stanley Fish argues, the task is not to arrive at hard and fast principles that govern all speech, but to find a workable compromise

[930] Cram, I., (2006) op. cit. p. 110.
[931] Cram, I., (2006) op. cit. p. 140.
[932] Errera, R., "The Freedom of the Press: The United States, France, and Other European Countries," Henkin, L., and A.J. Rosenthal (Eds.), *Constitutionalism and Rights: the influence of the United States constitution abroad* (New York: Columbia University Press, 1990) pp. 63-93, p. 85.
[933] Darbishire, H., "Hate Speech: New European Perspectives." (1999).

that gives due weight to a variety of values.[934] It is interesting to observed that the democratic values argument is not an invented criterion for determining freedom of speech boundaries. According to Professor Schauer, "Even among nations that take freedom of speech seriously, there are differences about the extent to which freedom of speech should prevail when it finds itself in conflict with other important values, such as the value of equality. And it is also the case that the value of freedom of speech, especially in conflict with other values, is at least partly a function of the value of liberty more generally."[935] Speech that aims to destroy the rights and freedoms of others through inciting hatred and racial discrimination is prohibited. Although there is no clear indication in Article 10 ECHR and Article 19 ICCPR of prescribing freedom of speech in the interests of avoiding speech which incites hatred and racial discrimination, except if such speech is considered within speech that might cause threat to national security, public safety, or morals, or incite disorder,[936] Article 17 of ECHR and Article 20 of ICCPR provide a frank legitimate reason for such proscription. The basis of permissible legal controls lies in the values of tolerance, pluralism, equality and individual dignity.[937] The situation is far different in the U.S., where the libertarian tone of recent First Amendment jurisprudence understates a countervailing constitutional value (equality.)[938]

V.4. Chapter Summary

While recognising that we have the right to express ourselves, we should inquire about the extent that such costly freedom should be tolerated. According to Baker, "[The] constitutional protection of speech is justified not merely because of the values served by speech but because freedom of speech serves these values in a particular, humanly acceptable manner, that is, non-violently and non-coercively."[939] This point which was emphasised by Professor Baker, led me to examine the theoretical basis for freedom of speech limitations, which is the third sub-question of this study. The question, however, was: how much speech should be restricted, by what standard, and by what means should that speech be restricted? I concluded that though free speech serves important human interests, it is far from costless, and some restrictions and regulations of speech

[934] Fish, S., (1994) op. cit. p. 104.
[935] Schaue, F., (2006) op. cit. p. 6.
[936] Clements, L., (1994) op. cit. p. 179; Ovey, C., & Robin C.A. White, (2002) op. cit. p. 280.
[937] Cram, I., (2006) op. cit. p. 123.
[938] Cram, I., (2006) op. cit. p. 102.
[939] See Baker, E., (1989) op. cit. p. 47.

are justified. There are three criteria suggested for determining the boundaries of freedom of speech, namely, harm, offence, and democratic values. Accordingly, speech that produces harmful or offensive results to individuals, groups, or society, or violates people's freedoms and rights, has a lower social value than the kind of speech that a society has in mind when it entrenches rights to free speech. The harm principle tells us that people can speak freely as long as their speech does not harm others. Although in fact it has not officially or explicitly been adopted into American constitutional law, its influence, according to Steven Smith is discernible, not only in the judicial sphere but in academic and popular discourse as well, as the following chapter will demonstrate.[940] In the other side of the Atlantic such as Europe as well in the jurisprudence of the HRC, it is the offence principle and democratic values argument that play significant roles in restraining some types of speech such as hate speech, which is protected in the U.S. I believe that all these criteria are important and none of these can be ignored even by liberal democratic societies. As long as these criteria are far from paternalistic justifications of restricting freedom of speech, it is up to the legislators and justices to determine precisely which of these positions is the most persuasive.

[940] Smith, S., "The Hollowness of the Harm Principle", *U San Diego Legal Studies Research Paper* No. 05-07, (2004) p. 1.

Part Three

Freedom of Speech Limitations in Practice

Part Three Outline

The previous chapter was a philosophical examination of freedom of speech boundaries. In that chapter, the study examined the limitations of free speech as a matter of philosophy and an exercise in logic, entirely, or to a great extent, divorced from the reality of speech-restricting law, ICCPR, ECHR, or U.S., or otherwise. This part concerns the reality of limitations on free speech as a matter of ICCPR, ECHR, or U.S. law, within the context of speech protected by the free speech provisions in these documents, and as interpreted by HRC, Strasbourg Institutions and U.S. Supreme Court to date. It explores the different implications of these theories for important aspects of freedom of speech and how such differences have affected the achievement of universalism in the human right of freedom of speech.

A cursory glance at different free speech laws about thw limited character of freedom of speech should be enough to confirm the previous chapter's theoretical conclusion that there is no absolute protection in the free speech realm. Most of these laws explicitly impose some restrictions on the right of freedom of speech. For example, although the ICCPR guarantees freedom of expression, it also allows restrictions necessary for the rights and reputations of others and for the promotion of the national security, public order, public health, and morals (Article 19). In addition, ICCPR specifically prohibits "race hate speech" (Article 20.) Similarly, the ECHR takes the wording of the Universal Declaration almost intact into its Article 10, but adds important further statements specifying a number of limits. The ECHR includes in paragraph (2) of Article 10 details of competing interests that must not be violated by the exercise of freedom of expression.[941]

What is common between the above-mentioned free speech provisions is that the limitations of such freedom are made explicitly, whereas in the system of freedom of speech in the US, not only are the limitations of free speech not explicitly mentioned, but also there is an explicit mention that freedom of speech should not be abridged. The U.S. Constitution is unusual among world constitutions as it has very few exceptions, none regarding freedom of statement. Does this mean that the First Amendment allows

[941] Similar to the above documents, the African Charter, in its Article 9, states that the right of freedom of expression must be exercised within the law. Moreover, Article 27 of the Charter, which is comparable to Article 29(2) of the Universal Declaration, also emphasises the limited character of the right to free expression. Article 27(2) reads, "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest." See Ouguergouz, F., (2003) op. cit. p. 161-164.

anyone to say anything at any time? No. The Supreme Court has rejected an interpretation of speech without limits. In other words, any exceptions to the First Amendment have come directly from the U.S. Supreme Court, which has the final authority to interpret the Constitution, and over the years, the Court has done just that, taking the words of the First Amendment, "Congress shall make no law...," and bending them to mean that indeed Congress (or any government entity) can make laws and regulations in certain limited circumstances such as national security, obscenity, breach of peace and property, commercial speech, and so on. Thus, even under a constitution which explicitly stipulates that freedom of speech should not be abridged; freedom of speech does not enjoy absolute protection.[942] In *Gitlow v. People of State of New York* the USA Supreme Court, with very frank words, ruled that

> It is a fundamental principle, long established, that freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.[943]

The main objective of this part is to answer the fourth question raised in the Introductory Chapter of the study about differences among liberal democracies in the nature of the protection of freedom of speech. The study thus examines these differences, in structure as well as in substance, between freedom of speech in the United States, on the one hand, and the international law of freedom of speech, on the other. Because the study aims to examine areas of differences among liberal democracies, the discussion necessarily goes beyond non-controversial or less contentious areas. Examples of controversial areas are speech that threatens national security, defamatory speech directed to public figures, obscenity, blasphemous speech and hate speech. This part starts by examining freedom of speech limitations as outlined by the U.S. Supreme Court, because the United States represents a view at one end of a spectrum about the practice of freedom of speech, and hence provides a useful point of comparison for a range of other views at different points on that spectrum.[944] Then, taking into account international human rights standards, decisions of the HRC, the ECtHR and EComHR, whose responsibility it is to interpret and apply freedom of

[942] Note, "Clear and Present Danger Re-Examined" *Columbia Law Review*", 51.1 (1951) pp. 98-108, 98.
[943] *Gitlow v. People of State of New York*, 268 U.S. 652 (1925).
[944] See Schauer, F., "The First Amendment as Ideology", in David Allen & Robert Jensen (eds.), *Freeing the First Amendment: Critical Perspectives on Freedom of Expression* (New York University Press, 1995) p. 10-24.

expression clauses, the second chapter of this part will try to outline basic principles that apply to the restriction of freedom of speech in the context of other competing interests.

Chapter Six

VI. Freedom of Speech Limitations in the United States

VI.1. The System of Limitations

In the United States, freedom of speech, political, artistic, commercial and otherwise, is ultimately governed by the First Amendment to the U.S. Constitution: "Congress shall make no law...abridging freedom of speech." But, contrary to the situation in the international law of free speech, there is no determination in the First Amendment's text about the legal boundaries of freedom of speech. As written, this guarantee, Schauer argues, makes no reference to the strength of potentially competing interests, no reference to the possibility of the right being outweighed or overridden, and no reference to any circumstances in which an exercise of the right might nevertheless be restricted.[945] The abstract or open-textured nature of the First Amendment led the Supreme Court of the United States of America to play a huge and significant role in categorising what is speech and when a state has a right to restrict it.[946] Over time, Ian Cram says, the Supreme Court jurisprudence has yielded up a body of basic principles that can lay claim to general acceptance.[947] In fact, the huge number of freedom of speech cases that the U.S. Supreme Court has handled enables the Supreme Court to become an expert in this domain. Because the U.S. courts have grappled at length with free speech questions,[948] many commentators and courts in the U.S. and other countries have been attracted and repelled by the U.S. Supreme Court's decisions. Sadurski, justifying the focus on the U.S. Supreme Court, explained, "The body judicial and scholarly doctrine generated by the First Amendment to the Constitution of the United States is by far the most influential and elaborate development of the principle of freedom of speech, and it provides a fruitful point of references both as a positive inspiration and as a target of criticism."[949] The Canadian Supreme Court, for example, emphasised the importance of the U.S. Supreme Court when ruled that "In the United States, a collection of fundamental rights has been constitutionally protected for over 200 years. The resulting practical and theoretical experience is immense, and should not

[945] Schauer, F., (2005) op. cit. p. 4.
[946] Emerson, T., (1963) op. cit. p. 908.
[947] Cram, I., (2006) op. cit. p. 147.
[948] Trager, R., and Donna Dickerson, (1999) op. cit. p. 9.
[949] Sadurski, W., (1999) op. cit. p. 5.

be overlooked by Canadian Courts."[950] Talking about freedom of speech guaranteed by the New Zealand Bill of Right, Grant Huscroft says that most of the arguments for expanding the protection afforded are inspired by the First Amendment to the U.S. Constitution.[951] In Israel, in the landmark decision *Kol Ha'am* in the 1950s, as justification for limiting speech, the Israeli Supreme Court introduced into the legal system standards for freedom of speech similar to the American standard, "clear and present danger."[952]

Chapter Two of this study illustrated that some, Justice Black in particular, have demanded absolute protection of freedom of speech. However, the absolutists' claim as to the scope of freedom of speech was not substantiated by real and convincing evidence, although on its face, it would appear to simplify the law of expressive freedom.[953] This explains why Black had few supporters for his absolute theory, those few including Justice Williams Douglas,[954] and Meiklejhon, who, as Chapter Four showed, accepted it with regard to political speech only.[955] In this regard, Meiklejhon says, "No one can doubt that, in any well-governed society, the legislature has both the right and duty to prohibit certain forms of speech". Libellous assertions, slander, words that incite to crime, and sedition and treason, which may be expressed by speech or writing, "may be, and must be, forbidden and punished".[956] According to Charles L. Black, Jr., "Mr. Justice Black himself recognises, as of course he must, that even 'absolute' rights have the limits that inhere in their own definitions."[957] Whether or not the unequivocal command of the First Amendment shows that the drafters intended the amendment to be evaluated solely on its face, the Court, according to Matthew

[950] *R. v. Keegstra* (1991) 61 C.C.C. 3d 1, 32 (Dickson C.J.C.).

[951] Rishworth, P., Grant Huscroft, Scott Optican, and Richard Mahoney, (2003) op. cit. p. 308.

[952] *Kol Ha'am v. Minister of Interior*, 7 Piskei Din 871 (1953). See Uriel Gorney, "American Precedent in the Supreme Court of Israel" *Harvard Law Review* 68.7 (1955) pp. 1194-1210. Yuval Karniel, "Balancing the protection of civil liberties during wartime", *Government Information Quarterly* 22.4 (2005) p. 626-643

[953] See Weaver, R., and Donald E. Lively, (2003) op. cit. p. 12.

[954] William Douglas is the only Justice who has supported Justice Black's idea and proclaimed that the First Amendment rights are absolute. See Charles Hyneman, "Free Speech: At What Price?" *The American Political Science Review* 56.4 (1962) pp. 847-852. p. 847; Weaver, R., and Donald E. Lively, (2003) op. cit. p. 14; Gerber, S., "The Politics of Free Speech", *Social Philosophy and Policy* 21(2004) p. 41.

[955] Meiklejohn, A., (1965) op. cit. p. 21; Meiklejohn, A., (1961) op. cit. 245, 246, 247. For a similar approach, see Frantz, "Is the First Amendment Law?-A Reply to Professor Mendelson" *California Law Review* 51 (1963) p.763; Beth, L., (1979) op. cit. p. 1118; Morrow, F., (1975) op. cit. p. 236, 240.

[956] Meiklejohn, A., (1961) op. cit. p. 20.

[957] Black, C., "Mr. Justice Black, the Supreme Court, and the Bill of Rights," 222 Harper's 63, 65 (February, 1961). Cited in Magee, J., (1979) op. cit. p. 21.

Melamed, has consistently interpreted it otherwise.[958] The Supreme Court has many times expressed that freedom of speech as protected by the First and Fourteenth Amendments is not absolute.[959] No justice, according to Wallace Mendelson, "has ever suggested that freedom of speech means freedom to say anything that one might choose at any time and any place."[960] On the contrary, most major thinkers of the day, in the view of Robert Trager and Donna Dickerson, believed that with freedom came responsibility, not only of the individual to exercise civility and justice but also of the government to ensure that peace was secured.[961] Justice Felix Frankfurter, who is believed to be one of Justice Black's opponents in the Supreme Court,[962] was strongly against the absolutist theory. Frankfurter believed that the Constitution is devoid of absolute prohibition and emphasised that there are limits to this essential condition of a free society.[963] Curtailment of freedom of speech, according to Frankfurter, is necessary sometimes in order to accommodate such interests as national unity, national security, the right to a fair trial, and the preservation of public peace.[964] Even the stoutest free speech defenders, such as Chafee, as an example of non-Court spokesmen, who believed that freedom of speech, but not speech, is absolute, did not go so far as Black's extreme view.[965] On the contrary, they criticised Black's First Amendment interpretation.[966]

Because, as McKay wrote, the First Amendment has never in fact been regarded as imposing an absolute prohibition upon governmental action that in any way restricts speech,[967] the question has always been where to draw the line. As an attempt to set a rule that can be considered as a reference to determine when speech should not benefit from freedom of speech protection, the Supreme Court in the United States has established several judicial tests that determine the scope of free speech.[968] Various

[958] Melamed, M., "Towards an Explicit Balancing Inquiry: R.A.V. and Black Through the Lens of Foreign Freedom of Expression Jurisprudence", p. 3. Available at: <http://works.bepress.com/matthew_melamed/1>
[959] See *Chaplinsky v. State of New Hampshire,* 315 U.S. 568 (1942); *Schenck v. United States*, 249 U.S. 47 (1919) ; *Whitney v. California*, 274 U.S. 357 (1927) ; *Stromberg v. California*, 283 U.S. 359 (1931) ; *Near v. Minnesota*, 283 U.S. 697(1931)
[960] Mendelson, W., (1970) op. cit. p. 28; Beth, L., (1979) op. cit. p. 1114; Canvan, F., "Speech That Matters" *Society* 36.6 (1999) p. 11-12.
[961] Trager, R., and Donna Dickerson, (1999) op. cit. p. 52.
[962] Andrews, J., "Changing Places"- a review of the book, 'The Antagonists: Black, H., Felix Frankfuther, and Civil Liberties in Modern America' by Simon, J., *National Review*, 41.25 (1989) p. 42-43.
[963] Gerald Gunther, *Individual Rights in Constitutional Law*, 4th edn (Mineola, NY-Foundation Press, 1986) p. 646. Jeffrey D. Hockett, (1992) op. cit. p. 485, 86
[964] *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).
[965] Chafee, (1949) op. cit. p. 897, 898.
[966] Mendelson, W., (1970) op. cit. p. 27; McKay, R., (1959) op. cit. p. 1194-5.
[967] McKay, R., (1959) op. cit. p. 1189.
[968] Gates, H., (1993) op. cit. pp. 1-8.

justices have applied limiting judicial tests to the right of speech, namely, the categorical approach (which identifies specific forms of speech that are subject to regulation); the "bad tendency" test (any expression that had a tendency to lead to substantial evil should be nipped in the bud); the "clear and present danger" test (a government may punish speech "that produces or is intending to produce a clear and imminent danger that it will bring about forthwith certain substantive evils); the "preferred position" test (which places speech in a position of prominence but acknowledges that free speech is not absolutely free); and the "balancing" test (which recognizes that when other rights conflict with the right to free speech the competing rights should be balanced to determine which has priority).[969] However, committed to the mentioned objective of this part of the study, which concerns the examination of areas of differences among liberal democracies, the study will only concentrate on those tests that lead, or have led, to these differences in application of freedom of speech, namely, the categorical approach, the bad tendency test, clear and present danger test and preferred position approach.

VI.2. The Limitations

VI.2.1. Categorical Approach

The methodology that the U.S. Supreme Court has adopted, the categorical approach, is very different from the corresponding methodology used by both HRC and ECcHR, which adopted the balancing approach. The balancing of interests test begins by identifying the societal and personal interests implicated by a legal conflict and assigning differing weights to those interests based on their varying importance to social and individual flourishing.[970] Balancing-of-interest jurisprudence, thus, resolves legal conflict by allowing the more important interests to prevail over the less important, or by allowing each interest to prevail to an appropriate extent.[971] In contrast to the balancing test, the categorical approach is often referred to as a judicial test set by the Supreme Court of the U.S. in order to determine the scope of free speech protection "by

[969] Hemmer, J., "Hate Speech Codes: A Narrow Perspective", *The North Dakota Journal of Speech & Theatre* 13 (2000b).

[970] Siegel, S, "The Origin of the Compelling State Interest Test and Strict Scrutiny." August 2006, at URL: <http://ssrn.com/abstract=934795>

[971] Siegel, S., (2007) op. cit. p. 10; Heyman, S., "Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression", *Boston University Law Review* 78.5 (1998) p. 1352, p. 1352; Aleinikoff, A., Constitutional Law in the Age of Balancing, *Yale L.J.* 96 (1987) p. 943, 945-48.

reliance on broad and abstract classifications of protected or unprotected speech."[972] The aim of the categorical approach is to clarify standards for banning certain types of speech.[973] This approach, according to Joshua Cohen, singles out a small set of categories of speech in the First Amendment, for example, child pornography, obscenity, fighting words, and express incitement, for lesser protection, specifying conditions for permissible regulation of expression in each category.[974] It is based on the idea of dividing speech activity into categories of protected speech and non-protected speech, and then sub-dividing protected speech into categories.[975] The approach emerged from the idea that speech which is so remote from the main rationale for freedom of speech, and speech that seeks to promote one of free speech rationales are not of equal importance. The latter, of course, undoubtedly, has a high value, whereas the former is classified as low value speech.

This approach was first articulated in the case of *Near v. Minnesota*. Although the Court in that case struck down a statute that authorised prior restraint on speech and press,[976] the Court emphasised that "liberty of speech and of the press is also not an absolute right."[977] There are certain categories of speech of which the Court said that "no Court could regard them as protected by any constitutional right"; thus it is appropriate for the government to censor them. These categories that are excluded from First Amendment's protection are speech that (1) endangers national security, (2) is obscene, (3) creates a breach of peace of property, (4) is libellous.[978] The categorical approach was elaborated extensively in the leading case on this approach, *Chaplinsky v. New Hampshire*.[979] In *Chaplinsky*, the Court ruled that:

> [T]he right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libellous, and the insulting or fighting words those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and

[972] Schlag, P., "An Attack on Categorical Approaches to Freedom of Speech", *UCLA L. Rev.* 30 (1983) p. 673. See also Dougherty, F., "All the World's Not a Stooge: The 'Transformativeness' Test for Analyzing a First Amendment Defence to a Right of Publicity Claim Against Distribution of a Work of Art", *Columbia Journal of Law & the Arts* 27.1 (2003) p. 41; Sullivan, K., "Post-Liberal Judging: The Roles of Categorization and Balancing", *University of Colorado Law Review* 63 (1992) p. 293.
[973] DeCew, J., (2004) op. cit. p. 89.
[974] Cohen, J., (1993), op. cit. p. 214.
[975] Trager, R., and Donna Dickerson, (1999) op. cit. p. 7; Cram, I., (2006) op. cit. p. 147.
[976] *Near v. Minnesota*, 283 U.S. 697 (1931).
[977] *Ibid.*
[978] *Ibid.*
[979] *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)

> are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[980]

The *Chaplinsky* Court, thus, commentators say, very clearly insisted that "obscenity," which the Court, in the 1973 case of *Miller v. California*, defined as works that, taken as a whole, appeal to the prurient interest; contain patently offensive depictions or descriptions of specified sexual conduct; and on the whole have no serious literary, artistic, political, or scientific value, fell outside First Amendment protection,[981] together with profanity, libellous speech, incitement to riot, and "fighting words" directed at someone close enough to the speaker that the words would "tend to incite an immediate breach of the peace" or convey "a quite unambiguous invitation to a brawl."[982] All of these are categories of speech that are banned without hesitation.[983] It is noted that in addition to the four categories excluded in *Near v. Minnesota*, the *Chaplinsky* Court added two further categories which are (5) indecent or profane speech, and (6) fighting words.[984] (7) Commercial speech was the seventh type of speech which was added afterwards to the non-protective speech category. Commercial speech is that which is intended to generate marketplace transaction.[985] The Court in the case of *Valentine v. Chrestensen* ruled that such speech is not protected by the First Amendment because it is speech whose primary purpose is for commercial gain.[986] The latest type of speech that is considered to be unconstitutional is (8) 'instructional speech,' which is devoid of advocacy and refers to the dissemination of factual information in a step-by-step, "how-to" format.[987] In 1993, a hired killer committed a triple homicide using methods found in a book entitled *Hit Man: A Technical Manual for Independent Contractors*. *Hit Man* instructed and encouraged its readers to commit the acts of violence.[988] In a wrongful death action filed by the relatives and representatives of the victims against the book's publisher, the Fourth Circuit held that the First Amendment did not protect the publisher from civil liability. To the Court, the speaker's intent could be inferred from the natural tendency and probable consequences

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[980] *Ibid.*
[981] *Miller v. California*, 413 U.S. 15 (1973).
[982] DeCew, J., (2004) op. cit. p. 84.
[983] Ely, J., *Democracy and Distrust* (Harvard University Press, 1981) p. 114.
[984] *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). For other cases dealing with fighting words, see *Cohen v. California*, 403 U.S. 15 (1971); *Gooding v. Wilson*, 405 U.S. 518 (1972); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). *Virginia v. Black*, 538 U.S. 343 (2003)
[985] Zelenzy, J., (2001) op. cit. p. 360.
[986] *Valentine v. Chrestensen*, 316 U.S. 52 (1942); *Florida Bar v. Went For It, Inc.*, 515 U. S. 816 (1995).
[987] See *supra* p. 42.
[988] *Rice v. Paladin Enterprises* 28 F.3d 233 (4th Cir. 1997). See Weissblum, L., (2000) op. cit. p. 35

of that speech, as the publisher "knew its murder manual would be used by murderers."[989] The Court, Isaac Molnar asserts, created a new class of unprotected speech in which liability attaches based upon the tendency of the words used.[990] Many agreed with the Court's decision, believing that this category of speech "only minimally implicates the values at the heart of the First Amendment."[991] According to the Court, such speech is not advocacy in any way, but rather is an instructional manual without relevant "communicative value."[992] Therefore, Zer-Ilan argues that "[g]overnment regulation of the narrow category of speech at issue in *Rice*- technical, detailed, step by step, do-it-yourself manuals, ought to be considered presumptively constitutional."[993] In fact, the *Hit Man* raises another question, what about a book that contains bomb-making instructions, which may be used by terrorist groups to pose a serious threat to the national security? Could such a book be subject to criminal prosecution for solicitation because the tendency of its words is to produce bombs?

It appears that the approach taken by the U.S. Supreme Court has been to define what is not included rather than what is included within the definition of protected speech.[994] The Court, however, justified the exclusion of these categories from First Amendment protection because not all speech is of equal importance from the point of view of the First Amendment values. Justice Frankfurter, for example, says that "not every type of speech occupies the same position on the scale of values."[995] In this approach, speech is described as either high value or low value speech. Explaining this, Michael Fox says, whereas high value speech conveys an "essential part of any exposition of ideas" which embodies the utilitarian ideals of liberty of thought espoused by J.S. Mill, and is therefore worthy of the utmost protection, low value speech has been deemed to be "of such slight social value as a step to the truth that any benefit that may be derived from [the speech] is clearly outweighed by the social interest..."[996] According to the Supreme Court, some categories of speech occupy a "subordinate position in the scale

[989] *Rice v. Paladin Enterprises* (1997). Rabban, D., (1983) op. cit. p. 1264.
[990] Molnar, I., "Resurrecting The Bad Tendency Test to Combat Instructional Speech: Militias Beware", *Ohio State Law Journal*, 59 (1998) p. 1333, 1357.
[991] Zer-Ilan, A., Case Note, "The First Amendment and Murder Manuals", *Yale L.J.* 106 (1997) p. 2701; Fagan, B., (2000) op. cit. p. 603-636.
[992] *Rice v. Paladin Enters*, Inc., 128 F.3d 233, 248-49 (4th Cir. 1997).
[993] Zer-Ilan, A., (1997), op. cit. p. 2701.
[994] Trager, R., and Donna Dickerson, (1999) op. cit. p. 28.
[995] *Dennis v. United States*, 341 U.S. 494 (1951).
[996] Fox, M., "*Chaplinsky*: Defining Freedom of Expression." 1999, The PSC Report - Online, at URL <http://www.uri.edu/artsci/psc/pscreport/spring00/fox.html>

of First Amendment values"[997] or are of "less constitutional moment,"[998] or they "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and moralities."[999] Supporting this classification, Professor Sunstein says, "Any well-functioning system of free expression must ultimately distinguish between different kinds of speech by reference to their *centrality* to the First Amendment guarantee."[1000] Talking about instructional speech, Beth Fagan says that, "The major rationales for protecting free speech are the (1) marketplace of ideas, (2) self governance, (3) tolerance, (4) social stability and interest accommodation, and (5) self-realization theories. [Instructional speech] lacks First Amendment value because none of the justifications underlying freedom of speech encompass such a [speech.]"[1001]

It is of great importance to say that not all 'low value' speech is outside the First Amendment coverage.[1002] While some is, particularly speech that threatens national security, contains obscenity, or incites to imminent unlawful conduct,[1003] other types, such as defamation,[1004] commercial speech,[1005] and campaign finance reform,[1006] are not, *eo ipso*, totally unprotected. The latter groups of speech are intermediate categories between free speech and unprotected speech. Sadurski comments that when speech is perceived as having a low value only, the restrictions upon such speech are subject to a balancing of costs and benefits which would be improper in the case of restrictions upon speech of higher value.[1007] The case, then, is absolutely different and the standard of review varies when one talks about speech of higher value. Political speech, which Chapter Four of this study concluded to be as the best example of speech that is regarded as high value speech, exacts standards such as the clear and present danger test and strict scrutiny, while for less valued forms of speech, such as commercial or indecent expression, intermediate levels of scrutiny apply.[1008]

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[997] *Ohralik v. Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). See also, *Board of Trustees of State Univ. of N. Y. v. Fox*, 492 U. S. 469, 478 (1989); *Florida Bar v. Went For It, Inc.*, 515 U. S. 816 (1995).
[998] *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).
[999] *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).
[1000] Sunstein, C., (1993) op. cit, p. 126. Sadurski, W., (1999) op. cit. p. 41.
[1001] Fagan, B., (2000) op. cit. p. 620, 635.
[1002] Fox, M., "*Chaplinsky*: Defining Freedom of Expression." 1999; Cram, I., (2006) op. cit. p. 148. Powell, C., (1995) op. cit. p. 21. F. Jay Dougherty, (2003) op. cit. p. 40.
[1003] Trager, R., and Donna Dickerson, (1999) op. cit. p. 28.
[1004] *Gertz v. Welch* 418 U.S. 323 (1974); *York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
[1005] See *Liquormart, Inc. v. Rhode Island* 517 U.S. 484 (1996).
[1006] *Buckley v. Valeo* 424 U.S. 1 (1976).
[1007] Sadurski, W., (1999) op. cit. p. 41-42.
[1008] Weaver, F., & Lively, D., (2003) op. cit. p. 13.

It can be said that a basic premise of First Amendment jurisprudence is that some but not all categories of speech are deserving of constitutional protection.[1009] There are categories that are in the realm of unprotected speech.[1010] Obscenity, by definition, is outside the coverage of the First Amendment, as is speech posing a threat to national security, and as is speech inciting imminent unlawful conduct.[1011] These categories, according to Russell Weaver and Arthur Hellman, may be prohibited without violating the First Amendment.[1012] The reverse is also true; unless the speech falls within one of these established categories, the government cannot argue that the speech should be suppressed because of its harmful content.[1013] In this case, if there is any intention to restrict speech because of the content, the restriction, in that case, should serve to promote a compelling interest, it should be narrowly tailored to achieve that goal or interest, and it must be the least restrictive means for achieving that interest. This is called the strict scrutiny test, which is comparable to the notion of "necessary in democratic society" in the international law of freedom of speech. Put another way, it is notable from the above discussion that the categorical approach allows content-based restrictions. The content-based laws are those that place different burdens on speech depending on its subject matter, communicative impact or viewpoint. Because content regulation is in general objectionable, according to Joshua Cohen, it is important to confine content-based regulation to the above exceptions.[1014] Thus, excluding categorical speech, we can generally say that content-based regulation is unconstitutional unless it furthers a compelling government interest and is narrowly tailored to protect that interest.[1015] Russel Weaver and Donald Lively have summarised the above conclusion in the following simple sentences:

> Freedom of speech analysis has two primary tracks that have their own tributaries. The first track of review focuses upon whether a given category of speech is entitled to First Amendment protection. The second track of review is concerned with whether regulation is content-based or content-neutral. Content-based regulation typically triggers closer judicial scrutiny than content-neutral regulation. This higher level of review follows, however, only for speech that qualifies for First Amendment protection."[1016]

[1009] Weaver, R., and Donald E. Lively, (2003) op. cit. p. 13.
[1010] *Ibid.*
[1011] Dougherty, F., (2003) op. cit. p. 37.
[1012] Weaver, R. and Arthur D. Hellman, "The First Amendment: Cases, Materials and Problems," 2004. p. 11, online at <http://www.lexisnexis.com/lawschool/study/texts/pdf/FirstAmend2004S.pdf>
[1013] Wang, X., "Freedom of speech in the United States Constitution" (2001).
[1014] Cohen, J., (1993), op. cit. p. 214.
[1015] Trager, R., and Donna Dickerson, (1999) op. cit. p. 7.
[1016] Weaver, R., and Donald E. Lively, (2003) op. cit. p. 12.

Judith DeCew has explained how courts in the United States have taken the view that illegitimate justifications for restricting or suppressing speech are those based on the content of the material. DeCew believes "that this view has likely grown from the lessons of American history, given that the early settlers and citizens were particularly concerned to protect each individual's ability to express unpopular political and religious views. Thus, content that the government finds objectionable has not in general been deemed an adequate justification for banning the expression."[1017] The case, however, is completely different if the law is determined to be content-neutral. In this case, as discussed in Chapter Three, the government adopts regulations involving restrictions which, without regard to the message being communicated, may accidentally interfere with First Amendment expression. In the situation where government's speech regulation is content-neutral, it need offer only a significant reason, a lower standard than a compelling reason. For example, a prohibition on advocating adultery restricts viewpoint, and thus needs a compelling government interest, whereas a prohibition on debating adultery on my street at 3 a.m. is content-neutral and needs only a significant reason.[1018] One more example; although a law might be able to regulate whether leaflets may be distributed in a public school, it cannot discriminate against only Christian or Muslim leaflets. There is one final point that needs to be illustrated before moving to the opinion that criticises the categorical approach. Although, as said, there are no barriers to government interference or regulation with regard to speech that falls within one of the categories of unprotected speech, obscenity for example, for the law to be enforced it must not be too broad, or vague. An overbroad doctrine, in brief, holds that a regulation of speech that curtails protected speech, even if it also restricts unprotected speech, constitutes a violation of free speech. In *NAACP v. Alabama*, the Supreme Court said that a law or government regulation "to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[1019] A vague law would be one that restricts some form of free expression but is unclear as to what is allowed and what is not.[1020] As a result, even if the speech in question is "unprotected" i.e., the state may proscribe it, a law may

[1017] DeCew, J., (2004) op. cit. p. 84.
[1018] Cohen, J., (1993), op. cit. p. 212. Trager, R., and Donna Dickerson, (1999) op. cit. p. 7.
[1019] *NAACP v. Alabama*, 357 U.S. 449 (1958). For cases see, *Ashcroft v. Free Speech Coalition* 535 US 234 (2002); *Reno v. ACLU* 521 U.S. 844 (1997).
[1020] However, vagueness has been the basis for voiding numerous such laws. See, *Winters v. New York*, 333 U.S. 507 (1948); *Burstyn v. Wilson*, 343 U.S. 495 (1952) See, First Amendment Center, section titled "Glossary", at URL, <http://www.firstamendmentcenter.org >

be invalid if it is also applicable to other, protected speech because it is too vague or written too broadly.

It appears from the above points that the Court, by relying on the categorical approach, has chosen one of the easiest ways to get a grasp on the complex issues raised by the First Amendment. This is because a categorical approach, as Louis Henkin believes, may have the advantage of more certainty and predictability, at least to the extent that the applicable category is capable of a clear definition.[1021] Thus, the Court only needs to decide in each instance whether the questioned speech definitionally falls within one or other of these categories.[1022] Proponents of this 'hierarchical' approach, which differentiates between 'low value' and 'high value' speech, highlight several other advantages of this methodology.[1023] In their view, categorisation of speech serves to limit the judges' discretion, fostering a more helpful body of precedent than simple *ad hoc* treatment. In addition, the hierarchical conception reflects the different values assigned to various forms of speech under free-speech theory.[1024] Categorisation, thus, aims at preventing judges from wrongly assimilating various forms of expression, which would either lead to the dilution of high-value speech or an excessively strong protection of low-value speech at the expense of the competing public interests involved.[1025]

Proponents of categorical approach also believe that the balancing approach, which is adopted by HRC and Strasbourg institutions, has not been very successful in defending freedom of speech, especially when national security is on the other side of scale. Whenever there is clear conflict between freedom of speech and security needs, for example, the scale usually falls in favour of security. To illustrate this, let us set up an example of the threat that terrorist organisations pose to society. The government, in order to prevent society from terrorist attacks, or in other words to protect people's right to life, will always find justifications to regulate people's freedom of speech, if such speech supports or indicates sympathy for a proscribed organisation.[1026] Thus, it can be said that the scale of the balancing test usually falls in favour of the competing rights. A further problem with the balancing approach is that it is likely to be less protective of

[1021] Henkin, L., "Infallibility Under Law: Constitutional Balancing", *Colum. L. Rev* 78 (1978) p. 1048.
[1022] *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Gooding v. Wilson*, 405 U.S. 518 (1972).
[1023] Smolla, *The First Amendment: Freedom of Expression, Regulation of Mass Media, Freedom of Religion* (Durham, NC: Carolina Academic Press, 1999) p. 17.
[1024] Randall, M., (2006) op. cit. p. 54.
[1025] Smolla, (1999) op. cit. p. 16.
[1026] Talbot, R., "Uniting Human Rights and National Security in Countering Terrorism: or Will Oil and Vinegar mix?" Working Paper published 19 November 2004. <http://www.ncl.ac.uk/nuls/research/wpapers/talbot3.htm#_ftnref1 >

controversial speech and speakers than other approaches. This can clearly be noted when one compares the balancing approach with the categorical approach. The latter, according to some, "is thought to be more protective of highly controversial speech-for example, 'hate speech' or 'indecent' speech or 'violent' speech-than is a balancing approach, because the categorical rules will be applied regardless of the identity of the speaker or the offensiveness of the speech."[1027] A prior restraint on hate speech, for example, is very likely to be struck down, regardless of how unpopular the speaker may be, or how offensive the speech. Under a balancing test, the case is different and it is difficult to predict whether the similar prior restraint will be upheld or struck down, because different judges will evaluate the facts and competing interests differently. The next chapter will show how the EComHR, in a case against *Germany*, ruled in favour of prohibiting hate speech because "the applicant organisation ... did not argue that there was no such risk that statements of incitement of hatred were to be expressed."[1028] It is not always easy to guess what the outcome will be because you're not certain what the court will identify as a special circumstance. Such uncertainty is particularly dangerous with respect to speech regulation, because it may discourage speakers.

Opponents of the 'hierarchical' approach challenge this methodology on four grounds. The first challenge denies that any objective and rational reasons exist to treat some categories of expression less favourably than others. As regards commercial speech, for example, it is argued that it fulfils a vital role in a market economy and 'scarcely deserves to be treated as "low value" speech as if it involved criminality.'[1029] Some commentators, such as Archibald Cox, strongly rejected the classification of speech into high and low value speech because of the risk of entrusting an authoritative body with the power of assigning different values to different categories of speech.[1030] Larry Alexander believes that we should "treat the realm of messages as an undifferentiated whole."[1031] The second challenge acknowledges the important differences between certain types of speech but highlights the practical difficulties in categorising speech.[1032] Both challenges, according to Randall, lead to the conclusion

[1027] Ennis, B., "Courtside", *Communications Lawyer Journal* (1999).
[1028] (1995) 84-A D R 149, 154, EComHR.
[1029] Munro, C., "The Value of Commercial Speech", *Cambridge Law Journal* 62.1 (2003) p. 157.
[1030] See Cox, A., (1980) op. cit. p. 28.
[1031] See also Alexander, L., (1989) op. cit. p. 547-54.
[1032] In a similar vein, it has been argued that political speech cannot satisfactorily be distinguished from other categories of speech. See, Hare, "Is the Privileged Position of Political Expression Justified?" in Beatson and Cripps (2000) op. cit. p. 105.

that it is preferable to treat all speech as presumptively the same and to balance all the interests involved in an ad hoc fashion.[1033]

The third challenge warns that inclusion of many types of speech under the non-protected speech area gave rise to a great fear among commentators that if the Court continued along this line, the list of speech types that would be unprotected would soon be longer than the list of speech that was protected. In fact, this is what happened in reality in the view of Alan Chen, who noted that the Court has on occasion adopted categorical approach for other categories and has considered expanding the scope of unprotected speech.[1034] Professor Scanlon, as well, fears that regulating one category of speech not only might lead to inappropriate extension to other categories, but the category itself may be overbroad.[1035] Even the Court itself has noted this weak point in this approach and begun to reverse itself and slowly the list was shrunk to just three very narrowly defined categories, namely, national security, obscenity, and incitement to an imminent unlawful conduct.[1036] The Court, in the famous *New York Times* rule, firstly extended the First Amendment's protection to libellous statements, (1) by giving libellous statements constitution protection if the statements were made about a public official or public figure (Justice Brennan in *New York Times v. Sullivan* gave a protection to libel of "public officials" rather than extending protection to all libel defendants);[1037] (2) by requiring that actual malice (knowledge that it was false or reckless disregard of whether it was false or not) be present; (3) by raising serious doubts about the constitutionality of criminal libel suits brought by a group when the reputation of the group is injured or there is injury to the group's psyche;[1038] (4) by limiting defamation actions alleging injury to private persons. Although in *Beauharnais v. Illinois* maintained that libel by private persons or groups receives no First Amendment protections,[1039] the U.S. Supreme Court since *Gertz v Welch* has indicated that a private person needs to show that a defamatory falsehood was made negligently.[1040] In *Hustler Magazine v. Falwell*, the Court indicated that the First

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[1033] Randall, M., (2006) op. cit. p. 55.
[1034] Chen, A., "Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose", *Harvard Civil Rights-Civil Liberties Law Review* 38.1 (2003) p. 39.
[1035] Scanlon, T., "Freedom of Expression and Categories of Expression", *U. Pitts. Law Rev* 40.4 (1979) p.539-40.
[1036] Trager, R., and Donna Dickerson, (1999) op. cit. p. 28.
[1037] *New York Times v. Sullivan*, 376 U.S. 254 (1964). See also Barendt, E., "Giving full voice to freedom of speech", *The Guadian*, Monday, 1 October 1990; Solum, L., (1989) op. cit. p. 131-133.
[1038] The Supreme Court found group libel to exist in *Beauharnais v. Illinois*, 343 U.S. 250 (1951) a widely criticized case from 1951. For more about group libel see, Bracken, H., (1994) op. cit. p. 114-129.
[1039] 343 U.S. 250 (1952)
[1040] *Gertz v. Welch* 418 U.S. 323 (1974).

Amendment limits defamation actions alleging injury to private persons, and requires at a minimum that the false statement at issue be reasonably interpretable as a statement of actual fact about the individual and that the plaintiff establish fault on the part of the defendant.[1041] Falwell argued for the court's utilization of the lowered standard of defamation of a private person. Had the court accepted his assertion, he would then have only had to show "fault."[1042] Instead, the court imposed the higher standard, which viewed Falwell as a public person, forcing him to make a showing of "actual malice."[1043] (5) By distinguishing between statement of fact and a presentation of personal political opinion. However, the line between false statements of fact and political opinion is sometimes hazy. Is "Bush is a crook and Condoleezza Rice a bitch" a statement of fact or a presentation of personal political opinion? Society highly values a citizen's right to criticise elected leaders. The Court, in *New York Times v. Sullivan*, according to Zelenzy, announced a new standard which was added to the law of defamation in all jurisdictions.[1044] It ruled that the First Amendment protects the speaker unless the false, defamatory statement is made with knowledge that it was false or with reckless disregard of whether it was false or not.[1045] Plaintiff in *New York Times* was a public official whose duties included supervising the Montgomery, Alabama Police Department. He alleged that the New York Times had libelled him by printing an advertisement that stated that the Montgomery police had attempted to terrorize Martin Luther King and his followers. The Supreme Court viewed this case as one involving criticism of government policy and not merely factual statements about an individual. Justice Brennan, acknowledging that defamatory speech deserved free speech protection in certain circumstance, said that public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.[1046]

Secondly, the Court in *Gooding v. Wilson* considered profane language as protected speech. When a young man used profanity toward a policeman, the Court ruled that such language was all in a day's work for policemen. While the "street language" common to many people in the lower social classes was considered indecent by most

[1041] *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).
[1042] *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Milkovich v. Lorain Journal*, 497 U.S. 1 (1990).
[1043] For the discussion of *Falwell* case, see Post, R., "The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v. Falwell*", Harvard Law Review, 103 (1990) pp. 603-686.
[1044] Zelenzy, J., (2001) op. cit. p. 122; Leigh, L., "Of Free Speech and Individual Reputation: *New York Times Co. v. Sullivan* in Canada and Australia," in Ian Loveland (1988) op. cit. p. 51-68.
[1045] Wang, X., "Freedom of speech in the United States Constitution" (2001).
[1046] *New York Times v. Sullivan*, 376 U.S. 254 (1964).

standards, it was everyday language to others.[1047] Similarly, indecent speech which was initially outside First Amendment coverage,[1048] and then entitled only to the "bare minimum" of First Amendment protection, [1049] eventually inherited the full constitutional protection of the First Amendment.[1050] The Supreme Court in *Reno v. ACLU* (1997);[1051] *United States v. Playboy Entertainment Group, Inc.*, (2000);[1052] and in *Ashcroft v. Free Speech Coalition* (2002), [1053] offered a full First Amendment protection to sexually explicit speech.[1054] It is interesting to observe that the Supreme Court has differentiated between indecency and obscenity. It has indicated that the *Miller* test concerning is designed to cover hard-core pornography. Indecency, in contrast to obscenity, is concerned with material that is offensive to public susceptibilities and a nuisance rather than harmful. The Federal Communications Commission (FCC) has defined broadcast indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities."[1055] Indecent material contains sexual or excretory material that does not rise to the level of obscenity. For this reason, the courts have held that indecent material is protected by the First Amendment and cannot be banned entirely. However, even though some kinds of sexually explicit material are protected by the First Amendment, in the Supreme Court's view, one kind, child pornography, is definitely not. In this regard, Supreme Court distinguished child pornography, images made using actual minors, from protected pornography which is not obscene[1056] and included the former, as well as public nudity,[1057] within categorically proscribable speech.[1058]

Thirdly, in *Chaplinksy*, the Court's opinion stated that "fighting words," are wholly outside of the protection of the First Amendment. Although the Court afterwards did not do away with "fighting words" as an unprotected category; but it simply defined it very

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[1047] *Gooding v. Wilson*, 405 U.S. 518 (1972).
[1048] *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).
[1049] Chief Justice Rehnquist in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). See also, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).
[1050] Smith, P., Donald B. Verrilli, Jodie L. Kelley, Julie M. Carpenter, and Deanne E. Maynard, "Supreme Court Protects Controversial Speech", *Communications Lawyer Journal*, 20.3 (2002) p. 24.
[1051] *Reno v. ACLU*, 521 U.S. 844 (1997)
[1052] *United States v. Playboy Entertainment Group, Inc.*, 120 S .Ct. 1878 (2000).
[1053] *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002).
[1054] *Cohen v California*. See, Smith, P., Donald Verrilli, Jodie Kelley, Julie Carpenter, and Deanne Maynard, (2002) op. cit. p. 24.
[1055] See webpage of the Federal Communications Commission under "Obscene, Indecent, and Profane Broadcasts", at <http://www.fcc.gov/cgb/consumerfacts/obscene.html>
[1056] *Miller v. California*, 413 U.S. 15 (1973)
[1057] *City of Erie v. Pap's A.M*, 529 U.S. 277 (2000)
[1058] See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *New York v. Ferber*, 458 U.S. 747 (1982).

narrowly.[1059] In other words, fighting words have been given constitutional protection as long as they were not one-on-one and did not create an immediate likelihood of violence.[1060] The Court in *Lewis v. City of New Orleans* (The *Lewis* test) defined "fighting words" as anything abusive and insulting, under face-to-face circumstances likely to provoke an immediate violent response.[1061] Notably, the Court in *R.A.V.* admitted that fighting words sometimes have value as speech, stating: It is not true that "fighting words" have at most a *"die minimus"* expressive content, or that their content is in all respects "worthless and undeserving of constitutional protection"; sometimes they are quite expressive indeed.[1062] In *Virginia v Black* (2003), the Court divided on the question of whether a state could prohibit cross-burning carried out with the intent to intimidate. A majority of the Court concluded that, because cross-burning has a history as a "particularly virulent form of intimidation," Virginia could prohibit that form of expression while not prohibiting other types of intimidating expression. Although "a burning cross does not inevitably convey a message of intimidation ... when a cross burning is used to intimidate, few if any messages are more powerful." Thus, the majority found the cross-burning statute to fall within one of *R. A. V.'s* exceptions to the general rule that content-based prohibitions on speech violate the First Amendment.[1063] The Supreme Court decision in *Virginia v Black*, according to some, reveals the extent to which balancing inquiries already inform modern First Amendment jurisprudence. It reveals a radical shift towards an explicit First Amendment balancing jurisprudence, embracing considerations of proportionality in all but name.[1064]

Fourthly, during the 1970s, the Court changed its doctrine regarding commercial speech, expressed in *Valentine v. Chrestensen*, and admitted, in a series of cases,[1065] that commercial speech does deserve First Amendment protection.[1066] Dougherty pointed out that "the Court's approach to determining the constitutionality of commercial speech has changed in the last sixty years from a categorical approach in which it was treated as non-speech receiving no First Amendment protection to something close to

[1059] See also, *State v. Robinson*, The Supreme Court of the State of Montana, 2003 MT 198
[1060] *Cohen v. California*, 403 U.S. 15 (1971)
[1061] *Lewis v. City of New Orleans*, 415 U.S. 130 (1974)
[1062] *R.A.V. v. City of St. Paul*, 505 U.S. 377(1982). See Bakken, T., (2000), op.cit. p. 4; Powell, C., (1995) op. cit. pp. 1-48; First Amendment Center, "What is the Fighting Words Doctrine? at URL, <http://www.firstamendmentcenter.org>
[1063] *Virginia v. Black*, 538 U.S. 343 (2003)
[1064] Melamed, M., (2007) op. cit. p. 1.
[1065] See the leading case of commercial speech, *Valentine v. Chrestensen*, 316 U.S. 52 (1942);*Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980); *Thompson v. Western States*, 535 U. S. 357 (2002)
[1066] Walsh, J., "Supreme Court Should Expand Commercial Speech Protection", *Legal Backgrounder*, 15.45 (2000). Chen, A., (2003) op. cit. p. 31.

parity with non-commercial speech, subject to strict scrutiny balancing with a heavy presumption against regulation."[1067] The *Liquormart* test proves what was said above. It involved billboard advertisements for alcohol at low prices, and the Court upheld the right of place such advertisements as long as they were truthful and not misleading. Any "fortuitous" increases at the point of sale would have to be regulated by other consumer protections than the First Amendment. Freedom of consumer choice does not involve consideration of whether alcoholics would forgo other necessities in order to meet marginal price increases.[1068]

Finally, with regard instructional speech, many argue that the *Hit Man* case poses a great danger that a wide range of speech would be classified in the unprotected category. Some asks, if the publishers of *Hit Man* are made to pay lawsuit damages, then how fortunate are Arthur Conan Doyle and Agatha Christie to be dead, since their whole literature consisted of instructions for murder.[1069] Joseph Spear inquires, if Paladin is liable for its readers' behaviour, then why would not any book, movie, newspaper or television news show that describes a crime in great detail be equally culpable?[1070] In fact, the United States Courts, in several decisions,[1071] before and after the *Hit Man* case, based their judgments in cases involving incitement to law violation, through instructional speech, on the *Brandenburg* judicial test which distinguishes between speech "which merely advocates law violation and speech which incites imminent lawless activity."[1072] The *Brandenburg* standard, as will be discussed later, enables the government to limit subversive speech only where it is intended to incite imminent lawless action and is likely to do so.[1073] By applying the *Brandenburg* test to the *Hit Man* case, as an example of instructional speech, it appears that a publisher of a book released ten years before the murder crime was committed should not take the responsibility for that crime.

The critics of the American categorical approach say, and this is the fourth challenge, that First Amendment adjudications accomplished by "the employment of balancing tests, often under the guise of categorization, rather than balancing."[1074] The Court has

[1067] Dougherty, F., (2003) op. cit. p. 38.
[1068] *Liquormart, Inc. v. Rhode Island* (1996)
[1069] Editorial, "Free Speech for Scoundrels", *San Francisco Examiner*, Nov. 30, 1997, at C14
[1070] Spear, J., "Censorship: Where Does it Stop"?, *Las Vegas Rev.-J.*, Nov. 21, 1997, at 15B
[1071] See for example, *Waller v. Osbourne*, 763 F. Supp. 1144 (M.D. Ga. 1991); *Davidson v. Time Warner*, 1997 WL 405907 (S.D.Tex. 1997); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067 (Mass. 1989).
[1072] *Brandenburg v Ohio* 395 U.S. 444 (1969).
[1073] See Fagan, B., (2000) op. cit. p. 603.
[1074] Beschle, D., "Clearly Canadian? Hill v. Colorado and Free Speech Balancing in the United States and Canada", *Hastings Const. L.Q.* 28 (2001)p. 188.

defined the above proscribable categories through behind-the-curtains balancing; weighing the reasons for prohibition in question against the reasons given by the state for the prohibition. Balancing under the guise of categorization is utilized in cases that define certain types of speech and expression as being excluded from First Amendment protections.[1075] Such tests, according to critics of the American approach, are a surreptitious and disingenuous application of what the international law of free speech (Article 19 ICCPR and 10 ECHR) stated honestly and transparently. Therefore, strong criticism has been directed by large numbers of Europeans and others who see the American approach as flawed because Americans have wound up doing surreptitiously and disingenuously what the rest of the advanced constitutional world does honestly and transparently. When American courts allow free speech rights to be overridden by compelling interests,[1076] or in the service of intricate three and four-part tests,[1077] they are engaging in a similar proportionality or balancing inquiry, but less honestly, and in a far less disciplined manner.[1078]

VI.2.2 Clear and Present Danger Test (CPD test)

When the topic of the limits of free speech is raised, perhaps what first comes to mind is the clear and present danger test.[1079] The US Supreme Court, in the absence any constitutionally explicit limits to freedom of speech, has set the CPD standard in *Schenck v. United State* in order to judge when the right to free speech may lawfully be regulated. Justice Holmes in *Schenck* illustrated the standard by arguing that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." [1080] This is because such speech constitutes a "clear and present danger" to public safety. Various formulations of the clear and present danger test, such as *Schenck* test (1919) its successor, *Dennis* test (1951), and *Brandenburg* test (1969) up to the present, have appeared in several significant Supreme Court decisions throughout the years.[1081] The importance of studying this test is because of its role in shaping the American law of freedom of speech towards speech that constitutes a threat

[1075] Melamed, M., (2007) op. cit. p. 4.
[1076] *New York v. Ferber*, 458 U.S. 747 (1982).
[1077] See *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980) (commercial advertising).
[1078] For more see Schauer, F., (2005) op. cit. p. 3.
[1079] Notes, "Speech, Harm, and Self-Government: Understanding the Ambit of the Clear and Present Danger Test", *Columbia Law Review*, 91 (1991) p. 1453.
[1080] *Schenck v. United State*, 249 U.S. 47 (1919)
[1081] Latham, E., "The Theory of the Judicial Concept of Freedom of Speech", *The Journal of Politics*, 12.4 (1950) pp. 637-651; Gerber, S., (2004) op. cit. p. 24.

to national security, hate speech, speech which incites others to violence against society, blasphemous speech, and fighting words. Before proceeding with these three versions of the CPD, it is imperative, in my view, to discuss the bad tendency test.

VI.2.2.1 Bad Tendency

After the First World War, which was a time of national emergency, the Supreme Court established the bad tendency test.[1082] According to that test, speech that has a tendency, or which the legislature could reasonably believe has a tendency, to lead to substantial evil (sedition, riots, rebellion, hindering the war effort) could be restricted. The test approach is based largely on the traditional principle of intent, which holds that an actor's intent may be presumed, in light of the surrounding circumstances, from the natural and usual consequences of his/her acts.[1083] Accordingly, where the consequences of speech could be bad, then the speaker intended those bad consequences and could therefore be punished for his speech.[1084]

Beginning with *Abrams v. United States*, bad tendency became a main judicial test that was used to silence opposition to the war. The defendants were convicted under the Espionage Act of inciting resistance to the war effort by printing leaflets that denounced the sending of American troops to Russia. The Supreme Court ruled the constitutionality of the Act and considered that the leaflets had a tendency to encourage war resistance and to curtail war production.[1085] The test, later, was most clearly articulated in *Gitlow v. New York* in which the Supreme Court stated that "[A] State, in the exercise of its police power, may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime or disturb the public peace [even though such utterances create no clear and present danger.]"[1086] Two years later, again relaying on the bad tendency test, the Supreme Court upheld the conviction of Charlotte Anita Whitney, a member of the Communist

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[1082] See what have been called "World War I cases", *Schenck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616 (1919); *Schaefer v. United States*, 251 U.S. 466 (1920); *Pierce v. United States*, 252 U.S. 239 (1920); *Gilbert v. Minnesota* 245 U.S. 325 (1920). For more see, Stone, G., "The Origins of the 'Bad Tendency' Test: Free Speech in Wartime", *Supreme Court Review*, (2002) p. 412-413; Smith, J., "The Sedition Law, Free Speech, and the American Political Process", *The William and Mary Quarterly*, 9.4 (1952) pp. 497-511.

[1083] Rabban, D., "The Emergence of Modern First Amendment Doctrine", *CHI. L. Rev* 50 (1983), p. 1230-31. See also Rabban, D., "The First Amendment in Its Forgotten Years", *The Yale Law Journal*, 90 (1981) p. 543-551.

[1084] See generally, Dow, D., & R. Scott Shieldes "Rethinking the Clear and Present Danger Test", *Indiana Law Journal*, 73.4 (1998) p. 1217

[1085] *Abrams v. United States*, 250 U.S. 616 (1919).

[1086] *Gitlow v. New York*, 268 U.S. 652 (1925).

Labour Party of California, who was prosecuted under that state's Criminal Syndicalism Act which prohibited advocating, teaching, or aiding the commission of a crime, including "terrorism as a means of accomplishing a change in industrial ownership ... or effecting any political change."[1087] Emphasising the fact that the First Amendment is not an absolute right, the Court argued "that a State ... may punish those who abuse this freedom by utterances ... tending to ... endanger the foundations of organized government and threaten its overthrow by unlawful means."[1088]

However, the bad tendency test has been abandoned and superseded by another judicial test that offers more protection to freedom of speech, namely, the clear and present danger test. The reason why the former test did not last long is because it offers very little protection for freedom of speech.[1089] Illustrating this point, Thomas Emerson says, "In theory, achievement of all other social values or objectives is preferred to allowing expression where any apparent conflict between the two exists. In practice, the doctrine cuts off expression at a very early point on the road to action; significant opposition to the government or its policies, for instance, receives no legal protection."[1090] The problem with the bad tendency test is because it it offers little protection for freedom of speech by looks at the nearness and seriousness of danger produced by the speech. If the seriousness is great, and the nearness is not, but has the probability of being near later on, then the speech is not protected. Justices Brandeis and Holmes, who strongly opposed the bad tendency test, emphasised that unless there is a real immediate danger, speech should not be suppressed. In *Whitney v. California*, Justice Brandeis, joined by Justice Holmes, concurred in an opinion that read more like a dissent. They wrote:

> Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one ... even advocacy of [law] violation however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted upon.[1091]

[1087] *Whitney v. California*, 274 U.S. 357 (1927).
[1088] *Ibid.*
[1089] Morreim, E., Freedom of Expression (PhD Thesis, University of Virginia, 1980) p. 175.
[1090] Emerson, T., (1963) op. cit. p. 910; Morreim, E., op. cit. p. 175.
[1091] *Whitney v. California*, 274 U.S. 357 (1927).

In my view, any resurrection of the bad tendency test will pose a great danger that a wide range of speech would be classified in the unprotected category, the same danger that Thomas Emerson posed above. A bad tendency test, in fact, opens avenues to restrict significant amounts of formerly protected speech. Therefore, in my view, the abandonment of bad tendency test was necessary and should be continued.

VI.2.2.2. Clear and Present Danger Test (*Schenck* Test)

The frailty of the protection that the bad tendency test provides for freedom of speech, led some Supreme Court Justices to search for, or to revive, a standard that opens up a wider area of protection and does not cut off speech at a very early point on the road to action. The Supreme Court, in other words, aimed to find a formula that can be used to distinguish between general political dissent and advocacy of abstract theories on the one hand, which would be highly likely to be prohibited under the bad tendency test, and incitement of particular illegal acts on the other hand. This standard was found in Justice Holmes's announcement in the case of *Schenck v. United States* in 1919, where he established a doctrine that has subsequently been used several times, in one form or another. The test determines which utterances the government may legitimately restrain.[1092]

The *Schenck* case began when Charles Schenck, the general secretary of the Socialist Party, sent copies of a letter urging resistance to the military draft to men who had been drafted for service in World War I. The leaflet railed against the draft as a tool of a despotic Wall Street elite, alleged that there existed a constitutional right to oppose the draft, and concluded by saying that the leaflet recipients "must do [their] share to maintain, support and uphold the rights of the people of this country." Justice Holmes, writing for a unanimous Court, affirmed Schenck's conviction under the Espionage Act and suggested that "the question in every case is whether the words are used in circumstances and are of such a nature as to create a clear and present danger that they will bring about substantive evils that Congress has a right to prevent."[1093] As a way of explaining the doctrine of clear and present danger, Holmes used what has become one of the most famous analogies in American law of freedom of speech. He wrote: "The most stringent protection of free speech would not protect a man in falsely shouting fire

[1092] Antieau, C., "The Rule of Clear and Present Danger: Scope of Its Applicability". *Michigan Law Review*, 48.6 (1950) pp. 811-840; Castberg, F., *Freedom of Speech in the West* (Oslo: Oslo Universty Press; London: George Allen & Unwin LTD, 1960) p. 165.
[1093] *Schenck v. United States*, 249 U.S. 47 (1919).

in a theatre and causing a panic."[1094] However, soon after the *Schenck* case, approximately six months, Holmes received an opportunity to elaborate what became known as the "clear and present danger" test, although this time it was in a dissent. In his dissent in *Abrams v. United States*, which was the beginning of a movement to a more speech-protective test, he wrote that the government could only "punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils."[1095] It appears that Holmes re-conceptualised the test to be more strict.[1096] This approach was emphasised by Justice Brandeis in the case of *Whitney versus California*, when he stated that "in order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated."[1097] Thus, "no danger flowing from speech can be deemed clear and present unless the incidence of the evil is so imminent that it may befall before there is opportunity for full discussion."[1098] The Holmes-Brandeis clear and present danger formula, then, looks at the seriousness and the nearness of the danger. Unlike the bad tendency test, both have to be great.[1099] Under this test, speech that advocates unlawful action falls within the constitutional protection if there is no likelihood that the speech will bring about the action.[1100]

Three points need to be clear before moving to evaluate the clear and present danger test. Firstly, although this test initially applied to speech directed at advocating the overthrow of the government, sedition in other words, it has over the years evolved to include many other kinds of threat to the safety of society and groups in society, hate speech for example; acts which incite others to violence against society;[1101] cases dealing with contempt of court;[1102] and cases related to religious freedom cases.[1103] Secondly, whenever there is an attempt by government to use the clear and present danger test to stop what it perceives as threats to national security, the government bears a heavy burden of proving that such danger does indeed exist. In other words, before

[1094] *Schenck v. United States*, 249 U.S. 47 (1919)
[1095] *Abrams v. United States*, 250 U.S. 616 (1919).
[1096] David R. Dow & R. Scott Shieldes "Rethinking the Clear and Present Danger Test", *Indiana Law Journal*, 73.4 (1998) 1217.
[1097] *Whitney v. California*, 274 U.S. 357 (1972).
[1098] *Ibid.*
[1099] *Schenck v. United States*, 249 U.S. 47 (1919).
[1100] Schwartz, B., "Oliver Wendell Holmes: First Amendment Hero." First Amendment Cyber-Tribune, <http://fact.trib.com/1st.oped.schwartz.html> See Vincent Blasi, "The First Amendment and the Ideal of Civil Courage: The Brandeis Opinion in Whitney v. California", *William and Mary Law Review* 29 (1988) p. 653.
[1101] See Castberg, F., op. cit. (1960) p. 167-170.
[1102] See *Bridges v. California*, 314 U.S. 252 (1941); *Landmark Communications v. Virginia*, 435 U.S. 829, 844 (1978).
[1103] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

being allowed to punish a man for what he/she has said or written, the government has to clearly prove that his/her speech presents an imminent danger of a major substantive evil, such as, for example, rioting, destruction of property, or forceful overthrow of the government.[1104] As Earl Latham says, "it is for the government to prove that the exceptional circumstances exist."[1105] When the *New York Times* published portions of the Pentagon Papers- secret revelations about the Vietnam War- the government temporarily stopped the publication. However, the Supreme Court ruled that the government simply had not met the heavy burden of proving that publication of the documents would indeed damage the nation.[1106] Similarly, in *Texas v. Johnson*, the Supreme Court ruled that burning the flag in political protest is protected speech and unless the state could prove that the activity created an immediate and imminent likelihood of danger, they could not punish the protestor.[1107] Thirdly, the clear and present danger test, as Bernard Schwartz says, is above all a test of degree. "Clear and present" danger is a standard, not a mathematical absolute.[1108] Holmes himself confessed this fact in the *Abrams* case when he said, "It is a question of proximity and degree." Its application, thus, will vary from case to case and will depend upon the particular circumstances.

What can be said here is that the existence of a bad tendency, thus, is no longer considered a sufficient ground for restraining such speech. This is why it is said, truly, that the clear and present danger test represented a substantial advance over the bad tendency test. Emphasising this point, Thomas Emerson said, "In theory, it protects some expression even though that expression interferes with the attainment of other social objectives, for the danger to the other interests must be immediate and clear. In practice, by drawing the line of allowable expression closer to the point of action, it opened up a wider area of protection."[1109] Agreeing with Emerson's emphasis, Vincent Blasi wrote, "Holmes implemented an approach that was, in theory at least, more protective of controversial speakers than the bad tendency test that previously had

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[1104] See *Schenck v. United State*, 249 U.S. 47 (1919); *Abrams v. United States*, 250 U.S. 616 (1919); *Whitney v. California*, 274 U.S. 357 (1972); *Bridges v. California*, 314 U.S. 252 (1941).

[1105] Latham, E., (1950) op. cit. 637. See McIntosh, W., and Cynthia Cates, *Judicial Entrepreneurship-The Role of the Judge in the Marketplace of Ideas* (London: Greenwood Press, 1997) p. 33-39. C. Douzinas, "Constitutional Law and Freedom of Speech: A Critique of the Constitution of the Public Share in Legal Discussion and Practice with Special Reference to 20th Century American Law and Jurisprudence" (PhD thesis, University of London, 1983) p. 187.

[1106] *New York Times v. United States*, 403 U.S. 713 (1971).

[1107] 491 U.S. 397 (1989).

[1108] Schwartz, B., "Oliver Wendell Holmes: First Amendment Hero."

[1109] Emerson, T., (1963) op. cit. p. 910. See also Emerson, T., (1980) op. cit. p. 422-481.

dominated First Amendment interpretation."[1110] This is why Zechariah Chafee argued that the CPD test represented the libertarian ideal of free speech.[1111]

VI.2.2.3. Clear and Probable Danger Test (*Dennis* test)

A revised version of the clear and present danger test was articulated by the Supreme Court during the Cold War. The period known as the 'Red Scare,' which, in the view of some, was replaced after September 11, or before that with the "Green Scare,"[1112] witnessed the birth of the Smith Act, passed by Congress in 1940. Section 2 of the Act prohibited the knowing or wilful advocacy or teaching of the duty, necessity, desirability, or propriety of overthrowing the United States Government by force or violence. The constitutionality of the Act was questioned in the *Dennis* case. The leaders of the Communist Party of America were arrested and charged with violating provisions of the Smith Act. Though Dennis never said anything about the overthrow of the government, his membership in the party, alone, was considered to be advocating lawless conduct. On appeal, the defendants, on the basis that their teachings did not present a clear and present danger to the United States Government, argued that the convictions should be reversed. Judge Hand, however, delivering the opinion for the Second Circuit, strayed from the *Abrams* case's clear and present danger formulation, introduced his own formulation of the CPD test, which relies on a broad definition of the CPD test. He suggested that even though there was no immediate danger posed by the Communist Party's ideas, their speech should be restricted by the Court. Judge Hand, writing for the majority, interpreted the phrase clear and present danger as follows: "In each case, we must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger" (Compare this with the European Comission's opinion in *Spycatcher* case and Ibn Taymiyyah's opinion in war on rebels (*Bughghat*).[1113] However, on this basis, the Second Circuit affirmed the convictions, and on review, the Supreme Court not only affirmed the Second Circuit's judgment but also adopted the opinion of Judge Learned Hand of a new formulation of the legal rule.[1114] Chief Justice Vinson acknowledged that

[1110] Blasi, V., "Misleading Metaphor: Holmes and the Marketplace of Ideas", 1998, p. 36, f. 105, available at <http://www.law.berkeley.edu/cenpro/kadish/Blasi%20Holmes.pdf>
[1111] Chafee, Z., "Freedom of Speech in War Time" *Harv. L. Rev.* 32, (1919) p. 932. Sheldon Leader, (1982) op. cit. p. 418.
[1112] Zogby, J., "The Other Anti-Semitism, The image of Islam in American pop culture", *Sojourners Magazine*, November-December 1998.
[1113] See *infra* p. 200 and 308.
[1114] *Dennis v. United States*, 341 U.S. 494 (1951).

the Court had in recent years relied on the Holmes-Brandeis formulation of clear and present danger without actually overruling the older cases that had rejected the test; but while clear and present danger was the proper constitutional test, that "shorthand phrase should [not] be crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case.[1115]

The above test, then, went beyond the "clear and present danger" standard established by the Court in the *Abrams* case and regressed to the bad tendency test as it looks at the seriousness and the probability of danger, and uses a sliding scale. If one is great, the other need not be, for the speech to be unprotected.[1116] This means that the restrictive force of the doctrine was broadened. Thus, the test protected less speech than the *Abrams* formulation of the test, paving the way for jailing political activists. This rephrased test had, as McKay argues, the effect of killing the clear and present danger rule.[1117] and led some not only to reject this new formation of the test, but also to reject the whole test, even Holmes's approach.[1118]

However the *Dennis* Doctrine is no longer considered acceptable and it has been overruled by the Court in subsequent decisions. In *Yates v. United States*,[1119] for example, the Court, moving closer to the Holmes understanding of the clear and present danger test as expressed in his dissent in *Abrams*, distinguished *Dennis,* holding that abstract advocacy was entitled to First Amendment protection. Only speech explicitly inciting the forcible overthrow of the government remains punishable under the Smith Act.[1120] The Court later held that there must be a present advocacy of the violent overthrow of the government and not merely the possibility of future advocacy to obtain a conviction under the Smith Act.[1121] Likewise, commenting on Judge Hand's formulation of clear and present danger, Justice Douglas in his concurring opinion in *Brandenburg v. Ohio*, which effectively swept away *Dennis*, said, "We approved the 'clear and present danger' test in an elaborate dictum that tightened it and confined it to

[1115] *Dennis v. United States*, 341 U.S. 494 (1951). See Dow, D., and R. Scott Shieldes, (1998) op. cit. p. 1217. Bracken, H., (1994) op. cit. p. 27

[1116] Levinson, S., "What is the Constitution's Role in Wartime? Why Free Speech and Other Rights Are not As Safe As You Might Think", *Find Law Legal Commentary*, Oct. 17, 2001; Mendelson, W., "Clear and Present Schenck to Dennis", *Columb. L. Rev.* 52 (1952), p. 330.

[1117] McKay, R., (1959) op. cit. p. 1209.

[1118] This rejection can be more clearly understood when one reads Justice Black's dissent in *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961).

[1119] 354 U.S. 298 (1957).

[1120] Trager, R., and Donna Dickerson, (1999) op. cit. p. 65.

[1121] Molnar, I., (1998) op. cit. p. 1340.

a narrow category. But in *Dennis v. United States,* we opened wide the door, distorting the 'clear and present danger' test beyond recognition." [1122]

VI.2.2.4. Clear and Imminent Danger Test (*Brandenburg* Test)

As said above, the Supreme Court developed various formulations of the clear and present danger test. In the last version of the test, the Court went beyond the "clear and present danger" test set forth in *Schenck* and *Dennis*. This line of cases culminated with the test set forth in *Brandenburg v. Ohio*, which, according to commentators, is regarded as the historic and seminal case in the area of the First Amendment and incitement to violence.[1123] In *Brandenburg*, a leader in the Ku Klux Klan made racist and anti-Semitic statements at a Klan rally and was later convicted under an the Ohio Criminal Syndicalism Act for pontificating that "if our [government] continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken." [1124] The law made illegal advocating "crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform," as well as assembling "with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." The Court declared an Ohio criminal-syndicalism statute unconstitutional because "the constitutional guarantees of free speech does not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[1125] In so doing, the Court established the modern incitement formulation of the CPD test, called the incitement standard. The Court not only made a substantial withdrawal from *Dennis* approach; it also clearly reformulated and expanded Justice Holmes's old clear and present danger test to maximize protection for the individual speaker. Explaining the reason for this significant change in the Court's position toward *Schenck's* and *Dennis* standard of clear and present danger, Avital Zer-Ilan wrote, "The

[1122] Douglas, J., concurring in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). For more details about *Dennis* case see Krislov, S., *The Supreme Court in the Political Process* (New York, Macmillan, 1965) p. 119. McKay, R., (1959) op. cit. p. 1212, 1222.

[1123] Weissblum, L., (2000) op. cit. p. 39; Linde, H., "Clear & Present Danger Reexamined", *Stanford Law Review*, 22.6 (1975) pp. 1163- 1186; Schwartz, B., "Holmes versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?" *Supreme Court Review*, (1994), p. 237; Stone, G., *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (W.W. Norton, 2004) pp. 522-24, 543, 548, 551; Greenawalt, K., "Speech and Crime", *American Bar Foundation Research Journal* 5.4 (1980) pp. 645-785, p. 650; Lynd, S., "Brandenburg v. Ohio: A Speech Test for All Seasons?" *The University of Chicago Law Review* 43.1 (1975) pp. 151-191

[1124] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

[1125] *Ibid.*

Court has recognised that the then-predominant clear and present danger test allowed the government to suppress undesirable political views simply by invoking the speech's tendency to violence."[1126] Zer-Ilan continued, "in order to ensure greater protection of political speech and less opportunity for government pretext, the *Brandenburg* Court abandoned the manipulable danger test." [1127] Under this new standard, which is comparable in my view with Ali Ibn Abi Talib's standard in dealing with rebellion in Islam,[1128] there must be clear and imminent danger of a substantive evil that the state has a right to prevent before it can interfere with speech. If there is time through discussion to expose falsehoods and fallacies and to avert the evil by the process of education, then the remedy to apply is more speech, not enforced silence. Speech, then, is protected until it is actually likely to incite unlawful action.[1129] Explaining this equation in detail, Cass Sunstein wrote that a three-part criterion must be met before the government can punish speech on the grounds of the clear and present danger test. First, the speech must be directed to inciting, not just advocating, lawless action. Second, the advocacy must be calling for imminent breaking of the law, rather than illegal conduct at some future time. Finally, the advocacy must be likely to produce such conduct.[1130] This means that only a very narrow range of liability exists for speech that allegedly motivates others to commit negligent or illegal acts. This also means that it is unlikely that written material can ever constitute incitement.[1131] *Brandenburg*, Arielle Kane argues, reflects the Court's belief that the free competition of ideas, rather than censorship, is the preferred means of eliminating "bad" ideas in the public consciousness.[1132]

The imminence requirement of *Brandenburg* was addressed subsequently by the Supreme Court several cases.[1133] In *Hess v. Indiana*, the Court, Weissblum observed, clarified the *Brandenburg* standard through its reasoning. [1134] It overturned the defendant's disorderly conduct conviction because his speech did not come within the narrowly limited classes of speech which a state may punish. The Court found Hess's words, "[w]e'll take the fucking street later," to amount to no more than advocacy of

[1126] Zer-Ilan, A., (1997), op. cit. p. 2699.
[1127] *Ibid.*
[1128] See *infra* p. 310.
[1129] Dow, D., & R. Scott Shieldes, (1998) op. cit. p. 1217; Molnar, I., (1998) op. cit. p. 1341.
[1130] Sunstein, C., "Is Violent Speech a Right"? *The American Prospect* 6.22 (1995b).
[1131] *Herceg v. Hustler Magazine*, 814 F.2d 1017, 1023 (5th Cir. 1987).
[1132] Kane, A., "Sticks and Stones: How Words can Hurt", *Boston College Law Review*, 43.1 (2001), p. 159-192
[1133] *Watts v. United States*, 394 U.S. 705, 706 (1969); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). See recently, *Virginia v. Black*, 538 U.S. 343 (2003)
[1134] Weissblum, L., (2000) op. cit. p. 40.

illegal action at some indefinite future time. The Court further required proof that firstly, the speech "was ... directed to any person or group of persons" and secondly, Hess's "words were *intended* to produce ... imminent disorder." Without such proof, the Court found Hess's words protected by the First Amendment.[1135]

It appears that the Courts have used the *Brandenburg* test to determine when speech transgresses the line from mere advocacy, which is protected by the First Amendment, to incitement, which is not. In other words, the *Brandenburg* incitement test has set the boundary of freedom of speech at a place where speech and illegal action meet. This definition is still the prevailing interpretation of freedom of expression and is used in other important areas of the First Amendment such as fighting words, hostile audience, profanity and blasphemy, and even in the free press/fair trial controversy. It is a foundation upon which other First Amendment rules have been built. However, applying this to current conditions, at the example where a Muslim cleric urged burning the building of Salman Rushdie's New York publisher, some concluded that the Muslim cleric would not be punished for the words alone. Although his speech advocated unlawful action, there was no danger that the audience would act on it. The situation would be different if translators and publishers connected with *The Satanic Verses* had been killed or wounded; as there was at least "a clear and present danger" that violence would take place.[1136]

Another example, the publication of Danish cartoons, and in fact of images considerably more offensive than these, would present no serious legal issues, and their publication would plainly be, and in fact has been, permitted.[1137] This explains, according to Professor Schauer, why it was not at all surprising that in the United States there has been essentially no suggestion whatsoever that publication of the cartoons should be subject to legal sanctions, although there has been a lively debate about whether newspapers and magazines should- as a matter of ethics, morality, decency, and the illumination of public debate- publish them.[1138] And in this sense the American debate about the cartoons- and it has been extensive- is less complex than the debate in Europe, where the questions of the desirability or propriety of publication have been more interwoven with questions of legality. This is because, according to the *Brandenburg* doctrine, speech alleged to cause illegal or violent acts could be subject to

[1135] *Hess v. Indiana*, 414 U.S. 105 (1973). Molnar, I., (1998) op. cit. p. 1342.
[1136] Schwartz, B., "Oliver Wendell Holmes: First Amendment Hero."; see also Alan Dershowitz, *Why Terrorism Works* (Yale University Press, 2002) p. 111.
[1137] Post, R., (2007) op. cit. p. 73.
[1138] Though Schauer relied on other case, *Collin v. Smith*, in delivering this opinion. Schauer, F., (2006) op. cit. p. 5.

legal sanctions if and only if the speech were to be explicitly directed at inciting unlawful acts, and if and only if the speech were to explicitly urge that those unlawful acts take place imminently, and if and only if the unlawful acts urged by the speech were in fact likely to occur imminently. Abstract advocacy of illegality, of violence, or even of murder, and explicit advocacy of violent and illegal acts to be carried out in the indeterminate future, remain fully protected by the First Amendment.

In conclusion, four remarks can be made. The first is regarding the *Brandenburg* test, which can be described as a very high standard to meet and which remains the bottom line on how the First Amendment views mere advocacy of violence and the last three will be dedicated to the clear and present danger test in general. Firstly, although some, such as Professor Smolla, have characterized the *Brandenburg* test as a rewording or an extension of the Holmes/Brandeis refinement of the CPD test,[1139] and others, such as Well, see *Brandenburg* as signalling the death of clear and present danger as envisioned by Holmes,[1140] the accuracy of such statements is hard to judge. What can, however, easily be judged, is that all are agreed that it is more difficult for the state to convict under *Brandenburg* than it was under the Holmes and Brandeis test.[1141] This strictness of the *Brandenburg* test can be proved by the fact that while the Holmes and Brandeis test suggested that the government could punish speakers who had the explicit intention of encouraging crime,[1142] the *Brandenburg* test withdrew this authority from the state.[1143] Although some, such as Bork, have argued that that advocacy of the overthrow of government, even on a theoretical level, is prohibited because it seeks as its goals the denial of what the majority have democratically decided,[1144] his view hardly reflects the modern jurisprudence of the Supreme Court as represents in *Brandenburg* test.

Secondly, throughout the evolution of the CPD test, the same dilemma arose in each case: Do speakers who express opposition to democracy have the right to express such opposition even if it might lead to the destruction of the democratic state? The answer according to all Judges is no. Justice Sanford, for example, premised his decisions in *Gitlow* and *Whitney* on the state's "essential" right of self-preservation.[1145] Even Hand, Holmes, and Brandeis accepted this premise, disagreeing merely with the imminence of

[1139] Smolla, R., (1992) op. cit. 115.
[1140] Wells, C., "Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence", *Harv. C.R.-C.L. L. Rev.* 32 (1997) p. 159.
[1141] Dow, D., & R. Scott Shieldes, (1998) op. cit. p. 1217. Harry. M Bracken, (1994) op. cit. p. 28.
[1142] Sunstein, C., "Is Violent Speech a Right"? *The American Prospect* 6.22 (1995b).
[1143] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
[1144] Bork, R., (1971) op. cit. p. 159.
[1145] See *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652, 668 (1925); see also *Dennis v. United States*, 341 U.S. 494, 520 (1951).

the danger posed to the state by certain speech.[1146] Thus, throughout the evolution of the CPD test, the point of departure among the various judges appears to have been one of fear: How much fear must the state experience before it has the power to silence the speaker? Whereas some would have accepted the suppression of speech tending to make a legislature slightly nervous, Brandeis and Holmes demanded at least some substantiation of the legislature's fear.[1147] However, and this is my third remark, I personally agree with Justice Brandeis's viewpoint in *Schaefer v. U.S.* where he characterised the clear and present test as "a rule of reason." Correctly applied, it will preserve the right of free speech both from suppression by tyrannous, well-meaning majorities and from abuse by irresponsible, fanatical minorities."[1148] Of course, this adoption of a clear and present danger test is confined only to the demanding version of the test, comparable to strict scrutiny, which has been expressed in the *Brandenburg* (1969.)[1149] Therefore, the weak interpretation of the test which has been a ground for the Court's decisions in *Schenck* (1919), *Abrams* (1919), *Gitlow* (1925), *Whitney* (1927), and *Dennis* (1951) should be abandoned. This means that speech that has a "tendency" to encourage illegality or mere advocacy of unlawful and violent action, without direct attempts to engage in or bring about such action, cannot be regulated. Only when the speech (1) advocates an illegal and very harmful act; (2) and its advocacy makes its imminent occurrence highly probable, then one can say that the clear and present danger test is satisfied, and that consequently such speech can be restricted.

Fourthly, although I have just said that the weak interpretation of the danger test should be abandoned or, in fact, it has been abandoned and superseded by a more strict interpretation of the test, namely the *Brandenburg* interpretation, I agree with the viewpoint that expresses some fears of the fragility of the First Amendment during times of crisis.[1150] It is well known that the terrorist bombings on September 11, 2001 focused attention on web sites and materials published by the press and media that either urge terrorist action or solicit support for terrorist causes. New wars, new opposition movements and new separatist groups - as well as new terrorist organisations - emerge frequently. Anti-terrorism and anti-security measures, according to

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[1146] *See Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring); *Gitlow v. New York*, 268 U.S. 652, 668 (1925);*United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494.
[1147] Dow, D., and R. Scott Shieldes, (1998) op. cit. p. 1217.
[1148] Schaefer v. U.S., 251 U.S. 466 (1919).
[1149] Sunstein, C., "Is Violent Speech a Right"? *The American Prospect*. 6.22 (1995b).
[1150] Hudson, D., "The First Amendment: A Wartime Casualty?" February 15, 2002, at URL <www.freedomforum.org>

International PEN report, are being wrongfully applied to writers and journalists.[1151] The famous adage, "History repeats itself," appears to be true in the aftermath of September 11, which was followed by Congress' quick passage and the President's enthusiastic signature of the so-called USA Patriot Act, a behemoth 342-page law that provides great powers to law enforcement officials.[1152] By the Patriot Act of 2001, even actions by protestors on the street, according to International PEN report, could be deemed as 'terrorist.' [1153] Critics of the USA Patriot Act accounted several examples of intolerance to First Amendment freedoms. According to David Hudson, "The news media have been restricted in assessing the war effort in Afghanistan. Educators have been punished for a range of activities, from allegedly making anti-Islamic comments to criticizing the American war effort. A public high school student in Ohio was suspended for posting a pro-war poster on his locker. Attorney General John Ashcroft has said that critics of the war effort 'give aid and comfort to the enemy.'"[1154] From these examples one can see that there is no doubt that freedom of speech system faces a great challenge, or as one commentator described it, "this is the challenge for future theorists of domestic and international law, and perhaps also for future courts."[1155] Moreover, the resurrection of bad tendency and the re-emergence of something like the clear and probable danger standard in advocacy cases, at least in a tentative fashion, becomes more likely nowadays than before 11 September, the National Coalition Against Censorship organisation has observed.[1156] As Professor David Cole argues, the USA Patriot Act resurrected the philosophy of McCarthyism, simply substituting terrorist for communist.[1157] Nat Hentoff went further when he said, "This will be one of our severest tests yet to rescue the Constitution from our government."[1158] Here, certain questions are posed by some commentators that need urgent clarification from the Supreme Court. Sanford Levinson in his article, "What is the Constitution's Role in Wartime?" asks

[1151] See International PEN report "Anti-Terrorism, Writers and Freedom of Expression: A Pen Report," which surveys 35 countries worldwide where anti-terrorism measures have been implemented since September 11. p. 12-13, 14. URL <http://www.pen.org/freedom/antiterror2003.htm>

[1152] The law allows the police to obtain information about private Internet communications under a relaxed standard of review. The statute also allows the government to obtain private information, including student records, without judicial review. See Hentoff, N., "Why Should We Care? It's Only the Constitution," *The Progressive,* 65(12), Dec 2001, p. 27; Cole, D., "National Security State," *The Nation,* Dec. 17, 2001.

[1153] See International PEN report (2003) p. 16.

[1154] Hudson, D., "The First Amendment: A Wartime Casualty?" (2002).

[1155] Hilden, J., "September 11, The First Amendment, and the Advocacy of Violence." (2001).

[1156] See the National Coalition Against Censorship webpage. It creates index so that those concerned with free expression will have one location that catalogues the various incidents of censorship and suppression of speech that are a direct result of the events of September 11th. <http://www.ncac.org/issues/freeex911.cfm>

[1157] Cole, D., "National Security State." (2001).

[1158] Hentoff, N., in *The Progressive* (2001) op. cit. p. 27.

whether today's Supreme Court would be as protective of a vocal supporter of Osama Ibn Laden. What if the speaker were a Muslim resident alien identified with a radical Islamic fundamental group? And what if the speech were given to other members of the same radical group- calling for participation in a "jihad" against a hated United States?"[1159] Julie Hilden asked interesting and difficult questions: After September 11, should we still live by the same rules? Does the vocal but "abstract" al Qaeda supporter deserve First Amendment protection? Would it betray or vindicate our First Amendment traditions to provide such protection? Is speech that advocates violence at the centre of the First Amendment, or at its periphery?[1160]

The major player in relation to this issue, in my view, still, is the Supreme Court. I still believe that there is a great opportunity for the Supreme Court to return to, or to continue, its major role in preserving the "system of freedom of speech" that has been built through significant steps over the Court's history. This can be done only through reemphasis, nowadays more than at any time before, on the *Brandenburg* test as the *only* legitimate ground for interference with speech inciting to unlawful acts or terrorist acts. In doing so, on the one hand, we will ensure that any speech that (1) advocates terrorist acts; (2) and whose advocacy makes the imminent occurrence of such acts highly probable, can be regulated (both requirements apply on Ibn Laden's speech in Al-Jazeera.) On the other hand, this will provide the highest protection for political speech. It is well known that the *Brandenburg* test formulated in that decision was designed to protect political speech; this form of speech has been regarded as the most valuable type of expression throughout the history of First Amendment jurisprudence because it enables an informed electorate to make proper decisions.[1161]

Thus, a threat which is extremely unlikely to become reality, but is also extremely grave, does not justify suppressing speech under the *Brandenburg* test. A mere advocacy of al-Qaeda's operations, without direct attempts to engage in or bring about such actions, thus, should not be regulated. This is because the *Brandenburg* test allows individuals to take any abstract position they would like with respect to a particular conflict- even a position advocating the necessity of violence- and argue strenuously for their position, without fearing or facing a penalty. A weaker advocacy test than *Brandenburg*'s would cause far-reaching, chilling effects on the rights of free speech and press and as some have argued, might, for example, allow the government to restrict

[1159] Levinson, S., "What is the Constitution's Role in Wartime?" (2001).
[1160] Hilden, J., "September 11, The First Amendment, and the Advocacy of Violence." (2001).
[1161] Fagan, B., (2000) op. cit. p. 618.

the freedom of speech of those who have suggested that the United States somehow deserved the September 11 attacks, such as Professor Ward Churchill or those who have criticized the U.S.'s response in Iraq and Afghanistan.[1162] Ward Churchill is well known for his inflammatory remarks calling the victims of 9-11 "little Eichmanns", a reference to Adolf Eichmann, who organized Nazi plans to exterminate Europe's Jews. In an essay written after the September 11 attacks, Churchill wrote, "The men who flew the missions against the WTC and Pentagon were not "cowards." That distinction properly belongs to the "firm-jawed lads" who delighted in flying stealth aircraft through the undefended airspace of Baghdad, dropping payload after payload of bombs on anyone unfortunate enough to be below -including tens of thousands of genuinely innocent civilians- while themselves incurring all the risk one might expect during a visit to the local video arcade. Still more, the word describes all those "fighting men and women" who sat at computer consoles aboard ships in the Persian Gulf, enjoying air-conditioned comfort while launching cruise missiles into neighbourhoods filled with random human beings. Whatever else can be said of them, the men who struck on September 11 manifested the courage of their convictions, willingly expending their own lives in attaining their objectives."[1163] In an interview with Denver station KCNC-TV, Churchill said he was not an advocate of violence.[1164] However, though speech such as Professor Ward Churchill's escapes prosecution under the *Brandenburg* test, this does not immunise his speech from being restrained under hate speech, whenever the offence principle requirements are fulfilled.

VI.2.3. Preferred Position Approach

This approach, as explained previously, assumes that when one of those other freedoms or rights such as freedom of privacy, or right to a fair trial contradicts with freedom of speech, the court should give the latter freedom a preferred position relative to all other rights. This means that the court will presume that any attempt by the government to suppress freedom of expression is unconstitutional unless it can meet the "heavy burden" of proof that free speech is outweighed by other interests (e.g., fair trial.) In other words, this fundamental right, as a corollary consequence of this approach,

[1162] Hilden, J., "September 11, The First Amendment, and the Advocacy of Violence." (2001).
[1163] The essay was expanded into a full-length book of Ward Churchill: *On the Justice of Roosting Chickens: Reflections on the Consequences of U.S. Imperial Arrogance and Criminality*, (AK Press, 2003).
[1164] See CNN report, CNN web page, "Professor Resigns after 9/11 essay prompts protests", 31-01-2005, at <http://www.cnn.com/2005/US/01/31/Professor.resigns.ap/>

deserves a strict scrutiny or show of compelling reason why any government would ever trample over it. McKay, speaking more generally, has mentioned a variety of devices that make up the preferred position concept. According to McKay,

> [T]here are a variety of devices, to be employed separately or in combination, which enable the courts to express the constitutionally mandated preference for freedom of speech and thought. Among these are the clear and present danger test; narrowing of the presumption of constitutionality; strict construction of statutes to avoid limitation of first amendment freedoms; the prohibitions against prior restraint and subsequent punishment; relaxation of the requirement of standing to sue where first amendment issues are involved; and generally higher standards of procedural due process where these freedoms are in jeopardy.[1165]

The preferred position approach, as DeCew says, has historically been viewed as a special and preferred democratic value in the United States, by the public as well as by the legislatures and courts.[1166] According to Justice Benjamin Cardozo in *Palko v. Connecticut*, "freedom of thought and speech" is "the matrix, the indispensable condition, of nearly every other form of freedom."[1167] The Supreme Court Justices have adopted this approach in several occasions.[1168] The Court, when had saw itself in a position of balancing multiple fundamental rights, often held First Amendment rights in a "preferred position" within the hierarchy of constitutional values. The phrase, however, was apparently first used in *Jones v. Opelika*. The Constitution, according to Chief Justice Stone, "by virtue of the First and the Fourteenth Amendments, has put those freedoms in a preferred position."[1169] In *Murdock v. Pennsylvania*, the Supreme Court remarked that "freedom of speech" is "in a preferred position."[1170] Justice Black in *Marsh v. State of Ala* stated that "[w]hen we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position."[1171] In *Thomas v. Collins*, the Court considered the constitutionality of legislation regulating individuals "delicate", especially "where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. That priority gives these liberties a sanctity and a sanction not permitting dubious

[1165] McKay, R., (1959) op. cit. p. 1184.
[1166] DeCew, J., (2004) op. cit. p. 81; S Gerber, S., (2004) op. cit. p. 24.23.
[1167] *Palko v. Connecticut*, 302 U.S. 319 (1937).
[1168] McKay, R., (1959) op. cit. p. 1189.
[1169] *Jones v. Opelika* 316 U.S. 584 (1942).
[1170] *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).
[1171] *Marsh v. State of Ala*, 326 U.S. 501 (1946).

intrusions."[1172] In *Prince v. Massachusetts*, the court ruled that first amendment freedoms "have preferred position in our basic scheme."[1173]

Here, a very logical question might come to mind: what is, then, the difference between the absolute test, adopted by Justice Black, and the preferred position approach, if freedom of speech always should be preferred? One of the major differences is found in Justice Black's opinion in the case *Konigsberg v. California*. In dissenting from the Court's opinion, Black expressed very clearly his view towards "the doctrine that permits constitutionally protected rights to be "balanced" away whenever a majority of this Court thinks that a State might have interest sufficient to justify abridgment of those freedoms. In his words, "I do not subscribe to that doctrine for I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field."[1174] Elsewhere he was very plain in refusing the balancing test when he said, "I do not agree that laws directly abridging First Amendment freedoms can be justified by a congressional or judicial balancing test."[1175] In short, the absolute view sees that there is no room for balancing between freedom of speech and any other substantial interests. The situation is to some extent different when one talks about the preferred position because the concept of preferred position, according to McKay, "implies a balancing of the preferred freedom at issue against any other interest which stands in opposing counterbalance."[1176] This is in theory, but in practice, one can see that there is no big difference, because the result of the balancing interests will always be in favour of free speech. What proves this conclusion is that absolutists such as Justice Black have often used preferred position in reaching the same result that they would reach if they used the absolute test. In *March v. Alabama*, for example, Black referred to the preferred position of freedom of speech in order to reverse the criminal punishment of a person who undertook to distribute religious literature on the premises of a company-owned town, contrary to the wishes of the town's management. Black said in his opinion, "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of

[1172] *Thomas v. Collins*, 323 U.S. 516 (1945).
[1173] *Prince v. Massachusetts*, 321 U.S. 158 (1944).
[1174] *Konigsberg v. California*, 366 US 36 (1961)
[1175] *Barenblatt v. United States*, 360 US 109 (1959).
[1176] McKay, R., (1959) op. cit. p. 1193-4.

the fact that the latter occupy a preferred position."[1177] So, the same criticism which are directed to absolute approach can be directed to preferred position approach. Justice Frankfurter was one of the strongest opponents to this approach, who deny that he First Amendment is to be preferred.[1178] He believes that the language which has uncritically crept into some recent opinions of this Court is a mischievous phrase because it may subtly imply that any law touching communication is infected with presumptive invalidity.[1179] What can be said here is that preferred position approach constitute a contradictory point between the American law of freedom of speech and international law which when dealing with free speech cases, gives more consideration to the values and principles, which recognized and protected under international law, such as human dignity, protection against racial incitement or group libel.

VI.3. Chapter Summary

Though free speech law in the U.S., represented in the First Amendment, protects wide range of speech, it is not absolute. The above discussion showed that if the First Amendment was reconstituted, its provision would be: No branch of government, federal, state, or local, shall abridge freedom of speech or of the press except (1) when speech presents a direct and imminent danger of inciting unlawful conduct; (2) contains obscenity or is sexually explicit (albeit not obscene) and readily available to children; and (3) constitutes a threat to national security.[1180] The reverse is also true; unless the speech falls within one of these established categories, it is simply not open to the government to argue that the speech should be suppressed because of its harmful content. This equation has given the right to free speech a preferred position over other values and principles such as equality and human dignity. As a clear and direct consequence of this preferred position which is given to freedom of speech, hate speech, as an obvious example of harmless offensive speech which escapes prosecution under the harm principle, is prohibited, or at least is regulated, by many international legal provisions such as ICCPR at Article 20, and finally in continental Europe, while under the American law, it is not within the categories of restricted speech though it undermines individuals' rights to equal concern and respect.[1181] Likewise, blasphemous

[1177] *Marsh v. Alabama*, 326 U.S. 501 (1946).
[1178] See *Ullmann v. United States*, 350 US 422 (1956); *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)
[1179] *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949).
[1180] Weaver, R., and Donald E. Lively, (2003) op. cit. p. 14.
[1181] Richards, D., (1989) op. cit. p. 182.

speech is not prohibited under the American law of free speech. This is, undoubtedly, the significant influence of Mill's harm principle, which tells that any doctrine should be allowed the light of day, no matter how immoral it may seem to everyone else, except that which causes harm to others. This principle, as shown above, has played a major role in setting boundaries for freedom of speech in the American law of freedom of speech, in contrast with international law of freedom of speech, where the offence principle, and sometimes democratic value principle, defines the limitations of freedom of speech equally with the principle of harm. The above discussion demonstrates that most of the classic exceptions to freedom of speech, as established by the U.S. Supreme Court, are consistent with this harm principle. The harm principle, for example, is a main factor in establishing the judicial test, 'categorisation'. Harmful speech such as speech that tends to incite an immediate breach of the peace or to threatens national security, and counsel to murder, are the main unprotected speech categories. The clear and present danger test is another legal formula for a philosophical harm principle. There is an obvious similarity between Mill's corn-dealer example and the American clear and present danger test.

The discussion of American free speech also reveals that it is obsessed with categorisation. The categorical approach, as mentioned above, is often referred to as a judicial test set by the Supreme Court of the U.S. in order to determine the scope of free speech protection "by reliance on broad and abstract classifications of protected or unprotected speech." There are certain categories of speech of which the Court said, that no Court could regard them as protected by any constitutional right; thus it is appropriate for the government not to censor them. The judicial attitude in international law, as the following chapter will illustrate, is somewhat different. It has been that of balancing between equally recognized rights, values and interests, as they are affirmed in the ICCPR or ECHR themselves, or elsewhere.

Chapter Seven

VII. Freedom of Speech Limitations in International Free Speech Law

VII.1. The System of Limitations

Freedom of expression is among the most important of the rights guaranteed by international human rights law, in particular, as Chapter Four showed, because of its fundamental role in underpinning democracy. The ICCPR, taking the wording of the Universal Declaration almost intact into its Article 19, provides: "Everyone shall have the right to freedom of expression." However, freedom of expression, according to this article, is not an absolute right like, for instance, the prohibition on torture but rather it is a qualified right.[1182] Paragraph 3 stated that:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

This means that international law, in contrast to American law, does expressly permit some restrictions on the right to freedom of expression and information in order to protect the private and public interests listed in paragraph 3 of Article 19 of the ICCPR.[1183] Indeed, the explicit mention of duties associated with freedom of expression in Article 19 -a clear allusion to the dangers of unbridled exercise of the right- is unique in the list of rights in ICCPR. Paragraph 3 of Article 19, therefore, has been used by judges as a guide in determining limits to freedom of expression. In its interpretation of this language, the HRC has stated, "It is the interplay between the principle of freedom of expression and such limitations and restrictions which determines the actual scope of the individual's right."[1184] The HRC also noted in its General Comment (10) that permissible restrictions on the right to freedom of expression "may relate either to the

[1182] Article 7 states "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."
[1183] Joseph, S., Jenny Schultz, and Melissa Castan, (2004) op. cit. p. 517; Conte, A., (2004) op. cit. p. 59; Bair, J., (2005), op. cit. p. 92; Callamard, A., "Freedom of speech and offence: why blasphemy laws are not the appropriate response", *Equal Voices*, Issue 18, June 2006, p. 7-13, online at <http:/ eumc.europa.eu/eumc/material pub ev ev18/ev-18.pdf>
[1184] Human Rights Committee, General Comment 10.

interests of other persons or to those of the community as a whole."[1185] However, the right is further qualified by Article 20 which prohibits war propaganda, incitement to violence and certain forms of hate speech. ICCPR here provides a compulsory restriction on this type of speech.[1186]

Similar to ICCPR, in the context of the ECHR, freedom of expression may be subject to limitations prescribed by law. European states, while designing Article 10 of the Convention, perceived a need to delimit the scope of rights that, if taken literally, would have unlimited breadth, and thus paid careful attention to the need to design the rights so as simultaneously to ensure their effective protection and also to provide appropriate breathing room for a multiplicity of important countervailing interests.[1187]A cursory reading of Article 10, as Georg Nolte says, gives the impression of an overly cautious if not restrictive approach to freedom of expression.[1188] Paragraph (2) of Article 10 reads:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

It can be said, then, that freedom of expression in the international law is a classic qualified right which should be balanced with other competing interests. This means that, unlike the law of freedom of speech in the U.S., the ICCPR and the ECHR do not adopt "the categorization approach," they do not begin their analysis by excluding different categories of speech from the protection. Rather, the ICCPR and ECHR prefer to distinguish different categories of expression within the last stage of their analysis, i. e. when assessing the proportionality of interference. To put it differently, while American freedom of speech doctrine, as Chapter Six of this study illustrated, is largely about categorization and about efforts to exclude categories of speech from any constitutional scrutiny, the approach in international human rights law is more straightforward about balancing freedom of expression interests against other social values.[1189] Under the ICCPR and the ECHR, there is an explicit authorisation of a

[1185] Human Rights Committee, General Comment 10
[1186] Joseph, S., Jenny Schultz, and Melissa Castan, (2004) op. cit. p. 517; Conte, A., (2004) op. cit. p. 518
[1187] Ovey, C., & Robin C.A. White, (2002) op. cit. p. 277; J. G. Merrills & A.H. Robertson, (2001) op. cit. p. 167; Schauer, F., (2005) op. cit. p. 17; Macovei, M., (2004) op. cit. p. 7.
[1188] Nolte, G., (2005) op. cit. p. 29.
[1189] Schauer, F., (2005) op. cit. p. 6.

process of balancing the interest in freedom of speech against other countervailing interests.[1190] For example, in the context of the ECHR, the balancing methodology is contained directly in Article 10(2), which precedes the foregoing list of approved countervailing interests with the statement that the freedom of expression, "since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society." The ECtHR adopted and employed an explicit balancing test under Article 10 in *Sunday Times v. United Kingdom*.[1191] This is similar to the situation in the context of the ICCPR, as the subsequent paragraph will examine. This means that the ICCPR and ECHR, or the non-American approach, appears explicitly to authorize a two-step process, in which the first step is to delineate the scope of the right, and then, if some activity or some governmental restriction falls within that scope, thereafter to determine whether the limitations are justified according to the designated burden of justification and the designated proportionality inquiry.[1192]

However, this does not mean that international law of free speech opens the gates widely for states to limit the right to free speech. On the contrary, limitations of this right must meet a strict test of justification.[1193] The HRC has consistently said that any restriction imposed on the right to freedom of expression must be required for the purpose of safeguarding one of the legitimate interests noted in Article 19(3).[1194] The State, therefore, has to be able to show that interference with the right is authorised by one or more of the stated grounds in the article at issue. For example, in the context of restricting the right to freedom of expression to prevent terrorism, the primary grounds for restriction are likely to be protecting national security and the rights of others.[1195] These limits to freedom of expression are subject to two overriding principles. First, the limits must be "provided by law." This means that the limit must be clearly spelt out in a law -one must know the extent of limits to one's right to freedom of expression and can only know that if the limit is imposed by law, rather than the arbitrary whim of a decision-maker. The limiting law must satisfy certain characteristics- it must be accessible, sufficiently circumscribed and clear, predictable in application, and

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[1190] Schauer, F., (2005) op. cit. p. 6.
[1191] *The Sunday Times v. United Kingdom* (No 1) 6538/74 [1979] ECHR.
[1192] Schauer, F., (2005) op. cit. p. 7.
[1193] *Kim v. Republic of Korea*, CCPR/C/64/D/574/1994; *Ross v. Canada* CCPR/C/70/D/736/1997; *Laptsevich v. Belarus*, CCPR/C/68/D/780/1997. See Bair, J., *The International Covenant on Civil And Political Rights And Its (First) Optional Protocol* (Peter Lang Pub Inc, 2005) p. 89, 92.
[1194] *Womah Mukong v. Cameroon*, CCPR/C/51/D/458/1991; *Pietraroia v. Uruguay*, 44/1979, U.N. Doc. CCPR/C/OP/1 at 76 (1984).
[1195] Office for Democratic Institutions and Human Rights, (2006) op. cit. p.11.

prospective rather than retrospective. Vaguely worded edicts with potentially very broad application, accordingly, will not meet this standard. This is, according to Georg Nolte, comparable to the twin notions of over-breadth and vagueness in the American law, mentioned previously.[1196] Secondly, the limit must also be 'necessary.' This is also comparable to the notion of strict scrutiny in the American law (the restriction should serve to promote a compelling interest, it should be narrowly tailored to achieve that goal or interest, and it must be the least restrictive means for achieving that interest.)[1197] That little word 'necessary' imports a notion of proportionality. The limiting measure must be 'necessary' to achieve one of the ends in 19(3) (a) and (b.)[1198] Accordingly, the HRC, where a state seeks to justify limitations as falling within the ambit of paragraph 3, requires the State party to demonstrate in specific fashion the precise nature of the threat to any of the enumerated purposes caused by certain types of speech, as well as why restricting such speech is necessary. In the absence of such justification, a violation of Article 19, paragraph 2 will be made out.[1199] Very recently, the HRC emphasised that "any restriction of the freedom of expression ... must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraphs 3 (a) and (b) of article 19 and it must be necessary to achieve the legitimate purpose."[1200] In *Womah Mukong v. Cameroon*, the author claimed a violation of his right to freedom of expression and opinion, as he was prosecuted for his advocacy of multi-party democracy and the expression of opinions inimical to the State party's government. The State party replied that restrictions on the author's freedom of expression were justified under the terms of Article 19, paragraph (3.) The HRC considered that the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights; in this regard, the question of deciding which measures might meet the "necessity" test in such situations does not arise. In the circumstances of this case, the HRC concluded that there had been a violation of Article 19 of the ICCPR.[1201] On the contrary, the HRC, in

[1196] Nolte, G., (2005) op. cit. p. 29.
[1197] Winkler, A., "Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts", *Vanderbilt Law Review* 59 (2006) p. 793.
[1198] General Comment, 25.
[1199] See in this regard, *Kim v. Republic of Korea*, 574/1994; *Laptsevich v. Belarus*, CCPR/C/68/D/780/1997; *Pietraroia v. Uruguay*, 44/1979; *Hak-Chul Shin v. Republic of Korea CCPR/C/80/D/926/2000*; *Tae Hoon Park v. Republic of Korea* CCPR/C/64/D/628/1995; *Keun-Tae Kim v Reoublic of Korea* CCPR/C/64/D/574/1994; *Ballantyne v. Canada*.
[1200] *Philip Afuson Njaru v. Cameroon*, CCPR/C/89/D/1353/2005.
[1201] Womah *Mukong v. Cameroon*, 458/1991.

Ross v. Canada, as an example of hate speech, observed that the restriction on the right to freedom of expression of the author met cumulatively the conditions set out in paragraph (3) of Article 19 of the ICCPR, and thus found no violation of the Article 19.[1202]

What can be said about the ICCPR, that restrictions on freedom of expression must pass the above so-called three-part test, can also be said when talking about ECHR.[1203] The balancing inquiry described in *Sunday Times* is three-tiered; failure at any tier renders the restriction unconstitutional in light of the Convention.[1204] First, the court must ask whether the interference was "prescribed by law."[1205] If so, the inquiry turns to whether the interference had aims that are "legitimate under Article 10(2)."[1206] Finally, the court asks whether the interference was "necessary in a democratic society."[1207]

1) Whether such interference has been "prescribed by law": it means that a restrictive measure should have a basis in domestic law that must be adequately accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful.[1208] For example, in a case regarding a journalist convicted for defamation, the crime of defamation must be provided for in the national law. Or, where prohibition of publication or seizure of the means by which an expression is disseminated -such as books, newspapers or cameras- are ordered or enforced, such measures have to rely on national legal provision.[1209]

2) Whether the interference has served one of the "legitimate aims" which is mentioned in 10(2.) It is worth noting that the catalogue of possible restrictions is limited. Domestic authorities may not legitimately rely on any other ground falling outside the list provided for in second paragraph. Therefore, as said, where called to enforce a legal provision which in any way would interfere with the freedom of expression, the national courts must identify the value or interest protected by the

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[1202] *Ross v. Canada* 736/1997.
[1203] Similarly, in the African law of free speech, "1. No one shall be subject to arbitrary interference with his or her freedom of expression. 2. Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society." See the resolution on the adoption of the Declaration of Principles on Freedom of Expression in Africa by the African Commission on Human and Peoples' Rights, meeting at its 32nd Ordinary Session, in Banjul, the Gambia, from 17th to 23rd October 2002.
[1204] *The Sunday Times v. United Kingdom* (No 1) 6538/74 [1979] ECHR 1.
[1205] *Ibid.*
[1206] *Ibid.*
[1207] *Ibid.*
[1208] *The Sunday Times v. United Kingdom* (No 1) 6538/74 [1979] ECHR 1; *Muller v. Switzerland*, 10737/84 [1988] ECHR 5; *Goodwin* v. *United Kingdom*, 17488/90 [1996] ECHR 16; *Markt Intern Verlag Gmbh and Klaus Beermann v. Germany* 10572/83 [1989] ECHR 21. See Alastair Mowbray, (2007) op. cit. p. 693-694; Beddard, R., (1993) op. cit. p. 181; Clements , L., (1994) op. cit. p. 172-3.
[1209] Macovei, M., (2004) op. cit. p. 30.

respective provision and check if that interest or value is one of those enumerated in paragraph (2.) These legitimate aims include, *inter alia*, national security, public safety, prevention of crime, protection of health or morals, and the protection of the reputation or rights of others. The following sections discussion will discuss some of these restrictions in depth.[1210]

3) Whether the interference has been "necessary in a democratic society": It means that where the domestic courts are satisfied that a legitimate aim underlies an interference with freedom of expression, they must then decide whether such interference is "necessary in a democratic society."[1211] The test for ensuring that the restriction is "necessary in a democratic society" requires a balancing act to be made by the Court in its assessment of the rights of the individual to freedom of expression on the one hand and State or community interests, cited above, on the other. In order to make that assessment, the Court asks the government to justify its actions by demonstrating that the interference is necessary in a democratic society.[1212] Different decisions have set out several criteria for determining the meaning of the words "necessary in a democratic society." These criteria, according to some, can be classified as follows:

a) The need for restrictions must be convincingly established.[1213]

b) The adjective "necessary" implies the existence of a "pressing social need."[1214] Thus, restrictions are deemed "necessary in a democratic society" if they answer "a pressing social need."[1215] In determining whether a restriction is necessary, the ECtHR has granted the parties to the Convention a measure of discretion, a so-called 'margin of appreciation,'[1216] which is, according to a former president of the Commission and the

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1210 *Ibid* p. 34-35.

1211 Greer, S., The *European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press, 2007) p. 258. Macovei, M., (2004) op. cit. p. 34-35.

1212 Kilroy, C., Protecting Freedom of Expression: Article 10, European Convention on Human Rights, p. 6, Chambers, M., (Based on a talk by Jonathan Cooper, Doughty Street Chambers), online at < http://www.abgm.adalet.gov.tr/Kilroy.pdf >

1213 *Tolstoy Miloslavsky v. the United Kingdom*, - 18139/91 [1995] ECHR 25.

1214 *Handyside* v. *United Kingdom*, 5493/72 [1976] ECHR 5. *The Sunday Times v. United Kingdom* (No 1) 6538/74 [1979] ECHR 1.

1215 *Observer and Guardian v. United Kingdom*, 13585/88 [1991] ECHR 49.

1216 *Handyside* v. *United Kingdom*, 5493/72 [1976] ECHR 5. For more about margin of appreciation doctrine see Mowbray, A., (2007) op. cit. p. 694-700; Yourow, H., *The Margin of Appreciation Doctrine in the Dynamics of the European Court of Human Rights Jurisprudence* (London, New York, The Hague: Martinus Nijhoff Publishers, Kluwer Press, 1996); Ostrovsky, A., "What's So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals" *Hanse Law Review*. 1 (2005) p. 47; Clayton, R., and Hugh Tomlinson., *The Law of Human Rights*, vol. 1 (Oxford: Oxford University Press, 2000) pp. 273-278; Ghandhi, P., *The Human Rights Committee and the Right of Individual Communication: Law and Practice* (Aldershot: Ashgate, 1998) pp. 311-314.

Court, "one of the more important safeguards developed by the Commission and the Court to reconcile the effective operation of the Convention with the sovereign powers and responsibilities of the governments in democracy."[1217] The doctrine is defined as "the line at which international supervision should give way to a State Party's discretion in enacting or enforcing its laws."[1218] The Court grants this variable discretion to national authorities when examining whether a State has violated an applicant's Convention rights under Article 8-11.[1219] Although this doctrine is not formally mentioned anywhere in the ECHR; and there is no textual basis for it, the Strasbourg institutions, in contrast to HRC's interpretation of ICCPR, have read the doctrine into the exceptions already built into the Convention, and have made the consideration of a margin of appreciation a crucial part of interpreting the exceptions.[1220] The Court uses the doctrine to determine in which issues the interpretation of fundamental rights according to the cultural traditions of an individual State is allowable, and which issues are so essential that all States have to meet the same prerequisites.[1221] It has allowed states such a margin of appreciation on the basis that they are in a better position to determine whether a restriction is necessary in the light of local circumstances.[1222] However, this goes hand in hand with European supervision, which extends to both the legislation and the decisions applying it, even those given by independent courts.[1223]

In practice, the latitude allowed to national governments varies from case to case, depending on many factors. Emphasising this point and reviewing the Court's application of the margin of appreciation, Judge Macdonald says, "The exact width of the margin of appreciation in any particular case is difficult to specify in advance."[1224] The width of the margin of appreciation depend firstly on the circumstances of the case in question,[1225] and secondly, and largely, on the purpose and nature of the limitation and of the expression in question.[1226] Thirdly, the standard of review varies according to

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[1217] Waldock, H., "The Effectiveness of the System set up by the European Convention on Human Rights." *Human Rights Law Journal* 1 (1980) p. 9; Mahoney, P., "Marvellous Richness of Diversity or Invidious Cultural Relativism", *Human Rights Law Journal* 19 (1998) p. 3.
[1218] See Yourow, H., (1996) op. cit. p. 13.
[1219] Yourow, H., (1996) op. cit. p. 195-196. Greer, S., (2007) op. cit. p. 257-274; Mowbray, A., (2007) op. cit. p. 630; Janis, M., and Richard S. Kay, (1990) op. cit. p. 244.
[1220] Greer, S., (2007) op. cit. p. 222. Ostrovsky, A., (2005) op. cit. p. 491; Janis, M., Richard Kay, Anthony Bradley, (2000) op. cit. p. 146-148.
[1221] Ostrovsky, A., (2005) op. cit. p. 47. Mahoney, P., (1998) op. cit. p. 3.
[1222] *Handyside* v. *United Kingdom*, 5493/72 [1976] ECHR 5.
[1223] *Ibid.*
[1224] Judge MacDonald cited in Janis, M., Richard Kay, Anthony Bradley, (2000) op. cit. p. 156.
[1225] Macovei, M., *Freedom of expression: A guide to the implementation of Article 10 of the European Convention on Human Rights*, 2nd edition (Human rights handbooks No. 2. Council of Europe, 2004) p. 6.
[1226] Ovey, C., & Robin C.A. White, (2002) op. cit. p. 278.

the category of speech at issue. Focusing on the category of expression, political speech is generally afforded the highest level of protection,[1227] even when it sometimes uses violent terminology or contains fighting words,[1228] followed by artistic expression,[1229] and lastly commercial expression.[1230] This preference for political speech can be demonstrated through examining cases involving political speech in which the doctrine of the 'margin of appreciation' has been drawn more narrowly in comparison with cases involving morals and commercial expression.[1231] States enjoy considerable discretion to restrict freedom of speech in cases involving morality (because of cultural diversity)[1232], and commercial speech (because there is a recognised need to protect commercial and confidential information, and also preventing unfair competition has been accepted as pursuing a legitimate aim for protecting the rights of others).[1233] The ECtHR stresses that 'there is little scope' for restrictions under Article 10(2) of the ECHR, with regard to political speech.[1234] The Court, in *Wingrove v. UK*, distinguished between freedom of political speech and freedom of expression that likely to offend the religious convictions of others: "Whereas there is little scope under Article 10 (2)....for restrictions on political speech or on debate of questions of public interest ... a wider margin of appreciation is generally available to the contracting States when regulating freedom of expression in relation to matters liable to defend intimate personal convictions within the sphere of morals or, especially, religion."[1235]

However, under the margin of appreciation doctrine, the standard of review varies not only according to the category of speech; other factors, such as the uniformity or

[1227] *Lingens* v. *Austria*, - 9815/82 [1986] ECHR 7; *Castells v. Spain* 11798/85 [1992] ECHR 48; *Incal v. Turkey* - 22678/93 [1998] ECHR 48; *Ceylan v. Turkey* - 23556/94 [1999] ECHR 44; *Oberschlick* v. *Austria*, -11662/85 [1991] ECHR 30. See Harris, O'Boyle, Warbrick, (1995) op. cit. p. 397; Jacq and Teitgen, 'The Press', in Delmas-Marty (1992) op. cit. p. 66.
[1228] *Ceylan v. Turkey* - 23556/94 [1999] ECHR 44.
[1229] See for example, *Muller v. Switzerland,* 10737/84 [1988] ECHR 5; *Otto-Preminger Institute v. Austria*, 13470/87 [1994] ECHR 26; *Wingrove v. the United Kingdom* - 17419/90 [1996] ECHR 60.
[1230] *Markt Intern Verlag Gmbh and Klaus Beermann v. Germany*- 10572/83 [1989] ECHR 21; *Hertel v. Switzerland,* -25181/94 [1998] ECHR 77. See Dijk, P., & G. J. H. van Hoof,, *Theory and Practice of the European Convention on Human Rights* (The Hague, Kluwer Law International, 1998) 559; Rich, S., "Commercial Speech in the Law of the European Union: Lessons for the United States?" *Federal Communications Law Journal* 51 (1998) p. 263.
[1231] Ovey, C., and Robin C.A. White, (2002) op. cit. p. 279; Hugenholtz, B., (2000) op. cit. p. 5-6.
[1232] Mahoney, P., (1998) op. cit. p. 3.
[1233] *Markt Intern Verlag Gmbh and Klaus Beermann v. Germany*- 10572/83 [1989] ECHR 21; *Hertel v. Switzerland,* -25181/94 [1998] ECHR 77; *Jacubowski v. Germany*, 15088/89 [1994] ECHR 21.
[1234] For a recent case, see *Dichand and Others v. Austria*, Judgment of 26 February 2002, Application No. 29271/95. See Ovey, C., and Robin C.A. White, op. cit. p. 279; P. Hugenholtz, B., (2000) op. cit .p. 6; Mahoney, P., (1998) op. cit. p. 3.
[1235] *Wingrove v. the United Kingdom* - 17419/90 [1996] ECHR 60. See Taylor, P., "The basis for departure of European standard under Article 9 of the European Convention on Human Rights from equivalent universal standards", The Durham Research Postgraduate Conference, published in Web Journal of Current Legal Issues in association with Blackstone Press, *Web, JCLI* 5 (2001).

divergence of state practice, also play an important role.[1236] The application of this doctrine changes where there is consensus within the ECHR membership on whether the activity in question is included within the rights protected in the Convention. The ECtHR tends to apply a narrow margin of appreciation where there is a broad consensus observed within the Convention community on the subject in question, and the reverse is also true; the court will expand the deference offered to the margin of appreciation when it observes that there is limited consensus on a particular right or practice within the Convention community. This explains the reason why the Turkish authorities were given a wide margin of appreciation in *Sahin v. Turkey*, a case which involved laws banning headscarves in public institutions in Turkey. Sahin, an Austrian Muslim, as a result of application of these laws, was prevented from wearing a headscarf while attending a public medical school in Istanbul. The Turkish government based this action on judgments by Turkey's Constitutional Court and Supreme Administrative Court, both of which referred to the Turkish Constitution's prohibition on mixing politics and religion and the establishment in the constitution of Turkey as a democratic, secular state. The applicant brought claims in the ECtHR that her right under Article 9 of the ECHR (which guarantees freedom of religion) had been violated.[1237] The ECtHR found that the measures undertaken by the Turkish (to protect the secular state) fell under the legitimate aim in Article 9(2) of maintaining public order. The court applied a broad margin of appreciation, partially because there was little or no consensus within the ECHR community as to whether the right to wear a veil was included in the protections afforded by Article 9.[1238]

While the doctrine has its critics, it no doubt allows for "the sustenance of justifiable moral values of different societies through striking a balance between a right guaranteed... and a permitted derogation [or limitation]."[1239] According to Professor Merrills:

> The margin of appreciation is a way of recognising that the international protection of human rights and sovereign freedom of faction are not contradictory... In helping the international judge to

[1236] See Schokkenbroek, J., "The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights." *Human Rights Law Journal* 19 (1998) p. 34; Dijk, P., & G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3d edition (The Hague: Kluwer, 1998) p. 87.

[1237] Thus, the case concerns Article 9 more than Article 10. In other words, freedom of religion is the core of this case, not freedom of expression. However, the reason for discussing this case here is to clarify that margin of appreciation application depends also on the existence of the consensus observed within the Convention community on the subject in question.

[1238] *Sahin v. Turkey*, 31961/96 [2001] ECHR 551.

[1239] See Yourow, H., (1996) op. cit. p. 13.

> decide how and where the boundary is to be located, the concept of the margin of appreciation has a vital part to play.[1240]

c) The Court also has to judge whether the interference at issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it were "relevant and sufficient."[1241] In other words, when assessing the proportionality of the restriction in question, the Court examines whether the formalities, conditions, restrictions or penalties imposed on the exercise of freedom of expression are proportionate to the legitimate aim pursued, that is, the restriction should not be overbroad nor be permitted if a less restrictive alternative would serve the same goal.[1242] This means that the State may restrict certain rights up to a point, but not beyond what is necessary to protect the purpose of the restriction. This ensures that the rights of individuals will not be overburdened in return for social goods.[1243] This is called the principle of proportionality, which, though it is not mentioned in the text of the Convention itself, is the dominant theme in the Court's case law.[1244]

Where the Court finds that all requirements are fulfilled, the State's interference will be considered legitimate. The burden to prove that all requirements are fulfilled stays with the State, the same as the case of ICCPR. The Court examines the three conditions in the order provided above. Once the Court finds that the State fails to prove one of the requirements,[1245] it will not give the case further examination and will decide that the respective interference was unjustified, and therefore freedom of expression violated.[1246]

What the above points demonstrated is that the structure of free speech clauses in some Western countries, such as the American free speech law, differs from the structure of freedom of speech in Article 19 of the ICCPR and Article 10 of the ECHR. The tendency at the international level, and similarly, at regional level, especially after World War II, has been away from abstract statement, towards more detailed

[1240] Merrills, *The development of international law by the European Court of Human Rights*, 2nd ed (Manchester: Manchester University Press, 1993) p. 174-175.
[1241] *Handyside* v. *United Kingdom*, 5493/72 [1976] ECHR 5; *The Sunday Times v. United Kingdom* (No 1) 6538/74 [1979] ECHR 1.
[1242] *Lingens* v. *Austria*, - 9815/82 [1986] ECHR ; *Vogt v. Germany* -17851/91 [1995] ECHR; *The Sunday Times v. United Kingdom* (No 2) -13166/87 [1991] ECHR; *Fressoz and Roire v. France*, -29183/95 [1999] ECHR; *Sporrong and Lonroth v. Sweeden* - 7151/75 [1982] ECHR.
[1243] Ostrovsky, A., (2005) op. cit. p. 49.
[1244] *Sporrong and Lonroth v. Sweeden* - 7151/75 [1982] ECHR 5; *Information Lentia v. Austria*.- 37093/97 [2002] ECHR 785; *Tolstoy Miloslavsky v. the United Kingdom*, - 18139/91 [1995] ECHR 25. See in this regard, Macovei, M., (2004) op. cit. p. 35.
[1245] In *Rotaru v. Romania*, - 28341/95 [2000] ECHR 192, the Court found that the domestic law was not "law" because it was not "formulated with sufficient precision to enable any individual - if need with appropriate advice - to regulate his conduct".
[1246] Macovei, M., (2004) op. cit. p. 23.

formulations of freedom of speech. Article 19 of the ICCPR and Article 10 of the ECHR, as seen above, protect and restrict the right in a rather more detailed manner. This leads to a conclusion that demand for an absolute status for freedom of speech, which is confined basically to systems with no literal restrictions clause such as America's First Amendment, does not arise with the ICCPR and the ECHR, which include explicit limitations on free speech. This divergence among Western countries or between some Western countries and international law in the field of freedom of speech extends to the methodology of restricting freedom of speech. While the American free speech adjudication is obsessed with categorisation, the international law of freedom of speech, as the above discussion revealed, inclines to balance freedom of expression interests against other social values. However, the right to free speech differs across Western countries not only in its structure and in the methodology of restricting freedom of speech, but also in its substance, as the following lines aim to demonstrate.[1247]

VII.2. Limitations

VII.2.1. Freedom of Expression v. National security

Many states justify their repression of free speech under a broad interpretation of "national security." One problem arises with regard to this. Such restriction is applicable under the ICCPR only insofar as it is "necessary." The exception is intended as just that (an exception) and it has been interpreted as a narrow exception. Rather than being employed in exceptional circumstances, it appears that many states is in fact taking any expression of political opinion to automatically amount to a threat to the "national security." The HRC, however, as a clear implementation of theory of democracy, discussed previously in Chapter Four, is reluctant to allow restrictions on free expression for the purposes of national security, at least in the absence of detailed justifications by the State Party.[1248] It has recognised citizens' right to "take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organise themselves."[1249] It has said that "the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential" through "a free

[1247] Schauer, F., (2005) op. cit. p. 16-17.
[1248] Joseph, S., Jenny Schultz, and Melissa Castan, (2004) op. cit. p. 530.
[1249] General Comment 25.

press and other media that are able to comment on public issues without censorship or restraint."[1250]

The limitation of political speech on the basis of national security was considered by the HRC in several communications. In most of them, the HRC observed that the State party must demonstrate the necessity of limitations for the purpose of national security. As a consequence, any restriction on that right must be justified in terms of Article 19 (3), i.e. besides being provided by law it also must be necessary for the protection of national security.[1251] In *Hak-Chul Shin v. Republic of Korea*, discussed above, the Committee rejected the State's claim that the mere picture "constitutes threat to the security and country or the free and democratic order" because the state failed to demonstrate that the conviction was necessary for purposes of national security, as required under article 19, paragraph 2, to justify an infringement of the right to freedom of expression[1252] In *Jeong-Eun Lee v. Republic of Korea*, the Committee emphasised that the State party must demonstrate that the restriction imposed on freedom of expression is in fact necessary to avert a real, and not only hypothetical danger to the national security.[1253] In *Mpaka-Nsusu v. Zaire*, the author presented his candidacy for the presidency of the Government Party and, at the same time, for the presidency of Zaire in conformity with existing Zairian law. His candidacy, however, was rejected. On 1 July 1979, he was arrested and detained without trial. The author claimed that he was a victim of persecution because of his political activities as leader of PANAFE. The HRC, taking into account the failure of the State party to provide any justification for this suppression, found a violation of Article 19 where any form of reprisal is made upon those expressing protect against a government's policies.[1254] In the previously mentioned communication, *Womah Mukong v. Cameroon*, the HRC found persecution for advocacy of multi-party democracy and an expression of opinions inimical to a state party's government violates the right to freedom of expression.[1255] The same decision was taken in *Dergachev v Belarus*, and *Pietraroia v. Uruguay*,[1256] which concerned speech that threatens the national security. The HRC considered that the conviction of the author for expression of his views amounted to a violation of his rights under Article

[1250] General Comment 25.
[1251] *Hak-Chul Shin v. Republic of Korea* 926/2000; *Tae Hoon Park v Republic of Korea* 628/1995; *Keun-Tae Kim v Reoublic of Korea* 574/1994; *Chiiko Bwalya v. Zambia*, CCPR/C/48/D/314/1988.
[1252] *Hak-Chul Shin v. Republic of Korea* 926/2000.
[1253] *Jeong-Eun Lee v. Republic of Korea*, CCPR/C/84/D/1119/2002.
[1254] *Andre Alphonse Mpaka-Nsusu v. Zaire* 157/1983.
[1255] Womah *Mukong v. Cameroon*, 458/1991.
[1256] *Pietraroia v. Uruguay*, 44/1979.

19 of the ICCPR because the State party, according to the HRC, not advanced that any of the restrictions set out in Article 19, paragraph 3, of the ICCPR were applicable.[1257]

In the above cases, as well in numerous other cases, for example *Kivenmaa v. Finland*;[1258] *Mpandanjila et al v. Zaire*;[1259] *Kalenga v. Zambia*;[1260] *Aduayom al v. Togo*;[1261] *Jaona v. Madagascar*;[1262] *Kim v. Republic of Korea*;[1263] *Sohm v. Republic of Korea*;[1264] *Motta v. Uruguay*;[1265] *Kalenga v. Uruguay*;[1266] and *Lanza v. Uruguay*,[1267] the HRC through using the above criteria, has differentiated between expression that constitutes a threat to national security and expression characterised as merely political speech. The HRC has recognised the importance of citizens being able to "criticize or openly and publicly evaluate their Governments without fear of interference or punishment, within the limits set by article 19, paragraph 3."[1268] In most of the above mentioned cases, rather than being employed in exceptional circumstances, states have in fact taken expression of political opinion to automatically amount to a threat to the "national security." Therefore, whenever there is no indication that the authors' activities represented a threat to the rights and the reputation of others, or to national security or public order, the HRC's opinion is that there is a violation of article 19 of the ICCPR.[1269]

In the context of the ECHR, the Strasbourg institutions emphasised that no restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. Accordingly, a government's claim, in *Vereniging Weekblad bluf! v. the Netherlands*, that national security should prevail over freedom of expression was rejected by the ECtHR.[1270] Several cases discussed above, such as *Lingens* v. *Austria*,[1271] *Oberschlick* v. *Austria*,[1272] *Bowman v. United Kingdom*,[1273] *Ozgur Gundem v. Turkey*,[1274] and those

[1257] *Dergachev v Belarus*, (2004.
[1258] 412/1990.
[1259] 138/1983.
[1260] 326/1988.
[1261] 422-424/1990.
[1262] 132/1982
[1263] 574/1994.
[1264] 518/1992.
[1265] 628/1995.
[1266] 33/1978.
[1267] 8/1977.
[1268] *Aduayom et al. v. Togo*, 422/1990, 423/1990 and 424/1990.
[1269] *Ibid*.
[1270] *Vereniging Weekblad bluf! v. the Netherlands*, 16616/90 [1995] ECHR 3.
[1271] *Lingens* v. *Austria*, - 9815/82 [1986] ECHR 7.
[1272] *Oberschlick* v. *Austria*, -11662/85 [1991] ECHR 30.

which will be examined while studying defamatory statements against politicians, such as *Oberschlick (No. 2)*[1275] and *Lopes Gomes da Silva v. Portugal*,[1276] demonstrate the preferred position that is given to political speech. It is necessary, in the view of the Strasbourg institutions, to distinguish between the publication of views that incite or might incite violence on the one hand and the publication of views that are intransigent and convey unwillingness to compromise with the authorities, on the other.[1277] In *Incal v. Turkey*, the applicant, an active member of a local section of a Turkish party, distributed leaflets describing the actions taken by the Turkish government towards the Kurds as "state terror" and "psychological war." The Turkish authorities confiscated these leaflets and convicted the applicant of attempting to "incite hatred and hostility through racist words." The Court did not share the government's views and found the applicant's criticism did not appear to contain any "incitement to the use of violence, hostility or hatred between citizens." Instead, the Court emphasised the particular importance of free expression for political parties and their active members. Therefore, it considered the applicant's conviction and confiscation of the leaflets constituted a violation of Article 10.[1278] This decision, certainly, emphasised the important role of freedom of expression in political debates.[1279] In the case of *Ceylan*, the Court, again, pointed out the importance of political speech.[1280]

The following lines will explore the extent to which national security concerns justify restrictions on the right to freedom of expression, in the context of ECHR. The first set of examples concerns the publication of information that might cause damage to national security. In the case of *M v. France*, the applicant, a Romanian working as a computer scientist, was convicted of conveying information to agents of a foreign power which could "damage France's diplomatic or military situation or its essential economic interests".[1281] Similarly, the ECtHR in the case of *Hadjianastassiou v. Greece* charged an aeronautical engineer and a captain in the Greek airforce with disclosing military secrets. The applicant was in charge of a project for the design and production of a guided missile when he communicated another technical study on guided missiles

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[1273] *Bowman v. United Kingdom*, - 24839/94 [1998] ECHR 4 (19 February 1998).
[1274] *Ozgur Gundem v. Turkey*, 23144/93 [2000] ECHR 104.
[1275] *Oberschlick* v. *Austria* (no. 2), 20834/92 [1997] ECHR 38 (1 July 1997).
[1276] *Lopes Gomes da Silva v. Portugal*, 37698/97 [2000] ECHR 439 (28 September 2000).
[1277] Kilroy, C., op. cit. p. 10.
[1278] *Incal v. Turkey* - 22678/93 [1998] ECHR 48. See Alastair Mowbray, (2007) op. cit. p. 644-645.
[1279] Macovei, M., (2004) op. cit. p. 44.
[1280] *Ceylan v. Turkey* - 23556/94 [1999] ECHR 44.
[1281] *M. v. France* (1984) DR 41, EComHR.

to a private company.[1282] The Court considered that "the disclosure of the State's interest in a given weapon and that of the corresponding technical knowledge, which may give some indication of the state of progress in its manufacture, are capable of causing considerable damage to national security." Both the Commission and the Court based their decisions basically on a measure of discretion, or the so-called 'margin of appreciation, which has granted to the parties of the Convention.[1283] A further example concerns the publication of memoirs written by the former security service personnel. Some publications of memoirs include confidential information about security services. These publications which reveal such information that might affect national security can be restricted, according to the Strasbourg institutions.[1284] Three newspapers, *The Observer, Guardian*,[1285] and *The Sunday Times*,[1286] were ordered by injunctions not to publish material from a book called *Spycatcher*, which recounted a person's memoirs of his employment in the British Security Service, because such a publication would cause unquantifiable damage to the Service. The restrictions, then, according to the Court argument, were necessary for the protection of national security and for maintaining the authority of the judiciary. The Court, by referring to the margin of appreciation, found that the reasons for granting the injunctions to publish between June 1986 and July 1987 were sufficient and proportionate. It was not unreasonable, the Court said, "to suppose that where a former senior employee of a security service - an "insider", such as Mr Wright - proposed to publish, without authorisation, his memoirs, there was at least a risk that they would comprise material the disclosure of which might be detrimental to that service." However, the Court after *Spycatcher* was published in the United States in 14 July 1987 found no sufficient reason to continue the injunction because the confidentiality of the book's content had been destroyed, since the book could be obtained from the United States and the Government of the United Kingdom had not banned its importation.[1287] The Court held that the intended purpose of the ban on publication, the prevention of the disclosure of information, could no longer justify the prohibition, because the information had already become public from another source.[1288]

[1282] *Hadjianastassiou v. Greece* 12945/87 [1992] ECHR 78.
[1283] Ovey, C., & Robin C.A. White, (2002) op. cit. p. 283; Hugenholtz, B., (2000) op. cit. p. 5-6.
[1284] Clements, L., (1994) op. cit. p. 174.
[1285] *Observer and Guardian v. United Kingdom*, 13585/88 [1991] ECHR 49.
[1286] *The Sunday Times v. United Kingdom* (No 2) -13166/87 [1991] ECHR 50. For more about this case, which is considered to be the landmark case in press censorship, see Mowbray, A., (2007) op. cit. p. 700-702; Saini, P., (1999) op. cit. p. 202. Morrisson, C., (1981) op. cit. p. 104-112.
[1287] Burnheim, S., "Freedom of Expression on Trial: Case Law under European Convention on Human Rights." (1997).
[1288] Mowbray, A., (2007) op. cit. p. 700-702; Barendt, E., "Spycatcher and Freedom of Speech", Public Law 39 (1989) p. 204; Ovey, C., and Robin C.A. White, (2002) op. cit. p. 283; J. G. Merrills & A.H.

In the Court's opinion, after July 1987, the restrictions sought to be justified on the ground of national security were to protect interests unrelated to national security such as "promoting of the efficiency and reputation of the Security service"; thus, the restrictions were not necessary in a democratic society.[1289] Thus, when the restriction is imposed on disclosure of information once it has already been made public, this can be considered a violation of Article 10, according to the ECtHR in *Vereniging Weekblad bluf! v. the Netherlands*.[1290]

The above mentioned cases demonstrate that the publication of confidential information about security services can be restricted as long as this restriction aims to protect interests related to national security. The restrictions on the disclosure of information, as the above cases show, are justified. In Chapter Four of this study, it was concluded that members of the public have a real interest in receiving as much information as possible to enable them to contribute effectively to political debate. Disclosure to enemy agents, or a small group of political associates and private companies, is not designed to, and does not enable anyone to contribute to political discussion. Thus, it cannot be considered as speech for Conventional purposes. Similarly, although the publication by a newspaper of confidential government information seem to be covered by free speech, a particular publication, such as *Spycatcher*, may not be protected because, firstly, the Convention states very frankly that freedom of expression may be restricted for preventing the disclosure of information received in confidence. The EComHR in *Haseldine v. U.K.* ruled that by virtue of Article 10 (2) civil servants were restricted from disclosing information received in confidence, and that such restrictions were in any event inherent in their duties.[1291] According to Professor Barendt, it is not clear that the civil servant has any real free speech interest in disclosing information entrusted to him in confidence.[1292] Secondly, some competing public interests, such as national security, are strong enough to justify restriction on disclosure. Nevertheless, as Monica Macovei asserts, where it is argued that the fidelity or confidentiality duty is justified by the interest of defending "national security," member states must define this latter concept in a strict and narrow

Robertson, (2001) op. cit. p. 173; Janis, M., Richard Kay, Anthony Bradley, (2000) op. cit. p.148-152; Michael, J., "Spycatcher's End?" *The Modern Law Review*, 52.3 (1989) pp. 389-395; Lord Oliver of Aylmerton, "Spycatcher Case: Confidence, copyright and contempt", in Shimon Shetreet, (1991) p. 23-39.

[1289] *Observer and Guardian v. United Kingdom*, 13585/88 [1991] ECHR 49.

[1290] *Vereniging Weekblad bluf! v. the Netherlands*, 16616/90 [1995] ECHR 3.

[1291] *Haseldine v. U.K.* (1992) 73 D & R 127, EComHR. See also, *Glasenapp v. Germany*, - 9228/80 [1986] ECHR 9; *Vogt v. Germany* -17851/91 [1995] ECHR 29.

[1292] Barendt, E., (1998) op. cit. p. 194.

way, avoiding the inclusion of areas which fall outside the real scope of national security.[1293]

The second set of examples is related to cases where the applicant conveyed ideas, not information, that constitute threat the national security. In the case of *Pat Arrowsmith v. the United Kingdom*, the EComHR was of the opinion that the distribution of leaflets calling for soldiers to refuse to be posted to Northern Ireland and giving several kinds of information to soldiers, including how to be discharged of their duties, constituted a threat to national security. The EComHR held that interference with, and punishment of, such distribution was a necessary curb in a democratic society on the right to free speech: "In view of the applicant's manifest intention to continue her action unless stopped by prohibitive measures, the decision to prosecute her was necessary for the protection of national security." Citing *Handyside v. United Kingdom*, the EComHR added: "The notion 'necessary' implies a 'pressing social need' which may include the clear and present danger test and must be assessed in the light of the circumstances of a given case."[1294]

The Strasbourg institutions have also examined cases where political opinions might cause threat to national security through the mass media. Although freedom to impart information and ideas without interference is guaranteed according to Article 10, the Convention's institutions have not always insisted on the protection of the media's freedom to impart information. The EComHR, in three cases,[1295] upheld British orders banning interviews with IRA, members of the Sinn Fein, Ulster Defence Association, Irish National Liberation Army and any other organisation defined as terrorist. These limitations on freedom of expression and information were held to be legitimate in a democratic society because their aim was to combat terrorism. In other words, the purpose of these limitations was to ensure that the spokesmen, representative, and political supporters of the listed organisations "do not use the opportunity of live interviews and other broadcasts for promoting illegal activities,"[1296] or "for advocating their cause, encouraging support for their organisations and conveying the impression of their legitimacy."[1297] Similarly, the Court in *Zana v. Turkey* gave the protection of national security and public safety priority over the right to freedom of expression. The

[1293] Macovei, M., (2004) op. cit. p. 23, 39-40.
[1294] *Arrowsmith v. the United Kingdom* (1978) 19 D & R, EComHR.
[1295] *Betty Purcell and others v. Ireland* (1991) 70 D R 262, EComHR; *David Brind and others v. the United Kingdom* (1994) 77D R42, EComHR; *Mitchel McLaughum v. The United Kingdom* (1994) 18 E.H.R.R C.D. 84, EComHR. See, Brice, D., *Human rights and the European Convention: the effects of the Convention on the United Kingdom and Ireland* (London: Sweet & Maxwell, 1997) p. 165-166.
[1296] *Betty Purcell and others v. Ireland* (1991) 70 D R 262, EComHR
[1297] *Betty Purcell and others v. Ireland* (1991) 70 D R 262, EComHR

applicant, who was a former Mayor of Diyarbakir, the most important city in South-East Turkey, was interviewed by journalists; the interview later appeared in a national daily newspaper. In the interview, the applicant said, "I support the PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake." Such remarks were considered to be a defending "of an act punishable by law as a serious crime," and so the applicant was convicted. When the case reached the ECtHR, the Court, taking into their account the extremely tense situation in south-east Turkey when the interview took place, and the position of the applicant as a well-known political figure, ruled that there was both a pressing social need, and relevant and sufficient reasons, to impose the restriction on such speech. Thus, there was no breach of Article 10.[1298] In *Surek* (No.3), the Court found that the grounds of protecting national security and territorial integrity were proportional with the restriction upon freedom of expression due to the capacity of the Article to incite violence in south-east Turkey. Indeed, the message which is communicated to the reader is that recourse to violence is a necessary and justified measure of self-defence in the face of the aggressor.[1299] Likewise in *Surek v. Turkey* (No.1), the ECtHR upheld the conviction of Surek for the publication in his weekly review of two letters from readers, vehemently condemning the military actions of the authorities in south-east Turkey and accusing them of brutal suppression of Kurdish people. In its judgment in this case, the Court found a clear intent to stigmatise the authorities through use of labels such as "the fascist Turkish army," the "TC murder gang" and "the hired killers of imperialism", and determined that strong language in the letters such as "massacres", "brutalities", and "slaughter" amounted to "an appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices which have manifested themselves in deadly violence." Noting that one of the letters "identified persons by name, stirred up hatred for them and exposed them to the possible risk of physical violence," the Court reiterated that while the mere fact that information or ideas offend, shock or disturb does not justify restriction on freedom of expression, at issue in the case was "hate speech and the glorification of violence."[1300]

Conversely, in *Surek and Ozdemir v. Turkey*, the ECtHR upheld the right of a weekly review to publish an interview with the leader of the PKK, explaining the goals of the organisation, stating the reasons why it had turned to violent means in pursing its

[1298] *Zana v. Turkey* 18954/91 [1997] ECHR 94.
[1299] *Surek v. Turkey* (No. 3), 24735/94 [1999] ECHR 53.
[1300] *Surek v. Turkey* (No.1), 26682/95 [1999] ECHR 51.

objectives, and proclaiming its determination to continue fighting. The review also published a joint statement of several organisations, representing a call "to unite forces" against state terrorism, repression of Kurdish people, unemployment, sex discrimination, etc. In its decision, the Court characterized statements from the interview such as "The war will go on until there is only one single individual left on our side" as a reflection of the resolve of the PKK to pursue its goals and commented. Noting the delicate balance of rights and responsibilities in situations of conflict and tension, the Court expressed the following view:

> Particular caution is called for when consideration is being given to the publication of the views of representatives of organisations which resort to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence. At the same time, where such views cannot be categorised as such, Contracting States cannot with reference to the protection of territorial integrity or national security or the prevention of crime or disorder restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media.[1301]

In the apparently similar case of *Ceylan*, an article written by a trade-union leader described the Turkish military operations in the South East as "State terrorism," "genocide" and "bloody massacres" and called for reaction from the democratic forces of the nation. The Court, pointing out the importance of political speech, found that "the Article in question, despite its virulence, does not encourage the use of violence or armed resistance or insurrection" and accordingly registered a violation of Article 10.[1302] In *E.K. v. Turkey* the Court ruled that limitations on freedom of expression did not apply to political expression or debate on matters of public interest.[1303]

A number of conclusions can be drawn from the above examination of European cases. Firstly, it appears that a general formula for legally restricting freedom of expression in the context of national security is difficult to establish. Each case will require a consideration of the specific context in hand, bearing in mind a number of different elements, which may include the form of expression, the characteristics of the person making the expression, the legal and cultural framework in a particular country and the actual impact of the expression amongst others.[1304] This is, obviously, a consequence of the application of the balancing approach, as opposed to the American categorical approach. The balancing test is defined by considering that "in each case the

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[1301] *Surek and Ozdemir v. Turkey*, 23927/94; 24277/94 [1999] ECHR 50.
[1302] *Ceylan v. Turkey* - 23556/94 [1999] ECHR 44. *Erdogde and Ince v. Turkey*, 21890/93 [1997] ECHR 85.
[1303] *E.K. v. Turkey*, 28496/95 [2002] ECHR 21.
[1304] Office for Democratic Institutions and Human Rights, 2006, p. 17.

judge evaluates all of the facts and competing interests, gives each fact and interest such weight as the judge deems appropriate in the circumstances of that case, and then weighs or balances the facts and interests supporting the restriction against the facts and interests opposing the restriction."[1305] This conclusion is demonstrated by reviewing cases on national security concerns, in which the Court took into account the actual language used in the media as an indicator of intent. The ECtHR carefully distinguishes between language that explains the motivation for terrorist activities and language that promotes terrorist activities. The actual language used is critical to this determination. In *Surek* (No.1), the Court held a weekly review responsible for the publication of letters from readers critical of the Government, citing the strong language in these letters, which led the Court to view the letters as "an appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices..."[1306] In contrast, in *Surek and Ozdemir* the ECtHR upheld the right of the same weekly review to publish an interview with a PKK leader, in which he affirmed his determination to pursue his objective by violent means on the grounds that the text as a whole should be considered newsworthy rather than as "hate speech and the glorification of violence."[1307] The jurisprudence on national security highlights also the importance of taking context into account when considering the potential impact of expression. A wide margin of appreciation during public emergency and in matters that concern national security has been granted to nations. This explains why most of the cases have been decided to be non-violations of Article 10 paragraph 2. In the *Zana* case, the ECtHR considered the general statement made about massacres by the former mayor of Diyarbakir in the context of the fact that massacres were taking place at that time, which in the Court's view made the statement "likely to exacerbate an already explosive situation..."[1308] This also demonstrates the fact that the Convention's institutions are unwilling to become involved in domestic conflicts in some European areas such as Northern Ireland, as seen when we discussed the banning of interviews with IRA cases, or the Kurdish region of Turkey, as seen in the *Zana v. Turkey* case.

Secondly, from examination of cases such as the *Pat Arrowsmith* case, it appears that in cases where speech constitutes a threat to national security, the U.S. approach to freedom of speech can be seen to be different and perhaps demonstrating a stricter approach to the protection of freedom of speech. The American approach treats claims

[1305] Ennis, B., "Courtside", *Communications Lawyer Journal*, (1999).
[1306] *Surek v. Turkey* (No.1), 26682/95 [1999] ECHR 51.
[1307] *Surek and Ozdemir v. Turkey*, 23927/94; 24277/94 [1999] ECHR.
[1308] *Zana v. Turkey* 18954/91 [1997] ECHR 94.

of national security with a dose of scepticism far larger than that seen in much of the developed world.[1309] This is well illustrated through a set of Supreme Court judgments relating to the restriction of freedom of speech, as shown previously. In considering whether a particular expression constitutes a form of incitement on which restrictions would be justified, the European jurisprudence does not include any specific causation requirement linking the expression at issue with the demonstration of a direct effect. In the Turkish cases considered by the ECtHR, no specific acts of violence are cited as having been caused by the applicant's expression. Rather, the question considered is what the likely impact might be, recognizing that causation in this context might be relatively indirect. In the previous chapter, while discussing freedom of speech limitations in the U.S., a significant change was observed in the Court's position toward political speech that threatens national security. The Court has recognised that the 'bad tendency' test, then the predominant clear and present danger, and clear and probable danger test allowed the government to suppress undesirable political views simply by invoking the speech's tendency to violence or the gravity and probability of the danger.[1310] So, in order to ensure greater protection of political speech and less opportunity for government pretext, the *Brandenburg* Court abandoned the manipulable tests.[1311] In the *Brandenburg* case, the Court ruled that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[1312] It is understood from the *Brandenburg* case that there must be clear and imminent danger of a substantive evil that the state has a right to prevent before it can interfere with speech. If there is time through discussion to expose falsehoods and fallacies and to avert the evil by the process of education, then the remedy to apply is more speech, not enforced silence. Speech, then, is protected until it is actually likely to incite unlawful action.[1313]

The study, here, will not go too far and compare Justice Black's opinion in the so-called Pentagon Papers, in which he stated that, even when national security might be at stake, "the history and language of the First Amendment support the view that the press must be left to publish news, whatever the source, without censorship, injunctions, or

[1309] *New York Times v. United States* (Pentagon Papers Case), 403 U.S. 713 (1971).
[1310] Zer-Ilan, A., (1997), op. cit. p. 2699.
[1311] *Ibid.*
[1312] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
[1313] Dow, D., and R. Scott Shieldes, (1998) op. cit. p. 1217; Isaac Molnar, (1998) op. cit. p. 1341.

prior restraints."[1314] However, by comparing the *Brandenburg* case with the case of *Pat Arrowsmith against the United Kingdom*, the difference between the American law of free speech and the European with regard to the protection guaranteed for political speech can clearly be seen, though in both laws political speech comes very near the top of the scale of protected speech. In the *Pat Arrowsmith* case, the applicant was convicted of distributing leaflets which urged soldiers to refuse to serve in Northern Ireland. Although Pat Arrowsmith argued that her conviction in effect stifled her freedom of expression in the crucial sphere of political debate, the EComHR agreed that the national authorities' limitations on this leaflet complied with the requirement of Article 10. It may be conjectured that the EComHR, although armed with paragraph 2 of Article 10, based its decision on the abandoned American judicial test, namely, the bad tendency,[1315] which offers very little protection for freedom of speech[1316] or at best, on the first formulation of the clear and probable danger test, which has been replaced by *Brandenburg*. It would have been more appropriate for the EComHR to distinguish between dissent and advocacy of abstract theories and incitement of particular and immediate illegal acts. According to Professor Barendt, "If the Commission had adopted the *Brandenburg* formula, its report would surely have been favourable to Miss Arrowsmith; the only conclusion that can be drawn is that for the time being it is reluctant to uphold a right of political speech which goes beyond measured criticism of government and other institutions."[1317]Though the applicant's campaign might seduce some soldiers into drawing back, she was merely trying to express her political opinion, no matter how radical or sensitive that might seem to the British government. In the view of Dickson Brice, "it may well be that if a case with similar facts were to occur today the by now more enlightened Strasbourg organs would decide it differently."[1318]

The EComHR's three decisions regarding the media's freedom to impart information have also received several criticisms. Most critics emphasised that the bans on such broadcasting "inevitably impeded the free flow of information on fundamental issues of political debate."[1319] An important function of broadcasts is to communicate opinions to the public so that the public may decide for themselves on the current political issues.

[1314] *New York Times v. United States* (Pentagon Papers Case), 403 U.S. 713 (1971). For more about Pentagon Papers, John Zelenzy, (2001) op. cit. p. 78-80.
[1315] Compare the *Pat Arrowsmith* case with *Abrams v. United States* , 250 U.S. 616, 1919; *Gitlow v. New York*, 268 U.S. 652, 1925; *Whitney v. California*, 274 U.S. 357 (1927).
[1316] Morreim, E., op. cit. p. 175.
[1317] Barendt, E., (1998) op. cit. p. 158.
[1318] Brice, D., (1997) op. cit. p. 165.
[1319] Pannick, D., "Article 10 of the European Convention on Human Rights," in Peter Birks, (ed), *Pressing Problems in the Law*, vol. 1 (Oxford: Clarendon Press, 1995) p. 122.

Even national security cannot justify a total prohibition on television and radio appearances by representatives of lawful political organisations. This is, however, not to deny that anti-terrorism is important in a democratic society, but the measures taken still have to be appropriate, which was not the case in the British Government orders in the above three examples, according to Graham Zellick, who believes that the bans were largely to protect governmental feelings.[1320] Similarly, Ronald Dworkin has criticised such bans, which, he characterises as "uncommonly silly", and "pointless" decisions.[1321] The bans in his view were no more than a "direct and savage example of political censorship" and struck at the "heart of a journalist's right to speak and the public's right to hear."[1322] Comparing the UK's ban on broadcasting interviews with representatives of the IRA with the American approach, it appears that the situation is very different. Under the American approach, whenever there is an attempt by government to stop what it perceives as threats to national security, the government bears a heavy burden of proving that such a danger does indeed exist. When the *New York Times* published portions of the Pentagon Papers -secret revelations about the Vietnam War- the government temporarily stopped the publication. However, the Supreme Court ruled that the government simply had not met the heavy burden of proving that publication of the documents would indeed damage the nation.[1323] This is one case, among many, that demonstrates the development in the law of sedition and contemporaneous progress of American law to a more liberal attitude towards the protection of political speech.[1324] The situation, then, is different under the European law, where the Court found no violation of Article 10 in the UK's ban on broadcasting interviews with representatives of the IRA,[1325] without imposing the heavy burden of proving that the interviews would indeed damage the nation.

VII.2.2. Freedom of Expression v. the Protection of the Reputation of Others

The protection of the reputation of others is another legitimate ground for restricting the right to freedom of expression. At issue is the potential conflict between freedom of expression and the reputation of others, which might be destroyed by a defamatory

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1320 Zellick, G., "Spies, Superversives, Terrorists, and the British Government: Free Speech and other Casualties", in Shimon Shetreet (ed), *Free Speech and National Security*, (Martinus Nijhoff Publishers, 1991) p. 96.
1321 Dworkin, R., *A Bill of Rights in Britain* (London: Chatto & Windus Ltd, 1990) p. 4.
1322 *Ibid.*
1323 *New York Times v. Sullivan*, 376 U.S. 254 (1964).
1324 Barendt, E., (1985) op. cit. p. 154.
1325 See *supra* p. 205.

statement. A defamatory statement, which tends to injure the plaintiff's reputation among respected segments of society, and occurs either through pure speech (photographs, pictures, statues, cartoons etc. whether in book, magazine or film) or symbolic speech (sign and gesture), raises issues under freedom of expression, according to the HRC.[1326] The following lines will examine cases where potentially defamatory statements were made against public figures.

Public figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain.[1327] In a free and democratic society, Lord Bridge of Harwich argues, "it is almost too obvious to need stating that those who hold public office in government and who are responsible for the public administration must always be open to criticism. Any attempt to stifle such criticism amounts to political censorship of the most insidious and objectionable kind."[1328] Many legal systems, therefore, have given the criticisms, or defamatory statements, directed to public figures a wider area of freedom than those directed to private persons.[1329] In the previous chapter, we have seen how the Supreme Court of U.S. extended the First Amendment's protection to libelous statements by giving libelous statements constitution protection if the statements were made about a public official or public figure, unless the applicant proved, with "convincing clarity," that the defamatory statement was made with "actual malice."[1330] The study here aims at finding how the jurisprudential approach of the international free speech law balances between free political speech and the reputation of public figures.

The HRC, in its General Comment 25, has said that the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential through a free press and other media that are able to comment on public issues without censorship or restraint. In *Victor Ivan Majuwana Kankanamge v. Sri Lanka*, a recent communication concerning defamation of public figures, the HRC found a violation of Article 19 of ICCPR. Victor Ivanhad been

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[1326] *Jacobus Gerardus Strik v. The Netherlands*, CCPR/C/76/D/1001/2001.
[1327] Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe.
[1328] *Hector v. Attorney-General of Antigua and Barbuda* [1990] 2 AC 312.
[1329] According to Resolution XII on the adoption of the Declaration of Principles on Freedom of Expression in Africa by the African Commission on Human and Peoples' Rights, "States should ensure that their laws relating to defamation conform to the following standards: 1)no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances; 2) public figures shall be required to tolerate a greater degree of criticism." See also, Quinn, F., *Human Rights to You* (Published by OSCE/ODIHR Warsaw, Poland in cooperation with the U.S. Department of State and USAID, 1997) p. 188.
[1330] *New York Times Co. v. Sullivan* (1964).

indicted several times for allegedly having defamed ministers and high-ranking officials of the police and other departments in articles and reports published in his newspaper, *Ravaya*. Three indictments filed against Victor Ivan between 1996 and 1997 were pending for adjudication in court, and the government had failed to justify the procedural delays. He claimed that those charges were designed to harass him. The HRC was "of the opinion that the proceedings have been unreasonably prolonged and are therefore in violation" of the Article 19 ICCPR. The HRC considered that

> to keep pending...the indictments for the criminal offence of defamation for a period of several years ... left the author in a situation of uncertainty and intimidation ... and thus had a chilling effect which unduly restricted the author's exercise of his right to freedom of expression.[1331]

In another communication, *Rafael Marques de Morais v. Angola*, which invoke "the right of political and social criticism," the author wrote articles saying that the President was responsible "for the destruction of the country and the calamitous situation of State institutions" and was "accountable for the promotion of incompetence, embezzlement and corruption as political and social values."[1332] Because of the offensive words and expressions that those article contained, the author was charged with "materially and continuously committ[ing] the crimes characteristic of defamation and slander against ... the President of the Republic." The Supreme Court of Angola considered that the author's acts were not covered by his constitutional right to freedom of speech, since the exercise of that right was limited by other constitutionally recognized rights, such as one's honour and reputation. The HRC, however, agreed with the author claim that freedom of expression under article 19 allows the criticism or openly and publicly evaluation of the governments, as well as expressing political opinion, including criticism of those who wield political power.[1333] In *Dobroslav Paraga v. Croatia*, the HRC observed that a provision in the Penal Code which restricts speech that describes the President as a dictator or an oppressor goes beyond the permissible restrictions under Article 19(3).[1334] In a recent communication, *Philip Afuson Njaru v. Cameroon*, the author was punished for the publication of articles which were described by the police as "unpatriotic articles," denouncing corruption and violence of the security forces. The committee, noting that under Article 19, everyone shall have the right to

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1331 *Victor Ivan Majuwana Kankanamge v. Sri Lanka*, CCPR/C/81/D/909/2000.

1332 *Rafael Marques de Morais v. Angola*, CCPR/C/83/D/1128/2002.

1333 *Ibid*.

1334 *Dobroslav Paraga v. Croatia*, CCPR/C/71/D/727/1996. For communication deals with criticism directed to Judges see, *Anthony Fernando v. Sri Lanka*, CCPR/C/83/D/1189/2003.

freedom of expression, found a relationship between the treatment against of author and his activities as a journalist and therefore that there had been a violation of Article 19, paragraph 2.[1335] There should be no doubt that, this opinion, besides others delivered by the HRC, certainly enhanced the protection of free debate on public issues.

The ECtHR has allowed more extensive freedom of expression in cases which involved conflicts between journalists and politicians.[1336] As Clare Ovey and Robin White say, "since democracy cannot function unless it is possible to scrutinise the acts of politicians and other powerful figures, the Court has held that the interests of such individuals in retaining their privacy weighs less heavily in the balance."[1337] This conclusion is understood from the Court's decisions in several cases. The *Lingens* case, however, is a key ruling on political expression, in which the Court imported a concept from the U.S. Supreme Court that politicians must expect and tolerate greater public scrutiny and criticism than average citizens.[1338] The Austrian Chancellor, Bruno Kreisky had been accused of protecting and assisting former members of the Nazi in two articles published by Peter Lingens, a magazine publisher in Vienna. The Chancellor brought private prosecutions for criminal defamation. Lingens was convicted and fined, and his magazine confiscated. He complained to the EComHR that his rights under Article 10 had been violated. When the Court examined the case under Article 10, it rejected the government's argument that the punishment of the applicant could be justified under the second paragraph. The Court commented that "freedom of press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders."[1339] In another case, where a candidate to the local elections was called "grotesque," "buffoonish" and "coarse," the Court found that although incisive, the wording was not exaggerated and it came in response to a provocative speech by the candidate. The Court also stated that political invective often spills over into the personal sphere; such are the hazards of politics and the free debate of ideas, which are the guarantees of a democratic society.[1340] The Court, in *Stoll v. Switzerland*, re-emphasised that that restrictions imposed on criticism directed to politicians would be "likely to deter journalists from contributing to public discussion of issues affecting the

[1335] *Philip Afuson Njaru v. Cameroon*, CCPR/C/89/D/1353/2005.
[1336] *Worm v. Austria*, - 22714/93 [1997] ECHR 52.
[1337] Ovey, C., and Robin White, (2002) op. cit. p. 279.
[1338] Burnheim, S., "Freedom of Expression on Trial: Case Law under European Convention on Human Rights." (1997).
[1339] *Lingens* v. *Austria*, - 9815/82 [1986] ECHR. See also, *Castells v. Spain* 11798/85 [1992] ECHR.
[1340] *Lopes Gomes da Silva v. Portugal*, 37698/97 [2000] ECHR.

life of the community" and were "liable to hamper the press in performing its task as purveyor of information and public watchdog."[1341]

The common idea of the Court judgments in the *Lingens* case and other cases is that politicians, who inevitably and knowingly laid their words and deeds open to close scrutiny by both journalists and the public at large, must display a greater degree of tolerance.[1342] Individuals who wish to avoid criticism should not become politicians. Politicians are certainly entitled to have their reputation protected, but, according to the ECtHR, in *Oberschlick* v. *Austria*, the requirements of that protection have to be weighed against the interests of open discussion of political issues.[1343] Thus, if the communications involved were not about matters of public policy, then, the judgment would be different.[1344] Similarly, in examining conflicts between the freedom of expression and the rights and reputation of ordinary citizens, the Strasbourg institutions were of the opinion that the conviction of the applicant for making insulting remarks about another person was necessary in a democratic society.[1345] The reason that lies behind this approach of the Strasbourg institutions towards defamatory statements directed at private persons is that such a person would not have at their disposal the same means, as a public figure, to respond to unfair criticism.

However, when it comes to the issue of public figures, the Court insisted that a careful distinction had to be made between facts and value-judgments: the existence of facts could be demonstrated, whereas the truth of value-judgment was not susceptible of proof.[1346] While opinions are viewpoints or personal assessments of an event or situation and are not susceptible of being proven true or false, the underlying facts on which the opinion is based, as in the recent case of *Pakdemirli v. Turkey* in which the president was accused of lying and slandering, may be capable of being proven true or false.[1347] In other words, if statements are presented as fact, the Court must examine whether the author acted in good faith and sought to comply with the ordinary obligation to verify a factual statement.[1348] Thus, as long as the journalist believed the

[1341] *Stoll v. Switzerland* 69698/01[2006] ECHR.
[1342] *Oberschlick* v. *Austria*, - 11662/85 (1991) ECHR.
[1343] *Ibid.*
[1344] See *Krone Verlag GmbH & Co. KG v Austria*, no. 34315/96 [2002] ECHR 159; *Plon (Socie'te') v France*- 58148/00 [2004] ECHR 200; *Tammer v. Estonia* - 41205/98 [2001] ECHR 83; *Von Hannover v. Germany*; 59320/00 [2004] ECHR 294; *Von Hannover v. Germany* 59320/00 [2005] ECHR 555. See Mowbray, A., "Institutional Developments and Recent Strasbourg Cases." *Human Rights Law Review* 5 (2005) p. 169-188; Janis, M., and Richard Kay, (1990) op. cit. p. 271.
[1345] *Fermin Bocos Rodriguez v. Spain*, (1996) 85-B D R 141, EComHR.
[1346] *Lingens* v. *Austria*, - 9815/82 [1986] ECHR 7.
[1347] *Pakdemirli v. Turkey* 35839/97 [2005] ECHR 122.
[1348] *Thoma v. Luxembourg*, - 38432/97 [2001] ECHR 240.

information be true, such intent is lacking and therefore the journalist's conduct may not be sanctioned under provisions prohibiting intentional defamation.[1349] However, as the Court's judgments in these cases have regarded most criticisms of politicians, no matter what their form and content, as "value-judgment" or "opinion," it was not "necessary in a democratic society" for journalists to prove the truth of their opinions and value judgements about political figures.[1350] Accordingly, the Court found the requirement to prove the truth of statements could not be fulfilled and therefore infringed the right to freedom of opinion. The Court's judgment in *Dalban v. Romania* upheld this conclusion by holding that "it would be unacceptable for a journalist to be debarred from expressing critical value judgments unless he or she could prove their truth."[1351] In 2003, in *Scharsach and News Verlagsgesellschaft mbH v. Austria*, the Court found that a journalist's reference to a right-wing politician as a "closet Nazi" was a value judgment which could be justified.[1352] The same rule was re-emphasised by the Court in a very recent case.[1353] Subsequently, the Court criticised Ukrainian defamation law for failing to distinguish between value judgments and statements of fact.[1354] Undoubtedly, these judgments, which have enhanced the protection of free debate on political issues, started a new era in the relation between freedom of political speech and politician right of protecting their reputation.[1355]

The Strasbourg institutions in two cases, namely, *Castells v. Spain*, and *Incal v. Turkey* have ruled that freedom of political expression is even wider when it is directed at the institutions of government.[1356] In *Castells*, the ECtHR reviewed whether insulting government guards is a protected expression under the ECHR or not. Mr Castells was a lawyer and a senator elected onto the list of a political group that supported Basque independence. In a weekly magazine, an article signed by the applicant described many murder cases in the Basque Country and argued that only the Spanish government could lie behind these acts. Mr Castells was charged with insults against the government. The Court reiterated that freedom of expression was especially important for an elected representative and that the limits of permissible criticism were wider with regard to the

[1349] *Bladet Ttomso and Stensaas v. Norway* - 21980/93 [1999] ECHR 29. See also *Selisto v. Finland*, 56767/00 [2004] ECHR.
[1350] Harris, O'Boyle, Warbrick, (1995) op. cit. p. 381. Mowbray, A., (2007) op. cit. p. 641-642.
[1351] *Dalban v. Romania*, - 28114/95 [1999] ECHR 74.
[1352] *Scharsach and News Verlagsgesellschaft mbH v. Austria* 39394/98 [2003] ECHR 596.
[1353] *Wirtschafts-Trend Zeitschriften-Verlags GMBH v. Autria*, 15653/02 ; 66298/01 [2005] ECHR 862.
[1354] *Ukrainian Media Group v. Ukrainian*, 72713/01 [2005] ECHR 198.
[1355] Clayton, R., and Hugh Tomlinson, *Privacy and Freedom of Expression* (Oxford University Press, 2001) p. 168.
[1356] For detailed discussion of this topic see above the examination of *Castells v. Spain*, and *Incal v. Turkey* cases. See also, Beddard, R., op. cit. p. 121.

Government than in relation to a private citizen or specific politicians. The Court ruled that the elected representative has a right to criticise or even insult his government. Therefore, the Court found the Government's contention was not convincing and the interference was not necessary in a democratic society and that there was a violation of Article 10.[1357]

The same principle that applies to politicians applies to other public figures, such as prominent businessmen, the police, royalty, actors, academics, etc. In *Thorgeirson v. Iceland*, the respondent Government sought to draw a distinction between political expression and the discussion of other matters of public interest. In the government's opinion, Article 10 did not accord the second category of expression the same breadth of protection as the former. The Court rejected the Government's purported distinction between political expression and the discussion of other matters of public interest. According to the Court, "there is no warrant in [the Court's] case-law for distinguishing."[1358] Accordingly, the Court found a writer, who published articles in an Icelandic newspaper on the subject of police brutality, acted responsibly and sought to debate matters of public interest.[1359] In *Fayed v. United Kingdom*, the Court was of the opinion that businessmen should expect their business dealing to be the subject of public debate.[1360] Five years later, the Court, in *Fressoz and Roire v. France*, considered the Article that published in the weekly newspaper detailing the chairmen's total taxable income and showing the amounts that he had received in different ways, as a contribution to a public debate on a matter of general interest.[1361] In *Janowski v. Poland*, the Court stated that public figures are entitled to be protected from verbal attacks in the performance of their duties unless the remarks form part of an open discussion on matters of public concern or involve the freedom of the press.[1362]

One last point needs to be made here. Despite the fact that American 'public figure' doctrine appears to have influenced the jurisprudence,[1363] the Strasbourg institutions have not extended their case law to all public officials and to public figures in the sense of the jurisprudence of the US Supreme Court. The case law relating to judges as individuals, as distinct from the judiciary as an institution, illustrates this difference between the two laws. In the above mentioned case, *New York Times v. Sullivan*, it

[1357] *Castells v. Spain* 11798/85 [1992] ECHR 48. See in this regard, Macovei, M., op. cit. p. 45-46.
[1358] *Thorgeir Thorgeirson v. Iceland* - 13778/88 [1992] ECHR 51.
[1359] *Ibid.*
[1360] *Fayed v. United Kingdom*, - 17101/90 [1994] ECHR 27.
[1361] *Fressoz and Roire v. France*, -29183/95 [1999] ECHR 1.
[1362] *Janowski v. Poland*, - 25716/94 [1999] ECHR 3.
[1363] Harris, O'Boyle, Warbrick, (1995) op. cit. p. 399.

appeared that the US Court extended the privilege applied to libel of public officials, to libel of all public figures. Therefore, when a public figure, in *Herbert v. Lando*, tried to recover damage for defamation, the Court applied the *Sullivan* test. Evidence of "actual malice" was required.[1364] While this is the doctrine of the Supreme Court towards all public figures, the Strasbourg institutions, in most cases, when there was a conflict between freedom of speech and the reputation of judges, have interpreted this aim broadly to encompass the protection of individual judges from unjustified criticism by the media.[1365] The aim of protecting the reputation of judges was invoked in *Barfod v. Denmark*. In the *Barfod* case, the ECtHR found that criticisms of the impartiality of lay judges employed by government and critical accounts of the behaviour of judges in court were defamatory.[1366] The case began when the applicant wrote a magazine article about a judgment given by a professional judge and two lay judges employed by a local government in Denmark. In that article, the applicant alleged that the two lay judges "did their duties." By this statement, the applicant meant that the two judges cast their vote as employees of the local government rather than independently and impartially. These words, according to the Court, represented "a serious accusation which is likely to lower [the judges] in public esteem." The Court believed that this statement ought not to be seen as a part of political debate. This is because this statement, according to the Court, was not a criticism of the reasoning in the judgment, but rather a defamatory accusation against the lay judges personally. Moreover, the applicant had failed to prove his accusation, which was based on the mere fact of the judgment. Basing its decisions on the above reasoning, the Court ruled that the interference with the applicant's freedom of expression was necessary for the protection of the reputation of the judges.[1367] The same approach was taken by the Court in another case; this time in *Prager and Oberschlick v. Austria*.[1368]

These two judgments were criticised on several grounds. The basic idea of these criticisms centres on the fact that the judiciary, like other democratic institutions, must be open to thorough public scrutiny; judges are generally obliged to tolerate a high degree of criticism concerning matters of public interest. As Pannick has argued, criticism of the judiciary is not the dangerous evil feared by those who would protect

[1364] 441 U.S. 153 (1979).
[1365] Mowbray, A., op. cit. p. 536.
[1366] *Barfod v. Denmark* - 11508/85 [1989] ECHR 1.
[1367] *Ibid* See, Janis, M., and Richard Kay, op. cit. p. 266-270.
[1368] *Prager and Oberschlick v. Austria*, - 15974/90 [1995] ECHR 12.

the courts. The benefits of freedom of expression are as in this context as in others.[1369] With regard to the *Barfod* case, Pannick believes that the reputation of the two judges could have been protected by allowing a freer debate on their judicial conduct, not by placing a restriction on the writer's freedom of expression, which would deter others from expressing their views on judicial behaviour, and thereby inhibit free expression.[1370] This explains why, in a recent case, the ECtHR leaned towards the freedom of the press by referring to a "value-judgment" approach.[1371] The Court's judgment in *Haes and Gijsels v. Belgium*[1372] seemed to mark a departure in its attitude to defamation cases involving judges, though it is not a full departure. Although the applicants published five articles in their magazines accusing the judges, who awarded the custody of children to the father, who had been accused of abusing the children, of bias, lack of independence, and being extremely right-wing, the Court ruled that the applicants could not be accused of having failed in their professional obligations, since the articles that they had written contained a mass of detailed information which was based on thorough research of their own and on the opinion of several experts. The Court also found that although the applicants' comments were without doubt severely critical, they appeared proportionate to the matters alleged. The Court considered that the applicants' allegations amounted to an opinion whose truth, by definition, was not susceptible of proof. Therefore, the verdict in the libel action directed to the applicants constituted a breach of Article 10 and the criticism of judges by journalists does not necessarily damage the authority and impartiality of the judiciary. The Court, however, mentioned that any criticism of a judge should be based on fair value-judgments and compliance with professional ethics. This is the difference between criticism of politicians, where a value judgment is not required to be fair and the criticism directed to judges where the applicant is required to establish that his/her value-judgment is fair, as groundless criticism of a judge can easily damage his or her reputation, indirectly, the authority and impartiality of the judiciary.[1373]

VII.2.3. Freedom of Expression v. the Protection of Morals

The protection of morals is not purely a philosophically or politically advanced notion, as under Article 19(3) and Article 10(2) of the ECHR, it is laid down as one of the

[1369] Pannick, D., *Judges* (Oxford University Press, 1987) p. 128.
[1370] Pannick, D., "Article 10 of the European Convention on Human Rights", *K.C.L.J.* 4 (1993-94) p. 44, 48.
[1371] Nolte, G., (2005) op. cit. p. 33.
[1372] *De Haes and Gijsels v. Belgium*, 19983/92 [1997] ECHR 7.
[1373] *Ibid*

justifications for interference with freedom of expression. The study here analyses how and where the international law of free speech draws the line between the guarantee of the right to freedom of expression and the protection of morals by a detailed study of communications and cases reviewed by HRC and Strasbourg institutions. This study takes sexually explicit speech and publications which contain blasphemy as the most obvious examples of forms of expression that are prohibited for the protection of morals. These two offences abridge freedom of expression in order to protect individuals and in some cases the public in general, against harm to moral integrity, to uphold standards of public behaviour as well as to protect religious sensibilities. The extent to which they constitute a restriction on freedom of expression, however, is a contentious issue.

VII.2.3.1. Sexually Explicit Speech

The law on sexually explicit speech, as said in Chapter Five, is aimed at protecting people against harm and offence, which the obscene and indecent materials and publications is said to cause. It guards moral integrity or protects some public interest in maintaining moral standards in a way which overrides personal freedoms, including freedom of expression. It is thus not surprising that restriction on obscene or pornographic material would be a classic instance of an Article 19(3) limitation based on protection of public morals.[1374] General Comment 28 states that in relation to Article 19 States parties should inform the HRC of any laws or other factors which may impede women from exercising the rights protected under this provision on an equal basis. As the publication and dissemination of obscene and pornographic material, which, in the view of Catharine Mackinnon, portrays women and girls as objects of violence or degrading or inhuman treatment conditions sexual,[1375] is likely to promote these kinds of treatment of women and girls, States parties, according to HRC, should "restrict the publication or dissemination of such material." This is the HRC's first statement indicating an obligation on States to control pornography, where it concerns depictions of adults. Pornography controls are apparently seen as more than mere permissible limitations to freedom of expression. General Comment 28 indicates that some forms of pornography are a form of free expression.[1376]

[1374] Joseph, S., Jenny Schultz, and Melissa Castan, (2004) op.cit. p. 529, 567.
[1375] Mackinnon, C., *Are We Human?* (Cambridge, Massachusetts and London: The Belknap Press of Harvard University Press, 2005) p. 112-119.
[1376] See, Joseph, S., Jenny Schultz, and Melissa Castan, (2004) op.cit. p. 567.

Generally speaking, the HRC has taken less strict approach in cases that require balancing free speech and the protection of public morals, in comparison with the protection of national security. In September 1976, Leo Rafael Hertzberg, a lawyer, was interviewed for the purposes of a radio programme entitled *A rbetsmarknadens uteslutna* (The Outcasts of the Labour Market). In the interview, he asserted on the strength of his knowledge as an expert that there exists job discrimination in Finland on the ground of sexual orientation, in particular, to the detriment of homosexuals. According to the contentions of the author of the communication, Finnish authorities, including organs of the State-controlled Finnish Broadcasting Company (FBC), have interfered with their right of freedom of expression and information, as laid down in Article 19 of the ICCPR, by imposing sanctions against participants in, or censuring, radio and TV programmes dealing with homosexuality. In his view, the Court of Appeals exceeded the limits of reasonable interpretation by construing paragraph 9 (2) of chapter 20 of the Penal Code as implying that the mere "praising of homosexual relationships" constituted an offence under that provision. The HRC was of the view that there had been no violation of the rights of the authors of the communication under Article 19(2) of the ICCPR.[1377] The HRC expressed that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities.[1378]

Likewise, the Strasbourg institutions, with regard to sexually explicit speech, where there is concern about the harmful or offensive effect of the publication on its reader or audience, have given the governments a wide margin of appreciation as to appropriate restrictions on freedom of expression.[1379] The most important case addressing the protection of morals of young people is the well-known *Handyside* case.[1380] Mr. Handyside published an English edition of the *Little Red Schoolbook*, which was originally published in Denmark. It included chapters on, *inter alia*, 'Education', 'Teacher' and 'Pupils'; the latter chapter contained 26 pages of information on matters concerning sex (topics included abortion, homosexuality, intercourse and masturbation). Before the publication of the English edition, a warrant was under the Obscene Publication Act 1959 and many copies of the book were issued seized. The ECtHR presented detailed reasoning on the doctrine of the margin of appreciation. The Court

[1377] *Hertzberg and Others v. Finland*, CCPR/C/15/D/61/1979 (1982).
[1378] *Ibid*.
[1379] *X. Y. and Z. v. Belgium* (1977) 9 D R 13, EComHR; *X. and the German Association of Z against the Federal Republic of German* (1963) 6 Y.B.E.C.H.R. 204, EComHR. See Saini, P., (1999) op. cit. p. 204.
[1380] *Handyside* v. *United Kingdom*, 5493/72 [1976] ECHR 5.

ruled that State authorities were in principle in a better position than the international judge to give an opinion on the exact content of these requirements, as well as on the necessity of a restriction or penalty intended to meet them. To the Court, it was not possible to find in the domestic law of the various contracting States a uniform European conception of morals. The requirement of morals varied from time to time and from place to place, especially in an era which was characterised by a rapid and far-reaching evolution of opinions on the subject.[1381] Despite extending free expression to information and ideas that "offend, shock or disturb," the Court ruled in favour of the state, allowing it a margin of appreciation to determine the measures needed to protect morals.[1382] The obscene character of the material was the reason that the ECtHR took into account before deciding its decision in *Muller and others v. Switzerland*.[1383] In the *Muller* case, which was discussed previously in Chapter Five, the ECtHR had to draw a borderline between the protection of freedom of speech of expression and morals. The ECtHR ruled that the limitations imposed on obscene artistic expression were prescribed by law; the aim pursued was legitimate, and necessary for the protection of morals.[1384]

It seems that the doctrine of the HRC and Strasbourg institutions toward obscenity is to some extent similar to that of the U.S. Supreme Court which has denied First Amendment protection without regard to whether it is harmful to individuals.[1385] They all banned such expression to protect "the social interest in order and morality."[1386] In addition, all considered the obscenity of the material as a justifiable reason to restrict it. This can be understood from the HRC General Comment 28, the ECtHR decisions in *Miller*. The only difference is that while American approach excludes obscenity from the Constitutional protection in the first stage, the international system authorises "a two-step process, in which the first step is to delineate the scope of the right, and then, if some activity or some governmental restriction falls within that scope, thereafter to

[1381] *Ibid.*

[1382] See also *X. v. the United Kingdom* (1978) 16 D R 32, EComHR; *X. Company v. the United Kingdom* (1983) 32 D R 231, EComHR; *Scherer v. Switzerland*, - 17116/90 [1994] ECHR 13. Merrills, J., and A.H. Robertson, (2001) op. cit. p. 174; Janis, M., and Richard Kay, (1990) op. cit. p. 233-243.; Morrisson, C., (1988) op. cit. p. 90-99; Beddard, R., (1993) op. cit. p. 125; Liao, F., "The Right to Freedom of Expression and the Protection of Health and Morals-Jurisprudence of the European Convention on Human Rights," *EURAMERICA*, 30.1 (2000) p. 188.

[1383] See Mowbray, A., (2007) op. cit. p. 661-666.

[1384] *Muller v. Switzerland*, 10737/84 [1988] ECHR 5.

[1385] Cohen, H., "Freedom of Speech and Press: Exceptions to the First Amendment," Congressional Research Services (CRS) Report for Congress, order 95-815 A, 2001, p. 2.

[1386] General Comment 28. See also *Roth v. United States*, 354 U.S. 476, 483 (1957). *Handyside* v. *United Kingdom*, 5493/72 [1976] ECHR 5.

determine whether the limitations are justified according to the designated burden of justification and the designated proportionality inquiry."[1387]

VII.2.3.2. Blasphemy

There is no denial that certain forms of expression can threaten the dignity of targeted individuals and create an environment in which the enjoyment of equality is not possible. Such a risk may be provoked by expressions that are hateful. Religion, besides the victim's race, ethnic origin, gender or sexual orientation, according to Ian Cram, can be the basis of speech that seeks to promote hatred.[1388] Therefore, reasonable restrictions on freedom of expression may be necessary or legitimate to prevent advocacy of hatred religion that constitutes incitement to discrimination, hostility or violence.[1389] The prohibition of blasphemous expression can also be raised on other grounds, such as protection of public morals or public order. The question is: Does international human rights law provide justifications for restricting blasphemy?

According to Professor Mashood Baderin, the limitation of blasphemy is explicable within the provision of Article 19(3) (b) of the ICCPR on the protection of public order or morals. The ability of blasphemous expressions to incite Muslims to public disorder is evidenced, for example, by the upheavals in many parts of the world that followed the publications of Rushdie's *Satanaic Verses*, which was considered as being offensive to the religious sensibilities of Muslims, not only by Muslims but even by non-Muslim religious leaders.[1390] The inflammatory nature of Rushdie's novel was the main reason, according to Ali Mazrui, for its being banned in some places, because of fears that it would cause riots.[1391] Therefore, according to Baderin, there is need in this realm, always carefully and objectively to distinguish constructive reasonable intellectual critiques of religious interpretations from expression that insult or revile the sensibilities of reasonable adherents of particular religions under the guise of freedom of expression.[1392] According to others, prohibition on blasphemy would also potentially be

[1387] Schauer, F., (2005) op. cit. p. 7.
[1388] This definition of hate speech brought from Ian Cram, (2006) op. cit. p. 102.
[1389] Callamard, A., (2006b) op. cit. p. 7-13.
[1390] Baderin, M., (2003) op. cit. p. 128. Daniel Pipes in his article "The Clash to End All Clashes? Making sense of the cartoon jihad", cited examples of non-Muslims who condemned Rusdhi's *Satanic*. *National Review Online*, February 7, 2006. In another article he gave several examples of condemnation of Danish cartoons by Westerners. "Cartoons and Islamic Imperialism", *New York Sun*, February 7, 2006.
[1391] Mazrui, A., "Islamic and Western Values", *Foreign Affair*, 76.5 (September/October 1997) pp. 118-132.
[1392] Baderin, M., (2003) op. cit. p. 128-129.

justified by public morals, though their justification is perhaps more contentious in many states, given the secular nature of many modern societies.[1393]

Some, however, see that this is where the ICCPR differs from the ECHR and indeed from many laws and practices around the world.[1394] Interference with expression that contains blasphemy is difficult justify under Article 19(3), particularly if that expression is given the meaning which equivalent phrases have in the case law of the ECtHR. Even under the clause "right of others," some see that the infringement of blasphemous publications can not be justified. [1395] The organisation, according to Agnes Callamard, does not extend such legitimate restrictions to offensive and blasphemous expressions.[1396] The conclusion, according to David Harris and Sarah Joseph, must be that the crime of blasphemy in its present form is incompatible with the ICCPR.[1397]

In contrast to the debate surrounding the position of the ICCPR towards blasphemous speech, under Article 10 of the ECHR, the situation is very clear. A wide margin of appreciation is generally available to States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.[1398] This is because, in the absence of a uniform European conception of the significance of religion in society, the State authorities are in a better position than the international judges to assess what is likely to cause offence to believers in each country.[1399] In the *Otto-Preminger Institute v. Austria* case, the Court rejected the EComHR's view that the seizure and forfeiture of a blasphemous film, which was potentially offensive to Christians, had violated Article 10 and justified this conclusion by pointing out that the overwhelming majority of Tyroleans were Roman Catholics.[1400] The same wide margin of appreciation was afforded to the State party in the *Wingrove* case. The case began when the British Board of Film Classification refused a certificate for distribution of a video made by the applicant portraying a woman, dressed as a nun and described in the credits as 'Saint Teresa' (of Avila), having an erotic fantasy involving the crucial figure of Christ. *Wingrove* applied to the ECtHR, claiming that the ban breached Article 10 of the ECHR as disproportionate to the aim of protecting the public morals. The British authorities considered the distribution of such material, which contravenes British blasphemy law, would outrage

[1393] Joseph, S., Jenny Schultz, and Melissa Castan, (2004) op. cit. p. 529.
[1394] Callamard, A., (2006b) op. cit. p. 7-13.
[1395] Harris, D., and Sarah Joseph (1995) op. cit. p. 416
[1396] Callamard, A., (2006b) op. cit. p. 7-13.
[1397] Harris, D., and Sarah Joseph (1995) op. cit. p. 417
[1398] Merrills, J., and A.H. Robertson, (2001) op. cit. p. 175.
[1399] Callamard, A., (2006b) op. cit. p. 7-13.
[1400] *Otto-Preminger Institute v. Austria*, 13470/87 [1994] ECHR 26.

and insult the feelings of believing Christians. The Court concluded that the reasons given by the British authorities to justify the measures taken could be considered as both relevant and sufficient for the purposes of Article 10 (2.)[1401]

It is worth noting that protection relates to the established Church of England rather than all religious beliefs and organisations. In other words, the offences apply only to attacks on the Church of England and by extension to attacks on Christianity. Consequently, opponents of Salman Rushdie's novel *The Satanic Verses* were unable to bring a blasphemy prosecution, as the courts declined to extend the offence to protect Islam.[1402] In the recent case of *R 'v' Chief Metropolitan Magistrate ex parte Choudhury*, a Muslim sought judicial review of the Magistrates' refusal to issue a summons for blasphemy against Salman Rushdie in connection with his book. *The Satanic Verses*, which purported to insult the Islamic religion, on the grounds that the law of blasphemy was confined to the protection of the Christian religion. The application was dismissed by the QBD who confirmed, "We have no doubt that as the law now stands it does not extend to religions other than Christianity." Moreover it stated that it was outside its powers to extend the law "to cover religions other than Christianity" since the "function of Parliament alone can change the law." However, because of this, and other reasons, there are recurrent suggestions that the law of blasphemy should be superseded by protection under anti-vilification statutes.[1403] There is some movement towards use of hate speech legislation rather than specific blasphemy provisions in criminal or other codes in restricting expression that might offend adherents of a particular faith/organisation or incite hostility to those adherents. So, restrictions on such speech might be imposed in the name of hate speech, in addition, and in the name of the protection of rights of others.[1404]

However, while some suggest that the HRC should follow a similar approach to the Strasbourg institutions in considering issues of moral and religious sensibilities,[1405] others see the necessity of abolition of blasphemy laws in today's free speech world, giving the example of the U.S. Constitutional tradition, in which there is no room for a law criminalizing blasphemy, since it is wholly incompatible with the First Amendment and it has been held by the courts that "from the standpoint of freedom of speech... the

[1401] *Wingrove v. the United Kingdom* - 17419/90 [1996] ECHR 60.

[1402] *R. v. Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* 3 W.L.R. 986 [Bone, 2001].

[1403] Levy, L., *Blasphemy: Verbal Offence against the Sacred, from Moses to Salman Rushdie* (Chapel Hill: University of North Caroline Press, 1995) p. 531-567; Sajid, A., "Incorporating Human Rights into Domestic law: The Gab Between the ECHR and the ICCPR", *The Muslim Lawyer Journal* 3.2 (1998) p. 2.

[1404] Callamard, A., (2006b) op. cit. p. 7-13.

[1405] Baderin, M., (2003) op. cit. p. 129.

state has no legitimate interest in protecting any or all religions from views distasteful to them...to suppress attacks upon religious doctrine" [1406] In the United States, the Supreme Court steadfastly strikes down any legislation prohibiting blasphemy, in the fear that even well-meaning censors would be tempted to favour one religion over another, as well as because it "is not the business of government ... to suppress real or imagined attacks upon a particular religious doctrine."[1407] For a long time, as Professor Robert Post says, the First Amendment has been held to protect from legal sanction all religious polemic, even expression that aims deliberately and provocatively to assault the religious sensibilities of the pious.[1408] It is recognized that "a first great principle of consensus" in First Amendment doctrine is that "In America, there is no heresy, no blasphemy."[1409]

What is important for this study, at least at this stage, as the blasphemy law will be examined further in following chapters, is the difference in interpretation and application of clauses to protect public morals among Western laws of free speech, a difference that, certainly, has impacted the achievement of the universalism in the human right of freedom of speech.

VII.2.4. Freedom of Expression v. Hate Speech

Hate speech is a term which refers to a whole spectrum of negative discourse stretching from hate and incitement to hatred; to abuse, vilification, insults and offensive words and epithets; and arguably also to extreme examples of prejudice and bias.[1410] Hate speech laws are those which prohibit expression that falls within the above definition. International law encourages states to introduce legislation which penalizes incitement to hatred. In this regard, the HRC and the Strasbourg institutions have developed a sizeable body of jurisprudence around the prohibition of hate speech such as Holocaust denial and National Socialism. Article 20 of the ICCPR is unambiguous in asserting:

> 1) Any propaganda for war shall be prohibited by law. 2) Any advocacy of national, racial or religious hatred that constitutes

[1406] *Burstyn v. Wilson* (1952).
[1407] *Joseph Burstyn, Inc v. Wilson*, 343 U.S. 495, 504-05 (1952). Post, R., (2007) op. cit. p. 73.
[1408] Post, R., (2007) op. cit. p. 73.
[1409] Kalven, H., *A Worthy Tradition: Freedom of Speech in America* (New York: Harper & Row, 1988) p. 7.
[1410] Jacobs, J., & K. Potter, *Hate Crimes: Criminal Law and Identity Politics* (New York, OUP, 1998) p. 11. McGonagle, T., "Wresting (Racial) Equality from Tolerance of Hate Speech." *Dublin University Law Journal*, 23 (2001) pp. 21-54, p. 23.

> incitement to discrimination, hostility or violence shall be prohibited by law.[1411]

By virtue of Article 20 of the ICCPR, which does not have a parallel in ECHR, certain speech not only may but in fact must be restricted. The prohibition of propaganda for war and advocacy of national, racial or religious hatred is a clear consequence of the atrocities leading up to and during Would War II. This provision provides a clear basis in human rights law for restricting freedom of expression where that freedom is used to incite discrimination, hostility or violence or for war propaganda. It may be used, according to Office for Democratic Institutions and Human Rights, "as a basis equally to prevent abuse of freedom of expression for a terrorist cause and to prevent the imputation of terrorist tendencies to particular communities which may amount to incitement to discrimination, hostility or violence against members of those communities."[1412]

In *J.R.T. and the W.G. Party v. Canada*, recorded messages warning callers about "the dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles" were considered by the HRC as advocacy of racial or religious hatred which Canada had an obligation under Article 20 (2) of the ICCPR to prohibit.[1413] In effect, it found that there was no scope to consider the complaint under the Article 19 right of a state to restrict freedom of expression because in this case the restriction was required under Article 20 of the ICCPR.[1414] In *Faurisson v. France*, a landmark decision, which addresses the issue of balance between freedom of expression and non-discrimination, the HRC held that the restriction on publication of these views did not violate the right to freedom of expression in Article 19 and in fact that the restriction was necessary under Art 19(3.) There was no violation of Article 19 because revisionist theses amounting to the denial of a universally recognised historical reality constitute the principal [contemporary] vehicle for the dissemination of anti-Semitic views.[1415] While endorsing the state's right to restrict freedom of expression in this case under Article 19(3) as necessary for the

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[1411] "For article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation. The Committee, therefore, believes that States parties which have not yet done so should take the measures necessary to fulfil the obligations contained in article 20, and should themselves refrain from any such propaganda or advocacy", HRC, General Comment 11, Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), 29 July 1983.

[1412] Office for Democratic Institutions and Human Rights, (2006) op. cit. p.12

[1413] *J.R.T. and the W.G. Party v. Canada*, 104/1981.

[1414] *Ibid.*

[1415] *Faurisson v. France*, 550/1993.

respect of the rights of others, the concurring opinion noted that the crime for which the complainant was convicted did not expressly include the element of incitement, and the statements for which he was convicted did not "fall clearly within the boundaries of incitement, which the State party was bound to prohibit" under Article 20(2) of the ICCPR. Nevertheless, the opinion suggested that:

> there may be circumstances in which the right of a person to be free from incitement to discrimination on grounds of race, religion or national origins cannot be fully protected by a narrow, explicit law on incitement that falls precisely within the boundaries of Article 20, paragraph 2. This is the case where, in a particular social and historical context, statements that do not meet the strict legal criteria of incitement can be shown to constitute part of a pattern of incitement against a given racial, religious or national group, or where those interested in spreading hostility and hatred adopt sophisticated forms of speech that are not punishable under the law against racial incitement, even though their effect may be as pernicious as explicit incitement, if not more so.[1416]

The HRC took into account the restrictions on the freedom of expression are permitted by Article 19, paragraph 3 may relate to the interests of other persons or to those of the community as a whole. Since the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-Semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-Semitism. The HRC therefore concluded that the restriction of the author's freedom of expression was permissible under Article 19, paragraph 3 (a), of the ICCPR.

In *Ross v. Canada*, the author claimed that his right under Article 19 of the ICCPR had been violated in that he was refused the right to express freely his religious opinions. It was also claimed that the author's opinions and expressions did not constitute hate propaganda; thus, the author's case was not comparable to *J.R.T. and W.G. v Canada*. The State party argued that freedom of religion and expression under the ICCPR must be interpreted as not including the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The HRC upheld the disciplinary action taken against a school teacher in Canada for statements he made that were found to have "denigrated the faith and beliefs of Jews and called upon true Christians to not merely question the validity of Jewish beliefs and teachings but to hold those of the Jewish faith and ancestry in contempt as undermining

[1416] Concurring Opinion by Elizabeth Evatt and Kretzmer, D., joined by Eckart Klein. *Robert Faurisson v. France* 550/1993.

freedom, democracy and Christian beliefs and values." The HRC noted that "it was reasonable to anticipate that there was a causal link between the expressions of the author and the poisoned atmosphere."[1417]

In *Ernst Zundel v. Canada*, the author, a German-born publisher, author and civil rights activist, and a towering figure in the worldwide Holocaust revisionist movement, was held responsible under the Canadian Human Rights for of exposing Jews to hatred and contempt on an Internet website known as the "Zundelsite."[1418] One of the author's articles posted on that site, entitled "Did Six Million Jews Really Die?" disputed that six million Jews were killed during the Holocaust. The author claimed that he was a victim of a violation of Article 19 of the ICCPR, as he was discriminatorily denied his right to freedom of expression. The State party contended that even if the author's exclusion from the precincts were to be considered a restriction of his right to freedom of expression, such restriction was justified pursuant to Articles 19, paragraph 3, and 20, paragraph 2, of the ICCPR. Given that Anti-Semitism is contrary to the values of tolerance, diversity and equality, as enshrined in the Canadian Charter of Rights and Freedoms and other domestic human rights legislation, the motion of the House of Commons further served the protection of public morals.[1419]

Departing from the jurisprudence of ICCPR towards another body of international free speech law, ECHR jurisprudence, it can, generally, be said that all forms of expression fall within the right set out in paragraph (1) of Article 10, notwithstanding its content, even, according to the ECtHR in the *Handyside* case, that which may offend, shock, or disturb the state or any sector of the population.[1420] However, there is an exception. Speech that aims to destroy the rights and freedoms of others through inciting hatred and racial discrimination is prohibited.[1421] In this regard, while the language of Article 10 of the ECHR is comparable to the language of Article 19 of the ICCPR, the ECHR has no provision comparable to Article 20 of the ICCPR, prohibiting incitement of discrimination, hostility or violence based on national, racial or religious grounds. However, although there is no clear indication in Article 10 of proscribing freedom of speech in the interests of avoiding speech which incites hatred and racial discrimination,[1422] Article 17 of the Convention provides a frank legitimate reason for

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[1417] *Ross v. Canada*, CCPR/C/70/D/736/1997 (2000).
[1418] See his webpage, <http://www.zundelsite.org> See also Lipstadt, D., (1993) op. cit. p. 117.
[1419] *Ernst Zündel v. Canada*, CCPR/C/89/D/1341/2005.
[1420] *Handyside* v. *United Kingdom*, 5493/72 [1976] ECHR 5.
[1421] Clements, L., (1994) op. cit. p. 179.
[1422] In some instances, Article 10 (2) itself, hate speech was regulated on the ground that they are necessary either to prevent disorder or crime, or to protect the reputation or rights of the minority groups

such proscription. Article 10, according to the Court, in common with other substantive provisions, must be interpreted in the light of other articles, notably Article 17, which states that nothing in the Convention creates a right to engage in activities "aimed at the destruction of any of the rights or freedoms set forth in the convention."[1423] The latter article, it has been held, is intended "to prevent totalitarian groups from exploiting, in their own interests, the principles enunciated in the convention." [1424] Thus, whenever expression runs against the basic ideas of the Convention or destroys the rights and freedoms of other people, then the restrictions on freedom of expression, according to Article 17, are justifiable.[1425]

The EComHR in a number of cases referred to Article 17 in upholding the prohibition of expression that denies the Holocaust, advocates racial hatred or expresses Nazi or Fascist ideas. In *Kuhnen*, for example, the applicant was leading an organisation which tried to bring back onto the political scene the National Socialist Party, prohibited in Germany. He wrote and disseminated publications in which he encouraged the fight for a socialist and independent Greater Germany, stating that his organisation was "against capitalism, communism, Zionism, estrangement by means of masses of foreign workers, destruction of the environment" and in favour of "German unity, social justice, racial pride, community of the people and camaraderie." In another publication, he stated, "Whoever serves this aim can act, whoever obstructs it will be fought against and eventually eliminated." Relying on Article 10, Mr Kuhnen complained against his conviction by the German courts. The EComHR declared the complaint inadmissible, referring to Article 17 of the Convention which prohibits any activity "aimed at the destruction of any of the rights and freedoms set forth herein." The EComHR observed that freedom of expression may not be used for the destruction of the rights and freedoms set forth in the Convention. It considered that the applicant's proposals, which advocated national socialism and aimed at impairing the basic order of freedom and democracy, ran counter to one of the basic values expressed in the Preamble to the Convention: the fundamental freedoms enshrined in the Convention "are best

concerned. In additional, See *Honsik v. Austria* (1995) 83-A D R 77, EComHR; *K. v. Austria* (1989) 62 D R216, EComHR; *X v. Italy (*1976) 5 D R83, EComHR; *Michael Kuhnen v. FRG* (1988) 56 D & 205, EComHR; *X. Austria* (1963) 6 Y.B.E.C.H.R 424, EComHR.

[1423] *Lehideux and Isorni v. France*, - 24662/94 [1998] ECHR 90; *J Glimmerveen and J. Hagenbeek v. the Netherlands* (1979) 18 D R 187, EComHR.

[1424] Merrills, J., and A.H. Robertson, (2001) op. cit. p. 169.

[1425] Clayton, R., and Hugh Tomlinson, (2001) op. cit. p. 168; Harris, O'Boyle, Warbrick, (1995) op. cit. p. 337-374; Dijk, P., and G. J. H. van Hoof, (1990) op. cit. p. 559; Macovei, M., (2004) op. cit. p. 18.

maintained ... by an effective political democracy."[1426] In other cases, also by referring to Article 17, the EComHR upheld the imposition of restrictions on political movements whose doctrine and platform were inspired by the Fascist party;[1427] found the convictions of distributers of leaflets that expressed applicants' intention to exclude all non-whites from the country were acceptable in a democratic society;[1428] and ruled restrictions on neo-Nazi and national-socialist activities legitimate.[1429] In short, the EComHR were of the opinion that the right to freedom of expression could not run counter to the basic values underlying the Convention, namely, "effective political democracy,"[1430] and "justice and peace."[1431]

The Convention's institutions, however, seem to accept constraints on all expressions that have any relation to racist or hatred remarks, not only those that pronounce Nazi and Fascist thoughts in a straightforward way, but also those that may risk even referring to these thoughts. When the German authorities imposed restriction upon a conference at which some supporters of Nazi ideas were to speak, the EComHR, referring to the German authorities' limitation, which required the applicant to guarantee that no speaker would mention Nazi ideas, decided that the limitation was legitimate because "the applicant organisation ... did not argue that there was no such risk" that statement of incitement of hatred were to be expressed."[1432] This means that the EComHR, in fact, prohibited every utterance referring to Nazi or Fascistic thoughts. It endorses restrictions upon an event if there is any risk of hate speech.[1433]

The ECtHR, similarly to the EComHR, referred to Article 17 in the case of *Lehideux and Isorni v. France*. The Court ruled that expression which "belongs to the category of clearly established historical facts- such as the Holocaust- whose negation or revision would be removed from the protection of Article 10 by Article 17."[1434] The Strasbourg institutions' justification of such prohibition may be better explained by the Court's own words in a case against Turkey. According to the Court,

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[1426] *Michael Kuhnen v. FRG* (1988) 56 D & 205, EComHR; *Udo Walendy v. Germany* (1995) 80 D EComHR; *Otto E. F. A. Remer v. Germany* (1995) 82 D & R117, EComHR.

[1427] *X v. Italy* (1976) 5 D & R 83, EComHR.

[1428] *J Glimmerveen and J. Hagenbeek v. the Netherlands* (1979) 18 D R 187, EComHR.

[1429] *X. Austria* (1963) 6 Y.B.E.C.H.R 424, EComHR; *H., W., P., and K. v. Austria* (1989) 62 D R216, EComHR; *Honsik v. Austria* (1995) 83-A D R 77, EComHR; *X v. FRG* (1982) 29 D R 194, EComHR.

[1430] *Michael Kuhnen v. FRG* (1988) 56 D & 205, EComHR

[1431] *Otto E. F. A. Remer v. Germany* (1995) 82 D & R117, EComHR; *T. v. Belgium* (1983) 34 D R 158, EComHR; *Pierre Marais v. France* (1996) 86 B D & R 184, EComHR.

[1432] *Nationaldemokratische Partei Deutschlands, Bezirksverband Munchen-Oberbayern v. Germany* (1995) 84-A D R 149, 154, EComHR.

[1433] See *Supra* p. 163.

[1434] *Lehideux and Isorni v. France*, - 24662/94 [1998] ECHR 90. See Williams, A., "Hate Speech, Holocaust Denial and International Human Rights", *European Human Rights Law Review* 6 (1999) p. 593; Mowbray, A., (2007) op. cit. p. 651-652.

> Tolerance and respect for the equal dignity of all human beings is the foundation of a democratic and pluralist society. As a result, it may be judged necessary in democratic societies to sanction and prevent all forms of expression which propagate, incite, promote or justify hatred founded on intolerance (including religious intolerance), if steps are taken to ensure that the "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued.[1435]

As regards Holocaust denial and historical "revisionism," in *Garaudy*, the applicant was found guilty by the Paris Court of Appeal of disputing the existence of crimes against humanity, public defamation of the Jewish community, and incitement to discrimination and racial hatred by publishing his book, *The Founding Myths of Modern Israel.* Given the overall revisionist tone of the work, the Court had serious doubts as to whether his writing could qualify for protection under Article 10 because it had a clear racist objective. The denial or rewriting of this type of historical fact, according to the Court,

> undermined the values on which the fight against racism and anti-Semitism was based and constituted a serious threat to public order. It was incompatible with democracy and human rights and its proponents indisputably had designs that fell into the category of prohibited aims under Article 17 of the Convention. The Court found that, since the applicant's book, taken as a whole, displayed a marked tendency to revisionism, it ran counter to the fundamental values of the Convention, namely justice and peace.[1436]

The ECtHR position is different, however, when the intention behind the publication of hate speech is to inform the public or illuminate debate.[1437] A number of the ECtHR cases address the role of journalists, as well as editors and publishers, and their responsibility for the dissemination of views promoting discrimination.[1438] In *Jersild v. Denmark*, a majority of a Grand Chamber of the Court accorded Article 10 protection to a television journalist who produced a programme in which other persons expressed unlawful racist views.[1439] Although the Court considered comments made by members of the Greenjackets (a group of young people), during an interview with the applicant, describing niggers as animals, not human beings, were more than insulting to members of the targeted group, the Court ruled the applicant's conviction was not necessary in a democratic society.[1440] This is because the applicant did not have a racist purpose when

[1435] *Muslim Gunduz v. Turkey* - 35071/97 [2003] ECHR 652.
[1436] *Garaudy v France* No. 65831/01 Admissibility decision of 07.07.03 ECtHR.
[1437] Ovey, C., & Robin C.A. White, (2002) op. cit. p. 280-281.
[1438] Cram, I., (2006) op. cit. p. 123.
[1439] *Jersild v. Denmark* - 15890/89 [1994] ECHR 33.
[1440] *Ibid.*

compiling his report and taken as a whole his segment could not objectively be viewed as having such a purpose. Thus, whenever there is intentional promotion of racist opinions, such an expression would not be granted the protection of Article 10.[1441] A very similar approach was adopted by the Court in *Muslim Gunduz v. Turkey*, in which the applicant, who was a leader of a community that calls itself an Islamic sect, was prosecuted following his participation in a televised programme. He was found guilty and sentenced for making statements inciting hatred and hostility based on a distinction founded on adherence to a religion. He alleged an infringement of Article 10 of the Convention. Although the Court emphasised that expressions aimed at propagating, inciting or justifying hatred founded on intolerance, including religious intolerance, are not protected by Article 10 of the Convention, it ruled that the Turkish court's ruling against the applicant constituted a violation of Article 10 of the Convention. This is because the *Gunduz* case occurred within a very specific context. First, the televised programme had the aim of presenting the sect headed by the applicant; the latter's extremist ideas were already known and were debated by the public and counterbalanced by the remarks of other participants in the programme in question; finally, they were expressed as part of a pluralist debate in which the applicant was an active participant. Accordingly, the Court considered that in the instant case the necessity of the restriction in question had not been convincingly established."[1442] It is understood from the *Jersild* and *Gunduz* cases that the Court took into account the intended audience of the message in determining whether state interference was justified. This is a very important ruling for all media professionals as it offers a significant measure of protection when reporting on debates on issues of racism, xenophobia and religious intolerance, as well as other matters of public interest.[1443] It is, in my view, the best way in my view to defeat racists.[1444]

The above decisions, as some say, apply the theory of the paradox of tolerance: an absolute tolerance may lead to the tolerance of the ideas promoting intolerance, and the latter could then destroy the tolerance.[1445] Not only the ICCPR and ECHR, beside the the UDHR[1446] and International Convention on the Elimination of all Forms of Racial

[1441] Mowbray, A., (2007) op. cit. p. 651-652.
[1442] *Muslim Gunduz v. Turkey* - 35071/97 [2003] ECHR 652.
[1443] Darbishire, H., "Hate Speech: New European Perspectives." (1999).
[1444] *Ibid.*
[1445] Macovei, M., (2004) op. cit. p. 7.
[1446] Article 1 states "All human beings are born free and equal in dignity and rights." Article 2: "*Everyone* is entitled to all the rights and freedoms set forth in the Universal Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin,

Discrimination,[1447] but most liberal societies rely on this theory to regulate such speech.[1448] Many countries give effect to the international obligations by enacting laws forbidding group libel or incitement to racial and religious hatred and, in some cases, Holocaust denial. However, it should be stressed that the provisions of international law, although reflected in the penal codes of many states, are not without controversy.[1449] In the United States, as the previous chapter showed, only the narrowest restrictions which are absolutely necessary should be imposed. The classic U.S. position maintains that hate speech should not be punished unless the speech intentionally or knowingly incites to violence or constitutes criminal intimidation or harassment.[1450] Restrictions should only be imposed when there is a clear danger of imminent violence arising from the speech and there is no other reasonable means of preventing that violence. Otherwise, it is strongly argued that the best antidote to speech is more speech; intolerant speech can be countered, ridiculed and shunned by tolerant speech. Since it is improbable that expression in the media, particularly the print media, could directly incite violence, such expression should be excluded from hate speech laws.[1451] To put it another way, in contrast to the ICCPR and ECHR, as well to most liberal systems, which explicitly exclude hate speech from free expression principles, American First Amendment doctrine protects incitement to racial hatred, Holocaust denial, and other forms of hate speech widely criminalized in the rest of the world.[1452] For example, the American First Amendment paves the road before the poll conducted in the U.S. by the Roper Organization for the American Jewish Committee, which asked, "Do you think it possible or impossible that the Holocaust did not happen?" The poll was conducted in order to determine the extent of Americans' knowledge of the Holocaust, and came out with a startling and surprising result: 22 percent of American adults and 20 percent of American high school students answered, yes, it was possible.[1453] The sponsors of the poll, or those who conducted it, or even students who did not deny the possibility that

property, birth or other status." Article 4: "*No one* shall be held in slavery or servitude. Article 7. *All* are equal before the law and are entitled without any discrimination to equal protection of the law."

[1447] See *L.K. v. The Netherlands* 4/1991, U.N. Doc. A/48/18 at 131 (1993); *Ahmed v. Denmark* CERD/C/56/D/16/1999; *Hagan v. Australia* CERD/C/62/D/26/2002.

[1448] For example, unlike in the USA, Canadian courts have held hate speech to be an inherently harmful activity analogous to a verbal assault, which is not deserving of the same protection as other forms of expression. *R v Keegstra* (1990); *Taylor v Canadian Human Rights Commission* (1990). In South Africa, Austria, Belgium, the Czech Republic, France, Germany, Lithuania, Poland and Slovakia, hate speech is considered as unprotected speech. See Barendt, E., (2005) op. cit. p. 177-186.

[1449] Joseph, S., Jenny Schultz, and Melissa Castan, (2004) op. cit. p. 544.

[1450] Lester, A., "Free speech and religion- The eternal conflict in the age of selective modernization" (12th May 2006) p. 5, at URL, <http://www.odysseustrust.org>

[1451] Darbishire, H., "Hate Speech: New European Perspectives." (1999).

[1452] See Bakken, T., (2000), op. cit. p. 4.

[1453] Lipstadt, D., (1993), op. cit. p. 4.

the Holocaust did not happen, might not find this opportunity to express their views in France, for example. Another instance can be given here, but this time from the Court. The example given previously about the American Court's tolerance toward marchers who displayed the Nazi uniform and the swastika in Skokie, a suburb of Chicago, inhabited mostly by Jews aged survivors of Nazi death camps, is sufficient to illustrate the divergence between American law and international law of free speech. Hate speech under the U.S. regime can only be regulated under the *Brandenburg* formula. This formula provides that advocacy of imminent unlawful action and violence may constitutionally be prohibited; this will cover incitement to race riots where a breakdown of law and order is likely.[1454] This is, of course, contrary to the doctrine of the ICCPR and ECHR, which typically restricts such speech, even though there is no suggestion that it is likely to lead immediately to violence and disorder. Alastair Mowbray emphasised this fact when he answered the question whether the advocacy of violence is accorded protection under Article 10. A majority of the Court, according to Mowbray, was not willing to find a breach of Article 10 where an opposition politician was punished for appearing to express support for a terrorist organisation.[1455] The divergence of American law of free speech from intentional law in interpreting and applying the clause "rights of others" constitutes the basis for departure of American law from equivalent universal standards.

VII.3. Chapter Summary

It appears that, in contrast to the seeming absoluteness of the First Amendment, international law of freedom of speech differs from the American in the presence of an explicit listing of various qualifications or exceptions to the right. Limitations on freedom of expression are made comparatively explicit in the formal agreements on human rights drawn up by governments. These classic limitations on freedom of expression are related to ensuring the rights of the individual (e.g. protection from libel and hate speech), defending public morality (through blasphemy, obscenity or pornography laws) and, securing the vital interests of the State (e.g. by prohibiting incitement to serious crimes and threatens to national security.)

The conclusion that can be drawn is that international law of freedom of speech, in a clear absence of influence of truth theory, restrains some types of speech which the American First Amendment doctrine, as a clear implementation of the truth theory,

[1454] Barendt, E., (1998) op. cit. p. 161.
[1455] Mowbray, A., (2007) op. cit. p. 645. See *Zana v. Turkey* 18954/91 [1997] ECHR 94.

protect.[1456] At the international level, the ideological imperative of freedom of speech, even if it leads to recognising the truth, is not allowed to ride roughshod over other human rights and laudable societal values. Prime examples of such rights are equality and non-discrimination.[1457] Rather, the right is nuanced to greater or lesser degrees: a certain balancing of competing rights is often deemed necessary or appropriate, as is evidenced by the consideration of the HRC approach in *Robert Faurisson v. France* and ECtHR decision in *Lehideux and Isorni v. France*. In other words, freedom of speech protection, according to the international approach, must be accompanied by the protection of other fundamental rights and freedoms such as a commitment to equality, dignity and diversity. Accordingly, freedom of hate speech might be prohibited even when it is harmless or unoffensive, because it is inconsistent with underlying values of liberal democracy such as citizens' right of equal respect and concern or with others' right of freedom of speech. This conclusion proves that the democratic values argument, discussed previously in Chapter Five, is not an invented criterion in determining freedom of speech boundaries. Even among nations that take freedom of expression seriously, there are differences about the extent to which freedom of expression should prevail when it finds itself in conflict with other important values, such as the value of equality.

The above discussion also shows that the judicial attitude in international law has been that of balancing between equally recognized rights, values and interests, as they are affirmed in the ICCPR or ECHR themselves, or elsewhere. The categorization used by the Supreme Court, as Chapter Six showed, is somewhat different.[1458] However, this does not erase the fact that several distinct categories of expression have emerged through the case law under the ECHR. It is clear from the case law of the ECtHR that the degree of protection afforded will very much depend on the subject matter of the expression at issue.[1459] To put it differently, while examining freedom of speech provisions, two methodologies can be envisaged.[1460] The first approach consists of presumptively treating all categories of expression the same and balancing the different interests at stake in an ad hoc fashion. Accordingly, balancing here is done on a case-by-case basis, as there is generally no hierarchy of rights. The HRC, for example, has adopted this method. The second method is the very one rejected by the HRC. It

[1456] The analysis of this conclusion will be a topic of the Concluding Chapter.
[1457] McGonagle, T., (2001) op. cit. p. 21.
[1458] Nolte, G., *European and US Constitutionalism* (Cambridge University Press, 2005) p. 23.
[1459] Lewis, T., (2004) op. cit.
[1460] Randall, M., (2006) op. cit. p. 53.

consists of distinguishing between different categories of speech. The above discussion of the European case-law demonstrated that the Strasbourg institutions have chosen this approach. The variations in the standard of review have to be seen in the context of the so-called 'margin of appreciation' doctrine, which grants national authorities some discretion when examining whether a pressing social need exists. Some types of expression, as noted from the examination of the case-law, have been regarded as deserving lesser or no protection. *Per contra*, the Court has clearly shown a preference for political expression. This approach of giving different levels of protection to different kinds of expression is adopted, as I said before, by the Supreme Court in the United States. Although the First Amendment, similarly to Article 10, refers generally to freedom of speech, certain categories of speech, such as obscenity, have been held to be entirely without First Amendment protection, while others, such as commercial expression, have been held to have a lesser degree of protection.[1461] Because of the central role of free expression in the functioning of democratic government, speech about political matters, in the United States, has been considered most obviously entitled to constitutional protection.[1462] It is therefore submitted that the HRC should follow a similar approach to the Strasbourg institutions in this regard.

[1461] *Ibid.* p. 53-86
[1462] Janis, M., & Richard S. Kay, (1990) op. cit. p. 271.

Part Four

Freedom of Speech and Islamic Law

Part Four Outline

The overarching question behind this part is: Is Islamic law *per se* contradictory to international law of freedom of speech, or are the violations of this precious freedom in the name of Islam rather a consequence of cruel regimes and historically established traditions? Can religion, such as Islam, contribute to building a culture of free speech? This part of the study, thus, is about the uneasy relationship between religion, Islam in our case, and one of the most precious human rights, freedom of speech. The study here summarizes this relationship by the delineation of some points of convergence and divergence between international law of freedom of speech and Islamic law freedom of speech.

There is a belief that if there should be major discrepancies between the attitudes to freedom of speech among Muslims in general, and the right to freedom of speech that has been declared as universal by the UN, it would mean that more than a fifth of humanity could question the legitimacy of this right.[1463] According to Professor Ali Khan, no value can become universal if it is opposed by Muslim states representing one fifth of humanity.[1464] This is because the binding force of any law, international law of freedom of speech included, cannot rest solely on force. The legitimacy of international law and international organizations ultimately is a function of widespread individual beliefs that the law and its authorities are right and appropriate. Religion, whether Islam or any other, is, after all, historically the language of universality *par excellence*. Professor Adam Seligman pointed out that it was first and foremost within religion that arguments for human dignity and worth were articulated.[1465] According to Fathi Uthman, religion is a way to establish and strengthen human dignity and freedom. What can be said is that the role of religion, Islam in our case, in awaking the awareness of the universality of freedom of speech among its adherents is important. Muslims usually look for a specifically Islamic basis for adopting any human right that declared as universal. For Muslims, the religious dominion of existence extends to encompass the

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[1463] Barrett, D., *World Christian encyclopaedia: a comparative study of churches and religions in the modern world* (Nairobi: Oxford University Press, 1982); A. Omran, 'UN Data on Demography of the Islamic World', paper presented at the International Conference on Islam and Population Policy, Jakarta and Lhokesumawe, Indonesia, 19-24 Feb. 1990 cited in Baderin, M., (2003) op. cit. p. 2; See also Esposito, J., *What Everyone Needs to Know About Islam* (Oxford University Press, 2002) p. 1.

[1464] Khan, A., 'The Reopening of the Islamic Code: The Second Era of Ijtihad', *University of St. Thomas Law Journal* 1(2003) p.373, f. 121.

[1465] Seligman, A., "Introduction", *Journal of Human Rights* 2.1 (2003) p. 8. See in this regard, Ali, M., *Religion of Islam* (New Delhi: S. Chand & Company Ltd, Ram Nagar, n.d.) p. 8-9.

whole of life. As such, all issues of social, economic or political significant, according to Sadek, must ultimately be related to the basic Islamic conceptions and shown to be in accord therewith in order to gain unreserved public acceptance and support.[1466] In the human rights context, *Shariah* is the root of the concept; thus freedom of speech, as one of the human rights, obtains legitimacy from religion.[1467]

This part presents with analysis the concept of freedom of speech from an Islamic point of view. The first chapter of this part looks at the meaning of speech and the reasons that justify the protection of freedom of speech in Islam. The second chapter of this part will end with the answer to the following question: Does Islam impose restrictions on freedom of speech? If yes, what are the differences between Islam and international law of freedom of speech in this regard? If the answer is no, then why was Salman Rushdie, the author of the book, which brought the Western world and the Muslim World into conflict, *The Satanic Verses*, condemned to death by Ayatollah Khomeini? Was *Satanic Verses* a free speech case or defamation?[1468] Why has the consequence of publishing Danish cartoons been truly dreadful?[1469] Were the Danish cartoons a free speech case or blasphemy? The purpose of the examination is, of course, not to provide an extensive analysis of free speech law in Islam, but rather to point to issues of differences between two laws, international and Islamic, specifically with regard to speech threatening national security, defamatory speech, obscenity, blasphemous speech, and hate speech.

[1466] Sulaiman, S., "The *Shura* Principle in Islam", Al-Hewar Center, Inc., 1999, p. 3 <http://www.alhewar.com/sadek*Shura*.htm>

[1467] Uthman, F., "Islam Should be Recognized as Dynamic, Flexible Religion", Al-Hewar Center, April 11, 1999, online at <http://www.alhewar.com/FathiOsman.html>

[1468] Rushdie, S., *The Satanic Verses* (London: Viking/Penguin, 1988); Ruthven, M., *A Satanic Affair: Salman Rushdie and the Rage of Islam* (London: Chatto & Windus, 1990); Daniel Pipes, "How Dare You Defame Islam", *Commentary*, November 1999; Daniel Pipes, "Salman Rushdie and British Backbone", *New York Sun*, June 26, 2007.

[1469] Post, R., "Religion and Freedom of Speech: Portraits of Muhammad", *Constellations* 14.1 (2007) pp. 72-90, p. 72.

Chapter Eight

VIII. The Meaning and Justification of Freedom of Speech in Islamic Law

The study here discusses two important issues: firstly, it looks into the meaning of speech in Islamic law and compares it with its meaning in the international law of free speech. The study, then, discusses the justifications that Islamic law provides for protecting the right to free speech. The main objective is to identify points of convergence and divergence between Islamic law and the international law of freedom of speech in these two issues.

VIII.1. The Meaning of Freedom of Speech in Islamic Law

The previous chapters, especially Chapters Two and Three, demonstrated that the determination of the meaning of speech is important firstly because once the use of a certain method is considered a component of freedom of speech, no individual, society, or government can deprive the speakers of their right to use it. Secondly, the level of protection depends on whether something is speech or conduct. According to Thomas Emerson, "the central idea of a system of freedom of speech is that a fundamental distinction must be drawn between conduct which consists of expression and conduct which consists of action. Expression must be freely allowed and encouraged. Action can be controlled..."[1470] The examination of the meaning of speech in international law (ICCPR and ECHR), as well as in national law of freedom of speech, such as the First Amendment, revealed that pure speech, symbolic speech and speech plus, fall under the dictionary meaning of speech.

Notwithstanding that freedom of speech in Islam is protected, in addition to *Quranic* verses, by several sayings narrated from the Prophet Muhammad,[1471] understanding what constitutes free speech is an area which is neglected by Muslim scholars. In fact, Muslim scholars' concern was, and still is, directed towards the justification for interference, rather than concerning themselves with the philosophy and definition of speech, as most Western free speech scholars do. Their focuses have not been directed towards ascertaining what is speech, consequently to be given the coverage of speech,

[1470] Emerson, T., (1969) op. cit. p. 17.
[1471] See Kamali, M., (1997) op. cit. pp. 26-107.

and what is non speech, to be subject to law. This can be demonstrated by looking at works of Muslim scholars and jurists which discuss the right to freedom of speech. A large number of books and articles of traditional and contemporary scholars and writers on freedom of opinion, thought, speech, as well as on human rights, political rights, equality and opposition in Islam were examined for that purpose.[1472] No exclusive treatment of meaning of speech can be found in the scholastic works of the Muslim scholars. It is difficult to find a work that defines freedom of speech, as did Professor Thomas Emerson, an American free speech scholar, for example, when he asserted that it "includes the right to form and hold beliefs and opinions on any subject and to communicate ideas, opinions, and information through any medium- in speech, writing, music, art, or in other ways" and noted that it involves "the right to remain silent, to hear the views of others, to listen to their version of the facts, to inquire, to have access to information, to assemble, and to form associations."[1473] Such determination of the meaning of speech is totally absent in the writings of Muslim scholars. Most of these works discuss freedom of speech without exposing the wide changes that have occurred in the concept of freedom of speech during the last two centuries. They have not examined how "art" can be a method of freedom of speech, as Article 19 of the ICCPR states. Nor have they explored whether freedom of speech can be attained through any medium, including paintings, images, poems, books, telephone, press, films, videos, statements in radio interviews; or television programmes, as the ECtHR ruled. They did not discuss how the legal nature of conduct, such as symbolic speech and speech plus, have affected the protection of conduct in freedom of speech law, as the Supreme Court of U.S. ruled. There is no single indication in their writings whether political speech can

[1472] Examples of these are, Abdul-Hakim Al-Ili, *Al-Hurryyiat al-Ammah* (Cairo: Dar al-Fikr, 1983); Hammad, A., *Hurryyiat al-Ra'y fil-Maydan al-Siyasi* (Cairo: Dar al-Wafa, 1987); Al-Mudgari, A., *Hurryyiat al-Fikr* (Rabat: Dar al-Fadala, 1991); Ahmed, A., *Hurryyiat al-Fikr wa Tarshid al-Waqi al-Islami*, 2nd edition (Cairo: Maktabat Nahzat Misr, 1992), Tabliya, A., *al-Islam wa Huquq al-Insan*, 2nd ed (Cairo: Dar al-Fikr al-Arabi, 1984); Shokar, I., *Manhaj al-Quran fi Taqrir Hurryyiat al-Ra'y* (Beirut: Dar al-Fikr al-Mu'asir, Damascus: Dar al-Fikr, 2002); Al-Tuaimat, H., *Huquq al-Insan wal-Hurryyiat al-Asasyah* (Amman: Dar al- Shoruq, 2003); Al-Khatib, H., *Al-Islam wa Mafhum al-Hurryyiat* (Dar al-Multaqa lil-Nashr, 1993); Al-Saidi, A., *Hurryyiat al-Fikr fil-Islam* (Cairo: Dar al-Ma'arif, 2001); Rabi, M., *Dhamanat al-Hurryyiat, Bain Wiqayat al-Islam wa Falsafat al-Dimuqratiyyah* (Riyadh: Maktabat al-Ma'arif, 1988); Uthman, H., *Hurryyiat al-Ra'y inda al-Arab* (Cairo: Kitab al- Jumhuriyah, 2001); al-Basyouni, A., *Wa Hal fil-Islam Hurryyiat Ra'y* (Maktabat al-Aqsa, 1994); Al-haj, A., *Hurryyiat al-Ta'bir Bayn al-Itlaq wa al-Taqied* (Khartoum, 2005), Ghazawi, M., *al-Hurryyiat al-Amma fil-Islam* (Alexandria: Mu'assasat al-Shabab al-Jami'ah n.d); Mustafa, M., *Hurryyiat al-Ra'y fil-Islam* (Cairo: Dar al-Ghareeb, n.d.); Al-Zuhayli, M., *Huquq al-Insan fil-Islam*, 2nd edition (Damascus: Dar al-kalima al-Taibah; Beirut: Dar Ibn Kathir, 1997).

[1473] Emerson, T., (1969) op. cit. p. 3. See also Scanlon, T., (1972) op. cit. p. 206; Braddon-Mitchell, D., and Caroline West, "What is free speech?" *Journal of Political Philosophy* 12.4. (2004) pp. 437–460, p. 437.

be represented in a film, such as Michael Moore's *Fahrenheit 9/11*.[1474] They have mostly emphasised the classical doctrines of Islamic law and exclusionist interpretation of international law freedom of speech. This has obscured many commonalities that do exist between Islamic law and international law of free speech and has continued to strengthen the theory of incompatibility between them. However, this, as Ahmed Abdussalam says, should not be surprising, as in a society where implementation of total freedom of speech is still a problem, discussion on the vehicle of this speech may not be a significant question for academic pursuit.[1475]

However, a few have discussed freedom of speech according to the modern concept of such freedom. One of the few books that show a compromise between the historical origin of freedom of speech and its contemporary concept is written by a Professor Mohammad Kamali, who has made great efforts in this regard. Kamali, in his distinguished work, *Freedom of Expression in Islam*, provided a detailed examination of the affirmative evidence on the subject of freedom of expression found in the sources of the *Shariah*, as well as considering the limitations, whether moral, legal or theological that Islam imposes on the valid exercise of this freedom. However, even in Kamali's work, there is no clarification of the meaning of speech in Islam. Although Kamali, relying on Western sources, defined freedom of speech as the freedom to communicate or transmit views and opinions in various forms such as books, photographs, signs, symbols and other means of communication,[1476] Kamali did not clarify, with evidence, whether or not Islamic law accommodates this meaning of speech. There is no indication in that book about whether the meaning of speech in Islam is confined to written and spoken words or extends to include within its scope speech that takes the form of symbolic action, such as wearing black armbands in protest at war, desecrating the flag of the country, burning a draft-card, growing or cutting a person's hair, saluting or refusing to salute a flag, a homeless person standing naked in a public place to make a statement about the inadequacy of public efforts to deal with homelessness, or speech plus action, such as leafleting and canvassing, picketing, patrolling, marching, parading, and demonstration.

In contrast to this complete absence, in the scholastic works of the Muslim scholars, of determination whether Islam confines freedom of speech to spoken and written forms or extends to other types of activities which are covered by the international law of free

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1474 See Shenon, P., "Michael Moore Is Ready for His Close-Up," *The New York Times*, June 20, 2004.

1475 Abdussalam, A., "Human Language Rights: an Islamic Perspective", *Language Sciences*, 20.1 (1998) p. 56.

1476 Kamali, M., (1997) op. cit. p. 7.

speech, Islamic law, embedded in the *Quran* and *Sunnah*, determines very clearly the meaning of speech. This determination of the meaning of speech can be understood from one of the famous sayings narrated from the Prophet of Islam. It is narrated, in *Sahih Muslim*, that the Prophet said, "If any of you sees something evil, he should set it right with his hand; if he is unable to do so, then with his tongue, and if he is unable to do even that, then (let him condemn it) in his heart. But this is the weakest form of faith."[1477] The Prophet Muhammad, in this saying, has guided believers to the tools that can be used in commanding good and forbidding evil (*hisbah*.)[1478] *Hisbah*, in this context, is defined by Muslim scholars as follows: "to speak and to act in pursuit of what in your enlightened judgement seems good, or to forbid, whether in words, acts or silent denunciation, any evil which you see being committed."[1479]

It is clear from this saying, which I will take as a starting point, that one can express her/his thought and opinion, whether on political issues, social events, economy, public morality, and so on, through speech, action, and silence.[1480] Most of these tools, as demonstrated in Chapter Two and Chapter Three, are forms of freedom of speech. More clearly, freedom of speech, according to the Prophet's saying, can take the form of pure speech (with his tongue), symbolic speech (silent denunciation), and speech plus (with his hand). Some examples will be given here to show that all these three types of speech are well-established in Islam. Firstly, with regard to pure speech, which is defined as speech which conveys ideas through speaking or writing, most Muslim scholars concentrate on spoken and written words when they define freedom of speech. This concentration is a natural reflection of the importance that is given to pure speech in both the *Quran* and *Sunnah*. In chapter 55 of the *Quran*, God says: "*God Most Gracious! It is He Who has taught the Qur'an. He has created man: He has taught him speech (and intelligence)*". This reference by the *Quran* in these verses to speech, as a third honour given by God to human beings after teaching him the *Qur'an* and creating him, reveals, according to al-Ghamdi, the importance of this form of speech in

[1477] Muslim, *Sahih Muslim*, no. 1, *hadith* no. 78 (Cairo: Mustafah al-Babi al-Halabi, 1955) p. 69. This prophetic saying has been mentioned also in al-nNawawi's famous compilation of 40 *hadith*, tradition no. 34. Nawawi, *al-Ahadith al-Arbin al-Nawawiyyah* (Saudi: Al-Jami'a al-Islamiyyah, 1988) p. 63-64. See its extensive commentary in Ibn Rajab al-Hanbali, *Jami' al-'Ulum wa al-Hikam*, No. 2, 7th ed (Beirut: Muasassat al-Risala, 1999) 234-257; Al-Ghazali, A., *Ihya Ulum al-Din*, no. 2 (Beirut: Dar al-Kutub al-Ilmiyyah, 1986) 359. See also Michael Cook, *Commanding Good and Forbidding Wrong in Islamic Thought* (Cambridge: Cambridge University Press, 2000).
[1478] Al-Hageel, S., *Human Rights in Islam and Their Applications in the Kingdom of Saudi Arabia*, Translated by Atari, O (Saudi-King Fahd National Library, 2001) p. 101.
[1479] Kamali, (1997) op. cit. p. 28.
[1480] Abduh, M., *Nahj Al-Balag* (Beirut: Al-Maktabat al-Ahliyyah, n.d.) p. 89.

Islam.[1481] Pure speech, as a method of communication, has been mentioned in several other verses of the *Quran* such as chapter 33 verse 70,[1482] chapter 2 verse 83,[1483] and chapter 4 verse 148.[1484] In chapter called *Abraham*, the *Quran* says: "*See thou not how Allah sets forth a parable? - A goodly 'word' like a goodly tree, whose root is firmly fixed, and its branches (reach) to the heavens ... And the parable of an evil 'Word' is that of an evil tree: It is torn up by the root from the surface of the earth: it has no stability.*"[1485] What these two verses say is that through the word, whether spoken or written, ideas and information, whether good one (*Kalimah Tayyibah*) or evil (*Kalamah Khabithah*), are exchanged.[1486] The Prophet of Islam has taken the importance of words even further by considering the word of truth to a tyrannical ruler as the best form of struggle (*Jihad*).[1487] Moreover, history tells that this type of speech has been practised since the beginning of Islam. One of the most obvious examples in this regard is the Friday speech (*Kutbah*).[1488] The Friday Speech, as a means of communication, is strongly associated with the call to Islam since its emergence, and it became a part of the structure of the Islamic call. Commentators tell that speech was the first tool and the most prominent means for the prophetic call. In many of the speeches delivered by the Prophet Muhammad, significant cultural and political issues were discussed.[1489] The Four Rightly-Guided Caliphs started their governance by announcing the method of ruling in speeches where they handled many religious and political issues that were important to the society.[1490] It can be said that the Friday Speech was the most important methods of informing people about public matters, including, of course, religious issues. Via the Friday Speech, ideas and information were exchanged between rulers and the public.

Another example of pure speech can be given here. Chapter Two of this study concluded that most modern free speech laws consider artistic speech, poetry in particular, to be deserving of free speech coverage. Islamic law, according to Muslim

[1481] Al-Ghamdi, A., *Huquq al-Insan fil-Islam* (Riyadh: Naif Arab Academy, 2000) p. 74.
[1482] "*O ye who believe! Fear Allah, and (always) say a word directed to the Right*"
[1483] "*And remember We took a covenant from the Children of Israel (to this effect): Worship none but Allah. treat with kindness your parents and kindred, and orphans and those in need; speak fair to the people; be steadfast in prayer; and practise regular charity*"
[1484] "*God loves not the public utterance of evil speech except by one who has been wronged.*"
[1485] (*Quran* 14: 24, 26)
[1486] Al-Rifai, M., *Kutbat al-Jummah* (Beirut: Gros Press, 1985) p. 135.
[1487] See *infra* p. 258.
[1488] For more about this Friday speech, see Al-Hamdani, N., *Kutbat al-Jummah* (Mecca: Majallat Da'awat al-Haqq, 1992) p. 6.
[1489] Al-Rifai, M., *Kutbat al-Jummah*, (1985) op. cit. p. 5.
[1490] See Abu Zahrah, M., *al-Khithaba, Usolha, Tarikha fi Azhr Osorha end al-Arab*, 2nd ed (Cairo: Dar al-Fikr al-Arabi, 1980).

scholars, has also recognised the composition of poems as an expression of the poet's opinion.[1491] Even more, poetry, according to Uwaidhah, was a tool used by the Prophet to encourage his army and send a message to others.[1492] Al-Bara narrated: "The Prophet said to Hassan, 'Abuse them (with your poems), and Gabriel is with you' (i.e, supports you)".[1493] However, the Prophet distinguishes between frivolous and serious poetry. He says: "Poetry is like ordinary speech: fine poetry is like fine speech, and objectionable poetry is like objectionable speech."[1494] Accordingly, poetry which contains obscenity, blasphemy or words of hatred is forbidden in Islam. What this example shows is that artistic speech is speech falls under the dictionary meaning of speech in Islam.

Communication of political, economic, social, religious and other ideas and information is not necessarily accomplished by pure speech; it may be conveyed, as mentioned previously, through means other than writing and speaking such as expressing ideas through using symbols. Winks and fingers are meant to, and do, communicate, perhaps more effectively than words under some circumstances. Symbolic speech is one of the methods that often used in defaming others. Signs, gestures etc. can give rise to a claim for defamation. The *Quran* very clearly and plainly indicated the forms that defamatory speech can take. This can be understood from verse 1 of chapter 104 which mentioned that a defamatory statement might occur either in words (*Lamz*) or by action (*Hamz*): "*Woe to every Humazah Lumazah*"[1495] Ibn Kathir mentioned that Ibn Abbas said that *al-hammaz* refers to Defemation. According to Mujahid, "*al-humazah* is with the hand and the eye, and *al-lumazah* is with the tongue." [1496] A further example of symbolic speech in Islam can be given here. Blasphemy, an expression which is restricted in Islam, can be committed, according to the Islamic approach, in two ways: firstly, by uttering expressly by tongue words of insult towards God, His Prophets, and His Holy Book (pure speech), or secondly by the performance of an act in which one cannot avoid the clear conclusion that it shows contempt of God, His Prophets, and His Holy Book, for example, to throw away with

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[1491] Salahi, A., "A Balanced Approach to Poetry", *Islamic voice*, vol. 15-07, no, 187, July 2002; Al-Jundi, A., *Al-Fushah Lughat al-Quran* (Cairo: Dar al-Fikr al-Arabi, 1986); al-Ani, S., *Al-Islam wal-Shar* (Kuwait: Salselat Aalm al-Ma'rifa, no. 66, 1996) p. 53-62; Abdul Khaliq, A., *Fusool fil-Siyasa al-Shariyyah* (Kuwait: jamiat Ihya al-Turath al-Islami, 1983) p. 15.

[1492] Uwaidha, A., *Athr al-Shaer fi- al- Islam* (Cairo: Matbat al-Amana, 1987) p. 7.

[1493] *Sahih Bukhari*, no. 4, *hadith* no. 3897 (Damascus: Dar Ibn Kathir 1987) p. 1512. For more about this toic see, Ibn Hisham, *al-Sirah al-Nabawiyyah*, no. 3 (Jordan: Maktabat al-Manar, 1988); Ibn Hajar, *Fath al-Bari*, no. 7 (Damascus: Dar al-Fayhaa, 1997) p. 671.

[1494] See Uwaidha, A., *Athr al-Shar fi- al- Islam*. Cairo: Matbat al-Amana, 1987, p. 29.

[1495] (*Quran* 104: 1; 68: 11.)

[1496] Ibn Kathir, *Tafsir al-Quran al-Azeem*, no. 2, 2nd (known *Tafsir Ibn Kathir*) (Riyadh: Dar Tayba, 2004) p. 149.

contempt the holy *Quran* or any part of it or even a single word of it; or to throw it in the fire; or to throw it in such a place as a garbage dump where there are filthy, dirty and repulsive things; or in a spittoon etc.[1497] Such an act when it done in an insulting and contemptuous manner, usually contains a message that someone desires to deliver. Muslim scholars, therefore, considered throwing away the holy *Quran*, or any similar act, as an expression of contempt for Islam. This example is not to classify whether blasphemy is restricted speech or not (as the discussion is about the coverage, not about the protection,) but to emphasise that the Islamic concept of the meaning of freedom of speech covers both pure speech and symbolic speech. The question that strongly poses itself here, since earlier in the study it was concluded that flag burning is a mode of political dissent, is: can the 11 September victims, in an angery reaction to a terrorist act committed by 19 hijackers, 15 of them Saudi, burn the flag of Saudi Arabia, which contains the *shahada* or profession of faith: "*There is but one God and Muhammed is His Prophet/ La ilaha Ila Allah Muhammada Rasulu allah.*"?[1498] Would such an action constitute blasphemy?[1499] Some commentators, without supporting their opinion with any evidence, concluded that the desecration of the flag that contains the most sacred line (*Shahada*) in Islam would amount to blasphemy and would not only warrant criminal proceedings under the strict Islamic criminal codes prevalent, but would also result in excommunication or the like.[1500] This opinion, in my view, fails to take into consideration that it is important, when accusing someone of blasphemy, that the meaning of conducts should be determined in the light of the context in which they are performed. Since custom varies with reference to time and place, it would follow that blasphemous conduct may amount to blasphemy in certain circumstances but not necessarily in others. Furthermore, Chapter Three of this study emphasises that for any symbolic speech to qualify as speech, the speaker must intend to produce understanding in the hearer by resort to or in virtue of the social context, or conventional meaning, of

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[1497] Kamali, M., (1997) op. cit. p. 215.

[1498] Article 3 of the Basic Law of Saudi Arabia states: "The state's flag shall be as follows: a) It shall be green. b) Its width shall be equal to two-thirds of it length. c) The words "*There is but one God and Muhammed is His Prophet*" shall be inscribed in the centre with a drawn sword under it. The statute shall define the rules pertaining to it." The *Shahada* is the first and most important pillar of Islam. It is the Muslim declaration of belief in the oneness of God and acceptance of Muhammad as his final prophet. See Encyclopedia Britannica, online available at <http://www.britannica.com/eb/article-69150/Islam>

[1499] Because it contains the *Shahada*, the Saudi flag has been given a holy significance besides its national importance and therefore any violation of the flag, however slight, amounts to desecration not only of the flag but also of Islam itself. On several occasions, Saudi officials protested against the desecration of the flag. During the Fifa World Cup, Saudi complained against depiction of the flag on a football, citing that kicking the creed with the foot was totally unacceptable. See Leithead, A., "Anger over blasphemous balls", BBC News, International version, August 26, 2007, online, at <http://news.bbc.co.uk/2/hi/south_asia/6964564.stm>

[1500] Duggal, K., and Shreyas Sridhar (2006) op. cit. p. 149-150.

what the speaker says. The intent is necessary to transform symbolic speech into a speech act. Therefore, the first issue to be examined in order to judge whether certain symbolic speech constitutes blasphemy is the intention of the speaker. The importance of the question of intention finds its basis in the Prophetic saying which tells that "The reward of deeds depends upon the intentions and every person will get the reward according to what he has intended." [1501] Kamali indicates the relevance of the blasphemer's intention regarding the words or acts he/she might have uttered or conducted.[1502] In the case of desecration of the flag that contains sacred words, a certain amount of ambiguity arises with regard to an act of abuse that is implicit and allusive. So, burning the Saudi flag might be understood as a political massage to Saudi Arabia or Saudis, rather than to Islam or Muslims. This is very different, in my view, from the situation of *the Satanic Verses* (pure speech) and Danish cartoons (artistic speech), where the intention of blaspheming Muslims was clear and supported by evidences, as Chapter Five showed. What the examples of the *Quran* and flag burning demonstrate is that symbolic speech is a recognised method of delivering ideas and information to others in Islam. It also demonstrates that in Islam, similar to modern free speech law, the speaker's intention is necessary to transform symbolic speech into a speech act.

The third example of symbolic speech in Islam is the right to remain silent. In the modern concept of free speech, whether international ICCPR and ECHR) or national (the First Amendment), when a person refuses to speak or prefers to be silent than to utter words, his/her silence is considered as a form of speech that should receive free speech coverage. This type of speech is defined as an expression that transmits an opinion without involving verbal or written expression. When the plaintiffs of Jehovah's Witnesses refused to salute the flag (a graven image) and recite the "pledge of allegiance" because by saluting the flag and reciting the "pledge of allegiance," they would be violating one of the Ten Commandments, the US Supreme Court ruled that students who refused to say the pledge of allegiance to the United States flag were expressing their feeling, opinion, and faith through their silence.[1503] Therefore, their silence inherits free speech protection.[1504] Islamic law also recognises silence as a form of speech. The last clause of the *hadith*, which is reinforced by several verses of

[1501] Bukhari, *Sahih Bukhari*, no. 3, *hadith* no. 1, p. 3.
[1502] Kamali, M., (1997) op. cit. p. 225.
[1503] *West Virginia State Board of Education v. Barnette*, 319 US 624 (1943); *State v. Lundquist* 278 A. 2d 263 (1971).
[1504] Moon, R., (2000) op. cit. p. 183-184.

Quran,[1505] according Ali Geraish,[1506] clearly states that the least a Muslim can do in the case of witnessing an evil act is to oppose it in his/her heart. This means that his/her silence is an indication of his/her dislike of the evil he/she comes across.[1507] As an example of a verse which considered silence as a mode of expression, scholars refer to verse 97 in chapter 4 which says, "*When angels take the souls of those who die in sin against their souls, they say: 'In what (plight) Were ye?' They reply: 'Weak and oppressed Were we in the earth.' They say: 'Was not the earth of Allah spacious enough for you to move yourselves away (From evil)?' Such men will find their abode in Hell, - What an evil refuge!*" This verse suggests that Muslims should not surrender to tyranny but should resist it by every possible means; if not by counter-action, then by avoidance (silence).[1508] Furthermore, the Prophet often used silence as a mean of expression of opinion. This is called in Islamic jurisprudence "*taqreer*," which is a silent approval or disapproval of the Prophet. For example, if the companions did something in presence of the Prophet, and the Prophet, despite being able to forbid it, did not do so; this is *taqreer* which implies a tacit approval or a silent approval.[1509]

The clause "with his hand" in the saying quoted earlier is an evidence of Islamic law's coverage of speech plus. This clause indicates that one can express his feeling, belief, or opinion through conduct, which must involve a message that a person intends to deliver to others, such as commanding good and forbidding evil (*al-amr bi'l-msruf wa'l-nahy an al-munker*). Islamic history, since its early days, has shown instances of the public demonstrating and challenging wrong-doing. Demonstrating in support of justice and against corruption is a legitimate tradition that the *Quran* legitimised in condemnation of corruption when it said: "*Let a party of the Believers witness their punishment.*"[1510] Ibn Kathir, in his interpretation of this verse, considered this type of freedom of speech as a most effective tool in conveying the *Quranic* message to others, as he said: "It is more effective as a deterrent and it conveys the sense of scandal and

[1505] See for example verse 5: 78-79: "*Curses were pronounced on those among the Children of Israel who rejected Faith, by the tongue of David and of Jesus the son of Mary: because they disobeyed and persisted in excesses. Nor did they (usually) forbid one another the iniquities which they committed: evil indeed were the deeds which they did.*"
[1506] See Goraish, A., (1991) op. cit. p. 255-256.
[1507] Ibn Rajab Al-Hanbali, *Jami' al-'Ulum wa al-Hikam*, No. 2, 7th edition (Beirut: Muasassat al-Risalah, 1999) p. 245.
[1508] See (*Quran*, 16:41) "*And as for those who emigrated for the Cause of Allah, after suffering oppression, We will certainly give them goodly residence in this world, but indeed the reward of the Hereafter will be greater, if they but knew!*" See Al-Najar, A., (1992) op. cit. p. 46-47.
[1509] Al-Nimer, A., *Fi Rihab al-Sira wa al-Sunnah*, p. 11; Goraish, A., (1991) op. cit, p. 96-97. 115.
[1510] (*Quran* 24: 1).

rebuke."[1511] Certainly, in these circumstances, speech plus could be more effective than verbal or written words.[1512] On several occasions, the Prophet called for demonstrations. Sheikh Abdul Rahman Abdel Khaliq says, "Demonstrations were practiced as a means used by the Prophet to demonstrate Islam and preach for it."[1513] In one of these occasions, the Prophet, and his companions, went out in a demonstration, which is considered an exercise of the freedom of speech in its most explicit form, to send a message to the Quraish showing how strong the Muslims were and and how willing they were to continue their call for Islam. Ibn Abbas narrated: I asked Omar Ibn al-Khattab why he was called *"al-Farouq"* (Differentiator). He replied, When Hamza joined Islam three days before me, I met a person from al-Makhzoumi; I asked him: 'Did you disdain the religion of your fathers and join the religion of Muhammad?' He told me, 'If I did, people who are better than me did so before me'. I asked him, 'Who is it?' He told me, 'It is your sister and your brother-in-law.' Omar immediately and angrily went to his sister's house to criticise her for converting to Islam. While Omar was there, verses of the Holy *Quran*, from *Taha* chapter, were recited. Omar listened to these verses of the *Quran*. He felt how great they were, and immediately went to the house of al-Arqam Ibn Abi al-Arqam where he declared his commitment to Islam in front of the Prophet saying *"There is no God but Allah, and Muhammad is the Prophet of Allah"*. Then, the people in the house said, 'God is greater', and people in the mosque heard them. Omar, then, encouraging the the Prophet to send the message to their enemies through demonstration, asked the Prophet: 'O, Prophet, aren't we adopting the right path in all cases, whether of life or death?' He said 'By the one who controls my soul, you are adopting the right, whether in case of life or death.' I said, 'So why should we hide from the Quraish? By him who has sent you with truth, let us go out.' So we went out in two lines [as demonstration], one headed by one of the companions, Hamza, and the other by me. The lines were rumbling like grindstones until we reached the *Kaaba* sanctuary. The Quraish people looked at me and Hamza and they were unprecedentedly distressed. The Prophet then called me *al-Farouq* as I differentiated between the right and the wrong.'[1514] Commenting on this incident, Munir al-Ghadban says: "When Omar suggested to the Prophet to declare worship and make a collective explicit demonstration in Mecca, he accepted the suggestion of Omar, and people went

[1511] See, *Tafsir Ibn Kathir* (2004) op. cit. no. 6, p. 8-9.
[1512] See *supra* p. 63.
[1513] See Abdul Khaliq, A., *Tanbi'hat wa Ta'qibat* (Kuwait: Jamiat Ihya al-Turath al-Islami, 1994) p. 16-19. Abdul Khaliq retreated from this view afterward sharing to some extent Ibn Baz's view.
[1514] Ibn Hajar, (1997) op. cit. no. 7. p. 61; Ibn Na'im, *Hulat al-Awliya*, no. 1, (Dar al-Fikr, n.d.).p. 40.

in two columns; at the head of the first one is Omar, and in front of the other one was Hamza. As a result, the voice of Islam was declared in Mecca, the Muslims entered the *Kaaba* and performed their prayers, and by this demonstration, preaching went through a new track.[1515]

Some, however, deny that speech plus, demonstration in particular, is protected by Islamic law of freedom of speech and claim that the early Muslims, companions of the Prophet in particular, did not recognise anything like it. One of the most respected religious scholars says:

> I do not consider demonstrations to be a solution. Rather they are causes of seditions, causes of evil and among the causes of injustice against some people. However, the legitimate causes are correspondence, advice and calling to good, by peaceful means. Such were the companions of the prophet, peace be upon him, by writing and speaking with those in error, with the Emir and the Sultan, by communicating with him and advising him and writing to him, without defamation in pulpits and other places that he has done this or that.[1516]

According to another famous scholar,

> Demonstration is a new practice that was not known before the age of the Prophet (PBUH) and the age of the Orthodox Caliphs, and the age of the companions. Demonstrations that include chaos and riots are prohibited, as are the mixing of men with women and youth with old people and other bad habits and actions. As for putting pressure on governments, if a government is Muslim, it is enough to invoke the Holy Quran and the Traditions of the Prophet, which are the best means to preach to Muslims ... So, we think demonstrations are wrong.[1517]

In addition to its contradiction with the evidence mentioned above about the legitimacy of speech plus in Islam, it seems that there is a political utilisation of the concept of "sedition" in this legal opinion, a topic that will be discussed later on in this study. This opinion can be criticised on many grounds. Firstly, there is no indication in Islamic law, whether the *Quran* or *Sunnah*, that freedom of speech inherits the legal protection only when individuals express their opinions through spoken and written words. Otherwise, a huge amount of free speech exercise would be excluded from the freedom of speech clause, which would make protection of freedom of speech devoid of

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[1515] Munir al-Ghadban, "al-Manhaj al-Haraki Il-Sirah al-Nabawiyyah", p. 86, cited in Ayub, A., *Hukm al-Mudhaharat fil-Islam* (Al-Fayyom: Dar al-Falah, 2004) p. 158.

[1516] See Ibn Baz Fatwa in Muhammad Ibn Hussain al-Qhahtani, *Fatawa al-Ammah fil-Nawazil al-Mudlahimah*, Scholrs' Answers about the rule of Demonstrations (Al-Riyadh, n.d.,) p. 89; Al-Wadi, M., *Tohfat al-Mojibb ala Iselat al-al-Hazer wa al-Gharib* (San'a: Dar al-Athar, 2005).

[1517] This fatwa is mentioned in Ayub, A., *Hukm al-Mudhaharat fil-Islam*, p. 179.

content. The opinion expressed by Ibn Baz, undoubtedly, narrows significantly the meaning of speech. Secondly, to the degree that these actions are intended to communicate a point of view, the free speech law is relevant and protects some of them to a great extent. The scope of free speech, thus, in my view, must not be limited to verbal communication, but it must apply to conduct that conveys an idea, such as saluting, burning a flag, or demonstration. Thirdly, with regard to the claim that Islamic history did not witness or recognise speech plus, it can be said that regardless the correctness of this claim, freedom of speech entails, according to al-Najar, different means and methods that can convey messages to others, even if such means are not laid down in Islamic law and were not used by the early Muslims.[1518] The basic principle in this matter is that a thing which is not disallowed is deemed to be lawful, as the well-known juridical dictum has it: "Lawfulness is a recognized principle in all things." In other words, everything (in which is included every method of speech) is presumed to be lawful, unless it is definitely prohibited by law. This dictum is in fact based on the plain words of the Holy Qur'an: "It is He Who hath created for you all things that are on earth."[1519] Furthermore, the above approach is against the concept of *Maslahah* which decides that whatever leads to the welfare of the individuals or the society is morally good in Islam and whatever is injurious is morally bad.[1520] The clear principle laid down in the Holy Qur'an is that everything has been created for the benefit of man; hence, leads to the only possible presumption is that everything can be made use of by him, unless a limitation is placed, by law, on that use. To Imam al-Shatbi, as *Shariah*'s aim is ultimately to serve human welfare, delivering of a message to others, for example calling for Islam, is not restricted to certain methods. It could be by any method, as long as it brings advantage (*maslahah*) to human beings.[1521] Agreeing with this view, Mohamed Berween, in his article, *The Fundamental Human Rights: An Islamic Perspective*, confirms that all forms of expression are protected in Islamic society. Citizens can express themselves in any way, individually or in groups, as long as they respect the law of the land.[1522]

Fourthly, Speech plus was used also to deliver a message to others at the ceremony of the pilgrimage, where the Prophet asked those performing the circumambulation of

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[1518] Al-Najar, A., (1992) op. cit. p. 44.
[1519] (*Quran* 2: 29).
[1520] Abu Zahrah, M., *Al-Jarimah wal-Uqubah fi'l-Fiqh al-Islami: al- Jarimah* (Cairo: Dar al-Fikr al-Arabi, 1998), p. 27-39.
[1521] Al-Shatibi, *Al-I'tisam*, no. 1. (Beirut: Dar al-Ma'rifah, 1982) p. 238
[1522] Berween, M., "The Fundamental Human Rights: An Islamic Perspective", *International Journal of Human Rights*, 6.1 (2002) pp. 61-75, p. 71.

the *kaaba* to hurry to demonstrate the strength and health of their bodies. Islam introduced many rituals to show the greatness of Islam and to call for it, such as the Friday Prayers.[1523] Moreover, Islamic history tells that demonstrating and marching for the sake of commanding good and forbidding evil were widely practised by Muslims.[1524] Imam Ahmed Ibn Hanbal was of the opinion that people should gather to challenge wrong-doing in order to vilify the action as well as the wrong-doers. Under the topic of commanding good and forbidding evil, al-Khalal reported that Muhammed Ibn Abi Harb said: "I asked Abu Abdullah (Ibn Hanbal) about the man who can hear improper things from his neighbour's house. He said: 'He has to advise his neighbour'. I said, 'But what if the neighbour does not accept the advice? Abu Abdullah said: 'You should gather the neighbours against him.'" [1525] Another example is what Al-Jawzi said: "One day, many people gathered, after having closed their shops, and made for the ruler's house, headed by clerics and readers of the *Quran*. They cursed the people of Al-Karkh, i.e. they objected to a new phenomenon which was the cursing of the Prophet's Companions (*sab al-sahabah*) by the people of Al-Karkh. They crowded around the door of Al-Ghurbah and spoke without reservation. The caliph then sent some servants to relay the message that he also objected to what they objected to and would make sure that this did not happen again. So they departed."[1526]

With regard to the allegation that speech plus activities may be turned to violence, riot and breach of the peace, Islamic law, no differently than the international law of freedom of speech, and the First Amendment, makes a distinction between peaceful assembly and non-peaceful assembly. Islam has rules for holding a demonstration and they explicitly forbid rioting, destruction of property, and certainly murder: "*Fight for the sake of God those that fight against you, but do not attack them first. God does not love aggressors.*" [1527] When demonstration turns to violence, and so brings harm (*Mafsadah*) to human beings, it loses the protection of Islamic law. To illustrate in more detail, even though the right to express opinion through communicative conduct such as demonstrations, strikes, sit-ins, marches, etc. is recognised in Islam, the Islamic ruling regarding what is called communicative conduct is divided into two parts: The first category is permitted communicative conduct, which includes those with the purpose of

[1523] Al-Ahmari, M., Mashroiyyat al-Khurug fil-Muzaharat, 2005, available at Islam online webpage, <http://www.islamonline.net/Arabic/In_Depth/Demonstration/Articles/01.shtml>.
[1524] See, al-Ali, H., "*al-Hisba ala al-Hakim*", 2nd edition, 2007, Available at his webpage, < http://www.h-alali.net>.
[1525] Al-Khalaal, A., *ktab ala'mr balma'rouf walnhi a'n almnkr* (Jeddah: Dar al-Iatisam, 1975) p. 116.
[1526] Ibn Al-Jawzy, A., *Al-Muntazem*, no. 16 (Beirut: Dar al-Kutub al-Ilmiyyah, 1992.) p. 94.
[1527] (*Quran* 2: 190).

achieving an legitimate goal, such as a pay rise, shorter hours of work, the granting of financial rights and so on. The second category is restricted communicative conduct, which includes those carried out for the purpose of causing violence in the community. This category, of course, includes acts which lead to a greater evil. This is an application of one of the *fiqh* maxims (*qaw'ed fiqhiyyah*), which is derived from the text of Prophet saying: "There should be neither harming nor reciprocating harm."[1528] This *fiqh* maxim says that a greater harm can be removed by a lesser harm. In the case of restricting demonstrations that might lead to violence, there is a conflict between two harms: the harm of restricting this type of freedom of speech, demonstration in our case, and the harm that emerges from allowing violent demonstration. The precedence, according to this *fiqh* maxim, is given to avoiding the greater harm. In other words, one may adopt any method he/she wishes to express his/her opinion, as long as the two conditions on this method must are fulfilled: (1) it should not itself violate the law, so if the method violates the law, it will be prohibited.[1529] For example, it is not permitted to use assassination in order to deliver a political opinion. On this basis, assassinating Salman Rushdie as a consequence of Ayatollah Khomeini's fatwa, which required Rushdie to be assassinated for the blasphemous speech Rushdie used in his *Satanic Verses*, cannot be considered as a protected free speech. On the same basis, the protests against the Danish cartoons, which were not confined to demonstrations, slogans and rallies outside the concerned embassies, but extended to arson against the Danish embassy in Damascus and setting fire to the Danish embassy in Beirut, should not be considered as a protected free speech. Freedom of speech through the destruction of the property or setting fire to public facilities or similar acts is not covered by free speech rules. Therefore, it is firstly suggested that Muslims should remember that any message that they seek to deliver to others, especially to non-Muslims, should not be delivered by means that are contrary to both Islamic law and international law. Secondly, it is suggested that Muslim scholars are hard pressed to take charge, affirming freedom of speech while rejecting its abuse as a cover for prejudice. A sharp line must be drawn, according to John Esposito, between legitimate forms of dissent and violent demonstrations or attacks on embassies that inflame the situation,[1530] and reinforce Western stereotypes about Muslims and violence, as Khalid Hroub wrote in his article,

[1528] Nawawi, *al-Ahadith al-Arbin al-Nawawiyyah* (Sharjah: Dar al-Fath, 1990) p. 49.
[1529] See Khalil, H., *Mawaqif al-Islam min al-Aunf wal-Audwan wa Intihak Hoquq al-Insan*, (Cairo:Matboaat Dar al-Shaab, 1994) p. 15-16.
[1530] Esposito, J., "Muslims and the West" (2006).

Cartoons Crises, Fair Case and Failure Lawyers.[1531] (2) The objective of the method must be legitimate. If the purpose of using that method is to achieve what is illegitimate, such method, thus, according to Islamic rules, becomes prohibited. For example, when the objective of a particular means is to spread false information about others or to invade the privacy of others, the means is prohibited.[1532] Ibn Al-Qayyim says, "If God has prohibited something, and it has means and methods that lead to it, He forbids it and prohibits them to achieve and consolidate its prohibition."[1533]

The picture of an Islamic concept of the meaning of speech that emerges from the above discussion is very clear. Islam, in order to accomplish the target of freedom of speech, has opened a variety of doors in practising the right to freedom of speech through different kinds of channels that match the diverse strata of the Islamic society. Freedom of speech can never be upheld, nor can its progress be maintained, in the absence of any of these channels and doors. This explains why Muslim scholars, when they examined categories of activities, which are usually done either by pure speech or communicative conduct, have studied them under the free speech issue. To put the topic in a different way, although the main focus of the chapter is the meaning of freedom of speech in Islamic law, such a focus cannot be fully served without addressing other relevant rights, including the right to promote good and forbid evil, the right to criticise, the right to be consulted, and certain other rights. This is due to the presence of a strong relationship and interaction between the right to free speech and the said rights, to the extent that addressing the latter has become a prerequisite to addressing the former. Certain terms now prevalent in the free speech discourse, such as pure speech, symbolic speech and speech plus, were not used by classical scholars; however equivalent concepts, meanings and conditions were discussed under other concepts. Examples of these concepts, which have been given a particular degree of protection in the name of freedom of speech, are: (1) the *Quranic* principle of commanding good and forbidding evil, which takes for granted the basic freedom of individuals to formulate and express their own opinions; (2) sincere advice, which is a manifestation of fraternity among Muslims, and may be proffered to anyone, including the *ulama* and government leaders; (3) the *Quranic* principle of consultation; which entitles community members to be consulted in public affairs; (4) the doctrine of independent reasoning; (5) the citizen's

[1531] Hroub, K., "*Azmat al-Rusoom, Qadayah Adilah wa Muhamon Tuasa*." Islamonline, February 15, 2006, <http://www.islamonline.net>.
[1532] For more see al-Ali, H., "*al-Hisba ala al-Hakim*", (2007).
[1533] Al-Jawziyyah, I., *I'lam al-Muwaqqi'in fi Rabb al-Alamin* no. 3, (ed.), Muhammed Munir al-Dimashi (Cairo: Idarat al-Tiba'ah al-Muniriyyah,) p. 135.

right to criticise government leaders.[1534] Some of these activities are only imaginable to be done through written and spoken words, for example sincere advice, the doctrine of independent reasoning and consultation. Sincere advice (*Nasihah*) is the *Quranic* principle which takes for granted the right of every individual to form an opinion or advice in which he or she sees a benefit, and the right to convey it in confidence to others, be it a follow citizen or a government.[1535] Another activity which is usually performed by written and spoken words is the doctrine of independent reasoning (*ijtihad*). *Ijtihad* is defined as exertion by a qualified scholar to the best of his or her ability to deduce the ruling on a particular issue from the evidence found in the sources. [1536] Like sincere advice and the doctrine of independent reasoning is consultation (*shura*). *Shura* means clarifying the opinions of people or their representative on public issues. Consultation, according to Muslim scholars, can only be meaningful and effective when the participants enjoy total freedom to express their views, whether in speech or in writting.[1537]

Other types of activities accept all possibilities. For example, freedom to criticise the governor or government activities (*hurriyyah naqd al-hakin*) can take the form of written and spoken words, or symbolic speech or speech plus. Freedom of criticism in Islam in its simple definition means the individual's right to give sincere advice, criticise in a constructive way, and refuse to obey the government if it is guilty of violating the law. The *Quran* gives to responsible dissent the status of a fundamental right.[1538] According to Kamali, this right is derived from the principle of commanding good and forbidding evil, which permits "an individual to criticise, change or rectify transgression and wickedness when he or she witnesses or anticipates its occurrence."[1539] This recognition of freedom of opposition by Islam, which can be

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[1534] Kamali, M., (1997) op. cit. p. 28.
[1535] *Ibid*. p. 34
[1536] Hussain, S., *Human Rights in Islam.* (India: Kitab Bhavan, 1994) p. 33; Ghazawi, M., op. cit. p. 60.
[1537] See Abdul Rahman Abdul Khaliq, *al-Shura fi zil Nizam al-Hukm al-Islami* (Kuwait: al-Dar al-Salfiyyah, 1975) p. 14; Ismael al-Badawi, *Mabda al-Shura fil-Islam* (Cairo: Dar al-Fikr al-Arabi, 1981), p. 7-8; Mahmoud Hilmi, *Nizam al- Hukm al-Islami Muqarana bil-Nuzum al-Mu'asarah* (Cairo: Dar al-Fikr al-Arabi, 1975), pp. 139-142; Al-Shishani, A., *Huquq al-Insan Wa al-Hurryyiah al-Asasiyyah fil-Nizam al-Islami Wal-Nuzum al-Mu'asarah* (Jordan: Matabi al-Jamaeiyyat al-Malakiyyah al-Ilmiyyah, 1980) pp. 136-138; Mahmoud Al-Khalidi, *Qawa'id Nizam al-Hukm fil-Islam* (Maktabat al-Muhtasib, 1983) pp. 142, 172-175.
[1538] See Ahmed,A., (1992) op. cit. p. 25-27; Afifi, M., *al-Mujtama al-Islami wa-Usul al-Hukm* (Cairo: Dar al-Itisam, 1980) p. 93; Ishaque, K., "Islamic law - Its Ideals and Principles" in *The Challenge of Islam*, A. Gauher (ed) (London: The Islamic Council of Europe, 1980) p. 157, cited in "Riffat Hassan Are Human Rights Compatible with Islam? The Issue of the Rights of Women in Muslim Communities" available at The Religious Consultation, <http://www.religiousconsultation.org/hassan2.htm>
[1539] Kamali, M., (1997) op. cit. p. 50; Mustafa, N., *al-Mu'ardah fil-Fikr al-Siyasi al-Islami* (Cairo-Maktabat al-Malek Faisal al-Islamiyyah, 1985) p.116.

clearly seen in a number of verses in *Qur'an* and the *Sunnah*,[1540] entails extension of this recognition to include different methods used to express this criticism or opposition. One might criticise government policy through writing a column in a newspaper. Others might use demonstrations to express their anger at government policy. The same can be said about the *Qur'anic* principle of commanding good and forbidding evil (*hisbah*), which is considered to be the most obvious reflection of the importance of freedom of speech in Islam. Muslim scholars have defined *hisbah* as any act that purposes to command good and forbid evil.[1541] Such an act might take a form of written or spoken words or communicative conduct.[1542]

VIII.2. Freedom of Speech Justifications in Islamic Law

Chapter Four of this study examined several justifications for protecting freedom of speech. It concluded that all these justifications focus on one or a combination of three values: truth, self-fulfilment and democracy. The crucial question, which can be strongly posed here is, does Islam have different reasons than international law for justifying the protection of freedom of speech? Can theories such as truth, self-fulfilment and democracy justify freedom of speech protection according to the Islamic viewpoint? The objective is to identify the traits shared by both sets of laws, and to see if the same or similar justification can be used across cultures to reach the same goal. Answering this question requires discussion of each justification separately in order to see whether Islam values freedom of speech because of these justifications or for other reasons.

VIII.2.1 Truth Theory

Free speech is justified because it contributes vitally to the discovery of truth. Mill pointed out that suppressing speech leads to the possibility of banning the truth. Emphasising this point, one Muslim writer says, "No one can deny that one should consider every variety of opinion in an attempt to determine the truth. Opinions of authorities in the field should be examined, as well as of those that are considered radical, reactionary, minority and of others that are stigmatised by some other

[1540] Al-Awadhi, A., *Hukm al- Mu'ardah wa Iqamat al-Ahzab al-Siyasiyyah fil-Islam* (Amman: Dar al-Nafaes, 1992) p. 12-18; Mustafa, N., (1985) op. cit. p. 76-105,122-115; Kamali, M., (1997) op. cit. p. 50.
[1541] Ibn Taymiyyah, *Public Duties in Islam, The Institution of the Hisbah*. Translated from Arabic by Muhtar Holland (London-Islamic Foundation, 1982) p. 6.
[1542] Mursi, F., "*Hurriyyaht al-Fikr fil-Islam wal-Nuzum al-Mu'asarah*" (PhD Thesis, Al-Azhar University, 1977) p. 262

uncomplimentary label. History teaches that what were considered as unpopular, and even despised opinions eventually got accepted."[1543] Mawdudi's reading of Islam's teachings led him to assert that Islam gives the right of freedom of thought and expression to all citizens of the Islamic State on the condition that it should be used for the propagation of virtue and truth and not for spreading evil and wickedness.[1544] Kamali, as well, concluded that Islam has valued freedom of speech as a great instrument for discovering and vindicating truth.[1545] This can be demonstrated by examining the *Quranic* text or Prophet's sayings, which insist on the importance of recognising the truth, whether by speech or in other ways. In order to achieve the aim of reaching the truth, a great value has been given to sincere advice, to the extent that the Prophet considered "religion is good advice."[1546] When falsehood and rumours spread in society, sincere advice becomes the only way to combat them and reach to the truth. To put the same issue in a different way, backbiting (*ghibah*) is the main source of false ideas and rumours, and through sincere advice, a person who has been a victim of the rumours can communicate with those who spread the false opinions by drawing a clear picture of the truth.[1547]

The *Quran*, in fact, goes further in valuing the truth by allowing a person to speak even an evil hurtful speech to others if by doing so the message would lead to achieving the truth and justice. As a general rule, words uttered in public which hurt another person by violating his honour or causing his physical harm or loss of property are prohibited in Islam. There is, however, one exception which is cited in chapter 4, verse 148 of the *Quran*: "*God does not love evil talk in public unless it is by someone who has been injured thereby.*" The *Qur'an* here drops the restrictions on evil speech if this speech can make the voice of victims of injustice heard.[1548] Ibn Abbas is quoted as saying: "This verse was revealed to allow an oppressed person to state in what way he had been oppressed and never to go beyond this."[1549] According to Sayyid Qutb, evil speech in public is allowed only for those who have been oppressed or traduced, within

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[1543] Syed, I., "Opposing Viewpoints", *Islamic Voice*, April 2005.
[1544] Mawdudi, A., (1987) op. cit. p. 28.
[1545] See Kamali, M., (1997) op. cit. p. 9.
[1546] On one occasion the Prophet told his companions, "Religion is *nasihah*" (advice). His Companions replied, "To whom, O messenger of God"? He replied, "To God, to His Book, to His Messenger, and to the leaders and commonalty of the believers." Al-Nawawi, *Sahih Muslim fi-Sharh al-Nawawi*, no. 1 (Riyadh: Dar A'lm al-Kutub, 2002) p. 37; Al-Albani, M., *Ghayet Al-Maram fi Takrig Ahadith Al-Halal wa Al-Haram* 3ed (al-Maktab Al-Islami, 1985) p. 199.
[1547] Kamali, M., (1997) op. cit. p. 35.
[1548] Ibn Hajar, (1997) op. cit. no. 5. p. 124; Qutb, S., *Fi Dhilal al-Quran*, no. 2 (Beirut &Cairo-Dar Al-Shoruq, 1986) p. 796; Ghazawi, M., op. cit. p. 169.
[1549] See Ibn Hajar, (1997) op. cit. no. 5. p. 124; Al-Qurtubi, *Al-Jami li-Ahkam al-Quran* (known as *Tafsir al-Qurtubi*) no. 6 (Riyadh: Dar Aalm Al-Kutub, 2003) p. 1-4.

the limits of self-defence.[1550] Commenting on this, Kamali says, "[the victims] may be given this opportunity, free of any restriction, if it serves the cause of justice and truth."[1551] Public utterance of evil speech, then, is only permitted in order to fight oppression and injustice; consequently it is illegitimate in the absence of these circumstances. By this, Islam allows for an individual who encounters abusive conduct to take a stand to denounce it, and to express an opinion to that effect. As Mawdudi says:

> God strongly disapproves of abusive language or strong words of condemnation, but the person who has been the victim of injustice or tyranny, God gives him the right to openly protest against the injury that has been done to him. This right is not limited only to individuals. The words of the verse are general. Therefore if an individual or a group of people or a party usurps power, and after assuming the reins of authority begins to tyrannize individuals or groups of men or the entire population of the country, then to raise the voice of protest against it openly is the God-given right of man and no one has the authority to usurp or deny this right. If anyone tries to usurp this right of citizens then he rebels against God.[1552]

The importance of truth, as one of the most important principles for Muslims, appears in several other places in the Muslims' Holy Book. The *Quran* says that the clear purpose of the *Quran* is to pronounce the truth: "*This is Our Book that pronounces for you the truth*."[1553] Furthermore, the *Quran* equates true believers with those who "*advise one another to truth and perseverance*."[1554] The Muslims' Holy Book also encourages people to tell the truth, as there is no further value beyond the truth and warns them against not doing this, as they will only gain misguidance. God says "*And what is there after attaining the truth, except misguidance*."[1555] In addition, standing up for the truth, Riffat Hassan says, is a *Quranic* right and a responsibility which a Muslim may not disclaim even in the face of the greatest danger or difficulty.[1556]

Prophet Muhammed paid great attention to the importance of free speech as a bridge which carries people to recognise the truth, even when the speech causes discomfort to oneself. Prophet Muhammed, as al-Suyuti mentioned in *al-Jami al-Sahir*, says, "Tell the truth even if it be unpleasant."[1557] Prophet Muhammed believed in the importance of the

[1550] Qutb, S., (1986) op. cit. no. 2, p. 796.
[1551] See Kamali, M., (1997) op. cit. p. 9.
[1552] Mawdudi, A., (1987) op. cit. p. 28.
[1553] (*Quran*, 45:29).
[1554] (*Quran*, 103:3).
[1555] (*Quran*, 9:32).
[1556] Hassan, R., "Religious Human Rights and the *Quran*, in Religious Human Rights in the World Today." *Emory International Law Review*, 10 (1996) pp. 85-96, p. 90.
[1557] Al-Suyuti, *al-Jami al-Saghir*, no. 1 (Beirut: Dar al-Kutub al-Ilmiyyah, 1990) p. 111.

political truth, and this is why he said that "the best form of *Jihad* (struggle) is to tell a word of truth to a tyrannical ruler."[1558] The Rightly-Guided Caliphs after Prophet Muhammed followed the *Quran* and Prophet Muhammed's policy toward free speech and its indispensable role in discovering the truth. In their first speeches on becoming rulers, they asked people to assist them when they were right and to correct them if they deviated from the truth.[1559]

The above point illustrates that Islam values freedom of speech because of its role in discovering truth. However, I argue, contrary to Kamali, that the truth that justifies the right to free speech is not the same as the truth theory represented by John Stuart Mill, which had a great influence on the US system. The truth that Islam seeks to recognise is that which leads to religious truth, not political. To demonstrate, scholars over centuries have studied and researched the relationship between freedom and responsibility. On the basis of their research they concluded that a person could never be reconciled with Allah, if he/she were deprived of free will and the right to choose his path in life.[1560] This is the same as John Milton's approach, not John Stuart Mill's. According to Penny Summers, the truth that justifies the right to free speech in Milton's theory is not the same as the truth theory represented by John Stuart Mill.[1561] Milton's theory was about religious truth (Truth is strong, next to almighty,) whereas Mill's theory was about secular truth.[1562] For example, while Mill believes that stifling a false opinion would be an evil act because without free discussion "the shell and husk only of the meaning is retained, the finer essence being lost,"[1563] Mawdudi is of the opinion that whenever evil talk is perpetrated by an individual or by a group of people or the government of one's own country, it is the right of a Muslim and it is also his obligation to warn and reprimand the evil-doer and try to stop him from doing it.[1564] While Mill claims that there is no certainty and argues from the fallibility of human knowledge that anything could be called into question, this idea about freedom of speech has been resisted by Muslims, as well as by Christians, who believe that they have the truth, or that the

[1558] Abu Dawud, *Sunan Abu Dawud*, no. 4, *hadith* no. 4338 (Beirut: Dar al-Jil, 1988) p. 120. Al-Tirmidhi, *Sunan al- Tirmidhi, hadith* no. 2329 (Beirut: Dar Al-Kutob al-Ilmiyyah, 1987) p. 409. See Cook, M., (2000) op. cit. p. 50-53.
[1559] Kamali, M., (1997) op. cit. p. 51.
[1560] See *infra* the example of dialogue between Abraham and God. p. 335.
[1561] Summers, P., (2001) op. cit, p. 15-16.
[1562] Milton, J., (1644) op. cit. p. 39. See Summers, P., (2001) op. cit, p. 10. (the first public defenses of freedom of speech revolved primarily around religious questions and freedoms)
[1563] Mill, J., (1859) op. cit. p. 77.
[1564] Mawdudi, A., (1987) op. cit. p. 28.

questioning of some things is socially dangerous.[1565] To put it another way, the U.S. Supreme Court in many cases has leaned heavily on truth or its American version, the marketplace of ideas, in relation to hate speech. In the United States, hate speech, such as denying the Holocaust, because of the application of this theory, is given wide constitutional protection while under international human rights covenants and conventions such as the ICCPR and ECHR and on the other side of the Atlantic, where truth theory or the marketplace of ideas has disappeared from their jurisprudences, it is largely prohibited and subjected to criminal sanctions.[1566] It is the implementation of the truth theory which allows free dissemination of hate speech in the United States. In Islamic law, hate speech, including denying the Holocaust, is prohibited because it prefers other competing interests, such as equality and the non-discrimination principle, over the value of truth.[1567] This is not to say that the Islamic truth theory is not interested in freedom of speech for political ideas, but to say that political speech in Islam is protected more under the theory of democracy than the truth theory.

VIII.2.2. The Self-Fulfilment Theory

The necessity of freedom of speech for human beings, as Emerson wrote, is because "Man is distinguished from other animals principally by the qualities of his mind. He has powers to reason and to feel in ways that are unique in degree if not in kind. He has the capacity to think in abstract terms, to use language, to communicate his thoughts and emotions, to build a culture. He has powers of imagination, insight and feeling. It is through development of these powers that man finds his meaning and his place in the words."[1568] Plato thought of the human being as "the animal possessing speech." Aristotle defined other creatures as a *logon*, meaning without speech (*logos*).[1569] So the importance of freedom of speech in the West derives from the widely accepted premise in Western thought that the proper end of man is the realisation of his character and potentialities as a human being.[1570] By examining, for example, the writings of Ibn Khaldoun, one of the famous Muslim philosophers in the past, one can find that the concept of freedom in the minds of Muslim philosophers and scholars is to a great

[1565] Shearmur, J., "Free Speech, Offence and Religion", *Policy* 22.2 (2006) pp. 21-25, p. 23.
[1566] Schauer, F., (2006) op. cit. p. 3.
[1567] See infra p. 339.
[1568] Emerson, T., (1963) op. cit. p. 879. See also Emerson, T., (1969) op. cit. p. 6.
[1569] Lee, P., "The right to communicate affirms and restores human dignity", online at World Association for Christian Communication webpage, <http://www.waccglobal.org>
[1570] Emerson, T., (1963) op. cit. p. 879.

extent similar to Emerson or West's understanding of the same concept. For example, Ibn Khaldoun wrote in his *Preface* about human civilisation:

> Man shares with all the animals their animal nature of feeling, movement, food, shelter and other things. He is, however, distinctive from them in thought which guides him to obtain his livelihood, and cooperate on it with others of the same species and assembling to prepare for this cooperation. He accepts what has been brought to him by the Prophets from God Almighty, and acts upon it, and adopts the good of others. He always thinks of all of this, never tiring of thought about it for a single moment ... [1571]

So, according to Uthman Bateekh, as mankind is distinguished by thought from other creatures, he/she is free because thought requires a degree of freedom.[1572] It can be said, then, that the argument that human dignity is the principal normative concept which underlies the idea of human rights finds its acceptance in both religious and secular thought and is thus an important common factor in the international human rights discourse.[1573] Talking about the position in Islam, Riffat Hassan asserts that human rights are seen as "rights which all human beings ought to have" because, "these rights are so deeply rooted in our humanness that their denial or violation is tantamount to a negation or degradation of that which makes us human."[1574] Fathi Uthman also pointed out that Islam sanctifies the liberty of the individual as an integral part of the dignity of the believer.[1575] Given that Islam firmly upholds human dignity and that the UDHR's preamble mentions "the inherent dignity ... of all members of the human family" as the rationale for proclaiming the UDHR, some consider this a starting point for a dialogue on the compatibility between the UDHR and human rights in Islam, as well as a common ground upon which the human rights discourse should be developed further[1576]

The above opinions which emphasise the dignity of the human being as a central concern of Islamic law can be demonstrated by referring to the clear message of many

[1571] Ibn Khaldun, *The Muqaddimah*, no. 2, by Ali Abdul Khaliq Wafi, 3d edition (Cairo: Dar Nahdhat Misr, n.d) p. 1018-1019. See also al-Aqaad, A., *al-Insan fil-Quran* (Beirut: Dar al-Kitab al-Arabi, 1970) p. 369.

[1572] Bateekh, U., *Hurryyiat al-Ra'y fil-Islam*, a paper submitted to a Conference "*Adb al-Ikhtilaf fil-Islam*", (the Islamic Organization for Education, Science and Culture, Tunisia, 1998); Shokhar, I., *Manhaj al-Quran fi Taqreer Hurryyiat al-Ra'y* (Beirut: Dar al-Fikr al-Mu'asir, Damascus: Dar al-Fikr, 2002) p. 31.

[1573] Baderin, M., (2001) op. cit. p. 52.

[1574] Hassan, R., "On Human Rights and the Qur'anic Perspective," in Human Rights in Religious Traditions, (1996) op. cit. p. 54.

[1575] Uthman, F., *al-Fard fil-Mujtama al-Islami Bayn al-Huquq Wa al-Wajbat* (Cairo: Al-Majls al- Sh'un al-Islamiyya, 1962) p. 27.

[1576] Sinanovic, E., "Humanitarian Intervention in International and Islamic law", *American Journal of Islamic Social Sciences*, 20.1 (2003), p. 96.

of God's proclamations in the *Quran*: "*We created humans in the best of forms*",[1577] and in the affirmation that "*I breathed into Adam of My spirit*"[1578] and "*endowed him with a spiritual rank above that of the angels.*"[1579] What these verses tell is that God has created Adam (human being) in the best shape, has given him a mind to distinguish good from evil, and provided him with knowledge and wisdom. With such features, man has deserved to inherit the earth and has angels to kneel before him. This is human beings' image and their position in Islam. Accordingly, Islam has given them human rights that suit their position. In verse 70 of chapter 17 God emphasised the importance of human dignity when He stated, "*We bestowed dignity on the progeny of Adam.*"[1580] This verse, as Kamali concluded, is a general and absolute declaration of the importance of human dignity in Islam, which entitles the individual to say what he or she pleases as long as their saying does not involve blasphemy, backbiting, slander, insult or lies, nor seek to give rise to perversity, corruption, hostility or sedition.[1581] According to this interpretation, imposing restrictions on the articulation of what an individual may wish to say, write, express or propagate, compromises both his dignity and the desire for personal growth.[1582] In this regard, Baderin emphasises that the intellect is the greatest instrument of human life and its full potential can only be achieved through exchange of ideas among individuals. Freedom of opinion and expression is a birthright of every human being which stimulates dialectical intercourse that aids human development and well-being. Expression is the outward manifestation of a person's opinion; thus a person's liberty is completely denied where freedom of expression is denied.[1583]

In the light of the foregoing discussion, it can be said that the individual in Islam is not a mere lifeless cog in the wheel of the state,[1584] but, as Qaradawi says,[1585] he/she is respected as the basic unit of society and as a moral being. Therefore, the right to free of speech has been given to every individual without regard to his/her race, tribal, colour, gender, religion etc. One of the most important implications of this theory in Islam,

[1577] (*Quran* 95:17).
[1578] (*Quran* 38:71).
[1579] (*Quran* 2:30) and (*Quran* 17:70).
[1580] (*Quran* 17: 70). See *Tafsir al-Qurtubi*, (2003) op. cit. no. 10, p. 293-294. Al-Zuhayli, M., *Huquq al-Insan fil-Islam*, 2nd edition (Damascus & Beirut: Dar al-kalema al-Taibah & Dar Ibn Kathir, 1997), p. 33, 47.
[1581] Kamali, M., (1997) op. cit. p. 10.
[1582] *Ibid*. p. 8-9.
[1583] Baderin, M., (2001) op. cit. p. 125.
[1584] Some Westerners, wrongly, believe that the individual has no rights in Islam, only God has. See Dalacoura, K., (2003) op. cit. p. 43. For the discussion of the same topic see Gibb, H., "Constitutional Organisation," in Khadduri, M., and Herbert J. Liebesny (eds.) *Law in the Middle East* (Washington, D. C. 1955) p. 12. Roberts, G., (2003) op. cit. p. 51-52.
[1585] See Qaradawi, (1999) p. 18.

thus, is that both parts of society, men and women, enjoy the freedom to express their opinions and thoughts. In the Holy *Quran*: chapter 9 paragraph 71, God says, "*The Believers, men and women, are protectors one of another: they enjoin what is just, and forbid what is evil: they observe regular prayers, practise regular charity, and obey Allah and His Messenger. On them will Allah pour His mercy: for Allah is Exalted in power, Wise.*"[1586] This is a decisive verse, which means that men and woman are associates in society. This verse, according to Muslim commentators, orders Muslim women, like men, to practise freedom of speech through enjoining what is right and forbidding what is wrong.[1587] They have the freedom to call for all people to reach consensus and to stop doing evil, not only in religious matters of worship or beliefs, but also in all human activities such as thinking, criticism, opposition and evaluating political, cultural and economic matters.[1588] Al-Kubaisi believes that these verses give clear evidence that a woman can advise the ruler and give her opinion on public affairs.[1589] Shah, in his book *Women, the Koran and International Human Rights*, argues that since the *Quran* does not specify sex leaving out the other, both men and women can enjoy all fundamental rights, including the right to participate in the administration of the state and take part in the decision-making process, equally.[1590]

Another important implication of this theory is that it grants the speaker the right to use the language of her/his own choice. Islam, as some say, considers language a human right that has to be guaranteed and protected for every member of the human race because of its advantageous effects on socio-cultural relations in a society.[1591] Such use is an essential characteristic of the human race which differentiates them from other creatures. The *Quran* refers to the nobility of the first man, Adam, through his ability to use language and learn its nominal forms for the purpose of expression and the

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[1586] See also verses 4: 124; 9: 72; 16: 97; 7: 158; 5: 38; 24:21; 3:195; 17:70; 52:21; 3:195; 16:97; 33:35-36 where God makes men and women equal on many occasions.

[1587] *Tafsir al-Qurtubi*, (2003) op. cit. no. 8. p. 203; Sayyid Qutb, (1986) op. cit. no. 3, p. 1675; Al-Tamimi, I., (1985) op. cit. p. 52.

[1588] See Al-Mawardi, A., *al-Ahkam al-Sultaniyyah* (Beirut: Dar al-Kutub al-Ilmiyyah, 1978) p. 299; *al-Ahkam al-Sultaniyah*, 2nd edition (Cairo: Mustafah al-Babi al-Halabi, 1966) p. 285; Ibn Jama'ah, *Tahreer al-Ahkam fi Tbdir Ahl al-Islam* (Qatar: Riyasat al-Mahakm al-Shariyyah, 1987) p. 91; Al-Ibn Bassam Muhtasib., *Nihayat al-Rtbah Fi Talab al-Hisbah, Mathba'at al-Ma'arf* (Baghdad: *Mathba'at al-Ma'arf*, 1968) pp. 10-14; Al-Tarifi, N., *al-Qada' fil-Islam Fi Ahd Umar Ibn al-Khattab* (Cairo: Dar al-Madani, 1986) p. 551-554; Al-Shahawi,I., *al-Hisbah fil-Islam* (Cairo: Dar al-Ma'rifa, 1963) p. 43-48; Zaydan, A., *Nizam al-Qada' fil-Islam* (Baghdad: Matba'at al-Ani, 1984) p. 324; Imam, M., *Usul al-Hisbah fil-Islam*, (Dar al-Hidaya, 1986) p. 67-68; Al-Khalidi, M., *Nizam al-Qada' fil-Islam* (Jordon: Al-Nadeem, M., 1983) p. 210.

[1589] Al-Kubaisi, H., al-*Shura fil-Islam* (Amman: Al-Majma al-Malaky Lbhuth al-Hadarah al-Islamyah, Muasasat Aal al-Bait, 1989) 108.

[1590] Shah, N., *Women, the Koran and International Human Rights* (Leiden/Boston: Martinus Nijhoff Publishers, 2006) p. 46-48.

[1591] Abdussalam, A., (1998) op. cit. p. 55.

identification of certain objects: "*And He taught Adam the names of all things; then placed them before the angels and said: 'Tell me the names of these if ye are right.'*"[1592] Praising Islam's position toward the right of language, Ahmed Shehu Abdussalam says, it would be meaningless to claim protection of human dignity in the context of freedom of speech without individual freedom to use the language with which the individual identifies.[1593] In short, the Islamic perspective in this regard is as follows: when language is freely chosen by the speaker to deliver ideas and information to others, it defines and expresses the self, and promotes his/her human dignity.

One may ask here, when there is a conflict between the quest for truth and human dignity, which one prevails according to Islamic law? Generally speaking, it appears from the verse, "*God loves not the public utterance of evil speech except by one who has been wronged,*"[1594] that the *Quran* gives priority to the quest for truth over human dignity.[1595] There is an exception here; this exception concerns situations where human dignity may take precedence over the search for truth. Espionage and violation of the sanctity of private dwellings are prohibited in Islam, even if this can lead to recognition of the truth.[1596] The example of an incident which happened in the era of the second Rightly-Guided Caliph, Umar Ibn Al-Kattab, should be sufficient to illustrate this point. The books of history cite that Umar broke into a house where the occupants were drinking alcohol, which is prohibited according to Islamic rules. Umar's purpose was to assertion the truth. However, the occupants blamed the head for the state, firstly, for invading an inhabited house without asking permission, in defiance of God's Command, "*Enter no house without the owner's permission*",[1597] secondly, for spying, despite God's command, "*Thou shalt not spy.*"[1598] Finally, Umar was blamed for breaking in and entering the house over the roof, despite God's order, "*Enter houses by the door.*" [1599] Umar, however, apologised for his inappropriate action, admitted his wrongness, and did not accuse them of drinking alcohol.[1600] This incident, and

[1592] (*Quran* 2: 31).
[1593] Abdussalam, A., (1998) op. cit. p.56.
[1594] (*Quran* 4: 148).
[1595] See *supra* p. 257.
[1596] "*It is no virtue if ye enter your houses from the back: It is virtue if ye fear God. Enter houses through the proper doors.*" (*Quran* 2: 189).
[1597] (*Quran* 24: 27). Qutb, *Fi Dhilal al-Quran*, no.4 (Beirut & Cairo-Dar Al-Shuruq, 1986) p. 2506-2510; Al-Shawkani, *Fath Al-Kadir*, no. 4 (Beirut: al-Maktabah al- Asriyyah, 1997) p. 25.
[1598] (*Quran* 49: 12). Qutb (1986) op. cit. no. 6, p. 3346; Al-Shawkani, (1997) op. cit. no. 5, p. 82.
[1599] (*Quran* 2: 189).
[1600] Abass al-Aqaad, *Abqariyyat Umar* (Beirut: Dar al-Kitab al-Libnani & Makttabat al-Madrasah, 1984) 514.

others,[1601] is evidence that Islam always considers the individual's freedom as a value that should not be violated in any circumstances, even when this violation is committed by the head of the state for the sake of recognising the truth.[1602] As Kamali said, "The quest for truth and justice, in this instance, is not permitted to disturb the privacy of the individual home, nor may it seek to uncover a person's weaknesses, even if doing so would otherwise promote the cause of justice."[1603] This is similar to the position taken by the international law of free speech in judging situations in which free speech values are served by harmful or offensive activities. The study, in Chapters Six and Seven, discussed whether destroying the reputation of others could be a way to reach to the truth, or having sexual intercourse in a public place might be an expression of their autonomy and liberty and assassinating the political leader may be considered as a form of participating effectively in a democratic society. There, the study reached a conclusion that none of these activities can be justified by free speech arguments. The above example shows that Islam adopts no different position than the international law.

VIII.2.3. The Theory from Democracy

Freedom of speech, according to this theory, is essential for the establishment and sustenance of a good democratic state. This is because democratic societies, as said, are designed to work best when their representative assemblies conduct informed deliberation after voters voice their opinions about particular issues or controversies. Through free speech people can discuss their daily cases, cast a vote, and participate effectively and wisely in decision-making operations which formalise the society and government system.[1604] Neither elected representatives nor their constituents can fully discharge their democratic responsibilities if they are prevented from freely exchanging their thoughts, theories, suspicions, beliefs, and ideas, or are hindered from gaining access to relevant facts, data, or other kinds of useful information upon which to form their opinions.[1605] This theory, in short, emphasises the value of freedom of speech to self-government in a democratic society.

Just as democracy is a mechanism for organising the relationship between the governor and the governed in modern Western societies, consultation (*shura*), similarly,

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[1601] See Cook, Ml, (2000) op. cit. p. 80.
[1602] Al-shawi, (1992) op. cit. p. 64.
[1603] Kamali, M., (1997) op. cit. p. 9.
[1604] See Sadurski, W., (1999) op. cit. p. 21.
[1605] "Free Speech/Freedom Of Expression", *Encyclopedia of Everyday Law*. Ed. Phelps, S., Gale Group, Inc., 2003. eNotes.com.

purposes to organise the same relationship in Muslim society.[1606] Many contemporary Muslims have compared the concept of *Shura* to the principles of Western democracy. *Shura* to them, is essentially parallel to the democratic principle in Western political thought, having analogous aspects and about the same tendency or direction.[1607] The *Quranic* principle of consultation, which entitles community members to be consulted in public affairs is, as Abdul Aziz Said and Jamil Nasser argue, a prerequisite for the functioning of the Islamic political system.[1608] The purpose of *shura*, in this regard, is to enhance the role of the community in decision-making. Therefore, every citizen, according to the rules of *shura*, has a right to voice his/her view on matters of common concern.[1609] No individual dynasty or class can be caliph, but the authority of the caliphate is bestowed upon the entire group of people, as the caliphate verse in the *Quran* declared: "*Allah has promised, to those among you who believe and work righteous deeds, that He will, of a surety, grant them in the land, inheritance (of power), as He granted it to those before them; that He will establish in authority their religion - the one which He has chosen for them; and that He will change (their state), after the fear in which they (lived), to one of security and peace.*"[1610] According to this *istikhluf*, which has been entrusted to all human beings, the community as a whole carries the responsibilities of caliphate.[1611] Every individual's opinion, thus, should be considered in the formation of government, which will be run with their advice and in accordance with their wishes.[1612] Commenting on this, one Muslim writer says, truly, that with a consultation system, autocratic rule will be abolished. Likewise, the

[1606] Imarah, M., *Al-Islam wa Huquq al-Insan: Darurat la Huquq* (Cairo: Aalm al-Ma'arifah, 1985) p. 31. For the opposite view see, Al-Jabri, M., *Al-Dimuqratiyyah wa huqoq al-Insan* (Beirut: Markaz Dirasat al-Wihdah al-Arabiyyah, 1995) p. 38. Al-Mutawkel, M., "al-Islam wa Huqoq al-Insan", in *Huqoq al-Insan al-Arabi* (Beirut: Markz Dirasat al-Wihdah al-Arabiyyah, 2005) p. 121.

[1607] Sulaiman, S., (1999) op. cit. p. 2.

[1608] Said, A., and Jamil Nasser, (1980) op. cit. p. 68; Al-Zuhayli, (1997) op. cit. p. 196; Ahmed, K., "Islam and Democracy: Some Conceptual and Contemporary Dimensions", *Muslims World*, 90.1/2 (2000) p. 1-21.

[1609] Al-Tuaimat, H., *Huquq al-Insan wa Hurryyiat al-Asasiyyah*, Amman-Dar al-Shuruq, 2003, p. 228; Al-Khatib, H., (1993) op. cit. p. 80.

[1610] (*Quran* 24: 55).

[1611] See Al-Mutairi, H., *al- Hurryyiat Aw al-Toufan* (Beirut: al-Mu'assasat al-Arabiyyah lil-Dirasat wal-Nashr, 2004) p.18; Ahmed, K., (2000), op. cit. 8; Al-Zuhayli, (1997) op. cit. p. 15-20. Shaltut, *M.*, (2007) op. cit. p. 56.

[1612] Al-Mawdudi, A., *Nizam al-Haya fil-Islam* (International Islamic Union for Student Organisations, 2nd edition, 1970) p. 25; Al-Mawdudi, A., *Nazariyyat al-Islam al-Siyasiyyah* (India: Dar al-Uroba lil-Daawa al-Islamiyyah, n.d.) p. 44-46; Al-Khatib, Z., *Nizam al-Shura fil-Islam wal-Nuzum al-Dimuqratiyyah al-Mu'asarah* (Cairo: Matbat al-Sa'da, 1985) p. 143; Al-Saidi, A., *Hurryyiat al-Fikr fil-Islam*, (2001) p. 34.

theocracy, oligarchy and demagogy will vanish.[1613] In short, all systems of governance which conflict with the true public interests of people will disappear.[1614]

However, the *sine qua non* of the rule of *shura* is freedom of speech. *Shura*, in other words, can only be meaningful and effective when the participants enjoy freedom to express their views.[1615] This is because *shura* requires a free discussion of daily concerns by the community members, and expression of these views to the community leaders so they can take into their consideration the viewpoints of community members when they make public decisions. It is a mockery of justice for any country to claim adherence to the *shura* while it prohibits the freedom of opinion and denies it to its citizens. According to Zaydan, "It would be totally in vain, and would make no sense to say that in Islam the government is bound by the principle of consultation, and yet should have the liberty to deny the participants of *shura* the freedom to express an opinion."[1616] A similar view has been expressed by Udah who believes that freedom of speech is a means by which the ruler and his subjects can cooperate and consult to attain benefit and to combat evil, discrimination and prejudice.[1617] Freedom of speech, according to Muhammed Berween, is essential and central to an Islamic state because it is one of the main principles for effective and successful governing.[1618] As Burhan Zraiq pointed out, Islam has considered freedom of speech as a plan to ensure the workability of the scheme of self-government.[1619]

The value of freedom of speech to self-government in a democratic society can also be found in another principle of Islam. Chapter Four of this study concluded that one of the interpretations of the theory of democracy focuses on the necessity of free speech for effectively "alerting the polity to the facts or implications of official behaviour, presumably triggering responses that will mitigate the ill effects of such behaviour."[1620] History, according to Potter Stewart, teaches us to worry about the abuse of government power, and one indispensable way of checking such abuse is to allow people to criticize the government and to prohibit the government from preventing such criticism.[1621] Therefore it is considered by many as a powerful instrument which can be used to

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[1613] Al-Tamimi, I., (1985) op. cit, p. 28

[1614] Al-Hageel, S. (2001) op. cit. p. 247, 249; Al-Zuhayli, (1997) op. cit. p. 196.

[1615] Kamali, M., (1997) op. cit. p. 42.

[1616] Zaydan, A., *Majmuat al-Buhuth al-Fiqhiyyah* (Baghdad: Maktabat al-Quds, 1986) p. 128.

[1617] Udah, A., *al-Tashri al-Jina'i al-Islami*, no. 2 (Cairo: Maktabat Wahbah, 1981) p. 34. See also for the same meaning Ibn Qayyim al-Jawziyyah, *I'lam al-Muwaqqi'in fi Rabb al-Alamin*, (ed) Al-Dimashi, M., (Cairo: Idarat al-Tiba'ah al-Muniriyyah, n.d.) p. 147.

[1618] Berween, M., (2002) op. cit. p. 71.

[1619] Zreik, B., *Al-Sahifa, Mithaq al-Rasul* (Damascus: Dar Muaed, 1996) p. 403

[1620] Blasi, (1977) op. cit. p. 546.

[1621] Stewart, P., (1975) op. cit. p. 634-635.

combat injustice and expose the misconduct of rulers when unfairness and oppression prevail in the society. The valuation of freedom of speech for the sake of this aim is represented in Islam through the principle of freedom to criticise and oppose the government (*Hyrriyat al-Mu'aradah*). Islam considers the right to criticism and opposition as a fundamental principle of the Islamic system of government.[1622] Therefore, it has tried since its beginning period to formalise a particular concept of opposition right that on the one hand is compatible with its principles and values and on the other hand entitles the individual to tell the truth and expose transgression, even when this entails opposing the ruling authorities.[1623] The Basic Code affirms the individual's right to criticise in constructive way and refuse to obey the government if it is guilty of violating the law. The Muslims' Holy Book is replete with verses which encourage people, both men and women on an equal footing, to disprove of, and denounce transgression, be it on the part of a government leader, a fellow citizen or indeed anyone who is engaged in a crime. Likewise, many instances of Prophet Muhammad's life emphasise the importance of the exercise of the right of opposition in Islam. Numerous traditions of the Prophet Muhammad indicate that there is no exaggeration in saying that the Prophet considered the exercise of the right of opposition against an unfair ruler as the best form of *Jihad* in Islam, "The best form of *Jihad* is to tell a word of truth to a tyrannical ruler." This saying cannot be understood except as asserting the existence of a collective moral obligation on society to speak out against all forms of oppression, vice and crime. The Prophet also said in another situation, "The best of martyrs is... the man who stood up against an unfair ruler and commanded and forbade him [to good and evil respectively] and the ruler killed him."[1624] It is observed from this saying that the highest status was not given to those who stood up for the *Jihad* duty on the borders of the Islamic state for the expansion of its area, but to those who carried out this duty inside the country's borders, in the centre of its force and against the one who held the power and controlled the authority, in other words, against an unjust regime, in order to achieve justice.[1625] In this regard, one writer says that "the main justification of *jihad* is to stop oppression and injustice inflicted upon the powerless masses."[1626] The Prophet Muhammad ordered Muslims to oppose oppressors and warned them against neglecting their right of opposition as he said in

[1622] Ahmed, A., (1992) op. cit. p. 25-27.
[1623] Afifi, M., (1980) op. cit. p. 93.
[1624] Al-Albani, (1995) *Hadith* No. 374, op. cit. p. 716; Al-Ghazali, A., (1986) op. cit. no. 2. p. 371, f. 2.
[1625] Rabi, M., (1988) op. cit. p. 119.
[1626] Khan, M., (2003) op. cit. p. 131; Kamali, M., "*Al-Maqasid al-Shari'ah*: The Objectives of Islamic Law", *The Muslim Lawyer Journal* 3.1 (1998) p. 2.

hadith which is narrated by Abu Dawud: "When the people see a wrongdoer and do not prevent him, Allah (God) will soon punish them all."[1627] In another version of this *hadith* the Prophet said "If acts of disobedience are done among any people and they do not change them though they are able to do so, Allah will soon punish them all."[1628] It is also reported, by Ibn Hanbal, that the Prophet Muhammad condemned those who do not resist oppression, as he said, "When you see my community afraid of calling a tyrant "Oh tyrant" then take leave of it."[1629] This gives an indication that Islam also gives people legal right to resist tyranny and dictatorship by considering a word of truth to a tyrannical ruler as the best form of *Jihad*.

A set of examples can be given here in order to demonstrate that freedom of speech was used in order to recognize and check errors of government, even during the prophethood era.[1630] When the Prophet signed the treaty of "Hudaybiya" with the non-Muslims in Mecca, Umar Ibn Khattab, one of the leading companions of the Prophet (and a future caliph), was dissatisfied with this treaty, despite the approval of the Prophet which accorded with divine revelation. In fact, Umar based his view on the unfavourability of some clauses of the treaty to the Muslims. [1631] The Prophet Muhammad allowed Umar to express his sharply critical view by listening carefully and responding to his criticism.[1632] What this example demonstrates, according to Imad al-Najar, is that freedom to criticise was practised even against the Prophet of Islam.[1633] Freedom to criticise is also validated by the clear precedent of the Prophet leading his companions and the orthodox caliphs. The first Islamic head after Prophet Muhammad adopted the same policy as the Prophet towards opposition. In his first speech after his election to office, according to Kamali, he invited constructive criticism of the government.[1634] All of the Rightly-Guided Caliphs expressed similar commitments to

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[1627] Abu Dawud, *Sunan Abu Dawud*, no. 4, *hadith* no. 4339, p. 120.

[1628] *Ibid*, *Hadith* no. 4341.

[1629] Ibn Hanbal, *Fihris Ahadith Musnad al-Imam Ahmed ibn Hanbal*, no. 2 (Beirut: Dar al-Kutub, 1985) 162. See also al-Suyuti, (1990) op. cit. no. 1, p. 44.

[1630] Al-Ghazali, A., (1986) op. cit. no. 2, p. 371-385.

[1631] The clause that Umar was against stated that "if a member of the infidel tribe went to the Prophet without the permission of his guardian, then he was to be returned to his tribe. But, if a Muslim went back to his Kin-folk, it was not obligatory on the latter to return him to the Prophet". See Ibn Hisham, (1988) op. cit. no. 3. p. 439-440. Watt, M., *Muhammad at Medina* (Oxford, New York: Oxford University Press, 1956); 48; Haykal, M., *Al-Faruq Umar*, No. 1, 10th edition (Cairo: Dar al-Ma'arif, 2000) p. 65; Pipes,D., "Al-Hudaybiya and Lessons from the Prophet Muhammad's Diplomacy", *Middle East Quarterly*, September 1999; Al-Khatib, Z., (1985) op. cit. p. 149-153; Khan, M., (2003) op. cit. p. 167-172.

[1632] Al-Nawawi, (2002) op. cit. no. 6. p. 150. Aqaad, A., (1984) op. cit. p. 523-524; Tabliya, A., (1984) op. cit. p. 321-322.

[1633] Al-Najar, I., *Al-Naqd al-Mubah* (Cairo: Dar al-Nahza al-Arabiyyah, 1977) p.437; Al-Khatib, Z., (1985) op. cit. p. 153.

[1634] Kamali, M., (1997) op. cit. p. 51. Uthman, F., *Huqoq al-Insan Bayn al-Shariah wal-Fikr al-Qanuni al-Gharbi* (Beirut: Dar al-Shuruq, 1982).p. 100; Uthman, H., (2001) op. cit. p. 53-55.

respecting the equal rights of all people, encouraging responsible and responsive rule, and accepting their own subservience to the rule of law.[1635] This is, according to some, an important feature of the Muslim experience which demonstrates its acceptance of dissent and opposition - individual as well as collective - as something authentic and as part of the tradition, and not something outside it.[1636]

These evidences, whether *Qur'anic*, *Sunnah*, or historic, show that citizens' freedom to oppose and criticise government leaders in order to inform citizens about abuse of power and enable them to do something about it, whether by Muslim or non-Muslim,[1637] is recognised in Islam. This right to criticise Islamic religious states is granted by the *Quran* even, according to Ali Shariati, if it leads to exploitation and alienation.[1638] Some have gone further by assuming that checking abuse of the government is not only a right of citizens in Islam, but it is an obligation of the community. As a result of this, when a citizen sees a deviation by the head of state and his officials in doing their duties, he/she should alert them to their misconduct and criticise their performance, otherwise he/she will be participating with them in this activity. According to Mawdudi,

> The right to freedom of expression for the sake of propagating virtue and righteousness is not only a right in Islam but an obligation. One who tries to deny this right to his people is openly at war with God, the All-Powerful. And the same thing applies to the attempt to stop people from evil. Whether this evil is perpetrated by an individual or by a group of people or the government of one's own country or the government of some other country; it is the right of a Muslim and it is also his obligation that he should warn and reprimand the evil-doer and try to stop him from doing it.[1639]

As a result of this, the description of Islam by some non-Muslim scholars, as a system intolerant towards opposition is incorrect.[1640] Similarly, mentioning some radical groups as an example of Islam's political system is also incorrect.[1641] According to Robin Wright, "neither Islam nor its culture is the major obstacle to political modernity,

[1635] Ahmad, A., (2003) op. cit. p. 27.
[1636] Ahmed, K., (2000), op. cit. 13.
[1637] According to Kamali, nothing in Islam reserves the freedom of opposition for Muslim alone. Kamali, M., (1997) op. cit. p. 106-107.
[1638] Wessels, A., "Ali Shari'ati and Human Rights", In *Human Rights and Religious Values: An uneasy relationship?* An-Na'im, A., Jerald Gort, Henry Jansen, & Hendrik Vroom, (eds) (Amsterdam: Editions Rodopi, 1995) p. 243-255.
[1639] Mawdudi, A., (1987) op. cit. p. 28.
[1640] Nevine Mustafa, (1985) op. cit. p. 63.
[1641] Kramer, M., "Islam Presents an Obstacle to Democracy", article in Jennifer A. Hurley (2000) op. cit. p. 34; Pipes, D., "There Are No Moderates: Dealing with Fundamentalist Islam", *National Interest*, fall 1995.

even if undemocratic rulers sometimes use Islam as their excuse."[1642] The above points illustrate that Islam values freedom of speech because of its role as a means of promoting democratic values. Affirming the existence of freedom of criticism and opposition in Islam entails the similar affirmation of the protection that Islam grants to freedom of speech because, according to some, freedom of opposition cannot exist unless there is freedom of speech and it cannot operate in a system of government which does not safeguard constitutional liberties.[1643] Commenting on this, Esposito and Voll say that: "The ultimate authority of the *Qur'an* and *Sunnah* provide the basis for critiques of existing conditions throughout Islamic history. Movements of Islamic opposition, renewal, and reform have been able to find their justification and legitimacy in this appeal to higher authority. In the modern era, this can become the basis for Islamic constitutionalism that aids both in the state definition and in providing a framework for recognizing legitimacy of opposition."[1644]

VIII.3. Chapter Summary

From the above, it can be concluded that although it was difficult to draw a conclusion from the Islamic jurisprudence about the meaning of speech, the examination of Islamic law, the *Quran* and *Sunnah*, revealed that not only pure speech is covered by Islamic law; communicative conduct is also characterised as a mode of expression in Islam. It shows that even if there is a minority Islamic view opposing the extension of the rules of freedom of speech to cover some speech plus activities, such as demonstrations, the evidences brought above support the argument that this right may be exercised by a variety of means, whether pure speech or communicative conduct. A close study of the purpose of *Shariah* and its implementation throughout the era of the Prophethood history suggests that to the degree that these actions are intended to communicate a point of view, the Islamic law of free speech is relevant and protects them to a great extent. To restrict any form of speech is to restrict what is expressed. This conclusion as to meaning of speech in Islam contributes in reinforcing the idea of universalism in the human right of freedom of speech.

The discussion, secondly, reveals that freedom speech in Islam is not necessary only because it produces another value such as discovering the truth or maintaining democracy, but also because it maintains the dignity of human being. The very values

[1642] Wright, R., "Islam Does Not Present an Obstacle to Democracy", article in Jennifer A. Hurley (2000) op. cit. p. 45-46.
[1643] Kamali, M., (1997) op. cit. p. 52.
[1644] Esposito, J., and John Voll, *Islam and Democracy* (New York: Oxford University Press, 1996) p. 41

that have been advanced in the international of free speech are exactly those that the Qur'an and the *Sunnah* advocated many centuries ago. However, adoption of these three values of freedom of speech in Islam by no means prevents thinking of them as a hierarchy, a list of values ordered according to some index of social good. Above, an example has been given which illustrates that the *Quran*, in general, gives priority to the quest for truth over human dignity. In fact this is very much the way the international law of free speech views free speech values. Obscenity, indecent language, or nude dancing receive less protection because they do not have direct implications for furthering self-government.

These free speech values, whether the truth, self-fulfilment, or democracy, should not be served by harmful or offensive speech. For example, invasion of a person's privacy for the sake of reaching to the truth is prohibited in Islam. Similarly, having sexual intercourse in a public place as an expression of the autonomy and liberty is not allowed according to Islamic rules. Likewise, Islam does not consider the assassination of politicians as a form of participating effectively in a democratic society. Neither of these activities is legal in Islam, nor free speech be used to justify them. The Islamic protection of speech is justified not merely because of the values served by speech but because freedom of speech serves these values in a particular, humanly acceptable manner, that is, non-violently and non-coercively. This is, however, the discussion of the next chapter.

Chapter Nine

IX. Freedom of Speech Limitations in Islamic Law

IX.1. The System of Limitations in Islamic Law

In Islam, as in any other civilised society, not only freedom of speech, but every freedom has boundaries and a legal scope.[1645] The idea of absolute freedom of speech, such as formulated by Justice Black,[1646] is unimaginable in Islam since there are certain other objectives such as human dignity, security, justice, and equality which are of equal or higher value. The fact is that freedom of speech is one of those freedoms which Islamic law has prescribed explicitly, whether by verses of the *Quran* or *Sunnah* of the Prophet.[1647] It is true that the *Quran* emphasises the importance of freedom of speech when it states that "*God Most Gracious! It is He Who has taught the Qur'an. He has created man: He has taught him speech (and intelligence)*",[1648] but it is also true that the *Quran*, in several other places, has restricted this right whenever its practice is misused (*su' isti'mal al-haqq*). Such an abuse of freedom of speech may be committed against individuals, as in the case of rights and reputation of others,[1649] or against the community, as in the examples of national security and public order.[1650] In other words, freedom of speech boundaries in Islamic law, similar to its position under the international law of free speech, which the HRC said "may relate either to the interests of other persons or to those of the community as a whole,"[1651] vary in terms of the interests they are designed to sustain. Some expressions, such as sedition, blasphemy and obscenity constitute an infringement of the fundamental matters and threatening the existence of the religion; thus they are considered to be serious violations of public interests, or rights of God (*Huqooq-Allah*), without being peculiar to any individual. Others, such as defamation, are sustained because the violation extends to rights and

[1645] Al-Mawdudi, *Nazariyyat al-Islam al-Siyasiyyah* (India: Dar al-Uroba lil-Daawa al-Islamyia, n.d) p. 31. Berween, M., (2002) op. cit. p. 71.
[1646] See *Supra* p. 2, 35, 153.
[1647] Hussain, S., (1994) op. cit. p. 76.
[1648] (*Quran* 55:1-4). See Baderin, M., (2003) op. cit. p. 126.
[1649] "*After this whoever exceeds the limits shall be in grave penalty.*" (*Quran* 2: 178); "*there is the law of equality. If then any one transgresses the prohibition against you, Transgress ye likewise against him.*" (*Quran* 2: 194); "*Fight in the cause of Allah those who fight you, but do not transgress limits; for Allah loveth not transgressors.*" (*Quran* 2: 190). "*Throw, throw into Hell every contumacious.*" (*Quran* 50: 25);
[1650] "*Say: the things that my Lord hath indeed forbidden are: shameful deeds, whether open or secret; sins and trespasses against truth or reason; assigning of partners to Allah, for which He hath given no authority; and saying things about Allah of which ye have no knowledge.*" (*Quran* 7: 33); "*Allah commands justice, the doing of good, and liberality to kith and kin, and He forbids all shameful deeds, and injustice and rebellion: He instructs you, that ye may receive admonition.*" (*Quran* 16: 90).
[1651] General Comment 10.

freedoms of others (*Huqooq-Ebad*). According to Zaidan, in the view of Islam, a right either complies with personal interest, in which case it is an individual right, or meets public interest, in which case it is a group or public right and is known as God's right.[1652] The rights of God, according to Muslim commentators, corresponded to public interests; therefore, there is no difficulty, according to Muslim scholars, in describing all rights of God as public rights or interests.[1653]

The following saying narrated from the Prophet illustrates more the Islamic law position on this issue. The saying, which was narrated by Jabir Ibn Abdullah, is about persons who drew lots for their seats in a boat. Some of them got seats in the lower part, which is the most rough and worst part, and the others in the upper. When the former needed water, they had to go up to bring water and this troubled the others. So, they said, "Let us make a hole in our share of the ship and get water." If the people in the upper part had allowed the others to do what they had suggested, and intended to do, all the people in the ship would have been destroyed; whereas by preventing them, both parties would be safe.[1654] This saying gives a clear picture of the Islamic attitude towards freedom, in general, and freedom of speech, in particular, that violates the rights of either individuals or community. The message that the Prophet desired to deliver is that by giving full rein to individual freedom without taking into consideration the rights of others, society will be led to destruction. It results, as some say, in the deprivation of the very rights and freedoms of others.[1655] On the one hand, freedom without restraints leads only to nihilism, the consequence of which is the complete breakdown of the moral and social order (*Huqooq-Allah*). On the other hand, an abuse of the exercise of rights will lead to inflicting damage on others (*Huqooq-Ebad*).[1656] This conclusion can be supported by another saying of the Prophet Muhammad. Abu Sa'id al-Khudri narrated that the Messenger of God said: "There should be neither harming nor reciprocating harm."[1657] According to this saying, any speech that causes harm to others, whether individually or as a community and whether it is beneficial or not beneficial to the one who causes it, is prohibited in Islam. Accordingly, defamation

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[1652] Zaydan, *al-Mufasal Fi Ahkam al-Marah* (Beirut: Mu'assasat al-Risalah, 1993) p. 165.

[1653] See Tabliya, A., (1984) op. cit. p. 110; Al-Ili, (1983) op. cit. p. 195-200. See also Khan, M., (2003) op. cit. p. 114.

[1654] Ibn Hajar, (1997) op. cit. no. 10. p. 318. *Hadith* no 187 in al-Nawawi, *Riyad al-Salihin*, Translated by Madni (India: Idara Isha'at-E-Diniyat (p) LTD, 2000), p. 128.

[1655] Hussain, S., (1994) op. cit. p. 73.

[1656] Rabi, M., (1988) op. cit. p. 118-119; Al-Mansur, M., "Political rights of women in Islamic law, international law and United Arab Emirates law" (PhD thesis, Glasgow Caledonian University, 2002) p. 41-42.

[1657] Nawawi, *al-Ahadith al-Arbin al-Nawawiyyah* (Sharjah: Dar al-Fath, 1990) p. 49.

(*qadhf*), libel (*ifitra*), insult (*sabb*), obsecnity (*fihsh*) and sedition (*fitnah*) can be restricted on the ground of the harm they produce. The power can be rightfully exercised over any member of the Islamic community in order to prevent harm to others. This is, obviously, comparable to the harm principle, articulated most clearly in John Stuart Mill's *On Liberty*, on which most freedom of speech restrictions in international law are based.

Evidence of the restricted character of freedom of speech in Islam can also be found in the traditional Islamic jurisprudence. The *ulema*, according to Kamali, have classified the entire range of Islamic law goals (*maqasid al-Shariah*) into three descending categories of importance: the essential (*daruriyyah*), the complementary (*hajiyyah*) and the desirable or the embellishments (*tahsiniyyah*).[1658] Then, they have identified five (*dauriyyat*) necessities upon which the foundations and fundamentals of Islamic law are established.[1659] These are: religion, soul (life), intelligence, posterity (and dignity), and wealth. Establishing and protecting these five important indispensables of human life are considered among the primary purposes of Islamic law. According to Kamali, these are seen as absolute requirements to the survival and spiritual well-being of individuals, to the extent that their destruction or collapse would precipitate chaos and the demise of normal order in society.[1660] This is because these five necessities aim to achieve the interests (*maslahah*) of human beings and protect them from harm (*mafsadah*) in all things.[1661] The *Shariah*, Kamali says, "is predicated on benefits to the individual and the community, and its laws are designed so as to protect these benefits and to facilitate the improvement and perfection of the conditions of human life on earth."[1662] The *Quran* is expressive of this when it singles out the most important purpose of the Prophethood of Muhammad: "*We have not sent you but as a Mercy to the worlds*."[1663]

The limitations imposed on freedom of speech by Islamic law are clearly connected with the goals of *Shariah* and, hence, with these necessities. When freedom of speech collides with other competing interests, the concept of *maslaha* needs to be adapted, in order to maintain a balance.[1664] *Maslaha*, or public interest, is a concept in traditional Islamic law. It is invoked to prohibit or permit something on the basis of whether or not

1658 Kamali, M., (1998) op. cit. p. 5.
1659 Al-Zuhayli, (1997) op. cit. p. 80.
1660 Kamali, M., (1998), op. cit. p. 2.
1661 See al-Shatibi, *al-Muwafaqat, Usul al-Shariah*, no. 1 (Beirut: Dar al-Ma'rifa, n.d) p. 195; Ibn Qayyim *I'lam al-Muwaqqi'in fi Rabb al-Alamin*, no. 3 (Cairo: Idarat al-Tiba'ah al-Muniriyyah, n.d.) p. 14.
1662 Kamali, M., (1998), op. cit. p.1.
1663 (*Quran* 21:107).
1664 Kamali, M., (1997) op. cit. p. 23.

it serves the public's benefit or welfare.[1665] According to al-Ili, when an act [or speech, whether spoken and written or communicative conduct,] brings advantage (*maslahah*) to human beings, limitations are unjustified according to Islamic law. The reverse is very true. Whenever an act [or speech] brings harm to these five necessities, limitations, in this case, are justifiable.[1666] A few examples will suffice to illustrate this connection. For example, Islamic law has made the preservation of the religion obligatory. This protection of religion is necessary for people because, as al-Zuhayli says, religion organizes the relation of man with God and with himself, and it protects the relations of man with his own fellow men and his society.[1667] Accordingly, freedom of religious discourse is limited to that which brings advantage to people. Speech which causes to harm people is restricted in Islam.[1668] For instance, to ensure the preservation of religion, speech that contains apostasy and blasphemy is not considered as free speech.[1669] The *Quran* says in chapter 9 verses 65-66: "*If thou dost question them, they declare (with emphasis): 'We were only talking idly and in play. Say: 'Was it at Allah, and His Signs, and His Messenger, that ye were mocking? Make ye no excuses: ye have rejected Faith after ye had accepted it. If We pardon some of you, We will punish others amongst you, for that they are in sin.*"

Moreover, the protection of human rights from the five necessities includes the obligation to preserve life, for it is prohibited to transgress against the rights of human beings: "*Whoever takes a life, for other than manslaughter or corruption, it shall be as if he killed all of mankind.*"[1670] As a result, speech that may endanger the life of people is prohibited.[1671] Furthermore, to ensure the preservation of intelligence, Islam, on the one hand, has permitted that sound intellect and knowledge be promoted. Freedom of speech in this regards connected with intelligence, one of the five necessities, on the ground that freedom of speech influences the development of human intellect. On the other hand, Islam has forbidden speech which corrupts or weakens human intellect. Obscenity, thus, is restricted as it poses a threat to the integrity of the human intellect. In addition, for the preservation of lineage, and consequently, according to some, of

[1665] According to al-Shatibi, this concept means any issue related to the sustenance of human life and perfect living in regard to man's desire and intellect. Al-Shatibi, *al-Muwafaqat*, no. 2, p. 25.
[1666] Al-Ili, (1983) op. cit. p. 195.
[1667] Al-Zuhayli, (1997) op. cit. p. 83.
[1668] Al-haj, A., (2005) op. cit. p. 333.
[1669] Al-Ili, (1983) op. cit. p. 196.
[1670] (*Quran* 5:32) "*They don't take a life which God has forbidden except with right.*" (*Quran* 25:67); "*And slay not the life which God has forbidden, except with right. Whoever is slain unjustly, We give power to his heir, but let him not go to excess in killing; Lo! He will be helped.*" (*Quran* 17:33)
[1671] Al-Ghamdi, A., (2000) op. cit. p. 85.

honour, Islamic law has set punishment for defamatory accusation without evidence, as appears in *Quranic* chapter, *al-Nur*.[1672]

These are but a few examples where limitations on freedom of speech are connected with goals of Islam (*maqasid al-Shariah*.) The lesson to be drawn from the concept of goals of Islam and its strong connection with freedom of speech is that absolute freedom of speech might not be possible, due to certain restrictions that might be imposed in order to the preservation of these five necessities. This is the philosophy of Islam in limiting the freedom of speech. Speech is legitimate and granted by Islamic law when it brings advantage for people and society, and it is limited when it harms individuals or society.

The same conclusion as that of the above *Quranic* verses, Prophetic sayings, and jurisprudence of old Muslim scholars can be understood from contemporary Muslim scholars' definition of freedom and freedom of speech. There is consensus among Muslim scholars that freedom of speech is basically allowed: however, whenever freedom of speech is misused, it must be limited.[1673] Abdul-Hakim Al-Ili wrote that Islam's view of freedom is rooted in the postulate that the individual enjoys liberty provided that exercising this liberty must not violate the rights of others and the interests of the community.[1674] Tabliya analysed the relevant evidence in the sources and drew the conclusion that the concept of freedom in Islam means that the individual is free to act in whatever way he/she wishes, provided that others are not harmed by his/her action.[1675] Al-Zuhayli's examination of freedom of speech in Islam led to a conclusion that although freedom to express opinion with different methods is guaranteed in Islam, there are limits for this freedom.[1676]Al-Mahmassani has defined freedom of speech as "the ability of the individual to say or to do what he or she wishes, or to avoid doing so, without violation the right of others, or the limits that are set by the law."[1677] All of these definitions agree on one point; there are basic rules within which freedom of speech should be practised. These rules are: (1) the limits of the individual's rights and freedoms stop at those of another individual as no harm is allowed in Islam, (2) achieving something in the public interest takes priority over individual interest.

[1672] Al-Zuhayli, (1997) op. cit. p. 91.
[1673] See also Ghazawi, M., op. cit. p. 169.
[1674] Al-Ili, (1983) op. cit. p. 195-200.
[1675] Tabliya, A., (1984) op. cit. p. 296.
[1676] Al-Zuhayli, (1997) op. cit. p. 189..
[1677] Mahmassani, S., *Arkan Huquq al-Insan fil-Islam* (Cairo, Dar Al-Ilm lil-Malayin, 1979) p. 72.

Two distinct points can be gleaned from the above discussion. Firstly, the rights of public interest in *Shariah* override individual rights.[1678] This means that right of individual with regard to freedom of speech has to be balanced against the rights of others to be protected from defamation, insults, slander, libel etc. The same holds true with respect to the rights of all members of society *vis a vis* States, sovereign rulers and the Real Sovereign, God - they all have to be harmonized in their own context.[1679] Therefore, the speaker is urged, by Islam, to consider the welfare of others while delivering his/her speech. This rule has a considerable impact on the right of freedom of speech and this can be clearly seen in the restrictions that might be imposed to protect morals. However, even international law does not grant individuals the right to freedom of speech in an absolute manner, but explicitly tie this right with certain identifiable conditions. This is evident, as Alex Conte says, through the mix of rights and duties set out in Article 19 ICCPR.[1680] It makes the expression of individualism conditioned on certain collectivist arguments like 'public health', 'public moral', 'public order' etc. For example, following 19(2), which allows freedom of expression, Article 19(3) says: 'The exercise of the rights ... may therefore be subject to certain restrictions, but these shall only be as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals." From reading the text of Article 10 ECHR, it appears that the restrictions, which are admissible according to paragraph two, fall into two categories: (1), protection of the public interests (national security, territorial integrity, and public safety, prevention of disorder or crime, protection of health or morals). (2), protection of other individual rights (protection of the reputation or rights of others which is the only competing interest that concerns individuals).

Secondly, the freedom that Islam grants is based on commitment and responsibility, without which there can be no true freedom. There is no freedom without responsibility; no responsibility without freedom. Although the previous chapter concluded that the right to free of speech has been given to every individual because the individual is respected as the basic unit of society and as a moral being, this does not erase the fact that the individual is morally responsible for all his/her speech, and thus should behave with a sense of social responsibility. In fact, the notion of accepting responsibility for

[1678] Al-Shatibi, *Al-Muwafaqat*, no. 2. p. 357.
[1679] Ali, S., "The Salman Rushdie Issue: A Synthesis of the Islamic law of Blasphemy/Apostasy in the Context of Canadian Multiculturalism", p. 11-12, available at The Canadian Society of Muslims, <http://muslim-canada.org/apostasy.htm>; Al-Nadi, F., *Mabadi Nizam al-Hukm fil-Islam* (Dubai: Dubai Police College, 1999) p. 287.
[1680] Conte, A., (2004) op. cit. p. 55.

one's own actions and one's accountability before God are central to the *Quran*'s theme. The *Quran* contains many verses that indicate that freedom and responsibility form an integral part of each other and can in no way be separated.[1681] The same is true of the Prophet's *Sunnah*, where he stated that "Everyone of you is a guardian and everyone of you is responsible for (that which is his custody)."[1682] The paragraph written by Syed Mumtaz Ali sheds sufficient light on this issue. According to him:

> One of the important features of Islamic law seems to be the emphasis on the correlation between rights and obligations. Not only the mutual relations of men amongst themselves, but even those of men with their Creator, are based on this same principle. One also has obligations as a member of the larger family *viz* the society and the State in which one lives. To speak only of the 'rights of man,' without simultaneously realizing his duties, would be transforming him into a nefarious beast, wolf or devil. Out of sheer necessity in civilized societies, legitimate constraints must be imposed upon man's rights. The nature and extent of various constraints and the shapes and forms which these limits assume in any given socio-political *cum* religious context, must always be a function of the dialectic between the rights and duties of the participants in this context.[1683]

This important feature of Islamic law has led several proponents of the cultural relativism perspective to argue that the whole idea of international law is 'un-Islamic,' because Islam emphasises responsibilities and not rights. According to this school of thought, while human rights are only rights in the secular system, such as in UDHR and ICCPR, they are rights and duties in Islam.[1684] In the same vein, the critics of this feature of human rights law in Islam indicate this as another difference from most Western human rights documents. The existence of a corresponding duty to many of the rights in Islamic law, to them, is a divergence from the UDHR and other international declarations on human rights, which focus almost solely on rights and rarely mention corresponding duties.[1685] What I would like to point out here is that international law of freedom of speech is not devoid of the idea of duties and responsibility. For example, Article 19 ICCPR explicitly states that: 'The exercise of rights provided for in paragraph 2 of this article carries special duties and responsibilities.' Article 10 of the ECHR provided that the exercise of freedom of expression, since it carries with it duties

[1681] (*Quran* 2: 30; 33: 72; 7: 172)
[1682] Muslim, *Sahih Muslim*, no. 3, *hadith* no. 1829, p. 1459. See also *Hadith* no 193 in al-Nawawi, (2000) op. cit. p. 138.
[1683] Ali, S., op. cit. p. 11-12.
[1684] See Al-Nadi, F., (1999) op. cit. p. 286.
[1685] Steiner, H., and Philip Alston, *International Human Rights in context, Law, Politics, Morals*, 2nd edition (Oxford: Clarendon Press, 2000) p. 342; Dalacoura, K., (2003) op. cit. p. 57; Malin Delling, "Islam and Human Rights." (Master Thesis, Gothenburg University, 2004) p. 4.

and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society. My purpose in mentioning two free speech provisions here is as a reminder that the notion and concern of responsibility is not essentially a religious concern and some kind of common ethical standards can be referred to as criteria. Accordingly, the religious argument declaring human rights devoid of responsibility loses its ground. It is a mistake to hold that human rights are in fundamental conflict with a duty of obedience towards legitimate government.

IX.2. Limitations

Having demonstrated that freedom of speech in Islam, similar to international law, in not an absolute right, the study turns to examine five limitations imposed on the right to free speech in Islam which are thought to be problematic areas between Islamic law and international law of freedom of speech, namely, speech threatening national or nation security, defamatory speech, obscenity, blasphemous speech, and hate speech.

IX.2.1. Freedom of Speech v. Nation Security (Seditious Speech/*Fitnah*)

National security is commonly pleaded to justify limits to freedom of speech. It is often pleaded by governments in most general terms, where it is apparent that the purpose of a limit on freedom of speech is simply to protect the people in power, rather than society or the State. It is, as said, truly, a trump card in free speech, in particular, and human rights, in general.[1686] According to Schauer, whatever the strength of the free speech principle, a threat to national security is commonly held to be a danger of sufficient magnitude that the interest in freedom of speech must be subordinated."[1687]

The study here purposes to examine the Islamic approach towards seditious speech (*fitnah*). Although the term *fitnah* has various meanings, including temptation, trial, misguidance, enticement, fascination, commotion, strife, affliction, torture, and sedition,[1688] only one of these juridical meanings of *fitnah* concerns the subject matter of this chapter, this is "freedom of speech limitations in Islamic law." This meaning is seditious speech which attacks the legitimacy of a lawful government. This section examines the Islamic approach towards seditious speech in the light of the evidence found in the *Quranic* texts, the Prophet's sayings and the juristic formulations of

[1686] William W. Burke-White, "Human Rights and National Security: The Strategic Connection", *Harvard Human Rights Journal* 17 (2004) p. 249, 251.
[1687] Schauer, F., (1982) op. cit. p. 179.
[1688] Kamali, (1997) op. cit. p. 190.

Muslim scholars. It attempts to define the scope of seditious speech and to establish a correct balance between people's right to criticise the government and the government's right to restrain seditious speech. In order to do this, three questions need to be elucidated: (1) Do the *Quranic* and prophetic texts protect the right to freedom of political speech? (2) How the four Rightly-Guided Caliphs interpreted these texts? And (3) What are the criteria that should be used in classifying certain speech as seditious speech and others as protected political speech? Before analysing of the Islamic law position on political speech, I will, however, begin with a brief introduction to the historical and current reality of political speech in the Muslim World. The importance of this introduction is to differentiate between Islam that depends on texts, and an Islam that depends on history. Some, especially in the West, mistakenly confuse them. They have criticized the political history of Islam, which is, as Shaltut and Abdul Jawad Yasin say, not indeed a counterpart of Islam.[1689]

IX.2.1.1. Political Speech in Historical and Current Reality

Throughout the ages, the Muslim community has witnessed huge political and intellectual developments. After the death of the Prophet (570 - 632), governance became similar to those in republican regimes.[1690] Four caliphs (632 - 661), who were not relatives, were selected by the community, although the methods of selection and approval differed.[1691] Islamic rule subsequently turned into a hereditary monarchy, starting from the *Umayyad Caliphate* (661-750), via the *Abbasid Caliphate* (750-1258), the *Fatimid Caliphate* (1261-1516) the *Ottoman Caliphate* (1299-1924), and finally turned into dictatorships.[1692] Throughout these long periods, to be accurate since the *Umayyad Caliphate*, the theoretical structure of freedom of speech, granted by the *Quran* and *Sunnah*, was not implemented in practice.[1693] Although there were some

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[1689] Shaltut, M., "*al-Nazariyyat al-Siyasiyyah fil-Islam*", in *Kira'at fil-Islam wa al- Dimuqratiyyah*. (eds) The Center for the Study of Islam and Democracy (Washington: CSID 2007) p. 54; Yasin, A., *Al-Sultah fil-Islam* (Beirut: al-Markz al-Thkafi al-Arabi, 1998) p. 11.
[1690] Ahmed, K., (2000), op. cit. 12.
[1691] Although there was fighting between Ali, the fourth caliphs in Islam after Muhammad, and Mu'awiya about who should be superior in guiding Muslims community, this problem was solved through consultation. Al-Suyuti, (2003) op.cit. p. 26-150. 139-141; Al-Awa, M., *Fil-Nizam al-Siyasi lil-Dawlah al-Islamiyyah* (Cairo: Dar al-Shuruq, 1989) p. 182; Imarah, M., (1985) op. cit p. 66-86. Ahmed, K., (2000), op. cit. 12.
[1692] For more information about this issue see, Al-Suyuti, (2003) op. cit. p. 164.
[1693] See Al-Khateb, A., "*Aafaq al-Tatworat al-Dimuqratiyyah end al-Muslmeen*", in A. Al-Tamimi, *al-Siyasa al-Sharaiyyah fil-Islam*, London-Liberty for the Muslim World Organisation (UK-Redwood Books, 1997) p. 16-17; Al-Tamimi, A., "al-*Dimuqratiyyah fil-Fikr al-Islami al-Mu'asir*", in Al-Tamimi, A., (1997) op. cit. p. 232; Ghazawi, M., p. 63-65; Vaglieri, L., "The Patriarchal and Umayyad Caliphates, the Institution of the Caliphate and the Ridda", in P. M. Holt; Ann K. S. Lambton & Bernard Lewis, *The*

individual cases when there was opposition against the ruler or government, that opposition was rarely heard.[1694] Generally, there was no freedom of speech in Muslim societies, except in matters that had nothing to do with politic or governance. There was no *Caliph* or *Sultan* who was able to hear criticism and opposing views. Caliphs, according to the commentators, used the *hiraba* verse, "*The punishment of those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter*" [1695] against their political foes. According to Abou El Fadl, "the Umayyads, in the first century of Islam, applied, or at least used, the dogmatic symbolism of the hiraba against their political opponents."[1696] Under this political suppression, people were not able to express their views, so their ideas and opinions could be only conveyed through violence and force. Consequently, political disputes led to armed clashes and military action between authority and opposition.[1697] This violation of freedom of political speech was not only for political reasons, but, as Hakem al-Mutairi says, for religious reasons as well.[1698] Some Muslim scholars, instead of defending the protection of this precious freedom, have defended the violation of freedom of speech. *Caliphs*, therefore, according to Hassan Hanafi, sought to gain the support of religious scholars who were linked to authority and worked on interpreting religious texts in favour of the *caliphs*.[1699] These scholars presented legitimate and jurisprudential justifications for the ruler to suppress freedom of political speech under the allegation of sedition.[1700] According to Abou El Fadl, Muslim Jurists not only sanctioned the authority of those who usurped power, but also made obedience to them a moral and legal, as well as religious, obligation.[1701] Abdul Jawad Yasin mentioned in

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Cambridge History of Islam, Volume 1 (Cambridge: the University Press, 1970) p. 74; Safi, L., "Overcoming the Polemics of Intolerance." *American Journal of Islamic Social Sciences*, 19.2 (2002); Iqbal, J., "The Concept of State in Islam-A Reassessment" *Iqbal Review*, 39.1 (1998); Al-Mawdudi, A., *al-Khilafa wal-Hukm*, Translated to Arabic by A.Idrees (Kuwait: Dar Al-Kalem, 1978) p. 93, 108; Ashur, I., (1999) op. cit. p. 10; Al-najar, I., (1977) op. cit. p.427; Al-Samad, H., (1994) op. cit. p. 43-71.

[1694] See Al-Mutairi, H., (2004) op. cit. p. 267 onwards. Mussa, M., *Hurriyyat al-Fikr*, al-(al-Muasasat ll-Derasat wal-Nashr, 1979) p.114-122.

[1695] (*Quran* 5: 33).

[1696] Abou El Fadl, K., (2001) op. cit. p. 61.

[1697] See Al-Kawakibi, *Tabaye al-Istibdad* (Manners of dictatorship), (Dar al-Sharq Al-Arabi, 1996) 49; Al-Mulaigi, Y., (1980) op. cit. p. 15.

[1698] Al-Mutairi, H., (2004) op. cit. p. 273-274; Mussa, M., (1979) op. cit. p. 107.

[1699] Hanafi, H., *Al-Jozzoor al-Tarikhiyyah li-Azmat al-Hurryyiat wa al-Dimuqratiyyah fi Wegdanna al-Mu'asir*, in *Al-Dimuqratiyyah wa Huquq al-Insan al-Arabi* (1986) op. cit. p. 180-181.

[1700] Al-Najar, A., *Dawr Hurryyiat al-Ra'y fil-Wihdah al-Fikriyyah Bayn al-Muslimin* (Virginia: International Institute of Islamic Thoughts, 1992) p. 17-18.

[1701] Abou El Fadl, K., *Rebellion & Violence, Islamic Law* (Cambridge: Cambridge University Press, 2001) p. 10.

his book, *The Authority in Islam/Al-Sultah fi al-Islam*, many instances where religious scholars claimed that the Islamic nation is not permitted to object to what the ruler does and there is no means in Islamic law to check the corruption of authority, except for one means, which is to advise the incumbent confidentially, within the narrowest limits. Accordingly, everyone who uses means other than confidential advice to check the abuse of the ruler is engaging in a seditious act.[1702] This position might have been taken by some Muslim scholars, in the view of Dalacoura, because "the first centuries after the death of Muhammad were ridden with discord and civil strife (*fitnah*) so they encouraged allegiance to whatever government was in power, even it was tyrannical."[1703] Therefore, according to Gibb, the jurists were increasingly forced to deprecate the right of rebellion against unjust ruler.[1704]

Based on the past narrow interpretation of freedom of political speech, the authorities in Muslim countries, supported by religious scholars, have continued to suppress people's basic rights and freedoms, including their right to freedom of speech, to such an extent that some say that the right to freedom of speech is totally absent in this part of the world.[1705] International and regional reports issued by human rights organisations are full of violations of this freedom in these countries. The list of violations includes the abuse of legal provisions on defamation and criminal libel as well as on surveillance, search and seizure, censorship, threats and acts of violence and of discrimination.[1706] Such abuses are directed against persons who exercise the right to freedom of opinion and expression, the right to seek, receive and impart information, and the right to peaceful assembly, as well as at persons who seek to promote the rights affirmed in the international law to free speech. The situation has been exacerbated since September 11. Some governments demonstrated their concern to protect their

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[1702] Abdul Jawad, *Al-Sultah fil-Islam* (Dar al-Badha, al-Markz al-Thkafi al-Arabi, 1998) p. 294-304.
[1703] Dalacoura, K., (2003) op. cit. p. 45.
[1704] Gibb, H., "Constitutional Organisation." In *Law in the Middle East*. Khadduri, M. and Herbert Liebesny (eds.). (Washington, DC: Middle East Institute) 1995, p. 18-19.
[1705] Ghalioun, B., *al-Mihna al-Arabiyyah: al-Dawla zid al-Mujtama* (Beirut: Markz Dirasat al-Wihdah al-Arabiyyah, 1993); Ghalioun, B., *Bayan min Ajl al-Mujama* (Beirut: Markz Dirasat al-Wihdah al-Arabiyyah, 1986) p. 48, 84, 85; Ziyada, R., "al-Islamyoon wa Huquq al-Insan." In Burhan Ghalioun and others (eds). *Huquq al-Insan al-Arabi* (Beirut: Markz Dirasat al-Wihdah al-Arabiyyah, 1999), p. 150-155; Antbawi, M., "*Dawr al-Nokba al-Muthaqfa fi Ta'azez Huquq al-Insan al-Arabi*", in *Al-Dimuqratiyyah wa Huquq al-Insan al-Arabi*, (1986) op. cit. p. 296.
[1706] See generally Amnesty International's annual reports regarding the Middle East at Amnesty Organisation web page. <http://web.amnesty.org>; Human Rights Watch's world reports at http://www.hrw.org; Special Rapporteur of the Commission on Human Rights on the promotion and protection of the right to freedom of opinion and expression at <http://www.unhchr.ch/html/menu2/7/b/expression/documents.htm>.

relationship with the U.S. by taking actions to suppress the free speech of citizens opposed to the U.S.'s actions.[1707]

Several examples will be given here in order to demonstrate that most of the governments in Muslim countries, supported by religious scholars, regard free speech as an obstacle or even a threat to their politics. Firstly, in Egypt, very recently, four editors of independent and opposition newspapers were charged of publishing "false" information, defaming the head of state and insulting state institutions such as parliament, the judiciary, and armed forces.[1708] The accusations against them came at the end of a period of intense speculation about the President's health, after he was not seen in public for a month.[1709] One of the editors, Ibrahim Issa, the editor of *al-Dustor Newspaper*, wrote an article about the President's rumoured health problems. Subsequently, Issa was charged with publishing reports "likely to disturb public security and damage the public interest."[1710] Surprisingly enough, this ruling, which according to Sarah Leah Whitson, Middle East and North Africa director at Human Rights Watch, is "incompatible with Egypt's Constitution and its commitments under international human rights law",[1711] was strongly welcomed by the Grand Sheikh of al-Azhar, Muhammed Sayyed Tantawi, who quoted a verse from the *Quran*, saying that those who accused women of adultery without necessary proof were to receive 80 lashes, in order to islamicize the accusation against the journalists.[1712] Explaining this, al-Tantawi, in a political *fatwa* (edict), which was addressed in religious terms, said that his example involved women but added, "libel is also applicable to men. This punishment is set by God to protect the honour of men and women from bad talk that hurts dignity and honour." According to Tantawi, "God will not respond to the invocation of the arrogant and pretenders who accuse others with the ugliest vice and unsubstantiated charges."[1713] In response to this strange *fatwa*, which misconstrued the meanings of Quranic verses,

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[1707] See International PEN report "Anti-Terrorism, Writers and Freedom of Expression: A Pen Report." op.cit. p. 33.

[1708] See Ian Black, "Egyptian editors jailed for defaming Mubarak", *The Guardian*, Friday September 14, 2007.

[1709] BBC News, "Editor charged over Mubarak story", 13 September, 2007, online available at < http://news.bbc.co.uk/2/hi/middle_east/6990938.stm >

[1710] See Human Rights Watch report, "Egypt: Four Editors Get Prison Terms, Fines, Government Should Repeal Laws Inhibiting Free Expression", September 15, 2007.

[1711] *Ibid*.

[1712] Verses 24-26 of chapter 24 say: "*Those who slander chaste women, indiscreet but believing, are cursed in this life and in the Hereafter: for them is a grievous Penalty. On the Day when their tongues, their hands, and their feet will bear witness against them as to their actions. On that Day Allah will pay them back (all) their just dues, and they will realise that Allah is the (very) Truth, that makes all things manifest.*"

[1713] "Shaikh al-Azhar: Jald Murawjee al-Esha'at Hukm Aam lam Yoqsad behi Fiah Mua'yanah", *Al-Riyadh Newspaper*, October 13, 2007. See also, Obaid, A, "Sijn al-Sahafayeen Akram mn Jaldihim", *Al-Bayan Newspapers*, October 14., 2007

Egypt's press union expressed "deep sadness and anger that such comments and weird *fatwas* (religious edicts) would contribute in tarnishing Islam."[1714] Similarly, the al-Azhar Scholars Front criticized the Grand Sheikh of al-Azhar, Muhammed Sayyed Tantawi. The Front said that Sheikh Tantawi was well aware that his interpretation of the *Quranic* verses was questionable and was being used to incriminate journalists who reported that Egyptian President was suffering from ill-health.[1715] Needless to say, this instance provides a clear illustration of the role that religious scholars have played in defending violations of freedom of speech in the Muslim world. It shows how the *Quranic* verses can been interpreted wrongly in favour of those who are in the authority.

The second example, which demonstrates how freedom of speech can be curtailed, by both governmental and religous authorities, without any hesitation, is from Saudi Arabia. In 1992, after several "Letters of Demand" directed to the King of Saudi, and signed by hundreds of prominent religious scholars and intellectuals, the opposition (academics and religious figures) signed another petition called the memorandum advice, demanding changes to the system. The memorandum advice, which met with huge reactions on both the domestic and international levels, that angered the authorities, is a detailed letter presented by the *ulama* in Saudi to King Fahd. It advocated freedom of speech for independent clerics, accountability for government officials and greater consultation between government policymakers and religious scholars in order to avoid "separation between politics and religion, which defeats the very purpose of the establishment of the Islamic state."[1716] The memorandum devoted a full chapter to discussing "dignity and human rights", and explaining the concept of human rights from an Islamic perspective. It demanded that the violation of human rights and human dignity by the regime should be stopped. It also called for an end to arbitrary arrest and torture. Overall, the situation of human rights the memorandum describes supports reports issued by the international human rights organizations concerning Saudi. As the memorandum was detailed and comprehensive, it was considered as an electoral programme or a work statement by the new Islamic trend in Saudi. It is also considered the first attempt to present from an Islamic philosophical point of view, critical international issues such as human rights, the freedom of speech,

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[1714] "Egyptian press union condemns prominent Muslim cleric for provocative comments", *Herald Tribune Newspaper*, October 11, 2007, online at <http://www.iht.com/articles/ap/2007/10/11/africa/ME-GEN-Egypt-Azhar-Journalists.php>

[1715] For more analysis of this case, see, Fact International, Cairo, October 24, 2007, online available at <http://www.factjo.com/factjo_en/fullNews.aspx?id=257>

[1716] See "Human Rights in Saudi Arabia: A Deafening Silence", Human Rights Watch's report 2001, at <http://www.hrw.org/backgrounder/mena/saudi/>

the independence of the judiciary and the separation of jurisdictional and executive authorities. Moreover, it is the first serious attempt to criticize issues that the government has been accustomed to hide, on both domestic and international levels.[1717]

According to a report issued by Human Rights Watch, "The government media and the official clerical establishment condemned this document as well. Some of the signatories were questioned and threatened; other oppositionists were banned from public speaking and suspended from their government jobs."[1718] The government of Saudi Arabia, supported by some official religious scholars, considered that imposing restrictions on this memorandum fell within the law. In an angry response, the King demanded that all the members of the Council of Supreme *Ulama* publicly denounce the document in a formal statement.[1719] According to Mahan Abedin, "The regime responded by using the official clerical establishment to issue statements against the signatories of ... the memorandum of advice."[1720] Consequently, the Council of Supreme *Ulama*, in the absence of 7 of its 18 members, convened in al-Taif and issued a statement condemning the memorandum submitted to the "Custodian of the Two Holy Mosques."[1721] The Council denounced the text in strong terms, saying that the way its signatories had behaved

> inspires the causes of disunity, hatred and fabrication ... and compeletely discredits the good feature of the state. It either proves that the ill-intent of the writers or their ignorance of reality ... The Board confirms that such act violates the Islamic Shariah.[1722]

The Grand Mufti, Shaikh Abdel Aziz Ibn Baz, publicly denied endorsing the opposition document, accusing those who signed it of spreading rumours that he had backed them; and he said the opposition were "trying to sow discord" among people as well as "ignoring the good done by the state". This merely insignificantly hidden harsh criticism of government was decisively repudiated by bin Baz "as being misguided and

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[1717] The memorandum advice is available in Rubin, B., and Judith Rubin, *Anti-American Terrorism and the Middle East*, (US: Oxford University Press, 2002). p. 61-62.
[1718] See "Human Rights in Saudi Arabia: A Deafening Silence", Human Rights Watch's report 2001, at <http://www.hrw.org/backgrounder/mena/saudi/>
[1719] Gold, D., *Hatred's Kingdom: How Saudi Arabia Supports the New Global Terrorism* (Regnery Publishing, 2003) p. 161.
[1720] Abedin, M., "Saudi Dissent more than just Jihadis", June 2006. First Published by SaudiDebate, online available at <www.SaudiDebate.com>
[1721] Champion, D., *The paradoxical kingdom: Saudi Arabia and the Momentum of Reform* (London: Hurst & Company, 2003), p. 224-5.
[1722] See Niblock, T., *Saudi Arabia: Power, Legitimacy and Survival* (Routledge, 2006) p. 96.

divisive, and ignoring the good deeds of the regime."[1723] Sheikh Qassem Bin Ali al-Shamakhi argued that "the authors of the advice memorandum are not Muslims, and we pray God to restore them to the right track." Sheikh Matar al-Zahrani explicitly called for punishment of those who signed the memorandum, as he claimed the memorandum aimed to "shake minds and cause unrest and destroy the unity of Muslims in this country ... and they must be punished if it was proved that they aimed at causing unrest and riots."[1724] Clearly, in this instance, religious scholars and authorities played a key role in condemning and attempting to suppress an exercise of free speech that was perceived as threatening to the status quo.

The third example concerns al-Jazeera channel, a television network headquartered in Doha, which broadcasts out of a region with little tradition of a free speech. Al-Jazeera broadcasts dissenting views in a region where dissent has been tightly controlled so political regimes can remain in power. When this channel has put on the table issues such as corruption, lack of political will, Islamic conservatism, lack of democratic institutions etc, the result was, according to Professor Douglas Boys, the closure of al-Jazeera's local offices in several Muslim countries.[1725] The ban on al-Jazeera gives a clear example of how authorities in Muslim countries do not tolerate freedom of speech. Even during the crisis of the Danish cartoons, and this is the fourth example, they capitalised on the situation in order to prove that freedom of speech or democratic values are anti-religious and incompatible with Islam, as John Esposito noted.[1726]

These examples, undoubtedly, show that these governments perhaps do not really understand the unquestionable value of a free speech for the society. Surprisingly enough, and regrettably, this viewpoint has even been followed and upheld by a large number of Muslims who themselves suffered violation of their freedom of speech. According to Ibrahim Syed, freedom of speech, free thinking, free inquiry, etc., are guaranteed to the Muslims by the Noble *Quran*, but, unfortunately many Muslims are unaware of this fundamental right.[1727] The reasons for this situation stem from misunderstanding, lack of the required Islamic knowledge, and misconceptions and lack of implementation of the right to freedom of speech, as well of other principles that are

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[1723] Dekmejian, R., "The Rise of Political Islamism in Saudi-Arabia", *Middle East Journal* 48 (1994), pp. 627-643, p. 634.
[1724] Al-Ketheeri, M., *al-Salafiyyah Bain Ahl al-Sunnah wal-Emamiyyah*, (Beirut: Markz al-Gadeer, 1997) p. 439-440.
[1725] El-Nawawy, M., and Adel Iskandar, *Al-Jazeera, How the Free Arab News Network Scooped the World and Changed the Middle East*, Westview Press, 2002, p. 114-115.
[1726] Esposito, J., "Muslims and the West", (2006).
[1727] Syed, I., Opposing Viewpoints, *Islamic Voice*, April 2005.

envisaged by authentic Islamic law.[1728] Most Muslim societies have relied on Islamic history in addressing the right of freedom of speech, rather than applying true Islamic beliefs, rules and principles.[1729] The above examples prove that the restrictions imposed on the freedom of speech are not the result of *Quranic* texts or the traditions of the Prophet, but they are made by the authorities and official religious scholars, for political purposes, and this is what I meant by the role of history in setting those restrictions. These instances confirm the role of historical context in establishing freedom of political speech principles in Islam and confirm that these principles are not the direct product of a pure and binding text. Rather, they are manufactured by history, or in other words manufactured by authority, and the stories of sedition are clear evidence of the extent of political control. As Yasin says, the political history of Muslims, on the one hand, and the current image presented by Islamists, on the other hand, have failed to show the real face of Islam, and failed to present it in the right way, as done by the Holy Quran and the Traditions of the Prophet.[1730]

This narrow vision of some Muslim scholars towards political speech has led a considerable number of Muslims, who search for explanations for their political predicament, to look at the Western model of the right to freedom of political speech as an ideal example and seek to cope this unique Western experience, rejecting any thought of applying an Islamic model, according to commentators.[1731] In this way, unfortunately, the right to freedom of political speech has been distorted and neglected. The great principles of Islam that assert freedom of political speech remained mere ideas and theories. The brilliant principle of consultation (*Shura*) was turned into a mere idea, discussed only in books as an ethical issue.[1732] Izz al-Din Al-Tamimi commented on this bitter fact, "Unfortunately *shura* disappeared from Islamic political life and vanished gradually with the succession of the ages until it became a kind of history that narrators recite and Muslim writers prize."[1733] Even the principle of commanding good and forbidding evil (*hisbah*) was directed toward violating the rights and freedoms of individuals, whether Muslims or non-Muslims, while turning a blind eye towards rulers. In this way, the principle of *hisbah*, like most Islamic principles, according to al-

[1728] See al-Qaradawi, Y., *Al-Hulool al-Mustawrda* (Beirut: Mu'assasat al-Risala, 1971) p. 352-356.
[1729] On this topic see, Khan, M., (2003) op. cit. p. 112.
[1730] Yasin, A., (1998) op. cit. 8.
[1731] Al-Ganushi, R., *al-Hurriyyat al-Ama fil-Dawla al-Islamya* (Beirut: Markz Dirasat al-Wihdah al-Arabiyyah, 1993) p. 187; Pipes, D., "Islam and Islamism - Faith and Ideology", *National Interest*, Spring 2000; Shames Al-Deen, M, (1994) op. cit. p. 18. See generally, Yaseen, A., (1998) op. cit..
[1732] See Ashur, I., (1999) op. cit. p. 110.
[1733] Al-Tamimi, I., *al-Shura Bayn al-Asala wa al- Mu'asarah* (Amman: Dar Al-Basheer, 1985) p. 5. Al-Najar, A., (1992) op. cit. p. 17.

Ganoshi, has departed from its objective.[1734] By this I mean that instead of being one of the important tools that enables the nation to prevent abuse by those in authority, this principle has been converted to an individual practice and the practical exercise of this duty has been confined to controlling society, while the authorities enjoy indemnity. This is, of course, against the principle of equality between rulers and individual with regard to commanding good and forbidding evil.[1735] In this regard, Khurshid Ahemd emphasises that Islam left "no room for any privileged class or priestly order... Mundane power is shared by all members of the community who are equal before the law. They have equal rights and obligations. All of the personal, civil, political, social, cultural and economic rights are guaranteed under Divine Law. The rulers do not enjoy arbitrary power. All are equally responsible before the law."[1736] The failure to abide by these Islamic principles, which the following lines will examine, led the Muslim communities, without exception, to a miserable situation that can be clearly seen nowadays and made a huge gap between Islam and the Western system.

IX.2.1.2. Political Speech in *Quran* and *Sunnah*

The *Quran* and the *Sunna*, emphasising the importance of political speech in the society and encouraging its members to exercise the freedom of political speech, opened many channels for the exercise of this right, namely, consultation, commanding good and forbidding evil and the right to resist oppression.[1737]

IX.2.1.2.1. Consultation (*Shura*)

Shura, as explained above, is a central issue in any debate among Muslims over political speech. The legitimacy of *shura* in Islam, as a principle, is rooted in the *Quran* and *Sunnah* themselves. In the *Quran*, is based, according to Muslim scholars, on two well known verses, even though there are also relevant references in other verses.[1738] In the first verse, the Prophet Muhammad is asked to *consult* with his companions. In the other, the community of the faithful is described as the one "*that (among its other attributes) administers its affairs by mutual consultation.*" The first verse is from the

[1734] Al-Ganushi, R., (1993) p. 187.
[1735] See, Al-Shayzari, (2000) op. cit. p. 31, 185-190.
[1736] Ahmed, K., (2000), op. cit. 10; Esposito, J., and John O. Voll, *Islam and Democracy* (New York-Oxford University Press, 1996) p. 41. See Al-Shawi, (1992) op. cit. p. 63-65. See also, Al-Qarni, (1994) op. cit. p. 411.
[1737] Hammad, A., (1987) op. cit. p. 193; Muhammad, Y., *Huqoq al-Insan fi Daw' al-Kitab wal-Sunnah* (Beirut: Dar al-Ma'arifa, 2006) p.491.
[1738] See Al-Tamimi, I., (1985) op. cit. p. 18-20; Al-Awa, M., (1989) op. cit. p. 182; Imarah, M., (1985) op. cit p. 180-182; Al-Mulaigi, Y., (1980) op. cit. p. 153.

chapter *Aal Imran*, while the second is in the chapter which bears the same title, *Shura*. In *Aal Imran*, God says:

> *It is part of the Mercy of Allah that thou dost deal gently with them Wert thou severe or harsh-hearted, they would have broken away from about thee: so pass over (Their faults), and ask for ((Allah)'s) forgiveness for them; and consult them in affairs (of moment). Then, when thou hast Taken a decision put thy trust in Allah. For Allah loves those who put their trust (in Him.)*[1739]

Several clear indications of the legitimacy of *shura* as a form of freedom of speech can be seen in this verse.[1740] This verse implies that the freedom to have a political opinion and to debate is guaranteed. It prohibits even the Prophet, according to Sayyid Qutb, from putting forward his opinion only; otherwise, if He did what was not allowed, the Muslims would not follow him.[1741] Both Al-Hassan Al-Basry and Al-Dhahak are reported to have said, "God did not order his Prophet to consult [the companions] because He needed their opinion, but to teach them the advantage of *Shura* and to set an example for the Muslim nation to follow after the Prophet."[1742] In addition, the clause "*so pass over (Their faults), and ask for ((Allah)'s) forgiveness for them; and consult them in affairs (of moment)*" strongly implies people's right to this freedom even if, in its practice, they held the wrong opinion or objected to the Prophet.[1743] This conclusion can be reinforced by another *Quranic* chapter which bears the same title, *Shura*. In this chapter, there is further evidence from the *Quran* of the legitimacy and importance of *Shura*.[1744] In describing the believers, *God* says:

> *Those who hearken to their Lord, and establish regular Prayer; who (conduct) their affairs by mutual Consultation; who spend out of what We bestow on them for Sustenance.*[1745]

In this verse, God mentioned *shura* alongside other pillars of Islam, which reflects its importance in Muslims' life.[1746] According to Imam al-Jassas, this verse proves the importance of *shura*, as it is mentioned jointly with faithfulness and praying.[1747] Apart

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[1739] (*Quran* 3:159). See also (*Quran* 42:38).
[1740] al-Najar, A., (1992) op. cit. p. 16.
[1741] Qutb, S., (1986) op. cit., no. 1, p. 501; *Tafsir Ibn Kathir*, (2004) op. cit, no. 2, p. 149.
[1742] Al-Bagwi, *Tafsir al-Bagwi*, Al-Tanzeel, M., No. 2 (Riyadh: Dar Tayba, 1990) p. 124; *Tafsir al-Qurtubi*, (2003) op. cit. no. 4, p. 250.
[1743] Hammad, A., (1987) op. cit. p. 196.
[1744] Shaltut, M., *al-Islam: Aqida wa Shariah*, 9th edition (Beirut: Dar al-Shuruq, 1977) p. 368.
[1745] (Quran 42:38). *Tafsir Ibn Kathir*, (2004) op. cit, no. 7, p. 211; *Tafsir al-Qurtubi*, (2003) op. cit. no. 16, p. 35-37.
[1746] See Al-Rais, M., *al-Nazariyat al-Siyasiyyah al-Islamiyah*, 7th edition (Cairo: Dar al-Turath 1976) p. 334. Al-Jabri, M., "Al-*Shura* Bayn al-*Quran* wa al-Ta'wilat al-Darfiyyah", in *Kira'at fil-Islam wa al-Dimuqratiyyah*, (2007) op. cit. p. 33.
[1747] Al-Jassas, A., *Ahkam al-Quran*, no. 3 (Beirut: Dar al-Kitab al-Arabi, 1915) p. 386. See also, *Tafsir Ibn Kathir*, no. 4. p. 126.

from the *Quranic* evidence, the Prophet is reported to have consulted his Companions on several matters and many political occasions.[1748] The books of *Hadith* (Prophetic sayings), *Quranic* interpretation, the Prophet's life and history include too many examples to mention here.[1749] A glance at the Prophet Muhammad's biography proves that consultation was the policy that the Prophet followed during his great life.[1750] The sentence, "suggest me O people", was used frequently by Prophet Muhammad in consulting with his followers.[1751] As Abu Hurayrah, one of Prophet Muhammed's companions, said, "I have not seen anyone more diligent in consulting his companions than the Prophet himself."[1752] Murad Hofmann, in his article "Governing under Islam and the Islamic Political System", mentioned that in spite of being *Allah's* Messenger, Muhammad did not run his community like an autocrat. On the contrary, he observed the *Quranic* command of consultation (*shuru*) as embodied in several verses of the *Quran*.[1753] Rather, on several occasions, he took decisions based on his companions' opinions, which were contrary to his personal view.[1754] Some commentators recall that the Prophet used to seek consultation in times of war and peace, as well as on personal matters.[1755] In the Battle of *Badr*, the Prophet consulted his companions on several occasions.[1756] The first time was before the battle commenced. He ordered them to fight only after having consulted with them, although they would have obeyed and followed his orders if he had not. Thus, he consulted *Al-Mohajreen* (Muslims from Mecca who had migrated to Medina to escape from persecution) and *Al-Ansaar* (Muslims from Medina), who all agreed to fight.[1757] The second time, Rashid Rida mentioned, was after the victory of the Muslims at *Badr* and their seizure of a quantity of booty and prisoners of war from the army of the unbelievers. The Prophet consulted with his

[1748] Al-Khatib, A., and Ibrahim Madkur, *Huquq al-Insan fil-Islam* (Damascus-Dar al-Tallas, 1992) p. 28; Al-Tamimi, I., (1985) op. cit. p.19-23; Al-Awa, M., (1989) op. cit. p. 182; Imarah, M., (1985) op. cit p. 182-184; Al-Mulaigi, Y., (1980) op. cit. p. 157; al-Nadi, F., (1999) op. cit. p. 201-205.
[1749] *Tafsir Ibn Kathir*, (2004) op. cit, no. 2, p. 149-150.
[1750] Al-Shawi, T., *Fiqh al-Shura wa al-Istishara* (al-Mansoura-Dar al-Wafa, 1992). p. 72-76, 130-136; Shaltut, (1977) op. cit. p. 439-440; Al-Ansari, A., *al-Shura wa Atharuha fil-Dimuqratiyyah* (Cairo: Dar al-Fikr al-Arabi, 1996) p. 65; Al-Jundi, M., *Ma'alm al-Nizam al-Siyasi fil-Islam* (Magma al-Buhuth al-Islamiyyah, 1970) p. 68-70.
[1751] Muslim, *Sahih Muslim*, no. 4, *hadith* no. 2779, p. 2137-8. See also Abu Samrah, K., al-*Shura fil-Islam* (Beirut: Dar ibn Hazem, 2003) p. 40; Al-Shawi, T., (1992) op. cit. p. 136-145.
[1752] Al-Tirmidhi, *Sunan al- Tirmidhi*, no. 4, *hadith* no. 1714, p. 185-6; Al-Suyuti, *Al-Dur al-Manthoor*, no. 2 (Beirut: Dar al-Kutub al-Ilmiyyah, 1990) p. 160; Tabliya, A., (1984) op. cit. p. 349; Zraiq, B., (1996) op. cit. p. 403; Al-Tamimi, A., (1985) op. cit. p. 19.
[1753] Hofmann, M., "Governing under Islam and the Islamic Political System", *American Journal of Islamic Social Sciences*, 21.3 (2004) p. 3.
[1754] See Mustafa, M., *Hurryyiat al-Ra'y Fil-Islam* (Cairo: Dar al-Ghareeb, n.d.) p. 67-99.
[1755] Hammad, A., (1987) op. cit. p. 202.
[1756] *Tafsir Ibn Kathir*, (2004) op. cit, no. 2, p. 149; Al-Suyuti, (1990) op. cit. no. 2. p. 160; Al-Mulaigi, Y., (1980) op. cit. p. 103; Al-Najar, A., (1992) op. cit. p. 50; Al-Tamimi, I., (1985) op. cit. p. 67-71.
[1757] Al-Nawawi, (2002) op. cit. no. 6. p. 133; Al-Saidi, A., (2001) op. cit. p. 35-37.

companions Abu Bakr, Umar and Ali over the issue of accepting ransom for the prisoners of war. While Abu Bakr had his reasons to suggest accepting the ransom, which was also the Prophet's opinion, Umar disagreed and Ali did not express an opinion, even though he was one of the three being consulted.[1758] This is an excellent example of allowing the freedom of political speech and its safeguarding. This clearly shows that freedom of political opinion in Islam is strongly supported by the texts of the *Quran* and the *Sunnah*.[1759]

However, there is a debate among Muslim scholars whether the leader of the community is obliged to consult community members regarding public affairs, thus, whether decisions should be made only through consultation, or whether the leader is free to consult or not consult them, as consultation is only a recommendation.[1760] Some believe that for members of a society to be consulted by the leader is recommended (rather than mandatory.)[1761] The view that says consultation is mandated but is not binding is based on the fact that the injunction to Prophet Muhammad in the *Quran*ic verse to consult his followers, "*Consult them* [companions] *in the* [community] *affairs*", was only to encourage his companions and raise their weight, rather than stating a duty on Prophet Muhammad and Muslim leaders afterwards.[1762] Furthermore, according to this group, when Muslim scholars determined the duties in Islam, they did not mention *shura* among them, which indicates that it is purely recommendatory. This party added, even if the leader consults people, he is free to follow their advice or not.[1763] However, most Muslim scholars, whether old or contemporary, oppose the conservative view on *shura* which recognizes it only as discretionary, non-binding consultation.[1764] *Shura*, according to them, is depicted as constituting the very process by which binding decisions on public matters are reached.[1765] This is because *shura*, as Abdulhamid Al-Ansari says, is "an explorer of the mind and the reason to the right... neglecting *shura*

[1758] Rida, M., in *Kira'at fil-Islam wa al-Dimuqratiyyah*. (2007) op. cit. p. 30.
[1759] Hammad, A., (1987) op. cit. p. 204-205.
[1760] Al-najar, I., (1977) op. cit. p. 410-411. Al-Jabri, M.,(2007) op. cit. p. 35.
[1761] For more details, Muhana, F., *La Dimuqratiyyah fil-Shura* (Beirut: Dar al-Fikr al-Mu'asir, Damascus: Dar al-Fikr, 2003) p. 113-116; Abu Samrah, K., (2003) op. cit. p. 59-68; Al-Mulaigi, Y., (1980) op. cit. p. 145; Al-Khatib, Z., (1985) op. cit. p. 163.
[1762] *Tafsir al-Qurtubi*, (2003) op. cit. no. 4, p. 250; Al-Shawkani, (1997) op. cit. no. 1, p. 496; Ibn Hisham, (1988) op. cit. no. 3. p. 167; Al-Tabari, M., Tafsir *al-Tabari*, no. 3 (Beirut: Dar al- Kutub al-Ilmiyyah, 1999) p. 495-496; Al-Suyuti, (1990) op. cit. no. 2. p. 159;Al-Jabri, M., (1995) op. cit. p. 43-45;
[1763] See Mutawalli, A., *Mabadi al-Shura fil-Islam*, 2nd edition, (Cairo: Aalm al-Kutub, 1972) p. 14; Fadel Allah, M., *Al-Shura, Ta'biat al-Hakemiyyah fil-Islam* (Beirut: Dar Al-Andalus, 1984) p. 117. Abu Samrah, K., (2003) op. cit. p. 59-68.
[1764] Al-Jundi, M., (1986) op. cit. p. 63-67; Al-Zuhayli, (1997) op. cit. p. 200; Al-Awa, M., (1989) op. cit. p. 183; Mursi, F., (1977) op. cit. p. 323.
[1765] Imarah, M., (1985) op. cit p. 34-35.

would expose the nation's welfare to danger."[1766] In other words, consultation "is a political guarantee of the stability of the state, a means of protecting the state from conditions which could weaken it and a major factor contributing to society's well-being."[1767] In addition, the *Qur'anic* verse regarding *shura* is clear and determinative about the imperative nature of *shura*. As Ibn Taymiyyah said, "There is no sufficiency for the leader of the consultation, God has ordered His Prophet to make decisions through consultation... others [other Muslims leaders] are worthier to obey this order."[1768] Al-Tabari characterised consultation as one of the fundamental principles of the *Shariah* which are essential to the substance and identity of Islamic government."[1769] Similarly, Shaltut emphasised that consultation is the basis of a legitimate regime, it is also the only way to reach the truth and to know the mature opinions, and finally, consultation, according to Shaltut, is one of the main bases on which the Islamic state should be built.[1770] According to al-Hageel, "The Islamic system of government is a consultative system... When making important decisions, especially those pertaining to public affairs, critical situations and crucial events facing Muslim nation and state, the ruler first informs himself of the views of a group of individuals."[1771] Khallaf, who is also in favour of this view, believes that "The Islamic government is constitutional, and the decision making is certainly not belonging to the leader alone, on the contrary, it belongs to the nation... because consultation is the way in making a decision in Islamic society."[1772] This meaning can also be read from the thought of Al-Mawdudi, who wrote in his book, *The life System in Islam*, that "The leader is required to govern the society by consulting the members of the consultation council."[1773] Al-Ghazali, in his book, *Islam and Political Tyranny/al-Islam wal-Istibdad al-Siyyasi*, emphasised that consultation is an obligation because, as he said, "The leader does not derive his leadership, nor does he deserve even a grain of support, except when his voice becomes compatible with the nation's desires, because only the nation is the origin of the authority, and compliance with the nation's desire is compulsory."[1774] Some have gone further by considering neglecting consultation as a

[1766] Al-Ansari, A., (1996) op. cit. p. 5-6, 191; Abu Samrah, K., (2003) op. cit. p. 40.
[1767] Al-Hageel, S., (2001) op. cit. p. 248.
[1768] Ibn Taymiyyah, *al-Siyasa al-Shariyyah fi Islah al-Ra'ea wa al-Ra'ria* (Cairo: Dar al-Hilal, 1981) p. 149.
[1769] Al-Tabari, (1999) op. cit. no. 3. p. 495-496.
[1770] Shaltut, (1977) op. cit. p. 438-439.
[1771] Al-Hageel, S., (2001) op. cit. p. 245; Al-Tamimi, I., (1985) op. cit. p. 26, 29-31.
[1772] Khallaf, A., *al-Siyasa al-Shariyyah* (Beirut: Mu'assasat al-Resalah, 1987) p. 31.
[1773] Al-Mawdudi, (1970) op. cit. p. 33. See also for the same author, *al-Khilafa wa al- Hukm* (1978) op. cit. p. 22, 41.
[1774] Al-Ghazali, M., (1998) op. cit. p. 46-53.

legitimate reason for deposing the leader. Ibn Atyia wrote, "*Shura* is one of the Islamic principles. Therefore, rulers who do not consult people on general and religious affairs have to be removed."[1775] According to Khalid Ishaque:

> The *Quran* gives to responsible dissent the status of a fundamental right. In exercise of their powers, therefore, neither the legislature nor the executive can demand unquestioning obedience...The Prophet, even though he was the recipient of Divine revelation, was required to consult the Muslims in public affairs.[1776]

Several evidences have been cited by this group in order to demonstrate the broader rather than the narrower interpretation of *shura*.[1777] Firstly, although in the "*Uhud*" battle between the Muslims and infidels, Prophet Muhammad consulted his companions about not going out to fight the infidels and his companions were in favour of fighting, which led to a tragic defeat for the Muslims, God ordered the Prophet to continue consulting his followers, despite the outcome of the previous consultation.[1778] Here, God wanted to send a message to leaders after Muhammad that even in the presence of Muhammad and the revelation from God, exercising consultation is a *sine qua non*.[1779] In addition, the frequent practice of consulting by the Prophet, according to Muhammad Rashid Rida, is an indication of the obligatory nature of consultation.[1780] To sum up, it can be said that consultation, as a form in which political speech is conveyed, is an obligatory duty on the head of state and other state authorities. Otherwise, as Brian Beedham commented, if consultation were only a recommendation, "there is not much comfort for democrats in *shura*."[1781]

IX.2.1.2.2. Commanding Good and Forbidding Evil (*al-Hisbah*)

The *Quranic* principle of *hisbah* (*al-amr bi'l-msruf wa'l-nahy an al-munker*) is considered as the most obvious reflection of the importance of freedom of political speech in Islam. According to this principle, people should command good, which is all that God and His Prophet have commanded, and forbid evil, all that they have

[1775] Ibn Atyia, *Al-Muharar al-Wajiz i- Tafsir al-Kitab al-Aziz*, No. 3, (Qatar: 1982) p. 397.
[1776] Ishaque, K., (1980) op. cit. p. 157.
[1777] Al-Razi, *al-Tafsir al-Kabir*, no. 9 (Beirut: Dar Al-Fikr, 2002) p. 69
[1778] Qutb, S., (1986) op. cit. no. 1, p. 501-502; Al-Jundi, M., (1986) op. cit. p. 64, 65; Al-Tuaimat, H., (2003) op. cit. p. 225-226; Al-shawi, T., (1992) op. cit. p. 52, 131; al-Mansur, (2002) op. cit. p. 107.
[1779] See Qutb, S., (1986) op. cit. no. 1, p. 501-502; Abdul Khaliq, A., (1975) op. cit. p. 36. Tabliya, A., (1984) op. cit. p. 349
[1780] Rida, M., in *Kira'at fil-Islam wa al-Dimuqratiyyah*. (2007) op. cit. p. 29; Abu Samrah, K., (2003) op. cit. p. 40; Al-Shawi, T., (1992) op. cit. p. 136-145.
[1781] Beedham, B., "Islam and the West", *The Economist*, Aug 4th 1994.

forbidden,[1782] by physical action, speech, or silent denunciation in accordance with their ability and to the extent that circumstances permit. In a number of *Quran*ic verses, God has praised people who command good and forbid evil and encouraged them to continue doing so because at the end they will be the successful ones.[1783] In chapter 3 verse 104 God says: "*Let there arise out of you a band of people inviting to all that is good, enjoining what is right, and forbidding what is wrong: The are ones to attain felicity.*" In another *Quranic* text, God emphasised that enjoining right and prohibiting evil is an essential duty of Muslims. According to verse 41 of chapter 22, "*(They are) those who, if We establish them in the land, establish regular prayer and give regular charity, enjoy the right and forbid wrong: with God the end (and decision) of (all) affairs.*" It is narrated that the Prophet has said: "By Him in Whose Hand my life is, you either enjoin good and forbid evil, or *Allah* will certainly soon send His punishment to you. Then you will make supplication and it will not be accepted."[1784]

A number of prominent *ulema* across the centuries have taken the view that "commanding good and forbidding evil is the greatest of religious principles and it is the task for which *Allah* has sent all the Prophets."[1785] Any absence of *hisbah* entails, in their viewpoint, the collapse of religion and widespread of corruption, oppression, and ignorance.[1786] In this regard, Al-Jassas says, "The obligation of commanding good and forbidding evil was emphasized by *Allah* in many situations in the *Quran*, by the Prophet in his *Hadith* and by the consensus of the predecessors and scholars."[1787] Ibn Hazm argues: "All of the *Ummah* has agreed that commanding good and forbidding evil is an obligation, and no one has contested this."[1788] Al-Shawkani says, "The obligation (commanding good and forbidding evil) is established in the *Quran* and the *Sunnah* and it is one of the most important *Shariah* duties and foundations."[1789] Al-Ghazali asserts, "Commanding good and forbidding evil is the greatest of religious

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[1782] Cook, M., (2000) op. cit. p. 24; Al-Hageel, S., (2001) op. cit. p. 101; Al-Awa, M., (1989) op. cit. p. 153; Mursi, F., (1977) op. cit. p. 262.

[1783] See Qutb, (1986) op. cit. no. 1, p. 447; al-Shawi, (1992) op. cit. p. 55.

[1784] *Hadith* no 193 in al-Nawawi, (2000) op. cit. p. 131. For more of the Prophet's sayings regarding *hisbah* see Al-Shayzari, A., *Nihayat al-Rutbah fi Talab al-Hysbah* (Dar al-Thaqafa: 2000) p. 142-143. Ibn Majah, *Sunan Ibn Majah, hadiths* no. 4004, 4005, 4006 (Beirut: Dar al- Kutub al-Ilmiyyah, 1998) p. 401-402; Al-Ghazali, A., (1986) op. cit. no. 2. p. 335-338; Al-Awa, (1989) op. cit. p. 160.

[1785] Al-Ghazali, A., (1986) op. cit. no. 2. p. 333. Al-Awa, M., (1989) op. cit. p. 182; Imarah, M., (1985) op. cit p. 152-178; Al-Qarni, A., *Al-Hisbah Bayn al-Mazi wal-Hazr* (Riyadh-Maktabat al-Nashr, 1994) p. 19; Kamali, (1997) op. cit. p. 28; Abu Zahrah, M., *Tanzeem al-Islam Lil-Mujtama* (Cairo: Dar al-Fikr al-Arabi, 1965) p. 23.

[1786] Al-Ghazali, A., (1986) op. cit. no. 2. p. 333; Qutb, S., (1986) op. cit. no. 1, p. 444-5; al-Najar, A., *al-Hisbah wa Dawr al-Fard Fiha* (Cairo- Al-Azhar Magazine, 1994) p. 13.

[1787] Al-Jassas, A., *Ahkam al-Quran*, no. 2 (Beirut: Dar al-Kitab al-Arabi, 1915), p. 592.

[1788] Ibn Hazm, *Al-Fisal fil Al-Melal wal-Ahwa wal-Nihal*, no. 4 (Cairo: Matba'at Al-Tamadon, 1903) p. 171.

[1789] Al-Shawkani, (1997) op. cit. no. 1, p. 467-470.

principles and it is the task for which *Allah* has sent all the Prophets."[1790] Ibn Taymiyyah emphasises, "The principle of commanding good and forbidding evil is one of the general principles of Islam, one which completes Islam."[1791]

The concept of *hisbah* can be divided into two types. First, there is the *hisbah* of the state against the public.[1792] This means that among the state's institutions there should be some whose task is to maintain the duty of advising the people to do good and refrain from evil. Second, there is the *hisbah* of the public against the state. *Shariah* makes the state subject to *hisbah* and holds the public responsible for making sure that the state respects the law.[1793] According to Abou El-Fadl, the *Quran* does command Muslim to enjoin the good and forbid the evil which could imply a duty to resist injustice.[1794] *Hisbah*, in this regard, is the *Shariah* term for the *Ummah*'s participation in the principle of monitoring and accountability.[1795] Through the principle of *hisbah*, then, freedom of political speech is guaranteed in Islam. According to Kamali, without freedom of speech, the application of *hisbah* would be inconceivable.[1796] Hammad believes that *hisbah* is a cardinal principle of Islam that "offers a basis which is sufficiently authoritative to validate freedom of expression in political and governmental affairs."[1797] Others see that *hisbah* "necessitates the freedom of the individual to formulate and express an opinion."[1798]

IX.2.1.2.3. Resisting Oppression (*Mukawamat Al-Dhulm*)

The *Quran* and *Sunnah* consistently demand the establishment of Justice and the removal of oppression. It is thus not surprising that the right to resist oppression is considered as one of the basic human rights from the Islamic perspective.[1799] Islam calls on every citizen, according to al-Zuhayli, to expose the transgressions, brutality or abuse of powers by the authorities.[1800] This is because, as Abdul Aziz Said and Jamil

[1790] Al-Ghazali, A., (1986) op. cit. no. 2. p. 333.
[1791] Ibn Taymiyyah, *al-Hisbah fil-Islam* (Riyadh: al-Mu'assasat al- Saudiyyah, n.d.); See also al-Najar, A., (1992) op. cit. p. 47; Mustafa, M., op. cit. p. 68.
[1792] For another classification of *al-Hisbah*, see Ibn Jama'ah, *Tahreer al-Ahkam Fi Tbdir Ahl al-Islam* (Qatar: Riyasat al-Mahakm al-Shariyyah, 1987) p. 91-92; Abu Ya'la, *al-Ahkam al-Sultaniyah*, 2nd edn (Cairo: Mustafah al-Babi al-Halabi, 1966) p. 290-308.
[1793] Al-Najar, I., (1977) op. cit. p. 423-427; Muhammad, Y., (2006) op. cit. p. 501; al-Ali, H., "*al-Hisba ala al-Hakim*", (2007).
[1794] Abou El Fadl, K., (2001) op. cit. p. 61.
[1795] Al-Khatib, Z., (1985) op. cit. p. 147.
[1796] Kamali, M., (1997) op. cit. p. 28
[1797] Hammad, A., (1987) op. cit. p. 221.
[1798] Zaydan, A., (1986) op. cit. p. 128.
[1799] Berween, M., (2002) op. cit. p. 74.
[1800] Al-Zuhayli, (1997) op. cit. p. 188. Goraish, A., (1991) op. cit. p. 246; AlNajar, I., (1977) op. cit. p. 433.

Nasser say, Islamic political system does not tolerate tyranny.[1801] What is important for this study is that resisting oppression is one of many ways in which Islam treated the freedom of political speech. It is a special form of freedom of speech, distinct from other forms, as it could be done by communicative conduct as well as pure speech.

The legitimacy of this unique form of freedom is based on many passages, either from the *Quran*, from the *Hadith* or from the history of their applications by the Rightly-Guided Caliphs [1802] In the *Quran*, God says, describing Muslims: "*And those who, when an oppressive wrong is inflicted on them, (are not cowed but) help and defend themselves.*"[1803] God describes them as people who, if oppressed, have the right to defend themselves and their rights. No one is to be condemned for resisting oppression, since God dislikes a weak believer and prefers for him dignity and honour.[1804] God also says, "*And did not Allah Check one set of people by means of another, the earth would indeed be full of mischief.*"[1805] This verse implies that if the oppressor is not resisted, evil will spread over the earth. That is why *Allah* has not only given to the oppressed this right to fight back but also ordered them to use it and warned them against not carrying out that obligation.[1806] He also says, "*why should ye not fight in the cause of Allah and of those who, being weak, are ill-treated (and oppressed)?- Men, women, and children, whose cry is: 'Our Lord! Rescue us from this town, whose people are oppressors; and raise for us from thee one who will protect; and raise for us from thee one who will help'.*"[1807]

The *Quran* not only contains explicit verses on resisting oppression, but it also makes it an obligation, using various methods. Some verses express the obligation to resist oppression by indication, others by implications. For example, one verse tells that "*There were in the city nine men of a family, who made mischief in the land, and would not reform ... They plotted and planned, but We too planned, even while they perceived it not ... Then see what was the end of their plot!- this, that We destroyed them and their people, all (of them.)*"[1808] This verse clearly shows joint responsibility, since the oppressors are held responsible as the main protagonists, while the nation are also

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[1801] See Said, A., and Jamil Nasser, (1980) op. cit. p. 63.
[1802] Ibn Hajar, (1997) op. cit. no. 5. p. 118; Al-Ghazali, A., (1986) op. cit. no. 2. 333-339; Hammad, A., (1987) op. cit. p. 237-238; Hussain, S., (1994) op. cit. p. 50-52; Goraish, A., (1991) op. cit. p. 246-48.
[1803] (*Quran* 42: 39).
[1804] Hammad, A., (1987) op. cit. p. 237-238.
[1805] (*Quran* 2: 251).
[1806] Al-Shawkani, (1997) op. cit. no. 1, p. 337; Al-Suyuti, (1990) op. cit. no. 1. p. 576; Hammad, A., (1987) op. cit. p. 243; Al-Mudgari, A., (1991) op. cit. p. 36.
[1807] (*Quran* 4: 75).
[1808] (*Quran* 27:48-51). See *Tafsir Ibn Kathir*, (2004) op. cit, no. 6, p. 199-192; *Tafsir al-Qurtubi*, (2003) op. cit. no. 13, p. 217; Qutb, S., (1986) op. cit. no. 5, p. 2645-6.

culpable as accomplices to this oppression, for failing to stop or resist them.[1809] An example of a verse which expresses the obligation to resist oppression by implication is verse 97 of chapter 4 which has been examined in the previous chapter.[1810] All these verses, Professor Abou El-Fadl asserts, while do not explicitly command insurrection or rebellion against unjust rulers, they do create a powerful construct that can be easily utilised to justify armed resistance to oppression.[1811]

One verse enjoins Muslims to obey God, the Messenger, and those in the authority: "*O ye who believe! Obey Allah, and obey the Messenger, and those charged with authority among you.*"[1812] Some infer from this the idea that opposition or dissent is forbidden and that authoritarianism is supported.[1813] However, in looking at the Qur'an and the *Hadith*, Muslims, according to *Graham Fuller*, must look not just at the text, but at the context of text: What are the broader principles and values underlying the language of the Qur'an on specific issues or the decisions and actions taken by the Prophet?[1814] What Fuller wanted to say is that specific provisions of the *Shariah* can be properly understood only in the context of its total scheme? The context and other references clearly indicate that the authority to be obeyed must be legitimate and engaged in establishing justice.[1815] Ibn Umar reports that the Prophet had said: In collective matters "Muslims should listen to and to obey the orders of the responsible men ... provided the order are not sinful."[1816] The quoted saying clearly implies, according to Hakem al-Mutairi, that as soon as the state violates Divine limits, it owes no obedience.[1817] No rulers in Islam, according to Abdul Aziz Said and Jamil Nasser, are above the law.[1818] Elaborating this, Muhammed Berween wrote that when the government becomes destructive and fails to fulfil its purpose, and when the political system becomes an obstacle to progress the development of the Islamic objectives then the citizens have the right to protest against tyranny.[1819] This understanding is reinforced by other verses which laid down that if "*an oppressive wrong is inflicted*

[1809] Hammad, A., (1987) op. cit. p. 244.
[1810] See *supra* p. 248.
[1811] Abou El Fadl, K., (2001) op. cit. p. 118-119.
[1812] (*Quran* 4:59).
[1813] See Ashur, I., (1999) op. cit. p. 16; Muhammad, Y., (2006) op. cit. p. 500-501.
[1814] *Graham Fuller* "Freedom and Security: Necessary Conditions for Moderation." *American Journal of Islamic Social Sciences* 22.3. (2005) p. 25.
[1815] Ibn Hajar, (1997) op. cit. no. 13. p. 153; Al-Shawkani, *Nayl al-Awtar: Sharh Muntaqal-Alkhbar*, No. 7 (Cairo: Dar al-*Hadith*, 1993) p. 269.
[1816] Muslim, *Sahih Muslim*, no. 4, *hadith* no. 1893, p. 1469; Bukhari, *Sahih Bukhari*, no. 3, *hadith* no. 2796, p. 1080.
[1817] Al-Mutairi, H., (2004) op. cit. p. 45. Hussain, S., (1994) op. cit. p. 85.
[1818] Said, A., and Jamil Nasser, (1980) op. cit. p. 64.
[1819] Berween, M., (2002) op. cit. p. 74.

against them," Muslims should *"not be cowed but help and defend themselves,"* and any blame for such action *"is only against those who oppress humanity with wrongdoing and insolently transgress beyond bounds through the land, defying right and justice."*[1820] According to Mawdudi, if an individual or a group of people or a party usurps power, and after assuming the reins of authority begins to tyrannize individuals or groups of men or the entire population of the country, then to raise the voice of protest against it openly is the God-given right of man and no one has the authority to usurp or deny this right.[1821] While the right to overthrow an oppressive government is not expressly granted, the right to challenge, according to Ahrar Ahmad, it certainly is.[1822] This conclusion, according to Katerina Dalacoura, is important for the notion of rights, the right to free speech in this study.[1823]

As in the case of the *Quran*, in the *Sunnah* the methods of warning against and forbidding oppression vary from implication to explicitly supporting resistance.[1824] My examination of *Sunnah* of the Prophet reveals that people are encouraged to challenge a ruler when necessary and appropriate. On several occasions, the Prophet warned Muslims of the consequences of their silence over tyranny.[1825] Ibn Jurair narrated that the Prophet said: If any man is among a people in whose midst he does acts of disobedience, and, though they are able to make him change (his acts), they do not change, *Allah* will smite them with punishment before they die.[1826] He also said "never will my community be united in an error,"[1827] obedience to a ruler should be only in righteousness not in transgression and that "the best form of *jihad* (struggle) is to tell a word of truth to an oppressive ruler."[1828] All of this indicates the significance of the community's will rather than the dictate of any ruler.[1829] In order to apply this *hadith*, Muslims throughout Islam's history have confronted the state and the consequences were always dire.[1830] Islamic history is rife with cases where people were killed because

[1820] (42:41-42). See in this regard, Al-Nawawi, (2002) op. cit. no. 1. p. 234.
[1821] Mawdudi, A., (1987) op. cit. p. 28; Abdul Khaliq, A., (1983) op. cit. p. 63-64.
[1822] Ahmad, A., (2003) op. cit. p. 25.
[1823] Dalacoura, K., (2003) op. cit. p. 45.
[1824] Al-Nawawi, (2002) op. cit. no. 6. p. 245. Ibn Taymiyyah, *al-Hisbah fil-Islam* (Riyadh: al-Mu'assasat al-Saudiyyah, n.d.) p. 22. Ibn Rajab Al-Hanbali, (1999) op. cit. p. 243-256.
[1825] Hussain, S., (1994) op. cit. p. 50. Sachedina, A., *The Islamic Roots of Democratic Pluralism* (Oxford University Press, 2000) p. 122.
[1826] Abu Dawud, *Sunan Abu Dawud*, no. 4, *hadith* no. 4340, p. 121.
[1827] Ibn Majah, *Sunan Ibn Majah*, no. 4, *hadith* no. 3950, p. 367.
[1828] *Supra* p. 41, 258, 268.
[1829] See Grunebaum, G., *Medieval Islam: A Study in Cultural Orientation*, 2nd edition (Chicago: The University of Chicago Press, 1953) p. 150.
[1830] See Cook, M., (2000) op. cit. p. 50-53. Al-Najar, A., (1992) op. cit. p. 11.

of exercising freedom of political speech. One of the best examples can be seen in the case of Ibn Maymun with the tyrannical ruler Abu Muslim.[1831]

The Prophet once said: "May *Allah* protect you from foolish rulers! The companions asked: what is a foolish ruler? He said: rulers after me who will not be guided by my *Sunnah* or follow my way. Those who believe their lies and support them in their oppression do not belong to me ... but those who do not believe them nor support them in their oppression belong to me and I belong to them..."[1832] In another saying, the Prophet said: "Oppressors and their supporters shall go to hellfire."[1833] Commentators said that not only those who assist an unjust and oppressive ruler are supporters; the description applies also to those who do not resist him, although they could do so, as by not resisting they become accomplices.[1834] The Prophet also said that: "Whoever walks with an unjust person to support him, while knowing he is unjust, has departed from Islam."[1835] He also once asked, "What will become of you when rulers oppress you?"[1836] It is clear here that this denial/interrogative technique implies humiliation for a nation which accepts the oppression of rulers. This technique is in fact a clear stimulus to resist oppression and put an end to the injustice of rulers.[1837] The once Prophet said: "Support your brother, whether he is the oppressor or being oppressed: if he is the oppressor, stop him from oppressing (The meaning can be applied to an unjust ruler, resistance to whom is an obligation, as implied by 'stop him from his oppression') and if he is being oppressed (this means the oppressed citizens) support him (meaning join him in resistance to deliver him from his injustice.)"[1838] Finally, it is narrated on the authority Abdullah Ibn Masud that the Prophet observed: "

> Never a Prophet had been sent before me by *Allah* towards his nation who had not among his people (his) disciples and companions who followed his ways and obeyed his command. Then there came after them their successors who said whatever they did not practise, and practised whatever they were not commanded to do. He who strove against them with his hand was a believer: he who strove against them with his tongue was a believer, and he who strove against them with his heart was a believer and beyond that there is no faith even to the extent of a mustard seed.[1839]

[1831] For details regarding this case see Cook, M., (2000) op. cit. p. 52-55.
[1832] Ibn Hanbal, *Fihris Ahadith Musnad al-Imam Ahmed ibn Hanbal*, no. 3, *hadith* no. 14441 (Beirut: Dar al-Kutub, 1985) p. 332.
[1833] Al-Suyuti, (1990) op. cit. no.1, p. 110.
[1834] Hammad, A., (1987) op. cit. p. 247.
[1835] Al-Suyuti, (1990) op. cit. no. 2. p. 182.
[1836] Al-Suyuti, (1990) op. cit. no. 2. p. 97.
[1837] Hammad, A., (1987) op. cit. p. 249.
[1838] Ibn Hajar, (1997) op. cit. no. 5. p. 122; *hadith* no. 237 in al-Nawawi, (2000) op. cit. p. 157; Al-Suyuti, (1990) op. cit. no. 1. p. 109.
[1839] Muslim, *Sahih Muslim*, no. 1, *hadith* no. 80, p. 69.

From the last quotation, which is directed to the Muslim public, al-Qaradawi concluded that resisting oppression is an Islamic duty on every Muslim.[1840] It is not a right for individuals, otherwise they would be too lazy to fulfil it and the oppressor would continue his injustice, the country would be ruined and corruption would spread among the citizens. Every Muslim is responsible for some task and is held accountable for not fulfilling it properly. This would enhance the scope and substance of freedom of speech.

The above discussion of freedom of political speech in *Quran* and *Sunnah* affirms the fact that the practice of this freedom is within reach for the entire nation through the legal and legitimate channels. It revealed that neither *Quran*ic or prophetic text could be interpreted to protect rulers from political, as opposed to personal, criticism, given that the aim of the *Quran* and *Sunnah* is to promote political debate. The basic principles in this regard have always been to enjoin good and forbid evil, consultation and resisting oppression. Muslim states are under a basic duty to implement these principles and protect the right of freedom of political speech of the individual through all legitimate means at their disposal.

IX.2.1.3. Political Speech in Practice (The Era of the Rightly Guided Caliphs)

Having used the various passages quoted above as a basis for establishing freedom of political speech in Islam, the study presents here practical evidences from the history of the Rightly-Guided Caliphs. This history, according to Abu Zahrah, is full of events showing the practical applications of freedom of political speech during that golden period of time of Islam.[1841] These practical applications provide a clear explanation of the passages quoted above. According to some commentators, it was the result of the teachings of the *Quran* and the Prophet that there developed such an atmosphere during the Righteous Caliphate that people never hesitated from criticising the new-born Islamic state or the caliph.[1842]

However, before presenting these practical examples, I should refer to an important event which strongly indicates the deep understanding of early Muslims of this freedom. This event is the *Al-Thaqeefah* meeting when the Prophet's companions, on learning of the Prophet's death, called for an important and large-scale meeting in order

[1840] Qaradawi, *Zahirat al-Gulow fil-Takfir*, 3d edition (Cairo: Maktabat Wahba, 1990) p. 72-73.
[1841] See Al-Sallabi, A., *Fasl Al-Khtab fi Sirat Ibn al-Kattab* (Alexandria: Dar al-Eman, 2002a) 121-125; Al-Mawdudi, *Tadwin Al-Dustur al-Islami* (Damascus: Dar al-Fikr, n.d.) p. 46-52.
[1842] Hussain, S., (1994) op. cit. p. 50. Al-Khatib, Z., (1985) op. cit. p. 144; Al-Ansari, *Nizam al- Hukm fi Islam* (Doha: Dar Kutri Ibn al-Fuja'ah, 1985) p. 52-53;

to choose a new ruler for the Muslim community.[1843] As Montgomery wrote, a meeting was held after the death of the Prophet to discuss who should succeed Muhammad, and there was a heated controversy among the companions regarding this issue.[1844] Although there was disagreement about who should take the place of Muhammad, consultation, according to many, was the only solution that solved this problem.[1845] The proceedings of this meeting show the clearest application of the freedom of political speech, particularly in terms of what happened between Muslims and the arguments everyone advanced concerning the choice of a ruler from among them. Here are a few examples, rather than an exhaustive list, of the practical applications of free political opinion in the *Ummah* under the Rightly-Guided Caliphs.

The first Rightly-Guided Caliphs understood the importance of political speech, and recognized it as a constitution for the government, and encouraged the people to adhere to it and not abandon it.[1846] After being chosen as caliph, Abu Bakr made a statement as thought declaring the principles of his reign:

> O people, behold me- charged with the cares of Government. I am not the best among you. I need all your advice and all your help. If I do well support me, if I mistake counsel me. To tell the truth to a person commissioned to rule is faithful allegiance, to conceal it is treason. In my sight the powerful and the weak are alike, and to both I wish to render justice. As I obey God and His Prophet, obey me, if I neglect the laws of God and the Prophet, I have no more right to your obedience.[1847]

Here, according to many, the caliph himself declared the principles of political criticism.[1848] He called on people to practise this freedom against him without fear or hesitation, which indicates a correct understanding of the Islamic *Shariah*.[1849] Abu Bakr's words were not just attractive principles and meaningless slogans used to embellish a talk. This is what we see today under many unjust leaders who excel in inventing demagogic methods to deceive the unassuming public - methods which are

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1843 Ibn Hisham, (1988) op. cit. no. 3. p. 405-410; Ridha, M., *Abu Bakr al-Sidiq, Awl al-Khulafa al-Rashidun*, (Beirut: Dar al-Kutub al-Ilmiyyah, 1979) p. 27; Al-Awa, (1989) op. cit. p. 182; Al-Tabari, *Tarikh al-Ummam wal-Mulook*, no. 4, 5th edition (Cairo: Dar al-Ma'arif, 1987) p. 203-210.

1844 See Watt, M., *A Short History of Islam* (England & USA-One world Publications, 1996) p. 34; Al-Khateb, (1997) op. cit. p. 16-17; Al-shawi, (1992) op. cit. p. 76-80.

1845 Al-Ili, (1983) op. cit. p. 468-469; Al-shawi, (1992) op. cit. p. 140; Al-Sallabi, (2002a) op. cit. p. 91-92.

1846 See Al-Samad, *H.*, (1994) op. cit. p. 115.

1847 Ibn Hisham, (1988) op. cit. no. 4. p. 414-415.

1848 Haridi, A., *Nizam al-Hukm fil-Islam* (Cairo: Cairo University, 1968) p. 137; Al-Ghazali, M., *al-Islam wal-Istibdad al-Siyasi* (Cairo: Dar Al-Kitab Al-Arabi, 1998), p. 29; Khafaji, M., *Al-Islam wa Huqoq al-Insan*, (1950) p. 59.

1849 Al-Tantawi, A., *Abu Bakr al-Siddiq* (Damascus: al-Maktaba al-Arabiyyah, n.d.) p. 302; Imad AlNajar, (1977) op. cit. p. 439.

completely different in practice from what they are said to be. Abu Bakr not only acknowledged the people's right to criticize him, but would also concede straight away if the truth was brought to his attention by anyone. He would spare no effort in debating and negotiating with his critics until he either convinced them of his opinion or became convinced of theirs. In so doing, he did not deny the people their right, or rather duty, to criticize and correct him. Similarly, none of his companions disapproved of this practice either. This can be seen from Umar and other companions' strong criticism of Abu Bakr when he decided to fight in what are known as the *Riddah* Battles.[1850]

When Umar Ibn al-Khattab took over as ruler, he followed in the footsteps of his predecessor, who had learned from the Prophet. Numerous examples have been recorded during his presidency.[1851] It is reported that while Umar was giving his first speech to the people and asking them to rectify any aberration they might seen in him, a voice was directed to him from the audience, saying to the head of the Islamic state, "If we see deviation on your part, we shall rectify it by our swords." The man, however, was not detained or killed as, unfortunately, happens nowadays in most Muslim states but Umar praised God that there was someone who would, in the cause of righteousness, remedy a wrongful situation.[1852] Furthermore, Umar encountered the same situation on several occasions, whether by men's opposition or women's, and in all situations, Umar did nothing except encourage them to continue expressing their opposing views.[1853] It is narrated that a man who was dissatisfied with Umar's rule, angrily and impudently said: "Fear God, O Umar." Another man responded to the angry man: "You are exceeding the limits of propriety with the head of the state." Umar blamed the second man, saying, "It would be to no good if people did not remind us so and it would be to no good if we did not listen to them."[1854] A woman who was dissatisfied regarding Umar's suggestion of reducing the amount of dowry interrupted him during a public speech and supported her disagreement with his suggestion by referring to verse 20 of chapter 4 of the *Quran*. Umar immediately withdrew his suggestion and said, "A woman is right, and Umar is mistaken."[1855] This certainly is the

[1850] Al-Samad, H., (1994) op. cit. p. 118-120; Hammad, A., (1987) op. cit. p. 258-260; Al-Mulaigi, Y., (1980) op. cit. p. 138.
[1851] Haykal, M., *Al-Faruq Umar*, (2000) op. cit. p. 189; Al-sallabi, A., *Al-Inshrah wa Rafa al-Ziq be Sirat Abi Bakr Ibn al-Siddiq* (Alexandria: Dar al-Eman, 2002b) p. 168-169; Al-Jundi, M., (1986) op. cit. p. 179-182; Mustafa, M., op. cit. p. 94; Al-Tuaimat, H., (2003) op. cit. p.185; Al-Samad, H., (1994) op. cit. p. 197-8.
[1852] Aqaad, A., (1984) op. cit. no.1. p. 484; Haridi, A., op. cit. p. 137-138.
[1853] Kamali, M., (1997) op. cit. p. 51.
[1854] See Al-Qaradawi, Y., (1971) op. cit. p. 361.
[1855] Al-Bahnasawi, S., *al-Khilafa wa al-Khulafa al-Rashidun* (Kuwait: Maktabat Al-Manar Al-Islamiyyah, 1999) p. 156-157; Al-Jundi, M., (1986) op. cit. p. 296; Kamali, M., (1997) op. cit. p. 51.

essence of freedom of opinion or political criticism. Thus, Umar not only acknowledged this principle, but guaranteed it for the people, practised it and let them practise it too.

History records that Uthman Ibn Affan faced difficulties in his management of some of the affairs of state and government, due to the choice of some unsuitable rulers. This led people to demonstrate against him and his government, holding him accountable for his actions. Although criticism of the government was widely exercised during the era of Uthman,[1856] Uthman, however, according to Abdul Mutaal al-Saeedi, did not deny the right of people to criticise the government and showed his willingness to reform and correct the governmental abuses.[1857] Similar to Abu Bakr, Umar and Uthman, Ali strongly believed that debate on public issues should be uninhibited, robust, wide-open, and that it may well include sometimes unpleasantly sharp attacks on government and public officials. Indeed, it is difficult to discuss a topic such as political speech in Islam without referring to opposition during the rule of the fourth ruler after Prophet Muhammad.[1858] In that era, which will be discussed below, the tolerance by the ruler, Ali Ibn Abi Talib, towards political speech, however harsh, was the keynote of these times of Islamic history and permissiveness reached a level that led to sedition.[1859] Ali was truly faithful to the principle of freedom of speech, regardless of the consequences, whether they affected him, the people closest to him or even his enemies.

What these examples show is that freedom of political speech was practised during the era of the Rightly-Guided Caliphs, and no one got hurt because of this practice. To condemn unequivocally all forms of freedom of political speech, would raise serious question as to the credibility of several of the most honoured figure in early Islamic history. If freedom of speech remained a solid pillar of thought and practice in the Muslims' life as it was in the era of the Prophet and in the era of the Rightly-Guided

[1856] Hussain, T., *Al- Fitnah al-Kubra-Uthman*, no. 1, 14th edition (Cairo: Dar al-Ma'arif, 2006) p. 163; Wilferd Madelung, *Succession to Muhammad* (Cambridge University Press, 1997) p. 84; Abduh, M., *Nahj Al-Balag*, no. 3, p. 2-30; Al-Tabari, op. cit. no. 4, p. 242-417; Al-Mutairi, H., (2004) op. cit. p. 49-54.

[1857] Al-Saidi, A., (2001) op. cit. p. 46-47; Ghazawi, M., op. cit. p. 62; Hammad, A., (1987) op. cit. p. 265; Al-Awa, (1989) op. cit. p. 182; Imarah, M., (1985) op. cit p. 85-89; Al-Samad, *H.*, (1994) op. cit. p. 123-125.

[1858] Al-Sarkhsi, *al-Mabsut*, no. 5 (Beirut: Dar al-Ma'arifa, 1986) p. 124-136; Uthman, H., (2001) p. 72-77; Hammad, A., (1987) op. cit. p. 265-268; Al-Ghazali, (1963) op. cit. p. 50, 84.

[1859] Halawa, H., The *Opposition Leader, Abu Dher Al-Ghafari* (Cairo: Maktabat al-Dar al-Arabiyyah, 1994) p. 39-48; Hussain, T., *Al- Fitnah al-Kubra-Ali wa-Banooh*, no. 2. 14th edition (Cairo: Dar al-Ma'arif, 2006); Kamali, M. "Freedom of Expression in Islam: An Analysis of *Fitnah* [Sedition]" *American Journal of Islamic Social Sciences*. 10 (1993) p. 183-187; Al-Jundi, M., (1986) op. cit. p. 182-188.

Caliphs, the Islamic nation, according to al-Najar, would not witness such a degradation of all aspects of the life.[1860]

IX.2.1.4. The Concept of Seditious Speech (*Fitnah*) in Islam

It is extremely difficult to distinguish between sedition and other concepts such heresy, treason, revolt, rebellion, and an act of political opposition. For example, it is not always possible to distinguish between sedition and rebellion. While the latter, according to Professor Abou El Fadl, means the act of resisting or defying the authority of those in power,[1861] sedition, in its legal definition, is incitement to rebellion or insurrection toward the lawful authority.[1862] However, the study does not attempt to create a theoretical construct distinguishing one act from another. Rather, it attempts to understand and make sense of the concept of seditious speech in Islamic law.

In its political sense, sedition, according to Kamali, is an abuse of freedom of speech which threatens the legitimacy of lawful government, and which could lead to collapse of normal order in society.[1863] This concept of sedition is found in Islam, no differently from other legal systems or, as some say, is equivalent to the doctrine of political crimes in Europe.[1864] Islam considers sedition (*fitnah*) a greater crime than murder: "*Turn them out from where they have Turned you out; for tumult and oppression (fitnah) are worse than slaughter.*"[1865] Therefore, on the one hand, the Qur'an admonishes Muslims to fight those who try to turn other Muslims away from Islam and seek to threaten to the legitimacy of lawful government. In several verses, the *Quran* has repeatedly condemned those who cause corruption on the earth and associate *fitnah* with corruption on the earth.[1866] Some Muslim scholars, however, went, extremely, further by extending the the application of *hiraba* verse "*The recompense of those who wage war against Allah and His Messenger and do mischief in the land is only that they shall be killed or crucified or their hands and their feet be cut off on the opposite sides, or be exiled from the land. That is their disgrace in this world, and a*

[1860] Al-Najar, A., (1992) op. cit. p. 14.
[1861] Abou El Fadl, K., (2001) op. cit. p. 4.
[1862] Merriam-Webster' collegiate dictionary, under the term "sedition", at URL, <http://www.merriam-webster.com/dictionary/sedition>
[1863] Kamali, M., (1997) op. cit. p. 193.
[1864] Udah, A., (1981) op. cit, no. 1, p. 100-109; no. 2, p. 671-705.
[1865] (*Quran* 2: 191).
[1866] (*Quran* 2: 11, 2: 27, 2: 60, 2: 205, 5: 32, 5: 64, 7: 56, 7: 85, 11: 85, 13: 25, 18: 94, 26: 152, 26: 183, 28: 77, 30: 41, 38: 28, 40: 26).

great torment is theirs in the Hereafter"[1867], to be applied as well on those who intended to spread the seditious speech.[1868]

On the other hand, both Imam Bukhari and Imam Muslim have mentioned, in their books on *Hadith*, several *hadiths* narrated from the Prophet Muhammad, which include a warning to those who try through seditious speech incite to riots where a breakdown of law and order is likely. The Prophet is quoted that predicting, "different evils will make their appearance in the near future." The Prophet told that a pious Muslim should refrain from involved in these compromising situations, "Anyone who tries to disrupt the affairs of this Umma while they are united, you should strike him with the sword whoever he be." [1869]

However, the difference between the concept of sedition in Islamic and modern law, although both forbid speech that constitutes a threat to the nation or national security, is that in the context of the latter system of polity, a total separation between the religious and political aspects of sedition is unfeasible.[1870] This is what is called a state and religion dilemma (*din wa dawlah*), a problem that straddles both constitutional law and human rights.[1871] While liberalism has accommodated religion by privatizing it and limiting it to the private sphere, religion in Islam is closely associated with the state. The basis of Muslim polity, according to Hamidullah, is religious and not ethnological

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[1867] (*Quran* 6: 33).

[1868] Although this verse concerns the crime of *hirabah*, which as defined by Professor Khalid Abou al-Fadl is "killing by stealth and targeting a defenceless victim in a way intended to cause terror in society", some Muslim scholars considered the dissemination or spreading of subversive ideas which engenders hatred in the hearts of people towards their rulers as a kind of fighting about God and the Prophet and spreading corruption on earth, and accordingly, this verse to be apply to this crime. Sheikh Saleh al-Attram argued in his famous writing about *the crime of hirabah and its punishment in Islam*, "undoubtedly, the general meaning of the verse is about every call for ideas subversive to the beliefs and ethics of Muslims, as the corruption of the belief in God and in monotheism is the most dangerous kind of corruption. Anyone who expresses his opposition to Islamic beliefs and principles is considered *Muharib* against God and the Prophet and a corruptor. Also, the call for the destruction of Islamic state and for weakening it and growing hatred in the hearts of its people against their rulers to hinder any cooperation between them are considered against God and the Prophet. People who act in that way are included in the people meant by the general meaning of the verse and its threats." Al-Attram says in another part, "Nowadays, this kind of corruption and fight has erupted at the hands of many proclaimers of evil to shake beliefs, and they were harshly punished. The punishment for fighters of God [who disseminate subversive ideas] has been proved to be effectives with them, as they were punished by the rulers. Punishing those who abuse the religion of the nation and its structure and security is applied even in nations that are not Muslim, in order to seek stability." al-Atram, S., "*Jarimat al-Hiraba wa Uqubatoha fil-Islam*", (LLM Thesis University of Imam Muhammad) p. 28-29. See also Abou El Fadl, K., (2001) op. cit. p. 48.

[1869] Muslim, *Sahih Muslim*, no. 3, *hadith* no. 1852, p. 1479. See also *Hadith*s no. 4903, 4904. Bukhari, *Sahih Bukhari*, no. 6, *hadith* no. 6658, p. 2591.

[1870] Kamali, M., (1997) op. cit. p. 194

[1871] Amadi, S., "Religion and Secular Constitution: Human Rights and the Challenge of Shariah", p. 30, online at <http://www.ksg.harvard.edu/cchrp/pdf/Amadi.pdf>

or linguistic.[1872] Therefore, when the religious principles of Muslim society are made the target of subversion and attack, the threat, as Kamali noted, is automatically directed at the very foundations of the Islamic society and state.[1873] On the same basis, the issue of apostasy (*riddah*), which is the voluntary and conscious reversion to disbelief (*kufr*) by denying any of its fundamentals in matters of faith, or law, such as the denial of Deity or Prophethood, or the licensing of prohibititions or the negation of obligations, can be solved. [1874] According to several Muslim scholars, restriction on speech contains apostasy is not because of the simple act of apostasy, but because the apostasy is linked to an act of political betrayal. [1875] Mayer concluded that the transformation of Islam into state ideology has led to equate the act of apostasy, or the rejection of the official ideology, with treason. [1876] So, preserving the community and maintaining law and order are the justifications for the restriction that Islamic law impose on the act of apostasy. The abandonment of Islam, in this context, is not apostasy but sedition, an act of mutiny or treason or a political offence that has nothing to do with the *Quran*ic guarantee of freedom of religion: "*no compulsion in religion.*"[1877]

Because of this special position of sedition in Islam, which does not separate the religious and political aspects of sedition, sedition laws in the Muslim States became a tool in the hands of the executive powers to storm many basic rights and freedom. The story of Abu Dhar al-Ghafari, one of the favorite companions of the Prophet of Islam, tells us how law speech has been utilized to silence opposition. Abu Dhar was known for his strong criticism of the authorities for appointing relatives of leaders as governors and giving them money from the public treasury. For example, quoting relevant *Quran*ic passages threatening the holders (sic) of riches with hell-fire, he criticized the luxurious life and free spending of Muaeiyah, the governor of Syria. He condemned the rulers' corruption; their oppression towards people, their luxury. Abu Dhar felt that this was a betrayal of the principles of Islam. Such criticism caused him to be exiled under

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[1872] Hamidullah, *Muslim Conduct of State,* Revised 7th edition (Lahore: Sh. Muhammad Ashraf, 1977), p. 174, cited in Baderin, (2003) op. cit. p. 124.

[1873] Kamali, M., (1997) op. cit. p. 194; Abu Zahrah, M., *Al-Jarimah wal-Uqubah fi'l-Fiqh al-Islami: al-Uqubah* (Cairo: Dar al-Fikr al-Arabi, n.d.) p. 173.

[1874] Abu Zahrah, M., *al-Uqubah* op. cit. p. 172.

[1875] Mahmassani, (1979), p. 123-142. See Al-Jarah, S., "*al-Islam wa al-Elan al-Almi li Huquq al-Insan*", in *Kira'at fil-Islam wa al- Dimuqratiyyah*. (2007) op. cit. p. 8-9.

[1876] Mayer, A., (2007) op. cit. p. 167.

[1877] (*Quran* 2: 256). See Al-Saidi, A., (2001) op. cit. p. 77-80; Al-Alwani, T., *La Ekrah fil-Din* (Cairo: Maktabat al-Shuruq al-Dowaliyyah, 2006); Ghazawi, M., op. cit. p. 101; Al-Ili, (1983) op. cit. p. 427. Muhammad, Y., (2006) op. cit. p. 569-586.

the allegation of sedition.[1878] As Crone and Hinds argue, the Umayyad and other caliphs saw themselves as representatives of God and the Prophet, then arguable one who fought against them, or criticised them, would be fighting God, or criticising God.[1879]

That example was from the past. Presently, Kamali says, "statutory enactments on the subject of sedition in present-day Muslim countries are, on the whole, wide-ranging and open to interpretation, often so much as to impinge on freedom of speech."[1880] Such wide-ranging and open interpretation of sedition can be demonstrated through the excessive amount of restrictions that limit expression which is judged to have a "seditious tendency." Several examples that were cited in Taha al-Alwani's book *La Ekrah fil-Din/No Compulsion in Religion*, of restrictions sought to be justified on the ground of sedition, were to protect interests unrelated to nation safety and security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology.[1881] Moreover, the concept of sedition has even widened even more in some countries to include any act, speech, words, publication or other thing to show that the Government has been misled or mistaken in any of its measures, or point out errors or defects in the Government or the Constitution as by law established or in legislation or in the administration of justice with a view to the remedying of such errors or defects.[1882] The sedition law, thus, as Ibrahim Mahmoud says, is used for politically motivated proceedings against activists, attorneys, journalists, and opposition leaders.[1883] Those who peacefully express critical views have been subject to arrest. In other words, the religious factor, in one form or another, has been used as a very effective tool in widening the scope of seditious speech.

This makes the concept of sedition in Muslim countries much broader than in advanced free speech laws such as Article 19 ICCPR, 10 ECHR and the U.S First Amendment. What makes the situation even worse is the Muslim scholars' attitude

[1878] Madelung, W., (1997) op. cit. p. 84; Al-Awa, (1989) op. cit. p. 89-92; Al-Tabari, op. cit. no. 4, p. 283-286; Hussain, T., *al- Fitnah al-Kubra-Uthman,* (2006) p. 163; Mussa, M., (1979) op. cit. p. 114.
[1879] Crone, P., and Martin Hinds, *God's Caliphs: Religious Authority in the First Centuries of Islam* (Cambridge: Cambridge University Press, 1981), p. 24-42, 80-96, Cited in Abou El Fadl, K., (2001) op. cit. p. 48.
[1880] Kamali, M., (1997) op. cit. p. 277.
[1881] Al-Alwani, T., *La Ekrah fil-Din* (Cairo: Maktabat al-Shuruq al-Dowaliyyah, 2002).
[1882] See Bhagwat, N., "Freedom of Expression in an Era of State Terror," Paper Presented at the Forum at the Fourth Conference On Freedom of Expression, of writers, poets, publishers and human rights organizations, Law Faculty, Bilgi University, Istanbul, 21st November 2005.
[1883] Mahmoud, I., "*al-Fitnah al-Muqadsah/The Secred Turmoil.*" (Beirut: Riad al-Rayyes Book Lmt, 1999) p. 19.

towards cases that involve sedition. Many of them seem to have scrupulously avoided being involved in controversial issues concerning the threat to legitimate government.[1884] On the contrary, many legal opinions (*fatwas*) have been released which, under the allegation of sedition, considered peaceful demonstrations as seditious acts;[1885] a mere criticism of the government in the Friday ceremony is considered as an act of sedition;[1886] and the call for an election is considered as an act of sedition.[1887] So the Islamic scripture is used to endorse more restrictions on freedom of speech under the name of sedition.

The crux of the issue, in my view, is not whether seditious speech, such as conspiracy against the constitution, the government, peace and safety of the country must be forbidden or not, as I would not dispute the illegality of such a subversive speech, which brings harm to more than one of the necessities of *Shariah*.[1888] The crux, rather, is what is the criterion that should be followed in determining certain publications constitute seditious speech? In this regard, one Muslim writers has warned of the practical consequences of the uncontroversial theoretical characterisation of sedition.[1889] Therefore, it is of great importance, in my view, to promote a clear recognition of the limited scope of restrictions on freedom of speech that may be imposed in the name of sedition law, so as to discourage governments from using the pretext of sedition to place unjustified restrictions on the exercise of these freedoms. There are two schools of thought about the criterion that should be used in determining when speech can be restricted on the ground of preventing seditious speech. In his set of legal opinions (*Majmuat Fatawa*), Ibn Taymiyyah argued that it is not always necessary to wait until a real danger to the government actually occurs, but that preventive action can be taken even though there is no immediate danger posed by the speaker or publishers.[1890] Under this approach, war can be waged on rebels (*Bughghat*) before they embrace any actual violence, that is, when they bring together their supporters in that way as presents a threat to normal order in the community.[1891]

[1884] See generally, Yaseen, A., (1998) op. cit.
[1885] See *supra* p. 250.
[1886] See Al-Nujaimi, A., *al-Mawrid al-Azb al-Zulal* (Riyadh: Dar al-Athar, 1997) p. 20.
[1887] Al-Wadi, M., *Tohfat al-Mojibb ala Iselat al-al-Hazer wa al-Gharib*, (2005).
[1888] See Goraish, A., (1991) op. cit. p. 273-6; Abu Zahrah, M., *al-Uqubah* op. cit. p. 148.
[1889] Kamali, M., (1997) op. cit. p. 163.
[1890] Ibn Taymiyyah, *Majmu'at Fatawa Shaykh al-Islam Ibn Taymiyyah*, no. 35, complied by Qasim, A., (Beirut: Muassasat al-Risalah, 1977) p. 56-57.
[1891] For more see, Al-Sarkhsi, (1986) op. cit. no. 5. p. 125; Al-Shawkani, (1993) op. cit. no. 7. pp. 187-202; Al-Ili, (1983) op. cit. p. 384; Hammad, A., (1987) op. cit. p. 124.

This school's approach, which has a great influence in the Muslim world nowadays,[1892] appears to focus solely on the content of the language of the speaker, not the surrounding circumstances of the speech. So, according to this school's view, in order to examine whether particular speech constitutes a form of incitement on which restrictions would be justified, there is no need to link the speech at issue with the demonstration of a direct effect. This means that the American bad tendency test, or at best, the clear and probable danger test, which offers very little protection for freedom of speech is enough justification for imposing restrictions on speech. Without doubt, this viewpoint protects less speech and paves the way for restricting a wide range of political speech. However, Ibn Taymiyyah's demand is, to a great extent, different from Caliph Ali's attitude towards the Kharajites. The importance of mentioning the latter school of thought as a source for the law of sedition and rebellion is because when it comes to the issue of *fitnah*, Ali Ibn Abi Talib, according to abou El-Fadl, is the example and the teacher *(Ali al-qudwa wal-mu'allim)*.[1893] The Kharajites, who ignited the flames of the first Islamic civil war, were a form of radical extremists, who interpreted the *Quran* and *Sunnah* of the Prophet very strictly to serve their violent conduct toward the lawful authority.[1894] One of their principles was *takfir* (charging with disbelief) of all those who disagreed with them on any theological issues, which granted them the right to kill them. Although their political agenda was based on violence, Ali did not punish anyone for such views. He did not restrain people from holding views; instead, Ali considered these to be matters which fell within the purview of the *Quranic* principle that argumentation should be conducted with courtesy and tolerance: "*Invite (all) to the Way of thy Lord with wisdom and beautiful preaching; and argue with them in ways that are best and most gracious*"[1895] Although the Kharajites's challenge to the legitimacy of the caliphate was characterised by rebellion and aggression, Ali did not restrain their speech until their speech constituted a clear and imminent danger to the whole community, or until they embarked on violence by killing people.[1896] Once, Ali was delivering a lecture in a mosque when Kharajities, who charged Ali with disbelief, raised their special slogan there. Ali said, "We shall not

[1892] Abou El Fadl, K., (2001) op. cit. p. 340-342.
[1893] Abou El Fadl, K., (2001) op. cit. p. 34.
[1894] Esposito, J., *Islam the Straight Path* (New York: Oxford University Press, 1998) p. 43-45; Khadduri, M., *The Islamic Conception of Justice* (Baltimore; London: Johns Hopkins University Press, 1984) p. 21-23.
[1895] (*Quran* 16: 125).
[1896] Hussain, T., *Al- Fitnah al-Kubra-Ali wa-Banooh*, (2006) p. 104, 113.

take military action against you as long as you do not fight with us."[1897] Al-Shafi, who co-opted Ali's approach, insisted that the rebels must be warned, debated, and given a full chance to repent before being fought. Accordingly, a mere suspicious or fear of rebellion is not enough to justify waging war against the rebels, al-Shafi says.[1898] Ali's approach clearly shows, as both Abu Zahrah and Hakem al-Mutairie concluded, that the Islamic state cannot restrict freedom of speech unless it is contrary to the basic principles of Islam.[1899] It shows that although this school of thought does not necessarily encourage or justify seditious speech, but it does insist on a certain degree of tolerance to be afforded for political speech. Others concluded that it is not lawful for the government to fight rebels solely on the ground of differences of opinion, unless they break the peace and embark on violence.[1900] Words and acts constitute *fitnah*, as Kamali emphasises, only when they succeed, or are likely to succeed, in posing a threat to normal order. An isolated opinion or act which remains ineffective, Kamali continues, would therefore fail to qualify as *fitnah*.[1901] Al-Sarkhsi reject the idea that mere talk is sufficient to authorise hostile action against the dissenters. He believes that only when the dissenters muster their forces and embark on violence against the just community, does it become lawful to resort to the use of force.[1902] According to Shames al-Din, who commented on this incident, "Although the opposition to the Islamic state during Ali's presidency challenged the legitimacy of the state and invoked people to disobey Ali, they were considered as citizens and their political rights were not violated. In fact, the battle against al-Kharijites did not begin because of their political opposition or of their different understanding of religion than the official understanding, but because they started the military action against the state."[1903] The second school, in my view, adopts the clear and present danger test, which focuses on the actual context and circumstances surrounding the speech. The view of this school assumes that the state is not permitted to forbid or proscribe advocacy of the use of force or of law violation, except where such advocacy is directed to inciting or producing present lawless action and is likely to incite or produce such action.

[1897] See Al-Sarkhsi, (1986) op. cit. no. 5. p. 125; Hussain, S., (1994) op. cit. p. 42; Al-Saidi, A., (2001) op. cit. p. 63-64.
[1898] See Abou El Fadl, K., (2001) op. cit. p. 152-154.
[1899] Abu Zahrah, M., (1998) op. cit. p. 127. Al-Mutairi, H., (2004) op. cit. p. 61
[1900] Abu Zahrah (1998) op. cit. p. 173. See also Udah, A., (1981) op. cit, no. 1, p. 104. Tabliya, A., (1984) op. cit. p. 307.
[1901] Kamali, M., (1997) op. cit. p. 193.
[1902] Al-Sarkhsi, (1986) op. cit. no. 5. p. 125.
[1903] Al-Din, M., *"Munaqsha Hawl al-Shura wa al- Dimuqratiyyah"*, *Majallat Menber Al-Howar*, no. 34, year 9th, p. 28; Al-Ghazali, (1963) op. cit. p. 89; Al-Mawdudi, (1978) op. cit. p. 62; Uthman, H., (1992) op. cit. p. 83.

The importance of the approach of this school, in my view, is because it distinguishes an isolated act or opinion which remains ineffective and does not incite opposition to lawful government from speech that constitutes clear and present danger. Such a distinction is important as advocacy, as Alan Dershowitz in his book *The Best Defence* wrote, "is the communication of ideas; it is directed at intellect; it affords the listener an opportunity to reflect on it. Incitement, on the other hand ... is a spur to automatic action, intended to bypass the rational thought processes, therefore [advocacy] should be protected."[1904] On the contrary, inciting people when they are not in a position to receive an opinion rationally, the speaker must be held responsible for his speech.[1905]

IX.2.1.5. Political Speech v. Sedition

From the above discussion of political speech and sedition, it can be noted that sedition is different from freedom of political speech, freedom of opposition in particular, discussed above, though the aims of both, such as the aim of changing the government, might be the same in some circumstances. While speech, whether written and spoken or communicative conduct, whenever it is deemed by the authority as tending toward insurrection against the established order, is a terrible sin in traditional Islam and deserves a harsh punishment, the right to opposition, which means the individual's right to give sincere advice, criticise in a constructive way, and refuse to obey the government if it is guilty of violating the law, is considered as a fundamental principle of the Islamic system of government. This means that freedom of opposition confines itself to peaceful and non-violent protest against a government, or at most, the practitioners of this freedom might aim to change the government, but only through democratic means, such as direct democracy or constitutional convention. The situation, however, is very different when talking about sedition, which is a revolt against legitimate authority through non-democratic means, such as happened in the era of the fourth Islamic leader after the Prophet, who encountered strong religious-political opposition by the Kharijites, who engaged in violence and political assassination.[1906] It is understood from the above two definitions of freedom of opposition and sedition that there is a clear line that can be used in distinguishing the

[1904] Dershowitz, A., *The Best Defence,* (New York: Vintage Books, 1983) p. 222.
[1905] O'Rourke (2001) op. cit. p. 133.
[1906] Ibn Hajar, (1997) op. cit. no. 12. p. 353-362. Al-Awa, (1989) op. cit. p. 182.

former from the latter. The opposition is entitled to enjoy liberty, within the limits of Islamic law, to say what they wish, and to criticise the government, provided that they do not incite overthrow of the government by force or violence, a matter that would transform the right of opposition to sedition. Thus, whenever speech does incite to overthrow the lawful government through non-democratic means, then restrictions should be imposed on such speech.[1907]

The study, on the basis of the above discussion, suggests that in order to prevent the sedition test from becoming a gag on expression of unpopular views or in order to ensure greater protection of political speech and less opportunity for government pretext, there is a need to point a set of authoritative or canonical rules that apply to a specific expression that is identified as sedition. There are points that can be made here as recommendations. The government should demonstrate that there is clear and imminent danger of a substantive evil that the state has a right to prevent before it can interfere with speech. If there is time through discussion to expose falsehoods and fallacies and to avert the evil by the process of education, then the remedy to apply is more speech, not enforced silence. Speech, then, is protected until it is actually likely to incite unlawful action.

IX.2.2. Freedom of Speech v. Reputation of Others

The exercise of the right to free speech is limited by other rights recognized in Islam, such as one's dignity, which is one of the important human rights in Islam.[1908] It is, as Al-Ili says, one of the five necessities of which Islamic law seeks to protect.[1909] The *Quran* has, specifically in the *Nur* chapter, classified speech that destroys other's honour and reputation as unprotected speech. It has, therefore, allowed people to sue those who say or publish abusive words including slander, libel, insult etc.[1910] Verses 11 and 12 of chapter *al-Hujurat* declared that every individual, whether men or woman, has a inherent dignity and is inviolable: not to be violated.[1911] The two verses, which recognise the right of human beings to be protected from defamation, sarcasm, and offensive nicknames,[1912] stated:

> *O ye who believe! Let not some men among you laugh at others: It may be that the (latter) are better than the (former): Nor let some women*

[1907] For more about this topic see Udah, A., (1981) op. cit, no. 1, p. 104-105.
[1908] Berween, M., (2002) op. cit. p. 64; Mawdudi, A., (1987) op. cit. p. 24.
[1909] Al-Ili, (1983) op. cit. p. 196.
[1910] Hussain, S., (1994) op. cit. p. 45.
[1911] Qutb, S., (1986) op. cit. no. 6, p. 3344.
[1912] Qutb, S., (1986) op. cit. no. 6, p. 3344.

> *laugh at others: It may be that the (latter are better than the (former): Nor defame nor be sarcastic to each other, nor call each other by (offensive) nicknames: Ill-seeming is a name connoting wickedness, (to be used of one) after he has believed: And those who do not desist are (indeed) doing wrong.*

Elsewhere the *Quran* also stated that no person is to be maligned on grounds of assumed guilt and that those who engage in malicious scandal-mongering will be grievously punished.[1913] The *Quran*, in short, strictly forbade defamatory speech, whether such speech is done by words (*Lamz*) or by action (*Hamz*): "*Woe to every (kind of) scandal-monger and-backbiter*."[1914] The Prophet Muhammad also warned against publishing these kinds of speech: "O you group of people that believe with your tongues while not with your hearts! Do not abuse the Muslims nor seek after their faults. For indeed, he who seeks after their faults, *Allah* will seek after his faults. And whosoever has *Allah* seek after his faults, He will expose them, even if he may have committed them in the privacy of his own home."[1915] The Prophet warned that "The gravest sin is going to lengths in talking unjustly against a Muslim's honour."[1916] He also said, "All things of a Muslim are inviolable for his brother in faith: his blood, his wealth and his honour."[1917] Elsewhere, the Prophet has declared that the avoidance of insulting others is indicative of the strength of one's character and faith. "The believer is not abusive, nor is he a slanderer, nor does he curse."[1918] The concept of defamation according to Islamic law can be classified as follows:

IX.2.2.1. Slanderous Accusation (*Qadhf*)

Slander, in Islamic law, means falsely accusing someone of adultery, sodomy, or being a bastard. This might be done by words either spoken or written or by signs. The *Quran* emphatically condemns anyone who brings a false charge of adultery or lack of chastity against an innocent person. Speech that commits the offence of *qadhf* but failed to produce evidence of the truthfulness of the accusation, should be restricted according to *Quran*ic injunctions.[1919] Such restriction, Al-Mawdudi says, is justifiable because it

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[1913] See *infra* p. 314.
[1914] (*Quran* 104: 1). See also (*Quran* 68: 11).
[1915] Abu Dawud, *Sunan Abu Dawud*, no. 4, *hadith* no. 4877, p. 271. See also, Al-Hanbali, I., *The Difference Between Advising and Condemning*, Translation by Abu Maryam Isma'eel Alarcon, 2nd edition, U.S.: Albaanah Book publishing, 2004, p. 10.
[1916] Abu Dawud, *Sunan Abu Dawud*, no. 4, *hadith* no. 4879, p. 272.
[1917] Muslim, *Sahih Muslim*, no. 4, *hadith* no. 2564, p. 1986.
[1918] Al-Tirmidhi, *Sunan al- Tirmidhi*, no. 4, *hadith* no. 1977, p. 308.
[1919] SchachtJ., *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1973), pp. 178-181

aims to protect the society from unfounded accusations, prior to having evidence or concrete proof of guilt.[1920] The chapter of the *Quran*, known as *al-Nur*, according to Ibn Kathir and Sayyid Qutb, warns people against throwing abusive words at others.[1921] The verses 24-26 of that chapter say:

> *Those who slander chaste women, indiscreet but believing, are cursed in this life and in the Hereafter: for them is a grievous Penalty. On the Day when their tongues, their hands, and their feet will bear witness against them as to their actions. On that Day Allah will pay them back (all) their just dues, and they will realise that Allah is the (very) Truth, that makes all things manifest.*

It is reported on the authority of Abu Huraira that the Prophet observed: Avoid the seven noxious things (*al-Kaba'ir*). It was said (by the hearers): What are they, Messenger of Allah? He (the Prophet) replied: ... and slandering chaste women ... "[1922] It appears that the Islamic offence of slander is a more specific concept than its literal and general meanings. Illustrating this, Kamali says, while literally slander means directing abusive words at others, and in this general sense slander could comprise all forms of abusive words, the *Quranic* concept of slander confines slanderous accusation to accusing another person, whether Muslim or non-Muslim, whether alive or a deceased person, of committing the act of adultery, or denying the legitimacy of his or her child.[1923] A general principle laid down by these verses, according to Al-Mawdudi, is that relations in the Muslim community should be based on good faith and not on suspicion: everyone should be treated as innocent unless he is proved to be guilty and *vice versa*.[1924] Therefore, speech that accuses another of adultery is restricted in Islam and the accuser may be liable to the punishment if fails to produce four witnesses to testify to the truth of his/her accusation.[1925] In this regard, Maulana Muhammad Ali says, the law of *Qadhf* in Islam purposes to stop the tongue of slander, which is generally very busy, and does not spare even the most innocent persons.[1926] What al-Mawdudi and Ali said explains why Islamic law made an accusation of adultery punishable like adultery if strong evidence of adultery be not forthcoming. To put the same issue in a different way, accusing others of a specific crime, namely committing

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1920 Al-Mawdudi, *Tafsir Surah al-Nur* (Damascus: Dar al-Fikr, n.d.) p. 88; Abd al-Majid al-Najar, (1992) op. cit. p. 88.

1921 *Tafsir Ibn Kathir*, (2004) op. cit, no. 6, p. 31-33; Sayyid Qutb, (1986) op. cit. no. 4, p. 2503; Abu Zahrah, *M., al-Uqubah* op. cit. p. 90.

1922 Muslim, *Sahih Muslim*, no. 1, *hadith* no. 145, p. 92; *Sahih Bukhari*, no. 3, *hadith* no. 2615, p. 1017.

1923 Kamali, M., (1997) op. cit. p. 171.

1924 Al-Mawdudi, *Tafsir Surah al-Nur*, p. 88; Abd al-Majid al-Najar, (1992) op. cit. p. 88-91.

1925 See Abu Dawud, *Sunnan Abu-Dawud*, no. 2, *hadith* no. 2254, p. 283. Al-Suyuti, (1990) op. cit. no. 5. p. 64.

1926 Ali, M., op.cit. p. 686.

adultery or sodomy, means that we are not dealing with "value-judgments" or "opinions," which are viewpoints or personal assessments of an event or situation and are not susceptible of being proven true or false, but with information and facts that are naturally amendable to proof. It is, therefore, necessary according to Islamic law for the accuser to prove the truth of his/her accusation. Not only in Islam, but in most free speech laws, truth of a defamatory statement is a complete defence.[1927] This *Quran*ic method of drawing a distinction between facts and opinions is similar to international human rights law which insisted that "the existence of facts could be demonstrated, whereas the truth of value-judgment was not susceptible of proof."[1928]

IX.2.2.2. Libel (*Iftira*)

It is possible to falsely accuse people of things like corruption, bribe, theft, or murder. According to the Islamic law, it is not permitted to libel someone by claiming without basis that they do or have done something generally considered repugnant or illegal - especially when those accusations can damage a person's reputation. The difference between libel and slanderous accusation in Islam is that all other varieties of false accusation which do not amount to slanderous accusation may amount to libel. In other words, libel is a sub-category of slanderous accusation which means the attribution of lies to another person, maliciously accusing another person of criminal acts, inventing something false about an individual.[1929] The subject-matter of the accusation may be any criminal act, such as terrorist, murder, theft, homicide or fraud, but not adultery or sodomy, otherwise such speech can be classified as slanderous accusation. Islamic law considers libel, whether committed by spoken or written words, or pictures, as an abuse of freedom of speech and classifies it as a restricted speech. Therefore, it grants the accused person who wishes to restore his good reputation the right to sue the accuser for libel. The subject of the accusation is open to enquiry and proof, which means that the claim may be investigated and the accuser must prove the accusation; otherwise he/she might be punished. Again here, as is the situation in slanderous accusation, accusing others of committing a crime is not considered to be an opinion or value judgment. Such a statement is presented as fact which is open to affirmation or denial. However, contrary to the situation in slanderous accusations, and similar to the situation in the international law of free speech, the court in libel cases, especially those involving

[1927] See Hemmer, J., (2000) op. cit. p. 168-169.
[1928] *Lingens* v. *Austria*, - 9815/82 [1986] ECHR 7.
[1929] Kamali, M., (1997) op. cit. p. 175.

public officials or public figures, must examine whether the speakers acted in good faith or not. The author may be punished for the offence only if he had clearly intended to harm the plaintiff or to damage his/her personal honour and reputation.[1930] The speaker is considered to act in good faith only if he/she believes the truth of the subject matter of the accusation. This requires that the accusation must have a sound basis through investigation and verification; in other words, it should be reached after taking the necessary care and fully evaluating the matter. This requirement can be understood from the *Quran*, where God ordered verification of incidents relating to any accusation and forbade a hasty process. This is shown by the verse, "*ye who believe! If a wicked person comes to you with any news, ascertain the truth, lest ye harm people unwittingly, and afterwards become full of repentance for what ye have done.*"[1931] Here, the *Quran*, according to Sayyid Qutb, clearly orders people to investigate and verify the relevant incidents before passing judgment or expressing criticism.[1932] Commenting on this condition, Kamali says that "facts must be investigated first before reaching to any conclusion which may otherwise prove to be unfounded and regrettable."[1933] However, this investigation and verification of the fact must be within the capacity of the investigator: "*On no soul doth Allah place a burden greater than it can bear.*"[1934]

Here are just a few examples from the *Quran* and *Sunnah* which demonstrate that the accusation of a public official or public figure is permitted if it is based on the accuser's belief in the truth of the subject matter of the accusation. The *Quran* tells in verse 18 of the *Qahf* chapter, "*So they both proceeded: until, when they were in the boat, he scuttled it. Said Moses: 'Hast thou scuttled it in order to drown those in it? Truly a strange thing hast thou done!'*" In this situation, the *Quran* mentions how the Prophet Moses verified the validity of the incidents which led to his criticism of the action of his teacher al-Khadhr, who made a hole in the ship which the poor people owned and worked on.[1935] They had no other means of livelihood, and Moses believed, with sound reasons, that what al-Khadhr did was unacceptable. Therefore, Moses directed reasonable criticism against the deliberate breaking of the barge. There is no doubt that Moses' statement, verily, you have committed evil, a bad, dreadful thing, to his tutor, comprises libel and abuse. However, the reality of the situation was not what Moses had imagined it to be,

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[1930] See al-Jawziyyah, I., *al-Turuq al-Hukmiyyah fil-Siyasa al-Shariyyah*. ed. Ghazi, M., (Jeddah: Matba at al-Madani, 1961) p. 111.
[1931] (*Quran* 49: 6). See Al-Suyuti, (1990) op. cit. no. 6. p. 92.
[1932] Qutb, S., (1986) op. cit. no. 6, p. 3341.
[1933] Kamali, M., (1997) op. cit. p. 54.
[1934] (*Quran* 2: 286).
[1935] Qutb, S., (1986) op. cit. no. 4, p. 2279.

having depended on the reasons which were available to him. This was pointed out later by Al- Khidhr: "*As for the boat, it belonged to certain men in dire want: they plied on the water: I but wished to render it unserviceable, for there was after them a certain king who seized on every boat by force.*"[1936] This verse tells that keeping the ship with a minor fault was better for its needy owners than keeping it in perfect condition to be seized unlawfully by the king and lost to them.[1937] While the hole was bored in the barge, by al-Khidhr, to save it from being seized, Moses's criticism was certainly made without actual malice because it was founded on proper grounds.

Another example can be given here. The verse "*O ye who believe! Avoid suspicion as much (as possible): for suspicion in some cases is a sin*"[1938] forbids groundless suspicion (*Zhann*),[1939] but, as Hammad interpreted, does not condemn suspicion entirely.[1940] Al-Tabri pointed out that God says, "*suspicion in some cases is a sin*", but God does not say "in all cases", and therefore He permitted believers to express and act on suspicion where there is reasonable case.[1941] According to another famous interpreter of the *Quran*, al-Qurtubi, there are two cases of suspicion. The first case, which is allowable is Islam, is the suspicion which is not without foundation and thus can be used as the basis for a judgment (such as in the above-mentioned example of the Prophet Moses and al-Khidhr.) Most of the secondary sources of the *Shariah*, according to Qurtubi, are based upon the strong probability of suspicion; analogy (*Qiyas*) is an obvious example.[1942] The second case of suspicion, which al-Qurtubi called doubt (*shakk*), is that where there are no reasonable grounds to support its validity.[1943] Al-Qurtubi emphisised that the forbidden suspicion in this verse is the groundless accusation of others, which the *Quran* has warned people about it because "an accusation is this case is made without reasonable and verifiable evidence, such as accusing somebody of committing adultery or drinking wine when there are no signs or reasons for such an accusation." Such suspicion, according to al-Qurtubi's reading of the verse, is prohibited according to the *Quran* and, therefore, should be avoided by the

[1936] (*Quran* 18: 79).
[1937] *Tafsir al-Qurtubi*, (2003) op. cit. no. 11, p. 34; Qutb, S., (1986) op. cit. no. 4, p. 2281.
[1938] (*Quran* 49: 12).
[1939] See Al-Suyuti, (1990) op. cit. no. 6. p. 99
[1940] Hammad, A., (1987) op. cit. p. 416.
[1941] Al-Tabari, (1999) op. cit. no. 21. p. 373-4.
[1942] See Al-Qurtubi, (2003) op. cit. no. 16, p. 324-331-332. *Qiyas*, which is one of the secondary sources of the Islamic law, is the extension of *Shariah* value from an original case, or *asl*, to a new case, because the latter has the same effective cause as the former. See, Kamali, M., *Principles of Islamic Jurisprudence* (Cambridge: The Islamic Texts Society, 2003) p. 264.
[1943] Al-Zarkashy says: when suspicion is deemed good and praised, it is then a certainty, and when it is considered dispraised, it is then a doubt (shakk). See, Abi al-Baqa'a al-Khafawi, *al-Khulliyyat, Mu'ajam fil-Mustalahat wal-Foruq al-lughawiyyah* 2ed edition (Beirut: Muasassat al-Risalah, 1993) p. 588.

believers.[1944] Supporting this analysis, Ibn Katheer says, "Muslims are to avoid suspicion without foundation."[1945]

Professor Kamali confirmed the above opinion by saying that it is obvious that the *Quran* does not forbid all suspicion.[1946] If the verse states that having some suspicion is sinful, this also implies that some suspicion is neither sinful nor forbidden and therefore is allowed. This permitted suspicion is that which has reasonable grounds to support its validity (*zann al-mubah*).[1947] *Zann al-mubah*, as defined by Kamali, is speculation based on probability where the chance of a thing being right or wrong are equal. This kind of thought is beneficial for one reason: to allow criticism, even if it includes libellous statements, or at least serves as a reason for exemption from punishment. The forbidden suspicion, which does not permit criticism and cannot be exempt from punishment, is that which is not built on reasonable and verifiable evidence, but stems from personal grudges. This latter type, which is forbidden by law and Islam alike, is mentioned in the following verse *"And those who annoy believing men and women undeservedly, bear on themselves the crime of slander and plain sin."*[1948] In the latter type, suspicion which is not substantiated by evidence should be avoided.[1949]

From the *Sunnah*, the Prophet said: "He who knowingly presents a false argument is subject to the anger of *Allah* until he desists."[1950] By implication, it is clear that whoever presents a false argument but does not know it is untrue is not sinful. This in turn means that whoever criticises after having made efforts to verify the truth of the situation in question is not to blame, even if the accusation turns out to be unfounded. This is exactly what we mean by saying libel is allowed if the incidents in question are true or believed to be true on reasonable grounds.[1951] This is why the Prophet Muhammad, in the previously mentioned example, allowed Umar to express his sharply critical view against "Hudaybiya", even though Umar's accusation turned out to be unfounded, because, as Montgomery Watt observes, the treaty at the end was "favourable of Muhammad's long-term strategy."[1952] This is because, apparently, all terms of the treaty were humiliating for the Muslims. An ordinary Muslim, it has been said, could not

[1944] *Tafseer Al-Qurtubi*, (2003) op. cit. no. 16, p. 324-331-332.
[1945] *Tafsir Ibn Kathir* (2004) op. cit. no. 7, p. 377-8.
[1946] Kamali, M., (1997) op. cit. p. 54.
[1947] Al-Qurtubi, (2003) op. cit. no. 16, p. 324-331-332.
[1948] (*Quran* 33: 58).
[1949] Kamali, M., (1997) op. cit. p. 54.
[1950] Al-Suyuti, (1990) op. cit. no. 2, p. 171.
[1951] Hammad, A., (1987) op. cit. p. 416-417.
[1952] Watt, M., (1956) op. cit. 49.

understand the logic of Muslims approving of this most disappointing treaty.[1953] Umar's accusation, certainly, was empty of actual malice; otherwise it would be prohibited.

The lesson to be drawn from this is that to express in good faith any opinion whatever respecting the conduct of a public figure in the discharge of his/her public functions is allowed in Islam. Islamic law excuses a critic for libel or harsh words if there was a reasonable basis for believing in the validity of the incident to which his criticism was related; likewise, if there was a reasonable basis for coming to that conclusion, even though it differed from reality. This, in my view and on contrary to some Muslim scholars,[1954] is another similarity between international human rights law and Islamic law with regard to where the balance must be drawn between the right of freedom of speech and the protection of reputation of others. In American free speech law, as Chapter Six showed, in order to recover damages for libel or defamation, a public official or public figure must be able to show by clear and convincing evidence that the defendant acted with actual malice. The Supreme Court defined actual malice as a state of mind in which a person or publication makes an untrue and defamatory statement about a person "with knowledge that it was false or with reckless disregard of whether it was false or not."[1955] The HRC and ECtHR, in several cases, mentioned in Chapter Seven, have imported this concept from the US Supreme Court. Thus, as long as the publishers believed the information to be true, such intent is lacking and therefore the publishers' conduct may not be sanctioned under provisions prohibiting intentional defamation.[1956] In short, the limits of acceptable criticism are wider regarding public figures as opposed to private individuals, who do not enjoy comparable access to effective channels of communication to counteract false statements

I.X.2.2.3. Insult (*Sabb*; *Shatm*)

While the subject-matter of a slanderous accusation or libel must be any criminal act, as neither of them takes place without attributing a specific charge to another person, this is not the case in insult claims. A general attribution which humiliates the person in the eyes of others is enough for the offence to have occurred and be described as an insult. Insult, according to Kamali, is "any word, expression, or gesture which attacks the

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[1953] Khan, M., (2003) op. cit. p. 170
[1954] Mawdudi is an example of those scholars who believe that Islamic law and Westerns laws are divided on this issue. Mawdudi, A., (1987) op. cit. p. 24.
[1955] *New York Times Co. v. Sullivan* (1964)
[1956] Macovei, M., op. cit. p. 52.

dignity of the person to whom it is addressed."[1957] Examples of speech that may be termed insult in Islam are calling someone an ass, dog, oaf, dumb, immoral and other similar names and adjectives which are straightforwardly insulting in the customary usage of most people. Insult is usually addressed to a live person, but it may also be directed to a deceased person,[1958] group of people, or to God and His recognised prophets. Islam prohibits insult to a live person, even one who is in fact notorious for criminal and evil behaviour, because such insult may lead to reciprocal abuse.[1959] The same prohibitive rules are applied with regard to insult speech that is addressed to a whole class of persons, such as saying that 'all Jews are cruel,' or 'Arabs are barbarians.' However, as such speech is more likely to be classified within the hate speech category, it is preferred to be discussed later on in a separate section. When speech includes insult to God or the recognized Prophet, such speech, which is called blasphemy, amounts to a more serious offence that invokes a heavier punishment than the common offence of insult, an issue which will be examined in more detail under blasphemy.

It is worth noting here that directing hurtful speech without attributing a specific charge means that there are no facts or information, the truth of which needs to be proved. The situation, then, is completely different from that in slander and libel cases, both of which are open to affirmation or denial. This is because the meaning the former speech conveys cannot generally be proven by evidence. In other words, an insult requires no proof of its veracity, as the mere utterance of insulting words is enough for the offence to have occurred.[1960] According to Kamali, "The factual content of ... [insult] is of no relevance. This is ... a point of distinction between insult and libel, for the latter normally implies the factuality of the charge being made."[1961]

The important point is that insult speech in Islam, which is equal to profane or fighting words in the West, has a lower social value than the type of speech that a society has in mind when it entrenches rights to free speech. The question here is, can Islamic law's position toward profane language or fighting words be accused of being less tolerant in comparison to international human rights law and American free speech law? Six cases have been reviewed, Four by the ECtHR and two by the US Supreme

[1957] Kamali, M., (1997) op. cit. p. 175.
[1958] According to a saying narrated from the Prophet Muhammad, "Make a mention of the virtues of your dead, and refrain from (mentioning) their evils." Abu Dawud, *Sunan Abu Dawud*, no. 4, *hadith* no. 4900, p. 271.
[1959] Kamali, M., (1997) op. cit. p. 179.
[1960] Udah, A., (1981) op. cit, no. 2, p. 455.
[1961] Kamali, M., (1997) op. cit. p. 227.

Court in order to answer this question. The discussion will start with the latter. In *Gooding v. Wilson*, the Supreme Court considered profane language as protected speech. When a young man used profanity toward a policeman, the Court ruled that such language was all in a day's work for policemen. While the "street language" common to many people in the lower social classes was considered indecent by most standards, it was everyday language to others.[1962] In *Castells v. Spain*, the ECtHR reiterated that freedom of expression was especially important for an elected representative and that the limits of permissible criticism were wider with regard to the Government than in relation to a private citizen or specific politicians. The Court ruled that the elected representative has a right to criticise or even insult his government. Therefore, the Court found the Government's contention was not convincing and the interference was not necessary in a democratic society and that there was a violation of Article 10.[1963] Likewise, the ECtHR *Thorgeir Thorgeirson v. Iceland* did not consider the claim that the police were 'beasts in uniform' and that their behaviour encompassed 'bullying forgery, unlawful actions, superstitions, rashness and ineptitude' as defamatory remarks.[1964] The Court, in *Steel and others v. the United Kingdom*, came to the same conclusion with regard to the arrest and detention of two protesters in the United Kingdom.[1965]

At the first glance, the answer to the above question is yes. International and modern free speech laws are less strict towards speech that contains profanity or fighting words. However, by a careful examination of both cases, the answer to the above question is not necessarily yes. In both above-mentioned cases, it appears that the protection of fighting words or profane speech depends on the circumstances in which that speech is uttered. So similar speech, if uttered in different circumstances, might be regulated. This conclusion can be reinforced, firstly, by the US Court decision in *Virginia v Black* where a majority of the Court concluded that the state could prohibit a form of expression delivered through a burning cross, when cross-burning was used to intimidate, while in *R. A. V.* the Court considered burning a cross, on the lawn of an African American family as a protected form of speech. It is also reinforced by the decision of ECtHR in *Janowski v. Poland*. The applicant who described two municipal guards as 'oafs' and 'dumb' at the end of a long heated discussion in the street regarding the unlawful or arbitrary actions committed by the guards towards street vendors, was

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[1962] *Gooding v. Wilson*, 405 U.S. 518 (1972).
[1963] *Castells v. Spain* 11798/85 [1992] ECHR 48. See in this regard, Macovei, M., op. cit. p. 45-46.
[1964] *Thorgeir Thorgeirson v. Iceland* - 13778/88 [1992] ECHR 51.
[1965] *Steel and others v. the United Kingdom*, 24838/94 [1998] ECHR 95.

convicted of verbal insulting.[1966] The Court found *Janowski's* conviction was a proportionate response because these two words did not concern the public interest. The position of profane speech or fighting words in Islam, to some extent, is similar to international and modern free speech laws. Muslim scholars have referred to a criterion which has a significant role in measuring whether the speech in question is insult or not. The criterion is that the speech in question must be measured in the light of the prevailing circumstances, such as the social status of the victim, and the context in which the words were expressed. According to Kamali, the court in its assessment should refer to popular custom, as this is the main indicator with regard to words and expressions that are not self-evident in meaning or connotation.[1967] Without reference to circumstances, Ibn Taymiyyah sees that neither the language nor the law may be expected to provide definite guidelines.[1968] For example, many words which were generally considered repugnant in the past have stopped being repugnant nowadays because of the social shifts that have taken place with various accusations. Therefore, the issue should be determined in the context of community toleration.

IX.2.3. Freedom of Speech v. Public Morals

When speech contradicts with public morals, Islam, which provides both legal safeguards and an effective moral system, adopts a policy which is totally different from its position towards political speech. Islamic law very strictly prohibits any speech that has, or might have, harmful impact on the public morals, such as blasphemous and obscene speech, indecent or plainly offensive words. Irresponsible freedom of speech in these areas leads to disrespect for all moral values. This position can be explained, according to Muslim scholars, by the fact that Islamic law is essentially a code of moral standards which are to be observed in a Muslim society and the function of the law is to enforce these moral standards even by punishments.[1969] *Quran* says: "*That will be best for you, if ye but knew!*";[1970] "*That is (the course Making for) most virtue and purity amongst you*";[1971] and "*It is a shameful (deed) and an evil.*"[1972] Commenting on these verses and others, Qaradawi says, Islamic society's standard of morality is indeed very

[1966] *Janowski v. Poland*, - 25716/94 [1999] ECHR 3.
[1967] Kamali, M., (1997) op. cit. p. 172.
[1968] Ibn Taymiyyah, (1997) op. cit. p. 1012.
[1969] Qutb, S., (1986) op. cit. no. 4, p. 2489; Al-Ghamdi, A., (2000) op. cit. p. 61.
[1970] (*Quran* 61: 11).
[1971] (*Quran* 2: 232).
[1972] (*Quran* 17: 32).

much higher and stricter than those of other societies.[1973] Therefore, freedom of speech in Islam carries with it special duties and responsibilities on individuals or on the community as a whole in promoting moral values. Two obvious examples of kinds of speech that are prohibited for the protection of morals will be discussed here, namely, sexually explicit speech and blasphemous speech.

IX.2.3.1. Sexually Explicit Speech (*Fihsh*)

In Islam, public morality is a term that has been interpreted very broadly.[1974] Not only hard pornographic and obscene literature and books, which distort the truth or propagate pernicious views and doctrine, but any sexually explicit speech, must be restricted according to Islamic law of freedom of speech. This includes a ban on all speech, the publication of which has a harmful or offensive effect on its reader or audience, such as obscene literature, entertainment and promiscuous visual or electronic media. Indeed, sexually explicit speech, whether obscene or indecent cannot be accommodated by Islamic law under it threshold of freedom of speech.[1975] According to Muzammil Siddiqi, former president of the Islamic Society of North America, "Pornographic pictures and movies are *haram* (prohibited). Muslims should not watch, sell or make such movies."[1976]

This conclusion can be evidenced by *Quranic* verses and the sayings of the Prophet, which invoke the state and individuals, through the principle of commanding good and forbidding evil (*hisbah*), not only to practice virtue, but also to establish virtue and eradicate vice, to bid good and to forbid wrong. In chapter 16 verse 90 *Quran* says that "*Allah commands justice, the doing of good, and liberality to kith and kin, and He forbids all shameful deeds, and injustice and rebellion: He instructs you, that ye may receive admonition.*" According to Abdul Malik Mujahid, Pornography and the culture of pornography has all the three elements which God has prohibited in the above verse of the *Quran*: *shameful deeds* (*Fuhsha*), *and injustice* (*Munkar*) *and rebellion* (*Baghi*). Scholars of the *Quran*, as Mujahid points out, "have included every vice which is intrinsically of a highly reprehensible character into this category whether it be fornication, nudity, public foreplay as depicted in films and photos, pornography, hurling abuses and curse words, promiscuous mixing, or dresses designed to expose the

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[1973] See Qaradawi, (1999) op. cit. p. 11-12; Ali, S., op. cit. p. 9.
[1974] Al-Mawdudi, *Mabadi al-Islam* (Riyadh: al-Reasah al-Ammah le-Idarat al-Buhuth, 1984) p. 181.
[1975] See Baderin, M., (2003) op. cit. p. 127. Ahmed, R., "If You Lose *Haya,* (Shyness) You Lose *Iman!* (Faith)", *Islamic Voice*, April 2003 vol 16-04 No, 196.
[1976] See Group of Muftis, Fatwa, "Watching Pornographic Movies", online available at "Fatwa Bank", December 20, 2003, URL <http://www.islamonline.net>

body."[1977] Furthermore, verse 19 of the chapter called *al-Nur*, a chapter on social behaviour, warns, "*Those who love (to see) scandal published broadcast among the Believers, will have a grievous Penalty in this life and in the Hereafter: Allah knows, and ye know not.*" According to Ibn Kathir, this is an instance of discipline directed at those who hear evil speech, believe it to some extent, and start to spread it; they should not spread such speech or deliver it to others.[1978] Shedding some light on this verse, Bagwy, in his interpretation of the Holy Book, says that the speech in the verse is directed to those who "like to disseminate vice among believers, which means that they like to make adultery popular."[1979] Although the restriction in this verse was directed to speech that publishes false accusation (*Qadhf*) against innocent women, the vocabulary of the *Quran*, al-Mawdudi explains, includes all types of sexually explicit acts. It includes all forms of suggestive behaviour and all such mediums which advocate, suggest, lure or arouse passion are regarded as illicit and immoral.[1980]

In the same chapter, but in verse 30, God commanded the Prophet to "*Say to the believing men that they should lower their gaze and guard their modesty: that will make for greater purity for them.*" According to Ibn Kathir, this is a command from *Allah* to His believing servants, to lower their gaze from looking at things that have been prohibited for them. They should look only at what is permissible for them to look at, and lower their gaze from forbidden things. If it so happens that a person's gaze unintentionally falls upon something forbidden, he should quickly look away.[1981] Muslim recorded in his *Sahih* that Jarir Ibn Abdullah Al-Bajali said, "I asked the Prophet as to what should be done when our glance accidentally falls (upon somebody forbidden) to look at, the Prophet commanded me to turn my gaze away."[1982]

There is something more to say about Islamic law's position toward sexually explicit speech. In chapter 6 verse 120 God says, "*Leave sin, open and secret,*" and in verse 151 says: "*Do not even go near lewdness - whether overt or covert.*"[1983] The *Quran* in chapter 7 verse 33 says: "*Declare [O Prophet,] indeed my Lord has prohibited*

[1977] Mujahid, A., "Islam on Pornography: A Definite No NO", at <http://www.soundvision.com/info/life/porn/isporn.asp>

[1978] *Tafsir Ibn Kathir*, (2004) op. cit, no. 6, p. 29. See also Qutb, S., (1986) op. cit. no. 4, p. 2503.

[1979] Al-Bagwi, (1990) op. cit. no. 6. p. 25. See also, Ibn Taymiyyah, (1977) op. cit. no. 14, p. 464-465 and 208-209.

[1980] Al-Mawdudi, *Tafsir Surah al-Nur*. p. 88; Al-Najar, A., (1992) op. cit. p. 132-133; Ar-Rasheed, *Islamic Voice*, Vol.12-03, 135, (1998).

[1981] *Tafsir Ibn Kathir*, (2004) op. cit, no. 6, p. 41; Al-Suyuti, (1990) op. cit. no. 5. p. 72; al-Mawdudi, (1984) op. cit. p. 181-2.

[1982] *Sahih Muslim*, no. 3, *hadith* no. 2159, p. 1699 . See also al-Nawawi, (2000) op. cit. *Hadith* no. 1625. p. 793.

[1983] (*Quran* 6: 151).

lewdness, whether overt or covert." Then at another instance, in chapter 17 verse 32 the *Quran* says: "*Do not even go near fornication.*" An important point to note in the last verse cited above is the phrase: "*Do not even go near.*" This phrase implies that a person should not only try to avoid sexually explicit speech but should also try to avoid all kinds of stimulants that might lead to sexually explicit speech.[1984] From this it can be understood that there would not be any doubt that pornographic material, even if not considered lewdness itself, is very close to and a stimulant toward lewdness and should therefore be considered an evil deed. It can be said thus that, in addition to the obscenity or immorality of its sexually explicit content, the primary focus of Islamic law concern is on the psychological and social harm that pornography may cause to the community. Sheikh Muhammad Nur Abdullah, talking about the harmful impact of pornography, says, "This is an avenue that will most likely lead to worse consequences, and therefore it must be blocked and prevented." [1985] Verse 33 of Chapter 17 confirmed this conclusion when it states, "*And come not even close to adultery. Indeed it is obscenity and a most evil way.*" Offensive pictures, whether obscene or indecent, rather than curb or fulfil desire, are designed to increase it, inducing one to further prohibited acts and finally *Zina* (adultery or fornication.) This is corroborated by the saying of the Prophet, reported in *Sahih Bukhari*, explaining the different categories of adultery: "Lustful glances constitute *Zina* of the eyes. Listening (to flirtation or lewd talk) constitutes *Zina* of the ears. (Licentious and lewd) speech constitutes *Zina* of the tongue. The (lustful) grip of the hand constitutes its *Zina*, and the movement of the feet (toward the act of *Zina*) is likewise. The heart lusts and desires. These are then either fulfilled by the private parts or rejected."[1986] Although this saying tells that seeing, listening, walking, etc., are means of committing the sin of fornication and adultery, Muslim scholars are agreed that the semantics of this saying include seeing, listening, walking, etc., which are means to any sexually explicit speech; thus, the Muslim should save him/herself from them.[1987]

From the above mentioned evidences, it can be said that authority in Islam can legitimately prohibit people from publishing or viewing sexually explicit materials. According to Muslim scholars, it is the responsibility of those in authority to make every effort to eliminate all of these types of sexual act, including speech, which is

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[1984] *Tafsir Ibn Kathir*, (2004) op. cit, no. 3, p. 323.
[1985] Muhammad Nur Abdullah, Fatwa, "Watching Pornographic Cartoons", online available at "Fatwa Bank", September 13, 2007, URL <http://www.islamonline.net>
[1986] *Sahih Bukhari*, no. 5, *hadith* no. 5886, p. 2304.
[1987] Desai, I., Fatwa, "Watching Pornography to Fulfill One's Desire", online available at "Fatwa Bank", December 20, 2003, URL <http://www.islamonline.net>

forbidden by the *Quran*.[1988] Islamic law on prohibition of obscenity is not very much different from the position of international law of free speech, which restricts speech whenever it contains obscenity. What is different is that Islam does not differentiate between obscene and indecent speech, as international freedom of speech law and the First Amendment law do. For example, although the HRC's approach obliges States to control pornography, where it concerns depictions of adults, pornography controls are apparently seen as more than mere permissible limitations to freedom of expression. General Comment 28 indicates that some forms of pornography are a form of free expression.[1989] From the judgments of the Strasbourg institutions about pornographic publication, it can be concluded that pornography is not equal to obscenity in the doctrine of ECtHR. This conclusion can be proved by the ECtHR judgments which exclude only certain types of pornography from Article 10's protection, such as that which involves children or violence. A further example can be given here. While obscene material is not protected by the First Amendment and cannot be broadcast at any time, indecent speech is protected. Contrary to all these free speech laws, Islamic law prohibits the sexually explicit content of pornography on the ground that it is an affront to the religious values of Islam and deeply offensive to a significant portion of Muslims who hold these values. The consumption of pornography, according to the above-mentioned evidences from the *Quran* and *Sunnah* undermines and destabilizes the moral fabric of a decent and stable society, by encouraging sexual promiscuity, deviant sexual practices and other attitudes and behaviour that threaten traditional family and religious institutions, and which Islam regard as intrinsically morally wrong. According to Kamali, in Islam, "a reasonable case can be made for imposing limits on freedom of expression in the interests of public decency, and to protect vulnerable members of society against provocative expressions that appeal to their baser passions."[1990]

As this part of the study aims to delineate some points of the basic convergence and divergence between freedom of speech in international law and Islamic law, and in light of the discussion made thus far, it can be said that this is an area of divergence between Islamic law and international law of freedom of speech. Some types of sexually explicit speech come under the coverage of free speech law in the latter law, while in Islamic law this type of speech has no protection. The position of Islamic law in this regard can

1988 Al-Mawdudi, *Tafsir Surah al-Nur*. p. 88; Abd al-Majid al-Najar, (1992) op. cit. p. 132-133.
1989 Joseph, S., Jenny Schultz, and Melissa Castan, (2004) op. cit. p. 567.
1990 Kamali, M., (1997) op. cit. p. 203.

be explained firstly by the fact that, even in liberal democracies, freedom to disseminate and acquire pornography ranks as of peripheral importance only. Chapter Four showed that courts have applied self-fulfilment as justification for free speech in cases dealing with possession of pornographic material. However, as Zechariah Chafee says, although individual fulfilment is an important justification of freedom of speech, it is not as important as other justifications.[1991] Talking about the situation under American law of free speech, Brennan says, strong protection is afforded to political speech in comparison to obscenity, indecent language, or nude dancing which receive less protection because they do not have direct implications for furthering self-government.[1992] This means that self-fulfilment theory, which justifies the protection of the latter example of speech, is of less importance than theory from democracy, on which the strong protection of political speech rests. Accordingly, if pornography will impede women's participation in political life (the theory from democracy) its prohibition is justified, even if it promotes the self-fulfilment.

Secondly, the lesser importance attached to the freedom to disseminate and acquire pornography may be explained by the fact that not only freedom of speech is self-evidently relevant to human dignity; other values such as individual privacy and religious freedom in Islam are of equal importance to human dignity.[1993] Consequently, authority can regulate sexually explicit speech because the freedom to engage in sexually explicit speech is less important than the social fabric that would be damaged by such free speech. In other words, sexually explicit speech might justifiably be restricted in order to protect another value which is also relevant to human dignity. This claim is not based on *paternalistic* or *moralistic* grounds, or is not without a liberal basis. Chapter Five demonstrates that the anti-pornography lobby base their argument against pornography on the liberal premise of equal concern and respect. Thirdly, and most importantly, this position on sexually explicit speech may be explained by the fact that there is no universally applicable common standard for public morals. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities.[1994] To make the point another way, the scope for the margin of appreciation in relation to the protection of morals should be much wider than in comparison to the margin of appreciation in relation to protection of political speech.

1991 (1955) op. cit. p. 36-37.
1992 Brennan, (1965), op. cit. p. 11.
1993 See Ian Cram, though not confining his view on Islam, (2006) op. cit. p. 141.
1994 *Hertzberg and Others v. Finland* (1982).

IX.2.3.2. Blasphemy (*Sab Allah wa Sab al-Rasul*)

Insult, as said above, is usually addressed to persons, but it may also be directed to God or to His Prophets. In this case, such defamation is called blasphemy. The conflict in blasphemous speech is between people's religious sensibilities (and other issues that might cause particular outrage in the society in question), and ideas about the freedom of speech.[1995] Although there has been a recent tendency in many countries, Western in particular, towards the repeal or reform of blasphemy laws, and these laws are only infrequently enforced where they exist,[1996] the situation is very different in Islam, where blaspheming God or his Prophets is still considered a very serious offence. Indeed, some Muslims regard it to be as heinous a crime as apostasy.[1997] The case of Salman Rushdie was an obvious indication of the importance of blasphemy law in Muslim societies.[1998] The recent case of the Danish cartoon raises itself strongly in any discussion of blasphemy. In fact, there are clear parallels between the Danish cartoons of 2005 and the firestorm that erupted in 1988 over *The Satanic Verses*. Rushdie used words (pure speech), not cartoons (artistic speech), to paint the prophet Muhammad in what some Muslims, truly, perceived to be a negative and insulting light. As said above while discussing the meaning of freedom of speech, blasphemy against sacred aspects of Islam is not restricted to verbal or written instances, but includes artistic works, symbolic speech or actions like tearing or defiling the *Quran*.[1999]

Before discussing the concept of blasphemy in Islam, it must be borne in mind that the issue of blasphemy, in general, is controversial whether in its concept or the prescribed punishment, and various opinions have been recorded on the matter ever since the early days of Islam.[2000] Blasphemy has been a somewhat open and difficult concept to define. It also overlaps with many other concepts such as apostasy, disbelief, and heresy. In Islam, contemptuous, irreverent speech or sacrilegious acts, not only about God, but also about the Prophet Muhammad and all other prophets, and the members of these prophets' households, as well as the holy scriptures, including the *Quran*, and other things that are of a similar religious nature (i.e., which are regarded as

[1995] Shearmur, J., (2006) op. cit. p. 22.
[1996] Blasphemy laws still exist in several countries. See "Oppose all blasphemy laws." *Weekly Worker* 612 Thursday February 16, 2006.
[1997] Al-Haj, A., (2005) op. cit. p. 333; Ali, S., op. cit. p. 5.
[1998] Baderin, M., (2003) op. cit. p. 127-128.
[1999] For more about of the tense relationship between blasphemy and art see, S. Brent Plate, *Blasphemy: Art that Offends* (London: Black Dog, 2006).
[2000] Kamali, M., (1997) op. cit. p. 213.

sacred) are all acts of blasphemy."[2001] Such an attack is prohibited by the verses of the *Quran* such as verse 57 of chapter 33: "*Those who annoy Allah and His Messenger - Allah has cursed them in this World and in the Hereafter, and has prepared for them a humiliating Punishment.*"[2002] This prohibition can also be noted in the sayings and doings of the Prophet.[2003]

It is worth noting that, in contrast to an apostate, a blasphemer could either be Muslim or non-Muslim. However, a non-Muslim would not be committing blasphemy merely by professing a religious doctrine which conflicts with Muslims' beliefs.[2004] As a result, the Christian belief that Jesus is the son of God or that Jesus is in some sense God's presence in human form, according to Muslim scholars, is not blasphemous, although it contradicts explicitly with the clear text of the *Quran*, wherein God denies having any offspring. This is because Christians profess this belief, not so as to offend Muslim sensibilities but as an article of their own faith.[2005] The reverse is true, however, when the blasphemous speech is not a part of the faith of its perpetrator, and consists of something which is equally forbidden in his/her religion; no distinction is made, in regard to this type of blasphemy, between Muslim and non-Muslim. So, in the case of the Danish cartoons, no distinction should be made between Muslims and non-Muslims, because, as Kamali says, anyone who reviles the Prophet commits a blasphemous offence, regardless of his/her religious denomination.[2006] However, whether it is a Muslim or non-Muslim who involves in blasphemy against Islam, the accusation of blasphemy, according to Muslim scholars, should be built on clear evidence. Abu Zahra, similar to Qaradawi, emphasised that no one may accuse another of apostasy or blasphemy without manifest evidence.[2007] Al-Qarni also pointed out that what is blasphemy or apostasy, must inevitably be defined in the circumstances of the particular case.[2008] This is, in fact, as al-Wehaibi says, an implication of the verse 94 of chapter 4 of the *Quran* where God warns the believers: "*When ye go abroad in the cause of Allah,*

[2001] Ali, S., op. cit. p. 5.
[2002] See chapter 9 verse 63 "*Know they not that for those who oppose Allah and His Messenger, is the Fire of Hell?- wherein they shall dwell. That is the supreme disgrace*"; chapter 58: verse 20 "*Those who resist Allah and His Messenger will be among those most humiliated.*"; chapter 58 verse 5 "*Those who resist Allah and His Messenger will be humbled to dust, as were those before them: for We have already sent down Clear Signs. And the Unbelievers (will have) a humiliating Penalty*" chapter 8 verse 13 "*This because they contended against Allah and His Messenger. If any contend against Allah and His Messenger, Allah is strict in punishment.*"
[2003] See generally, Ibn Taymiyyah, *al-Sarim al-Maslul ala Shatim al-Rasul*, (1997).
[2004] Kamali, M., (1997) op. cit. p. 213-216.
[2005] See Kamali, M., (1997) op. cit. p. 217.
[2006] Kamali, M., (1997) op. cit. p. 235.
[2007] Abu Zahrah, M., *al-Uqubah* op. cit. p. 182. Qaradawi, (1990) op. cit. p. 26.
[2008] Al-Qarni, A., "Zawabet al-Takfir inda Ahl al-*Sunnah* wal-Jama", 2bd edn (Beirut: Mu'assasat al-Risalah 1999) p. 288.

investigate carefully, and say not to any one who offers you a salutation: Thou art none of a believer!"[2009] Therefore, it is important when accusing someone of blasphemy to take into account that the meaning of words should be determined in the light of the context in which they are uttered. Since custom varies with reference to time and place, it would follow that blasphemous words may amount to blasphemy in certain circumstances but not necessarily in others. What can be said is that whenever there is doubt (*shubha*), it is better to err on the side of refraining from accusing of blasphemy, then imposing the punishment, than to err on the side of accusing of it in a doubtful case.[2010] The previously-discussed example of desecration of a flag that depicts religious symbols has clearly illustrated this point.[2011]

The question arises here, as blasphemy law is characterised nowadays as part of broader restrictions on speech and behaviour that affect people's freedoms, what is the justification that can be given for such restriction? Examination of cases where speech contains blasphemous words shows that international law of free speech justifies the abridgement of freedom of speech in order to protect individuals and in some cases the public in general, against harm to moral integrity and to uphold standards of public behaviour, as well as to protect religious sensibilities. Discussing the situation under ICCPR, Sarah Joseph, Jenny Schultz, and Melissa Castan pointed out that a prohibition on blasphemy would also potentially be justified by public morals.[2012] Another scholar asserted that the limitation of blasphemy is explicable within the provision of Article 19 of the ICCPR on the protection of public order or morals.[2013] It is worth referring to the resolution adopted by the Commission on Human Rights on "Combating Defamation of Religions." The Commission, through this resolution, expressed deep concern at the intensification of the campaign of defamation of religions in particular ethnic and religious profiling of Muslim minorities. It noted that "defamation of religions is among the causes of social disharmony and leads to violations of human rights of their adherents."[2014] Under Article 10 of the ECHR, the situation, as Chapter Seven showed, is very clear. A wide margin of appreciation is generally available to States when

[2009] See Part II of Muhammad al-Wehaibi's book, *Nawakid al-Iman al-Itiqadia wa Zawabet al-Takfir inda al-Salf.*" (Riyadh: Dar al-Muslim 2002).
[2010] See also An-Na'im, A., (1992) op. cit. p. 36. Abdur Rahman, D., *Shari'ah: The Islamic Law* (London: Ta-Ha Publishers, 1984) p. 224.
[2011] See supra p. 246.
[2012] Joseph, S., Jenny Schultz, and Melissa Castan. The International Covenant on Civil and Political Rights: cases, materials, and commentary, 2nd edition (Oxford: Oxford University Press, 2004) p. 529.
[2013] Baderin, M., (2003) op. cit. p. 128.
[2014] Commission on Human Rights resolution 2003/4.

regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.[2015]

Some wrongly assume that blasphemy law in Islam is justified only because of the wrong committed against God.[2016] It is true that blasphemy speech, as al-Ili says, is restricted in Islam for the preservation of the religion.[2017] However, it is irrefutable that Muslims have a very real interest in avoiding speech that shocks to their religious sensibilities.[2018] The offence in blasphemous speech is directed at them as well, and they therefore each individually are the victims of the offensive behaviour. According to Kamali, the hallmark of blasphemy is a contemptuous and hostile attack on the fundamentals of religion, which offends the sensibilities of its adherents.[2019] It can be said, thus, that the restriction imposed by Islamic law on blasphemous speech, similar to international law, might be justified on the ground of protecting rights of others or of protection of public morals. However, it might also be justified on the same principle as that on which the restriction on sedition in today's modern states is based. Previously, I mentioned the basis of Muslim polity is religious and not ethnological or linguistic. *Shari'ah*, according to Muslims scholars, makes no distinction and separation between religion and state. Islam is a religion and a state. State politics is part of Islamic teachings, in that Islam is a religion as much as it is a legal system.[2020] Thus, it is not difficult to appreciate the reason for restraining the act of blasphemy, for it constitutes a politico-religious rebellion. More clearly, as Professor Mumtaz Khan says, the basis of the Islamic nationality is *religious*, not political, ethnic, linguistic or regional. A citizen, by definition, has rights and owes allegiance to the State, howsoever defined. Under the secular, non-Islamic, Western way of life, based on political authority, a Western citizen owes his allegiance to the political entity. Any speech or act that leads to breach of this allegiance would be restricted. In Islam, a Muslim citizen owes his allegiance to a politico-religious entity which is based upon his religious ideology. Blasphemous speech constitutes a breach of this allegiance, the gravest sin that may be committed

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[2015] Merrills, J., and A.H. Robertson, (2001) op. cit. p. 175.
[2016] Viskum, B., (2006) op. cit. p. 3. f. 3.
[2017] Al-Ili, (1983) op. cit. p. 196.
[2018] See Weller "Addressing Religious Discrimination and Islamophobia: Muslims and Liberal Democracies. The Case of the United Kingdom", *Journal of Islamic Studies* 17.3 (2006) pp. 295-325, p. 303, where he mentioned the effect of Rushdie's novel on the Muslim minority in Britain.
[2019] Kamali, M., (1997) op. cit. p. 213. Baderin, M., "A Macroscopic Analysis of the Practice of Muslim State Parties to International Human Rights Treaties: Conflict or Congruence?" *Human Rights Law Review*, 1.2 (2001) pp. 256-303, p. 296.
[2020] Hosen, N., "In Search of Islamic Constitutionalism", *American Journal of Islamic Social Sciences*, 21.2 (2004) p. 14; Fitzgerald, V., "Nature and Sources of the Shariah", in Majid Khadduri and Herbert J. Liebesny (eds.) *Law in the Middle East* (Washington, D. C. 1955) p. 85.

against religion and the state, and thus is restricted.[2021] In short, blasphemy is not a crime against religion alone, but primarily against the community and state, as it threatens the very foundation of Islam and its political organisation.[2022]

It is worth saying that Islamic blasphemy law is not only condemned by some Western writers,[2023] but some Muslim writers have also criticised the law and described it as against the teachings of *Quran* and the policy of the Prophet Muhammad.[2024] The Salman Rushdie affair illustrates, according to Al-Na'im, "the serious negative implications of the law of apostasy to literary and artistic expression."[2025] Nazir Ahmad, for example, is one of those who hold the opinion that this concept of blasphemy, as it is understood nowadays, is contradictory to the *Quran* and the Prophet's conduct.[2026] The *Quran*, in Nazir's viewpoint, prescribes restraint, and distancing from the blasphemous persons or situations. The emphasis is on restraint and forgiveness. God, in several verses of His Holy *Quran*, according to Nazir, calls for tolerance against an insult directed to Himself or His Prophets. In verse 140 of chapter 4 He said: "*When ye hear the signs of Allah held in defiance and ridicule, ye are not to sit with them unless they turn to a different theme*." Emphasising the importance of tolerance, in chapter 28 verse 55 God said: "*And when they hear vain talk, they turn away therefrom*" and say: "*to us our deeds and to you yours; peace be to you*." Nazir also cited many other verses of the *Quran* which encourage people to be patient with those who address blasphemous speech and emphasize forgiveness, forbearance and compassion.[2027] Nazir, as an attempt to support his allegation of the contradiction between blasphemy and Islam, mentioned some cases of blasphemy that happened in the lifetime of the Prophet Muhammad, to which his personal reaction, as also the reaction of all his devoted Companions, was impeccable adherence to the *Quranic* teachings.[2028] Finally, he concluded that the blasphemy law should be abolished.

2021 Khan, M., "Salman Rushdie and his Satanic Verses", *Islamic Voice*, 14-05.161 (2000).
2022 Ibn Qayyim al-Jawziyyah, *Zad al-Maad fi Huda Khayr al-Ibad*, no. 2 (Mecca: al-Matba'ah al-Makkiyyah, n.d.) p. 419.
2023 See Grinberg, M., "Defamation of Religion v. Freedom of Expression: Finding the Balance in a Democratic Society." *Sri Lanka Journal of International Law*, 18 (2006), pp. 1-22.
2024 See An-Na'im, A., "Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives", *Harvard Human Rights Journal* 3 (1990c) p. 13.
2025 An-Na'im, A., (1990c) op. cit. 27. See also Samir al-Jarah, (2007) op. cit. 9-15.
2026 Ahmad, N., "Blasphemy in the Light of the *Quran*", *Hamdard Islamicus*, Vol. XXII, No. 1, Karachi, Pakistan, 1998.
2027 See (*Quran* 7: 199; 25: 63).
2028 The Prophet, according to Nazir, was subjected to verbal and physical humiliation. He narrowly escaped assassination by migrating to Medina. He was accused of forgery "... nay, he forged it." (*Quran* 21:5), was stigmatized as a man 'possessed' (*Quran* 23:70) and 'mad' (*Quran* 68:2). Nazir, "Blasphemy in the Light of the *Quran*." (1998).

Although giving more space for freedom of speech in Muslim communities and keeping the limitations on freedom of speech to a minimum are necessity, nonetheless the noble cause of freedom of speech, in my view, is not furthered by deliberately offending the religious feelings of any religious community by publishing cartoons, paintings, or film of the Prophet which portrays him as a comical figure. This is because blasphemous speech would outrage and insult the feelings of people, incite violence, and consequently breach the peace, the same reason that was given by ECtHR in the *Wingrove* case. It discourages universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion, which the Charter of the United Nations calls for it.[2029] The Danish cartoons, for example, undoubtedly, have offended the religious sensibilities of the community of believers. Salman Rushdie's *Satanic Verses* was hurtful to Muslims' feelings. Therefore, in fact, it is difficult to agree with the opinion that argues in favour of abolishing of blasphemy law. In addition to its contradiction with several clear evidences of the *Quran* and *Sunnah* of the Prophet Muhammad, such a view ignores the fact that religion is a very sensitive aspect of human life. Normally, no individual would ever be prepared to hear or read anything that offends his religious tenets or insults the founders of the religion.[2030]

The Islamic law of freedom of speech certainly permits criticism of religious beliefs. Islamic law, according to Esposito, provides one of the clearest and most important examples of diversity of opinions. Historically, Muslims have also debated the question of free will versus predestination. That is, are human beings truly free to choose their own actions or are all actions predetermined by an omniscient God? What are the implications of such beliefs upon human responsibility and justice?[2031] The doctrine of the createdness of the *Quran*, which has clear political connotations, was widely debate by Muslims in the past.[2032] Even further, in a theological debate or a philosophical discussion, one may legitimately doubt the factual basis of tenets of the religion and assert that they are historically inaccurate. Abdul Star Qasim has given several examples of the dialogues between God and Satan, where the latter denied the divinity of God, to prove the tolerance of Islamic law in this regard.[2033] Islamic law, as Izz al-Din Al-Tamimi points out, is tolerant enough to accept all opposing views, and can

2029 June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945.
2030 Khan, M., "Salman Rushdie and his Satanic Verses." (2000).
2031 Esposito, J., *What Everyone Needs to Know About Islam*, (2002) p. 42.
2032 Abou El Fadl, K., (2001) op. cit. p. 89-90.
2033 See "*Ru'ia Ijtihadiyyah fi Mas'alat al-Hurriyyat*", in *Kira'at fil-Islam wa al- Dimuqratiyyah*. (2007) op. cit. p. 71-73.

accommodate these opinions, however harsh they are.[2034] Everything, Muhammad Mussa argues, is allowed to be debated, from the existence of God to the simplest questions.[2035] This right to freedom of speech in religious matters is guaranteed for every individual, even secularists and atheists. Fathi Uthman has cited several verses of the *Quran* to support this approach.[2036] In chapter 10 verse 99 *Quran* says: "*If it had been thy Lord's will, they would all have believed,- all who are on earth! wilt thou then compel mankind, against their will, to believe!*" Verse 28 of chapter 11 of *Quran* says: "*He said: "O my people! See ye if (it be that) I have a Clear Sign from my Lord, and that He hath sent Mercy unto me from His own presence, but that the Mercy hath been obscured from your sight? shall we compel you to accept it when ye are averse to it?*" Lastly but not least, *Quran* in chapter 88 verse 22 says to the Prophet: "*Thou art not one to manage (men's) affairs.*" All these verses clearly demonstrate that freedom of religious discourse is not only allowed in Islam, rather it is recommended. The story of the Prophet Abraham, as the *Quran* tells, began with freedom of thought, then of expression of the opinion, and ended up with attainment of the truth. The *Quran* tells how Abraham, in his search for truth, dialogued with God:

> *So also did We show Abraham the power and the laws of the heavens and the earth, that he might (with understanding) have certitude. When the night covered him over, He saw a star: He said: This is my Lord. But when it set, He said: I love not those that set. When he saw the moon rising in splendour, he said: This is my Lord." But when the moon set, He said: unless my Lord guide me, I shall surely be among those who go astray. When he saw the sun rising in splendour, he said: This is my Lord; this is the greatest (of all). But when the sun set, he said: O my people! I am indeed free from your (guilt) of giving partners to Allah. For me, I have set my face, firmly and truly, towards Him Who created the heavens and the earth, and never shall I give partners to Allah.*[2037]

The Prophet Abraham, thus, reached the truth via a dialogue, despite being with his God. He was able then to discuss and debate with his people and to show them the truth. Referring to this dialogue, and others, Firyal Muhana says that this is the theoretical ground of freedom of speech in Islam which leads to truth, respect of human beings, and democracy.[2038] The *Quran*, in many other verses, admits the diversity and variety of opinions, including religious opinions. Verse 118 of chapter 11 says: "*If thy Lord had so*

[2034] Al-Tamimi, I., (1985) op. cit. p. 9.
[2035] Mussa, M., (1979) op. cit. p. 101.
[2036] Uthman, F., "*Fil-Tajroba al-Siyasiyyah lil-Harka al-Islamiyyah al-Mu'asarah*", in *Kira'at fil-Islam wa al- Dimuqratiyyah*. (2007) op. cit. p. 91.
[2037] In Chapter 2 verse 260, there is another interesting dialogue between the Prophet Abraham and God.
[2038] Muhana, F., (2003) op. cit. p. 147-152.

willed, He could have made mankind one people: but they will not cease to dispute."[2039] This diversity, of course, will generate different opinions towards many religious issues, which should be tolerated. This means that a difference of views among people, which might lead to conflict and dispute, according to Sayyid Qutb's interpretation of this verse, is not only an ordinary matter, but is also a positive sign.[2040] Explaining this, though relying on another verse, Kamali says, this diversity can lead to allowing and tolerating differences that might result from different opinions.[2041]

This conclusion, that Islam recognises the diversity of religious opinions, is supported with what was narrated from the Prophet Muhammad about a person who makes a religious decision, exerts himself and gives a correct decision. The Prophet says that this person "will have a double reward, and if he errs in his judgment, he will merit a reward."[2042] This Prophetic saying, according to Muslims writers, gives a clear evidence of freedom of religious speech in Islam because, whether his efforts lead him to correct results or to erroneous conclusions, the person will be rewarded.[2043] The tradition of the Prophet is full of examples of religious discussions with others where the Prophet showed tolerance toward opposing views. Ibn Hisham reported a discussion between the Prophet and Otbah Ibn Rabiea, when the latter offered the Prophet all the benefits of life to stop his missionary work.[2044] The Four Rightly-Guided Caliphs followed the same procedure. There are several evidences in the books of traditions and jurisprudence stating that religious discussions were based upon the freedom of speech.[2045] It is sufficient here to recall the example, mentioned previously, of the Ali's debate with the Kharijites.

Islam, then, admits freedom of religious speech between Muslims and non-Muslims and among Muslims, in order to reach the truth. However, this freedom, as said above, does not confer a fundamental right to abuse any religion or its founder.[2046] It does not extend, as al-Awa says, to speech that condemns the founder of a religion or the prophets it venerates as immoral persons or frauds and charlatans.[2047] The distinction, then, may be, and must be, made, according to al-Azhar' report, between thought and

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2039 See Al-Khatib, H., (1993) op. cit. p. 28-29; Al-Amreni, A., *al-Islam wal-Mushkilah al- Unsriyyah*, (Riyadh: Maktabat al-Tawbah, 1990) p. 253.
2040 Qutb, S., (1986) op. cit. no. 4, p. 1933.
2041 Kamali, M., (1997) op. cit. p. 76.
2042 Muslim, *Sahih Muslim*, no. 4, *hadith* no. 1716, p. 1796.
2043 Al-Samad, *H.,* (1994) op. cit. p. 193. Kamali, M., (1997) op. cit. p. 43.
2044 Ibn Hisham, (1988) op. cit. no. 2. p. 304-305.
2045 Al-Haj, A., (2005) op. cit. p. 317.
2046 Al-Haj, A., (2005) op. cit. p. 333.
2047 Al-Awa, M., *al-Haq fil-Ta'bir*, 2nd edition (Cairo: Dar al-Shuruq 2003) p. 24.

creation on the one hand and between degrading and insulting religion on the other.[2048] As Baderin suggested, there is need in this realm always to carefully and objectively distinguish constructive reasonable intellectual critiques of religious interpretations from expressions that insult or revile the sensibilities of reasonable adherents of particular religions under the guise of freedom of expression.[2049] Islam respects creative freedom,[2050] but in the case of *the Satanic Verses* and the the Danish cartoons, as well as in previously-mentioned examples such as *Piss Christ*, *Jerry Springer: the Opera* and artwork depicting Al-Qaeda's leader Osama Ibn Laden in a Christ-like manner, it was a question of something quite different and exceeded the limits of freedom of speech. It is quite outrageous to play around in an offensive manner with the most deep-seated content of people's religious beliefs, merely for fun or for aesthetic effect, as Salman Rushdie did.[2051] It is quite outrageous to confuse the Prophet with St. Peter, portraying the Prophet at the entrance to a cloud-filled heaven, facing a long line of suicide bombers saying, "Stop, Stop. We ran out of virgins." It is difficult to argue, as some do, that the intention behind this offensive cartoon was genuinely communicative. Can depicting the Prophet Muhammad as "the Beast of the Apocalypse"[2052] or depicting the head of the Prophet Muhammad on a dog's body[2053] be seen "as an attempt in a critical, satirical way to engage in a dialogue with Muslim community about Islamic fundamentalism and the current crisis of the Moslem world in most of the Middle East"?[2054]

No one would deny that nowadays the issue of Islamic extremist terrorism and its threat to basic human rights should be discussed and condemned whenever the situation requires. No one can draw a red line to posing questions such as whether the motivation of the terrorists or alleged terrorists is self-defence or offensive expansion, national self-determination or Islamic supremacy; what targets of the terrorists or alleged terrorists are noncombatants; whether Islam condones, or sometime condones terrorism; whether some attacks are Islamist terrorism, or only terrorist acts done by Muslims; how much

[2048] Report issued by Majma al-Buhuth al-Islamiyyah in al-Azhar University. See *al-Khaleej Newspaper*, No. 7663, May 22, 2000.
[2049] Baderin, M., (2003) op. cit. p. 128-129.
[2050] The Iranian representatives, ESCR Committee, UN Doc. E/C.12/1993/SR.8 (1993), in Baderin, M., (2001) op. cit. p. 297.
[2051] Shearmur, J., (2006), op. cit. p. 23.
[2052] Pope Innocent III in 1213 in Paul Weller, (2006) op. cit. 318.
[2053] Ibison, D., "Sweden risks crisis over Prophet Picture", *The Financial Times*. August 29, 2007.
[2054] Viskum, B., (2006) op. cit. p. 1.

support there is in the Muslim world for what kinds of Islamic terrorism.[2055] Such questions collected from Tony Blair's speech to the Los Angeles World Affairs Council, refute the claim of Flemming Rose, the cultural editor at the *Jyllands-Posten*, who said that the cartoons were commissioned in response to several incidents of self-censorship in Europe caused by widening fears and feelings of intimidation in dealing with issues related to Islam.[2056] Such debate, which is not prohibited in Islam, has been widespread in the West, as well as in the East, for a long time. The polite contestation of religious claims, Jeremy Shearmur suggests, should receive absolute protection.[2057] The case is totally different where freedom of speech degrades God and insults sacred issues; an inference of deliberate intention of outraging the religious feelings can be raised, which is punishable under Islamic law.[2058] In the latter case, there would be general recognition that a plea of free speech would not be an acceptable moral defence of the action. Thus, decisive repression action by the government is imperative for the sake of the general welfare. According to Jeremy Shearmur:

> [S]ome of the Danish cartoons seemed to amount to little more than a gratuitous insult to the Prophet, and as this is a topic of the very highest sensitivity to Muslims, my argument here suggests that there was a case for a legal ban on the most offensive of the cartoons in Denmark, and that there is a moral argument against their publication even where it is legal.[2059]

However, this does not prevent us from saying that blasphemy has been defined in a very broad way as to be capable of application to wide variety of concepts. Blasphemy laws in the Middle East, according to the Vice Chair of the U.S. Commission on International Religious Freedom, Nina Shea, are not limited to criticisms of Islam's Prophet Muhammed or the realm of the Divine, they are also used by prevailing powers and those with Islamist agendas to crush political dissidents and scholars engaged in intellectual debate.[2060] Such a concept and definition of blasphemy would appear to have widened so much in scope that it has become possible to label as blasphemous almost any criticism or even a mere disagreement with Muslim scholars.

2055 Tony Blair's speech to the Los Angeles World Affairs Council," 1 August 2006, online at <http://www.number10.gov.uk/output/Page9948.asp> Javaid Rehman in his previously-mentioned book has discussed the issue of terrorism and Islam in depth. See especially pages from 51-70.
2056 Rose, F., (2006) op. cit.
2057 Shearmur, J., (2006), op. cit. p. 23.
2058 For the same opinion see, Loquies, S., "Limits to freedom of expression and protests", *The Indicant Express*, Sunday, February 12, 2006
2059 Shearmur, J., (2006), op. cit. p. 25.
2060 Shea, N., "Danish Cartoons and Blasphemy". *National Review Online*, February 7, 2006.

Even further, the law of blasphemy is not limited only to insult against God, the Prophets, and the Holy book, but it has been extended to be applied to decent intellectual debate and religious discussions, which Islam does not prohibit, according to Mawdudi.[2061] Although what is prohibited, according to Mawdudi, is evil speech that encroaches upon the religious beliefs,[2062] this prohibition is extended to criticism of some rules of Islamic law which are often wrongly treated as if they were themselves divine revelation. This, of course, tends to narrow the scope of freedom of speech, which is against the main principles of Islam. In this regard, the study calls for a distinction that must be made between the *Shariah*, divinely mandated laws or regulations that are universal, and *fiqh* (understanding), those laws that are the product not simply of divinely revealed texts but of human understanding and interpretations developed in and in response to specific historical and social contexts. Calling to reform some Islamic rules regarding freedom of speech or even about other topics, by reinterpreting of some texts or by depending on the writing of cotemporary scholars rather the traditional, is not, and certainly should not be, considered as blasphemy. According to a former president of al-Azhar University, jurisprudents widely divided in their interpretation *Quranic* verses. Accordingly, nobody can judge another one an atheist because he understands verses differently, or because he has different interpretation than old scholars. Professor Umar Hashim continues, "We cannot accuse anybody of being atheist even if his views were different from those of the majority of Muslims as long as those views are based on thorough study of the Islamic sources."[2063] The point I would like to clarify is that it is of great importance, in my view, to narrow down, specify, and isolate the concept of blasphemy from allied concepts such as criticism and disagreement.

IX.2.4. Freedom of Speech v. Hate Speech

Speech targeted at an individual or group, which seeks to promote hatred on the basis of the victim's race, religion, ethnic origin, gender or sexual orientation[2064] is totally alien to Islam, which, according to Riffat Hassan,[2065] urges throughout that human beings should treat others with sensitivity and compassion: "*Wert thou severe or harsh-*

[2061] Mawdudi, A., (1987) op. cit. 30.
[2062] Mawdudi, A., (1987) op. cit. 30.
[2063] In Interview with Al-Etihad Newspaper, no. 8571, 22 December 1998.
[2064] This definition of hate speech brought from Ian Cram (2006) op. cit. p. 102.
[2065] See Hassan, R., Religious Human Rights and the *Quran*, (1996) op. cit. p. 90-91.

hearted, they would have broken away from about thee."[2066] According to Paul Hardy, in his article *Islam and the Race Question*, "The racialized discourse prevalent in our own era has over the centuries proven alien to the societies which developed under the inspiration of Islam."[2067]

Islamic law prohibits speech which promotes the ideas of discrimination on the basis of nation, race, tribe, colour, even on the basis of religion and doctrine according to Qaradawi,[2068] and violates the principle of equality and human brotherhood.[2069] The *Quran* condemns, in many verses, those who spread mischief on earth and incite to hatred among these equal human beings.[2070] The condemnation is extended even to spreading mischief against non-Muslims, as verse 108 of chapter 6 states. By such extension of hate speech law, Islam has furnished the highest possible standard of morality. This is so because hate speech, according to Islamic perspective, sows enmity and discord among the people and causes hostilities between them.[2071] It is also because all human beings, in the view of Islam, are equal and form one universal community that is united in its submission and obedience to God.[2072] Since God, has given each person human dignity and honour, and breathed into him of His own spirit, as the *Quran* tells in chapter *Sad*: "*When I have fashioned him (in due proportion) and breathed into him of My spirit*", it follows that people are essentially the same.[2073] "All people stand equal, like the teeth of a comb," the Prophet Muhammad says.[2074] In the verse, which has played a central role in Muslim discourse on the hate speech question, the *Quran* says:

> *O mankind! We created you of a man and woman and made you into nations and tribes so that you may know one another. The best and most honoured of you in the sight of God is the most pious and God-fearing among you. Surely God is the All-Knowing, the All-Aware.*[2075]

[2066] (*Quran*: 3: 159).
[2067] Hardy, P., Islam and the Race Question, online at <http://www.masud.co.uk/>. For the same meaning see Kamel, A., *al-Islam wal-Tafrika al-Unsriyyah* (Cairo: Magma al-Buhuth al-Islamiyyah, 1970) p. 14. Tabliya, A., (1984) op. cit. p. 317.
[2068] See Qaradawi, (1999) op. cit. p. 9.
[2069] Al-Awa, (1989) op. cit. p. 228; Baderin, M., (2003) op. cit. p. 130. See also Deedat, A., *al-Hal al-Islami lil-Mushkilah al-Unsriyyah*, translated by Muhammad Mukhtar (al-Muktar al-Islami, n.d) p. 18; Al-Bahi, M., *al-Tafrika al-Insuriah wa al-Islam* (Cairo: Maktabat Wahba, 1979) p. 9-10.
[2070] Qutb, S., (1986) op. cit. no. 6, p. 3348.
[2071] Al-Ghamdi, A., (2000) op. cit. p. 47-50.
[2072] Deedat, A., *al-Hal al-Islami lil-Mushkilah al-Unsriyyah*, p. 14-15; Sayyid, M., *al-Islam Yoharib al-Tafreqah al-Unsriyyah* (Cairo: Al-Majls al-A'ala lil-Sh'aon al-Islamiyyah, 1969) p. 29.
[2073] (*Quran* 38: 71).
[2074] Al-Baghdadi, A., *Tarikh Baghdad*, no. 7, *Hadith* no. 3516 (Beirut: Dar al- Kutub al-Ilmiyyah, n.d.) p. 57.
[2075] (*Quran*: 49: 13). See *Tafsir Ibn Kathir*, (2004) op. cit, no. 7, p. 385.

This verse, which confirms the principle of equality in Islam according to Hasan al-Basha,[2076] was revealed immediately after the triumphant entry of the Prophet into Mecca. After a declaration of immunity from reprisal offered to the tribes of Mecca that had fought against him, the Prophet, al-Suyuti mentioned, requested Bilal, a black man from Abyssinia, to call the people to prayer. A group of three new Muslims saw this. One of them remarked how happy he was that his parents were not present to see such a disgusting sight. Another one, Harith ibn Hisham, found it remarkable that the Blessed Prophet could find no one other than a black to call the Muslims to prayer. This verse of the *Quran* was subsequently revealed because these three Arab men were discriminating between themselves and Bilal, an African.[2077] This message, according to some, is not for Muslims only, because Allah is addressing all of humanity. While Muslims are one brotherhood, this is part of a larger brotherhood of humanity.[2078] According to Fathi Uthman, the verse speaks "about the 'children of Adam' - not Muslims, not non-Muslims, not Arabs, not anything. We are *all* children of Adam and we all have dignity from God, and we should preserve it."[2079]

This universal declaration of equality of all human was confirmed by the proclamation of the Prophet in his final message to humanity during the farewell pilgrimage: "Oh humankind, your Lord is one and your ancestors are one. You are all children of Adam, and Adam is made of clay. An Arab has no superiority over a Non-Arab, nor a Non-Arab over an Arab, and neither shall there be superiority of a white over a black, nor a black over a white person but by good character."[2080] In another and famous saying, mentioned by Ibn hanbal in his *Musnad*, the Prophet warns people against uttering speech that promotes hatred or incites to violence. Abu Dhar, the leader of the tribe of Ghifar, and one who accepted Islam in its early days, narrates: "Once I was conversing with Bilal. Our conversation gave way to a dispute. Angry with him, the following insult burst from my mouth: "You cannot comprehend this, O son of a black woman!" A while later a man came and told me that the Prophet summoned me. I went to him immediately. He said to me: "I have been informed that you addressed Bilal as the son of a black woman. This means you still retain the standards and judgements of

[2076] Al-Basha, H., *Zahf al-Unsriyyah wa Muwajhat al-Islam* (Damascus: Dar Qutaiba, 1994) p. 27, 39.
[2077] Al-Suyuti, (1990) op. cit. no. 6. p. 107. See also Al-Sawaf, M., *Nazrat fi Surah al-Hojorat* (Beirut: Mu'assasat al-Risalah lil-Nashr wal-Tawzeea, 1987) p. 43.
[2078] Muhammad, M., *Islam Condemns Racial Discrimination* (The Supreme Court Council for Islamic Affairs, 1967) p. 33; Al-Bahi, M., *al-Tafrika al-Insuriah wa al-Islam* (Cairo: Maktabat Wahba, 1979) p. 5-7; Al-Abbadi, A., *al-Islam wal-Mushkilah al-Unsoryiah* (Beirut: Dar al-Ilm li'l-Malayin, 1969) p. 30; Al-Amreni, A., (1990) op. cit. p. 251-253.
[2079] Uthman, F., "Islam Should be Recognized as Dynamic, Flexible Religion." (1999).
[2080] Ibn Hajar, (1997) op. cit. no. 6. p. 644; Al-Suyuti, (1990) op. cit. no. 6. p. 108.

the pre-Islamic days of ignorance (*Jahilia*)."[2081] There is little doubt that Bilal suffered emotional humiliation and personal loss of dignity. Hate speech directed at a member of a vulnerable racial community, such as Bilal in the above case, will deter him from participation in political life, according to Ian Cram.[2082] Therefore, it should be banned because, as Owen Fiss argues, it violates others' right to equal concern and respect.[2083] All these reasons support forbidding hate speech in Islam.

From the forgoing *Quranic* verses and Prophetic sayings, it can be said that Islamic law, similar to international human rights law (both ICCPR and ECHR,) assumes that when one of those freedoms or rights such as the right to equality contradicts with freedom of speech, the latter freedom should not be given a preferred position, as it is in the U.S. Supreme Court. Full liberty and equality, according to Islamic perspective, as well as according to some Western theorists,[2084] cannot exist simultaneously without limits on personal expression as some speech, such as that which creates discrimination.[2085] The principle of equality, according to Owen Fiss, requires the state to interfere in social structure to outlaw discriminatory practices in housing, education and other government programmes, thus, why should free speech discourse not be mediated by this positive conception of equality?[2086] Although Islamic law values the importance of freedom of speech, it asks, what if this value collides with the right of equality? The value of equality between humans irrespective of any distinction of colour, race or nationality, which is a universal human right, has an important and significant position in Islam, according to Mawdudi.[2087] Consequently, Islamic law prohibits aggression and mischief on earth, and prohibits racial or religious hatred and incitement to discrimination, violence or hostility.

It is worth noting that mere hate speech is enough for speech to be restricted, according to Islamic law. In other words, it is not required at all, for speech to be prohibited on the ground of hate speech, that it include the element of incitement. Accordingly, it is not necessary, in Islamic doctrine, for the *Jyllands-Posten* cartoons to

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[2081] Ibn Hanbal, *Fihris Ahadith Musnad al-Imam Ahmed ibn Hanbal*, no. 5 (Beirut: Dar al-Kutub, 1985), 158. For other Prophetic sayings about this topic see Al-Bahi, M., (1979) op. cit. p. 14-17; Sayyid, M., (1969) op. cit. p. 30; Al-Amreni, A., (1990) op. cit. p. 258; Al-Basha, H., (1994) op. cit. p. 37-38; Khan, F., "Solving the problem of identity in the era of globalisation", *New Civilisation Magazine*, Spring 2005: Issue 2.

[2082] Cram, I., (2006) op. cit. p. 110.

[2083] Fiss, O., "The Right Kind of Neutrality," in Fiss, O., *Liberalism Divided* (Boulder, Co: Westview, 1996) p. 117.

[2084] Delgado, R., "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling", *Harv. C.R.-C.L. L. Rev.* 17 (1982) p. 133

[2085] For opposite view see, Tim Bakken, (2000), op. cit. p. 1. Dworkin, R., (1987) op. cit. p. 1-54..

[2086] Fiss, O., (1996) op. cit. p. 117.

[2087] Mawdudi, A., (1987) op. cit. p. 31-2.

"incite imminent violence", for them to be banned, as some wrongly believe. The Islamic law approach in this regard is in complete agreement with the approach of the HRC, expressed in *Faurisson v. France*, which ruled that "in a particular social and historical context, statements that do not meet the strict legal criteria of incitement can be shown to constitute part of a pattern of incitement against a given racial, religious or national group, or where those interested in spreading hostility and hatred adopt sophisticated forms of speech that are not punishable under the law against racial incitement, even though their effect may be as pernicious as explicit incitement, if not more so."[2088]

By considering carefully the above approach of Islamic law toward hate speech, one can understated the outrage that occurred in the Muslim World because of the publication of the Danish cartoons. The recent images of the Prophet Muhammed publis by the Danish newspapers, if they do not constitute blasphemy, are nothing more than a campaign which promotes racism and violence. The cartoons of the Prophet, especially the one with his headdress shaped like a bomb, give an indication for non-Muslims that Islam is a religion of terrorism, since the Prophet Muhammed symbolizes the religion.[2089] Such an indication promotes hate by branding all followers of Islam as terrorists, and since no one likes terrorists, people will naturally be led to hate Muslims. The matter, then, is not only about an attack on the tenets of a religion; it is a verbally threatening attack upon the followers of a religion that seeks to, or is likely to cause religious hatred.[2090] Writing about the cartoons, Spiegelman says, "They polarized the West into viewing Muslims as the unassimilable other; for True Believers, the insults were irrefutable proof of Muslim victimization and served as recruiting posters for the Holy War."[2091]

Such hate speech could pave the road, as Ghali Hassan warns, to a Muslim Holocaust.[2092] It is well known that Adolf Hitler's victory in the election on 30 January 1930, based on his ideology of "one people, one empire, and one leader," paved the way for one of the greatest criminal acts in human history. During that perioed, blasphemous cartoons depicting Jews, and anti-Jewish posters were wide-spread all over Europe. During the occupation of Europe by the *Wehrmacht* (German forces), in France, Italy,

[2088] *Faurisson v. France* 550/1993.
[2089] Modood, T., Randall Hansen; Erik Bleich; Brendan O'Leary; Joseph H. Carens. "The Danish Cartoon Affair: Free Speech, Racism, Islamism, and Integration", *International Migration*, 44.5 (2006) pp. 3-62.
[2090] For the difference between the two concepts see, Cram, I., (2006) op. cit. p. 108.
[2091] Spiegelman, A., "Drawing Blood: Outrageous Cartoons and the Art of Outrage", *Harper's Magazine*, June 2006, 43-52; Weller, P., (2006) op. cit. pp. 295-325.
[2092] Hassan, G., "Road to the Muslim Holocaust", *Global Research*, February 7, 2006.

the Netherlands, Belgium, Norway etc. the locals were rounding up Jews much faster than the Nazis could handle them.[2093] Shabbir Akhtar wrote, at the height of the Rushdie affair, talking about blasphemy and hate speech, that the next time there are gas chambers in Europe, there is little doubt concerning who will be inside them.[2094] The tragedy repeats itself again, but this time with Muslims. Paul Findley, a former United States Senator, wrote, "When I ask what word comes to mind when Islam and Muslims are mentioned, the word terrorism is usually volunteered by several people in the audience without audible objection from others attending."[2095] Linking Islam with terrorism or describing Muslims as terrorists, certainly, intends to degrade or intimidate or incite violent action against a group of people based on their religion, and this is the essence of the concept of hate speech, which is forbidden according to the international law of free speech, as Chapter Seven concluded. It is the duty of every civilized citizen to point a finger at any form of racism and violence against other human beings. This does not means that prohibition of hate speech will alone solve the underlying problems which lead to intolerance and discrimination.[2096] There are many actions which a state can take to protect individuals and groups from incitement to hatred, discrimination and violence before having to address the vexed question of what is punishable speech. The Islamic experience, discussed above, provides useful measure in dealing with sensitive issues such as hate speech. Islam has adopted two courses for the protection of individuals against hate speech: the first is through cultivating religious consciousness in the human soul and the awakening of human awareness through moral education which appears clearly from the incident between Abu Dhar and Bilal. This means that Islam, before laying down any legal and moral injunctions with regard to hate speech, sought to firmly implant in people's heart the conviction that their dealings are with other human beings who are equal and form one universal community.[2097] The second is by inflicting deterrent punishment, which can be understood from verses 11 and 12 of chapter 49 of the _Quran_:: "*O you who believe! Let not a group scoff at another group, it may be that the latter are better than the former; nor let (some) women scoff at other women, it may be that the latter are better than the former, nor defame one another, nor insult one another by nicknames. How bad is it, to insult one's brother after having*

[2093] Hassan, G., "Road to the Muslim Holocaust." 2006.
[2094] In Weller, P., (2006) op. cit. pp. 320.
[2095] See p. 67 and the chapter titled "Terrorism and Defamation" of his work *Silent No More* (Amana Publications, 2001).
[2096] Bollinger, L., (1986) op. cit. p. 86-90. For a similar view, see Cram, I., (2006) op. cit. p. 104-106.
[2097] Abu Zahrah, M., (1998) op. cit. p. 11-12.

Faith. And whosoever does not repent, then such are indeed wrong doers."[2098] Muslim commentators in their comment on this verse say that God here forbade any speech or act which humiliates and belittles people, whether this act or speech is scoffing at people or addressing people by nicknames that they dislike.[2099] Islam, here, has a claim upon the attention of every thinker, not only because it is the most civilizing and the greatest spiritual force of the world but because it offers a solution the most baffling problems which confront mankind to-day.[2100]

IX.3. Chapter Summary

While the previous chapter demonstrated that freedom of speech is important value in Islam, this chapter emphasised that it is not absolute. When one speech-related value contradicts with other values, no absolute status should be demanded for free speech. Several evidences, from the *Quran* and *Sunnah*, were discussed to demonstrate the limited character of freedom of speech in Islam. The discussion of these evidences showed that there is a range of constraints and regulations governing freedom of speech of both individuals and groups, in pursuance of the integrity of Islam and the Muslim community. The chapter, however, concentrated on five controversial areas of freedom of speech restrictions in Islam, namely, speech threatening national security, obscenity, blasphemy, defamatory speech and hate speech. In each of these five examples, there is interference between freedom of speech, protection of which is grounded in the *Quran* and *Sunnah*, and one of the five universal objectives of Islam which are equally supported by the same background. The concept of *Maslaha* has played a major role in setting boundaries for freedom of speech in the Islamic law of freedom of speech. *Maslahah*, as explained above, is invoked to prohibit or permit something on the basis of whether or not it serves the public's benefit or welfare. In the name of the doctrine of *Maslahah*, certain types of speech that may encroach on Islamic principles such as seditious, obscene, and blasphemous speech, or on the rights and freedom of others, such as defamatory or hate speech, may be restricted. For instance, to preserve religion, Islamic law legislates the restriction on blasphemy. In addition, to preserve lineage, it stipulates the punishment for false accusation against a chaste innocent woman.

2098 (*Quran*: 49:11).
2099 *Tafsir Ibn Kathir*, (2004) op. cit, no. 7, p. 376; *Tafsir al-Qurtubi*, (2003) op. cit. no. 16, p. 324-330; Ibn Hajar, (1997) op. cit. no. 10, p. 569-570; Al-Suyuti, (1990) op. cit. no. 6. p. 96-98; Al-Razi, (2002) op. cit. no. 14, p. 132. aA-Sawaf, M., (1987) op. cit. p. 32-35.
2100 Ali, M., op.cit. p. 11.

A careful observation of these restrictions would reveal that there is no need for Muslim scholars to insist on paternalistic or moralistic justifications in order to restrict these types of speech, except, to a small extent, the case of sexually explicit speech. Most of the classic exceptions to freedom of speech, which were discussed above, are consistent with liberal justifications of restricting on freedom of speech, which Chapter Five of this study discussed in detail. The liberal commitment to the right to freedom of speech, as that chapter concluded, is not absolute. It can be overridden if the private activities of individuals are such as to cause significant harm or offence to others. Islamic law, mainly, has relied on the harm principle in order to impose these restrictions on free speech. Speech, therefore, must not be harmful to others, otherwise it falls beyond the scope of the valid exercise of this freedom in Islam. Examples of speech that is considered to be harmful in Islam are slanderous accusation (*qadhf*), insult (*sabb*), obscene speech (*fihsh*), and speech threatening the nation's security (*fitnah*). On the other hands, Islam, similar to other legal systems, even liberal ones, has imposed limitations on some harmless forms of speech that cause offence to others, such as public utterance of hurtful speech, public sexual activity, distribution of materials offensive to religion or patriotic sensibilities, racial and ethnic slurs. As there is considerable doubt whether these can be justified by the harm principle, because certain sorts of unpleasant psychological states are not in themselves harms, al-*Shariah*, it can be said, has relied on the offence principle and democratic values argument in restraining such speech.

Chapter Ten

X. Concluding Chapter

X.1. Findings of the Study

The previous chapters clearly demonstrate that the West has contributed in a pioneer way, or let us say, was, and still is, the major contributor in building the modern system of freedom of speech. This contribution has been done either through universal declarations, such as UDHR, international and regional conventions, such as ICCPR and ECHR, and human rights laws, such as the United States Bill of Rights, or through the theories that have been formulated by Western philosophers and scholars, such as John Milton, John Stuart Mill, and Alexander Meiklejohn. This major role notwithstanding, however, the broader claim raised by some Western human rights advocates, in addition to some of those influenced by Western thought, that the concept of human rights, including, of course, the right to free speech, is a recent and modern achievement and one that is quite alien to Islamic culture, is open to challenge.[2101]

Chapters Eight and Nine of this study clearly demonstrate that freedom of speech is not a Western product, or to be more precise, is thinkable in other societies than Western, or at least is not a right that is foreign to Islam. Rather, it is a human right that has roots in Islam. The Study shows that the accusation of Islamic law of free speech based partly on the misunderstanding of Islam and its teachings, and based significantly on assumption that 'Islam today' means practically the same thing as the Muslims of today. The *Quran* and *Sunnah* contain many clear textual references to the freedom of speech. In both sources of Islamic law, Muslims and mankind in general are urged to exercise the right to free speech, even against authority, as it appears from the saying narrated from the Prophet Muhammad, "The best form of *Jihad* is to tell a word of truth to a tyrannical ruler." This right may be exercised, according to another saying, by a variety of means, whether pure speech (written and spoken words) or communicative conduct (demonstration): "If any of you sees something evil, he should set it right with his hand; if he is unable to do so, then with his tongue, and if he is unable to do even that, then (let him condemn it) in his heart."

It must be noted, however, that the questions posed in the Introductory Chapter and the objectives of the study were not concerned with the issue of Islam's recognition of

[2101] See *supra*, opinions delivered by Mayer, Donnelly, Rodha Haward, Tibi, Schacht, Gibb, and Siegman, in Introductory Chapter, p. 7.

freedom of speech as a human right, *per se*, although this was an emergent issue from the above discussions. The issue of Islam's recognition of this freedom has been discussed extensively by Muslim scholars, last but not least among them, Muhammad Kamali, who cited, in his book, *Freedom of Expression in Islam*, affirmative evidence of a freedom of speech discourse in Islamic law. However, what neither Muslim scholars nor even Westerners have examined is the issue of the universalism of the right of freedom of speech in the light of Islamic Law, which, as explained in the Introductory Chapter, is distinct from the question of the universality of this freedom. No previous study has examined in detail whether Islam constitutes an obstacle to the adoption of universal free speech law. From this standpoint, this study calls upon Muslim and Western scholars to investigate more carefully and deeply the differences between Islamic law and international law of freedom of speech and the implications of such differences, if any, for universalism in the human right of free speech.

This study, however, clearly demonstrates that the Islamic law of freedom of speech is not contrary to the international law of freedom of speech, represented in Article 19 ICCPR and Article 10 of ECHR. Rather, the study goes further and concludes that Islamic law urges the international concept of freedom of speech and calls for it. The *Quran* and *Sunnah*, in this regard, constitute a fertile source for supporting the argument that freedom of speech in Islam includes concepts comparable to those found in international law and modern democracies. This compatibility between Islamic law, on the one hand, and international law, on the other, is not restricted to the level of the concept of freedom of speech. Rather, even the interpretation and application of freedom of speech in the light of Islamic law are, to a considerable degree, consistent with the interpretation and application of the international law of freedom of speech. Even more, at the theoretical level, freedom of speech in Islamic law, similar to international law, is not only intrinsically important, valued for its own sake, but it is also instrumentally important as it serves a number of broad objectives. In other words, freedom of speech in Islam is not necessary only because it maintains the dignity of human beings, but also because it produces values such as maintaining democracy or the rules of *shura*. In this regard, the study concludes that there is a common standard of freedom of speech justifications between the Islamic law and international law. This, however, is not to deny differences between Islam and the West regarding the importance of each theory. Such differences, indeed, can be observed even between Western laws of free speech. For example, the application of democracy theory is clear when one examines international free speech law or American free speech law. Despite

this fact, the U.S. Supreme Court, in *Brandenburg* for example, has taken the protection of speech to extremes, whereas such speech can be easily restricted by the European Court, as demonstrated by the *Pat Arrowsmith* case. The point to be emphasised here is that the justifications of freedom of speech are the same either in Islamic law or in the international law of freedom of speech; the difference lies in the limits of these justifications in permitting free speech.

It is imperative to say that there is no controversy, at least at the international level, about the limited characteristic of freedom of speech. No free speech law permits absolute free speech. In several European countries, it is forbidden to say that the Nazi Fuhrer Adolf Hitler did not murder millions of Jews. Some countries, Britain for example, still have a blasphemy law (the Christian God only) on their statute books. Both ICCPR and ECHR allow for limited restrictions on freedom of speech. In Islamic law as well, freedom of speech is not absolute. However, incompatibility between the Islamic law and international law is said to exist at the level of the restrictions that each system imposes on free speech. In this regard, five controversial areas are often raised as an indication of differences between these two laws, namely, speech threatening nation security (*fitnah*), defamatory speech (*qadhf* and *iftira*), obscenity (*al-fihsh*), blasphemous speech (*sab Allah wa sab al-Rasul*), and hate speech. The first concerns the position of Islamic law toward political speech. While international law on freedom of speech, as an implementation of democracy theory, gives a preferred position to political speech over other forms of speech, the writings of many Muslim scholars have neglected the importance of this type of speech, or even interpreted religious texts in a way that restricts this right. Some scholars, for example, have applied the principle that an unjust verdict may not be annulled except in complete secrecy, to justify repression of demonstrations, marching, and so on. Such a stance has certainly contributed to a perception of Islamic law as intolerant toward political speech. Can this meaning be original to the Islamic religion? Can this negativity be the message of Islam to the world?

A careful analysis of *Quranic* texts and Prophetic sayings, in addition to the examples mentioned in Chapter Nine on the exercise of the right of political speech in the era of the Rightly-Guided Caliphs, refutes, on the one hand, the incompatibility that has been claimed by some Westerners between Islamic law and international law in this regard. On the other hand, it throws doubt on the interpretations of a number of Muslim scholars, of the texts that restrict political speech. It shows that although the scope of the practical application of freedom of speech in Muslim world is narrower than that of

international free speech law, the principle of freedom of political speech is theoretically recognised by Islam. The discussion demonstrated that intolerance does not principally stem from the details of Islamic law. Evidences from the *Quran* and *Sunnah* and examples of the practical applications of freedom of political speech in the era of the Rightly-Guided Caliphs have been shown to emphasise the preferred position of political speech in Islam. These evidences demonstrate that Islamic doctrine, as embedded in texts and traditions, is conducive to freedom of political speech in many compelling ways. The insistence on the right of people to command good and forbid evil, the encouragement of consultative rule, the tolerance toward opposing views, and the right to resist oppression are all strongly indicative of the importance of political speech in Islam.

Indeed, even when political speech constitutes a threat to nation security (*fitnah*), the study demonstrates that Islam does not condone repression of such speech by authority. Rather, it laid down conditions intended to prevent the authorities, in the guise of protection of nation security, from abusing their powers to violate this right. Islamic law, it can be said, established a correct balance between people's right to criticise the government and the government's right to restrain seditious speech. Although a distinction was made between political speech and sedition (*fitnah*), the study showed that at least in certain major schools of Islamic law, in some specific situations and on the basis of defined conditions, opposition that involves even armed rebellion is accepted as legitimate. The instance, reported in Chapter Nine, of the fourth caliph's approach in dealing with the Kharijites, who engaged in violence and political assassination, confirms the eagerness of Islam to protect political speech to an extent that is not only compatible with the international law of free speech, but is even compatible with the stance adopted by the American Supreme Court in this sphere. A number of the cases mentioned in Chapter Seven showed that international law protects political speech up to the point that it threatens national security without a need to link the expression at issue with the demonstration of a direct effect. This, certainly, differs from the approach of the US Supreme Court which, through the clear and imminent danger test, assumes that the state is not permitted to forbid or proscribe advocacy of the use of force or of law violation, except where such advocacy is directed to inciting or producing present lawless action and is likely to incite or produce such action. The importance of the American approach, in this regard, is that it distinguishes an isolated act or opinion which remains ineffective and does not incite opposition to lawful government from speech that constitutes clear and imminent danger. From this

perspective, this study appeals for reconsideration of the standards used by some Muslim scholars to draw a line between political speech and seditious speech. Seditious speech which is defined as speech that threatens the legitimacy of lawful government, and which could lead to collapse of the normal order in society, should be distinguished from the right to political speech, which is considered as a fundamental principle of the Islamic system of government. The study, therefore, suggests that the American standard, "clear and imminent danger," as the most protective of political speech, should be used as a standard, which may superficially appear to conflict with the Islamic law of free speech but which, on close examination, reveals no difference. Such a reconsideration is all the more necessary at this critical time when the world, in general, and the Muslim world, in particular, is facing the impact of the so-called "war on terror." This "war" has resulted in many opposition movements becoming subject to accusations of arousing sedition and terror. Indeed, liberation movements, groups and peoples that counter dictators are described as terrorist. Several commentators have maintained that human rights are being trampled under foot in the fight against terrorism.[2102] Amenity International and Human Rights Watch report that the fight against terrorism is being used to legitimate extra-judicial killings encroachments of opponents of torture and other kind of state terrorism.[2103] In this regard, it is astonishing that democratic states have declared war on terrorism before agreeing to a precise specific definition of the concept and meaning of terrorism. This has led to the shuffling of cards, the upturning of concepts and violation of the principles laid down by the international community. Many laws, which were supposedly designed to prevent incitement to terrorism and related expression, go further than is absolutely necessary for the prevention of terrorism. This can lead to a sense of alienation through depriving parts of the community of a legitimate means of expressing their views, which may tend to push them further towards more radical forms of protest or create an environment which is more susceptible to terrorists' discourse.[2104] These laws often fail adequately to distinguish between social or even academic discussions about the role of violence, on the one hand, and actual threat to national security, on the other. This means that the offence could be used against any person who engages in legitimate discussion of the

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[2102] See in general, Lagoutte, S., Hans-Otto Sano and Peter Smith, *Human Rights in Turmoil: Facing Threats, Consolidating Achievements* (Leiden; Boston : Martinus Nijhoff, 2007). See in particular in that book, Peter Vedel kessing, "Terrorism and human rights." p. 133.

[2103] Amenity international, "UK: Human rights under sustained attack in the 'war on terror'", November 2, 2005, at <http://news.amnesty.org/index/ENGEUR450502005>; Human Rights Watch, "Anti Terror Campaign Cloaking Human Rights Abused", (Washington, January 16, 2002) at <http://hrw.org/english/docs/2002/01/16/global3690.htm>

[2104] Office for Democratic Institutions and Human Rights, (2006) op. cit. p. 3.

historical and theological bases of concepts such as *jihad*, precisely at a time when open discussion and critical thought in this area is required.[2105]

The clear and imminent danger test, for nearly a century, has been successful in drawing a proper line between political speech and speech that poses a threat to national security. The same standard, the study argues, could equally provide criteria for the appropriate distinction between political speech and speech that constitutes incitement to terrorism. Accordingly, authorities in the Muslim world must demonstrate that there is a clear and imminent danger of a substantive evil that the state has a right to prevent, before they can interfere with speech. Such a narrow interpretation of limitation of freedom of political speech, which is supported by the evidences found in the *Quran* and *Sunnah*, would help Islamic law to be an active contributor in building the idea of universalism in freedom of speech.

Moreover, nation-states in Muslim societies must view freedom of speech and national security as correlated and complementary goals. Better protection of freedom of speech would make the Muslim societies safer and more secure. According to Kamali, "It is almost certain that success in securing and protecting the basic rights of citizens improves the prospects of national security."[2106] Governments in the Muslim world should be aware of that and should realise that the confrontation of extremism will not take place by increasing the suppression of the freedom of speech of others, but rather by respecting citizens, including them in decision making and giving them the right to free speech.[2107] On this issue, Maimul Khan made an important point. Frequent calls to *Jihad* in a number of Muslim countries, according to Khan, are a result of not allowing Muslim masses to speak out against their governments and unholy alliance of Muslim leaders with their Western counterparts. It is repressive and oppressive Muslim regimes in most of the Muslim states that lead to the rise of extremist religious groups against their governments, not the mandate of the *Quran*.[2108]

The compatibility between Islamic law and international law of freedom of speech is, moreover, not confined to their position toward distinguishing political speech from speech that constitutes a threat to national security. The examination of Islamic law settings in Chapter Nine clearly demonstrates that Islamic law, similar to international law, has taken a serious view when principles and values such as human dignity,

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[2105] See in this regard, Statement on Clause 1 of the Terrorism Act of the United Kingdom, by Article 19 Campaign London October 2005, available at <http://www.article19.org/pdfs/analysis/uk.gt.05.pdf>. Office for Democratic Institutions and Human Rights, (2006) op. cit. p.3.

[2106] Kamali, M., (1997) op. cit. p. 211.

[2107] Office for Democratic Institutions and Human Rights, (2006) op. cit. p. 3.

[2108] Khan, M., (2003) op. cit. p. 137.

honour, equality or public morality are violated in the name of freedom of speech. The Islamic philosophy in this regard is that speech, whatever it might be, ought not to be tolerated over other values which are deemed to be of no less importance. Accordingly, Islamic law, on the basis of protecting one of the five necessities of Islam, honour, allows people to sue those who say or publish false and malicious comments. Many verses of the *Quran* and sayings of the Prophet Muhammad strictly forbid defamatory speech. In practice, however, both international law and Islamic law permit some flexibility to distinguish between different contexts and targets of defamatory speech. The study shows that the international law of freedom of speech, under certain conditions, permits defamatory statements directed to public figures, as understood from the European Court decisions in several cases mentioned above. This is because the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is, according to the HRC's General Comment, essential through a free press and other media that are able to comment on public issues without censorship or restraint. Similarly, in Islam, a distinction is made between public figures and private persons, as demonstrated by an interesting debate that took place between the Prophet Moses and Khidr, and by the criticism that Umar Ibn Khattab directed to the "treaty of Hudaybiya" which was signed by the Prophet Muhammad. The lesson evinced by these examples is that Islam affords a high level of protection to free debate on public issues, including harsh words directed to a public figure, or even libel, as long as the accuser acted in a good faith. Thus, another area of apparent conflict between Islam and the international law of freedom of speech proves on investigation to be an area of compatibility.

As evidence of incompatibility of Islamic law with the international law of freedom of speech, Westerners, on the basis of Muslims' reactions towards *the Satanic Verses* and Danish cartoons, point to the blasphemy law in Islam. Giving examples of religious values and rules that make it almost impossible to reach completely the standard set by the UN, one writer says, "Rules on blasphemy ... will in an Islamic state inevitably constitute a problem for the freedom of expression and freedom of religion."[2109] The study demonstrates, however, that it is difficult to agree with this point of view. The limitation of blasphemy is explicable within the provision of Article 19 (3) (b) of the ICCPR on the protection of public order or morals. Under Article 10 of the ECHR, the offence of blasphemy in two cases, *Otto-Preminger Institute v. Austria* and *Wingrove v.*

[2109] Delling, M., (2004) op. cit. p. 69.

the United Kingdom, was found to be necessary in a democratic society. Accordingly, the allegation of incompatibility of Islamic law with the universal value of freedom of speech is far from reality; otherwise, the allegation of incompatibility must be extended to include the decisions of the European Court in the above two cases. However, it is submitted that it is important in Islamic law to narrow down and specify the concept of blasphemy in such a way as to distinguish it from allied concepts such as criticism and disagreement. Any attempt, whether by the Islamic authorities or Muslim scholars, to define blasphemy in a very broad way such as to be capable of application to a wide variety of concepts must be rejected. As for the blasphemy laws in some European countries, which apply only to attacks on Christianity, it is suggested that the offence of blasphemy should be extended to restrict speech that might offend adherents of other religions/faiths/organisations or incite hostility to those adherents. This restriction might be imposed in the name of hate speech and, in addition, in the name of protection of the morals and rights of others. A basis for this suggestion, in fact, can be found in the *Quranic* verse 108 of Chapter 6 which forbids insult to non-Muslims, whether, according to Muslim scholars, the followers of revealed scripture, specifically Jews and Christians, the non-Muslim citizens of a Muslim state, or virtually all non-Muslims,"[2110] as this might be likely to invoke hostility and abuse in response: "*Revile not ye those whom they call upon besides Allah, lest they out of spite revile Allah in their ignorance.*"

The same verse, beside others, especially verses 11 and 12 of the *al-Hujurat* chapter, constitutes a ground for restricting hate speech in Islam. The study reveals that hate speech is prohibited in Islam because it contradicts with other values and principles, such as the principle of equality. The incident concerning Abu Dhar, the leader of the Arabic tribe of GhifaR, and Bilal, a black man from Abyssinia, clarifies the position of Islamic law toward hate speech, which is in complete agreement with the approach of the U.N. Committee and the Strasbourg institutions. Internationally, both ICCPR and ECHR, in the name of equality and individual dignity, restrict hate speech, even when it does not cause incitement against others. The examination of limitations of freedom of speech proves that the Islamic hate speech law contradicts only the American law of freedom of speech, which does not criminalise hate speech.

It must be clarified that the protection of morals is not a purely philosophical or political notion; it is, as under Article 19(3) and Article 10(2) of the ECHR, laid down

[2110] Kamali, M., (1997) op. cit. p. 179.

as one of the justifications for interference with freedom of expression. For example, on the ground of protecting public morals, obscene speech is outlawed according to the international law of freedom of speech. However, the study reveals that international law, contrary to the Islamic law position, differentiates between obscene and indecent speech. Accordingly, pornographic speech which involves no children or violence is protected. This type of sexually explicit speech, which comes under the coverage of free speech law, has no protection in Islamic law, as clearly appears from verse 19 of the chapter called *al-Nur*. Islamic law very strictly prohibits any speech that has, or might have, harmful impact on the public morals, such as vulgar, lewd, obscene, indecent or plainly offensive words. The Islamic law on sexually explicit speech aims at protecting people against moral harm, which indecent materials and publications is said to threaten. This is, as the study shows, an area of divergence between Islamic law and international free speech law. The position on sexually explicit speech may be explained by the fact that there is no universally applicable common standard for public morals. As Caroline West points out, "what is viewed as sexually explicit can vary from culture to culture and over time. 'Sexually explicit' functions as a kind of indexical term, picking out different features depending on what has certain effects or breaks certain taboos in different contexts and cultures."[2111] This is why, in the context of the jurisprudence of the Strasbourg Court, national authorities' far-ranging restrictions on the production, dissemination and possession of sexually explicit material have almost without exception been upheld.[2112] Consequently, the study here suggests that the HRC must develop consideration for Islamic values. This is possible, according to Baderin, through the adoption of the margin of appreciation doctrine.[2113] The margin of appreciation in this regard is useful as it facilitates a universal interpretation of international law of freedom of speech. To illustrate more, a narrow deviation by some legal systems, such as Islamic law, from international norms, especially deviation which is on behalf of a strong implementation of another vitally important human right, emphasises the need for an effective tool which on the one hand reaffirms the universalism in freedom of speech and on the other hand recognises and respects the moral autonomy of the various national and cultural communities that form the world community. This recognition and respect require that states be left with discretion to

[2111] West, C., (2005) op. cit.
[2112] Cram, I., (2006) op. cit. p. 168.
[2113] Baderin, M., (2003) op. cit. p. 220-221.

interpret internationally recognized free speech as they see fit. The most effective tool, as stated above, is the doctrine of margin of appreciation.

The importance of this doctrine, which allows human rights norms to take on local flavour, and still preserves the concept of core or universal rights,[2114] is not confined to the relationship between international law of freedom of speech and Islamic law. The doctrine appears all the more necessary with regard to the deviation of some Western laws of freedom of speech from international law. The study shed light on some areas of incompatibility among Western states themselves in relation to the interpretation and application of the international law of freedom of speech. This does not mean that the West (the US and Europe) is in total conflict within itself in relation to the interpretation and application of Article 19 ICCPR. Freedom of speech has a prominent place in both the European Convention and the US Constitution. On both sides, the evaluation of the past half-century has been a spectacular and a highly positive one for freedom of speech. Chapters Two and Three prove that there is a considerable degree of agreement among the Western nations in relation to the meaning of speech. The reading of the theories of freedom of speech in Chapter Four and the application by Strasbourg Court and American Supreme Court of these theories, in Chapters Six and Seven, leads to the conclusion that there is a Western consensus on the importance of freedom of speech for self-fulfilment. On both sides of the Atlantic, according to Georg Nolte, free speech enjoys high protection and is held to be one of the most fundamental pillars of democracy.[2115] There is, the study reveals, some level of consensus about the value of freedom of speech in helping people to participate effectively as members of the nation in the political life and in enabling the intellectual and emotional growth of persons. This means that, to some extent, there is a common standard of freedom of speech justifications among Western laws.

However, this compatibility is not absolute. Still there is a contradiction in some areas between the American and European approaches to freedom of speech. What is strange is that Western human rights advocates and free speech scholars, with a few exceptions,[2116] have either neglected the study of this divergence within the Western States or have generally simplified the matter of interpretation and application and

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[2114] Ostrovsky, A., op. cit. p. 47.
[2115] Nolte, G., (2005) op. cit. p. 46.
[2116] For a few attempts that have tried to evaluate elements of divergence and of convergence between European and US is the field of freedom of speech see Nolte, G., (2005); Barendt, E., (2005); Cram, I., (2006); Schauer, F., (2005); Errera, R., "The Freedom of the Press: The United States, France, and Other European Countries", *in* Henkin, L., & A.J. Rosenthal (Eds.), *Constitutionalism and Rights: the Influence of the United States Constitution Abroad* (New York: Columbia University Press, 1990) pp. 63-93.

seemed to be less enthusiastic to take into account the complexity that arises from this divergence.[2117] This Western neglect of the study of the differences in the interpretation and applications of the freedom of speech between Western systems is, of course, criticised. Westerners, as Professor Frederick Schauer argues, often ignore or pay no attention to the differences that exist, in structure as well as in substance between freedom of speech in the United States and the other side of the Atlantic in their interpretation and application of Article 19 of ICCPR.[2118] These differences are not confined to the practical sphere, but extend to the theoretical sphere as well.

At the theoretical level, in Chapter Four, several theories that justify the protection of freedom of speech were examined. The chapter reached a conclusion that theoretically, freedom of speech might be justified because (1) it leads the society to recognise the truth, (2) it is associated with the exercise of personal autonomy, (3) and it helps individuals to participate effectively and wisely in decision-making operations which formalise the society and government system. Chapters Six and Seven illustrated how these justifications affect protection of freedom of speech in practice. The study showed that the American law of freedom of speech relies, besides the theories of self-fulfilment and democracy, on truth theory, formulated by John Stuart Mill, whereas the basic foundation of Article 19 ICCPR, and Article 19 ECHR, is only the theories of self-fulfilment and democracy. ICCPR reserves on the adoption of the truth theory (marketplace of ideas model). Similar to ICCPR, ECHR relies on only two theories to justify the right to freedom of speech, namely, self-fulfilment and democracy theories. This difference at the theoretical level, of course, has consequences. The truth theory, which has a significant role in shaping freedom of speech jurisprudence in the USA, assumes that truth can be promoted only by uninhibited public discussion and the consideration of all views, no matter how mistaken or misleading they appear. Accordingly, even hate speech must be allowed because the truth of true speech enables truth to prevail over falsity, good ideas to win out over bad ones, and sound arguments to triumph over unsound ones. Hate speech is difficult to be justified under the justification from democracy, adopted by ICCPR and ECHR, which is premised on the conviction that freedom of speech serves an indispensable function in the process of

[2117] Mayer as an example, devoted her pen energetically, firstly to defending the Western characteristic of human rights, including freedom of speech, and secondly, to focusing on the difference between Islamic law and international law of human rights. This enthusiasm, however, neglects the incompatibility between American law and International law of human rights. One of a few studies by Mayer which focus on this topic is, "Clashing Human Rights Priorities: How the United States and Muslim Countries Selectively Use Provisions of International Human Rights Law", *Satya Nilayam: Chennai Journal of Intercultural Philosophy* 9 (2006). 44-77.

[2118] Schauer, F., (2006) op. cit. p. 2.

democratic self-government. According to Michel Rosenfeld, if the paramount objective is the preservation and promotion of democracy, then anti-democratic speech in general, and hate and political extremist speech in particular, would in all likelihood serve no useful purpose, and would therefore not warrant protection.[2119] This divergence, at the theoretical level, explains why some free speech laws, such as those of the U.S., protect certain kinds of speech such as hate speech, whereas others, such as the U.N. Covenant and European Convention, do not. This raises a question whether there is a need to develop a common theoretical standard of freedom of speech between the international, regional and national institutions.

Practically, the study, in Chapters Six and Seven, demonstrates that not only the structure of free speech clauses (implicit limitations) and the system of restricting freedom of speech (the categorization approach) in the American free speech law, differ from the structure of freedom of expression (explicit limitations) and the system of restricting freedom of speech (balancing approach) in international law, but there are also differences of substance.[2120] It has been shown that two distinct Western pro-freedom of speech philosophies are currently vying with one another for supremacy in the world today. These can neatly be summarised as "the US and the Rest." The First Amendment doctrine protects incitement to racial hatred, Holocaust denial, and other forms of hate speech widely criminalized in the rest of the world, and explicitly departs from free expression principles contained in numerous human rights documents. The American First Amendment doctrine treats claims of national security with a dose of scepticism far larger than that seen in much of the developed world.[2121] In all of these dimensions, and many more, according to Frederick Schauer, the United States, as a matter of substance and not a matter of structure, is a free speech outlier, insisting that its "exceptional" approach to freedom of speech and freedom of the press is both wiser and more faithful to American political and legal traditions than would be the American analogue to European views on these and related issues. At the international level, the ideological imperative of freedom of expression is not allowed to ride roughshod over other human rights and laudable societal values. Prime examples of such rights are equality and non-discrimination.[2122] Freedom of speech protection, accordingly, must be accompanied by the protection of other fundamental rights and freedoms such as a commitment to equality, dignity and diversity. Although the American approach is

[2119] Rosenfeld, M., (2001) op. cit. p. 1532-3.
[2120] Schauer, F., (2005) op. cit. p. 47.
[2121] *New York Times v. United States* (Pentagon Papers Case), 403 U.S. 713 (1971).
[2122] McGonagle, T., (2001) op. cit. p. 21.

rather unique in the extent to which it tends to protect speech of all sorts, it is the second approach, however, which has gained the greatest level of acceptance in international law.

On the basis of the above discussion, which reveals that there are important differences among liberal democracies in the nature of the protection of freedom of speech, the study concludes that in contrast to the universality of the human right of freedom of speech, universalism in freedom of speech, even among liberal democracies, has not been achieved so completely. Although the discussion of this study shows that Western systems generally agree on basic principles about free speech, they are not unified in a certain model of freedom of speech interpretation and implementation. It reveals that the international dimension of the law is visible everywhere in the European law of freedom of speech, whereas this is in marked contrast to the American scene. The example of hate speech shows that there is a deviation by the American legal system from international norms. According to Ian Cram, "The consensus in domestic and international law about the importance of eliminating form of hateful expression may be contrasted with continuing judicial hostility in the US to state legislatures' attempts to curb the expressive activities of hatful speakers."[2123] This leads to the question whether the American free speech system departs significantly from corresponding provisions in equivalent UN instruments.

There is, certainly, a need to encourage the promotion and realisation of international law of freedom of speech on the other side of the Atlantic. It is, therefore, suggested, firstly, that international law should be considered in resolving the question of the American law of freedom of speech. International law must be taken into account when interpreting the constitutional right of freedom of speech, which certainly is neither wholly isolated from, nor inherently at odds with, freedom of speech values prevailing on the other side of the Atlantic. The first amendment, Cedric Powell, talking about hate speech, says, has been construed by the Supreme Court in a manner that is antithetical to equality.[2124] In a somewhat similar vein, Henry Cohen believes that "the idea that a commitment to freedom of expression depends on a freestanding preference for liberty over equality is ... a serious mistake, because it fosters an unnecessary and destructive hostility to freedom of expression among friends of equality and unnecessary and destructive hostility to equality among friends of expressive liberty. Where reconciliation is possible, it promotes division; where disagreement is possible on

[2123] Cram, I., (2006) op. cit. p. 101.
[2124] Powell, C., (1995) op. cit. p. 3.

ground, it insists on drawing false lines of principle."[2125] Likewise, Weaver and Lively believe, "[t]he high value assigned to First Amendment freedoms sometimes has been a source of rhetorical excess and misleading signals. Reference to freedom of speech and of the press as the "indispensable condition" for other basic rights and liberties generated arguments that the First Amendment overarched other constitutional interests."[2126] Certainly, freedom of speech is better protected in the United States than under international law of freedom of speech. However, there is little doubt that personality rights, such as human dignity, protection against racial incitement or group libel, are better recognized and protected under the latter law than under American law.[2127] Thus, when dealing with free speech cases, more consideration should be given to the values and principles recognized and protected under international law, such as human dignity, protection against racial incitement or group libel. Freedom of speech and the competing interests have the same important value, and that neither should be unreasonably sacrificed to the other.[2128] According to Bracken, freedom of speech is one of several competing values.[2129] The study, here, is not calling for placing freedom of speech in a subordinate position, nor are we denying that the competing values such as democracy, equality, freedoms, and human dignity all underpin the right to freedom of speech, but it emphasises an important matter, that the right of freedom of speech should be measured against other rights in each case, and neither should be presumed to have supremacy.

It is time that the U.S. courts began looking to the rules and decisions of international committees and courts with regard to the issues of freedom of speech.[2130] The international model of free speech adjudication, which has embraced a balancing approach, is an important tool in solving the problem of the departure of American free speech law from corresponding provisions in equivalent UN instruments. It provides a powerful solution through which the U.S. Supreme Court can consider hate speech cases in compliance with international law of freedom of speech. In short, there is a need for proportionality in First Amendment jurisprudence. The case of *Virginia v Black*, discussed above, showed that the Supreme Court has taken hesitant steps towards jurisprudence based on a more explicit balancing test. In that case, the Court considered

[2125] Cohen, J., op. cit. p. 211-212.
[2126] Weaver, R., & Lively, D., op. cit. p. 11.
[2127] Nolte, G., (2005) op. cit. p. 47.
[2128] Heyman, S., (1998) op. cit. p. 1309.
[2129] Bracken, H., op. cit. p. 22
[2130] See Jackson, V., "Comparative Constitutional Federalism and Transnational Judicial Discourse", *International Journal of Constitutional Law* 1 (2004) pp. 109-128.

whether a state could prohibit cross-burning carried out with the intent to intimidate. The absolute guarantee of the First Amendment was balanced against the limitations imposed on that absolute. This is an issue proportionality, as was the *Sunday Times* decision by the European Court. The study suggests that the Court may be ready to comply with international law of freedom of speech, one that embraces interpretation and explicitly acknowledges balancing of the protections of the First Amendment against legitimate legislative interests as the way to adjudicate First Amendment cases. Accordingly, the following two-step balancing inquiry is proposed: (1) Are the limits placed on speech legitimate and of sufficient importance to justify governmental intrusion on the protection of speech as embodied in the First Amendment? (2) Are the restrictions on speech proportionate to the purpose for the restrictions?

As for the Human Rights Committee, it is suggested that consideration should be developed for American values. The promotion and realisation of international law of freedom of speech on the other side of the Atlantic cannot be done unless the HRC adopts the doctrine of margin of appreciation. This adoption of the doctrine of freedom of speech supplemented with the American approach would ultimately lead to stability within the international human rights regime in relation to the USA. The doctrine of margin of appreciation has another significance here. The study, in Chapter Three, emphasised that, in the realm of free speech law, it is not sufficient, in order to assess whether a certain speech receives protection or not, to look solely at the content of the speech in question, whether it is public speech, such as a political one, or private, commercial speech for instance, but also one should look at the method used in delivering such speech. For example, political discourse receives the highest protection from free speech law in most jurisprudence, but it might be regulated if the method used to deliver it is outside the protected methods, assassination for example. Despite this privilege goal, the method by which communicative conduct occurs, through conduct rather than words, is presumptively regulable. Thus, for most communicative conduct, the purpose of speech is protected, but the method of speech is regulable. The reverse is also true. Some types, such as sexually explicit speech, might have a regulable purpose, while the method by which most sexually explicit speech is communicated, pure speech such as written and spoken words or artistic speech, is presumptively protected. Regardless of this importance, the study in Chapter Three shows that, in the context of ICCPR, unfortunately, there is no specific rule concerning non-speech activities. The exercise of these activities might be regulated if such regulations are provided by law and necessary for (a) respect of the rights or reputations of others; (b)

the protection of national security or of public order (*ordre public*), or of public health or morals. This is in marked contrast to the situation under the American and European laws of freedom of speech. The latter, through the doctrine of margin of appreciation, distinguishes pure speech, which receives the highest protection; from communicative conduct, which does not inherit the same level of protection. It is suggested, therefore, that the HRC should follow a similar approach to the Strasbourg institutions in considering issues of communicative conduct. This cannot be done except through adopting the doctrine of margin of appreciation.

Based on the above analysis, the study can be ended by the conclusion that the adoption of universalism in the human right of freedom of speech is not against Islamic law. Islamic law, represented in *Quran* and *Sunnah*, can accommodate the concept of universalism in free speech law, if interpreted in their proper context. The difference between the law of freedom of speech in Islam and its counterpart in the international law is thus a matter of degree, which rules out an absolute incompatibility between the two. Such difference exists more acutely among liberal democracies, as shown in above American example. In fact, when I embarked on conducting a comparative study between freedom of speech law in Islam on the one hand and modern free speech law, whether international or national, I thought the two laws would be completely different from each other. My study proved to me that I was wrong: a careful reading of Islamic texts, represented in the *Quran* and *Sunnah*, showed that there are more similarities between the two laws than differences. This study, therefore, rejecting the idea that there are no universal standards by which cultures may be judged, encourages the defence of the international law of free speech especially across Muslim societies without, however, underestimating the costs that such a defence inevitably entails which can be clearly read in the saying of Prophet Muhammad: "The best of martyrs is... the man who stood up against an unfair ruler and commanded and forbade him [to good and evil respectively] and the ruler killed him."

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