



**The Limitations of Freedom of Expression in Theory and  
Practice**

**(Between the First Amendment of the U.S. Constitution and  
Egyptian Law)**

**Submitted to University of Stirling/ School of Arts and  
Humanities- Law Department in partial in Fulfilment of the  
Requirement for the Degree of Doctor of Philosophy (Law)**

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**May 2019**

## ACKNOWLEDGEMENT

This is the hardest part of my thesis. Working on this thesis has undoubtedly been very challenging. I have tasted both the stress and sweetness of scholarship during the pursuance of this PhD and have further identified my strengths and weaknesses in different spheres of life. Overall, it has been a very rewarding endeavour and a great milestone in my life. I do not want to leave out anyone who devoted his or her knowledge, time, and support to inspire me to finish my research project. PhD is a group effort; I will do my best to acknowledge anyone who assisted me with my study.

First of all, thanks to God for giving me the strength and the patience to keep my spirit high, helping me to overcome all obstacles, and for not giving up before I reached my ambition. I would like to express my sincere gratefulness to King Salman Al Saud, the king of Saudi Arabia, for his unlimited support, and most importantly, his kindness and careens, without his tremendous assistance, my PhD would not have materialised.

My appreciation and thanks also goes to my supervisor Dr Oles Andriychuk for his constructive reviews and continuous guidance through my research. My special thanks to Dr Hong-Lin Yu and other faculty members at the Department of Law at the University of Stirling.

My appreciation and thanks also goes to my beloved father, his generosity and compassion for others continue to serve as the source of inspiration in my life. I also dedicated it to my beloved mother, whose love and importance in my life will never be forgotten, for her unceasing moral support. Finally, I specially acknowledge the support and co-operation of my wife and children all the way through. I have "stolen" so much of their time during the course of my studies. In addition to the joy of the successful completion of this PhD, I hope to be able to compensate further for their "stolen" periods afterwards.

## ABSTRACT

The divergence of freedom of expression either in Muslim or Western States is one of the most controversial issues that continue to be debated. The scope of restrictions under Egyptian law, which apply Islamic or Shari'a norms, differ from American constitutional law. The purpose of this study is to examine how freedom of expression in the United States of America and Egypt are subject to different limitations. In order to put the study into context, the research examined the justification and methods of freedom of expression in both the United States of America and Egypt. As foundation stones of the debate, the study depended mainly on philosophical theories and many Islamic sources. The researcher examined various cases of freedom of expression and the sources of those cases varied in terms of the level of the Courts.

The Egyptian experience can explain how the country's Supreme Constitutional Court can develop the interpretation of Islamic law to be consistent with democracy. Also, the methods used by the U.S Supreme Court in interpreting the First Amendment, namely the categorical and balancing approach, can explain how the absolutist and pragmatic position of the First Amendment and the complexity of freedom of speech are treated.

The plain approaches and the experiences either in the United States of America or Egypt are rich in their principles and norms which are based on the local particularities. The research findings suggest that, although there are some differences of scope and application between the laws of both countries, these should not create a general state of dissonance.

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# Chapter One

## 1. Introductory Chapter

### 1.1: Statement of the Problem

The divergence between Islamic countries and Western liberal democracies has received much attention during recent years. This attention has been further highlighted by political developments of the early 21st Century, particularly the democratic transition that took place in many Arab countries, which has keenly focused much attention on human rights fields. Freedom of expression is at the centre of many modern legal debates, both between nations and within nations. The distinction of freedom of expression or freedom of speech<sup>1</sup> is more obvious when it relates to the comparison between the United States and Egypt or liberal and Islamic states.<sup>2</sup> This should not be surprising since each country has a different history, society, religion, and so on.<sup>3</sup>

Freedom of expression is important either at an individual or community level, but this does not mean there is a general agreement on its limitation.<sup>4</sup> Some people may see forms of speech as a kind of liberty; others do not agree with them under different justifications. For example, the protests for the legalisation of same-sex marriage represent a kind of freedom of expression under Western countries' laws, whereas, in many Islamic countries, such protests are inconsistent with the instructions of Islam and, thus, fall outside the protection of free speech. Without confining ourselves to this example, there are two different views of freedom of speech.

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<sup>1</sup> It should be noted that it is not my intention to discuss the linguistic aspects of expression and speech. Thus, the terms 'freedom of expression' and 'freedom of speech' are used interchangeably throughout this thesis, unless the context indicates otherwise. See, Eric Barendt, *Freedom of Speech* (Oxford University Press 2005).p.5.

<sup>2</sup> Azizah Y Al-ibri, 'Islamic and American Constitutional Law: Borrowing Possibilities or a History of Borrowing' (1998) 1 U. Pa. J. Const. L. 492.p.492.

<sup>3</sup> Mohamed Saeed M Eltayeb, 'The Quest For Permissible Limitations On Freedom Of Expression: Public Order And Public Morality Exceptions' (2015) 13 The Review of Faith & International Affairs 69.p.69.

<sup>4</sup> Mashood Adebayo Baderin, 'Modern Muslim States Between Islamic Law and International Human Rights Law' (Nottingham 2001).p.1.

The central concern, then, is the question whether there are limits to freedom of expression: is there anything that cannot be said, or circumstances under which things cannot be said? Following from this there is a cluster of other questions. If freedom of expression does have limits, just how can these limits be defined? Is the giving of offence one of the possible limits to freedom of expression? How can we identify the boundaries of what might legitimately be considered offensive? Finally, is there any kind of right to take offence?

The USA's Constitution offers broad protection to freedom of speech.<sup>5</sup> The U.S. First Amendment plays a considerable role in forming a solid base for free speech protection. This should not be surprising, according to S  thigh, as it "forms part of the law that affects how speech is treated by the (US) state, constrains the actions of state actors where speech is concerned and contributes to the formation of a particular legal culture".<sup>6</sup> In the United States, freedom of speech characterises with its wide scope of constitutional protection including undesirable speech.<sup>7</sup> Protecting the right of individuals to express their opinion, in some circumstances, may cover political speech. For example, in *Texas v. Johnson*, the U.S Supreme Court reversed the trial court's decision that convicted Johnson of desecrating a flag. The court found that burning the flag did not threaten peace and justice as a part of political speech therefore, it was subject to free speech protection. The Court stated that "[t]he Government may not prohibit the verbal or nonverbal expression of an idea merely because society finds the idea offensive or disagreeable".<sup>8</sup> What this example show is that freedom of expression in the United States is an inherent part of a representative democracy and the right of the people above the right of the Government.<sup>9</sup> Furthermore, the Supreme Court cannot restrict free speech unless there is a compelling state interest.<sup>10</sup> In the decision written by Justice Oliver Holmes, the Court stated, "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent".<sup>11</sup> This view which was upheld

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<sup>5</sup> Sultan Aljamal, 'Freedom of Speech as a Universal Value' (The University of Hull 2007).p.152.

<sup>6</sup> Daith   Mac S  thigh, 'The Mass Age of Internet Law' (2008) 17 Information & Communications Technology Law 79.

<sup>7</sup> Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2002) 24 Cardozo L. Rev. 1523.p.1530.

<sup>8</sup> *Texas v Johnson* 491 US 397 (1989).

<sup>9</sup> Barendt, p.54.

<sup>10</sup> *Thomas v. Review Bd.*, 450 U.S. 707 (1981).

<sup>11</sup> *Schenck v. United States*, 249 US 47 (1919).

later by many justices, has played a considerable role in the Court decisions.<sup>12</sup> Rightly so, cases involving extremist or subversive expression are conceived differently either in structure or substance, than in many countries.<sup>13</sup>

The First Amendment's flexible function regarding freedom of speech helps the American Supreme Court to develop freedom of expression principles without the need for an explicit constitutional text.<sup>14</sup> However, dealing with freedom of speech in the USA is considerably more difficult than doing so in other states; this is because freedom of speech has wide protection in the First Amendment.<sup>15</sup> One point, which should be raised here, is the broad successes of American judiciary approaches to produce results that are both substantively desirable and procedurally appropriate. These results are due to the consequence of a willingness to interpret the legal text and to strike a balance between conflicting values with freedom of expression.<sup>16</sup> The wide scope of protection of freedom of expression under the American approach differs than in from many liberal countries.<sup>17</sup> It is no more surprising that the European Courts have considered free speech issues for a much shorter time than the American Courts, which have been engaged with them for centuries.<sup>18</sup> According to Sadurski, "[t]he body of 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".<sup>19</sup>

In the context of Egypt, it is an Islamic country, and Islamic law is the primary source of its legislation. This means that all judicial decisions are based on the Qur'an, the most fundamental source of guidance for all Muslims, and related secondary sources.<sup>20</sup> Article 2 of the Egyptian Constitution states that "Islam is the religion of the state, Arabic is its official language, and the principles of Islamic Sharia are a primary source of

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<sup>12</sup> Robert Trager and Donna L Dickerson, *Freedom of Expression in the 21st Century* (SAGE Publications 1999).p.61

<sup>13</sup> Lee C Bollinger, 'The Skokie Legacy: Reflections on an Easy Case and Free Speech Theory' (1981) 80 Mich. L. Rev. 617.p.618. See also, Rosenfeld (n 7).p.1523.

<sup>14</sup> Barendt (n 1).p.50.

<sup>15</sup> *ibid*, p.55.

<sup>16</sup> Muhammad fawzy Alkhdr, 'Alqda' Wal'iielam Hurriat Alttaebir Bayn Alnazarat walttatbiq.(Comparative Study).Mada Cetre.' [2012] Mada. p.9.

<sup>17</sup> Trager and Dickerson (n 12).p.7

<sup>18</sup> Barendt.( n 1).p.55.

<sup>19</sup> Wojciech Sadurski, *Freedom of Speech and Its Limits*, vol 38 (Springer Science & Business Media 1999).p.5.

<sup>20</sup> Sometimes Muslims scholars use jurisprudence, or *ijtihad* when the Qu'ran and secondary sources are silent. See, Al-Hibri (n 2).

legislation”.<sup>21</sup> Naturally, the State relies on Islamic law to protect freedom of expression and to define its limits. The Supreme Constitutional Court has developed its approach by interpreting Islamic law to be consistent with the highest level of human rights protection.<sup>22</sup> Egyptian law generally agrees on basic principles about free speech. It permits people to speak or write freely. The priority is given to the interests of the society more than the interest of the individual.<sup>23</sup> For example, the Egyptian moral’s Court convicted an Egyptian writer for publishing a book, entitled ‘the bed’. The book was described as disseminating pornography and portraying Islam in a satirical manner. The Court said the book was an obvious violation to Islamic religion and public morals.<sup>24</sup> In very general terms, some speech is protected, and other speech is not. Pornography, slander, insult and speech, that constitutes a real threat to national security are examples of speech categories that, generally, are not encompassed by the protection of Egyptian law.

Taking into consideration the above points, one can ask: why are some human rights restricted in Egypt and not in the USA? Is Egypt not similar to the USA in the very understanding of the value of free speech? If the answer is yes, then what are the differences between them? To put it another way, although the USA and Egypt protect speech, freedom of expression in the USA is broader, compared to Egypt, and gives greater protection to speech. Therefore, answering all these sub-questions will help to find an answer to the study's main questions, which revolve around the limitations on the right of freedom of speech in the light of the different applications of human rights laws. In addition, a comparison between the USA and Egypt, firstly, leads to an identification of their similarities and differences and, secondly, provides lessons on freedom of speech that have been developed by them. Furthermore, this study may lead to removing the ambiguity and misunderstanding that revolves around the limitation of freedom of expression in both countries.

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<sup>21</sup> Egypt’s Constitution of 1971, at [http://www.palatauruscentrostudi.eu/Doc/EGY\\_Constitution\\_1971\\_EN.Pdf](http://www.palatauruscentrostudi.eu/Doc/EGY_Constitution_1971_EN.Pdf).

<sup>22</sup> Clark B Lombardi and Nathan J Brown, ‘Do Constitutions Requiring Adherence to Shari’a Threaten Human Rights-How Egypt’s Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law’ (2005) 21 Am. U. Int’l L. Rev. 379.p.435.

<sup>23</sup> Muhamad Kameel, *Madaa Kafalat Haqi Al’iinsan Fi Altaebir Bayn Alfaqih Al’iislami Walqanun Alwadeii* (Munsha’at almaearif, Alexandria 2016).p.384.

<sup>24</sup> Court of Moral, No 6969 (1992).

Freedom of expression cases highlights the divergence between the laws in protecting this right. In other words, the divergence in the limitations on freedom of expression between national laws is an issue that needs to be addressed. Also, there is no justification to call for the door to absolute freedom of speech to be opened. There is an imperative need for freedom of expression to be measured strictly, so that a distinction can be made between restricted speech and expressions that fall under the freedom of speech umbrella. Emerson states that the definition of a clear limit on freedom of expression cannot be based on one factor, but rather, freedom of speech is of such great value that “it is necessary to have some understanding of the forces in conflict, the practical difficulties in formulating limitations,...and the impact of the whole process upon achieving an effective system of free expression”.<sup>25</sup> Although they are inter-related, one should differentiate between rationality and understanding of freedom of expression. That is, freedom of expression has a central territory and peripheries when our attention focuses on the importance and vital role of freedom of expression, this would help to create the rationality for freedom of expression in the first place, and when the attention directed to understand the outer boundaries, for example, how and why some speeches are protected and others not, this would help to expand our understanding of this freedom. Thus, rationality and understanding would help to expand knowledge about freedom of expression.<sup>26</sup>

## **1.2. The Aim and Methodology of the Thesis**

### **1.2.1 The Scope and Aim of the Study**

The primary objective of this study is to engage in the conceptual analysis and application of the limitation of freedom of expression in Egypt and the United States. It will be argued that freedom of expression law in Egypt is different from current form of free speech law in the United States.

Recent years have witnessed a spurt of studies concerning freedom of expression, but these have been largely confined to a single legal form. A legal analysis of freedom of expression in Egypt on the basis of sources of Islamic law comparing with the United States is hoped to make some positive contribution to the freedom of expression field.

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<sup>25</sup> TI Emerson, ‘Toward a General Theory of the First Amendment’ [1963] *The Yale Law Journal*.p.887.

<sup>26</sup>Sadurski (n 19).p. preface.

Further, this work will highlight the existence of commonalities between boundaries of freedom of expression in Egypt and the United States, as well as points of divergence between the two sets of legal norms.

It is essential for the matter of this study to provide some concrete examples from Egypt and the United States regarding the factual position of the limitation of freedom of expression. The present study will use the example of Egypt as an Islamic state and the United States as a liberal country to demonstrate the principles that have been adopted in the two countries and their influence on the limitations of freedom of expression. What is being sought through this analysis is, to highlight the issue of why the Egyptian courts have more limited explicit protection for expression. Egypt as Hallaq observes, offers “the longest experiment in legal modernization and, simultaneously, perhaps one of the fiercest tendencies to contest secularization of the law in the name of one Islamic ideology or another”.<sup>27</sup> Also, this study explains how the United States offers the most protection of free speech.<sup>28</sup> The distinctive principles that are applied by the U.S Supreme Court “represent an alternative to the detailed weighing of free speech and other interests which is characteristic in, for example, the courts of Canada and Germany and in the European Court of Human Rights”.<sup>29</sup>

My aim is not to find a single answer for changeable circumstances, but to answer logically the complex questions that are related to freedom of expression. By examining free speech Articles in Egypt and the United States, it can be observed that, although these provisions protect freedom of expression, they do not determine when and how freedom of speech should be restricted.<sup>30</sup> Indeed, the vagueness of the clause defining and limiting the individual's right to express his/her opinions is obvious in the U.S First Amendment.<sup>31</sup> According to Schauer, “The boundaries of [the First Amendment] are frequently contested, and they are unclear even when there is general agreement as to broad principles”.<sup>32</sup> Clearly, the definition of the scope of freedom of expression is a

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<sup>27</sup> Wael B Hallaq, *An Introduction to Islamic Law* (Cambridge University Press 2009).p.143.

<sup>28</sup> Robert Trager and Donna L Dickerson (n 12).p.7.

<sup>29</sup> Barendt.(n 1).p.55.

<sup>30</sup> Sultan Aljamal (n 3).p.17.

<sup>31</sup> Wallace Mendelson, ‘On the Meaning of the First Amendment: Absolutes in the Balance’ (1962) 50 Cal. L. Rev. 821.p.821.

<sup>32</sup> Frederick Schauer, ‘Categories and the First Amendment: A Play in Three Acts’ (1981) 34 Vand. L. Rev. 265.p.267.

problem that should be addressed.<sup>33</sup> As further illustration, different limitations and implementations of laws compel me to discuss the issue more deeply in order to make the limitations on freedom of expression easier to understand. However, as with every study, time and space impose limitations and, consequently, 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 concentrates on analysing and discussing only the aspects of freedom of speech relevant to its limitations.

Now, the questions that the study seeks to answer:

What are the initial bases that support freedom of expression in Egypt and the United States of America?

What are the standards that apply either in the United States of America or Egypt to deal with freedom of speech?

How do the Courts in the United States of America and Egypt treat freedom of speech cases?

The contrasting approaches adopted by the United States and Egypt afford a special opportunity to embark on different methodologies of the difficult problems posed by some types of speech and of the various possible solutions to them. As we shall see, in the United States, speech and the best ways to cope with it are conceived differently than in Egypt or other Islamic countries. Therefore, in order to provide an answer to the study's main questions, I emphasise the importance of examining the above questions in this regard. Without such an examination of all these questions, it is difficult, in my view, to judge restrictions on freedom of speech. This demands a move beyond a single perspective and, despite the complexity and diversity of human society, an attempt to provide the scope of freedom of speech in Egypt and the United States. This research study is a contribution to that end and focuses on the realisation of freedom of expression within the context of the differences among the States' applications. The following discussion is central not only to arguing whether freedom of speech is protected or unprotected, but why speech is restricted, for example, in Egypt and not in the United States, by what criteria, and by what means.

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<sup>33</sup> Frederick Schauer, 'Freedom of Expression Adjudication in Europe and America: A Case Study in Comparative Constitutional Architecture' .p.2

I consider that my contribution is an attempt to enrich and deepen the debate on these issues which, for many people, is not as simple as it may appear. However, the ultimate purpose is not to ‘criticise’ or ‘praise’ this or that State or to attempt to judge a “correct” opinion, but rather to use their arguments with different cases that can change the limitations on freedom of expression.

### **1.2.2 The Methodology**

To achieve broad knowledge of the limits of freedom of expression and obtain the most robust answers to the research questions framed above, this study explores the databases covering the topic of freedom of expression, both in Egypt and the United States. While most people understand that freedom of expression, at its basic level, means an individual’s right to express an opinion about different topics, understanding what constitutes ‘free speech’ is not clear.<sup>34</sup> As one writer has described, “one of the most disputed areas in contemporary human rights law is that of freedom of expression”.<sup>35</sup> Professor Eric Barendt, the author of ‘Freedom of Speech’, believes that the scope of freedom of expression is uncertain and subject to different views.<sup>36</sup>

Everyone would agree that speech should be immune from restrictions or limitations, except when it is made in circumstances where a violation and infringement of others is likely to occur. This requires a careful search for the meaning of speech, especially in our current time, when speech and its meaning are uncertain and subject to different views.<sup>37</sup> This quest has further focused on the value and justification for protecting freedom of expression. Freedom of speech has special values that require expanding our knowledge to depart from the narrow justification of legal arguments. Indeed, legal arguments becomes an exact structural analysis of positive speech. However, freedom of speech values sometimes lead to difficulties because each value has a special character.<sup>38</sup> In

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<sup>34</sup> Kabir Duggal and Shreyas Sridhar, ‘Reconciling Freedom of Expression and Flag Desecration: A Comparative Study’ (2006) 2 *Hanse L. Rev.* 141.p.141.

<sup>35</sup> State University of New York at Buffalo School of Law, *Buffalo Human Rights Law Review* (State University of New York at Buffalo, School of Law 1998).p.103.

<sup>36</sup> Eric Barendt, *Freedom of Speech* (Oxford University Press 2009).p.1.

<sup>37</sup> Thomas M Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy* (Cambridge University Press 2003).p.9.

<sup>38</sup> Trager and Dickerson ( n 12).p.102.

addition, this research examines the areas related to the distinctive role of the U.S. and the Egyptian Supreme Court in interpreting the Constitution to deal with freedom of expression cases. In doing so, several research methods are used in this study, mainly, conceptual analysis, as well as, comparative, socio-legal and doctrinal research methods. First, the conceptual analysis will be used as it is mainly concerned with discussing freedom of expression to make free speech, as well as, the laws and their related values, more obvious. That is, the primary function of conceptual analysis “is to understand the meaning of an idea or concept”.<sup>39</sup> The conceptual analysis thus goes beyond the mere study of the verbal meaning of laws. Speech has different meanings and forms; therefore, this approach tries to attain a better understanding of not only the meaning of speech, but also the cases of the respective jurisdictions.<sup>40</sup>

Indeed, the use of this approach is essential when considering how a country commits to democracy and how tensions, for example, between freedom of expression and other interests, are resolved. Commenting on this point, Donnelly argues that, “[p]articular rights concepts, however, have multiple defensible conceptions. In turn, any particular conception has many defensible implementations”.<sup>41</sup> Conceptual analysis seeks to facilitate the duty of legal philosophers not only by clarifying the actual meaning of concepts, but also by linking it with the empirical observations, or empirical information supplied by others.<sup>42</sup> This is because conceptual analysis characterised by its ability to remove ambiguity and fix problems of legal practice.<sup>43</sup>

Conceptual analysis offers the opportunity to address a particular set of questions that are of crucial importance for our understanding of a wide range of concepts especially that linked to the freedom of expression concept.<sup>44</sup> In this way, conceptual analysis would help to explain how and why the legal system in the U.S and Egypt are different.<sup>45</sup> Also,

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<sup>39</sup> Humanities Research Strategies: Conceptual Analysis

<http://libguides.usc.edu/humanitiesresearch/conceptual>>accessed 03 July 2018.

<sup>40</sup> Aleardo Zanghellini, ‘A Conceptual Analysis of Conceptual Analysis in Analytic Jurisprudence’ (2017) 30 Canadian Journal of Law and Jurisprudence. pp.485,486.

<sup>41</sup> Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 Human rights quarterly 281.p.29

<sup>42</sup> Zanghellini.p.490.

<sup>43</sup> Bix, Brian H. "Raz, authority, and conceptual analysis." *Am. J. Juris.* 50 (2005): 311. p.315.

<sup>44</sup> Himma, Kenneth Einar. "Conceptual Jurisprudence. An introduction to conceptual analysis and methodology in legal theory." *Revus. Journal for Constitutional Theory and Philosophy of Law/Revija za ustavno teorijo in filozofijo prava* 26 (2015): 65-92. p.67.

<sup>45</sup> Himma.p.87.

this approach would help to develop new ways of thinking about how we understand freedom of expression and the contexts in which it occurs.

Second, it is also useful to employ the comparative research method to contrast the law in Egypt and the United States to discover similarities, dissimilarities, strengths and weakness in order to determine the optimal approach. Since freedom of expression has a different meaning and different justifications, the focus needs to be not only on freedom of expression theories but also on their practice. It has been defined as “a process in which the comparatist takes several objects in order to study them within a ‘scientific’ framework in which the object or element being studied is viewed in terms of the ‘other’”.<sup>46</sup> In other words, comparison allows us to understand how freedom of expression law can be applied in different circumstances.<sup>47</sup>

Indeed, as articulated by Husa, “comparative law is part of entity that consists of legal disciplines: a part of organised attempt to understand human law, a special normative phenomenon that is not limited to a certain state or cultural sphere”.<sup>48</sup> In this way, comparative research opened the scope for researchers to be familiar with different aspects of human rights law. Generally speaking, comparative research is “appropriate as it allows knowledge of other legal systems to be built up and then used to inform development of the law”.<sup>49</sup> This means that a minimum of two states can gain advantages from each other regardless of the potential differences between them, and at this same time, this would offer an opportunity to examine the strengths and weaknesses in each law.

The two selected countries differ in significant ways in the application of freedom of expression, but the advantages of comparing them can be achieved in different ways: 1) by taking into account various courts’ decisions to help understand how free speech can survive under different circumstances,<sup>50</sup> and 2) by discussing how the courts in the U.S. and Egypt deal with free speech cases. This involves the U.S. Supreme Court’s

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<sup>46</sup> Samuel, Geoffrey. *An introduction to comparative law theory and method*. Vol. 11. Bloomsbury Publishing, 2014. p.11.

<sup>47</sup> Charlotte Elliott-Harvey, ‘Free speech, tolerance, offence and diversity: A comparative study of France and Denmark’ (The University of Leeds 2018).p.85.  
using the cases of Dieudonné and Yahya Hassan

<sup>48</sup> Husa, Jaakko. *A new introduction to comparative law*. Bloomsbury Publishing, 2015. p.18.

<sup>49</sup> Nazli Ismail Nawang, ‘Political Blogs and Freedom of Expression: A Comparative Study of Malaysia and the United Kingdom’ (The University of Edinburgh 2013).p.7.

<sup>50</sup> Sadurski ( n 19).p.6.

approaches (balancing, categorical) and the Egyptian Supreme Constitutional Court's (SCC) approach (Ijtihad). The approach would help to understand the limitations of freedom of expression. This should be not surprising, as "the comparative law now goes beyond analysis of the texts of legal rules and instead compares the law in action".<sup>51</sup> Therefore, this research, by using a comparative approach will examine how the courts address different issues and offer different solutions.

Thirdly, the study has also adopted a doctrinal approach with the position in the U.S. and Egypt. This method can be a useful tool in demonstrating the misconceptions through analysis of the law and implies the need to develop a law on the basis of the question 'what is the law'?<sup>52</sup> The distinctive role of the doctrinal method has been defined as the "basis of the common law and is the core legal research method".<sup>53</sup> According to Egan, "the doctrinal method emphasises the concept of "doctrine" as a source of law that can only be discovered through close analysis of authoritative texts intrinsic to the discipline of law".<sup>54</sup> In other words, the doctrine method would help to set a solid basis to analyses the relevant legal provisions that affect the relevant laws.

In this way, the doctrine approach allows us to substantiate and position research interests and questions within the wider legal discourse, and in turn, contribute to them. The doctrine method has therefore been described as a tool that allows the author to analyse the primary sources, which has a negative impact on the relevant laws, and to clarify their influence on the judiciary and on the relevant legal provisions.<sup>55</sup> In particular, it should facilitate the development of principles consistent with recognised national and international standards. It thus clear that a doctrinal method is appropriate as it involves "the careful reading and comparison of appellate opinions with a view to identifying ambiguities, exposing inconsistencies among cases and lines of cases, developing

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<sup>51</sup> Ralf Michaels, 'Comparative Law'(2011). p.3.

<sup>52</sup> Knight, Andrew, and Les Ruddock, eds. *Advanced research methods in the built environment*. John Wiley & Sons, 2009. p.30. See also, Egan, Suzanne. "The Doctrinal Approach in International Human Rights Scholarship." (2017). p.2

<sup>53</sup> Hutchinson, Terry, and Nigel Duncan. "Defining and describing what we do: Doctrinal legal research." *Deakin L. Rev.* 17 (2012): 83. p.85.

<sup>54</sup> Egan (n 52).p.2

<sup>55</sup> Cansu Aykota, 'Painting the Steps: A Socio-legal Analysis of the Freedom of the Press in Turkey' (Brunel University 2016). p.8.

distinctions, reconciling holdings, and otherwise exercising the characteristic skills of legal analysis”.<sup>56</sup>

The doctrine approach will be applied in the case of the U.S. and Egypt since the two countries’ laws are based on different principles. Indeed, liberal theory and Islamic legal theory have a special position in the U.S. and Egypt and this allows knowledge of other legal systems to be built up and then used to inform the development of the law.

Last, this research, however, pulls the topic beyond established discourses on provocation and case law and looks at the law as a social institution throughout a socio-legal approach. The socio-legal method will be used to examine the potential interaction between law and social structure. This is because “law is not viewed as an autonomous force to which society is subjected, but rather shapes and is shaped by broader social, political and economic logics, contexts and relations”.<sup>57</sup> This makes socio-legal research important because it allows us to gain particular insights. It allows us to distinguish between theory and practice,<sup>58</sup> and determine whether or not our observations are universal or specific to particular circumstances and times. In conducting socio-legal research, we must ask ourselves; What is the effect of law and legal order on social order? and What is the effect of law on attitude, behaviour, institutions, and organisation in society?

Schiff stated that, the “analysis of law is directly linked to the analysis of the social situation to which the law applies, and should be put into the perspective of that situation by seeing the part the law plays in the creation, maintenance and/or change of the situation”.<sup>59</sup> In this way, socio-legal approach facilitates two different aspects of research: understanding the nature of society that is linked to the law, and raising awareness through offering a new research perspective; or conditions that could potentially be useful to a given law context. Most importantly, the socio-legal approach offers an alternative way to address a set of questions that are of crucial importance for our understanding of a wide range of human rights including freedom of expression

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<sup>56</sup> Posner, Richard A. "The present situation in legal scholarship." *The Yale Law Journal* 90.5 (1981): 1113-1130. p.1114.

<sup>57</sup> O'Donovan, Darren. "Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls." *Legal Research Methods: Principals and Practicalities* (2016).

<sup>58</sup> Eijkman, Quirine. "A socio-legal perspective on human rights and policing." *Netherlands Quarterly of Human Rights* 25.1 (2007): 5-20. p.2.

<sup>59</sup> Schiff, David N. "Socio-legal theory: social structure and law." *The Modern Law Review* 39.3 (1976): 287-310. p.287.

cases. This is because “[a] socio-legal approach is conceptually distinguished from more positivistic approaches; the whole emphasis, the reason for it and its meaning cannot and should not be linked to other approaches. It does not disclaim other lines of thinking, but, it is considered, establishes alternative ones”.<sup>60</sup>

Indeed, the socio-legal method used in this thesis is the most significant approach that will serve to address the consequences of the actual effect of the law’s implementation.<sup>61</sup> This pushes socio-legal research to develop new ways of thinking about how we understand freedom of expression law and the contexts in which it occurs. Since this study is a comparative research project, using the socio-legal approach in the U.S. and Egypt would help to achieve two main goals. First, to understand the effect of laws on the interest or conflicts of interest within the two societies. Second, to provide a useful catalogue of the principal similarities and differences in freedom of expression law in the U.S. and its counterpart protection models in Egypt.

### **1.2.2.1 Limitations**

The research methodology has already been defined as a conceptual analysis and comparison approach of the research material. Therefore, the focus is placed on justifications for freedom of expression in Egypt and the U.S. and how the two countries understand, deal with, and develop freedom of expression, especially regarding the adjudicated cases in different courts of law. It is, however, not possible to cover all the legal adjudications; therefore, major cases are restricted to those that have strong links to the public interest. Because this discussion is limited to only those areas where it is completely necessary, the impact of this limitation is reduced by omitting unnecessary details and keeping the focus of the investigation on the relevant legal aspects of the issue.

Finally, it is not my aim to take an especially strong position on the desirability of one approach or structure over another. Herein, the hypothesis is that although there are different meanings and applications of freedom of expression in Egyptian’s law and

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<sup>60</sup> Schiff ( n 39). p.287.

<sup>61</sup> Yorke, Lois K., et al. "Mary Louise Lynch Chair in Women and Law Inaugural Lecture Conférence inaugurale Mary Louise Lynch." p.392.

American's law, this should not be surprising because the limitations on speech are uncertain and can be changed under different circumstances.

### **1.3. The Structure of the Study**

This thesis asks many questions about limiting expression. Its purpose is to understand the philosophical and legal decisions associated with freedom of expression.<sup>62</sup> However, in order to provide some context related to the topic, I split the discussion into two parts: (1) the limitations found in theory; and (2) the limitations in practice. This study use different examples to explore in depth how the U.S. and Egypt have practiced and applied freedom of expression. In thinking through these issues, I do not focus exclusively on one legal aspect. Thus, the study is organised into ten chapters. Chapter 1 provides a short legal background in order to understand and discern the similarities and differences between the practices of freedom of expression in the U.S. and Egypt. In this chapter, a number of questions will be raised including the following: What are the standards that apply either in the U.S. or Egypt to deal with freedom of speech and, what are the similarities and differences between them? and How do the courts in the U.S. and Egypt treat freedom of speech cases? Also, this chapter rationalises the study's aims and objectives, which are to understand the divergence of freedom of expression laws in the U.S. and Egypt. In addition, this chapter deals with the aim and scope of the study. Finally, Chapter 1 illustrates the method and the sources adopted by the study. The aim of this chapter is to give key conclusions and arguments of the thesis.

Chapter 2 is divided into two sections: (1) conventional means of speech, and (2) unconventional means of speech. Each section examines the concept of the meaning of speech by shedding some light on how scholars have interpreted the meaning of speech. The chapter aims to create a framework for understanding the meaning of speech. This is because the meaning of words, intentions, and behaviours differs significantly from one state to another, and depends on different circumstances, such as the differences between cultures and customs. Thus, this chapter expands and broadens knowledge about the meaning of speech and gives a general understanding of how speech can be practiced under the meaning of freedom of expression.

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<sup>62</sup> Barendt ( n 1).pp.3, 4,5.

For Chapter 3, it is necessary to justify the value of freedom of expression since, as Schauer noted, “a limitation of speech requires a strong justification”.<sup>63</sup> Therefore, this chapter is devoted to examining the value of speech within three philosophical justifications for the protection of freedom of speech. These are (1) the search for truth, (2) individual autonomy theory, and (3) democracy and self-government theory. Section 2 of Chapter 3 seeks to deal with offensive and harmful speech. The purpose of discussing this topic is to provide a convincing justification for some types of speech to be excluded from legal protection. Indeed, speech, as mentioned above, is subject to different meanings and justifications. Therefore, clarifying the justification for offensive and harmful speech will help to give a clearer understanding about why speech in Egypt, for example, is dealt with in a manner often considered unsatisfactory by Americans and visa versa. Also, this would create an understanding of freedom of expression and expand and broaden knowledge about its limitations.

Chapter 4 introduces three international instruments. The right to freedom of expression will discuss along with the international human rights norms and jurisprudence. This would help to define the limitations on freedom of expression. An attempt will be made to explain how legal orders to the limitation of freedom of expression may shape decision-making trade-offs between the demands of liberty and the need to guarantee individual and collective security. In doing so, special attention will be given to the adjudicative methods of balancing. Also, the work will consider the impact of applying a balancing approach on the right freedom of expression, protected under the European Convention on Human Rights.

Chapter 5 continues the approach adopted in Chapter 2 whilst focusing on the meaning of speech. This chapter examines the meaning and scope of freedom of expression under the American Constitution. When referring to the meaning of speech, some assume that verbal speech is the only meaning of speech. However, the term ‘speech’ under American law takes different forms. According to Waldman, “[w]hen 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”.<sup>64</sup> Therefore, the meaning of speech in the U.S. is examined by shedding light on how different courts have interpreted the meaning of speech. Also, this chapter seeks to reveal that, although freedom of expression is a Constitutional right, a

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<sup>63</sup> Schauer FF, *Free Speech: A Philosophical Enquiry* (Cambridge University Press 1982).p.8.

<sup>64</sup> Joshua Waldman, ‘Symbolic Speech and Social Meaning’ [1997] *Columbia Law Review* 1844.p.1847.

wide parameter of limitations impinges on it in practice. The emphasis on the nation's well-being allows a wide interpretation of restrictions which, at times, is used for ulterior motives such as to maintain national security. The aim of this chapter goes beyond mere theoretical postulations to examining the legal practicalities that lead to identifying the limits of freedom of expression under the American legal system.

Sections 1 and 2 of Chapter 6, examine the U.S. Supreme Court's methods of interpreting the First Amendment, namely, the categorical and balancing approach. The wide scope, the absolutist and pragmatic positions regarding the First Amendment, and the complexity of freedom of speech cases give the U.S. Supreme Court an opportunity to set a rule that can be considered to be a reference for defining the boundaries of freedom of speech.<sup>65</sup> Thus, Chapter 6 provides a historical background on how the U.S. Supreme Court has interpreted the First Amendment. It explains the meaning and the metaphorical system of protected and unprotected speech under the categorical and balancing approach. Also, Chapter 6 critically examines these two methods. This is done in order to highlight how the American court deals with freedom of expression issues, with the aim of supporting my hypothesis, that limitations of freedom of expression can be changed under different circumstances.

Chapter 7 focuses on the idea and scope of freedom of expression in Islamic law. This is because the primary source of human rights law in Egypt comes from Islamic law. This chapter is divided into two sections. Section 1 considers the concept and initial basis of freedom of expression. Section 2 examines the purpose of freedom of expression in Islamic law. The argument, thus, is developed through an examination of the Islamic text (the Qu'ran) and tradition (Prophetic Sunnah), and a consideration of some select periods of Islamic history (the eras of some Rightly-Guided Caliphs). In addition, this paper discusses the interpretations of some earlier schools of law regarding these two sources of Islamic Law, besides the more recent contributions by Muslim scholars who have advanced fresh interpretations of freedom of speech in light of the changing realities of contemporary Muslims societies. The justification of freedom of expression under Islamic law will enable readers to become familiar with and gain a better understanding of the issues and the development of freedom of expression in Egyptian law. The aim of this chapter is to establish a general framework of the principles that constitute the right

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<sup>65</sup> Schauer, 'Categories and the First Amendment: A Play in Three Acts' (n 32).p.267.

to freedom of expression under Egyptian law. This would help to understand why some speech deserves constitutional protection while others do not.

Chapter 8 establishes that freedom of expression in the Egyptian legal system is rich with a wide range of rules that allows us to understand Islamic law and its application. In pursuit of this, it is necessary to establish a general historical background and discuss the meaning of freedom of expression under the Egyptian Constitution in order to set the context for further discussion of its protection. The approach adopted in Egypt is different from the approach adopted in the U.S. Therefore, this chapter looks at how the SCC has interpreted Islamic law and its role in protecting freedom of expression.

For Chapter 9, it is necessary to define the limitations on freedom of expression in Egypt. Egyptian law does expressly permit some restrictions on freedom of expression in order to protect private and public interests. In pursuit of this, it is necessary to look at how the courts, as the last bastion of liberty, exercise judicial activism to protect that right. The study goes beyond mere theoretical postulations to examine how Egyptian law strikes a balance between freedoms of expression and protecting the reputations of others, public morals and national security. This would clarify the limitations placed on freedom of expression in practice.

Finally, Chapter 10 concludes that the difference between the law of freedom of speech in Egyptian law and its counterpart in American law is a matter of degree, which rules out an absolute incompatibility between the two. A careful reading of the U.S. and Egyptian law, in addition to many court cases, shows that, in both laws, freedom of speech is not absolute or close to absolute. This study, therefore, proves that freedom of speech can be restricted whenever there is a need to do so. In the words of Sadurski, “the government would be obliged to prohibit a speech act whenever it would be reasonable to expect that any resulting harm outweighed the harm of restraining people from speaking”.<sup>66</sup>

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<sup>66</sup> Sadurski (n 19).p.38.

## Chapter Two

### 2. Conventional and Unconventional Means of Speech

#### 2.1 Chapter Outline

Since freedom of speech principle has a wide range of meanings, it is therefore necessary to begin by clarifying the forms that fall under the meaning of speech. This would be the first step towards defining the limitations on freedom of expression. Questions that should be raised about the meaning of speech not only are of concern to political or social philosophers, but also have to be answered by law specialists, who are able to interpret constitutional guarantees and the inherent meaning of speech. When discussing the meaning of speech, in fact, more than one form should be taken into account. The meaning of words, as well as, intent and conduct accompanying the words are considered the most important elements that characterise the meaning of speech. Freedom of speech or speech thus raises a complexity of issues that require a balanced approach to determine the target meaning. The outcome of this balanced approach will ultimately help to expand knowledge about speech, as well as, opens the door for more practising to this right on a wide range.

It is not the purpose of this chapter to rehash the contentions about free speech. The primary goal, rather, is to delimit the category of speech that falls within constitutional protection in the first place. But, in light of this logical link, it is necessary to provide at least a brief explanation of speech and its interrelation with other acts. Professor Thomas Emerson, considered one of the most prominent modern legal scholars, in a contribution to work representing expression, writes: “the functions of expression and the principles needed to protect expression in such areas are different from those in the main system, and that different legal rules may, therefore, be required”.<sup>67</sup> Although some actions or behaviours fall outside speech forms,<sup>68</sup> the focus of this chapter is directed to the meaning of speech through different views.

The distinction between speech and the action of a free speech clause is relevant to questions about the meaning of speech. While some verbal communication falls outside

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<sup>67</sup> Thomas Irwin Emerson, *The System of Freedom of Expression* (Random House Trade 1970).p.20.

<sup>68</sup> Barendt (n 1).p.79.

speech and has no meaning (e.g, 'speaking loudly in libraries'), some expressive conduct delivers the meaning to the listener in more than pure speech, therefore, this kind of act falls in the heart of the 'free speech doctrine', such as in picture and film speech.<sup>69</sup> Thus, drawing a line between speech and conduct requires an understanding of the latter meaning of speech.

This part of the discussion, then, revolves around two principal issues. The first concerns the meaning of speech; in particular, whether it covers more than a form which may be understood as communicating a message. The second is the scope of speech; that is, what falls within and what falls outside the concept of speech can only be established if we have a clear perspective as to the meaning of speech. My aims are not to discuss the meaning of speech from the linguistic perspective, but rather to search for the meaning that falls under legal protection. This discussion, then, revolves around the questions, (1) What is the meaning of speech? and (b) What kinds of acts or symbols are covered by the freedom of speech principle? It is important to draw a line between protected and unprotected speech. Moreover, according to Justice Black, the distinction between speech and conduct is the first step towards distinguishing between protected and unprotected speech. It would be easy for courts to uphold the regulation of any form of protests that can be regarded as unprotected speech.<sup>70</sup> In other words, "distinction is essential if we wish to maintain the boundary between legislative and judicial roles in a democratic society".<sup>71</sup>

One important clarification is required before we continue. The general principle that everyone shall have the right to freedom of speech is not itself a controversial issue, yet differences of opinion arise regarding the meaning of speech. The speech that will be discussed here could be defined as the communication of an idea, information, and artistic sentiment through means that are linguistic, pictorial, or traditionally artistic. Thus, in order to examine this issue, many legal views should be taken into account to clarify the line between speech, in its pure form, on the one hand, and communicative conduct on the other. Finally, the meaning of speech will not serve the context of freedom of speech; rather, it may help to understand the situations that revolve around the theories of freedom of speech. Communication of political, economic, social, religious, and other

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<sup>69</sup> Andres Moles Velazquez, 'Autonomy, Freedom of Speech and Mental Contamination' (University of Warwick 2007).p.18.

<sup>70</sup> Labor Board v Fruit Packers, 377 US 58 (1964).

<sup>71</sup> Miller v Civil City of South Bend, 1990.

issues is not excluded from the general principle of speech, but the only issue raised here is that concerning the kind of speech that needs to be contextualised as speech and thus fall under the freedom of speech principle.

## Section I

### 1. Conventional Speech: Pure Speech

#### 2.1.1. Written and Spoken Words

Since pure speech is considered the most common form of speech, it is significant to specify the meaning of it. The different opinions that are raised by many scholars illustrate this fact. Locke<sup>72</sup> and Frederick Copleston<sup>73</sup> found speech devoid of any act. However, others completely oppose the former opinion, such as Tien, who founds that nothing can be excluded from speech,<sup>74</sup> and Sadurski, who asserted that speech cannot be pure and is always associated with other factors.<sup>75</sup> What is more, Gardiner, in his point of view, found that speech does not become speech unless it has four main elements: “a speaker, listener, words, and things to be spoken about”.<sup>76</sup> While the written word, which is introduced by books, magazines, newspapers, and the internet (social media), can deliver ideas to the reader or listener, the spoken word is considered to have a stronger effect on an audience than other kinds of words.<sup>77</sup> In spite of the fact that there are different kinds of speech, either in the printed word<sup>78</sup> or thoughts which differ in some ways from words and symbols,<sup>79</sup> they are all covered by the freedom of speech concept. Thought is a kind of communication among members of society and a way to convey an idea from one to another. The philosopher John Locke, made a strong link between ideas and words. To Locke, words are the external translation of invisible ideas that are held by men, and thoughts enable one to express his/her feelings via articulate sounds more effectively than by any other natural connection. Thus, without thoughts, words cannot practise their primary function in delivering ideas and would be useless.<sup>80</sup> Commenting

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<sup>72</sup> John Locke, *An Essay Concerning Human Understanding* (Eliz Holt 1700), p.328.

<sup>73</sup> F Copleston, ‘A History of Philosophy: Modern Philosophy: The British Philosophers. Part II: Berkeley to Hume.(Vol. 5)’ [1964] Garden City, NY: Image.p.102.

<sup>74</sup> Lee Tien, ‘Publishing Software as a Speech Act’ (2000) 15 Berk. Tech. LJ 629.p.638.

<sup>75</sup> Sadurski (n 19).p.44.

<sup>76</sup> Alan Henderson Gardiner, ‘The Theory of Speech and Language (1932)’. Abstract.

<sup>77</sup> Richard Moon, *The Constitutional Protection of Freedom of Expression* (University of Toronto Press 2000).p.28.

<sup>78</sup> Barendt (n 1).p.75.

<sup>79</sup> Copleston (n 73).p.102.

<sup>80</sup>According to Locke “ idea which every one thinks on, or intends by that name, is apparently very different in Men using the same language. For example, some link gold with anything bright and strong, others link

on Locke's theory, Kretzmann argued that Locke introduced two main ideas supporting his claim "to apply words to signify immediately other than one's own ideas". First, speech is the mark of the speaker's idea that is always delivered by sound. Second, words are nothing without an idea, and when one uses words to deliver his/her idea, they create a meaningful phrase.<sup>81</sup> However, Locke did not address how the meaning that we apply to words can be subjected to different interpretations. In other words, words are not necessary to be understood as they are in our minds.<sup>82</sup> It should be noted that the definition of the meaning of speech is related to many factors. Gardiner argued that, "Speech is elastic so that two sentences with the same words may have entirely different meanings, depending on the various factors concerned, such as sentence form, word order, meaning of silence, and the uses of various parts of speech".<sup>83</sup> Speech without communication and clear ideas cannot be pure speech.<sup>84</sup> At an international level, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the First Amendment to the U.S Constitution are no exceptions in the context of using the ultimate meaning of words. According to Diez, "the meaning of words is dependent on their discursive context; that this context is not rigid but inconstant".<sup>85</sup> Thus, the core of free speech is not just pronouncing some words; rather, it is an exchange of experience and all community interests.<sup>86</sup>

Speech, whether the spoken or written word; plays, films, videos, photographs, cartoons, and paintings all fall under the speech umbrella. Furthermore, in order to understand speech, three elements should be available: (1) the time of speech, (2) who is targeted by speech, and (3) the possible consequences of speech. Clearly, the core of speech is to communicate, deliver, and participate with others, and any restriction or limit on this right will directly affect the freedom of speech. For example, when individuals have an idea, they usually express it by communicating with others with any kind of speech, but when the idea is restricted by law or force, the benefits and advantages of the idea would

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gold with the colour yellow and anything having worth or value. Therefore, a person is affected by the ideas that he has rather than word itself. See, Locke (n 72). pp 282,283,363, 364.

<sup>81</sup> Norman Kretzmann, 'The Main Thesis of Locke's Semantic Theory' (1968) 77 *The philosophical review* 175.p.187.

<sup>82</sup> Trager and Dickerson (n 12).p.26.

<sup>83</sup> Gardiner (n 76). Abstract.

<sup>84</sup> David Braddon-Mitchell and Caroline West, 'What Is Free Speech?' (2004) 12 *Journal of Political Philosophy* 437.p440.

<sup>85</sup> Thomas Diez, 'Speaking'Europe': The Politics of Integration Discourse' (1999) 6 *Journal of European public policy* 598.p.610.

<sup>86</sup> Martin Philip Golding, *Free Speech on Campus* (Rowman & Littlefield 2000).p.17.

be useless.<sup>87</sup> Thus, it is not too much of an exaggeration to say that speech as a concept requires many factors to complete speech system.

### 2.1.2. Artistic Speech

As I have already mentioned, speech can be expressed in many ways, including artistic speech. The Oxford English Dictionary (OED) defines art as “[t]he expression or application of human creative skill and imagination, typically in a visual form such as painting or sculpture, producing works to be appreciated primarily for their beauty or emotional power”.<sup>88</sup> As a result, speech can be performed by one of these skills. While the general meaning of speech is limited by the use of words, artistic works or ideas can be more comprehensive than other kinds of freedom of expression as they can be ‘seen, heard, and held’.<sup>89</sup> According to Barendt, “the use of [art] should be regarded as speech, particularly when its meaning is clearly established as a comparable verbal or written message”.<sup>90</sup> An expression such as art is able to expand our knowledge and experience, therefore, it should be protected by law.<sup>91</sup> Interestingly, art as a form of speech goes beyond the traditional view, which focuses on painting, sculpture, and multimedia, as it can be practiced by dancing. However, art is not perceived as an absolute right. According to a group of judges, “motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee. Nor may an entertainment program be prohibited solely because it displays the nude human figure”.<sup>92</sup> This diversity gives people who practise this kind of speech further space to express their freedom. Thus, the interrelation of art and free speech (in general)<sup>93</sup> is not based on two concepts, rather, the combination of art and many kinds of freedom fall under the freedom of expression scope.

The crucial activity of artistic speech goes hand in hand with progress and development, especially in democratic societies. According to Meiklejohn, art is one of the most important expressions and should have a high standard of protection. He believed that “there are many forms of thought and expression within the range of human

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<sup>87</sup> Nigel Warburton, *Free Speech: A Very Short Introduction* (OUP Oxford 2009).p.5.

<sup>88</sup> Oxford Dictionaries’ <<https://en.oxforddictionaries.com/definition/art>> accessed 28 November 2017.

<sup>89</sup> Howard Saul Becker, *Art Worlds* (Univ of California Press 1984).p3.

<sup>90</sup> Barendt (n 1).p78.

<sup>91</sup> C Edwin Baker, *Human Liberty and Freedom of Speech* (Oxford University Press 1992).p..26.

<sup>92</sup> *Miller v. Civil City of South Bend*, 197 (1990).

<sup>93</sup> One should be aware that freedom of speech’ is a protected right subject to different jurisdictions.

communications from which the voter derives the knowledge, intelligence, and sensitivity to human values”.<sup>94</sup> The vital role of art is obvious through many works that are introduced either to support or criticise some people’s conduct or behaviour, and sometimes these works play a fundamental role in guiding public opinion more than in other manners. Cartoonists have an influence on society more than words.<sup>95</sup> Picasso commented on the potential meaning of his paintings, as he said, “it isn’t up to the painter to define the symbols... otherwise, it would be better if he wrote them out in so many words”.<sup>96</sup> Clearly, many issues that have emerged on the surface and are handled by graphics, whether related to politics, economics, religion, or society, are characterised in comprehensive expressive drawing. However, cartoons collide with some dissenting views, for example, in relation to politics, which took place in the Iraq war, or in terms of moral protection such as the case of *Muller v. Switzerland*,<sup>97</sup> or on religious issues, which happened when a Danish newspaper printed cartoons mocking the Prophet Muhammad and led to all Muslims being extremely angry.

Provisions that deal with artistic speech under international law, such as Article 10 ECHR, have protected artistic speech under the title of freedom of expression. According to the article, “[e]veryone 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...”.<sup>98</sup> Article 19 (2) ICCPR explicitly defined the freedom of art as one of the rights that falls under its protection. It stated that “[e]veryone 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, either orally, in writing or in print, in the form of art, or through any other media of his choice”.<sup>99</sup> Moreover, in the case *Muller v. Switzerland*, the Court commented:

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<sup>94</sup> A Meiklejohn, ‘The First Amendment Is an Absolute’ [1961] *The Supreme Court Review*.pp.356,257.

<sup>95</sup> Doug Marlette, ‘Freedom of Speech and the Editorial Cartoon: ‘Cartoons Are the Acid Test of the First Amendment’ [2004] *Nieman Reports*, 58 (4)., winter 2004, p.22.

<sup>96</sup> Cited in Alan Haworth, *Free Speech: All That Matters* (John Murray Learning 2015).p.26

<sup>97</sup> According to European Court of Human Rights, Swiss government’s decision to remove a Swiss national paintings from an exhibition on account moral protection unjustified. The court comment “the paintings had depicted sexual relations between men and animals, and it was not unreasonable for the Swiss government to find that they would offend the sexual propriety of ordinary people. Accordingly there had been no violation of art 10 of the Convention”. *Muller v Switzerland* (1988) 10737/84 13 EHRR 21.

<sup>98</sup> *European Convention on Human Rights* Article 10.

<sup>99</sup> *International Covenant on Civil and Political Rights* Article 19.

“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”.<sup>100</sup>

Although the right to art or artistic speech under the international human rights law has taken implicit and explicit forms, the true meaning of this right has not changed. However, the freedom of art under the U.S. Constitution’s First Amendment has substantive meaning behind its protection. Rubinfeld commented on this: “art is protected [under the First Amendment] because it is the apogee of self-expression and self-determination”. What is more, the diversity of art forms, such as music and painting, have contributed to the upgrading of thought to everything useful.<sup>101</sup> Since an idea itself cannot create expressive conduct, artistic speech or ‘symbolic speech’ is an expression that is able to deliver messages to the public. Indeed, in many cases, it is not difficult to define whether speech includes conduct or not. For example, transferring ideas by different forms of communication with others comes under the freedom of speech protection, but in terrorist acts such as murder and bombing, the conduct moves from the circle that falls under the protection of the law to actions that deserve to be punished.<sup>102</sup>

The existence of artistic speech in the right to freedom of speech makes a significant difference in the practising of this right. The idea of art as a part of speech cannot be understood by comprehensive views; rather, it requires a deep focus on special usage. In this regard, Schauer said, “communication, like speech, is a term of art, a term of technical language, whose definition cannot be derived solely from ordinary usage”.<sup>103</sup> Moreover, the function of artistic speech should be viewed from two angles. First, by the alternative approach to the expression of ideas and opinions, which leads to helping to develop ideas and capacity development. Second, one of the general principle of freedom of speech. Furthermore, there is a logical reason to protect free speech under constitution.

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<sup>100</sup> *Muller v Switzerland (1988) 10737/84.*

<sup>101</sup> Jed Rubinfeld, ‘The Freedom of Imagination: Copyright’s Constitutionality’ [2002] *Yale Law Journal* 1.p.33.

<sup>102</sup> Barendt (n 1).p.80.

<sup>103</sup> Frederick F Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press 1982).p.103.

Innovation (artistic) and freedom of speech can be two sides of the same coin, which means that ‘artistic’ is a natural result of freedom, and without it progress and development will be rigid.<sup>104</sup> Thus, ‘artistic’ cannot be separated from freedom of speech, and artistic speech should be classified as a top priority when discussing freedom of speech. According to Tien in his comment on the First Amendment, arts, with other factors which are called ‘speech sub-communities’, are the basic norm of building social convention.<sup>105</sup> What can be said, is that art is an essential form of expression, and this would help to understand why this form falls under an expression form that deserves constitutional protection.

### 2.1.3. Speech v. Conduct

Many law philosophers are concerned with defining and justifying the theories that deal with speech acts.<sup>106</sup> When traditional views have limited freedom of speech, in ‘pure speech or verbal utterance’, other views are expanded to include different types of freedom of speech such as talking and writing,<sup>107</sup> and ‘speech-plus-conduct and expressive conduct’. This expansion gives free speech further dimension to be more general and advanced.<sup>108</sup> However, in some cases, as in First Amendment jurisprudence, for instance, the protection and valuation of conduct or symbolic speech do not differ from the words.<sup>109</sup> The value of conduct in the process of freedom of speech development is fundamental, as Hayek asserted, in *The Constitution of Liberty*, concerning the importance of action and its functional role in the creation of surrounding typical factors that are suitable for freedom of expression. Hayek’s idea did not focus on action as a kind of speech but rather described the core of action as derived from practices and experiences which ultimately reflect on the value of action.<sup>110</sup> In addition, exercising the

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<sup>104</sup> Nazeem MI Goolam, ‘The Cartoon Controversy: A Note on Freedom of Expression, Hate Speech and Blasphemy’ (2006) 39 *Comparative and International Law Journal of Southern Africa* 333.pp.335, 338.

<sup>105</sup> Tien (n 74).p.635.

<sup>106</sup> Franklyn Saul Haiman, ‘*Speech Acts and the First Amendment*’ (SIU Press 1993).p.10.

<sup>107</sup> Marianne Constable, ‘Law as Claim to Justice: Legal History and Legal Speech Acts’ (2011) 1 *UC Irvine L. Rev.* 631.632.

<sup>108</sup> Ken I Kersch, ‘How Conduct Became Speech and Speech Became Conduct: A Political Development Case Study in Labor Law and the Freedom of Speech’ (2006) 8 *U. Pa. J. Const. L.* 255.p.265.

<sup>109</sup> Arnold H Loewy, ‘Distinguishing Speech From Conduct’ (1993) 45 *Mercer L. Rev.* 621.p.632.

<sup>110</sup> Friedrich August Hayek, *The Constitution of Liberty: The Definitive Edition*, vol 17 (Routledge 2013)..p.138.

free speech act has improved over time. This is obvious through new technology, such as TV broadcasts, Facebook, and Twitter, which are seen as a new way of practising the ‘speech act’.<sup>111</sup> Moreover, the core of conduct can be seen through beliefs and opinions, which are often considered the appropriate way to convey messages more than pure speech.<sup>112</sup>

Before turning specifically to the relationship between speech and action, it is vital to note that there are three elements which characterise the general concept of speech acts:“(1) an exertion of the will, (2) an accompanying state of consciousness, and (3) a manifestation of the will”.<sup>113</sup> However, the term ‘free speech’ is not typically an issue in some activities that are speech acts in ordinary usage and cannot be categorised as freedom of speech; for example, paying money for someone to commit a crime. In contrast, the other forms of speech that are practised almost every day fall under the concept of free speech, such as waving a flag. These kinds of distinctions clarify the importance of this section.<sup>114</sup>

The overlap between speech and conduct is not merely distinct between two concepts; rather, speech and action are seen, in some cases, as inseparable.<sup>115</sup> However, the line between expression and conduct should be defined. According to Professor Emerson,“to attempt to bring such forms of protest within the expression category would rob the distinction between expression and action of all meaning, and would make impossible any system of freedom of expression based upon full protection of expression”.<sup>116</sup> Freedom of speech relies on the consequence of spoken words or symbolic action to obtain constitutional protection. In other words, the outcome of this balancing approach will ultimately differentiate between harm and peaceful freedom. For example, shouting at a football match is treated as conduct, while waving slogans written to demand rights is treated as speech.<sup>117</sup> Moreover, according to Greenawalt, the distinction between speech acts and pure speech can be seen through words which can ‘change the world’.

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<sup>111</sup> Haworth (n 96).p.30.

<sup>112</sup> Lillian R BeVier, ‘The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle’ [1978] *Stanford Law Review* 299.p.319.

<sup>113</sup> Albert Kocourek, ‘Acts’ (1925) 73 *University of Pennsylvania Law Review and American Law Register* 335.p.236.

<sup>114</sup> *ibid.* p.13.

<sup>115</sup> David Kretzmer, Francine Kerschman Hazan and Friedrich Ebert Stiftung, *Freedom of Speech and Incitement against Democracy* (Martinus Nijhoff Publishers 2000).p.88.

<sup>116</sup> Emerson (n 67).p.89.

<sup>117</sup> Loewy (n 109).p.621.

By saying ‘you are fired’, the boss is telling the employee to leave his job; consequently, he loses his job. When the supervisor says, ‘you are successful’, this means that you do not need to study more. These are the kinds of statements that change the situation from ‘do’ or ‘not to do’ in specific ways and thus change the situation from pure speech to speech acts.<sup>118</sup> It can be argued that freedom of expression should have more special treatment than any other freedoms because it is a peaceful activity.<sup>119</sup> John Stuart Mill agreed with this view and asserted that the expression of ideas by pure speech or any other expression is further from aggressive acts than other kinds of actions. Moreover, Mill was very precise when he found that speech forms cannot be subjected to harmful principles unless it has harmful actions.<sup>120</sup> This view almost contrasts with the liberal view in terms of unlimited freedom when even the actions have incitement.<sup>121</sup>

Although the spoken word generally has more protection than conduct, there are two conduct approaches that qualify for speech protection. The first is “the actor's intent to communicate”, and the second is “the observer's interest in understanding the expression”. The main goal of these categories is to serve the public interest and spread knowledge among community members.<sup>122</sup> By contrast, in Emerson’s view there is no difference between speech and conduct. He said, “[A]ll nonverbal [as well as verbal] conduct that is an integral part of assembly would normally be considered ‘expression’”.<sup>123</sup> On the other hand, the use of physical force or violence, against a person or property, would be considered ‘action’. Disruption of a meeting by moving about or making noise must also be counted as ‘action’. This view suggests that when speech and conduct do not cause harm to others, this right should be protected. This view also gives action a vital role as a kind of speech, as it enables people to practise their rights more freely and with greater choice in determining the type of freedom activity.<sup>124</sup> The dividing line between speech and action is obvious through more interest in regulation actions

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<sup>118</sup> Kent Greenawalt, *Speech, Crime, and the Uses of Language* (Oxford University Press 1992).pp.65,66.

<sup>119</sup> Baker (n 91).p.56.

<sup>120</sup> JS Mill, *On Liberty* (1869).p101.

<sup>121</sup> Raymond Suttner, ‘Freedom of Speech’ (1990) 6 S. Afr. J. on Hum. Rts. 372.p.387.

<sup>122</sup> Robert P Gonzalez, Patrick B. and Kuehn, ‘Begging: Free Speech or Poor Conduct?’ (1990) Vol. 5: Is Civil Rights and Economic Development 239.pp.245, 246.

<sup>123</sup> Emerson (n 67).p.293.

<sup>124</sup> According to Emerson, judgment on such conduct, whether it falls under free expression or not, requires focus on the context of the act because action differs from one case to another. For example, some actions are not themselves harmful, but in some cases these actions may cause harm so, the action status changes from protected to unprotected. See Baker (n 91).p.72, 73. See also David Kretzmer, Francine Kerschman Hazan and Friedrich Ebert Stiftung, *Freedom of Speech and Incitement against Democracy* (Martinus Nijhoff Publishers 2000). pp.48, 49.

than in restrictive speech. This view is based on the fact that “preventing certain harms often is more important than protecting an individual’s right to act as one wishes, even if the action is tied to expression”<sup>125</sup>. A similar idea was expressed by Holmes when he asserted the importance of protection of all speech acts unless they threaten public safety and the security of a country and cause immediate danger.<sup>126</sup> Moreover, action can be seen in the view which finds that action or doing things may include verbal conduct when used as violence against others. For example, disruption of peace during a demonstration by shouting or directing abrasive words can also be considered as action.<sup>127</sup>

The idea that speech and conduct cannot be distinguished is related to the fact that speech and action coincide. Throughout history, there are many examples which establish this point. For instance, terrorism was and is always grounded in ideology, or, in other words, incitement by speech. Hate crimes, including murder or torture, also hurt people by using extremist speech, which causes violence. This example and others clarify the complexity of speech and action, or what the limit of speech is that can distinguish it from conduct. What can be said in this regard is that the common factor perpetrated, whether in speech or otherwise, is violence. Consequently, once violence is defined, the inseparable points between speech and action can be formally held apart.<sup>128</sup>

The interpretation which links acts and words has taken further forms, which give the meaning of acts further dimension. A more tranquil debate in language philosophy, and from a philosopher can be seen in Austin’s view, he found that no actions can be performed without words.<sup>129</sup> The relationship between speech and actions is a large and daunting topic, but without getting into deep theoretical water, we can surmise that actions are divided into three main parts. First, an illocutionary act means “the action performed simply in saying something”. Second, the perlocutionary act “is the action performed by saying something”. Third, a perlocutionary act “is an utterance considered in terms of its consequences, such as the effects it has on its hearers”.<sup>130</sup> In addition, the connection between acts and speech can be found in the ‘inequality context’. For instance, ‘steal from a shop and I will give you money or you are fired’ is the

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<sup>125</sup> Trager and Dickerson (n 12).p.18.

<sup>126</sup> *Abrams v United States*, 250 US 616 (1919).

<sup>127</sup> Sadurski (n 19). p.72.

<sup>128</sup> Kretzmer, Hazan and Stiftung (n 115).p.89.

<sup>129</sup> John Langshaw Austin, *How to Do Things with Words*, vol 367 (Oxford university press 1975).p.139.

<sup>130</sup> Rae Langton, ‘Speech Acts and Unspeakable Acts’ [1993] *Philosophy & public affairs* 293.pp.295, 300.

manipulation of transactions. These statements are considered discriminatory acts. When the content of these discriminatory acts removes the ultimate meaning from the content and just convey the obvious ‘meaning and feeling and thoughts’, the discriminatory acts would be meaningless.<sup>131</sup> Thus, the scope of speech acts may be determined not by the effects of the general meaning but by its purpose.

The fact that speech and action are protected under many countries institutions is remarkable and cannot be denied. However, the overlap between speech and action should not draw attention away from the primary component in the freedom of speech process. In other words, what should have more regulation than another action or verbal conduct? According to Robert Trager and Donna Dickerson the clarity and meaning of actions other than oral expression<sup>132</sup> lead to the fact that regulated action is more of a priority than outright expression for many reasons. First, action in its content may have a negative impact, which can cause physical harm, prevent rights, and interfere with other interests. This may have a direct effect on people or the freedom of the expression process. So, preventing this kind of action is an important approach to protecting people from such harmful conduct. Dealing with this kind of conduct is more important than other acts, because in the short term, the consequences of negative conduct may cause imminent danger. Second, generally the results of actions cannot be hidden. For example, pointing a knife at a person because of his opinion or beliefs cannot carry any other meaning than the threat of danger. By contrast, oral speech can carry different meanings in one sentence. For instance, ‘I hate black people’, would likely include many situations in which the statement is not racial. For example, someone might be at odds with a black man. So, these facts draw the line between speech and action in real practice.<sup>133</sup>

Besides what is discussed above, there is another view which differentiates between speech and conduct. There is the importance of dealing with such speech as an action which falls outside free speech protection. This view does not state that speech and action have equal protection, but rather draws the line between acceptable and unacceptable speech. For example, speech that incites violence, terrorism, and racism falls outside the speech umbrella; thus, it should be judged as action. This view clarifies the standard of

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<sup>131</sup> Catharine A MacKinnon, *Only Words* (Harvard University Press 1993),p.100.

<sup>132</sup> Trager and Dickerson (n 12).p.19.

<sup>133</sup> Generally, the topic of oral speech is controversial and subject to many aspects that determine what kind of speech it is and its objectives, as opposed to the opposite action which often has only one interpretation. See *ibid.*pp. 18, 19.

judgement which categorises speech forms depending upon the strict view that cannot accept conduct as a part of speech.<sup>134</sup>

While some find that delivering an idea by acts is a kind of free speech,<sup>135</sup> others are strict and call for distinguishing between conduct and oral speech such as Justice Black. His idea centred on the negative impact of conduct that normally affects public life; therefore, conduct or speech should be regulated. He said, “I have no doubt about the general power of Louisiana to bar all picketing on its streets and highways. Standing, patrolling, or marching back and forth on streets is conduct, not speech, and as conduct can be regulated or prohibited”.<sup>136</sup> This view is consistent with the idea that purports drawing the line between speech and action on the basis of violence, coercion, and threatening state security. In the case of picketing, for instance, picketing includes speech and conduct. In the legal view, gathering information between speech and conduct may cause conflict in the protecting and unprotecting principles. Thus, the separation between them keeps pure speech away from such conduct, which normally includes unprotected elements.<sup>137</sup>

Alexander Meiklejohn said, “the legislature has both the right and the duty to prohibit certain forms of speech”.<sup>138</sup> Clearly, besides drawing the line on speech forms, this view opens the door for the legislature to practise power on the basis of justice and society’s interest. However, any restriction of speech should be justified by governmental action, even if the consequences or the value of other conduct is more or equal to the freedom of speech.<sup>139</sup> This view is consistent with Baker’s view when he said, “barring state-imposed prohibitions of substantively valued conduct greatly increase opportunities for minorities to develop new logics and new realities—the notion that replaces objective truth”.<sup>140</sup>

So, what is the particular reason that lies behind freedom of speech or freedom of actions? What was in Richard Moon’s mind when he said, “our discussion of freedom of expression is framed as constitutional argument, it may become natural to think of the

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<sup>134</sup> Robert B McKay, ‘Preference for Freedom, The’ (1959) 34 NYUL Rev. 1182.p.1196.

<sup>135</sup> Warburton (n 87).p5.

<sup>136</sup> Cox v Louisiana, 379 US 559, 581 (1965). See also, Harry Kalven Jr, ‘Upon Rereading Mr. Justice Black on the First Amendment’ (1966) 14 UCLA L. Rev. 428.p.448

<sup>137</sup> L Frederick Neff, ‘Amalgamated Food Employers Local 590 v. Logan Valley Plaza, Inc.: The Right to Picket on a Privately Owned Shopping Center’ (1968) 73 Dick. L. Rev. 519.p.521.

<sup>138</sup> A Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948). p.18

<sup>139</sup> Schauer, *Free Speech: A Philosophical Enquiry* (n 103).p.8.

<sup>140</sup> Baker (n 91).p.89.

freedom as an individual right against state interference”,<sup>141</sup> or when Scanlon noted that “there will be cases where protected acts are held to be immune from restriction despite the fact that they have as consequences harms which would normally be sufficient to justify the imposition of legal sanction”?<sup>142</sup> These views do not merely illustrate the conjunction between speech and acts; rather, they clarify the importance of actions between individual interest and state regulation. According to Baker, protecting acts as a kind of speech from restriction is vital for developing and processing communities through increasing their experiences and awareness.<sup>143</sup> Lesser or no understanding of the nature of the relation between an individual’s actions and the state might have negative effects on both sides. For example, prohibiting or censoring such speech distorts and impedes these activities without people being satisfied or understanding the reason for banning, which may constitute their public condemnation and cause conflict between the state and individuals.

It seems that categorising harmful speech on a general concept would be insufficient. However, Scanlon defined the two ways which could justify any restriction of acts of expression:

“(a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; (b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing”.<sup>144</sup>

Moreover, there is a view that certain expressions guide others to the appropriate approach to worthy causes for action and expression which motivate action in different ways and that easing the task and achieving the potential goals are more valuable than other types of action.<sup>145</sup> In addition, by classifying some immoral conduct such as hate speech or obscenity, as acts of expression rather than another kind of speech, speech act supporters find it a practical approach to easing the task for those who distinguish

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<sup>141</sup> Moon (n 77).p.219.

<sup>142</sup> Susan J Brison, ‘The Autonomy Defense of Free Speech\*’ (1998) 108 Ethics 312.p.320.

<sup>143</sup> Baker (n 91).p.90.

<sup>144</sup> Thomas Scanlon, ‘A Theory of Freedom of Expression’ [1972] Philosophy & Public Affairs 204.p213. It should be noted here that Scanlon has defined harmful actions in six cases. For more details see pp.210, 211.

<sup>145</sup> *ibid.*p.212.

between the issues that should be directly subjected to the law from the cases that should be subject to additional control through the law.<sup>146</sup>

As mentioned above regarding the potential benefits of application of the classification of action, this does not deny the fact that there might be a drawback to such a distinction. This can be seen through Emerson's view when he said, "attempt[s] to bring such forms of protest within the expression category would rob the distinction expression and action of all meaning, and would make impossible any system of freedom of expression based upon full protection of expression".<sup>147</sup> So far, this view is consistent with that of Professor Frederick Schauer, who found that the distinction between speech and acts is necessary because the advantages of speech are greater than conduct in many aspects; consequently, special protection must be offered for speech even if it has a negative impact.<sup>148</sup> In addition, according to Barendt, the concept of speech is quite far from action; therefore, equality between them would be far from the truth. Barendt's view was based on the foundation that the consequences of acts are more harmful than speech.<sup>149</sup> This view is comparable with the saying "Sticks and stones may break my bones, but words can never hurt me".<sup>150</sup>

There is another opinion upheld by Samuel Nelson, who recognises that the theoretical view of freedom of speech does not depend on freedom whether it is speech or action, but rather, the core of freedom focusses on the potential harm that might arise from conduct.<sup>151</sup> Words and actions are derived from the same principle, which is based on the consequence of expression. A threat to national security, for instance, may cause harm to the state by both words and action. I illustrating this point, because words and actions are capable of harming others, so they should be subjected to the same regulations.<sup>152</sup>

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<sup>146</sup> Haiman (n 106). Review. Generally, Haiman focuses on the social control of organizing such harmful conduct under the law, and he believes that drawing the line between pure speech and actions is a crucial step towards a free society.

<sup>147</sup> Emerson (n 67).p.89.

<sup>148</sup> Frederick Schauer, 'The Phenomenology of Speech and Harm' (1993) 103 *Ethics* 635.

<sup>149</sup> Barendt (n 1).p.79. The distinction between speech and act can be seen through speech which has no or little effect and acts which include terrorist activity that uses suicide and other crimes to send a message.

<sup>150</sup> James Garbarino and Ellen DeLara, 'Words Can Hurt Forever (2010)'.p.78

<sup>151</sup> Samuel P Nelson, *Beyond the First Amendment: The Politics of Free Speech and Pluralism* (JHU Press 2005).p.147.

<sup>152</sup> Schauer, *Free Speech: A Philosophical Enquiry* (n 81).p64. See also, Susan Hurley, 'Imitation, Media Violence, and Freedom of Speech' (2004) 117 *Philosophical Studies* 165.p.191. see also Haiman (n 106).p.1

#### 2.1.4. Regulating Pure and Action Speech

Although there are many opinions that have asserted the equality between pure speech and action as a type of freedom of expression, this does not mean that the two conducts should be subjected to the same regulations. The only way speech and action can be differentiated is by isolating any harm from being pure speech.<sup>153</sup> According to Cox, restrictions or permission in many laws that deal with freedom of speech do not rely on rigid bases; rather, they depend on the case's situation. For example, spreading rumors may have no or less restriction on normal days, but in times of emergency, the regulations may be changed in order to maintain security. These norms can apply to both speech and actions.<sup>154</sup> This view is consistent with the idea which states that every action is permitted unless there is a logical reason to restrict it.<sup>155</sup> Thus, it can be seen from the two views that pure speech and action speech are not immune from restriction. Moreover, Holmes goes beyond the former view as it asserted that in some cases the intent to cause harm would justify the restriction of free speech.<sup>156</sup> *People v. Most* held that “[a] breach of the peace is an offense...it may be committed by written words...or even by spoken words, provided they tend to provoke immediate violence”.<sup>157</sup> However, intention to communicate needs more effort to decide whether it encompasses the meaning of speech or not.<sup>158</sup>

Justice Oliver Wendell Holmes asserted the importance of surrounding circumstances in determining whether such an act should be protected or not. For Justice Holmes, “[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent”.<sup>159</sup> For example, in the case of *Rice v. Paladin*, the Fourth Circuit decided that the surrounding circumstances of criminal culpability played an important role in determining the practical elements that assist in

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<sup>153</sup> Haiman (n 106).p.2.

<sup>154</sup> Archibald Cox, *Freedom of Expression* (iUniverse 1999).p.5.

<sup>155</sup> Greenawalt, *Speech, Crime, and the Uses of Language* (n 118).p.10.

<sup>156</sup> *Abrams v. United States*, 250 U.S. 616,627(1919).

<sup>157</sup> *People v Most*, 171 NY 423 (NY 1902).

<sup>158</sup> *Barendt* (n 1).p.81

<sup>159</sup> *Schenck v United States*, 249 US 47 (1919). See also, Lonan Weissblum, ‘Incitement to Violence on the World Wide Web: Can Web Publishers Seek First Amendment Refuge’ (1999) 6 Mich. Telecomm. & Tech. L. Rev. 35.p.40.

committing a crime.<sup>160</sup> In addition, the surrounding circumstances can transfer speech from protected to unprotected rights. For instance, political speech is generally protected under the free speech principle, but when the speech calls for incitement during war time, the situation would be changed from protected to unprotected speech. This eases the task of courts in dealing with each case separately from others.<sup>161</sup>

It can be said, then, that it is true that the freedom of speech has been protected under many international conventions. However, under the (ECHR), for instance, in such circumstances the protection cannot be overbroad and treated with some types of free expression separately from another case without thereby committing to its protection in every situation.<sup>162</sup> The distinction between protecting and unprotecting conduct is a controversial measurement. For example, a transit authority allows solicitation for assisting the community, and by contrast, prevents the poor from begging in public places. The transit authority justifies this by saying “that begging is not covered by the free speech concept, because it is action, not expression”.<sup>163</sup> The dilemma of speech does not stand on the limitation of protection; rather, it extends far to justify any speech restriction. For example, when the state restricts speech or conduct, the restriction should be justified.<sup>164</sup> Thus, so far, this view clarifies the diversity and complexity of understanding and application of the general frame of freedom of speech.

### **2.1.5 Section Summary**

As mentioned at the beginning of this chapter, freedom of speech has different forms, including acts. However, the vagueness of the vision of the limitation of harmful speech, for instance, is considered to be one of the controversial issues that confront freedom of speech. This is obvious through different views raised on this issue and can be divided into two points. First, some have asserted that harmful speech should be excluded from the protection of freedom of speech. Second, others have found that “bad speech is often

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<sup>160</sup> *Rice v Paladin Enterprises, 96-2412 (1997)*. See also, Weissblum (n 159).p.37.

<sup>161</sup> Barendt (n 1).p.76.

<sup>162</sup> P Bernt Hugenholtz, ‘Copyright and Freedom of Expression in Europe (2001)’.

<sup>163</sup> Trager and Dickerson (n 12).p.19.

<sup>164</sup> Susan J Brison, ‘Speech, Harm, and the Mind-Body Problem in First Amendment Jurisprudence’ (1998) 4 Legal Theory 39.p.41.

a part of a good way of life”.<sup>165</sup> All human beings have an interest in being allowed to send and receive ideas, emotions, experiences, and experiments. In order to do so, clear vision and logical answers should be drawn to pave the way for defining the limits that should be set for free speech limitation.

Many views which categorise harmful conduct generally fall outside legal protection; the advocacy for harmful conduct, for instance, is encompassed in First Amendment protection.<sup>166</sup> The effect of surrounding circumstances through culture, place, and religion in defining the concept and limitation of speech is obvious in many countries; therefore, the protection should be subjected to those circumstances. According to Trager and Dickerson, “the interrelationship between the communicator and the audience . . . wrapped in a culturally created context, must be considered when deciding if expression is eligible”.<sup>167</sup>

To sum up, the public’s increasing appetite for freedom requires a constant rethinking of the place of pure speech and conduct and the proper scope of legislation within our burgeoning society. It may well be that the pressures for one form of legislation will be increasingly felt as dissolving free speech value. To some extent, this may inevitably mean that the state’s power to grant exclusive freedom in certain areas will have to be modified. It may also mean that in certain instances pure or action speech may have to be revised. It is not possible to offer a simple definition of ‘pure or action speech’ in terms of what is included within or outside free speech limitations. As mentioned elsewhere in this chapter, the concept of speech is far too complex for that, and at too many points the definition depends upon the surrounding circumstances. According to Brison, “speech is both context-dependent and open to multiple interpretation”.<sup>168</sup> As a result, any attempt at a simple type of definition is fundamentally unsound.

The above point should not be seen that my suggestion is that pure or action speech should have unlimited interpretation despite the idea which says that “there is no limit to the number and variety of speech communities”.<sup>169</sup> I do not view interpreting regulating speech as unjustifiable. What I am saying is that even speech that consists of a variety of

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<sup>165</sup> Joseph Raz, ‘Free Expression and Personal Identification’ (1991) 11 Oxford Journal of Legal Studies 303.p.316.

<sup>166</sup> Weissblum (n 159).p.37.

<sup>167</sup> Trager and Dickerson (n 12).p.29.

<sup>168</sup> Brison (n 142).p.55.

<sup>169</sup> Bolinger, *Aspects of Language* (New York: Harcourt Brace Jovanovich 1975).p333.

types should be regulated on certain grounds. My objective in this chapter is to illustrate the precise meaning of speech in order to ease the task for the reader in understanding the meaning of free speech because it gives people multiple choices in the ways that can express their freedom more than other freedoms.

## Section II

### 2.2. Unconventional Speech: Communicative Conduct

#### 2.2.1 Introduction

After exploring different forms of speech which helped to clarify the position on conventional speech, it is important now to have a look at the forms of action that fall under free speech protection. Communicating ideas through forms of expression other than writing or speaking is vital to determining the protection that should be applied. According to Thomas Emerson, "...the focus of inquiry must be directed toward ascertaining what is expression, and therefore to be given the protection of expression, and what is action, and thus subjected to regulation as such."<sup>170</sup> Moreover, the protection that covers action and limits expression is the line that separates them.<sup>171</sup> The potential meaning of speech makes this right functional; consequently, "free speech is defined not by what [it] is, but by what it does".<sup>172</sup>

Some forms of expression, such as words, paintings, sculptures, and flags, are types that fall within symbolic expression. Attempts to convey ideas or emotions to other people by symbolic forms, rather than words or pictures, are common. The distinct meaning of symbols are not due to the message they convey; rather, the sophisticated meaning of symbols themselves what are give a message further dimension. According to Wasserman, "Any attempt to protect the symbol, to protect its ability to present its symbolic message without interference from conflicting messages", breaks down because the very decision to protect the symbol assigns that preferred message to it".<sup>173</sup> The word 'camel' has no absolute meaning, but people who speak Arabic agree that it denotes patience and endurance, and the word 'camel' brings an animal to mind for some people and a desert for others. The word 'camel' is a symbol for a huge creature that lives in the desert but is not the only symbol for that animal.<sup>174</sup> As Harry Kalven noted, "all speech is necessarily speech plus. If it is oral, it is noise and may interrupt someone else;

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<sup>170</sup> Emerson (n 67).p.18. See, Sadurski (n 19).p.44.

<sup>171</sup> Trager and Dickerson (n 12).p18.

<sup>172</sup> Schauer, *Free Speech: A Philosophical Enquiry* (n 103).p.91.

<sup>173</sup> Howard M Wasserman, 'Symbolic Counter-Speech' (2003) 12 Wm. & Mary Bill Rts. J. 367.p.391.

<sup>174</sup> Trager and Dickerson (n 12).pp.20, 21.

if it is written, it may be litter”.<sup>175</sup> I would add that even acts that are exercised every day can be a form of speech; for example, spending money to buy something is an act that can express a desire to buy a specific book or product or donate money to election candidates.<sup>176</sup> Thus, according to what has been said symbolically or through speech plus covers most of our daily life practices and symbolic conduct, considering the alternative ways to convey ideas or messages rather than normal speech.<sup>177</sup> In fact, the broad concept of symbolic expression helps to dissolve potential differences between speech and non-speech conduct. The distinction between speech and action in reality does not exist. Rather, the boundaries that revolve around speech and action, or protected and unprotected speech are, not from social or economic consequences but are related to political factors.<sup>178</sup> The difficulties that revolve around some cases, such as burning flags and draft cards, require more effort to draw the line between speech and conduct.<sup>179</sup> According to Josh Cohen, “[i]n a society with relatively poor and powerless groups, members of those groups are especially likely to do badly when the regulation of expression proceeds on the basis of vague standards whose implementation depends on the discretion of powerful actors”.<sup>180</sup> While there is no obvious distinction between expression and conduct,<sup>181</sup> generally, non-communicative or non-speech activities are subject to more regulation than are communications.<sup>182</sup> In order to clarify conduct that is more than just the communication of ideas, a wide vision should be focussed on the reasons rather than the type of conduct or speech.<sup>183</sup> It should be noted here that the methods of communication are varied, but the most important factor is to define the limitation on communication and whether it falls within the scope of free speech principles or not.<sup>184</sup>

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<sup>175</sup> Harry Kalven, ‘The Concept of the Public Forum: Cox v. Louisiana’ (1965) 1965 The Supreme Court Review 1.p.23. See, Haiman (n 106).p.4.

<sup>176</sup> Owen Fiss, *The Irony of Free Speech* (Harvard University Press 2009).p.14.

<sup>177</sup> James R Dyer, ‘Texas v. Johnson: Symbolic Speech and Flag Desecration under the First Amendment’ (1990) 25 New Eng. L. Rev. 895.p.895.

<sup>178</sup> Frederick Schauer, ‘On Deriving Is-Not from Ought-Not’ (1993) 64 U. Colo. L. Rev. 1087.p.1092.

<sup>179</sup> Joshua Cohen, *Philosophy, Politics, Democracy: Selected Essays* (Harvard University Press 2009).p.124. See, Stephen E Gottlieb, ‘Speech Clause and the Limits of Neutrality, The’ (1986) 51 Alb. L. Rev. 19.p.24.

<sup>180</sup> *ibid.*p.124. See also, Henry Louis Gates, ‘Truth or Consequences: Putting Limits on Limits’, *Proceedings of the American Antiquarian Society* (American Antiquarian Society 1994).p.328.

<sup>181</sup> Gates (n 180).p.320.

<sup>182</sup> Schauer, ‘On Deriving Is-Not from Ought-Not’ (n 156).p.1090.

<sup>183</sup> Sadurski (n 19).p.44.

<sup>184</sup> Schauer, *Free Speech: A Philosophical Enquiry* (n 103).p.96.

Since, in some cases, the distinction between expressive conduct or symbolic speech and speech associated with conduct is vague, and since verbal speech has wide constitutional protection, research in symbolic and speech plus which accompanies pure speech may remove such vagueness. According to Schauer, “. . . in defining ‘speech’ we are not just attempting to describe something. Rather we are trying to carve out categories of activity and give to the activities thus circumscribed a particular degree of protection”.<sup>185</sup> Since words -written or spoken - do not have enough power to change most events that accrue in our daily life<sup>186</sup> and the comparison normally raised is between pure speech and symbols plus speech,<sup>187</sup> the aim in this section is to discuss the issues that relate to communication concepts, to examine the concepts of conduct and action that constitute free speech, and to offer an account of non-verbal expression grounded in contemporary free speech practice. It seeks to make distinctions between conduct that is protected and illegal behaviour that is not.

### **2.2.2 Symbolic Speech**

A recurring theme in freedom of speech analysis concerns the expansion of freedom to include various types of speech, including symbolic speech. This type of speech is defined as an essential part of normal or pure speech and they cannot be separated. Ogden and Richards said, “for words, arrangements of words, images, gestures, and such representations as drawings or mimetic sounds we use the term symbols”.<sup>188</sup> Using symbolic speech or behaviour to convey a message rather than words that are spoken or written was considered to be the feature that differentiates symbolic speech from other types.<sup>189</sup> According to Haiman, “. . . the ability to use, transmit, comprehend, and respond to symbols is a uniquely human capacity setting us apart from all other earthly

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<sup>185</sup> *ibid.*p.91.

<sup>186</sup> Charles Kay Ogden and Ivor Armstrong Richards, ‘The Meaning of Meaning: A Study of the Influence of Thought and of the Science of Symbolism (1923)’.p.23. See also, Trager and Dickerson (n 12).p.27.

<sup>187</sup> Melville B Nimmer, ‘Meaning of Symbolic Speech under the First Amendment, The’ (1973) 21 *UCLA L. Rev.* 29.p.31.

<sup>188</sup> Charles Kay Ogden and Ivor Armstrong Richards. p.23.

<sup>189</sup> Dyer (n 177).p.895.

creatures”.<sup>190</sup> As a result, we use symbolic speech as a vehicle to convey ideas that can play an effective role more than well-organised speech.<sup>191</sup>

Symbolic speech is also defined as an alternative way to convey ideas and emotions with a broad conception that may have a stronger effect than words or pictures.<sup>192</sup> For example, wearing five interlocking rings coloured blue, yellow, black, green, and red on a white background has no meaning on its own, but during the past 100 years, the five interlocking rings have come to signify that its connected with the Olympic Games, only because we have agreed to think of the five interlocking rings in that way. Thus, the five rings’ meaning as a symbol can be understood without referring to spoken or written words. However, verbal or written speech is excluded from such symbolic speech. The supporters for this claim say that it is not logical to protect symbolic speech while standing silently inside a demonstration to claim rights.<sup>193</sup> Symbolic speech, as with other freedoms of speech, cannot be immune from such restrictions<sup>194</sup> nor in some cases should the protection of speech be higher than pure speech.<sup>195</sup> However, because communicative conduct involves conduct/action or conduct/symbol rather than mere speech, such conduct should be subjected to narrowed regulations and specific content to prevent any overlap that may occur between them.<sup>196</sup>

Symbols as a form of expression have more constitutional protection than most other kinds of actions for two reasons. First, concerning the positive effects symbols convey to ideas in different forms, despite the fact that symbolic action has various forms of behaviour, it is sufficiently equivalent to pure speech. Second, symbolic speech is often compatible with social and individual concerns.<sup>197</sup> Freedom of speech and symbols promote individual autonomy and the development of personality; talking about one’s ideas and feelings in different forms is a vital liberty. Thus, it can be said that there are different approaches of symbolic conduct to express ideas and emotions. The importance of symbolic speech can be seen throught three grounds. First, examine the forms of

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<sup>190</sup> Haiman (n 106).p.8.

<sup>191</sup> Symbolic Conduct [notes]’ (1969) Vol. 68, I Columbia Law Review pp. 1091-1126..p.1107.

<sup>192</sup> Freedom of Expression, The First Amendment’, Freedom of Expression ACLU’ <http://www.lectlaw.com/files/con01.htm> accessed 13 January 2018.

<sup>193</sup> Trager and Dickerson (n 12).p.21.

<sup>194</sup> I Herman Stern, ‘Enjoyable Organizational Picketing-A Phantasy on the Constitutional Doctrine of International Brotherhood of Teamsters v. Vogt’ (1957) 31 Temp. LQ 12.p16.

<sup>195</sup> ‘Symbolic Conduct [notes]’ (1969) Vol. 68, I Columbia Law Review pp. 1091-1126.p.1103.

<sup>196</sup> Barendt (n 1).p.80.

<sup>197</sup> Sadurski (n 19).pp.45, 47.

symbolic conduct that enable people to practice freedom of speech in different ways. Second, make distinctions between symbolic actions that fall under free speech protection and behaviour that does not. Last, consider the degree to which symbolic speech should be restricted; however, defining the limit of symbolic speech is not an easy task. This is made evident by Justice Brennan, who said, “expression that for practical purposes it partakes of the same transcendental constitutional value as pure speech. Yet where the connection between expression and action is perceived as more tenuous, communicative interests may be overridden by competing social values”.<sup>198</sup>

### 2.2.3 Forms of Symbolic Speech

One of the most controversial forms of protest and recently one of the most common ones involves using different symbols of conduct rather than pure speech. Symbols arise during wars or crises are marked primarily by conveying messages using different forms. Because symbols have distinct meaning which differ from pure speech, the use of symbolic conduct to send messages should be clear and directed to the main object. Symbolic speech forms are many and varied, conveying ideas or emotions by using an emblem or flag,<sup>199</sup> public dances,<sup>200</sup> wearing armbands,<sup>201</sup> practicing some kind of sport,<sup>202</sup> sleeping in public places<sup>203</sup> using gestures and speech, which include written or oral words, and so on, are considered forms of symbolic conduct. Even in pure speech cases, conveying ideas or information would be difficult without involving the use of symbols.<sup>204</sup> Interestingly, remaining silent or showing no emotion is a kind of negative speech.<sup>205</sup> Justice Harlan, on his part, found that on demonstrations, for example, there was conduct other than verbal that deserved to be treated in the same manner as verbal speech.<sup>206</sup> Barendt stated that, “a right not to speak, in particular a right not to be forced to say what a person does not accept, is an integral aspect of freedom of speech”.<sup>207</sup> Whe

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<sup>198</sup> Richmond Newspapers, ‘Inc. v. Virginia’ (1980) 448 U.S. 555.

<sup>199</sup> ‘Notes Symbolic Conduct’ [1968] 68 Colum. L. Rev. 1091.p.1093.

<sup>200</sup> Nimmer (n 187).p.31.

<sup>201</sup> Toni Robinson, ‘Symbolic Speech’ (1971) 38 Brook. L. Rev. 1015.p.1020.

<sup>202</sup> Using sports to convey a message was obvious during World War II when President Franklin Roosevelt “recommended that [m]ajor League Baseball continue to operate during World War II because he believed it contributed symbolically to the American war effort”. See Wasserman (n 173).p.377

<sup>203</sup> Charles W Collier, *Meaning in Law: A Theory of Speech* (Oxford University Press 2009).p.1.

<sup>204</sup> Barendt (n 1).p.78.

<sup>205</sup> George P Rice, ‘The Right to Be Silent’ (1961) 47 Quarterly Journal of Speech 349.p.350.

<sup>206</sup> *Garner v Louisiana*, 368 US 157,185 (1961). See, ‘Notes Symbolic Conduct’ (n 191).p.1097.

<sup>207</sup> Barendt (n 1).p.93.

one expresses a message conveyed in a different form of verbal or symbolic action, it qualifies as the meaning of silence. For example, when people keep silent before a governmental department. This message can be understood that they are not satisfied with the government policy. Indeed, the whole meaning that derives from symbolic speech can be understood in the same way as pure speech. This means that ideas or information which are expressed by symbolic conduct are sufficient and efficient approaches to convey a message. In this regard, Nahmod comments, “[l]ike the interpretation of such words, the meanings attributed to [symbol] depend on what the viewer brings to the activity of viewing”.<sup>208</sup> While the central meaning of a symbol can be delivered by speech, in some cases, as the U.S Supreme Court noted, using symbolic conduct to convey an idea does not mean that this conduct falls under free speech protection.<sup>209</sup> Burning a flag on someone else’s lawn, putting a religious or political logo on his or her house, painting a cross on a group’s place of worship, or damaging their cars cannot be protected under free speech principles, regardless of their symbolic form.<sup>210</sup> As there are endless examples of types of speech that are classified as symbolic speech, some of which are mentioned above, it is crucial, therefore, to discuss one of the most controversial forms of symbolic speech, namely, draft card burning (this is discussed in chapter five).

#### **2.2.4 The Right Not to Speak**

Very different kinds of expression are joined under the label ‘symbolic speech’,<sup>211</sup> The right not to speak is applied to convey messages as an alternative approach to speech and falls under free speech protection.<sup>212</sup> In the words of Justice Murphy, “[t]he right of freedom of thought and of religion, as guaranteed by the Constitution against State action, includes both the right to speak freely and the right to refrain from speaking at all . . .”.<sup>213</sup> Furthermore, this right has a strong link with the autonomy/self-expression principle (this is discussed in chapter three) more than any other principle. This is because the autonomy

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<sup>208</sup> Sheldon H Nahmod, ‘Sacred Flag and the First Amendment, The’ (1990) 66 Ind. LJ 511.p.512.

<sup>209</sup> Howard M Friedman, ‘Why Do You Speak That Way--Symbolic Expression Reconsidered’ (1987) 15 Hastings Const. LQ 587.p.588.

<sup>210</sup> Haiman (n 106).p.6.

<sup>211</sup> Barendt (n 1).p.93.

<sup>212</sup> Trager and Dickerson (n 12).p.176.

<sup>213</sup> *West Virginia State Bd of Educ v Barnette*, 319 US 624,645 (1943).

principle serves the interests of those speakers who want to be silent.<sup>214</sup> Most regulations related to freedom of expression widely discuss the freedom of speech, but there may be times when a person prefers to express his or her ideas by silence or declining to participate in such activities.<sup>215</sup> A national flag, for example, is a form of symbolic speech as discussed earlier in this chapter, but the questions that may arise here are, is saluting a national flag covered by the right of silence? Does freedom of speech allow the government to punish individuals who decline to salute the flag? Could people decline to salute a national flag because of their religious beliefs or feelings of anger against government policy?

The right to not speak, or ‘negative freedom of speech’,<sup>216</sup> is a substantial and objective basis for democratic society. According to Chief Justice Burger, “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind’”.<sup>217</sup> This opinion is based on the grounds that the freedom not to speak or the right to be silent is equal to the right to speak. Supporters of this equality believe that the right to silence is justifiably subject to the same limitations that apply to speech.<sup>218</sup> Furthermore, the U.S. Supreme Court found that protection of the freedom not to speak is essential for a democratic society, and without this right, freedom is incomplete.<sup>219</sup> The fact that silence would justify a high degree of free speech protection indicates there is ambiguity in understanding the nature of public and private systems. As White wrote, “[s]ilence is plainly necessary to any kind of speech, for without silence the words and phrases and syllables cannot be distinguished from each other or from the noise that surrounds them”.<sup>220</sup>

Although the right to silence is an independent form of speech, there are difficulties in treating right-to-silence cases because of the lack of a solid legal basis.<sup>221</sup> The insufficient principle of the right to silence has been obvious over the centuries when people had no

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<sup>214</sup> Anna M Taruschio, ‘The First Amendment, the Right Not To Speak and the Problem of Government Access Statutes’ (1999) 27 Fordham Urb. LJ 1001.p.1012.

<sup>215</sup> Trager and Dickerson (n 12).p.175.

<sup>216</sup> Taruschio (n 214).p.1001.

<sup>217</sup> *Wooley v Maynard*, 430 US 705, 714 (1977). See, Bosmajian, Haig. *The Freedom Not to Speak*. NYU Press, 1999.’p.426.

<sup>218</sup> Rice, George P. “The Right to Be Silent.” *Quarterly Journal of Speech* 47.4 (1961): 349-354.’p.351.

<sup>219</sup> *Wooley v Maynard*,430 US 705 (1977).

<sup>220</sup> James Boyd White, ‘Free Speech and Valuable Speech: Silence, Dante, and the Marketplace of Ideas’ (2003) 51 UCLA L. Rev. 799.p.800.

<sup>221</sup> ‘Rice, George P. “The Right to Be Silent.” *Quarterly Journal of Speech* 47.4 (1961): 349-354.’ (n 196).p.354.

right to keep silent in cases related to religious or political beliefs. According to Bosmajian, “the freedom not to speak has not yet been developed into an applied, clearly defined legal principle, standard or doctrine, as have been other "corollary" and "cognate" rights”.<sup>222</sup>

In right-to-silent cases, the conflict between lower and higher authority is obvious. In *West Virginia State Board of Education v. Barnette*, the U.S. Supreme Court rejected the Board of Education and asserted the children’s right not to salute the American flag because of their religious belief. The Court held that a local government has no power to restrict people’s feelings, opinions, or faith, which is guaranteed under the First Amendment.<sup>223</sup> It was pointed out that there was no conflict between the students’ action and public security; therefore, their action falls under free speech protection. In the words of Justice Murphy, “[t]he right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except insofar as essential operations of government may require it for the preservation of an orderly society”.<sup>224</sup> It is noteworthy that religious freedom falls under the umbrella of freedom of speech protection.<sup>225</sup> Similarly, in the case of *Keyishian v. Board of Regents*, the U.S. Supreme Court upheld the right of state employees not to be compelled under the United States District Court for the Western District of New York to an oath of loyalty that they were not members of ‘subversive’ organizations.<sup>226</sup> In short, both cases are a mode of free thinking. As a result of this, statutes which force or compel people to salute a flag or affirm allegiance are unconstitutional because they are enacted to limit free speech.

What has been discussed illustrates that the protection of the right not to speak is not absolute, which means we face a right-to-silence case. The question here is not whether such a case is undisputable; the question posed is whether silence should be protected or not, that is, when the right to silence falls under freedom of speech guarantees. The concept of free silence is neither carefully clarified nor accurately used in many

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<sup>222</sup> ‘Bosmajian, Haig. *The Freedom Not to Speak*. NYU Press, 1999.’ (n 217).pp.426,440.

<sup>223</sup> *West Virginia State Board of Education v Barnette*, 319 US 624 (1943).

<sup>224</sup> *ibid*.

<sup>225</sup> ‘Rotnem, Victor W., and F. G. Folsom. “Recent Restrictions upon Religious Liberty.” *American Political Science Review* 36.06 (1942): 1053-1068.’p.1057.

<sup>226</sup> *Keyishian v Board of Regents* 389 (1967).

regulations. In fact, this ambiguity gives room for judges and legal scholars to explore the distinctive feature of this right on a freedom of speech basis.

### **2.3 Chapter Summary**

The main aim of this thesis is to draw free speech limitations, and this section upholds one of the most important functions of free speech to achieve this goal. However, defining the limitation of symbolic speech is not an easy task and must consider the most difficult practical issues of the moment that need careful scrutiny. As Chief Justice Warren said, "[w]e cannot accept the view that an apparently limitless variety of conduct can be labelled "speech" whenever the person engaging in the conduct intends thereby to express an idea".<sup>227</sup>

Admittedly, symbolic speech is form of speech. Demonstrations, canvassing, picketing, patrolling, and marching are forms of speech plus. Flag burning or burning draft cards characterises symbolic speech, and both have the same motivation, which is to send a message. However, in each there is an approach that conveys, in its particular context, a different meaning. The discussion of all these freedom of speech forms has shown that, in general, symbolic speech can be expressed in positive and negative ways by using symbols and their meanings. The positive approach of symbols may be conveyed by using normal symbols, such as flags. The negative approach can be expressed by showing the negative impact and lack of interest in such events that take place. Examples of this are refusing to stand in the appropriate manner during the ceremony of a national day or refusal to participate in governmental service.<sup>228</sup> Thus, what can be said is that reflecting contrary views is equal to raising the flag, and this is able to deliver a message in a symbolic way. Finally, this section discusses many forms of freedom of expression that fall under the forms of free expression protection, which would help later when discussing the forms of expression under national law and the cases that have been dealt with by courts.

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<sup>227</sup>*United States v O'Brien*, 391 U S 367,377 (1968).

<sup>228</sup> Wasserman (n 173).p.399.

## Chapter Three

### Section I

#### 3.1 The Justifications of Limiting Freedom of Expression

##### 3.1.1 Section Outline

After attempting to determine the general meaning of speech as the first step to outlining free speech limitation in the previous chapter, this chapter considers a model of theories that are roughly assumed in discussions regarding the freedom of speech. Before proceeding further, it may be useful to analyse what is special about the context in which the legal limit of speech is considered and how it justifies the freedom of speech. Justifications that individuals need to reach an understanding about the freedom of speech should be based on comprehensive and multiple function theories.<sup>229</sup> We can suppose that harmful speech or speech that advocates violence is based on the same principle that covers the search for truth. Surely, no logical answer can justify this equality under the freedom of speech principle. As a result, it is important to understand why the equality between the two types of speech is false.<sup>230</sup> The goal here is not to support any particular account, but, to a certain extent, to provide an overview of a familiar set of assumptions about the limitation of speech. Therefore, the consequences of speech require a search for different types of theories to justify freedom of speech.<sup>231</sup> Sunstein says, “[w]e should, of course, recognize the plurality and diversity of values served by a system of free expression [legal advance] has to do with autonomy and self-development as well. Any simple or unitary theory of free speech value should be obtuse”.<sup>232</sup> Moreover, developing freedom of expression arguments is essential, especially in the present time, when freedom of expression cases have overlapped and become complex, as this would help to ease the task of legislators and courts’ legal scholars to confront these issues.<sup>233</sup> Furthermore, injecting free speech theory in our practical lives is essential for two main

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<sup>229</sup> S Hurley, ‘Imitation, Media Violence, and Freedom of Speech’ [2004] *Philosophical Studies*.p.192.

<sup>230</sup> Sadurski (n 19).p.7.

<sup>231</sup> *Canada Supreme Court Reports Her Majesty the Queen v James Keegstra and the Attorney General of Canada et al 3 SCR 697 (1990)*.

<sup>232</sup> C Sunstein, *Democracy and Problem of Free Speech (New York, The Free Press 1993)*.p. xx.

<sup>233</sup> Barendt (n 1).p.22.

reasons. First, it can help in understanding many aspects with a logical justification. Second, it may provide a further dimension for the protection of free speech through different points of view.<sup>234</sup>

Freedom of speech has special values, which require expanding our knowledge to depart from the narrow justification of legal arguments that are based on solid principles. Indeed, legal arguments become an exact structural analysis of positive speech. To suggest more precisely, we can and should ask about the justifications of free speech. We also need to know the potential link between the justifications of freedom of speech and understanding its limitation. Designing the question differently, Ronald Dworkin says, there is “‘constitutive’ reasons for freedom of speech: respect for individual autonomy, responsibility, etc.”<sup>235</sup> The question raised by Dworkin is whether a distinctive role can be derived from legal theories that go beyond the general understanding of freedom of speech. To balance, I prefer the view of the right to free speech being protected, along with the manner in which it can be justified through law. Finally, the aim is, as mentioned in the introductory chapter, to formulate the limitation of freedom of speech in the clearest and most precise fashion possible, which could serve both as an evaluative guideline and be suitable for a range of cases, covering different types of speech. Rather than relying on a single interpretation of certain theories about the search for truth, individual autonomy and democracy, I will discuss these values from different views. The goal is to provide, to a certain extent, an overview of a familiar set of assumptions about the content of the values of freedom of speech.

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<sup>234</sup> SV Shiffrin, ‘Methodology in Free Speech Theory’ [2011] *Virginia Law Review*.p.549.

<sup>235</sup> R Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (1999).pp.200,201.

## The Values of Freedom of Expression

### 3.1.2 Introduction

Freedom of speech has many arguments regarding the protection of freedom of expression; therefore, it is important to justify the principle that protects freedom of speech, especially the one that combines the three values of truth, democracy and individual autonomy. The complexity and diversity of human nature is the main component of freedom of expression. According to Richard Moon, “[f]reedom of expression must be protected because it contributes to the public’s recognition of truth or to the growth of public knowledge; or because it is necessary to the operation of a democratic form of government . . . or because it is an important aspect of individual autonomy”.<sup>236</sup>

Freedom of speech is a deeply embedded norm that differs from other forms of freedoms.<sup>237</sup> Thomas Emerson explains the potential outcome of protecting freedom of speech. He argues that once a society protects its freedom of speech, the members of society are guaranteed self-fulfilment, the promise to achieve the truth, social participation and preservation of society balance.<sup>238</sup> Similarly, Lee Bollinger acknowledges that there is more than one reason to protect free speech; one of them is that, without free speech, self-fulfilment cannot be achieved.<sup>239</sup> However, according to Trager and Dickerson, labelling freedom of speech is one of the main reasons that leads to the overlap in free speech values.<sup>240</sup> I mention this in contrast to Bollinger to emphasise that freedom of speech requires an examination of its values by scrutinising its applications. Thus, this part is to explore the theoretical justifications that are given for freedom of speech. For each of these justifications, I will discuss the different types of speech to which they apply. In this regard, I agree with Scanlon when he says, “theories of freedom of expression are constructed to respond to what are seen as the most threatening arguments for restricting expression”.<sup>241</sup> Indeed, the diversity of the freedom of speech theories is the most important feature that characterises this right. This fact can

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<sup>236</sup> Moon (n 77).p.9.

<sup>237</sup> Barendt (n 1).p.7.

<sup>238</sup> Emerson (n 23).pp.978,979.

<sup>239</sup> Lee C Bollinger, *The Tolerant Society* (Oxford University Press on Demand 1988).p.45.

<sup>240</sup> Trager and Dickerson (n 12).p.102.

<sup>241</sup> TM Scanlon Jr, ‘Freedom of Expression and Categories of Expression’ [1978] U. Pitt. L. Rev.p. 529.

be seen through many arguments that link freedom of speech with truth,<sup>242</sup> autonomy and personal development,<sup>243</sup> national self-preservation<sup>244</sup> or political and commercial speech.<sup>245</sup> Furthermore, an ideal theory of freedom of speech plays a distinctive role in constructing our knowledge in many aspects that revolve around our actual tradition.<sup>246</sup>

### 3.1.3 Search for Truth

#### Truth's Argument

Discussions concerning the rationality regarding freedom of speech usually refer to many thinkers, such as John Stuart Mill,<sup>247</sup> Milton, Lock and others.<sup>248</sup> The argument of the marketplace of ideas<sup>249</sup> theory is straightforward: truth is a proper approach that enables people to think freely, which reflects on their lives positively.<sup>250</sup> Baker urges for the protection of this type of freedom, which would further the function of high values and keep it away from conflicts.<sup>251</sup> According to Trager and Dickerson, “[search for truth] is an expansive concept that can encompass philosophical, religious, political, scientific, or social truths”. The discovery of truth is a valuable concept that needs a democratic foundation to achieve its potential goals.<sup>252</sup> After all, the emergence of truth leads to development and progress in societies.<sup>253</sup> Historically, the development in the process of the search for truth was at the core of many scholars’ arguments. The search for truth has reformed over time, starting from the 1600s until the 2000s, when the ideas and arguments about truth have broadened further.<sup>254</sup>

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<sup>242</sup> See in general P Summers, ‘Cultural Truth and the First Amendment Your Truth Better Than Mine? A Look at Postmodernism and Free Expression’ [2000] *Intercultural Communication Studies*.

<sup>243</sup> See in general, K Greenawalt, ‘Free Speech Justifications’ [1989] *Columbia Law Review*.

<sup>244</sup> See in general, A Meiklejohn, ‘The Balancing of Self-Preservation Against Political Freedom’ [1961] *California Law Review*.

<sup>245</sup> See in general, TM Scanlon Jr, ‘Freedom of Expression and Categories of Expression’.

<sup>246</sup> Shiffrin, ‘Methodology in Free Speech Theory’ (n 234).p. 550.

<sup>247</sup> See in general, JS Mill, *On Liberty (1859)* (1975).

<sup>248</sup> Trager and Dickerson (n 12).p.102.

<sup>249</sup> The marketplace metaphor usually used to refer to theories that discuss the dominant rationale of freedom of speech by searching for truth. And this term derived from the notion that everyone is free to send or receive information to reach the truth without any interference. See Sadurski (n 19).p8.

<sup>250</sup> Warburton (n 87).p.25.

<sup>251</sup> Baker (n 91).p.7.

<sup>252</sup> Trager and Dickerson (n 12).pp. 102,103.

<sup>253</sup> Moon (n 77).p.10.

<sup>254</sup> Summers (n 242).p.10.

The search for truth has taken on a different discussion. John Milton (1644), who is regarded as the main source of the truth theory,<sup>255</sup> theorises based on the combination of many factors, such as discoverability and the search to reach the truth.<sup>256</sup> Milton believes that the truth comes from unlearnt ideas, which are either true or false, and this leads us to discover the truth.<sup>257</sup> This view explains the hard-line stance of Milton towards censorship, which was imposed by authorities.<sup>258</sup> Moreover, the mist that impedes our vision towards truth is caused either by misunderstanding or by errors in concepts, such as intolerance and hatred, which is uglier than the wrong itself.<sup>259</sup> Milton uses the metaphor “shutting the park gate to keep the birds from flying away” to illustrate that preventing people from hearing about others’ mistakes through censorship is a futile ban and it is like limiting a bird’s freedom.<sup>260</sup> Therefore, in order to clarify the truth and remove barriers that stand between the false and the true, we need robust debates among community members. In the words of Milton, “[a]nd 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 encounter”.<sup>261</sup> In this view, the existence of antinomies is positive for truth and false and this will raise the value of truth. However, the “negative definition”<sup>262</sup> of truth that was made by Milton was deliberated, as he asserted that the ambiguity in the shape and essence makes familiarity in all of truths’ aspects impossible.<sup>263</sup> Milton’s view is consistent with postmodernists who have found that the meaning of truth lacks solid foundation, which can lead to an ultimate understanding of its comprehensive meaning.<sup>264</sup>

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<sup>255</sup> See in general, J Milton, *Areopagitica: A Speech for the Liberty of Uncensored Printing to the Parliament of England* (2009).

<sup>256</sup> F Schauer, ‘Speech and Speech--Obscenity and Obscenity: An Exercise in the Interpretation of Constitutional Language’ [1978] *Geo. LJ*.p.916.

<sup>257</sup> J Milton and MY Hughes, *Complete Poems and Major Prose* (1957).p.948.

<sup>258</sup> Haidar Dziauddin, ‘A Comparative Study of Freedom of Expression and Right to Privacy in Relation to the Press in Malaysia and the United Kingdom’ (University of Newcastle 2005).p.22.

<sup>259</sup> Milton and Hughes (n 257).p.948.

<sup>260</sup> Trager and Dickerson (n 12).p.105.

<sup>261</sup> J Milton, *A Speech for the Liberty of Uncensored Printing* (1834).p.43.

<sup>262</sup> This expression used by Fish to refer to Milton’s definition is negative: “it refuses, necessarily, to say what truth is”. See S Fish, ‘Unger and Milton’ [1988] *Duke Law Journal*.p.978.

<sup>263</sup> RM Thomas, ‘Milton and Mass Culture: Toward a Postmodernist Theory of Tolerance’ [1991] *U. Colo. L. Rev.*p.445.

<sup>264</sup> *ibid.*p.544.

Truth theory has been developed over time by the English philosopher John Stuart Mill (1835), who furthered Milton's idea with more expansion around the search for truth.<sup>265</sup> Mill's approach throughout *On Liberty*<sup>266</sup> considers a key place in the intellectual tradition, not because it offers a further concept of truth, but rather because it offers a firm foundation for researchers, which has lasted for years. According to Bracken, this is true as Mill's theory raised a number of assistance factors of freedom of expression, especially those that connect to development and progress of community members. Therefore, it is seen as a fair-minded defence of freedom of speech.<sup>267</sup> Mill specified that the goal in *On Liberty* is to outline the "nature and limits of the power which can be legitimately exercised by society over the individual".<sup>268</sup> He felt that truth comes through the false and, when one wants to know the truth, he/she should know the false at the beginning. Mill wrote about the search for truth and its distinctive role among society members:

"The peculiar evil of silencing the expression of an opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error".<sup>269</sup>

The distinctive role of Mill's theory, which is based upon the integration of "instrumental and constitutive" facts, considers the main core of Mill's study in *On Liberty*. Mill is right that truth cannot really be described as constitutive without supportive elements, such as the collective participant.<sup>270</sup> Indeed, the life of truth or knowledge is derived from the exchange of ideas and information, and this cannot occur through individualism and isolationism. Similar to Mill, Milton asserted that the upscale intellect is a fruit of collective work and this ultimately reflects in the progress of society. In this regard, he

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<sup>265</sup> Summers (n 242).p.13.

<sup>266</sup> This book published by Mill in 1859 includes the classic liberal defence of freedom of expression. See in general, Mill, *On Liberty* (n 120).

<sup>267</sup> HM Bracken, *Freedom of Speech: Words Are Not Deeds* (Greenwood Publishing Group 1994).p.11.

<sup>268</sup> Mill, *On Liberty* (n 120).p.7.

<sup>269</sup> *ibid.*.p.10.

<sup>270</sup> Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (n 214).201.

says, “[a]ssuredly we bring not innocence into the world, we bring impurity much rather, that which purifies us is trial, and trial is by what is contrary”.<sup>271</sup>

Although Milton and Mill based their theories on different backgrounds,<sup>272</sup> both of them were convinced that, without freedom of speech, the pursuit of truth is impossible.<sup>273</sup> Therefore, they share the idea that truth cannot exist without openness on all opinions or what is called the ‘marketplace of ideas’.<sup>274</sup> While the ‘marketplace of ideas is traceable to many scholars’ arguments, such as Milton’s and the 20<sup>th</sup>-century philosopher, Holmes’s<sup>275</sup> (who enter the ‘marketplace of ideas’ to American jurisprudence),<sup>276</sup> Mill’s theory has more dominance on this theory through “utilitarian justification”.<sup>277</sup> Given the ‘marketplace of ideas’ theory’s assumptions about truth, three rationales can be raised to show the importance of truth. Firstly, it opens the door for people to become free to exchange their ideas, knowledge and experience. Secondly, the theory gave speakers and writers the opportunity to deliver their ideas and opinions. Therefore, their suggestions would become clearer and contribute to solving many issues. Lastly, this theory provides the basis for deep thinking through a rational and smart approach.<sup>278</sup> This kind of ‘truth-based’ argument made by Milton and Mill attracted 20 scholars, such Holmes and Brandeis, to believe that the free market idea is a successful approach to achieve public good.<sup>279</sup> Furthermore, both Mill and Holmes agreed that free speech and truth are the touchstones of societal goals.<sup>280</sup>

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<sup>271</sup> J Milton, *Prose Works* (Westley and Davis 1835).p.108. See also, .A Grey, ‘Why Pornography Should Not Be Censored’ [1993] Libertarian Alliance Political Notes.

<sup>272</sup> Milton belongs to a religious school and Mill came from a political and social school . See, Trager and Dickerson (n 12).p.99.

<sup>273</sup> Thomas (n 263).p.543.

<sup>274</sup> Summers (n 242).p.13.

<sup>275</sup> Holmes is considered one of the most modern scholars who discussed the marketplace of idea. According to Stanley Ingber, “[a]lthough this classic image of competing ideas and robust debate dates back to English philosophers John Milton and John Stuart Mill, Justice Holmes first introduced the concept into American jurisprudence in his 1919 dissent to *Abrams v. United States*”. See, Stanley Ingber, ‘The Marketplace of Ideas: A Legitimizing Myth’ (1984) 1984 *Duke Law Journal* 1.p.3. See also, Warburton (n 87). p10.

<sup>276</sup> See generally, *Abrams v United States*, 250 *U S* 616 (1919).

<sup>277</sup> F Schauer, ‘Hohfeld’s First Amendment’ [2007] *Geo. Wash. L. Rev.*p.922.

<sup>278</sup> *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.*

<sup>279</sup> *Whitney v California*, 274 *US* 357, 375 (1927) (*Brandeis & Holmes, Concurring*).

<sup>280</sup> IM Ten Cate, ‘Speech, Truth, and Freedom: An Examination of John Stuart Mill’s and Justice Oliver Wendell Holmes’s Free Speech Defenses’ [2010] *Yale Journal of Law and the Humanities*.p.61.

Another crucial aspect that we need to address throughout Mill's theory is the potential risk that may occur because of censorship,<sup>281</sup> which is more dangerous than falsehood itself. The progress of public knowledge is not merely based on true or false ideas, but rather on the combination of both.<sup>282</sup> In order to show how censorship would effect public life in practical matters, there can be three reasons why it would be right to not censor any opinion. Firstly, it is wrong to believe that the majority's opinion is true, and therefore, contrary opinions should be suppressed. False opinion, even with at least a grain of truth, should be protected because this helps amend our mistake from one side and makes us immune to the harm of similar mistakes in the future.<sup>283</sup> Sadurski maintains that "[t]olerance for [falsehood] is necessary in order to provide 'breathing space', because strict liability for false factual assertions would create a 'chilling effect' and result in the deterrence of true statements".<sup>284</sup> Secondly, prejudice towards certain opinions, even if they are true, is wrong because true opinions do not hold one viewpoint but are based on updates, facts and evidence. For example, a person who demands free speech does not understand what and when the speech should be free or how he/she can justify free speech in wrong circumstances. Thus, by not allowing opposite points of view to be expressed, he/she will remain unable to build his/her idea on a firm foundation. Lastly, we should recognise that often, truth or falsehood in opinions is uneven. Therefore, if such opinions are false, this does not mean that they are completely empty from elements of benefit. Legal protection contains false and true statements, and if we do not hear both sides of an argument, we may lose the chance to make the synthesis between truth and falsehood to discover the truth.<sup>285</sup> In this regard, Justice Holmes asserted the importance of open discussion to be "eternally vigilant against attempts [from authority] to check the expression of opinions that we loathe and believe to be fraught with death".<sup>286</sup> This argument about censorship leads to the fact that censorship on the freedom of speech (which almost takes place in a totalitarian society) is the main obstruction in the progress and development of societies. States that repress the exchange

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<sup>281</sup> Censorship has often been described as a kind of constraint that practiced by some States to limit freedom of speech. See, Warburton (n 87).p.6.

<sup>282</sup> Moon (n 77).p.10

<sup>283</sup> JS Mill, *On Liberty* (Ticknor and Fields 1863)..pp.41,42,43. See also, A Stroll and RH Popkin, *Philosophy Made Simple* (2012).

<sup>284</sup> Sadurski (n 19).p.11.

<sup>285</sup> Mill, *On Liberty* (n 120).pp.38,35,36. See also,Stroll and Popkin (n 283).pp.87,88,89.

<sup>286</sup> *Abrams v. United States*, 250 U. S. 616 (1919). See also, Warburton (n 87).p.10.

of ideas and information under strict laws dissolve the distinct role of social practice and negatively affect the values and principles that govern society.<sup>287</sup>

While Milton and Mill keened over governments suppressing people's ideas, suppression by some regimes does not necessarily cause harm. According to Mill, opinions should be protected unless "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".<sup>288</sup> Furthermore, in *American Communications Association v. Douds*, the court said, "[w]e could justify any censorship only when the censors are better shielded against error than the censored".<sup>289</sup> Of course, no one can claim that total suppression of freedom is better than freedom. Suppression sometimes needs to scrutinise to the search for truth. To Baker, "suppression will be more useful than free speech for some purpose and at some time".<sup>290</sup> Therefore, our will becomes stronger when laying out ideas if the argument is rationally balanced: "[o]ur truthful opinions will be stronger and less vulnerable to superficial attack if they are based on reasoned judgment".<sup>291</sup> This view raised the importance of knowing the purpose of restriction and thus, censorship on such speech is not suspicious.

It can be concluded from truth's theory that true and false opinions fall under the interest of society. Therefore, it should be discussed and exchanged and must receive high protection. It can also be concluded that even false ideas contain a portion of truth, which should not give a state the opportunity to suppress this kind of opinion. To state it another way, democratic societies cannot develop and flourish under any type of suppression. Arguments, discussions and criticising ideas are considered to be the doorways to freedom and truth. Therefore, the continuity of such governments that hold sway in the face of open and robust arguments (despite any threat that they pose to public security) is more dangerous than the falsehood itself. Baker says, "[c]ensorship inevitably impedes the development and acceptance of some perspectives that we would adopt as useful".<sup>292</sup> Thus, it is important to search for the truth, as it is vital to protect social values.

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<sup>287</sup> D Overgaauw, 'The Paradoxes of Liberty: The Freedom of Speech (Re-) Considered' [2009] Amsterdam Law Forum, Forthcoming.p.26.

<sup>288</sup> Mill, *On Liberty* (n 120).p.101.

<sup>289</sup> *American Communications Association v Douds*, 339 US 382 (1950).

<sup>290</sup> Baker (n 91).p.19.

<sup>291</sup> Moon (n 77).p.10.

<sup>292</sup> Baker (n 91).p.18.

Applying Mill and Milton's approach to the limitation of freedom of speech certainly leads to one fact: the exercise of freedom of speech in a wider sense, regardless of it being true or false, should be protected unless it causes harm to others, i.e., truth's theory gives plenty of reasons to be trusted. Firstly, in the truth's theory, the distinction between true and false should be dissolved. Therefore, the view should not be dependent on whether the expression at stake is possibly true or false, but it should be linked with the surrounding circumstances. For example, during times of peace, criticising governments is protected. However, during a war, this right would be restricted to protect national security. This notion can also be applied in the case of pornography, where the restriction should be applied on minors people rather than mature.<sup>293</sup>

Secondly, the result that may emerge from restricted truth may help to develop theories that are linked to freedom of speech. James Bryce, one of the scholars who was influenced by Mill's theory,<sup>294</sup> says, "[i]n fact the chronic evils and problems of old societies and crowded countries, such as we see them today in Europe, will have reappeared on this new soil".<sup>295</sup> Indeed, in a situation where people do not feel free to express their ideas because of censorship or social restrictions, there is a minimisation of the opportunity to search for truth, for both the speaker and the listener. This may have a negative effect on the intellectual competition process. Another point that should be added to the distinctive function of truth theory is that truth would raise the possibility of tolerating false opinions. It would give an alternative way to those people who have lower motivation or rational thinking to be more confident and autonomous.<sup>296</sup>

In modern society, the idea of marketplace has recently been asserted by the United States' Supreme Court on the importance of having unfettered access to ideas, especially those linked with political and social interests.<sup>297</sup> The openness of the market gives an advantage to the people and government alike. Firstly, for people, the search for truth becomes more urgent, especially these days, where technology has developed further and become more progressive. Secondly, truth can help the government be wiser and more understanding in dealing with the issues that are faced by balancing the cons and pros of

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<sup>293</sup> Trager and Dickerson (n 12).p.58.

<sup>294</sup> *ibid.*.p.59

<sup>295</sup> VJ Bryce, *The American Commonwealth* - (Cosimo, Incorporated 2007).p.851. See also, CMA Destler, 'Wealth Against Commonwealth 1894 and 1944' [1944] *The American Historical Review*.p.49.

<sup>296</sup> Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2002) 24 *Cardozo Law Review* 1523.p.1534.

<sup>297</sup> *Roth v US* 354 US 476, 484 (1957).

the ideas that should be based on the consequence and surrounding circumstances. Thus, it can be said that the implementation of the truth theory, which allows for the free flow of ideas and leads to the collision of the true with the false, is a successful manner of exposing the truth and expanding the mass of sense data of society members when dealing with difficulties that they may confront.<sup>298</sup> On its own, the marketplace theory seems to be a rich argument for freedom of speech throughout its evaluation regarding many aspects that are linked to this freedom.<sup>299</sup>

### 3.1.3.1 Criticisms of the Truth Theory

The emphasis on the importance of truth theory through its distinctive role is one of the defining features of liberal theory. It has been described as one of the theories that introduced freedom of speech on a solid basis.<sup>300</sup> The fact that is vital in the search for truth can be seen as “throughout modern history the ruling theory in respect of the philosophical underpinnings of the principle of freedom of speech”.<sup>301</sup> However, this theory is underpinned by many philosophers for different reasons. According to Bickel, “[t]he theory of the truth of the marketplace, determined ultimately by a count of noses- this total relativism- cannot be the theory of our Constitution”.<sup>302</sup> This view is consistent with Haworth, whose quasi-truth theory acts as a misleading map.<sup>303</sup>

To begin with, the idea that people have the ability to harbour various viewpoints towards the best choice<sup>304</sup> is a claim that lacks accuracy. Society members, in fact, have little confidence in their own factual judgment in differentiating between the true and the false, especially when the falsehood has an amplifying volume in relation to the truth. When considering the case of propaganda during times of war or during an election race, for instance,<sup>305</sup> the lack of rational capabilities about certain issues are justified, as “we do not have unlimited mental resources to judge every piece of information when making

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<sup>298</sup> David Alan Grier, ‘The Marketplace of Ideas’ (2009) 42 Computer 8.p.3.

<sup>299</sup> JD Peters, *Courting the Abyss: Free Speech and the Liberal Tradition* (2010).p. 15.

<sup>300</sup> A Tower, ‘Philosophical Issues Raised by Debates about Free Speech, It Is Surprising That There Are so Few Book-Length Treatments of the Subject Written by Philosophers. ...’.p.352.

<sup>301</sup> Schauer, *Free Speech: A Philosophical Enquiry* (n 103).p.15.

<sup>302</sup> AM Bickel, *The Morality of Consent* (Yale University Press 1975).p.77.

<sup>303</sup> A Haworth, *Free Speech* (2012).p.2.

<sup>304</sup> Baker (n 91).p.6.

<sup>305</sup> Sadurski (n 19).p.12.

decisions on every issue”.<sup>306</sup> Rational shortages are common and noticeable in many societies where the people neglect their potential power in discussions and evaluation and, instead, rely on the community elites’ opinions.<sup>307</sup> According to Frederick Schauer, “some people may have so little confidence in their own factual judgments that they always sit down gingerly for fear that the chair they see is only an apparition, but we hardly need [to] tailor first amendment doctrine around them”.<sup>308</sup> Therefore, once people want to overcome the difficulties that they confront, when they base their opinions, they should balance their judgment on both cases and then outweigh the false case.<sup>309</sup> Thus, the reliance of truth theory on rational assumption is unjustified.

The other difficulty with Mill’s theory is that the truth argument does not expand its scope to encompass all human sciences. O’Rourke observed that Mill was keen on highlighting his religious tendency more than mathematical formulae when concentrating on religious concepts.<sup>310</sup> However, Barendt explains the search for truth weakness when he says, “Mill’s theory is difficult to apply to types of expression, where it seems absurd even to look for an element of truth, or to propositions, which are quite obviously factually false, such as ‘the moon is made of green cheese’”.<sup>311</sup> This sort of paradox about Mill’s thesis has been treated by the U.S. Supreme Court when it asserted that some types of pornography fall under its protection.<sup>312</sup> The court’s opinion clarifies its opposition to the truth’s argument. Judge Easterbrook noted, “[t]he constitution does not make the dominance of truth a necessary condition of freedom of speech”.<sup>313</sup>

Another argument to strengthen the case made by Mill is the assumption that free speech considers that the doorway to develop and progress societies or, more concretely, to develop social participation, is inaccurate.<sup>314</sup> The difference between the environment of free speech in the scientific and public community, for instance, is explicit. While novel ideas issued by scholars to discuss such issues are based on scientific facts, some general

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<sup>306</sup> Andres Moles Velazquez, ‘Atonomy, Freedom of Speech and Mental Contamination’ (Warwick University 2007).p.126.

<sup>307</sup> Moon (n 77).p.10.

<sup>308</sup> F Schauer, ‘Categories and the First Amendment: A Play in Three Acts’ [1981] Vand. L. Rev.p.287.

<sup>309</sup> SD Smith, ‘Skepticism, Tolerance, and Truth in the Theory of Free Expression’ [1986] S. Cal. L. Rev.pp.595, 596.

<sup>310</sup> KC O’Rourke, *John Stuart Mill and Freedom of Expression: The Genesis of a Theory* (2003).p.79.

<sup>311</sup> Barendt (n 1).pp11,10

<sup>312</sup> *Cohen v California* 403 US 15 (1970).

<sup>313</sup> *Association v Hudnut*, 771 F2d 323, 330 (7th Cir1985).

<sup>314</sup> Barendt (n 1).p.9.

debates at the government or public level lacks clear vision towards truth discovery.<sup>315</sup> There are instances where unregulated speech has not always led to the discovery of truth. One of these instances happened in Germany in the first half of the 20<sup>th</sup> century, where free speech flourished on a wide scale. However, during that time, the Nazis were growing and coming to power. This case shows that it is not logical to say that the existence of freedom of discussion may lead to ultimate good.<sup>316</sup> As Bollinger writes, “the chance that the Nazi messages may turn out to be ‘true’ is hardly a persuasive basis on which to defend such speech”.<sup>317</sup> Similarly, in the case of hate speeches, open discussions and exchanging ideas may not be the best remedy to reduce the negative consequences that are raised by hate speeches. In some cases, according to Hemmer’s view, free speech may create a gap among society members, rather than discovering the truth and this may accrue because of the lack of respect of some people in the eyes of the law.<sup>318</sup>

The critics of the truth argument also believe that Mill’s theory is an argument that lacked precision when it equated the exchange of ideas with the buyer and seller of goods. Public discourse is simply about the activities that transform individualistic desires to collective action. For example, let us consider the case of David O’Brien. When he burned the draft, the act was not to advance his view isolated from the public participant. O’Brien based his action on the reaction of supporting, encouraging and raising morale by society members, far away from the manner of goods dealers.<sup>319</sup> Moreover, exchanging ideas through public discussions is collective more than individual will. In this regard, Moon says, “[h]uman desires. . . not prosocial, formed independently of debate and discussion, but [is] instead given form in public discourse”.<sup>320</sup>

It should now be clear that the notion of truth theory is an essential part of free speech. However, the social goods do not centralise on one aspect to achieve goals. Experiences and needs are more exigent to people than speech. Consequently, marketplace is not likely to be the only method to create different environments, perspectives and concepts.

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<sup>315</sup> Bernard Arthur Owen Williams, *Truth & Truthfulness: An Essay in Genealogy* (2002).pp. 217, 218.

<sup>316</sup> Barendt (n 18).p.9.

<sup>317</sup> Lee C Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (New York: Oxford University Press; Oxford: Clarendon Press 1986).p.54.

<sup>318</sup> Joseph J Hemmer and Justice Edward Sanford, ‘Hate Speech Codes : A Narrow Perspective’ (2000) 13 North Dakota Journal of Speech & Theatre 21.p.25.

<sup>319</sup> SH Shiffrin, *The First Amendment, Democracy, and Romance* (1990).pp.91,92.

<sup>320</sup> Moon (n 77).p.14.

According to Ingber, “the marketplace serves as a forum where cultural groups with differing needs, interests, and experiences battle to defend or establish their disparate senses of what is ‘true’ or ‘best.’”<sup>321</sup> Clearly, the scepticism that revolves around truth theory does not originate from a vacuum. The failure of truth to build solid principle is obvious through many criticisms that are made of the marketplace ideas.<sup>322</sup> Indeed, since the truth theory has been issued before hundreds of years, many things have changed, whether on the individual or society level. As a result, it is not too much of an exaggeration to say that “[s]uch a development is long overdue”.<sup>323</sup> David Strauss precisely notes, “[t]here is no theory that explains why competition in the realm of ideas will systematically produce good or truthful or otherwise desirable outcomes”.<sup>324</sup> It can be said that it would be unreasonable to say that the marketplace of ideas has absolute dominance on the freedom of speech principle, especially these days when new technology covers most of life’s aspects. The marketplace of ideas, like other theories, has pros and cons. As individuals, we are not obliged to follow what has been stated in theories unless it has covered all human requirements. That is surely too optimistic an assumption.

### **3.1.3.2 Truth Theory Limitation**

The marketplace of ideas is a model that encompasses many human sciences. It is like other markets of goods and services – it should be away from restriction or interference.<sup>325</sup> The notion of a marketplace of ideas is based on testing truth and its collision with falsehoods. Therefore, it is not too much of an exaggeration to say that the trial of truth theory is one of the most important elements to discover the truth.<sup>326</sup> The test of theory, according to Baker, is “illustrate judicial reliance on the classic marketplace of ideas model”.<sup>327</sup>

The fact is that the search for truth should be immune to restrictions, unless it can cause serious danger. This view is raised by John Mill:

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<sup>321</sup> Ingber (n 275). p.27.

<sup>322</sup> See, Barendt (n 1).pp.12.,13.

<sup>323</sup> Tower (n 300).p.357.

<sup>324</sup> DA Strauss, ‘Persuasion, Autonomy, and Freedom of Expression’ [1991] Columbia Law Review.p.349.

<sup>325</sup> Barendt (n 1).p.11.

<sup>326</sup> Rosenfeld (n 296).p.1533.

<sup>327</sup> Baker (n 91).p.11.

“[E]ven 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. An opinion that corn-dealers are starvers of the poor. . . ought to be unmolested when simply circulated through the press, but may justly incur 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”.<sup>328</sup>

The insights made by Mill to illustrate judicial aspects of the marketplace theory have been developed over time by Holmes and Brandeis.<sup>329</sup> They define the limits of freedom of speech, or what is called “the clear and present danger test”. The test aims to strike a balance between speech and the consequences. In the case *Dennis v. United States*, it was asserted that “wherever speech was the evidence of the violation, it was necessary to show that the speech created the ‘clear and present danger’ of the substantive evil which the legislature had the right to prevent”.<sup>330</sup> The logic of Brandeis is clear, and the present danger is based on the fact that not every suppression of free speech is justified, unless the danger of that speech is reasonable. According to Brandeis, free speech should be suppressed if it can cause serious falsehood, if there is imminent danger of speech, and if the falsehood is dangerous and threatening.<sup>331</sup> Similarly, Holmes believed that harmful as well as honest speech in some cases should be subjected to the same judgment.<sup>332</sup> According to Holmes, free speech should be protected, “unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country”.<sup>333</sup> This view is consistent with Frederick Schauer’s opinion, as he writes, “suppression is justified only if speech can never cause harm, or if the search for truth is elevated to a position of priority over all other values”.<sup>334</sup> According to Rosenfeld, when a speech poses a ‘clear and present danger’, this, in fact, undermines the value of speech that is targeted by the marketplace of ideas. By contrast, it raises harmful action, and therefore, it falls outside constitutional protection.<sup>335</sup> However, speech sometimes should be permitted, even if ideas contain falsehoods, not because the false statement is desirable, but because the existence of

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<sup>328</sup> Mill, *On Liberty* (n 120).pp.100,101.

<sup>329</sup> Baker (n 91).p.8.

<sup>330</sup> *Dennis v United States*, 341 US 494 (1951).

<sup>331</sup> *Whitney v California*, 274 US 376 (1927).

<sup>332</sup> *Abrams v US*, 250 US 616,630 (1919). See also,Sheldon M Novick, ‘The Unrevised Holmes and Freedom of Expression’ (1991) 1991 Supreme Court Review 303.p.350.

<sup>333</sup> *Abrams v. US*, 250 US 616 (1919).

<sup>334</sup> Schauer, *Free Speech: A Philosophical Enquiry* (n 103).p.29.

<sup>335</sup> Rosenfeld (n 296).p.1534.

falsehoods is inevitable.<sup>336</sup> The falsehood redeems the first amendment, as it guarantees “freedom to advocate ideas, including unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion”.<sup>337</sup>

Moreover, the marketplace theory assumes that absolute speech is the ideal way to discover truth.<sup>338</sup> This view justifies the decision of the Burger Court to expand truth’s theory to cover commercial advertising.<sup>339</sup> In the *Bigelow v. Virginia* case, the court highlights the advantages that qualify the advertisement to be protected:

“(1) the advertisement did more than simply propose a commercial transaction and contained factual material of clear public interest, (2) portions of the advertisement involved the exercise of the freedom of communicating information and disseminating opinion, (3) the advertisement conveyed information of potential interest and value to a diverse audience including not only readers possibly in need of the services offered, but also those with an interest in the subject matter or the law of another state and its development, and readers seeking reform in the prosecuting state, and (4) the advertised activity pertained to constitutional interests; the editor's First Amendment interests, under such circumstances, coincide with the constitutional interests of the general public”.<sup>340</sup>

However, one clear implication of talking about commercial speech is that it lacks the protection that is offered to speech. This insufficient protection has negative effects on many values that should be protected by commercial speech. The divergence between speech and commercial speech regarding judicial protection accrues because speech is more comprehensive than commercial speech in the realm of freedom of speech.<sup>341</sup>

Largely, the notion of a marketplace of ideas does not have obvious limits. This fact can be seen in many countries where the marketplace of ideas has different interpretations, perspectives and acceptance.<sup>342</sup> However, this divergence should not have negative effects on our understanding of the nature of this theory. Indeed, the surrounding circumstances that revolve around this theory play a crucial role in adopting a particular perspective of truth or progressive interests of humanity.

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<sup>336</sup> NF Burnett, ‘New York Times v. Sullivan’ [2003] Free Speech On Trial: Communication Perspectives.p.127.

<sup>337</sup> Edwin Baker, ‘Scope of the First Amendment Freedom of Speech’ (1978) 25 U.C.L.A. L. Rev. 964.p.970.

<sup>338</sup> Baker (n 91).p.11.

<sup>339</sup> *Virginia State Bd Of Pharmacy v Virginia Cit Cons Council*, 425 US 777 (1976).

<sup>340</sup> *Bigelow v. Virginia*, 421 U.S. 809 (1975).

<sup>341</sup> V Brudney, ‘First Amendment and Commercial Speech, The’ [2012] BCL Rev.pp.1166,1167,1154.

<sup>342</sup> Georg Nolte, *European and Us Constitutionalism* (2005).p.48.

### 3.1.4. Individual Autonomy

#### The Argument

In individual autonomy, we appeal to the self-expression and self-fulfilment of individuals as an essential part of liberal theory. The distinctive value of autonomy does not boil out to one's action. Rather, it is a rule that has substantive consequences over harmful activities.<sup>343</sup> To make a more significant point, individuals seek liberty to expand their freedom of speech and participate without intervention, especially when the action is harmless and does not pose any threat to others.<sup>344</sup> Therefore, autonomy relies on "principles comparable to the persuasion principle".<sup>345</sup> Moreover, the consequentialist nature that characterises many theories, including truth's theory, is considerably different from the rationale that focusses on personality growth.<sup>346</sup> The crucial role that plays by self-fulfilment and self-expression of individuals through their autonomy has been raised by many scholars.<sup>347</sup> Legal scholar Thomas Emerson boils down the distinctive role of self-fulfilment through its open nature, which motivates human creativity to achieve its potential goals.<sup>348</sup> A human being's nature requires that people be socialist and express their feelings freely. Therefore, the act they express is subjected to self-fulfilment.<sup>349</sup> Thomas Emerson writes the following:

"Freedom of expression is essential as a means of assuring individual self-fulfillment. The proper end of man is the realisation of his character and potentialities as a human being. To cut off [man's] search for truth, or his expression of it, is to elevate society and the State to a despotic command... and to place him under the arbitrary control of others".<sup>350</sup>

The notion that free speech and autonomy belong to the same concept is true.<sup>351</sup> The values of speech do not differ from those that existed in autonomy, at least not on the judiciary level. In the *Bose Corp. v. Consumers Union of United States*, the court stated, "the freedom to speak one's mind is... an aspect of individual liberty – and thus a good

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<sup>343</sup> Sadurski (n 19).pp.16,17.

<sup>344</sup> Moon (n 77).p.19.

<sup>345</sup> Strauss (n 324).p.354.

<sup>346</sup> Barendt (n 1).p.13.

<sup>347</sup> See Baker (n 91).pp.47-69, Barendt (n 1).pp.13-18 and Moon (n 77).pp.19-21.

<sup>348</sup> Emerson (n 67).p.6. See also, Summers (n 242).p.15.

<sup>349</sup> Trager and Dickerson (n 12).p.101.

<sup>350</sup> Emerson (n 67).p.6.

<sup>351</sup> Barendt (n 1).p.13.

unto itself [and] essential to the common quest for truth and the vitality of society as a whole”.<sup>352</sup> The court clearly referred to freedom of speech as a vehicle of self-fulfilment, which intuitively means that our defence of freedom of speech is not based on its values, but rather because individual liberty, derives its protection from the distinctive function of speech.<sup>353</sup> Similarly, in *Roberts v. United States Jaycees*, the Court asserted on the importance of freedom of association for protecting public and individual liberties especially those related to freedom of expression. Thus, this right should be immune from any governmental restriction.<sup>354</sup> Moreover, speech derives its protection from autonomy and integrity. Resisting the ideas that distinguish between autonomy and speech portrays that one works in isolation from the other, a point raised by Professor C. Edwin Baker when he said the following:

“Both the concept of coercion and the rationale for protecting speech draw from the same ethical requirement that the integrity and autonomy of the individual moral agent must be respected. Coercive acts typically disregard the ethical principle that, in interactions with others, one must respect the other's autonomy and integrity as a person. When trying to influence another person, one must not disregard that person's will or the integrity of the other person's mental processes”.<sup>355</sup>

Furthermore, freedom of speech emerges as a comprehensive value that includes all desirable conducts. Stanley Fish finds that free speech “is just the name we give to verbal behaviour that serves the substantive agenda we wish to advance”.<sup>356</sup> In other words, there is no need to justify self-realisation and autonomy when subjected to the free speech clause because these conducts are located in the centre of freedom of speech.<sup>357</sup> For example, in the *Handyside v. United Kingdom* case, the court asserted that the progress and development of the community could not occur without making room for freedom of speech.<sup>358</sup> The value of freedom of expression thus goes hand in hand with individual autonomy, which usually leads to the development and thriving of a society's members. Similarly, in *Lingens v. Austria*, the judgment argued that in a representative freedom of speech, self-fulfilment is one of the most important elements of individual process.<sup>359</sup>

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<sup>352</sup> *Bose Corp v Consumers Union of United States*, 466 US 485, 503 (1984).

<sup>353</sup> Sadurski (n 19).pp.17,18.

<sup>354</sup> *Roberts v. United States Jaycees*, 468 US 609 (1984).

<sup>355</sup> Edwin Baker (n 337).p.1001.

<sup>356</sup> Stanley Fish, *There Is No Such Thing as Free Speech and It's a Good Thing Too* (1994).p.102.

<sup>357</sup> Moon (n 77).p.21.

<sup>358</sup> *Handyside v United Kingdom*, 747 (1976).

<sup>359</sup> *Lingens v Austria*, 8 EHRR 407 (1986).

What can be said, then, is that there is congruency between freedom of speech and self-fulfilment, either on the freedom realm or individuals' progress as a whole.

The value of autonomy, on the other hand, is obvious and substantial in determining the potential problems that threaten freedom of speech. The argument for self-fulfilment, as Maya Randall thinks, "explain[s] why the scope of freedom of expression. . . extends to other categories such as artistic".<sup>360</sup> Schauer believes that the argument from autonomy reverses the ideal approach to the free speech theory. Autonomy and other arguments rely on numerous characteristics that form a human being's nature. Schauer's opinion on autonomy is that "[t]he value of the argument from autonomy is that it is an argument that is directed at speech, rather than at the entire range of interest that might with some minimal plausibility be designated 'individual'".<sup>361</sup> Therefore, self-fulfilment cannot be isolated from the aspect of freedom of speech.<sup>362</sup> Through speech and self-fulfilment, ideas, emotions and feeling are created, which reflect on the development of the self and any suppression for self-fulfilment is, in fact, an affront to free speech.<sup>363</sup>

Another point should be noted here. The importance of autonomy theory is mentioned in the international law provisions. Article 19 (2) of International Covenant on Civil and Political Rights, for instance, asserts the freedom of speech right. It claims, "[e]veryone 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, either orally, in writing or in print, in the form of art, or through any other media of his choice".<sup>364</sup> Similarly, the first amendment of the U.S. protects the freedom of speech right, which means that, tacitly, the speech leads to self-fulfilment.<sup>365</sup> Thus, these examples explicitly cover individuals' autonomy, at least among legal scholars, but some may find individuals' autonomy theory ambiguous; therefore, this article highlights the importance of theories, such as fulfilment theory, to explain either national or international instruments, especially those that are related to freedom of speech.

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<sup>360</sup> MH Randall, 'Commercial Speech Under the European Convention on Human Rights: Subordinate or Equal?' [2006] Human Rights Law Review.p.79.

<sup>361</sup> Schauer, *Free Speech: A Philosophical Enquiry* (n 103).p.71.

<sup>362</sup> Barendt (n 1).p.13.

<sup>363</sup> Emerson (n 25).p.879.

<sup>364</sup> International Covenant on Civil and Political Rights,

<<http://Www.Ohchr.Org/En/Professionalinterest/Pages/Ccpr.aspx>> Accessed 29 Jan 2017.'

<sup>365</sup> Baker (n 91).p.59.

The distinctive role of autonomy or self-fulfilment goes beyond an individual's interest in covering State's goods. When a State allows people to express their opinions and suggestions, this ultimately reflects the community's development and advancement.<sup>366</sup> The importance of individual autonomy, according to Scanlon, appears through its independence from the power of the State.<sup>367</sup> Furthermore, Professor Moon claimed that the desired role of freedom of speech in realising autonomy may undermine the ideas, judgment and participant of individuals as a part of the autonomy is hollow from its real meaning.<sup>368</sup> Autonomy, therefore, represents a real measurement to judge the speech that deserves constitutional protection from others that do not.<sup>369</sup> In fact, many freedoms, such as sexual needs, are derived from moral autonomy rather than freedom of speech. Therefore, it is considered as the main source for many freedoms.<sup>370</sup> According to Edward Bloustein, the conceptions of self-fulfilment and freedom of expression are the same, as both of them are the "essence of the democratic state".<sup>371</sup> The next section discusses these conceptions.

### 3.1.4.1 The Limitation of Autonomy Theory

An account of the value of autonomy must involve more than a general claim that the restriction of autonomy is disrespectful to the individuals or it conflicts with an individual's freedom. While individual autonomy has a distinctive role in the practice of many freedoms,<sup>372</sup> others believe that autonomy, like other freedoms, should be subjected to such restrictions.<sup>373</sup> This harmony between the two views raises the importance of defining the limit of autonomy. To begin with, Tomas Emerson believes that society members seek many social interests, such as justice and equality, more than freedom of

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<sup>366</sup> Trager and Dickerson (n 12).p.48

<sup>367</sup> T Scanlon, 'A Theory of Freedom of Expression' [1972] *Philosophy & Public Affairs*.p.215.

<sup>368</sup> Moon (n 77).p.21.

<sup>369</sup> MH Redish, 'The Value of Free Speech' (1982) 130 *University of Pennsylvania Law Review* 591.p.620.

<sup>370</sup> R Dworkin, 'Is There a Right to Pornography?' [1981] *Oxford Journal of Legal Studies*.p.177.

<sup>371</sup> EJ Bloustein, 'Origin, Validity, and Interrelationships of the Political Values Served by Freedom of Expression, The' [1980] *Rutgers L. Rev.*p.374.

<sup>372</sup> Rosenfeld (n 296).p.1535.

<sup>373</sup> Redish (n 369).p.623.

expression.<sup>374</sup> Yet, this view shows that a person's right of self-fulfilment<sup>375</sup> is not at the top of freedoms' priority that people seek to achieve. Similarly, Sadurski, like many others, directed strong criticism when he said, "the [theory] is incapable of supplying the reasons for subjecting speech to a more lenient system of legal control than many other aspects of individual behaviour which may also be essential to one's self-expression and self-realization".<sup>376</sup> Some critics feel that the broad role of self-fulfilment may be called the "pleasure principle". According to them, this broadness will negatively affect an individual's morality and overlapping cultures. For example, chaotic or violent traits lack social interest. Therefore, this kind of conduct should be restricted.<sup>377</sup> Indeed, exercising some activities that infringe upon human dignity or the rights of other people under the self-fulfilment principle should not be subjected to unlimited protection.<sup>378</sup>

In the light of the foregoing discussion, there is a need to address the relation between individual autonomy and state power. In other words, does a state has the mandate to limit individual autonomy? Human beings are characterised by their ability to reason and judge, and the government, by contrast, is confronted with the responsibility to create an environment of tolerance and harmony for the betterment of the people. This seems puzzling, especially when the case links to the fact that individuals should be protected from exposure to foolish and dangerous choices, or what may be called restricted on public interest grounds.<sup>379</sup> This claim is consistent with Mill's view when he writes, "even opinions lose their immunity when the circumstances in which they are expressed are such as to constitute in their expression a positive instigation to some mischievous act".<sup>380</sup> However, the notion of state intervention is not welcomed by some who think that the individual sovereign is "a citadel" and thus, individuals should be immune from the State's mandate<sup>381</sup>. Scanlon argues, "[a]n autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what

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<sup>374</sup> Emerson (n 25).p.880.

<sup>375</sup> Self-fulfilment or autonomy are an essential part of freedom of speech. According to Moon, "freedom of expression is central to self-realization and autonomy because individual identity, thought and feeling emerge in the social realm". See Moon 'The constitutional protection of freedom of expression'. p. 21. See also, Trager and Robert "Freedom of Expression in the 21st Century". p. 101.

<sup>376</sup> Sadurski (n 19).p.18.

<sup>377</sup> Trager and Dickerson (n 12).p.101.

<sup>378</sup> Barendt (n 1).p.16.

<sup>379</sup> TM Scanlon, 'Freedom of Expression and Categories of Expression' (1978) 40 University of Pittsburg Law Review.p.519.

<sup>380</sup> Mill, *On Liberty* (n 120).p.100.

<sup>381</sup> Schauer, *Free Speech: A Philosophical Enquiry* (n 103).p.69.

he should do”.<sup>382</sup> Human beings are characterised by the divergence between the right of the state and the individual because the common elements that share autonomy are truth and democracy arguments.<sup>383</sup> These difficulties, notwithstanding, represent a significant contribution to freedom of speech. A limitation to the state’s power to interfere with individual autonomy makes sense only when the state bases its regulation on the fact that an individual has the right to be autonomous. In *Stanley v. Georgia*, Justice Marshall’s view on the First Amendment is 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”.<sup>384</sup> Individual autonomy, thus, is not subjected to the state’s restriction whenever they wish to put it before him/her. Rather, any constraints should be justified when the state intends to impose such limitations on individual freedom.<sup>385</sup> Kent Greenawalt states, “government should not prohibit people from acting as they wish unless it has a positive reason to do so. The ordinary reason for prohibiting action is that the action is deemed harmful or potentially harmful in some respect”.<sup>386</sup> Another point is worth noting. The argument has no moral constraint that would prevent individuals from behaving disrespectfully. Limits to individual autonomy are not always linked with the state’s authority, but also with the individuals themselves. According to Rostbøll, “[individuals] living up to the ideal that everyone is treated as autonomous, not merely by the state but also by each other”.<sup>387</sup> Indeed, individuals’ autonomy should be respected by citizens themselves. When the people believe that they are autonomous and living up to autonomous requirements, consequently, the authority of the state upon their freedoms would be significantly minimalised.<sup>388</sup>

There is a further point that should be noted here. It can be argued that some individuals’ restriction is required to protect moral autonomy. Sometimes people lack wise decisions to confront some problems. Therefore, they need the state’s assistance to overcome difficulties. For example, individuals may be exposed to tricks by advertisements or leaflets to buy or sell some products. Therefore, almost everyone can agree that

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<sup>382</sup> Scanlon, ‘A Theory of Freedom of Expression’ (n 347).p.216.

<sup>383</sup> Schauer, *Free Speech: A Philosophical Enquiry* (n 103).p.72.

<sup>384</sup> *Stanley v Georgia*, 394 US 557 (1969).

<sup>385</sup> R Dworkin, *Taking Rights Seriously* (1978).p.24.

<sup>386</sup> K Greenawalt, *Speech, Crime, and the Uses of Language* (1989).p.9.

<sup>387</sup> CF Rostbøll, ‘Autonomy, Respect, and Arrogance in the Danish Cartoon Controversy’ [2009] *Political Theory*.p.632.

<sup>388</sup> *ibid*.p.632.

individuals sometimes need to surrender their freedom to the state's authority. In some circumstances, the state's restrictions are incompatible with moral autonomy, but it falls among the central duty of the state.<sup>389</sup> While the intervention of state is suspect, especially when this is related to an individual's freedom, in the case of autonomy, the external factors might play a distinctive role in exercising individuals' sovereignty more than the individual autonomy.<sup>390</sup> According to Sadurski, "some false beliefs are enormously difficult to verify; the verification, while costly, may be reachable and reliable; the power of censorship may be seen as a rational solution to the particular collective-action problem".<sup>391</sup> Thus, drawing a line between the individual and the state is not an easy task that can be achieved with only a broad vision. Rather, it should be grounded on a clear limit to ensure justice in applying freedom of speech.

From what has been discussed, it can be said that unlike many theories, the argument of individuals' autonomy characterises with its reliance on utilitarianism, which finally reflects self-development and fulfilment. In other words, the values of autonomy go beyond an individual's interest to cover society as a whole.<sup>392</sup> Indeed, it seems that there is some congruency between autonomy and development, and advancement either on the individual or on the collective level. However, this rationale, as discussed earlier, lacks some aspects, which means that the theory itself cannot cover all freedom of speech aspects without assistance or linking with other theories to complete the freedom of speech process.<sup>393</sup>

### **3.1.5 Democracy and Self-Government**

#### **The Argument**

The argument discussed in the previous sections puts a common emphasis on the importance of exercising freedom, whether at the individual or at the collective level. Unlike the former theories, the argument from democracy characterises with its capacity

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<sup>389</sup> Barendt (n 1).p.17.

<sup>390</sup> W Kymlicka, *Liberalism, Community, and Culture* (1989).p.61.

<sup>391</sup> Sadurski (n 19).p.20.

<sup>392</sup> Barendt (n 1).p.13.

<sup>393</sup> Sadurski (n 19).p.20.

to overcome the modern time variables in many Western states.<sup>394</sup> A representative view is this extract from Sunstein, as he wrote, “[s]peech 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”.<sup>395</sup> This theory, to some extent, rests on the development and advancement of society as a whole through public participation, and therefore, it can be called political speech or self-government. For Blasi, this theory “holds that each member of the polity, no matter how eccentric or humble, occupies a vital role in the governing process and thus enjoys a right to hear and be heard on all matters relevant to governance”.<sup>396</sup> Alexander Meiklejohn, who is considered the most influential 20<sup>th</sup>-century philosopher of free speech in the United States, and other 20<sup>th</sup>-century scholars thought that self-government was the core value of free speech.<sup>397</sup> The importance of freedom of speech is inherited from the value of self-government, which in turn, plays a crucial role in determining the conception of democracy.<sup>398</sup> Post argues that “democratic self-governance requires that public opinion be broadly conceived as a process of ‘collective self-definition’ that will necessarily precede and inform any specific government action or inaction”.<sup>399</sup> According to this view, public opinion is a necessary constraint on the democratic and governmental processes and is appropriately essential for the progress of a society as a whole.

The democratic argument, according to Moon, intended to highlight the importance of free speech to remain immune from constitutional restrictions.<sup>400</sup> At the same time, the freedom “implies democracy as a process for specifying and implementing people’s choices”.<sup>401</sup> This point about the link between freedom of speech and democracy has been taken up by many commentators. Raz, for instance, maintains that freedom of expression is an essential element through three aspects. Firstly, no government can be classified as democratic without being open to freedom of speech. Secondly, freedom of expression

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<sup>394</sup> Barendt (n 1).p.18. This theory included many cases, see e.g., *Time, Inc. v. Firestone*, 424 U.S. 448, 457 (1976); *New York Times Co v Sullivan*, 376 US 254, 269 (1964). *Hutchinson v Proxmire*, 443 US 111, 134 (1979).

<sup>395</sup> Cass R Sunstein, ‘Pornography and the First Amendment, 1986 DUKE L.J. 589(1986)’ (1986) 1 Duke Law Journal.p.603.

<sup>396</sup> Vincent Blasi, ‘The Checking Value in First Amendment Theory’ (1977) 2 American Bar Foundation Research Journal 521.p.524.

<sup>397</sup> Trager and Dickerson (n 12).p.99.

<sup>398</sup> Baker (n 91).p.30.

<sup>399</sup> R Post, ‘Constitutional Status of Commerical Speech, The’ [2000] UCLA L. Rev.p.302.

<sup>400</sup> Moon (n 77).p.14.

<sup>401</sup> Baker (n 91).p.31.

is a prerequisite of exchange and diversity in cultures. Lastly, freedom of expression concerns a governmental process through observing its work.<sup>402</sup> Free expression, in this regard, is a distinctive manner that leads to “alerting the polity to the facts or implications of official behaviour, presumably triggering responses that will mitigate the ill effects of such behaviour”.<sup>403</sup> Accordingly, freedom of speech is a central engine for democratic society.<sup>404</sup>

In their reading of the implications of the theory of democracy and self-government, some legal scholars,<sup>405</sup> such as Alexander Meiklejohn, who discussed that citizens have the right to express their feelings, opinions without interference.<sup>406</sup> Indeed, the importance of the self-government theory emerges from its reliance on many valuable aspects that characterise the argument from other theories.<sup>407</sup> The distinctive role of free speech is derived from the fact that “‘the people need free speech’ because they have decided. . .to govern themselves”.<sup>408</sup> Thus, two aspects should be applied to achieve citizen participation in democracy. Firstly, people must have enough sources to collect the information that meet with their requirements. Secondly, there must be no barriers between citizens and government officials, and people should be encouraged to express their opinions freely towards any issues that they confront.<sup>409</sup> Because the people are the ones who judge the government’s performance, the people are the ones who need to address the government with its mistakes. As Schauer puts it, “[c]riticism of public officials and public policy is a direct offshoot of the principles of democracy”.<sup>410</sup> Both requirements of democracy lead to an emphasis on the power of citizens in guidance with the government policy. If the government is democratic, it is for people to decide what the limitations are of the government, especially when the matter is related to the

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<sup>402</sup> Joseph Raz, ‘Free Expression and Personal Identification’ (1991) 11 *Oxford Journal of Legal Studies* 303.p.324.

<sup>403</sup> Blasi (n 396).p.546.

<sup>404</sup> Baker (n 91).p.28.

<sup>405</sup> Spinoza, Hume and Kant discussed democracy. See Schauer, *Free speech: A philosophical enquiry*.p.36.

<sup>406</sup> Meiklejohn, *Free Speech and Its Relation to Self-Government* (n 116).p.2.

<sup>407</sup> Barendt (n 1).p.18.

<sup>408</sup> Baker (n 91).p.30.

<sup>409</sup> LB Solum, ‘Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech’ (1988) 83 *Nw. UL Rev.* 54.p.83.

<sup>410</sup> Schauer, *Free Speech: A Philosophical Enquiry* (n 103).p.38.

government's performance, because as citizens, they have an obligation towards their government, and therefore, towards the various works undertaken by government.<sup>411</sup>

In its simplest form, the argument for democracy is somewhat paradoxical when considered between popular will and the state's power. Meiklejohn was clear when he addressed this issue, as he said, "Just as our agents must be free in their use of their delegated powers, so the people must be free in the exercise of their reserved powers".<sup>412</sup> As for the relationship between democracy and freedom of expression, he took a different approach for extending democracy to include different forms of speech, except those that may cause harm to others.<sup>413</sup> Therefore, he puts forward four areas that must be protected to ensure the applicability of democracy: "education, philosophy and the sciences, literature and the arts, and public discussion of public issues".<sup>414</sup> Clearly, these preconditions highlight the democratic society's requirements. Also, it characterises democratic theory from the two previous theories.<sup>415</sup> Obviously, these "prizes"<sup>416</sup> show that the exercise of self-government requires being open to others and enabling people to send and receive ideas, which ultimately reflects positively on public good. Therefore, any communication that lacks social utility should fall outside legal concerns.

In his reading of the implications of the democratic government, Professor Ian Cram has discussed that the state's power derives from popular sovereignty. When the people express their opinions about various ideas freely, especially political matters, without governmental restrictions, popular sovereignty can be achieved.<sup>417</sup> Accordingly, in societies that do not allow people to express their opinions in various ways, the values and societal development would be undermined.<sup>418</sup> Indeed, communicating in public is the sole purpose of free speech protection. Raz maintains that "to be protected [speech] has to be public... address or made available to the public or any section of the public".<sup>419</sup>

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<sup>411</sup> Raphael David Daiches, *Problem of Political Philosophy* (Cambridge Univ Press 1970), p.85.

<sup>412</sup> Meiklejohn, 'The First Amendment Is an Absolute' (n 94), p.256. See also, Blasi (n 396), p.555.

<sup>413</sup> Moon (n 55), p.16.

<sup>414</sup> Meiklejohn, 'The First Amendment Is an Absolute' (n 94), p.257.

<sup>415</sup> Barendt (n 1), p.20.

<sup>416</sup> CR Sunstein, 'The First Amendment in Cyberspace' [1995] *The Yale Law Journal*, p.1762.

<sup>417</sup> I Cram, *Contested Words: Legal Restrictions on Freedom of Speech in Liberal Democracies* (2006), p.14.

<sup>418</sup> Barendt (n 1), p.47.

<sup>419</sup> Raz, 'Free Expression and Personal Identification' (n 402), pp.303,304.

The speech should be “beyond the reach of legislation limitation, beyond even the due process of law. With regard to them, Congress has no negative power whatever”.<sup>420</sup>

The importance of this argument emerges through the various national and international entities that are asserted on the protection of democracy and the rights of individuals to have access to information. The first example is The Universal Declaration of Human Rights in Article 19, which asserted that protection of freedom of expression should include, “seek, receive, and impart information and ideas ... regardless of frontiers”.<sup>421</sup> Similarly, The European Convention on Human Rights recognises the importance of access of information in Article 10 (1), where it declares that the right of freedom of expression “include[s] freedom to hold opinions and to receive and impart information and ideas without interference by public authority”.<sup>422</sup> In *Autronic AG v. Switzerland*, the Court said the right access to information is granted by the law; therefore, under Article 10 of the Convention, the State has no authority to prevent people from this right.<sup>423</sup> Based on Article 10, in *Ozgur Gundem v. Turkey*, the Court stated, “[f]reedom of expression was a precondition of a functioning democracy and would not depend merely on a State’s duty not to interfere, but might require positive measures of protection”.<sup>424</sup> On the national level, many countries also include access to information to their constitutions. While the first amendment of the U.S. Constitution does not include direct meaning to the right of democracy or access to information, the text itself appears to emphasise these freedoms, as it says, “[c]ongress shall make no law. . . abridging the freedom of speech. . . and to petition the Government for a redress of grievances”.<sup>425</sup> The Egyptian Constitution in Article 57 also asserted on the right of the people to access to information, stating that “[t]he State shall protect citizens’ right to use all forms of public means of communications”.<sup>426</sup>

The argument for democracy, as its name indicates, requires public participation in making the choice. It is against the tenets of governmental monopoly or “licences” that

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<sup>420</sup> Trager and Dickerson (n 12).p.107.

<sup>421</sup> Universal Declaration of Human Rights, <<http://Www.Un.Org/En/Universal-Declaration-Human-Rights/>> Accessed 18 Oct 2016.’

<sup>422</sup> The European Convention on Human Rights,<[http://Www.Echr.Coe.Int/Documents/Convention\\_ENG.Pdf](http://Www.Echr.Coe.Int/Documents/Convention_ENG.Pdf)> Accessed 11 Jan 2017.’

<sup>423</sup> *Autronic AG v Switzerland*, - 12726/87 [1990] ECHR.

<sup>424</sup> *Ozgur Gundem v Turkey*, 23144/93 [2000] ECHR.

<sup>425</sup> ‘First Amendment to the US Constitution,<<http://Constitutioncenter.Org/Interactive-Constitution/Amendments/>> Accessed 19 Oct 2016.’

<sup>426</sup> ‘Constitution of The Arab Republic of Egypt 2014<<http://Www.Sis.Gov.Eg/Newvr/Dustor-En001.Pdf>> Accessed 19 Oct 2016.’

considerably gives authority more priority over citizens.<sup>427</sup> The space and respect that is given to the people to voice their concern on issues of public policy is a direct offshoot from the principle of democracy. Discussion on issues of public interest and criticising leaders cannot exist without reliance on the theory. In addition, the distinctive approach that is applied by the democracy argument, as Barendt discussed, has a big influence on institutions of civil society and its members.<sup>428</sup> Thus, it is not too much of an exaggeration to say that this argument combines two main elements, which are an individual's freedom and the public interest. Indeed, the framers deemed it necessary to create the democratic theory, rather than merely including democracy within the other forms of speech. If we were to draw a rough distinction, we could reasonably decide that the argument is more beneficial, as discussed, than other theories and more likely to serve individuals and society alike and that the theory thus deserves a greater degree of constitutional protection than other theories. In this regard, liberty and freedom are "not just the right to express but the exercise of that right that reflects the functional part of democracy".<sup>429</sup>

### **3.1.5.1 The Limitation of Democracy and Self-Government**

It is evident from the preceding account of the principle of democracy that the argument is confronted with two main limits. First is the concept of democracy. Second is the scope of governmental interference. As the theory puts public good as its top priority, it does not define any limitation for this practice.<sup>430</sup> Therefore, the call for clarifying the principle has become an important theme in the literature. I shall discuss the kinds of limitations in order, all with a view of clarifying the meaning of priority of democracy.

To begin with, the view that finds political speech<sup>431</sup> to be a means of self-government can be characterised by its highest value than other forms of speech. Therefore, the theory

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<sup>427</sup> KI Kersch, *Freedom of Speech: Rights and Liberties under the Law* (2003).p.212.

<sup>428</sup> Barendt (n 1).p.18.

<sup>429</sup> Haidar Dziauddin, 'A Comparative Study of Freedom of Expression and Right to Privacy in Relation to the Press in Malaysia and The United Kingdom' (University of Newcastle 2005).p.26.

<sup>430</sup> Sadurski (n 19).p.31.

<sup>431</sup> Political speech, according to Sunstein "lies at the core of freedom of expression, which is principally concerned with democratic deliberation". See Moon.p.16.Also Blasi recognises that the "theory of political community known as "selfgovernment", which holds that each member of the polity, no matter how eccentric or humble, occupies a vital role in the governing process and thus enjoys a right to hear and be heard on all matters relevant to governance. See Blasi (n 396).p. 524.

should be limited to political speech. The supporter for this opinion claimed that the form of political speech is separated from the other forms of speech, especially those that demean people.<sup>432</sup> Robert Bork contends, “[c]onstitutional protection should be accorded only to speech that is explicitly political”.<sup>433</sup> Therefore, the argument is criticised for being limited in certain respects.<sup>434</sup>

This narrow scope has been expanded by many scholars to cover other forms of speech. Although the Meiklejohn doctrine is not based on one form of speech,<sup>435</sup> political speech occupies a wide range of his discussions on democratic process. This fact is evidenced in the first amendment, which categorises political speech as its top priority more than any other form of speech.<sup>436</sup> In Meiklejohn’s account, citizens need to make a wise decision on the issues that confront them. He writes, “the welfare of the community requires that those who decided issues shall understand them. They must know what they are voting about”.<sup>437</sup> The focus of Meiklejohn is thus on broadening the horizon of the individuals. This, in turn, requires the theory to be enlarged. It is difficult to make clear judgments if the citizens’ conception of democracy or self-government is limited. Some scholars acknowledge the importance of this proponent and therefore include “the novel, the poem, the painting, the drama” to their argument.<sup>438</sup> The numerous forms of expression received acceptance from many democracy advocates<sup>439</sup> and are seen as essential tools in the first amendment.<sup>440</sup> Moon agreed with scholars, as he argues, “[these] expression deserve some protection and have sought to fit these other forms of expression into the democratic account”.<sup>441</sup> Professor Cass Sunstein, also, stresses that the extended protection of the argument of democracy to include other forms of speech is vital to the individuals’ values.<sup>442</sup> However, this later broadness in the conception of

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<sup>432</sup> Trager and Dickerson (n 12).p.107.

<sup>433</sup> RH Bork, ‘Neutral Principles and Some First Amendment Problems’ [1971] Ind. Lj.p.20.

<sup>434</sup> LEE C. Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (Oxford press 1986).p.46.

<sup>435</sup> Redish (n 369).p.592.

<sup>436</sup> *ibid.*p.597.

<sup>437</sup> Meiklejohn, *Free Speech and Its Relation to Self-Government* (n 138).p.25.

<sup>438</sup> Harry Kalven Jr., ‘The Metaphysics of the Law of Obscenity’ (1960) 1960 The Supreme Court Review 1.p.16.

<sup>439</sup> See Solum (n 409).p.74. Moon (n 77).pp.15, 16. Baker (n 91).p.26.

<sup>440</sup> Bollinger (n 434).p.48.

<sup>441</sup> Moon (n 55).p.15.

<sup>442</sup> Cass R Sunstein, *Democracy and the Problem of Free Speech* (1995).p.123.

the political speech does not “directly feed the democratic process”; therefore, it should be limited.<sup>443</sup>

Another aspect of this theory that needs to be addressed is its reliance on collective rather than individual action. Meiklejohn’s account, for instance, is not based on speech that is related to ‘private speech’, but rather on the general interest that is based on social debates. Meiklejohn asserted on the importance of underpinning the commitment of ‘public’ collective participation to protect public interest. He justifies that this view as private speech is just seeking his own interest. Therefore, the speech that does not fall within collective or public concept does not deserve constitutional protection.<sup>444</sup> Frederick Schauer places great emphasis on the role of the majority. He believes that the importance of people emerges from their capacity to make a wise judgment regarding various issues.<sup>445</sup> Democracy can be more effective through collective discourse through exchanging ideas among community members, as Moon says.<sup>446</sup>

It is preferable to hold an alternative conception of democracy, under which the argument should be more broadly understood. Although the argument of democracy has considerable effect on philosophical theorising, it is criticised on different grounds.<sup>447</sup> Its weakness might be due to its narrowing limitation in the political sphere, as Strauss says.<sup>448</sup> In addition, the democracy argument, according to Steven Shiffrin, adds nothing important to political speech, as he says, “a politically based approach to the first amendment abandons history, precedent, and important values in pursuit of a legitimacy that is founded on controversial question-begging”.<sup>449</sup> Moreover, the theory fails to define a clear and logical limitation to its argument, as Baker mentioned.<sup>450</sup> Kalven says, “a hiatus in our basic free speech theory”, the realm of political speech on Meiklejohn’s view focussed on political process rather than other human interests that may equal the

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<sup>443</sup> Baker (n 91).p.26. see also LR BeVier, ‘The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle’ [1978] *Stanford Law Review*.p.299-317.

<sup>444</sup> Alexander Meiklejohn, ‘Political Freedom: The Constitutional Powers of the People (1948)’. pp.79, 80. See also, Moon (n 55).p.15. See also, Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (n 434).p.258.

<sup>445</sup> Schauer, *Free Speech: A Philosophical Enquiry* (n 103).p.39.

<sup>446</sup> Moon (n 77).p.18.

<sup>447</sup> Baker (n 91).p.25.

<sup>448</sup> Strauss (n 324).p.351.

<sup>449</sup> ‘Shiffrin, First Amendment and Economic Regulation: Away from a General Theory of the First Amendment, 78 *Northwestern L. Rev.* 1212, 1239 (1983).’ pp.1226, 1239.

<sup>450</sup> *ibid.*.p.25.

political speech in its priority.<sup>451</sup> Accordingly, short handing the conception of freedom of speech in political speech is far from the truth,<sup>452</sup> impossible,<sup>453</sup> and an unavailing dodge.<sup>454</sup>

Recognising the centrality of liberty also deepens another criticism of the democracy theory. Acknowledgement of the collective decision of the democracy argument is rejected for different reasons. Baker has properly stated that the collective and individual decisions are derived from the same principle; both people and individual play significant influence on the freedom sphere; therefore, there is “no principled basis for making the distinction”.<sup>455</sup> Schuer agrees with this notion. He bolstered the former view by arguing an invalidity of the distinction between public and private speech, evidenced by constitutional text and human experience.<sup>456</sup> Indeed, supporting individual rights does not come from a vacuum; the more we accept the premise of the argument from democracy, we should recognise that the individuals’ role is the main source of collective action and that, without the individual, public right cannot exist. Roscoe Pound addresses this fact when he says, “group will [is] no less important than the individual will”.<sup>457</sup> Indeed, the right of the individual or minority group should be protected because “[t]hey may have better ideas than those of the elected majority”.<sup>458</sup>

What can be said then is self-government and participatory democracy theory sound like complementary roles for developing and progressing community. Although several persuasive conflict opinions have been raised towards the argument, and although the other arguments have a close link to the arguments for free speech, the argument for democracy plays a fundamental role in changing the free speech laws to be better able to meet the requirements of the era than other arguments.<sup>459</sup> The fact that to some extent, the democracy argument characterises with its comprehensive vision over community members as a whole rather than the individual means more freedom for public good. Another clear advantage for the argument is that it paves the way for individuals to

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<sup>451</sup> H Kalven, ‘The Metaphysics of the Law of Obscenity’ [1960] *The Supreme Court Review*.p.15.

<sup>452</sup> *ibid*.p.18.

<sup>453</sup> Moon (n 77).p.18.

<sup>454</sup> ‘Alexander, L., “Low Value Speech”, *Nw. U L. Rev* 83 (1989)’p.554.

<sup>455</sup> Baker (n 91).p.33.

<sup>456</sup> Schauer, *Free Speech: A Philosophical Enquiry* (n 81).p.37.

<sup>457</sup> R Pound, *Jurisprudence* (1959).314-17.

<sup>458</sup> Barendt (n 1).p.20.

<sup>459</sup> *ibid*.p.20.

practice free expression without obstacles that may undermine their role in the democratic process.<sup>460</sup>

### 3.1.6 Section Summary

The significant influence of many arguments on the freedom of speech laws does not mean that these theories are entitled to different levels of protection. Rather, they generally are subjected to the same principle of protection.<sup>461</sup> Free speech theories relate to justifying the principle. More strictly, free speech cannot be named free speech without a solid foundation that is able to justify an individual's speech. Otherwise, free speech becomes an oxymoron and difficult to achieve.<sup>462</sup> Many forms of speech such as pornography, hate speech, and defamation are speech in their ample concept, but because free speech has a special normative, not every speech is eligible to be under free speech protection. According to Professor Schauer, freedom of speech "focus is on what free speech can do for the individual, either as speaker, or as listener, or both".<sup>463</sup> Even though freedom of speech exists in this narrow space, it does not mean that other forms of speech, such as art, fall outside the freedom of speech protection. Rather, different justifications for freedom of expression have opened the scale for varying protection. This fact can be recalled when Sunstein says, "[a]ny simple or unitary theory of free speech value would be obtuse".<sup>464</sup>

The study of the three theories illustrates how a combination of the three values – truth, self-fulfilment, and democracy and self-government – affect the limitation of freedom of speech in practice. Indeed, the content of freedom of speech protection cannot be justified unless there is a clear contribution to good, whether for the individual or public alike. In other words, it can be said that the three arguments are a cornerstone for legitimising freedom of speech and that "[f]reedom of expression, like other important rights, is supported by a number of overlapping justifications".<sup>465</sup>

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<sup>460</sup> Sadurski (n 19).p.31

<sup>461</sup> F Schauer, 'Must Speech Be Special' [1983] Nw. UL Rev.p.1291.

<sup>462</sup> David Braddon-Mitchell and Caroline West, 'What Is Free Speech?' (2004) 12 Journal of Political Philosophy 437.438.

<sup>463</sup> Schauer, 'Must Speech Be Special' (n 461).p.1290.

<sup>464</sup> Cass Sunstein, 'Democracy and the Problem of Free Speech' (1995) 11 Publishing Research Quarterly 58.p.xx. See also, Moon (n 77).p.8 n.2.

<sup>465</sup> Moon (n 77).p.8.

## Section II

### 3.2 Freedom of Speech Limitations

#### 3.2.1 Section Outline

The previous section was a philosophical examination of freedom of speech boundaries. In this section, the argument will examine the limitations of free speech on both theoretical and practical norms. Before proceeding further, the question that should be laid in this part. Is free speech different from philosophical theories to an exercise? How could freedom of expression ever be harmful or offensive? What measurement should be applied when two such speeches collide? Thus, the aim is to clarify the limitations found in theory and in practice. This study explores the different implications of free speech, and how such speech differs from one case to another.

The fact is that freedom of speech has long been held to have limits. In the words of Justice Blackmun, “if all expressive activity must be accorded the same protection, that protection will be scant”.<sup>466</sup> What Blackmun presents is merely a manner of describing a very exacting scrutiny of freedom of speech. Although many scholars emphasised that freedom of speech protects different forms of speech,<sup>467</sup> some speeches, such as offensive words, are excluded from constitutional protection.<sup>468</sup> Harmful speech, for instance, may have negative effect on personal dignity. In the words of Heyman, ‘free speech is a right that is limited by the fundamental rights of other individuals and the community as a whole’.<sup>469</sup> The importance of Section I is raised by Hurley when he inquires when the harmful speech can be excluded from free speech protection.<sup>470</sup> Consequently, discussion at this stage should be focused not on the speech that gains constitutional protection, but rather, on how far the speech has protection. In other words, when will the speech move from free speech to harmful or offensive speech? The purpose of discussing this topic is to provide a convincing justification for excluding some types of legal speech protection.

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<sup>466</sup> *R A V v City of St Paul (90-7675)*, 505 US 377 (1992). See also, Lawrence Friedman, ‘Regulating Hate Speech at Public Universities after R.A.V. v. City of St. Paul’ (1993) 37 Howard Law Journal 1.p.16.

<sup>467</sup> DeCew, J., &quot;Free Speech and Offensive Expression&quot; - Google Scholar.p.85.

<sup>468</sup> *Chaplinsky v New Hampshire 315 US 568 (1942)*.

<sup>469</sup> SJ Heyman, ‘Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression’ [1998] Boston University Law Review.p.1279.

<sup>470</sup> Hurley (n 229).p.165.

However, while recognising that some kinds of speech should be restricted, we also should inquire about the limitations of freedom of expression that should be applied under international law, especially when the issue is related to defamation, privacy or national security. To put the position more precisely, not only the necessity of these rights is subject to certain circumstances, but also these are comprehensive rights that require different treatment and norms.<sup>471</sup> Indeed, the importance of these rights is obvious: speech that negates these conditions would undermine its own normative basis; therefore, discussion on these rights should be focused on a case-by-case basis.

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<sup>471</sup> Heyman (n 469).p.1356.

## **What Speech Should not be Protected?**

### **(Limitations in Theory and Practice)**

#### **3.2.2 Introduction**

In many societies, free speech is a worthy right that deserves constitutional protection. An individual cannot enjoy speech in relation to others unless they recognise him as a free person. However, some types of speech are excluded from free speech protection. As Heyman says, “free speech is a right that is limited by the fundamental rights of other individuals and the community as a whole”.<sup>472</sup> Although all agree on the importance of free speech for the individual and collective alike, there is no society that would protect free speech without limitation. In the words of van Mill, “[e]very society places some limits on the exercise of speech because it always takes place within a context of competing values”.<sup>473</sup> Alexander and Horton make a similar point when they suggest that speech is simply valuable and its principle subject to different categories.<sup>474</sup>

Speech is important because people find it essential to express their opinions and feeling. However, whatever reasons we offer to protect speech can also be used to show why some kinds of speech should and might no longer have grounds for protection. In the words of Judith DeCew, “Despite all the arguments in favour of maximal 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 of all expression”.<sup>475</sup>

That is, some speech is not worthy of protection because it is outside speech values. I can publish threat to other; but I cannot, under any circumstance, get away with it by claiming that this is freedom of expression. What if someone is not satisfied with American policy and refers to Pastor Terry Jones, when he insists on burning the Quran? This type of speech illustrates the importance of restricting such speech to protect either individuals or society from the consequent harm that may emerge from negative speech. The

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<sup>472</sup> *ibid.*p.1279.

<sup>473</sup> Van Mill, David, Freedom of Speech <<http://plato.stanford.edu/entries/freedom-speech/#IntBouDeb>>. Accessed 6 January 2017’.

<sup>474</sup> L Alexander and P Horton, ‘Impossibility of a Free Speech Principle, The’ [1983] Nw. UL Rev.p.1322.

<sup>475</sup> ‘DeCew, J., “Free Speech and Offensive Expression”, Social Philosophy and Policy, 21.2 (2004).’p.85.

negative speech considers the most factor that put speech in strict limitation. Indeed, speech that causes offense or harm to others does not come under the general principle of free speech protection. In *Chaplinsky v. New Hampshire*, for example, the Supreme Court very clearly insisted that the free speech is not an unlimited right. Speech that contains ‘lewd and obscene, the profane, the libellous’, and other words fall outside free speech protection.<sup>476</sup> According to Justice Brennan, profane speech has strict scrutiny more than normal speech, basically because it is not at the ‘core of First Amendment protection’.<sup>477</sup>

The wide variety of speech requires extending the speech argument to cover negative speech. Speech that causes harm and offence is considered, in general terms, the most common reasons behind speech restriction.<sup>478</sup> Limiting free speech by establishing unprotected categories of expression, according to Trager and Dickerson, is crucial to protect free speech from such danger.<sup>479</sup> Therefore, the following discussion is not to argue the general principle of freedom of speech, but rather to make a clear understanding of when speeches that cause harm or offence can be restricted and fall out side free speech protection.

### **3.2.3 The Harm Principle and Free Speech**

The harm principle or liberty principle<sup>480</sup> is considered to be the only liberal theory that has validity to justify the limiting of free speech.<sup>481</sup> The importance of the harm principle is so great, not only on judges but also on many different fields that interested in development and progress of humanity’s knowledge.<sup>482</sup> Harcourt claimed that the “harm principle is being used increasingly by conservatives who justify laws against prostitution, pornography, public drinking, drugs and loitering, as well as regulation of

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<sup>476</sup> *Chaplinsky v New Hampshire*, 2 315 US 568 (1942).

<sup>477</sup> Shiffrin, *The First Amendment, Democracy, and Romance* (n 299).p.23.

<sup>478</sup> Aljamal (n 5).p.117.

<sup>479</sup> Trager and Dickerson (n 12).p.112.

<sup>480</sup> C West, ‘Pornography and Censorship (2004)’.

<sup>481</sup> This view raised by Mill. See J Feinberg, *Harm to Others* (1990).p. ix.

<sup>482</sup> SD Smith, ‘The Hollowness of the Harm Principle’ [2004] U San Diego Legal Studies Research Paper.p.2.

homosexual and heterosexual conduct”.<sup>483</sup> The considerable influence of the harm principle reflects on many court decisions, which qualifies the principle to be one of the main sources that are adopted by the courts.<sup>484</sup> Harcourt noted that “the harm principle became the dominant discursive principle used to draw the line between law and morality”.<sup>485</sup> Many states throughout the world restrict harm speech. This can be evidenced through international legal conventions, which emphasised the importance of fighting harmful messages.<sup>486</sup> The International Covenant on Civil and Political Rights, for example, in Article 20(2) requires “[any] advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence to be prohibited by law”.<sup>487</sup> In *Commonwealth v. Bonadio*, for example, the Court emphasised the potential role of the harm principle, as it stated “[t]he concepts underlying our view of the police power in the case before us were once summarized as follows by the great philosopher, John Stuart Mill, in his eminent and apposite work, *ON LIBERTY*”.<sup>488</sup>

One of the most notable proponents of this principle is John Stuart Mill. In his classical *On Liberty*, he asserted that “one very simple principle as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control”. That principle is interested in “the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, [and] ... to prevent harm to others”.<sup>489</sup> To this view, harm cannot be limited unless it causes clear and direct danger to others.<sup>490</sup> Mill’s aim from this principle is to draw a clear limit between justified and unjustified conducts. Indeed, preventing harm to others is vital “because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right”.<sup>491</sup> Cass Sunstein makes a similar point when he suggests that such speech should be restricted because of the harm that it may cause. To him, “explicit speech should be regulated not because it is offensive

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<sup>483</sup> BE Harcourt, ‘The Collapse of the Harm Principle’ [1999] *The Journal of Criminal Law and Criminology* (1973).p.139.

<sup>484</sup> Smith (n 482).p.2.

<sup>485</sup> Harcourt (n 483).p.138.

<sup>486</sup> A Tsesis, ‘Dignity and Speech: The Regulation of Hate Speech in a Democracy’ [2009] *Wake Forest Law Review*.pp.521, 522.

<sup>487</sup> International Covenant on Civil and Political Rights, <<http://www.ohchr.org/En/ProfessionalInterest/Pages/Ccpr.aspx>> Accessed 29 Jan 2017.’ (n 344).

<sup>488</sup> *Commonwealth v Bonadio*, 490 Pa 91 (1980).

<sup>489</sup> John Stuart Mill, *On Liberty* (1859).pp.22, 23.

<sup>490</sup> ‘Van Mill, David, Freedom of Speech <<http://plato.stanford.edu/entries/freedom-speech/#IntBouDeb>>. Accessed 6 January 2017’.

<sup>491</sup> John Stuart Mill (n 489).p.22.

and sexually explicit (the problem of “obscenity”) but instead because and when it produces harm through merging sex with violence or coercion”.<sup>492</sup>

The lack of justification for restricting the conduct that some people want to engage in may undermine the core of the principle; therefore, the principle is justified (1) when the restriction aims to prevent harm and (2) when the harm constitutes a danger to others.<sup>493</sup> However, the harm principle, as Nils Holtug noted, does not cover all negative conducts that cause harm.<sup>494</sup> Indeed, the broadness of harm makes this term subject to different judgments.<sup>495</sup> Feinberg noted that speech has different forms; each form should be subjected to different judgments.<sup>496</sup> According to Moon, “[h]arm is a vessel into the courts can pour almost anything they choose”.<sup>497</sup> Thus, we would have to distinguish between different sorts of harm and what kind of harm should be ruled out by the harm principle.

Although harm is defined as a mean “[t]o harm a person is to diminish his prospect, to affect adversely his possibilities”,<sup>498</sup> many scholars have applied different approaches to define the concept of harm. To begin with, Mill’s view focuses on the consequences rather than the type of expression, either on speech or on the action level. He distinguished between speech of incitement, which leads to a mischievous act, and speech that only expresses an idea. To him, expressing an idea by a peaceful manner, through a newspaper article, for example, is different from delivering an idea by an angry mob; the important thing that we need to focus on is not whether the statement is false or true, or moral or immoral, but rather, our attention should focus on whether the act causes harm or not.<sup>499</sup> Mill also introduces another drastic limitation on what counts as ‘harm’ to distinguish between some kinds of harms. For example, suppose my job position suffers because your qualifications are higher than mine and that drives me to not upgrade for a higher job. This kind of harm, in Mill’s view, cannot justify any legitimate restriction.<sup>500</sup> Furthermore, Mill stated that acts that are harmful to others should be limited to two factors. First, the harm should violate the rights of others. Second, the harm should violate

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<sup>492</sup> C Sunstein, ‘Democracy and the Problem of Free Speech’ [1995] *Publishing Research Quarterly*.

<sup>493</sup> Smith (n 482).p.9.

<sup>494</sup> N Holtug, ‘The Harm Principle’ [2002] *Ethical Theory and Moral Practice*.p.364.

<sup>495</sup> Smith (n 482).pp.10, 11, 12, 13, 35.

<sup>496</sup> Joel Feinberg, ‘Harm to Others—a Rejoinder’ (1986) 5 *Criminal Justice Ethics* 16.p.18.

<sup>497</sup> Moon (n 77).p.109.

<sup>498</sup> J Raz, *The Morality of Freedom* (1986).p.414.

<sup>499</sup> John Stuart Mill (n 489).pp. 100, 101.

<sup>500</sup> Mill, *On Liberty* (n 489).p.145. See also, Smith (n 482).p.35.

people's interest.<sup>501</sup> He stated that “[harmful to others is not specified], but the dispositions which lead to them, are properly immoral, and fit subjects of disapprobation which may rise to abhorrence”.<sup>502</sup>

The simple feature of the harm principle (which targets the harm to others) offers a distinctive role to the state to practice their authority. Jorge Menezes Oliveira observes that “Mill does certainly not pretend that the [harm] principle is a sufficient condition for [the] legitimate use of coercion against individuals; it specifies only a necessary condition. . . . It tells us when we may restrict liberty, not when we ought to”.<sup>503</sup> Emphasising the same opinion, Sadurski comments, “not all the harmful expressions will be captured by the restrictions, and some non-harmful expressions will be”.<sup>504</sup> These words of Oliveira and Sadurski indicate that the harm principle does not restrict all conducts that cause harm, which means that the State can apply its view. The space that is offered by the harm principle gives an opportunity for the authority to rely on surrounding circumstances rather than just focussing on the harmful conduct. In other words, a state can make a balance between the “costs and benefits of restriction”.<sup>505</sup> Holmes argued that some types of speech should be restricted, especially those that “imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country”.<sup>506</sup>

In the U.S. courts, speech is protected unless it causes harm to others. According to Rodney Smolla, three main elements make expression punishable: first, when it causes physical harm; second, harm that cause a negative effect to some relationship; and last, harm to an intellectual response.<sup>507</sup> For example, contracting with someone to injure individuals or groups is harm, and it requires punishment. The courts do not protect the dissemination of false news aimed at the destruction of relations between members of the community because its purpose to inflict harm. Causing intellectual response harm by, say, defaming the reputation of individuals or violating a community's value can also be punished under emotional damages in a lawsuit. In *Chaplinsky v. New Hampshire*, the

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<sup>501</sup> Mill, *On Liberty* (n 489).p.145. See also, Jorge Menezes Oliveira, ‘Harm and Offence in Mill’s Conception of Liberty’ .p.13.

<sup>502</sup> John Stuart Mill (n 489).p.140.

<sup>503</sup> Oliveira (n 481).p.3.

<sup>504</sup> Sadurski (n 19).p.39.

<sup>505</sup> Smith (n 482).p.11.

<sup>506</sup> *Abrams v. United States*, 250 U. S. 616 (1919).

<sup>507</sup> Rodney A Smolla, ‘Free Speech in an Open Society (Knopf 1992)’ .p.48.

court stated that “[t]he right of free speech is not absolute at all times and under all circumstances, and does not include the use of lewd and obscene, profane, libellous and other words which by their very utterance inflict injury or tend to incite an immediate breach of the peace”.<sup>508</sup> According to this classification, harm to others takes various forms. Let us take one practical example. Advocating for people, either directly or by using social media, to join to terrorist groups can be given three general interpretations in today’s context: first, it is an advertisement to terrorists; second, it is a way to spread violence; and third, it reflects a bad reputation about the religion or state that the terrorists belong to, and this generally negatively affects the security and peace. In the light of these interpretations, it can be concluded that the restriction or regulation of some types of speech do not come from a vacuum. Speech that regulates or restricts, in fact, is based on the harm they cause. Speech that is deliberately evil and encourages one to act in ways that frustrate other people’s preferences should be subjected to legal interference.<sup>509</sup>

Finally, it is important to recognise that restricting all harm is impossible and may affect negatively on the free speech process,<sup>510</sup> but in order to solve or at least limit the consequence of harm, Mill emphasised family and social role in fighting and amending harmful conduct. To him:

“I fully admit that the mischief which a person does to himself may seriously affect, both through their sympathies and their interests, those nearly connected with him, and in a minor degree, society at large. When, by conduct of this sort, a person is led to violate a distinct and assignable obligation to any other person or persons, the case is taken out of the self-regarding class, and becomes amenable to moral disapprobation in the proper sense of the term. . . . But with regard to the merely contingent, or, as it may be called, constructive injury which a person causes to society, by conduct which neither violates any specific duty to the public nor occasions perceptible hurt to any assignable individual except himself; the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom”.<sup>511</sup>

Although the harm principle, as mentioned above, played a crucial role for legal enforcement, there are some who believe that harm principle is not covering legal requirements. More formally, in the writing of Bernard E. Harcourt, the harm should

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<sup>508</sup> *Chaplinsky V New Hampshire*, 315 U S 568 (1942).

<sup>509</sup> Sadurski (n 19).p.38.

<sup>510</sup> Van Mill, David, *Freedom of Speech* <<http://plato.stanford.edu/entries/freedom-speech/#IntBouDeb>>. Accessed 6 January 2017’.

<sup>511</sup> John Stuart Mill (n 469).p.145.

update its principle to overcome the difficulties of our current time. According to him, the principle should “focus on the types of harm, the amounts of harms and the balance of harms”.<sup>512</sup> Another view raised by George Kateb, as he believes that the harm principle should be extended to include other forms, but this should not include all harmful conduct without discrimination because sometimes make a wise judgment on such conduct is normative and subject to different circumstances. He says, ‘freedom of expression is genuinely respected only when extreme expression is protected’.<sup>513</sup>

The harm principle is silent in the sense that it does not respond to many update issues that are raised in our current time. The harm principle failed Considerably to respond adequately to the harm that was caused by allowing prostitution on a large scale; to the threat of dangerous disease that was caused by malpractice, such as the conduct that occurs outside the health domain; or to people losing their jobs due to defamation and rumours by social media. Harm to others is silent regarding many aspects that need to be addressed. Harcourt suggested that the best way to overcome the lack of harm principle is by “access[ing] larger debates in ethics, law and politics-debates about power, autonomy, identity, human flourishing, equality, freedom and other interests and values that give meaning to the claim that an identifiable harm matters”.<sup>514</sup>

What can be said, then, is that a fundamental objection to the harm principle is inappropriately fixated on all forms. Mill’s model of the arena, for example, is inclined to focus on physical rather than psychological or economic harms.<sup>515</sup> Mill refers to surrounding circumstances in making judgments on conduct. According to him, “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”.<sup>516</sup> Indeed, many expressions have serious consequences and not everyone uses them in a way that can be acceptable. Hence, the answer to the question posed at the starting point of this section, about the limit of harm, would be that a restriction or limitation is not based on one form. Blasi contends that “[s]peech could be restricted when it might lead

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<sup>512</sup> Harcourt (n 483).p.114.

<sup>513</sup> 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.

<sup>514</sup> Harcourt (n 483).pp.181-183.

<sup>515</sup> Warburton (n 87).p.31.

<sup>516</sup> John Stuart Mill (n 489).p.100.

to bad consequences in the form of individual or social harms”.<sup>517</sup> We can answer this question once we have found that speech constitutes a threat to the freedom and security of others. Again, we cannot make wise judgments unless we shoulder different considerations. Professor Feinberg acknowledged, with regard to balance harm arguments, “in the end, it is the legislator himself, using his own fallible judgment rather than spurious formulas and “measurements”, who must compare conflicting interests and judge which are the more important”.<sup>518</sup> Before we settle for such a limited and hypothetical role for the offence principle, however, it is important to consider another possible justification. This alternative justification relies crucially on the value of the protection of the community. Thus, it may be argued that, since it is valuable for a person to live his life without interference from others, it is also vital to protect social values. This fact appears in the current time, when the harm principle is being used more by many who advocate for laws to protect the community from such conduct, which has negative effect on morals, such as “pornography, public drinking, drugs, loitering. . .and homosexual”. By endorsing the harm principle, the legal enforcement of morality has changed traditional thinking, which lasted for years’ reliance on moral offensive.<sup>519</sup>

### 3.2.4 The Offence Principle and Free Speech

The offence principle considers an alternative argument in which the harm principle cannot work for the principle of free speech. According to the English Dictionary, offend means to “hurt someone's feelings, give offence to, affront, upset, displease, distress, hurt, wound, pain, injure,... annoy, anger, exasperate, irritate, vex ...”.<sup>520</sup> Further, according to Donald VanDeVeer, “[t]o be offended is, by definition, to suffer distress or anguish”.<sup>521</sup> The offence principle serves as an alternative approach to cover all the penalties that are not covered by the harm principle. Mill stated that the “harm principle sets the bar too high and that we can legitimately prohibit some forms of expression

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<sup>517</sup> V Blasi, ‘Learned Hand and the Self-Government Theory of the First Amendment: Masses Publishing Co. v. Patten’ [1990] U. Colo. L. Rev.p.12.

<sup>518</sup> Joel Feinberg, *Harm to Others* (Oxford University Press 1984).p.203.

<sup>519</sup> Harcourt (n 483).p.139.

<sup>520</sup> ‘Offend Meaning <<https://www.google.co.uk/search?dcr=0&q=Dictionary#dobs=offend>>. Accessed 16 Dec 2017.’

<sup>521</sup> ‘D VanDeVeer, “Coercive Restraint of Offensive Actions”. *Philosophy & Public Affairs*, 1979.’p.177.

because they are very offensive”.<sup>522</sup> People are protected from such offensive conduct, guaranteed under Article 10(2) of the ECHR, as it stated that “[freedom of speech] may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary. . .for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others”.<sup>523</sup> Similarly, Article 19(3)(b) of the ICCPR emphasised the protection of some public interests by maintaining a moral standard.<sup>524</sup> Further, Egyptian law under Article 65 protects freedom of expression: “[f]reedom of thought and opinion is guaranteed. Every person shall have the right to express his/her opinion verbally, in writing, through imagery, or by any other means of expression and publication”.<sup>525</sup> However, the Penal Code excludes incitement from free speech protection.<sup>526</sup>

The notion of the offence principle emerges from the fact that harm is not the only way that constitutes a danger to others. Some conduct can be categorised as a crime, but in a different form.<sup>527</sup> In this regard, Feinberg says that “it is always a good reason in support of a proposed criminal prohibition that it is probably necessary to prevent serious offense to persons other than the actor, and would probably be an effective means to that end”.<sup>528</sup> Many believe the harm principle cannot itself cover all free speech aspects. Accordingly, our concentration should focus on fleshing the offense principle, which constitutes, with the harm principle a solid foundation for limiting the freedom of speech.<sup>529</sup>

The importance and necessity of the offence principle does not emerge from a vacuum. ‘Achieve public interest’ is considered one of the key features of the offence principle. That is, the offence principle and freedom of expression have a common interest in creating public interaction among society members. While freedom of expression allows people to express their opinions, “incivility is sometimes tolerated for the sake of social

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<sup>522</sup> Freedom of Speech <<http://Plato.Stanford.Edu/Entries/Freedom-Speech/#IntBouDeb>>. Accessed 6 January 2017’.

<sup>523</sup> European Convention Of Human Rights <[http://Www.Echr.Coe.Int/Documents/Convention\\_ENG.Pdf](http://Www.Echr.Coe.Int/Documents/Convention_ENG.Pdf)>. Accessed 21 Mar 2017.’

<sup>524</sup> International Covenant on Civil and Political Rights Article 4 (1).’

<sup>525</sup> Constitution of The Arab Republic of Egypt 2014 <<http://Www.Sis.Gov.Eg/Newvr/Dustor-En001.Pdf>> Accessed 7 January 2017.’

<sup>526</sup> ‘The Penal Code <<Http://Hrlibrary.Umn.Edu/Research/Egypt/Criminal-Code.Pdf>> Accessed 7 January 2017.’

<sup>527</sup> AP Simester and A Von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (2011).

<sup>528</sup> Feinberg, *Harm to Others* (n 481).p. xiii.

<sup>529</sup> Joel Feinberg, *Harm to Self* (New York-Oxford University Press 1986).p.3.

discourse”.<sup>530</sup> Although harm and offence principles apply the same function towards some actions, there are considerable differences between harm and offence, and any connecting between them cannot be justified.<sup>531</sup> Van Mill, calls for the importance of separation between harm and offence because the forms of expression are different.<sup>532</sup> The need for the offence principle is more pressing in liberal states where the people practice different activities under the freedom title. When one say obscene words, shouting slogans of supporting for the terrorist Islamic State of Iraq and Syria (ISIS) or nude dancing without caring with the public sense. Under the harm principle, this conduct cannot be categorised as harm to others; but in the principle of offence, these actions would be subject to such regulations.

There is no disagreement that prescribing boundaries to freedom of expression must be a careful effort, to avoid sliding down the slippery sloppy. Human beings’ nature, of course, differs from one to another, but this does not mean that we should be silent against ‘unusual’ conduct, nor does this mean that the effect of such conduct would not be offensive to others just because any single other person found it offensive. Indeed, supplying rigid grounds for restriction is not an easy task, especially when this is related to the freedom of speech. Therefore, Joel Feinberg was precise when he asserted that the offence principle must be narrowed.<sup>533</sup> He outlined standards to be a compromise between general conduct and conduct that has serious offence. These standards contain three factors that determine the offensiveness: (1) “the extent of the offensive standard”, which refers to the amount of the offensiveness and the expected negative consequences of that conduct; (2) “the reasonable avoidability standard”, referring to what extent person can avoid witnesses the offensive conduct; (3) “the Volenti standard”, which refers to “whether or not the witnesses have willingly assumed the risk of being offended either through curiosity or the anticipation of pleasure”.<sup>534</sup> Let us take a real example to summarise these standards. Suppose there are three persons: the first person is interested in erotic films and decides to buy a ticket to attend a sex movie; the second person went to the city centre and found someone who insulted Blacks or Muslims; the last person

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<sup>530</sup> Andrew P Simester and Andrew Von Hirsch, ‘Rethinking the Offense Principle’ (2002) 8 Legal theory 269.p.295.

<sup>531</sup> *ibid.*p.280

<sup>532</sup> Van Mill, David, Freedom of Speech <<http://plato.stanford.edu/entries/freedom-speech/#IntBouDeb>>. Accessed 6 January 2017’.

<sup>533</sup> J Feinberg, *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (2014).p.86.

<sup>534</sup> Feinberg, *Harm to Others* (n 481).p.26.

decided to go to a public corner where people can do what ever they want, and while he was there, he found himself obligated to watch some people engaging in sexual acts. Under Feinberg's principle, the first behaviour is not an offence because the person was interested in attending the sex movie, and this is protected under prong (3). The behaviour that the second person met is an offence because the conduct was directed towards a group of people (Black and Muslims), as prong (1) postulated. The last person is offended because there was no possibility to avoid witnessing the offensive display, as prong (2) postulated. Further, like the harm principle, as some notice, the offence principle is "designed to mediate practical conflicts between interests. . . and the well-being of different members of society".<sup>535</sup>

Do these three factors of the seriousness of the offensiveness alone determine offensive speech? Feinberg says that the seriousness factors cannot themselves constitute legal ground without balancing them with the reasonableness of the offending conduct. According to him, reasonableness can be determined by three factors: (1) "its personal importance to the actors themselves and its social value generally". If there is public interest behind the speech that offends others, then that provides a solid ground for protection. (2) "The availability of alternative time and places where the conduct in question would cause less offense". If one has an opportunity to sell alcohol next to the mosque, according to this argument, it would be legitimate to forbid this conduct. (3) "The extent, if any, to which the offence is caused with spiteful motives". This means that the reasonableness of speech cannot exist without a close investigation of the speaker's motivation. The most notable, factors of the seriousness and reasonableness of offending should be balanced by legislatures or judges because the actions that fall under offence principle are unlimited.<sup>536</sup>

Feinberg categorically asserts that the offence principle is not a broad principle that covers all conduct, without discrimination. If the offence principle is broadened to include all conduct that causes some nuisance, as Almagor says, then the primary function of the principle would be undermined.<sup>537</sup> Indeed, open avenues to suppress each conduct just because some might be offended would negatively affect, not merely the offence principle, but rather the free expression process, especially these days, when

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<sup>535</sup> Simester and Hirsch (n 527).

<sup>536</sup> Feinberg, *Harm to Others* (n 481).p.45.

<sup>537</sup> Cohen-Almagor, R., 1993. Harm Principle, Offence Principle, and the Skokie Affair. *Political Studies*, 41(3). p.459.

cultures have become more overlapping. To be precise, human beings' nature is different from one to another, depending on different factors such as culture and education level. In some places, for example, and in many countries, it is no longer indecent for a man to hold another man's hand in public. On the other hand, in some areas, especially in the Middle East, this is considered to represent a kind of respect and warm relationship. This means that the degrading conduct in the eyes of some may not be so with others. "The content may be offensive to some".<sup>538</sup> Ronald Dworkin agreed with this point, as he observed, "[o]f course individual liberty would be very restricted if no one was allowed to do anything that any single other person found offensive".<sup>539</sup> A similar viewpoint is taken by the U.S. Supreme Court; it says that "the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection".<sup>540</sup> Also, the lack of offence in some speech pushed the Egyptian law to exclude some defamation from its restrictions.<sup>541</sup> Taking an action, according to Sadurski, against some conduct just because it offends others is not a logical reason to suppress the speaker.<sup>542</sup>

Giving the above standards, pornography that post on social media causes offence to individuals especially minors. The discomfort affecting many people cannot easily be shrugged off, and there seems to be an almost general agreement to stop it. The U.S. First Amendment, for example, does not recognise the obscene message, whether direct or across all media.<sup>543</sup> There is no question that the effective social networks on society members by many extremist groups, such as al-Qaeda and ISIS, are taking advantage of the fruits of globalisation and modern technology and posting videos or messages to incite violence. According to Weimann, "[t]he interactive capabilities of the internet, like chatrooms, social networking sites, video-sharing sites and online communities, allow terrorists to assume an offensive position".<sup>544</sup> Consequently, there is no doubt that the terrorist messages via social media are offensive on several grounds. First, they incite

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<sup>538</sup> Feinberg, *Harm to Others* (n 481).p.26.

<sup>539</sup> R Dworkin, *A Matter of Principle* (1985).pp.340,345,346.

<sup>540</sup> *FCC v Pacifica Foundation*, 438 US 726 (1978).

<sup>541</sup> Mohamed Abdel Akadirkamil, *Madaa Kafalah Haqq Al'iinsan Fi Alttaebir Bayn Alfaqqih Al'iislami Walqanun Alwadei* (munsha'at almaearif 2016).p.374

<sup>542</sup> Sadurski (n 19).p.37.

<sup>543</sup> JH Lipschultz, *Social Media Communication: Concepts, Practices, Data, Law and Ethics* (2014).pp.170, 171.

<sup>544</sup> G Weimann, 'Terror on Facebook, Twitter, and Youtube' [2010] *The Brown Journal of World Affairs*.p.53.

against non-Christian or non-Muslims (depends on the extremist groups' belief). Second, they send the wrong message to the new generation about religious beliefs. Third, they feed a division among different communities and sometimes among members of society themselves, as this happened, for example, in Iraq and Syria.

Under the international level, however, the principle is vague and indefinite; there is no common standard to define public morals that have a strong link with offence principle.<sup>545</sup> Further, U.S. free speech law gives wide protection for many speech forms except, for example, fighting words and obscenities. The U.S. Supreme Court has said it “has been categorically settled by the Court, that obscene material is unprotected by the first amendment”.<sup>546</sup> However, the Court did not introduce a logical reason for excluding obscenities from its protection.<sup>547</sup> What is more, the principle does not cure the potential dangers of technology developments, as discussed. The offence principle gives narrow content to restrict conduct that has considerable effect on free speech process.<sup>548</sup> Indeed, the wide ambit that is given to free speech generally and offence speech in particular is an issue that should be resolved. In this regard, it has been said that “[f]reedom of speech is a central and precious right, and the Constitution rightly draws the limits very widely. The law must be cautious about what it prohibits”.<sup>549</sup> Ronald Dworkin has observed, “[I]t is the central, defining, premise of freedom of speech that the offensiveness of 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”.<sup>550</sup> Although the Feinberg principle widely discusses the scope of offensive conduct, it does not provide adequate reasons for the offense of such conduct. Indeed, providing sufficient reasons to justify such a restriction is crucial to make the ambit of the Feinberg principle more effective.<sup>551</sup> Amagor said, “[a]ny principle designed to restrain freedom of speech should be narrowly defined in order to prevent the possibility of opening a window for further

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<sup>545</sup> *Leo R Hertzberg et al v Finland*.

<sup>546</sup> *Miller v California*, 413 U S 15 (1973).

<sup>547</sup> Trager and Dickerson (n 12).p.118.

<sup>548</sup> Van Mill, David, Freedom of Speech <<http://plato.stanford.edu/entries/freedom-speech/#IntBouDeb>>. Accessed 6 January 2017’.

<sup>549</sup> Freedom of Expression Has Limits, Mail and Guardian Online, February 20,2006, Online, <<http://www.Mg.Co.Za>> Accessed 22 Dec 2016’.

<sup>550</sup> Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (New York: OUP 1996).p.206.

<sup>551</sup> Simester and Hirsch (n 527).

restrictions”.<sup>552</sup> Thus, the wide scope of offence, as we said before, creates ground for making freedom of expression follows the desires rather than the real surround circumstances.<sup>553</sup>

Regardless of these disadvantages, the importance of the principle cannot be denied. At a national level, the principle plays a considerable role in protecting public peace, as the U.S. Supreme Court contended. According to the Court, “the word “offensive” was not defined in terms of what a particular addressee thought, it was defined as what reasonable men of common intelligence understood as words likely to cause an average addressee to fight”.<sup>554</sup> Many speech forms that hurt people are subjected either to the harm or offence principles, which means that the offence principle works as a compatible principle to distinguish between the speech that deserves protection from others that do not.<sup>555</sup>

### 3.2.5 Section Summary

Although there is a considerable difference in the primary function of the harm and offence principle,<sup>556</sup> both, as we have seen, play a vital role either on the national or international level in determining the limitations of freedom of speech. These two principles define the boundaries of speech, which makes free speech more valuable. The speech that introduces harmful or offensive results to individuals, groups or societies, or violates people’s freedoms and rights, are excluded from be granted free speech protection under the harm and offence principles. Accordingly, the principles, besides their role as principles of free speech, are enacted to protect public morality. In the words of Schauer, “[i]f no first amendment and principles of [harm and offence] existed, would we say that a telephone bookie’s operation constitutes a greater danger of harm than the march of the American Nazi Party in Skokie”.<sup>557</sup> This point led to the fact that under the offensiveness and harm argument, the restrictions on such materials are normative and subject to different standards. The arguments, however, open the scale for governmental

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<sup>552</sup> ‘Cohen-Almagor, R., 1993. Harm Principle, Offence Principle, and the Skokie Affair. *Political Studies*, 41(3).’ (n 537).p.22.

<sup>553</sup> Dziauddin (n 429).p.57.

<sup>554</sup> *Chaplinsky V New Hampshire*, 315 U S 568 (1942).

<sup>555</sup> ‘Cohen-Almagor, R., 1993. Harm Principle, Offence Principle, and the Skokie Affair. *Political Studies*, 41(3).’ (n 537).p.461.

<sup>556</sup> J Feinberg, ‘Harm to Others: The Moral Limits of the Criminal Law, Vol. I’.p.3.

<sup>557</sup> Schauer, ‘Categories and the First Amendment: A Play in Three Acts’ (n 308).p.271.

control.<sup>558</sup> I am not here against governmental interference nor conduct regulation when there is sufficient reason for restriction. The free speech principle does not only cover the peaceful conducts, harm or offensive conducts that may subject to the principle of protection, but also the conducts that have pornography connotations.<sup>559</sup> Thus, as long as the criteria of the two arguments are uncertain, the legislators and justices should balance harm and offensive conducts against other protected rights, and this, in the end, would support free speech protection. Finally, in this way, the ‘Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination hostility or violence’ asserted that, when the case is relevant to the incitement to hatred, the state should update its regulations to be more able to cope with variables.<sup>560</sup>

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<sup>558</sup> Schauer, *Free Speech: A Philosophical Enquiry* (n 103).p.179.

<sup>559</sup> Freedom of Speech <<http://Plato.Stanford.Edu/Entries/Freedom-Speech/#IntBouDeb>>. Accessed 6 January 2017’. See also Schauer, *Free Speech: A Philosophical Enquiry* (n 103).p.184.

<sup>560</sup> This conference organised by the Office of the United Nations High Commissioner for Human Rights (OHCHR), See ‘Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred That Constitutes Incitement to Discrimination Hostility or Violence.’ (2012).

## Chapter Four

### The Limitation of Freedom of Expression in International Law

#### The Sources and Limitations under International Law

##### 4.1 Introduction

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. This chapter concerns the limitation of freedom of expression under international law and how the international and national courts dealt with it. That is, the instruments for the protection of fundamental rights and liberties, in both the national and international contexts, consistently feature the presence of disposition, which asserts the value of human rights. The protection of freedom of expression appears frequently among these rights. Looking beyond international law, many national constitutions recognize, also, an individual's right to freedom of expression.

When States become party to international human rights treaties,<sup>561</sup> they become subject to international norms and, based on international standards, they are obligated to respect and protect human rights, including freedom of expression. This obligation to respect requires states to "refrain from interfering with or curtailing the enjoyment of human rights". The obligation to "protect requires states to protect individuals and groups against human rights abuses." Further, "the obligation to fulfil means that states must take positive action to facilitate the enjoyment of basic human rights".<sup>562</sup> It is worth mentioning that the obligation of states can be applied in two ways: namely, "1- to adopt

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<sup>561</sup> In the cases of The Universal Declaration of Human Rights all States are binding to apply the Charter. See Anthony D'Souza and Carmo De, *World Constitutionalism* (Cambridge Scholars Publishing 2007). p.33. See also Naorem Sanajaoba, *Law and Society: Strategy for public Choice*, 2001 ( First Edit, K, M, Rai Mittal 1991).p.110.

<sup>562</sup> United Nations, Human Rights, <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>> Accessed 16 January 2017.'

statutes or other measures necessary to protect the rights guaranteed by the treaty and 2- to remedy any violations of human rights”.<sup>563</sup>

This section reviews the limitations of free speech in a number of international and regional instruments where it enjoys significant priority. Many of the contributions to this volume refer to international or regional human rights instruments, such as the Universal Declaration of Human Rights (hereinafter referred to as the UDHR), the International Convention on Civil and Political Rights (hereinafter referred to as the ICCPR) and the European Convention on Human Rights (hereinafter referred to as the ECHR).

The purpose of this section is to provide some background to the more detailed discussion of the limits of free speech topics. The limitations on freedom of speech as a legal concept cannot be understood without a clear vision of the freedom of speech and its relationship with other freedoms. Thus, a look at the variety of conventions gives a better understanding of the importance of the limitations of freedom of expression borne in international law.

#### **4.2 The Universal Declaration of Human Rights (UDHR)**

The UDHR was adopted in 1948 as a universal basis for human rights. It plays a considerable role in furthering the concept of human rights.<sup>564</sup> The effect of UDHR on the state party proved controversial. One view stated by Professor Cassin, one of the UDHR’s principal authors, was that “the UDHR could be considered as an authoritative interpretation of the Charter of the United Nations and as the common standard towards which the legislations of all the Member States of the United Nations should aspire”.<sup>565</sup> The second view found that all States were subject to the Universal Declaration, whether or not the state was a member of the international community.<sup>566</sup> The UDHR aimed to respect human rights, including freedom of expression; Article 19 stated that “everyone has the right to freedom of opinion and expression; this right

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<sup>563</sup> W Magnuson, ‘Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection under International Law, The’ [2010] Vand. J. Transnat’l L.p.285.

<sup>564</sup> LB Sohn, ‘The New International Law: Protection of the Rights of Individuals rather than States’ [1982] Am. UL Rev.p.15.

<sup>565</sup> LB Sohn, ‘The Human Rights Law of the Charter’ [1977] Tex. Int’l LJ.p.21.

<sup>566</sup> S Coliver, *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (1999).pp.16,17.

includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontier”.<sup>567</sup>

The most obvious feature of this provision is the extensive list of expression that may be practiced. Also, many States have used these provisions as guidance in dealing with any issue related to human rights.<sup>568</sup> Therefore, this Article is considered to be the foundation stone of freedom of expression not only for traditional approaches of spoken and written expression, but also, for the modern technologies such as Facebook, Twitter. . .etc.<sup>569</sup> Moreover, it appears that, superficially, Article 19 of the UDHR virtually granted the different approaches to the right of freedom of expression. The balance between duties and responsibilities in terms of freedom of speech are made obvious in international law. While Article 19 protects freedom of speech, Article 29 (2) defines the limitations of practicing this right. It stipulate that “ [free speech] shall be subjected only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the subject requirements of morality, public order and the general welfare in a democratic society”.<sup>570</sup> Unlike the ICCPR and the ECHR, the UDHR does not draw a clear limitation on restrictions to freedom of expression.<sup>571</sup> However, this Article paves the way for legislators to practice their responsibilities and duties through reliance on the principle of proportionality.<sup>572</sup>

### **4.3 International Convention on Civil and Political Rights (ICCPR)**

The ICCPR, which was founded in 1966,<sup>573</sup> came into force in 1976.<sup>574</sup> As of 2008, the ICCPR comprises 160 member states.<sup>575</sup> To some extent, the ICCPR is an enforceable international treaty and, especially, in relation to states that ratified the Optional

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<sup>567</sup> Universal Declaration of Human Rights, <[http://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf)> Accessed 30 Jan 2017.’

<sup>568</sup> GS Alfredsson and A Eide, *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999).p.403.

<sup>569</sup> Moeckli and others, *International Human Rights Law* (2014).p.226.

<sup>570</sup> Universal Declaration of Human Rights 1948-1998, Article 29 (2)

<sup>571</sup> M Szappanyos, ‘Freedom of Islamophobic Expression v. Rights and Reputation of Others’ [2010] *Studia Iuridica Auctoritate Universitatis Pecs Publicata*.p.237.

<sup>572</sup> P Sturges, ‘Limits to Freedom of Expression? Considerations Arising from the Danish Cartoons Affair’ [2006] *IFLA journal*.p.6.

<sup>573</sup> International Covenant on Civil and Political Rights, <<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> Accessed 29 Jan 2017.’

<sup>574</sup> M Haas, *International Human Rights: A Comprehensive Introduction* (2013).p.115.

<sup>575</sup> Hare I and J Weinstein, *Extreme Speech and Democracy* (2010).pp.62,63.

Protocol.<sup>576</sup> The International Convention's provisions regarding freedom of speech are naturally very similar to those provisions in the UDHR because both documents are derived from the same source and aim to protect human rights, including freedom of expression.

For this purpose, the relevant provisions of Article 19 (3) of the ICCPR are as follows:

“3. 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 or of public health or morals”.<sup>577</sup>

Although, under Article 19(3), the ICCPR gives a wide scope to the practice of freedom of expression, it defines the situations that subject freedom of expression to such restrictions. Accordingly, restrictions, which do not satisfy the two-tier test, are unjustified and contravene the (ICCPR) limitations.<sup>578</sup> Further, this article indicates that its scope protects individuals from governmental and other individuals' interference.<sup>579</sup> In its comment on the Article, the Human Rights Committee (hereinafter referred to as the HRC) states that “[i]t 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”.<sup>580</sup>

While Article 19 gives a clear vision about the scope of practicing freedom of expression, Article 20 provides additional cases that require restrictions on freedom of expression. The Article asserts unambiguously that “1) Any propaganda for war shall be prohibited by law. 2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.<sup>581</sup> According to the HRC, additional restrictions can be justified to protect either individuals or the

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<sup>576</sup> Magnuson (n 563).p.286.

<sup>577</sup> International Covenant on Civil and Political Rights, <<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> Accessed 29 Jan 2017.’(n 347).

<sup>578</sup> Zaid Ali, 'Freedom of Speech in International Law' [2010] Journal of Sharia and Law.p.27.

<sup>579</sup> Magnuson (n 563).p.280.

<sup>580</sup> ‘Human Rights Committee, General Comment 10.’

<sup>581</sup> ‘International Covenant on Civil and Political Rights Article 4 (1).’

community as a whole.<sup>582</sup> For example, in the case of *Pietraroia v. Uruguay*, the HRC decided that, when it restricted the activities of Rosario Pietraroia, the Uruguayan Government had failed to meet the standard restrictions on freedom of expression. The HRC concluded that, contrary to that stated by the Government, the defendant posed no threat to national security and, therefore, there was no violation of Article 19 (3).<sup>583</sup> By contrast, in the case of *Womah Mukong v. Cameroon*, the HRC found that criticism of either the political process or the government was a form of freedom of expression and, therefore, Mr Mukong's arrest was unjustified and incompatible with Article 19(3). The HRC has said consistently that any limitation on freedom of expression must contain two main elements. These are, firstly, "it must be provided for by law, it must address one of the aims enumerated in paragraph 3(a) and (b) of Article 19". Secondly, it "must be necessary to achieve the legitimate purpose".<sup>584</sup> Accordingly, in order to be lawful, any restriction should match these two overriding principles.<sup>585</sup> In the context of restricting the right to freedom of expression to prevent pornography, the primary grounds for this limitation are to protect public morals. In its General Comment 10, the HRC asserted that restrictions on the right to freedom of expression could be justified when it "relate[s] either to the interests of other persons or to those of the community as a whole".<sup>586</sup>

#### **4.4 The European Convention on Human Rights (ECHR)**

The ECHR came into force in September 1953. Under this Convention, the State's parties are bound to respect all the rights contained within it. This Convention is considered to be the most comprehensive and complete system in protecting freedom of expression worldwide,<sup>587</sup> either on an individual or a collective level.<sup>588</sup> The right to freedom of expression, contained in the ECHR, is almost identical to that found in the International Covenant. The only difference between ICCPR and ECHR regarding limitations on

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<sup>582</sup> 'Human Rights Committee, General Comment 10.'

<sup>583</sup> *Pietraroia v. Uruguay*, 44/1979.'

<sup>584</sup> *Wornah Mukong v Cameroon*, CCPR/C/51/D/458/1991.

<sup>585</sup> See, *Laptsevich v Belarus*, CCPR/C/68/D/780/1997.

<sup>586</sup> 'Human Rights Committee, General Comment 10.'

<sup>587</sup> Magnuson, William. "Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection under International Law, The." (2010) *Vand. J. Transnat'l L.* 43: 255.p.281.

<sup>588</sup> *ibid.* p.285.

freedom of expression is that the ICCPR has fewer limitations than the ECHR.<sup>589</sup> Article 10 (2) makes the following provision:

“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”.<sup>590</sup>

The vast scope of the freedom of expression limitations is considered to be the most obvious feature that characterises this provision from the other human rights provisions.<sup>591</sup> This Article provides the necessary framework for the consideration of necessary limitations and holds an exalted position in the demarcation of freedom of expression. Also, it does not exclude any form of expression, even when this form of expression causes offence to others.<sup>592</sup> In the words of Pekkanen, the comprehensive meanings of Article 10 “are required for a democratic society whose basic values reflect pluralism, tolerance and broadmindedness”.<sup>593</sup> That is, Article 10 draws a clear line against which the freedom of expression must be subject to restriction. Firstly, “the restrictions must be prescribed by law”. Secondly, “a restriction on free speech is permissible only if it is “necessary in a democratic society””. Lastly, “a restriction on free speech is valid only if it is designed to further one or more specified objectives”.<sup>594</sup> Also, Article 10 sets out the restrictions and limitations on freedoms of expression and is balanced between the interests of freedom of expression and those of communities.<sup>595</sup> However, restrictions on freedom of expression by national regulation cannot be accepted if these are not compatible with the meanings of Article 10 (2).<sup>596</sup> Under the ECHR’s

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<sup>589</sup> Magnuson, William. "Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection under International Law, The." (2010) *Vand. J. Transnat'l L.* 43: 255, p281.

<sup>590</sup> The European Convention on Human Rights, <[http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)> Accessed 11 Jan 2017.’

<sup>590</sup> Barendt (n 1).p.65.

<sup>591</sup> Barendt (n 1).p.65.

<sup>592</sup> ‘Macovei, M., Freedom of Expression: A Guide to the Implementation of Article 10 of the European Convention on Human Rights, 2nd Edn (Human Rights Handbooks No. 2. Council of Europe, 2004).’p.7.

<sup>593</sup> Raimo Pekkanen, ‘Freedom of Expression according to the European Convention on Human Rights’ [1993] *Finnish Yearbook of International Law*, Vol. 4, pp. 453-470.p.455.

<sup>594</sup> D Pannick, ‘Article 10 of the European Convention on Human Rights’ [1993] *KCLJ*.pp.44,45.

<sup>595</sup> Ali (n 578).p.29.

<sup>596</sup> Pekkanen (n 593).p.457.

duties and responsibilities, freedom of expression can be restricted only when the exercise of such a freedom exceeds its limits.<sup>597</sup> In further explanation, international law does not impose on the State the use of a specific manner to apply its rule; the State's only responsibility is to ensure proper implementation to international law.<sup>598</sup>

The European Court of Human Rights' jurisprudence played a crucial role in illustrating Article 10's limitations on free speech.<sup>599</sup> In the *Sunday Times*, the Court held that "[t]he Court. . . is empowered to give the final ruling on whether a 'restriction'. . . is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision".<sup>600</sup> In this case, the Court criticised the United Kingdom's Court for its insufficient reasons to prohibit publication. Accordingly, the UK Government changed its law to be applicable with the purpose of Article 10.<sup>601</sup> Indeed, some domestic laws are incapable of tackling domestic affairs, and this may be behind the ECHR's dominance in national rules since, according to Feldman "the rights arising under the European Convention on Human Rights stem from such norms and remedies are obtainable against the state from the European Court of Human Rights. Decisions of the court can place an obligation on the state to amend its law".<sup>602</sup>

It is worth mentioning that the Court defined the scope of free speech intervention since, according to the Court, the interference must be 'prescribed by law', have a 'legitimate aim' and be 'necessary for democratic society'.<sup>603</sup> The ECHR illustrates the meaning of the word necessary in the context of free speech. In the case of *Lingens v. Austria*, the Court said that free expression ought not to be restricted unless there is a "pressing social need". Also, the European Court provides that any restrictions on free speech should be "relevant and sufficient" and "proportionate to the legitimate aim pursued".<sup>604</sup> Finally, in order to ensure that the ECHR standards are applied among states members, the ECHR created the European Commission of Human Rights and the European Court of Human Rights. In the context of international human rights law, the following section explores

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<sup>597</sup> *ibid.*p.458.

<sup>598</sup> Kitsuron Sangsuvan, 'Balancing Freedom of Speech on the Internet Under International Law'.p.714.

<sup>599</sup> Pannick (n 594).p.45.

<sup>600</sup> *The Sunday Times v United Kingdom (No 1)* 6538/74 [1979] ECHR.

<sup>601</sup> *Dziyauddin* (n 429).p.192.

<sup>602</sup> D Feldman, 'The Human Rights Act 1998 and Constitutional Principles' [1999] *Legal Studies*.p.186.

<sup>603</sup> *Gunduz v Turkey* (App no 35071/97) - [2003] ECHR 35071/97.

<sup>604</sup> *Lingens v Austria* (App no 9815/82) - [1986] ECHR 9815/82.

the extent to which concerns about the three elements of respect of the rights or reputations of others, national security and protection of morals justify restrictions on the right to freedom of expression.

#### **4.5 Balancing Freedom of Expression against Defamation, Privacy and National Security**

The common factors between the international treaties in relation to limitations on freedom of expression are the protection of the rights and reputation of others, and the protection of national security; public order, and public morals. The exercise of the right to freedom of expression shall not be injurious to either the equal enjoyment of other persons' rights or to the rights of the community or society, as determined by international law. It is said that "freedom of speech. . . goes no further than matters of public concern or interest and should be exercised with responsibility".<sup>605</sup> This part does not go too far in discussing all cases, but there is some examination here of some of these grounds.

##### **4.5.1 Defamation**

The protection of the reputations of others is one of the most important necessities in democratic society and is among a number of cases that justify limitations on freedom of expression as articulated under Article 10(2) of the ECHR.<sup>606</sup> The importance of this right is obvious since, without the protection of reputation, we cannot take full advantage of our potential as autonomous human beings. Also, it is futile to boast of democracy if we are not protected from those who injure our reputations among respected segments of society. The following paragraphs examine cases where potentially defamatory statements were made against public figures.

The publication of a critical or false statement about another which may either affect or damages his or her reputation is considered to be a controversial issue that needs to be addressed. This fact is evidenced by the law that subjects defamation to different considerations.<sup>607</sup> Indeed, the issue of a false statement about a normal person, which

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<sup>605</sup> Adonis v Philippines, CCPR/C/103/D/1815/2008/Rev1 (26 April 2012).

<sup>606</sup> European Convention Of Human Rights

<[http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)>. Accessed 21 Mar 2017.'

<sup>607</sup> Moeckli and others (n 569).p.229.

damages his or her reputation, is completely different from defamatory statements made against public officials or public figures. In the case of *Castle v. Spain*, Mr Castle was a lawyer and senator elected from the list of a political grouping. He was accused of insulting the Government during a sensitive time. According to the Spanish Supreme Court, freedom of expression was not limitless and could not be protected in all circumstances. In its comments, the ECHR found that the Spanish Government violated the right of freedom of expression and that the Government's reasons for restrictions on free speech were unjustified. In the words of the Court, "the limits of permissible criticism are wider with regard to the Government than in relation to a private citizen or even a politician".<sup>608</sup> Thus, when considering whether the correct balance has been struck between defamation and freedom of expression, regard should be taken of the following issues with respect to whether or not the expression and the nature of the activities, which were the subject of the report, had a negative impact on public affairs. For example, on matters of national security, the form, content and consequences of defamation must all be subject to strict or heightened scrutiny.

In another communication, the United States of America's Supreme Court examined a case where opinions might be restricted to protect reputation. The Court took a broad view of its scope and protected the rights of people to criticise public issues. In the *New York Times v. Sullivan* case, the Court held that freedom of expression covered speech whether or not it was directed to criticise the conduct of officials. The Court noted that "[the protection of the constitutional guaranty of freedom of speech and press does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered". However, the constitutional guarantee of freedom of speech and the press excludes the criticism of a public official when either the criticism or defamatory statement is made with 'actual malice'.<sup>609</sup> The United States of America's Courts have given the surrounding circumstances when making a judgment on the scales of freedom of expression. In the words of Professor Barendt, the procedures, taken by the courts, are "designed to give speech more protection than it would enjoy if courts treated it and competing interest as factors of equal weight or importance in the balancing process".<sup>610</sup> Obviously, the United States of America's Supreme Court's decisions are compatible

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<sup>608</sup> Case of *Castells v Spain* (Application no 11798/85).

<sup>609</sup> *New York Times Co. v. Sullivan* (1964).

<sup>610</sup> Barendt.(n 1)pp.50,51.

with international human rights standards which aim to give criticism a wider scope than political speech.<sup>611</sup>

#### **4.5.2 Privacy**

The protection of privacy is another legitimate ground for restricting the right to freedom of expression. While, hitherto, reputation/free speech issues have been considered more often at the constitutional level, privacy issues are more important than the former. This is especially so these days, with the lifestyle development whereby the new technologies provide access to news and to opportunities to exchange information and pictures.<sup>612</sup> All these features make privacy and interrelationships with other issues more complex. Intrusion into a person's private life is a civil matter and often a criminal wrong. However, the implementation of laws that protect privacy can, and often do, undermine many freedoms, such as the media's freedom to fulfil their functions of informing the public and commenting critically on private affairs. In the case of *Von Hannover v Germany*, Princess Caroline complained that magazines infringed on her privacy when, without permission, they published pictures during her leisure time. Accordingly, she reported this issue to the European Court of Human Rights, requiring protection of her privacy as stipulated by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Court found that what the Princess did was merely her right to have a private life, which is protected fully by the Convention. Thus, the media violated the right of the applicant's privacy.<sup>613</sup>

Similarly, in the case of *Bartnicki v Vopper*, Barthnicki, a teachers' union negotiator, complained that, when she discussed a matter of public concern, someone intercepted her telephone conversation and the Vopper, a radio broadcaster, illegally published the contents of the conversation. The United States of America's Supreme Court found that the interception was unlawful. However, whilst the Vopper had considered the right to a type of freedom of speech fully protected under the First Amendment, the Supreme Court considered that Barthnicki's conversation was of public interest to the community and, thus, there was no violation of privacy. According to Justice Breyer, the conversation was not purely a private affair and, thus, irrespective of the interception, the Supreme

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<sup>611</sup> Moeckli and others (n 569).p.229.

<sup>612</sup> Barendt (n 1).p.230.

<sup>613</sup> *Von Hannover v Germany* - (2004) 16 BHRC 545.

Court's judgment was justified. In his view, the Supreme Court's decision would enable freedom of speech to be practiced on a flexible basis.<sup>614</sup>

The two cases discussed above demonstrate that there is no difference between the judgment of the European Court and the United States of America's Supreme Court since their judgments focused on protecting privacy rather than public affairs. Therefore, it can be said that the enjoyment of privacy requires a distinction between criticism against public affairs and private life. More precisely, in order to avoid intrusion into private affairs, criticism of officials, for example, must be directed against their public lives and not against their families, dress or other things related to their private lives.<sup>615</sup> Further, Courts must strike a fair balance between the competing interests of freedom of expression and respect for a person's private life.

### **4.5.3 National Security**

National security is one right, that may clash with freedom of expression. The main human rights treaties recognize the right to protect national security. However, like freedom of expression, it is vital to note here that there is no universal agreement on the meaning of national security.<sup>616</sup> Nevertheless, the United Nations Environment Programme (UNPE) defined national security as a "requirement to maintain the survival of the nation-state through the use of economic, military and political power and the exercise of diplomacy".<sup>617</sup> The importance of the protection of national security cannot be denied since, without guaranteeing this right, all human rights would be suspended. Therefore, it is not too much of an exaggeration to say that the protection of national security is the top priority of international law. One communicator noted that "due to great importance of national security for all countries, international human rights instruments consider the protection of national security to be one of the legitimate aims justifying restrictions on the exercise of human rights".<sup>618</sup> This means that the assurance of national security is vital to human rights, including the right of freedom of expression.

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<sup>614</sup> *Bartnicki v Vopper*, 532 US 514 (2001).

<sup>615</sup> *Adonis v Philippines*, CCPR/C/103/D/1815/2008/Rev.1 (26 April 2012).

<sup>616</sup> AP Amiri, *Freedom of Information and National Security: A Study of Judicial Review under US Law* (2015).p.20.

<sup>617</sup> United Nations Environment Programme, *From Conflict to Peacebuilding. The Role of Natural Resources and the Environment*, 2009, Available at [http://www.unep.org/pdf/pcdmb\\_policy\\_01.pdf](http://www.unep.org/pdf/pcdmb_policy_01.pdf).p.7.

<sup>618</sup> Amiri (n 616).p.21.

However, this does not mean that international law's protection of national security opens the gates widely for States to practice this right without limitation. On the contrary, when the State decides to restrict or limit freedom of expression, the State is obligated to give compelling reasons for any derogation of this right. While there are no universal limitations and scope of national security, which makes this principle considerably vague,<sup>619</sup> one can use the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, which defined in its Siracusa Principles the limitation of freedom of expression on the basis of national security. According to these Principles, restriction on freedom of expression can be justified if there is a threat to either "the nation or its territorial integrity or political independence against force or threat of force". By contrast, the Principles noted that national security could not be used either "to prevent merely local or relatively isolated threats to law and order" or "as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse".<sup>620</sup> Obviously, these limitations were directed to define the limitations on the use of national security and to prevent States from using national security to justify its suppression of freedom of expression. Further, in the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, the Principles permit States to restrict freedoms for reasons of national security. It stated that freedoms can be restricted if it "is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government".<sup>621</sup> The narrow limitation that is given to the State to justify the overuse of national security may give Governments a high degree of control over various aspects of people's lives. This can seriously damage the values of the right to freedom of expression and can cause further abuse of the Government's authority.

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<sup>619</sup> *ibid.* p.20.

<sup>620</sup> *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (1985)*.p.8.

<sup>621</sup> The Johannesburg Principles are derived from various laws by a specialist group in regional and international law. See, *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, 1996, Available at <https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf> .p.8.

## 4.6 Balancing Approach under ECHR and Other International Instruments

The most characteristic feature of human rights law is its ability to balance the protection of human rights and the duty of the State.<sup>622</sup> As noted by the European Court, the limitation of the restrictions imposed on freedom of expression under the right of national security is one of the main factors that lead to a democratic society flourishing.<sup>623</sup> Accordingly, States are obligated to define the proper limitation of freedom of expression when this is inconsistent with national security.<sup>624</sup>

Although the ECHR widely draws the scope and limitations of freedom of expression, each country has an opportunity to amend or control freedom of expression correctly to be compatible with the public interest. In the words of Sangsuvan, “[s]tate sovereignty... empowers a state to choose its degree of compliance with existing international agreements”.<sup>625</sup> The space that is given to local authority is vital to expanding the scope and limits of freedom of speech. More particularly, ECHR provides basic standards of freedom of speech, and this helps to balance and control the use of this right.

The ECHR is keen to protect democratic society through upholding the responsibilities and duties in clarifying the limitations on free speech.<sup>626</sup> This is evidenced through the application of the doctrine of balancing. According to Barendt, States may limit freedom of expression in the case of “the display of sexually explicit material, on commercial speech, or the disclosure of official secrets”.<sup>627</sup> The ‘margin of appreciation’ also characterises the European Court since it allows the national court to limit freedom of expression when there is the need ‘in a democratic society’ under scrutiny of the Court.

The divergence of the application of freedom of expression between countries is obvious in many domestic legal systems and this explains the extensive coverage of the ECHR.<sup>628</sup> Clearly, ECHR cannot address all the issues that confront States, and “rights do not tell us how they are to be actualized”<sup>629</sup>. Therefore, this would be a good opportunity for

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<sup>622</sup> Moeckli and others (n 569).p.112.

<sup>623</sup> Coliver (n 566).p.17.

<sup>624</sup> M Macovei, ‘A Guide to the Implementation of Article 10 of the European Convention on Human Rights’ [2004] Human rights handbooks.p.23.

<sup>625</sup> Sangsuvan (n 598).p.714

<sup>626</sup> Handyside v United Kingdom (App no 5493/72) - [1976] ECHR 5493/72.

<sup>627</sup> Barendt (n 18).p.66.

<sup>628</sup> Sangsuvan (n 598).p.709.

<sup>629</sup> Alec Stone Sweet and Jud Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 Colum. J. Transnat’l L. 72.p.95.

States or judges to apply their visions and perspectives of freedom of expression within an ECHR framework. Indeed, constitutional and legislative statements about freedom of expression are used to organise the practice of freedom of expression.

However, the fact remains that freedom of expression laws cannot go beyond restrictions on certain rights without balancing freedom of expression against other interests. Therefore, balancing freedom of expression is fundamental for local authorities and international law alike. (However, there have been considerable disagreements among scholars on the balancing metaphor).<sup>630</sup> Of course, the purpose of the examination is not to provide an extensive analysis of striking a balance in the law, but rather, to focus on what exactly was affected, in what proportion, and does balancing enough to protect freedom of expression.

#### **4.7 Proportionality and balancing**

Proportionality analysis is an essential tool of balancing or weighing rights,<sup>631</sup> and this raises a question: what, exactly, is the proportion? The notion of proportionality is somewhat mysterious and not well understood, but it seems clear, at the very least, that proportionality is “a conceptual framework in which to define the appropriate relationship between human rights and considerations that may justify their limitation in a democracy”.<sup>632</sup> Proportionality provides a substantive solution to the appropriate relationship between human rights and limitation for their justifications. For example, it is not possible for constitutional judges to strike a balance or weigh between two or more conflicting interests without relying on proportionality. In other words, proportion is an inevitable result of the balance.<sup>633</sup> In short “[m]ore than enough is out of proportion, more than necessary is out of proportion, more than appropriate is out of proportion”.<sup>634</sup>

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<sup>630</sup> See Chapter Six Section Two. See also e.g., T Alexander Aleinikoff, ‘Constitutional Law in the Age of Balancing’ (1987) 96 *The Yale Law Journal* 943.pp.972-995. See also, David S Bogen, ‘Balancing Freedom of Speech’ (1978) 38 *Md. L. Rev.* 387.pp387, 388.

<sup>631</sup> Sweet, Alec Stone, and Jud Mathews. "Proportionality balancing and global constitutionalism." *Colum. J. Transnat'l L.* 47 (2008): 72.p..89.

<sup>632</sup> Barak, Aharon. "Proportionality and principled balancing." *Law & Ethics of Human Rights* 4.1 (2010): 1-16. pp.4,5.

<sup>633</sup> Souliotis, Panagiotis. "Proportionality and the European Convention on Human Rights: A Critical View." *Available at SSRN 2690366* (2015). p.10.

<sup>634</sup> Schlink, Bernhard. "Proportionality in constitutional law: why everywhere but here." *Duke J. Comp. & Int'l L.* 22 (2011): 291.p. 292.

Although this claim might seem uncontroversial, it tells us less about what proportion is. It does not tell us, for example, anything about the extent to which they are shared public interests or in what percentage. But it is clear that the possession or apprehension of proportion is a necessary condition for being able to think and determine if the means at issue works or doesn't work, is necessary or is not necessary.<sup>635</sup> It is worth mentioning that proportionality consists of four subparts to serve its legitimate goals, which are "proper purpose, rational connection, necessity and proportionality stricto sensu".<sup>636</sup>

In law, the principle of proportionality arises in those cases when norms or law does not help to reach the goal.<sup>637</sup> Driving a car during an emergency is one example. Everyone is entitled to protect their own or family life. To pursue this end, he or she is entitled to use means that would otherwise be prohibited and, may, thus break the traffic laws. Action that might be helpful and necessary to protect people's lives during emergency is allowed categorically. But the law doesn't go so far as to allow one to act any way one wants. Different circumstances during emergency situations requires proportionality.<sup>638</sup>

Assume there is a man who stole a car in the middle of the road. A policeman shouts for the man to stop, but the man ignores the policeman. The only means to get the car back is to use deadly force against the man. Shooting the man is helpful, and it is even necessary to get the car back. But we easily agree that this is inappropriate and/or imbalanced. The life of the man who stole the car is important, but shooting is not the only available means to get the stolen car back. Shooting will take place only when there is an urgent necessity to protect property. The life of the man is much more precious than the value of a car.<sup>639</sup> By framing the discussion in terms of proportionality one is able to decide when to use deadly force against criminals.<sup>640</sup>

This approach to interpretation rests heavily on the idea that there is almost no limitation on the application of this doctrine.<sup>641</sup> For example, in the case of *Benet Czech Spols vs the Czech Republic*, the Court insisted on expanding the State's right to apply its own

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<sup>635</sup> Schlink.p.299.

<sup>636</sup> Barak, Aharon. *Proportionality: constitutional rights and their limitations*. No. 2. Cambridge University Press, 2012.

<sup>637</sup> Schlink.p.292.

<sup>638</sup> See Schlink.p.293.

<sup>639</sup> See Schlink.p.293.

<sup>640</sup> Tsakyrakis, Stavros. "Proportionality: An assault on human rights?" *International Journal of Constitutional Law* 7.3 (2009): 468-493. p.487.

<sup>641</sup> Pekkanen (n 593).p.462.

perspective. This explains the reason why the Czech authorities were given a wide margin of appreciation on criminal investigations into suspicious activities that threatened public interest. According to the Court, any governmental measures to protect public interest are justified unless the measures are “manifestly without reasonable foundation”.<sup>642</sup>

The HRC defined a restriction on the freedom of expression by the State on national security grounds whereby it “must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat”.<sup>643</sup> Sometimes, the process involves an ad hoc calculation of many aspects to strike the proper balance between free speech and national security. In the words of Professor Barend, “the balancing process may be mandated by text itself. . . represent a judicial technique developed to avoid the difficulties of an “absolutist” position, which asserts that free speech can never be restricted”.<sup>644</sup> Therefore, in assessing the extent to which there is a coherent vision of national security that warrants interfering with free expression, clear and strict scrutiny limits must be applied.

The HRC has approved restrictions on freedom of expression on the basis of national security. In the case of Philip Afuson Njaru v. Cameroon, Philip Afuson Njaru, a journalist supporter of human rights who had been ill-treated by various State agents because of his criticism of the Cameroon government, complained that his right under Article 19 of the ICCPR was being violated. The Committee asserted that Article 19 protected the right of freedom of expression; unless the restriction was “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”. The Committee found that there was no justification for the Government’s restrictions and, therefore, the Government’s action was an excessive interference of journalist freedom guaranteed by law.<sup>645</sup>

Thus, when considering whether the correct balance has been struck between freedom of expression and national security, note should be taken of the following issues: whether

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<sup>642</sup> Benet Czech, spol sro v Czech Republic (App No 31555/05) - [2010] ECHR 31555/05.

<sup>643</sup> ‘General Comment No. 34 on Article 19 of the ICCPR, 2011, Available at <http://bangkok.ohchr.org/programme/documents/general-Comment-34.aspx>.’

<sup>644</sup> Barendt (n 1).p.157.

<sup>645</sup> Philip Afuson Njaru v Cameroon, CCPR/C/89/D/1353/2005.

the expression contributes to the violation of national security; the nature of expression and how it links to the activities concerned; and, finally, the type of imposed sanction.

#### **4.8 Application of the proportionality doctrine in the case law of the European Court of Human Rights**

The most characteristic feature of human rights law is not only its ability to balance between the protection of human rights and the duty of the State, but also collective interests.<sup>646</sup> This is evidenced by many human rights cases that have been invoked by the Court.<sup>647</sup> Although, the European Convention and its additional Protocols are absence of the concept of proportionality,<sup>648</sup> it “has acquired the status of general principle in the Convention system”.<sup>649</sup> According to Ellis, the concept of proportionality is “recognised as one of the central principles governing the application of the rights and freedoms contained within these instruments”.<sup>650</sup> Indeed, the common feature of the balancing approach under the rubric of the principle of proportionality is that the doctrine acts as an interpreter of the ECHR. More precisely, it is a practical approach that guarantees the application of the ECHR under different circumstances.<sup>651</sup> The value of this approach can be seen through its diversity and capability to work under different circumstances. This section will examine in what way proportionality is used in the jurisprudence of the Court, especially in cases with respect to freedom of expression.

First of all, proportionality has been invoked before the ECtHR. This can be seen in the case of *Ceylan v. Turkey*, where the applicant, Mr Ceylan, President of the Petroleum Workers’ union, wrote an article in a weekly newspaper, criticising the State’s policy in its treatment of people’s issues and described the State’s action as ‘state terrorism’. The Turkish Government convicted the applicant of being a threat to national security by inciting against the unity of the State. Therefore, Mr Ceylan was sentenced to imprisonment and a fine. After emphasising the correlation between necessity and social needs, The Court held that Article 10 (2) protected different types of freedom of expression, including “offend[ing], shock[ing] or disturb[ing]” speech. The applicant's

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<sup>646</sup> Moeckli and others (n 569).p.112.

<sup>647</sup> Souliotis.p.11. See also, Tsakyrakis. p.475.

<sup>648</sup> Ellis, Evelyn, ed. *The principle of proportionality in the laws of Europe*. Hart Publishing, 1999. p.23.

<sup>649</sup> Van Dijk, Pieter, Godefridus JH Hoof, and Godefridus JH Van Hoof. *Theory and practice of the European Convention on Human Rights*. Martinus Nijhoff Publishers, 1998. p.81.

<sup>650</sup> Ellis.p.23.

<sup>651</sup> Hare and Weinstein (n 575).p.67.

criticism did not appear to contain anything to "encourage the use of violence or armed resistance or insurrection". Therefore, the Government's decision was unlawful and its interference with the applicant's freedom of expression was protected by Article 10 of the ECHR. This decision emphasised the position.<sup>652</sup>

In contrast, in the case of *Zana v. Turkey*, the applicant, Mr Mehdi Zana, a Turkish citizen, complained that the Turkish Government violated his right of expression protected by Article 10 of the ECHR. In its judgment, the European Court of Human Rights observed that the right to freedom of expression basically prohibited a Government from restricting a person's right to express his/her opinion. However, in the opinion of the European Court of Human Rights, in circumstances such as those of the present case, Article 10 does not confer on the individual such a right to express an opinion without limitation. According to the European Court of Human Rights, the applicant's statement, as published in the national daily newspaper, was supportive of a local terrorist organisation. Consequently, it upheld that the margin of appreciation enjoyed by the national authority was duly exercised and the penalty imposed was proportionate to the aims pursued. The State's decision against the applicant was justified in order to protect national security. Therefore, there had been no interference with the applicant's right to freedom of expression as protected by Article 10.<sup>653</sup>

A very similar approach was adopted in the case of *E.S. v. Austria*, in which the applicant, who held several seminars against Islam Prophet Mohammed, was found guilty by the local court of the Republic of Austria and fined 480 euros. She was sentenced for making statements inciting religious hatred. She alleged an infringement of Article 10 of the Convention. Although the European Court of Human Rights emphasised freedom of expression protected under Article 10 of the Convention, it ruled that the domestic courts ruling did not violate Article 10 of the Convention. According to the Court, "the domestic courts comprehensively assessed the wider context of the applicant's statements, and carefully balanced her right to freedom of expression with the rights of others to have their religious feelings protected, and to have religious peace preserved".<sup>654</sup> Thus, it held that the means adopted to protect religious feelings towards others were proportionate and did not violate Article 10. It can be understood from the last two cases that the Court

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<sup>652</sup> *Ceylan v Turkey* - 23556/94 [1999] ECHR .

<sup>653</sup> *Zana v Turkey* 18954/91 [1997] ECHR.

<sup>654</sup> *E.S. v. AUSTRIA* 38450/12 [2018] ECHR.

took into account the potential effects of speech. This is a very important ruling to protect national security and religious tolerance, as well as other matters of public interest.

From what has been discussed, it can be said that the argument of balancing characterises with its wide reliance on proportionality, which finally, reflects different limitations of freedom of expression. Indeed, it seems that there is a proportionality in each right that can be changed under various circumstances and in different percentages. Therefore, when free speech offends or infringes other rights, it should be subject to proportionality, especially when it is related to national security. The importance of the protection of national security cannot be denied, and it is one of the main reasons to restrict freedom of speech, but without relying on proportionality protect national security can be use from some States to justify its suppression of freedom of speech. This can seriously damage the values of freedom of speech and narrow its practice.

#### **4.9 Chapter Summary**

This chapter introduced three international instruments. The right to freedom of expression was discussed, along with the body of international human rights norms and jurisprudence, which helped to define the limitations on freedom of expression. At the international level, the promotion of freedom of expression does not weaken other human rights, such as equality and non-discrimination since both have independent values.<sup>655</sup> Freedom of expression is an inherent right guaranteed to all people. However, this right as discussed above, cannot be limitless. The above discussion of the European case-law demonstrated that a balancing approach should be used when the rights of two individuals clash, in order to determine the outcome of the matter. A balancing approach under the European Convention on Human Rights, as one observed, “seems to be the standard approach for dealing with complaints”.<sup>656</sup> An attempt is made to explain how legal orders to the limitation of freedom of expression may shape decision-making trade-offs between the demands of liberty and the need to guarantee individual and collective security. In doing so, special attention is given to the adjudicative methods of balancing.

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<sup>655</sup> Salman Rushdie, ‘Wresting (Racial) Equalitt from Tolerance of Hate Speech’.p.27.

<sup>656</sup> Van der Sloot, B., 2016. The Practical and Theoretical Problems with ‘Balancing’ Delfi, Coty and the Redundancy of the Human Rights Framework. *Maastricht Journal of European and Comparative Law*, 23(3), pp.439-459.p.439.

The chapter proves that freedom of expression, in many cases, is better served by the application of balancing. Balancing is not merely important to differentiate between speech cases, but it “connected [speech] to other constitutional values”.<sup>657</sup> In the words of Alexander Tsesis, “[t]he constitutional protection of speech does not derive solely from the act of communication but from the contextual balancing of personal liberties and social goods”.<sup>658</sup>

In addition, the work considers the impact of applying a balancing approach on the right of freedom of expression protected under the European Convention on Human Rights. In some circumstances, freedom of expression may cause a threat to national security or public interests; therefore, balancing between conflicts of interest is an important principle that should be taken into account when dealing with freedom of expression cases. Some types of expression, as noted from the examination of the case law, have been converted from being protected to unprotected. In other words, it is clear from the case law of the European Court of Human Rights that freedom of expression is customarily not absolute and the degree of protection is subject to the surrounding circumstances.

It should be noted here that the European Court of Human Rights and national courts should not be operating in complete isolation. They should be aware of each other’s judgments to try to develop a freedom of expression protection mechanism, especially these days, when the scope and limitations of freedom of expression confront great challenges.

The subsequent chapters examine how the courts in the United States and Egypt understand and deal with freedom of expression cases.

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<sup>657</sup> Tsesis A, ‘Balancing Free Speech (2015)’.p.27.

<sup>658</sup> *ibid.*p.4.

## Chapter Five

### 5. Freedom of Expression in the United States of America

#### 5.1 Introduction

The previous chapter examined the boundaries of freedom of expression under international law. In that chapter, the study revealed that free speech may be restricted under some circumstances to protect other interests. This chapter concerns the reality of limitations on free speech as a matter of U.S. law, as interpreted by the U.S. courts. It explores different implications of various theories, that were discussed in chapter three, for important aspects of freedom of speech.

Freedom of expression is among the most important rights guaranteed by the U.S. Constitution. Many constitutions protect freedom of speech but the protection under the text of the First Amendment is distinctive.<sup>659</sup> The First Amendment ruled that “Congress shall make no law... abridging freedom of speech”<sup>660</sup>. This means in general term that the scope of freedom of speech under the First Amendment is unlimited.<sup>661</sup> The wide scope given to freedom of speech is a phenomenon that distinguishes the United States of America from the rest of the world.<sup>662</sup> The bedrock of the First Amendment is to build a democratic society. The United States Supreme Court has recognised that the First Amendment demonstrates a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”.<sup>663</sup> The strong constitutional position, which is based on “history and experience”<sup>664</sup>, paves the way not

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<sup>659</sup> Kitsuron Sangsuvan, ‘Balancing Freedom of Speech on the Internet Under International Law’ (2013) 39 NCJ Int’l L. & Com. Reg. 701.p.715.

<sup>660</sup> The full text is as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

<sup>661</sup> A Aramyan, ‘Freedom of Expression and Its Limitations: Certain Theoretical and Practical Aspects’ [2015] 21st Century.p.93.

<sup>662</sup> Robert A Sedler, ‘An Essay on Freedom of Speech: The United States Versus the Rest of the World’ [2006] Mich. St. L. Rev. 377.p.378.

<sup>663</sup> *New York Times Co v Sullivan*, 376 US 254, 270 (1964). See also, Viktor Mayer-Schonberger and Teree E Foster, ‘More Speech, Less Noise: Amplifying Content-Based Speech Regulations Through Binding International Law’ (1995) 18 BC Int’l & Comp. L. Rev. 59.p.66.

<sup>664</sup> K Sangsuvan, ‘Balancing Freedom of Speech on the Internet under International Law’ [2013] NCJ Int’l L. & Com. Reg.p.716.

only for the value of freedom of speech but, also, to other values that are closely related such as equality and privacy.

Furthermore, the First Amendment' acts as a barrier to prevent any governmental interference; this is considerably different from the constitutional rights of freedom of expression in states such as Canada, Germany and Australia.<sup>665</sup> As Professor Seng stated, "the First Amendment acts as a limitation on all governmental action in the United States, whether it be federal, state or local and as a limitation on private action for, or supported by, the government".<sup>666</sup> However, the standard of protection of freedom of speech under the First Amendment sometimes raises conflict between the United States and international human rights. For example, hate speech has a narrow range of protection under the ICCPR whereas it has a wide scope of protection under the United States constitution.<sup>667</sup> Even on a national level many societies, even liberal ones, have different limitations than those applicable in the United States. For example, free speech law in France is much narrower than it is in U.S.' law.<sup>668</sup> French law prohibits Nazism expression and subjects them to strict rules<sup>669</sup> whereas the Skokie marchers are protected under the U.S. constitution<sup>670</sup>. Indeed, the limitation of freedom of expression under U.S. law is vastly different from the positive command of the French government which has various ways to control the freedom of expression<sup>671</sup>. Not surprisingly, the experience under the First Amendment application with respect to freedom of expression issues has longer experience than other laws and makes the American approach so markedly different.<sup>672</sup> In his comment on the divergence between U.S. courts and European courts, Professor Barendt, stated that "[the U.S. courts] have considered [free speech] issues for nearly a hundred years, while European courts have for the most part only been engaged

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<sup>665</sup> Tom Ginsburg and Rosalind Dixon, *Comparative Constitutional Law* (Edward Elgar Publishing 2011).p.412.

<sup>666</sup> Michael P Seng, 'Freedom of Speech, Press and Assembly, and Freedom of Religion under the Illinois Constitution, 21 Loy. U. Chi. LJ 91 (1989)'.p.91.

<sup>667</sup> Sedler (n 662).p.379.

<sup>668</sup> Elissa A Okoniewski, 'Yahoo, Inc. v. LICRA: The French Challenge to Free Expression on the Internet' (2002) 18 Am. U. Int'l L. Rev. 295.p.296.

<sup>669</sup> Sangsuvan (n 659).p..717.

<sup>670</sup> Frederick Schauer, 'Speech and Speech--Obscenity and Obscenity: An Exercise in the Interpretation of Constitutional Language' (1978) 67 Geo. LJ 899.p.919. See also, Chriska Francois, 'The Risk It Takes to Bloom: The Freedom of Speech and Its Limits in the United States and France: A Comparative Examination' (2015) 84 UMKC L. Rev. 1033.p.1037.

<sup>671</sup> Okoniewski (n 668).p.304.

<sup>672</sup> Schauer, 'Freedom of Expression Adjudication in Europe and America: A Case Study in Comparative Constitutional Architecture' (n 33).p.12.

with them for the last forty or fifty years”<sup>673</sup>. To put the same issue in a different way, the high degree of freedom given to the United States Supreme Court and the individual states’ courts to interpret the First Amendment free speech clause, provides the courts with the opportunity to approach freedom of expression from different perspectives depending on each adjudication.<sup>674</sup> In the words of Schaure “the enormous differential in the simple quantity of free speech experience has made the United States more experienced, in the non-evaluative sense of that term, and it has thus allowed American courts to confront a much larger quantity and diversity of free speech issues”.<sup>675</sup> Indeed, the different application of the principle freedom of speech constitutes a contradictory point between the U.S. American law of freedom of speech on the one hand and international and Egyptian law on the other hand, when dealing with free speech cases. This calls for more consideration of the standards of free speech law. My point is largely that whether one approach is better or worse is not really the question but rather the different approaches to dealing with freedom of speech emerge from different substantive commitments, different experiences and different views regarding the limitations of freedom of expression.

The main objective of this chapter is to answer the first and second questions raised in the introductory chapter of the study concerning the standards used by the U.S. law and its approach in treating free speech cases. This chapter sets out the relevant constitutional provision and examines the courts’ interpretation and application. It further discusses, the effect of the First Amendment on freedom of expression and the impetus of the doctrine toward a shifting approach within the United States when it comes to the management of freedom of expression. Moreover, an investigation is conducted, on the limitations of freedom of expression and its relationship with other interests such as national security and public interest. However, before turning to the details of the U. S.’ law, an overview of freedom of expression under the First Amendment is indispensable.

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<sup>673</sup> Barendt (n 1).p.55.

<sup>674</sup> Louis M Benedict, ‘The First Amendment and Academic Freedom: Faculty as Employees and Citizens’ (the Graduate College of Bowling Green State University 2008).pp.39.40.

<sup>675</sup> Schauer, ‘Freedom of Expression Adjudication in Europe and America: A Case Study in Comparative Constitutional Architecture’ (n 33).p.12.

## 5.2 The scope of freedom of speech under the U.S. Constitution

The role of law and judicial institutions in maintaining a system of freedom of expression has played a substantial part in shaping freedom of speech. The constitutional protection of the right to freedom of expression under the U.S. law has unprecedented protection both in terms of substance and architecture. The vast protection of freedom of expression makes unprotected speech minimal.<sup>676</sup> The core of the First Amendment speech was subjected to only two judicial forms, namely, protected or not protected; under these two levels, speech was subjected to narrow limits. Further, the First Amendment's protects freedom of speech by giving a general concept of this right. In order to give comprehension and momentum to the meaning of the principle of the law, the U.S. Supreme Court uses different interpretations of the First Amendment.<sup>677</sup> In *Chaplinsky v. New Hampshire*, the Court stated that "there were certain well-defined and narrowly limited classes of speech, the prevention and punishment of which had never been thought to raise any Constitutional problem, such as "fighting" words".<sup>678</sup> However, the old position cannot be applied forever. The U.S. American scope of freedom of expression has fallen into disfavour in the last two centuries and widened to fairly narrow to rather broad.<sup>679</sup> This should not be surprising, as "[t]he history of the First Amendment is the history of its boundaries".<sup>680</sup> The government control over public life, including freedom of expression, is one of the main reasons that has led to urgent demands to reform the judicial system.<sup>681</sup> Therefore, the U.S courts depart from a single approach when interpreting freedom of speech under the First Amendment to a wider and practical view in dealing with issues of free speech.<sup>682</sup>

In 1969, almost fifty years after the *Holmes* case, the Supreme Court, through its majority members, began to rethink the Court's approach to narrowing the scope of the protection of free speech.<sup>683</sup> In the case of *Brandenburg v. Ohio*, the Supreme Court ruled that the government could not punish someone for his speech unless the speech "is directed to

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<sup>676</sup> Okoniewski (n 668).p.300.

<sup>677</sup> Smith (n 462).p.2.

<sup>678</sup> *Chaplinsky v New Hampshire*, 315 US 568 (1942).

<sup>679</sup> Emerson (n 25).p.900.

<sup>680</sup> Frederick Schauer, 'The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Saliency' [2004] Harvard Law Review 1765.pp.1,5.

<sup>681</sup> Emerson (n 25).pp.901-903.

<sup>682</sup> Barendt (n 1).p.49.

<sup>683</sup> Trager and Dickerson (n 12).p.61.

inciting or producing imminent lawless action and is likely to incite or produce such action”.<sup>684</sup> This obviously applied in the case of *Morse v. Frederick*, where Frederick an 18-year-old student at Juneau-Douglas High School in Alaska and others decided to hold up the message “Bong Hits 4 Jesus” in protest. The school administration found that Frederick’s conduct conflicted with the school regulations, and therefore, expelled him from the school. The Ninth Circuit Court of Appeals ruled that the school administration action conflicted with the right of free speech. The Supreme Court, contradicted, and asserted that in some circumstances the school has the right to restrict freedom of expression. According to the court “schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use”. The crucial issue before the court, though, was to examine the specific weight of each fundamental freedom and to assess the advantages and the disadvantages of the interference. Therefore, it upheld the measures that were taken to pursue a legitimate aim since they intended to safeguard the students morality.<sup>685</sup> Similarly, in the case *Guiles v. Marineau*, the case began when the plaintiff Zachary Guiles, a 13-year-old student at Williamstown Middle High School wore a t-shirt displaying critical messages about President George W. Bush. such as “Crook,” “Cocaine Addict,” “AWOL, and Draft Dodger”. The school officials found Guiles’s t-shirt violated the school regulations. The United States Supreme Court upheld the student’s rights to freedom of expression. However, the Court asserted the right of the school to protect the school environment. The Court noted, “expressive rights must be balanced against educators' need to maintain discipline and create a positive learning environment”.<sup>686</sup> In short, freedom of expression can be restricted when there is a necessity and logical reason to do so.

On many occasions, many U.S. judges have stress that freedom of expression has limitations. Holmes, a judge who was particularly concerned about the scope of the protection of freedom of speech made this point: “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic”.<sup>687</sup> Opening the door for speech would endanger other freedoms since some types of speech should be limited.<sup>688</sup> According to Frankfurter, curtailment of freedom of

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<sup>684</sup> *Brandenburg v Ohio*, 395 US (1969).

<sup>685</sup> *Morse v. Frederick*, 551 U. S.(2007).

<sup>686</sup> *Guiles Ex Rel. Lucas v. Marineau*, 349 F. Supp. 2d 871 U S (D. Vt. 2004).

<sup>687</sup> *Schenk v. United States* 249 U.S. 47,52 (1919).

<sup>688</sup> Warburton (n 87).p.9.

speech is inevitable when protecting public order and decency, national security, the rights to reputation and a fair trial as well as avoiding a collision between two interests.<sup>689</sup>

The broad scope to protect of freedom of expression gives scholars and judges alike an opportunity to deal with freedom of expression from different perspectives rather than considering only one concept.<sup>690</sup> In *McCulloch v. Maryland*, Chief Justice Marshall stated, "we must never forget that it is a constitution we are expounding ... a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs".<sup>691</sup> This view is consistent with that of Justice Holmes when he says "when we are dealing with words that are also a constituent act, like the Constitution of the United States, we must be considered in the light of our whole experience and not merely in the light of what was said a hundred years ago".<sup>692</sup> However, in order to understand the full significance of words of the Constitution, it is necessary to examine more specifically how U.S. law and judicial institutions operate amid the concrete realities of the present day. Indeed, the limitation of freedom of expression under the First Amendment is far more than determined by a single factor. According to Schauer: "[w]hen the First Amendment does show up, the full arsenal of First Amendment rules, principles, maxims, standards, canons, distinctions, presumptions, tools, factors, and three-part tests becomes available to determine whether the particular speech will actually wind up being protected".<sup>693</sup> The difficulty of defining the limitations of freedom of speech can be seen, for example, in distinguishing between obscene and offensive speech. Recognising the difficulties of defining the scope of free speech, Schauer says that "the boundaries of the First Amendment ... turn out to be a function of a complex and seemingly serendipitous array of [different] factors that cannot be (or at least have not been) reduced to or explained by legal doctrine or by the background philosophical ideals of the First Amendment".<sup>694</sup> However, an examination of the purpose and interpretation of constitutional language leads to a clearer understanding of the Court's approach to dealing with freedom of speech cases.

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<sup>689</sup> 'Minersville School District v. Gobitis, 310 U. S. 586 (1940).'

<sup>690</sup> Nadia Ahmad, 'The Canadian Charter of Rights and Freedoms: An Example of Canadian Dependence on the United States or Commitment to International Law' (1997) 6 J. Int'l L. & Prac. 329.p.335.

<sup>691</sup> *McCulloch v Maryland*, 17 US(1819).

<sup>692</sup> *Missouri v Holland*, 252 U S (1920).

<sup>693</sup> Schauer, 'The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience' (n 680).p.8.

<sup>694</sup> *ibid*.pp.6.7.

## 5.3 Freedom of Speech forms

### 5.3.1 Symbolic Speech

Symbolic speech is a comprehensive meaning which includes all speech types<sup>695</sup>. Therefore, it is vital to examine whether an activity constitutes mere conduct or actions. This illustrates why the Supreme Court often uses the words expression and speech interchangeably.<sup>696</sup> However, on a government level, regulating the cases that take the form of written or spoken words may be harder than symbolic speech<sup>697</sup>. Moreover, conduct that is ‘imbued with elements of communication’ is the substantial element that distinguishes symbols and gestures from pure speech. For example, conduct like dancing seems to be protected not just because it is communicative, but because dancing is a positive approach to conveying the message and becoming a part of the message. Similarly, photos of candidates for election in the streets: a photo is not a direct way to communicate, but it is a favourite way to introduce a brief idea about the candidate to the audiences.<sup>698</sup> Overlapping complexity may further the vagueness of such cases related to ‘communicative conduct’ unless the vision is expanded to cover all surrounding circumstances<sup>699</sup>. This becomes obvious in the case *Sause v. Bauer*, where “two police officers visited Sause's apartment in response to a noise complaint”. Sause filed suit against the police officer for preventing her from practicing religious rites. She claimed the right to free exercise of religion as she practiced it in her daily life. The Tenth Circuit affirmed her right. The Supreme Court reversed the decision and concluded that obstructing people’s practice of religious rites does not always violate the First Amendment right to the free exercise of religion. The Court emphasized that surrounding circumstances must be taken into account when reviewing a case where religious rites were obstructed. The Court thereby asserted the importance of public interest in broad sense.<sup>700</sup> While not all communicative conduct necessarily falls under the protection of free speech, a high level of scrutiny should be used to avoid colliding with legitimate

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<sup>695</sup> Larry Alexander, ‘Free Speech and Speaker’s Intent’ (1995) 12 Const. Comment. 21.p.22.

<sup>696</sup> Nimmer (n 187).p.33.

<sup>697</sup> James M McGoldrick Jr, ‘Symbolic Speech: A Message from Mind to Mind’ (2008) 61 Okla. L. Rev. 1.p.23.

<sup>698</sup> *ibid*.p.15.

<sup>699</sup> Gordon Babst, ‘Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston’.pp.363, 364.

<sup>700</sup> *Sause v. Bauer*, 585 U.S. (2018).

social and government interest.<sup>701</sup> Indeed, the difference between ‘speech’ which covers all verbal actions whether spoken or written and ‘freedom of speech’ which concerns specific cases is that freedom of speech only applies in those instances of speech that are logical.<sup>702</sup> According to Schauer “[c]ategories are the tools of systematic thinking. They enable us to organise our ideas, to draw analogies, and to make distinctions”<sup>703</sup>. Thus, the two factors: intent and likelihood understood the message which was upheld by *Spence’s* court, consider the most beneficial tests that enables the court to distinguish between symbolic and other forms of speech<sup>704</sup>. Moreover, the *Spence’s* test gives speech a higher rank than conduct; yet in this obvious defacement of public property case is where the focus is on conduct rather than speech<sup>705</sup>. What is more, how many courts have implemented the *Spence’s* test emphasises its importance. Robert Post noted that “[t]he *Spence* test thus appears to have enjoyed the normal life of a relatively minor First Amendment doctrine”.<sup>706</sup> Thus, the discussion will focus on intent and the audience’s understanding, except for the context of conduct because the last factor mostly overlaps with the second factor.<sup>707</sup> It is in no way my intention to build a new theory, rather to look at the factors from a different perspective.

## **Intent Function**

Intent to convey symbolic ideas or information is considered to be one of the most crucial elements of symbolic speech that should be contained; otherwise symbolic speech cannot be protected<sup>708</sup>. In the words of Schauer “any coherent formulation of a Free Speech Principle requires communicative intent as well as a perceived message”<sup>709</sup>. Without intent a speaker or communicator cannot express anything to others, and the message is blurred and can hardly be labelled as speech<sup>710</sup>. Communicating or sending messages to others cannot make sense without intent. This can be illustrated with a case of speech:

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<sup>701</sup> *Barnes v Glen Theatre, Inc*, 501 US 560, 577 (1991). See also, McGoldrick Jr (n 579).p.52.

<sup>702</sup> Sadurski (n 19).p.56.

<sup>703</sup> Schauer, ‘Categories and the First Amendment: A Play in Three Acts’ (n 308).p.265.

<sup>704</sup> James L Swanson, ‘Unholy Fire: Cross Burning, Symbolic Speech, and the First Amendment-Virginia v. Black’ [2002] *Cato Sup. Ct. Rev.* 81.p.96.

<sup>705</sup> Joshua P Davis and Joshua D Rosenberg, ‘Inherent Structure of Free Speech Law, The’ (2010) 19 *Wm. & Mary Bill Rts. J.* 131.p.171.

<sup>706</sup> Robert Post, ‘Recuperating First Amendment Doctrine’ [1995] *Stanford Law Review* 1249. p.1252.

<sup>707</sup> Waldman (n 64).p.1844.

<sup>708</sup> Friedman (n 209).p.589.

<sup>709</sup> Schauer, *Free Speech: A Philosophical Enquiry* (n 103).p.98. See also, Sadurski (n 19).p.46.

<sup>710</sup> Barendt (n 1).p.81.

for example, when somebody raises board without intending to do so, the act would be labelled as movement. But, the act's categorisation will change entirely from movement over to speech when combined with intent.<sup>711</sup> Thus, the initial judgment should focus on acts and then on intent to decide whether the act falls under free speech protection or not. Indeed, attitudes, by means which are broadly linguistic-verbal, by writing or printing and the communication of ideas, beliefs, questions and queries, reminders and so on, can convert cases easily from peaceful to aggressive and from protected to unprotected conduct, if insights into the underlying intent change.

The problem that may confront any subject is not related to the type of conduct, rather it is linked to the intent which can play a crucial role in differentiating between the meaning in the same case. Similarly, an expression that is used to send messages by symbolic conduct cannot make sense without surrounding elements. For example, using actual sleeping to deliver ideas or emotions would be difficult to understand. But, if the communicator slept in a small tent in a particular area that is famous for opposition to government policy, for example, this may convey the message to the government that housing problems need to be solved for poor people.<sup>712</sup> In the case *Virginia v. Black*, Justice O'Connor asserted that focusing on circumstances is a practical way to solve a mystery revealed, as one needs "all of the contextual factors that are necessary to decide whether a particular [conduct] is intended to intimidate"<sup>713</sup>. What can be seen from the formerly mentioned cases is that a person's intent to communicate an idea to the recipients of the message is one of the most important elements that determine whether symbolic conduct falls under the protection of free speech protection or not.<sup>714</sup> Indeed, an act without intent to convey an idea cannot be categorized as an act of expression.<sup>715</sup> Interestingly, in some cases choosing symbolic speech to convey messages is an appropriate approach to reaching goals<sup>716</sup>. Another reason is, according to Emerson, "the mass media of communication were not open to those lacking the necessary funds or

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<sup>711</sup> Tien (n 74).p.634.

<sup>712</sup> Collier (n 203).p.118.

<sup>713</sup> *Virginia v Black*, 538 US 343, 345 (2003). See also, Swanson (n 704).p.100.

<sup>714</sup> Christopher J Marengo, 'Constitutional Law-First Amendment-Symbolic Speech-Clark v. Community for Creative Non-Violence' (1985) 3 NYL Sch. Hum. Rts. Ann. 485.p.502.

<sup>715</sup> Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy* (n 44).p.8.

<sup>716</sup> Friedman (n 209).p.590.

established position, and hence such persons could convey their message effectively only by some kind of novel or dramatic conduct”<sup>717</sup>.

Furthermore, the speaker’s intent to convey a specific message may change the situation of freedom. For example, consider a person who wears a Nazi armband, simply as an “expression of one’s personality”. He wears it because he likes the Nazi logo, without the intent to send a message or motivate others to support the Nazism movement. This case cannot be considered an instance of speech but is a case of expression.<sup>718</sup> It is unnecessary here to offer a definition of “expression”. What is crucial here is merely to insist on the obvious point that intent has an ability to change meaning and the context of a subject case by case. Professor Schauer gives the reason for how speech is subject to free speech protection. He said, “any coherent formulation of a Free Speech Principle requires communicative intent as well as a perceived message”. What can be understood then, is that if human action does not intend to convey a message to others the conduct and judgment begins to blur.<sup>719</sup> This approach so far describes the difficulties that confront intent application. For example, pronouncing “Hello” can have different meaning deferent meanings, for instance, it can be used for greeting or, in some circumstances may be used by international students as a kind of English language practice.<sup>720</sup> Peter Tiersma rightly observed, “[t]he crucial element is not simply the words used, but the context or circumstances in which the utterance is made”.<sup>721</sup> The conflict and debate about intent and its role in symbolic speech is obvious. This is evident in the case of *New Rider v. the Board of Education*, where some students decided to change their hairstyles because of their traditional beliefs. School administration found this behaviour conflicted with school regulations, especially those that related to hairstyles. The Court of Appeals asserted that the school’s regulation with regards to this case is logical and consistent with the lofty principles of the school. By contrast, the Supreme Court found that the school and the decisions of the Court of Appeals decisions were unjustified because students’ intention was not to highlight their hair styles or be discontented with such public issues, rather, their aim was to draw students’ attention to their cultural

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<sup>717</sup> Emerson (n 67).p.79.

<sup>718</sup> Frank A Morrow, ‘Speech, Expression, and the Constitution’ (1975) 85 *Ethics* 235.p.237.

<sup>719</sup> Schauer.p.98. See also,Sadurski (n 19).p.46.

<sup>720</sup> Tien (n 74).p.640.

<sup>721</sup> Peter Meijes Tiersma, ‘The Language of Offer and Acceptance: Speech Acts and the Question of Intent’ (1986) 74 *California Law Review* 189.p.192.

heritage. Thus, the Court found that the student's conduct was covered under free speech.<sup>722</sup>

Similarly, in the *Tinker v. Des Moines School District* case, the school punished students because they wore armbands to school in protest of the Vietnam War. The school's decision was affirmed by many courts on the grounds that protecting the school was valuable. However, The United States Supreme Court has disagreed with this view, as it asserted that the interpretation of students' symbolic conduct was far from the truth. According to The Court, "[there are no] facts that might reasonably have led school officials to forecast substantial disruption of or material interference with school activities". What the students did, was completely within the protection of the free speech clause of the First Amendment.<sup>723</sup> Indeed, applying constitutional rights, especially in cases that relate to individuals' freedom is not an easy task.<sup>724</sup> It is vital to notice here that intent (according to the First Amendment) to express the symbolic message covered all symbolic forms, unless conduct caused a threat to others. This is evidenced in the case *Virginia v. Black* when the Supreme Court found that "cross-burning was prima facie evidence of intent to intimidate"<sup>725</sup>. Whether intent was to threaten or intimidate can be determined by considering surrounding circumstances and by 'scrutinizing the facts and context', according to Justice O'Connor.<sup>726</sup> From these cases, it can be concluded that a balance between guarding existing regulations but also allowing for the expressions of symbolic conduct within an acceptable boundary is highly recommended.

## **Audience Understanding**

After discussion on the first factor of Spence's test, it is appropriate, therefore, to turn to the second factor, understanding the message. This factor in combination with the third factor – context – expands the principle of conduct to include different social meanings.<sup>727</sup>

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<sup>722</sup> *New Rider v Board of Education*, 414 US 1097 (1974).

<sup>723</sup> *Tinker v Des Moines Indep Community Sch Dist*, 393 US 503 (1969).

<sup>724</sup> Nadine Strossen, 'Keeping the Constitution Inside the Schoolhouse Gate-Students' Rights Thirty Years After *Tinker v. Des Moines Independent Community School District*' (1999) 48 Drake L. Rev. 445.p.456.

<sup>725</sup> *Virginia v Black*, 123 S Ct at 1545.

<sup>726</sup> *Virginia v. Black*, 538 U.S. 343, 345 (2003). . See also, Swanson (n 586).p.100.

<sup>727</sup> Waldman (n 64).p.1863.

Ideas, emotions and experiences, are normally derived from our talk because this approach to exchange would make our conversation rational, Professor Paul Grice says.<sup>728</sup> This means that the tie between the speaker and the audience is not merely a link between two parties; rather, it is a consistent relationship that is able to create interaction and interpret meaning. Consequently, the prospective role that is performed by the audience is substantial in understanding the speaker's message. The importance of audience understanding can be seen when one takes into account how many courts rely on this factor as an essential part in minimizing the role of intent.<sup>729</sup> As mentioned earlier, symbolic speech has different forms, but linking social meaning with symbols improves understanding of the message. In *West Virginia State Board of Education v. Barnette*, the Supreme Court clarified the effect of social meaning on symbolic speech as it noted that, "[a]ssociated with many... symbolic are appropriate gestures of acceptance or respect: a salute, a bow or bared head, a bended knee."<sup>730</sup>

Symbolic speech, as discussed earlier, can be expressed in different forms. However, communicative conduct, according to Professor Moon, will fail unless the sender's message is absorbed by the receiver and can define the purpose of the actor's intention. In this view, conduct can be characterised as symbolic speech under the two requirements.<sup>731</sup> Symbolic speech, as Nimmer discussed, cannot fall under the First Amendment protection unless the message is understood by audience. In other words, conveying a message with no meaning to the audience cannot be symbolic speech.<sup>732</sup> Moreover, even in an insulting case, for instance, where the speaker can express illegal conduct or what may be called -negative free speech-, an audience or recipient can understand the meaning and still be the same as when he or she received a message that falls under the protection of speech. More obviously, audience function is substantial in differentiating between peaceful and fighting conduct because the relation between them is 'dialogic and independent.'<sup>733</sup> According to the Post "[p]rotection uncivil speech does

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<sup>728</sup> H Paul Grice, Peter Cole and Jerry Morgan, 'Logic and Conversation' [1975] 1975 41.p.45. See also, Ken Turner, 'The Principal Principles of Pragmatic Inference: Co-Operation' (1995) 28 Language teaching 67.p.68.

<sup>729</sup> Waldman (n 64).p.1851.

<sup>730</sup> *West Virginia State Board of Education v Barnette*, 632 (1943).. See also, Waldman (n 40).p.1871.

<sup>731</sup> Moon (n 77).p.28, 29.

<sup>732</sup> Nimmer (n 187)..p.36

<sup>733</sup> Post, 'Recuperating First Amendment Doctrine' (n 706).p.1254.

not automatically destroy the possibility of rational deliberation”.<sup>734</sup> To bring such an activity within a protected sphere, a performed action should occur that is meant to convey meaning and this usually cannot occur without a speaker and audience.<sup>735</sup>

It is argued that self-expression is derived from allowing an audience to interpret and analyse the speaker’s message. This notion is based on the fact that individuals are free to reflect upon their emotions and understanding towards the messages they receive. As a result, people are able to express different forms of opinions and suggestions.<sup>736</sup> Furthermore, the assigned role of the audience towards the courts is an essential factor in reflecting public opinion. Indeed, the modern concept translates the sophisticated capability of audiences in discovering and analysing the events that occur before them. According to Lidsky “audiences are capable of rationally evaluating the truth, quality, credibility, and usefulness of core speech”. This view is contrary to the previous concept of the audience that looked at the negative side as in the case of a misunderstanding and lack of ability in determining the comprehensive meaning of a speaker’s message.<sup>737</sup>

The distinctive role of the audience has ready application to the actual case. Consider, for instance, in the case of *Cohen v. California*, before many people and close to the courthouse, Cohen wore a jacket bearing the words "Fuck the Draft". This act, seen by the Court of Appeals of California, as “offensive conduct” might negatively affect the audience; therefore, Cohen was convicted and sentenced to 30 days of imprisonment. The U.S. Supreme Court refused to accept the decision of the Court of Appeals, noting that the appellant’s act constituted freedom of speech.<sup>738</sup> The constitutional protection of freedom of speech is based primarily on serving societies and removing any governmental interference that may minimise public interaction.<sup>739</sup> Furthermore, the Court broadened the role of the audience by interpreting the meaning of such symbols as asserting an “evident position on the inutility or immorality of the draft”.<sup>740</sup> What can be

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<sup>734</sup> Robert C Post, ‘Racist Speech, Democracy, and the First Amendment’ (1990) 32 *Wm. & Mary L. Rev.* 267.p.304.

<sup>735</sup> Moon (n 77).p.30.

<sup>736</sup> Sandy Tomasik, ‘Can You Understand This Message-An Examination of *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston’s Impact of Spence v. Washington*’ (2015) 89 *John’s L. Rev.* 265.p.280

<sup>737</sup> Lyrissa Barnett Lidsky, ‘Nobody’s Fools: The Rational Audience as First Amendment Ideal’ [2009] *University of Illinois Law Review*, Forthcoming.p.810.

<sup>738</sup> *Cohen v California*, 403 *US 15* (1971).

<sup>739</sup> *ibid.*Overview.

<sup>740</sup> *ibid.*

seen, thus, is that an audience can play an essential role in developing the judgment process and broaden the conceptual meaning of free speech practice.<sup>741</sup> It is worth noting that external factors such as differences in cultures and norms may play a substantial role in the way any given audience member interprets speech. According to Lidsky “[people] are separated and defined by deep divisions based on sex, age, class... all with somewhat differing norms and expectations of conduct”.<sup>742</sup> Thus, audiences do not always have the same level of understanding nor are they capable of conveying ideas in the same way. However, the impact of the efficient conduct of audiences seems to be a powerful and legitimate reason for constitutional protection.<sup>743</sup> Finally, the values of freedom of expression would be lacking without interaction between the communicator and the audience.<sup>744</sup>

From the above two points (intent and audience) we can conclude that not all speech acts are protected. Although some critics have insisted on the futility of the Spence test,<sup>745</sup> it is necessary to limit symbolic speech. Practice freedom on clear principle creates incentive to practise freedom of speech because broadness in rights may cause weakness in these rights.<sup>746</sup>

### **5.3.1.2 Symbolic Speech Limitation**

Expressive ideas that take place through symbols are not all the same. There is a clear difference between symbols that refer to peace and symbols that represent ugly ideas. Symbolic speech has meaning, and even if the meaning comes across differently among different individuals, there is range or distribution of meaning. Therefore, just because conduct can be expressive does not mean that every act is symbolic and thus subjected to free speech protection.<sup>747</sup> The U.S. Supreme Court has defined that freedom of speech protection does not cover every act with certain content and forms of expression, “[w] e

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<sup>741</sup> Lidsky (n 737),p.809.

<sup>742</sup> Lyrissa Barnett Lidsky, ‘Defamation, Reputation, and the Myth of Community’ (1996) 71 Washington Law Review,p.41.

<sup>743</sup> Sadurski (n 19).pp.53, 54.

<sup>744</sup> Trager and Dickerson (n 12),p.29.

<sup>745</sup> Davis and Rosenberg (n 705).p.188.

<sup>746</sup> Caroline Mala Corbin, ‘Speech of Conduct-The Free Speech Claims of Wedding Vendors’ (2015) 65 Emory LJ 241.p.270.

<sup>747</sup> Waldman (n 64).p.1848.

cannot accept the view that an apparently limitless variety of conduct can be [labelled] 'speech' whenever the person engaging in the conduct intends thereby to express an idea".<sup>748</sup> So, what is the measurement that should be applied to limit symbolic speech?

While a framework of various forms of speech including "ideas, events, persons, places, and objects" has been elaborated upon in the context of symbolic speech,<sup>749</sup> it is vital to distinguish between symbolic speeches that deserves free speech protection from others that do not. Firing a bullet at the American President John F. Kennedy or the Israeli Prime Minister Yitzhak Rabin or the Indian leader Mohandis K. Gandhi or attacks by Islamic extremists on France and Belgium in 2015 and 2016 – all of these examples can be treated as symbol conduct, but cannot under any circumstances find protection under freedom of speech. If one thinks that no principle of free speech exists, one might assume that assassination for political reasons is equal to flag burning or writing graffiti. The reason behind characterising such speech from the purposes of the jurisprudence of freedom of speech is because such symbolic speech lacks 'rationales for freedom of speech'.<sup>750</sup> From this point of view, the rational element can be seen as the corner stone of freedom of speech including symbolic behaviour that has legal disciplines adopted for its particular characteristics. In other words, while individuals should remain free to express opinions without restriction, the scope and content of the opinions should be subjected to the principles of morality and social values.

Professor Edwin Baker believes that distinguishing between speech and nonspeech for protection does not rely upon similarity in cases of speech or conduct, rather the relevance of the reasons for protection or its denial should focus upon the ultimate goal of laws.<sup>751</sup> The difficulty arises because of the ambiguity of some cases in terms of what is called "unrelated to free expression". In the case of flag burning or draft card burning (this case will be discussed later), for instance, many reasons led to restricting these symbols of conduct.<sup>752</sup> According to Justice Harlan, freedom of expression cannot be justified when it conflicts with the state's best interest.<sup>753</sup> To distinguish between the conducts that deserve protection or not, one needs to first look at what the action entails

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<sup>748</sup> *United States v O'Brien* 391 US 367 (1968).

<sup>749</sup> Akhil Reed Amar, 'Case of the Missing Amendments: RAV v. City of St. Paul, The' (1992) 106 Harv. L. Rev. 124. pp.134, 135.

<sup>750</sup> Sadurski (n 19). pp.55, 56.

<sup>751</sup> Baker (n 91). p.70.

<sup>752</sup> Smolla (n 507). pp.58, 59, 60.

<sup>753</sup> *United States v. O'Brien* 391 U.S. 367 (1968).

and not to the mere action. Therefore, according to professor Amar, “judges must go beyond the formal words of a law and consider its real-life effect”.<sup>754</sup> In the case of *Cox v. Louisiana*, Justice Black commented that speech has limited meaning and any conduct such as standing, marching and patrolling are not equalising the treatment of free speech. The only way that conduct can be covered under free speech protection is when states or authorities regulate such conduct.<sup>755</sup>

In the *Wisconsin v. Mitchell* case, the Court of Appeals was obvious in distinguishing between speech and act. The Court stated that “the statute punishes only conduct”. The United States Supreme Court, affirmed the court’s decision that what they did was completely consistent with First Amendment principles.<sup>756</sup> Similarly, in the *Texas v. Johnson* case, the Supreme Court reversed the trial court's decision that convicted Johnson of desecrating a flag. The court found that burning the flag did not threaten peace and justice as a part of political speech therefore, it was subject to free speech protection.<sup>757</sup>

The principle that was applied to symbolic speech which differentiated between protected and unprotected conduct can also be seen in general free speech protection. The invasion of public or individual rights under an absolutist form of regulation cannot be acceptable. As Barendt pointed out, “the freedom of speech is not the same as speech, so that rightly understood the term does not exclude restriction on some modes of expression”.<sup>758</sup> So far the meaning of such freedom related terms has been left without subtle distinctions to open the scale to make a balance with other types of speech.<sup>759</sup> Indeed, a growing appreciation of the importance of free speech needs balancing from courts to define the ultimate goals of regulation.<sup>760</sup> According to Emerson “the concept of expression must be related to the fundamental purpose of the system [of freedom of expression]”<sup>761</sup>. However, this opinion has been viewed as insufficient because it lacks some essential elements to distinguish between protected and unprotected conduct. Again and again,

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<sup>754</sup> Amar (n 749).pp.138, 143.

<sup>755</sup> *Cox v. Louisiana*, 379 U.S. 536 (1965).

<sup>756</sup> *Wisconsin v Mitchell*, 508 US 476 (1993). See also, Tracy L Coghill, ‘Wisconsin v. Mitchell: The Debate between Hate Crime Statutes and Freedom of Speech Continues’ (1993) 45 Mercer L. Rev. 1475.p.1476.

<sup>757</sup> *Texas v Johnson*, 491 US 397 (1989).

<sup>758</sup> Barendt (n 1).p.50.

<sup>759</sup> *ibid*.p.161.

<sup>760</sup> Bogen (n 630).p.387.

<sup>761</sup> Emerson (n 67).p.18. See also, Baker (n 91).p70

since there is no single unifying justification for a principle of free speech, a problem arises as to how to make a proper judgment on such expressions especially those that are related to defining the limitations of expressive conduct.<sup>762</sup>

### 5.3.2 Speech plus

Is ignoring the red light during rush hour a form of “speech” that ought to trigger free speech scrutiny? Or are marching, picketing or demonstrating down the middle of the street actions that do not implicate the Free Speech Clause? In order to answer these questions and limit overbreadth of the doctrines concern about protected speech, it is vital to scrutinise what is called speech plus conduct, which is a combination of protected and unprotected speech.<sup>763</sup> The right to free speech is not marginal, and it is therefore necessary to exercise caution in judgment on such speech. Speech plus conduct, according to Professor Harry Kalven, is a phrase that encompasses various types that require more distinguishing criteria to separate types conducts that need or deserve regulations from others that do not.<sup>764</sup> Speech plus is recognised as “not what [we] say, but the way that we say it”.<sup>765</sup> Furthermore, it is vital to know that the concept of speech plus originated to distinguish between different types of speech .<sup>766</sup> In the words of Justice Douglas, in commenting on the picketing case: “[p]icketing by an organized group is more than free speech, since it involves the patrol of a particular locality and since the very presence of a picket line may induce an action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated”.<sup>767</sup> However, the “poor and puny anonymities”<sup>768</sup> that characterise most speech plus cases are subjected to stricter scrutiny than pure speech.<sup>769</sup>

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<sup>762</sup> Baker (n 91).pp.71, 73.

<sup>763</sup> McGoldrick Jr (n 697).p.2.

<sup>764</sup> Kalven (n 175).p.23.

<sup>765</sup> Bogen (n 630).p.389.

<sup>766</sup> William E Lee, ‘Speaking Without Words: The First Amendment Doctrine of Symbolic Speech and the Supreme Court’ (1990) 15 Colum.-VLA JL & Arts 495.p.514.

<sup>767</sup> *Bakery Drivers Local v Wohl*, 315 US 769,776 (1942). See also, Theodore J St Antione, ‘Free Speech or Economic Weapon-The Persisting Problem of Picketing’ (1982) 16 Suffolk UL Rev. 883.p890.

<sup>768</sup> Lee (n 766).p.495. According to Lee, speech plus is behaviour that derived from symbolic speech.

<sup>769</sup> McGoldrick Jr (n 697).p.15.

The use of streets or public places to express ideas or emotions is an intelligent approach that creates attractive and effective communication between the speaker and the audience. The recognition of the strong effect of speech plus forms in the dissemination of ideas was followed by the recognition that speech plus is more than a type of speech that may be limited by simple judgment. In *Thornhill v. Alabama* (this case is seen as the first case that distinguishes between speech and conduct),<sup>770</sup> for example, the Supreme Court did not agree on a statute that prohibited picketing on the grounds that picketing is a form of speech and thus should be protected unless it causes serious or imminent harm to others.<sup>771</sup> In the case of the *International Brotherhood of Teamster Local 695 v. Vogt, Inc.*, shift picketing was declared unprotected when the court pointed out that picketing against an individual's freedom: "picketing was an improper attempt to coerce the employer into coercing its employees". Therefore, the conduct falls outside of free speech protection.<sup>772</sup> Thus, these two cases did not only show the divergence in the judgments, although the acts were the same, but also raised the point that picketing – as a form of speech plus – should be subjected to strict balance biased on the freedom of speech principle. According to Professor Edgar, "picketing... like any other speech, is protected by the constitution as a means, however, like other speech, it will not be protected when used for the purpose of accomplishing an unlawful end".<sup>773</sup>

Distinction between the conduct that is performed before an audience and those activities that are expressed by spoken or written word does not come from a vacuum. Speech plus is more than the right that only conveys emotion and feeling by various types of expression. This can be seen in an interesting contrast between pure and plus speech presented in the case of *Hughes v. the Superior Court of California*. The Court said that "[i]t has been amply recognised that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent".<sup>774</sup> This divergence is plain, because according to Barendt, if speech plus equates pure speech, it could have caused a simple failure to produce political assassination, for example, to the relevant coverage of a free speech clause.<sup>775</sup>

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<sup>770</sup> Lee (n 766).p.514.

<sup>771</sup> *Thornhill v Alabama*, 310 US 88 (1940).

<sup>772</sup> *International Brotherhood of Teamster Local 695 v Vogt, Inc* 354 US 284 (1957).

<sup>773</sup> 1621, *INC v Wilson* (1960).at 7. See also, *St Antione* (n 767).p.887.

<sup>774</sup> *Hughes v Superior Court of California*, 339 US 460 (1950).

<sup>775</sup> Barendt (n 1).p.79.

Since speech plus does not have a specific form, the real concern focuses on professor Moon's interpretation of speech plus that it has an impact on public debate is not the core point but instead that speech plus can play a crucial role as an alternative media method. Speech plus, as a vital approach to conveying ideas and opinions is important for two reasons. First, all speech plus cases take place before many people in public places, which enables demonstrators or those who wish to send a message to impart and receive information, as well as ideas to a larger audience. Therefore, the message will be more acceptable and public. Second, pickets, parades or protests that take place on the front steps of governmental departments, lecture halls, hospitals, concert halls, churches, machine shops, classrooms, football fields, or in a home, will attract various media to report the action to an audience, and this will give the action more momentum.<sup>776</sup> What can be seen then is that speech plus is a form of freedom that can be exercised by various means.

Although some differences have been determined between conduct and pure speech,<sup>777</sup> the constitutional basis of free speech protection encompasses both of them when they are exercises in a peaceful way.<sup>778</sup> Therefore, the ultimate restriction of both cases is related to the same principle.<sup>779</sup> Clearly, Baker applied this similarity in what he called the "speech-conduct dichotomy". This view was based upon the idea that "speech itself... is necessarily a physical activity that takes place at specific times and places and can interfere with other activities".<sup>780</sup> So, speech plus and pure speech can and should receive equal legal protection because their core meaning and protection is derived from the same notion.<sup>781</sup> Therefore, a distinction between speech plus and pure speech is, in fact, artificial.<sup>782</sup>

Finally, I believe that the speech plus model – as a part of freedom of speech – is built on an understanding of freedom of speech as a right of the individual to be free to express their opinion. Freedom of speech, however, does not protect speech in general. Instead, it protects and permits individuals to communicate with others, and to participate in an

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<sup>776</sup> Moon (n 77).pp.171, 172.

<sup>777</sup> Kalven (n 175).p.23.

<sup>778</sup> *Cox v Louisiana* (1965) 379 US 536.

<sup>779</sup> Sadurski (n 19).p.52.

<sup>780</sup> Baker (n 91).p.128.

<sup>781</sup> Sadurski (n 19).p.55.

<sup>782</sup> Richard E Shugrue, 'Inquiry into a Principle of Speech Plus, An' (1969) 3 Creighton L. Rev. 267.p.281.

activity that meets their desire to send messages to others, with limitations. Furthermore, if participation in the social activity of speech is unjustified by the law in a free and democratic society, the right of speech cannot be treated as speech that deserves legal protection. Recognising speech plus as a fundamental form of speech leads us to accept the notion that this kind of speech is a fruitful method of expression, and the entitlement to the freedom of speech principle aims to protect freedom without interference or hurting others. It should be apparent from the discussion thus far that the phrase “speech plus” cannot be understood in broad terms. Frameworks of understanding the various actions, or statutes are the best way to understand how speech plus works.

### **5.3.2.1 Speech plus Limitation**

From the discussion of conduct or behaviour speech, it appears that symbolic speech and speech plus are subjected to the same principle. However, the distinct role of speech plus should not be neglected and left without a plain legal principle that balances it against various other rights. A single act from an irritating demonstrator or picketer cannot be treated the same way as another person’s act that endangers people or property.<sup>783</sup>

In accord with the broad principle of speech plus, it is vital to understand that these overbreadths are an essential element in distinguishing between acts and pure speech. The task of speech plus, then, is to strike a balance between basic freedoms, such as the right to speak out on unpopular issues, and the right of society to be free to take part in parades, pickets, and protests.<sup>784</sup> Professor Thomas Emerson, defined that the problematic complexity of freedom of expression centres around two issues, one of them is to define

“the distinction between “expression” and “action”. . . Expression often takes place in the context of an action or is closely linked with it, or is equivalent in its impact. In these mixed cases it is necessary to decide, however artificial the distinction may appear to be, whether the conduct is to be classified as one or the other”.<sup>785</sup>

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<sup>783</sup> Sadurski (n 19).p.91.

<sup>784</sup> Kalven (n 175).p.22.

<sup>785</sup> Shugrue (n 782).p.269.

The ambiguity of some speech plus cases highlights the difficulties of this type of speech compared with pure speech which has a wide range of legal protection.<sup>786</sup> However, these difficulties should not draw attention away from the aspect of rationale, fact which treats speech plus and communicative conduct as one legal principle.<sup>787</sup>

In speech plus cases, it is plain that an individual's intention to send a message and the messages are understood; therefore, the expressive conducts are covered by freedom of speech. But, speech plus regulation is not an exception of freedom of speech. Marching in the street and picketing, for example, which supports extreme rights cannot be entitled to free speech protection.<sup>788</sup> In *Edwards v. South Carolina*, the Supreme Court asserted that, when free speech practice entails no violence or threat of violence, the right must be guaranteed. Moreover, the court differentiated between demonstrations that fall under free speech protection from those that do not. According to the court "[i]f, for example, the petitioners had been convicted upon evidence that they had violated a traffic law regulation, or had disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public, this would be a different case".<sup>789</sup>

On the other hand, speech that only conveys emotion and feeling without threatening substantial disruption is subject to constitutional protection. This can be seen in the case of peaceful public protesters. In the case *Snyder v. Phelps, Matthew, Snyder*, a U.S. Marine, was killed during the Iraq war. Phelps, who founded Westboro Baptist church, and others protested peacefully in a public place displaying signs against American policy such as "America is doomed", "you are going to hell", and "thanks [to] God for dead soldiers". Snyder's father filed a suit, alleging that the leader of the protesters, Phelps had a negative affect on his psychological state, and demanded compensation. The Supreme Court granted petitioner summary judgment, ruling that there was no violation to the right of free speech. According to the Fourth Circuit, Phelps and other protesters "were entitled to First Amendment protection because those statements were on matters of public concern, were not provably false, and were expressed solely through hyperbolic rhetoric".<sup>790</sup> This case makes it quite clear that protesters were entitled to

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<sup>786</sup> Emerson (n 25).p.917.

<sup>787</sup> Sadurski (n 19).p.55.

<sup>788</sup> Barendt (n 1).p.79.

<sup>789</sup> *Edwards and South Carolina (196) 372 U S 229, 236*. See also, Bogen (n 630).p.392.

<sup>790</sup> *Snyder v. Phelps*, 09-751 U. S. (2011).

express their opinion in protest according to the law because their statements were based on factual evidence and pertaining to public matters.

Another case that related to protesters rights is the case *McCullen v. Coakley*. Massachusetts amended the state law of Reproductive Health Care Facilities Act. The amended Act aimed to limit the protesters' role by standing 35 feet around "reproductive health care facilities". McCullen and other activists highlighted the dangers of abortion. They claim that the dictated of 35 feet negatively affects their freedom of expression and, therefore, transgresses First Amendment limitations. The Supreme Court concluded that the Massachusetts Act violate the First Amendment for many reasons; for example, one of them is that the Act imposes unreasonable restrictions on freedom of speech in public places.<sup>791</sup> That is, restricting access to public places cannot be justified unless there is significant impetus to protect public interest or national security.

Thus, divergence between the legal and the general meaning of speech plus is such that the former is often more expansive than the latter. The nature of speech plus that contains protected and unprotected conduct and requires state regulation to control its practice.<sup>792</sup> Thus, the central issue that should be addressed is not picketing, for example, as a form of speech plus or symbolic speech, but rather "whether speakers have violated or incited violation of labour related laws or other valid regulations".<sup>793</sup> According to Sadurski, the proper approach to give speech plus a high level of protection can be determined by "balancing the benefits of protecting a plus... as an essential carrier of a speech act, and, on the other hand, the costs that the conduct produces by colliding with legitimate social or individual interest".<sup>794</sup>

#### **5.4 Draft Card burning (case study)**

Since expressive conduct can be characterised as speech cases and the cases that are regulated by the state, it would be useful to determine the purpose of this regulation that organises such conduct.<sup>795</sup> Indeed, this applies to many conduct cases that combine

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<sup>791</sup> *McCullen v. Coakley*, 573 U.S. (2014).

<sup>792</sup> Sadurski (n 19).p.44.

<sup>793</sup> Friedman (n 209).p.592.

<sup>794</sup> Sadurski (n 19).p.47.

<sup>795</sup> *Barendt* (n 18).pp.80, 82.

speech and conduct as those cases are often characterized by ambiguity.<sup>796</sup> therefore a judicial treatment of the burning of draft cards raises the difficulties that confront regulations especially in the cases which contain symbolic conduct. Since conduct has a different meaning from other types of speech, the need for determination and whether such symbolic conduct should have protection or not can only be shown by comprehensive dissection.<sup>797</sup> Of the various forms of symbolic speech, draft card burning, in particular, has posed serious questions concerning the ambit of the freedom of speech. Draft card burning is, by its very nature, symbolic. Any form of disdain, regardless of the surrounding circumstances, is therefore bound to raise the issue of whether or not it will be considered as “speech” within the meaning of the constitutional guarantee of freedom of speech. Does the freedom of speech principle treat speech as a particular form of symbolism? What are the boundaries of the symbols that should be subjected? Could people in Egypt, for example, express their feelings about political issues by using symbols tht are identical in the United States? Moreover, is there any difference if draft card burning is taking place by engaging in a civil rights demonstration or in war time against government policy? In other words, does the action take place for the purpose of making a political statement or merely for personal reasons?

Equality between verbal speech and symbolic speech is an ideal approach to balancing the scale of practicing different types of freedom of speech other than pure speech. According to Nimmer, “[r]ecognition of such equality would mean that no one will be penalised because he is only able to or chooses to communicate in a language other than that of conventional words”.<sup>798</sup> This opinion presumes that there is no expression without symbols and ideas can be expressed in different ways.<sup>799</sup> Even if draft card burning does not, in general, carry expressive meaning, the surrounding circumstances may overcome that presumption. This can be seen in the case of destroying a draft card, which was not considered expressive conduct until many U.S protesters started their demonstration against the Vietnam War.<sup>800</sup> In the case David Paul O’Brien of Boston, O’Brien was sentenced for burning the Selective Service registration certificate to “influence others to adopt his anti-war beliefs”. This conduct, according to the Supreme Court, falls outside

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<sup>796</sup> Eleanor F Taylor, ‘Draft Card Burning’ (1967) 3 Portia LJ 52.p.58.

<sup>797</sup>‘Notes Symbolic Conduct’ (n 177).p.1098.

<sup>798</sup> Nimmer (n 187).p.62.

<sup>799</sup> *ibid.*p.34.

<sup>800</sup> Corbin (n 646).p.265.

of the protection of free expression.<sup>801</sup> O'Brien thought himself innocent because the conduct was aimed to draw the public's attention and to stop the Vietnam War, thus, his act was a kind of symbolic speech protected under the First Amendment of the Constitution. The Court in this case was precise when noted that the protection of speech does not include all speech types. The Court asserted:

"We cannot accept the view that an apparently limitless variety of conduct can be label[led] 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms".<sup>802</sup>

The approach that was applied in O'Brien's case tests governmental interest, according to Rosenblatt, "the most commonly employed yardstick in measuring the constitutionality of flag statutes".<sup>803</sup> While the fundamental constitutional right burdened the government's role,<sup>804</sup> the court's treatment has been criticised by many scholars who found that in practice it is toothless. Henkin, for instance, found that any discrimination between speech and conduct cannot be accepted under any circumstances. Speech and conduct are two sides of one coin.<sup>805</sup> Furthermore, according to Barendt, the decision made by the court can be criticised on two counts. First, the court's treatment in this case did not adopt conventional approaches to restrict expression; rather, it seems the court decision raises some new obstacles to practising expressive conduct. This way seems misconceived because in different speech cases the focus should be on the surrounding circumstances of each case rather than the comprehensive view. For example, in the case of distributing leaflets, total restrictions cannot be justified unless it is necessary to keep public places clean or protect the environment. Second, the court labelled O'Brien's behaviour in an unrealistic manner and distinguished between burning a draft-card and

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<sup>801</sup> *United States v. O'Brien*, 391 U. S. 367,377 (1968).

<sup>802</sup> *United States v. O'Brien*, 391 U. S. 367,377, 376 (1968). See also, Louis Henkin, 'The Supreme Court, 1967 Term' (1968) 82 Harvard Law Review 63.p.77. See also, Robert M Phillips, 'Draft Card Burning' (1969) 18 Clev.-Marshall L. Rev. 407.p.407.

<sup>803</sup> Albert M Rosenblatt, 'Flag Desecration Statutes: History and Analysis' [1972] Wash. ULQ 193.p.231.

<sup>804</sup> Michael C Dorf, 'Incidental Burdens on Fundamental Rights' [1996] Harvard Law Review 1175.p.1176.

<sup>805</sup> Henkin (n 802).p.79.

other forms of speech which cannot be accepted under any circumstances. Therefore, the only way that may justify the court's treatment is to define the ultimate goals of regulation.<sup>806</sup> I will explain my own view after describing a similar case that, however differs from the O'Brien case in some significant ways.

Nudity and sexually explicit conduct are considered (in the view of The U.S. Supreme Court), a type of expressive conduct that is covered under First Amendment protection. However, some judges argue that publicly nude dancing should be restricted to prevent crime and protect a public interest.<sup>807</sup> Similarly, in the case of Lafayette Park, protesting group decided to set up camp to draw community member's attention to those people suffering from displacement due to the lack of a suitable place to live. The Supreme Court ruled in this case that people may demonstrate and express their feelings, but restricted sleeping in the park. The last exception was rejected by protestors as they believed preventing them from sleeping in the park would negatively affect the demonstration's message. Applying the O'Brien standards, the Supreme Court rejected protestors' requests to allow them to sleep in the park because this conduct conflicted with the government's interest to keep the park clean.<sup>808</sup> A few years later after O'Brien's case, the case *Spence v. Washington* defined that freedom of expression under the first Amendment is not limitless. In some circumstances speech – as will be developed later – cannot falls within the outer ambit of the First Amendment's protection. According to the Supreme Court, “[t]he right of free speech, though precious, remains subject to reasonable accommodation to other valued interests”.<sup>809</sup>

To sum up, on the basis of the examples provided in this study, it is observed that two broad trends seem to exist. While some are in favour of statutes that forbid burning a draft card or damaging any national symbols, others permit such conduct as a part of freedom of speech. My position on this case is as follows: the main issue is centred on balancing constitutional jurisprudence. These case notes do not examine the conflicting opinions, but rather, raise logic and the implications of regulation. This is evidenced in

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<sup>806</sup> Barendt (n 1),p.82.

<sup>807</sup> *Erie v Pap's A M*, 529 US 277, 290, 291 (2000). It is important to note here that there are different types of protection. According to Kopf “some expressions are not afforded First Amendment protection2 4 some are afforded full protection,’ and some are afforded a level of protection somewhere in the middle”.

<sup>808</sup> *Clark v Commun for Nonviolence*, 468 US 28, 2948 (1984). See also, Haiman (n 106).pp.72, 73.

<sup>809</sup> *Spence v Washington*, 418 US 405, 417 (1974). See also, Waldman (n 64).p.1849. See also, Corbin (n 646).p.246.

the Court of Appeals Second Circuit, where burning a draft card could not be speech, because if we accept burning the card as a type of protected speech, then we need to accept other conduct such as stalling cars during rush hours as a form of speech. The Court stated that “sincere motivation or the labeling of even non-violent conduct as symbolic does not necessarily transform that conduct into speech protected by the First Amendment”.<sup>810</sup> So, the logical question raised here is, what is the measure that should be applied to differentiate between the conduct that should, and that should not, count as legally protected under the free speech principle? The area in defining the criteria that can distinguish between the various kinds of conduct still does not exist.<sup>811</sup> Indeed, incommensurable value may cause misunderstanding or misuse for the constitutional power, according to Kopf “the [changeable] decision[s] will not only reduce the value of some First Amendment protections, but will also create confusion among courts and practitioners attempting to resolve the decision's inconsistent application of traditional First Amendment rules”.<sup>812</sup> Moreover, the decision issued by governments should be subjected to courts for scrutiny, because previous experiments have proven that the capacity of governments to properly balance between its interest and free speech is doubtful.<sup>813</sup> Therefore, a broad understanding of the meaning of speech is the only way to remove mistrust whether in courts’ or governments’ work. Generally, in thinking about whether conduct should be protected under the free speech principle or not, it is not an easy task and should be subjected to strict scrutiny. Thus, the following section will focus on the three factors adopted in the Spence case to analyse how far these elements distinguish between speech and conduct.

## 5.5 Chapter Summary

One of the characteristic of symbolic speech is that the symbols context is not rigid but constantly depends on circumstances.<sup>814</sup> Wearing a t-shirt with a crescent logo in different colours is a normal look, but, it would be quite difficult to predict how someone might

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<sup>810</sup> *United States v Miller*, 367 F 2d 72 - Court of Appeals, 2nd Circuit 1966. at 79. See also, Lawrence R Velvel, ‘Freedom of Speech and the Draft Car Burning Cases’ (1967) 16 U. Kan. L. Rev. 149.p.156.

<sup>811</sup> Vincenzo Zeno-Zencovich, *Freedom of Expression: A Critical and Comparative Analysis* (Routledge 2008).p.84.

<sup>812</sup> John B Kopf III, ‘City of Erie v. Pap’s AM: Contorting Secondary Effects and Diluting Intermediate Scrutiny to Ban Nude Dancing’ (2002) 30 Cap. UL Rev. 823.p.824.

<sup>813</sup> Barendt (n 1).p.88.

<sup>814</sup> McGoldrick Jr (n 697).p.82.

interpret the symbol.<sup>815</sup> This fact can be seen in our current times, where the Isis logo meant nothing to most people two or three years ago, but recently because of the extremist movement in the Middle East has been on the rise, the logo has gained popularity and become a wide-ranging symbol of terrorism. Ultimately, the ambiguous and controversy will continue in every symbolic case because symbolic speech is “a short cut from mind to mind”.<sup>816</sup> This means, symbols cases need to be scrutinised very closely in order to differentiate between expressive conduct found to be symbolic speech and that found to be merely conduct.<sup>817</sup> For example, in the case of *City of Dallas v. Stanglin*, the local city court issued an order limiting dance halls to people above the age of 18. The Court of Appeals of Texas found that the order violated the rights of minors under the First Amendment.<sup>818</sup> The Supreme Court did not agree on this, and found that there was nothing related to free speech.<sup>819</sup>

On the other hand, speech plus is described as “a cheap way to reach the public with ideas”.<sup>820</sup> The distinctive role of speech plus as an essential carrier of ideas and emotion by speech cannot be denied.<sup>821</sup> However, this substance function collides with intelligible rationale. This ambiguity is common in the distinction between speech plus and pure speech<sup>822</sup> where the protection of the strict regulations that are applied to speech plus are more than pure speech.<sup>823</sup> This divergence, according to Henkin, is unjustified because “speech is conduct, and actions speak”.<sup>824</sup> Consequently, the vital approach to confront this difficulty is to make a strict balance between actions or speech that are involved.<sup>825</sup>

Finally, it is vital to understand how helpful symbol or speech plus have been in their essential roles within the freedom of speech (system) to determine the limitations of speech. Therefore, courts do not need to create new definitions of either symbols or speech plus; rather new concepts are needed that enable the confrontation of the difficulties of such cases because these cases mean more than simply raising a burning

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<sup>815</sup> *ibid.*,p.82.

<sup>816</sup> Tomasik (n 736).p.268.

<sup>817</sup> McGoldrick Jr (n 697).p.39.

<sup>818</sup> *City OF Dallas et al v Stanglin*,490 US 19 (1989).

<sup>819</sup> *ibid.*

<sup>820</sup> Bogen (n 630).p.390.

<sup>821</sup> Sadurski (n 19).p.48.

<sup>822</sup> Kalven (n 175).p.23.

<sup>823</sup> McGoldrick Jr (n 697).p.2.

<sup>824</sup> Henkin (n 802).p.79.

<sup>825</sup> Kalven (n 175).p.27.

flag or picketing. Consequently, the best way to control symbol conduct or speech plus is balancing<sup>826</sup> based on case-specific facts and circumstances rather than looking to the regulation of the activity under issue. In addition, by doing this we could guarantee equal protection between symbolic behaviour and words that expand the freedom of speech practice.<sup>827</sup> According to Lessig, no fixed general meaning is attached to what he called the semiotic content of our speech and actions. The interpretations of such actions are subjected to varying factors<sup>828</sup>. The scope of free speech, thus, must be limited depending upon 'human nature' and all its entails.

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<sup>826</sup> By balancing, I mean to refer to the Court's careful weighing of competing factors-here the importance of speech vs. the government's concern for nonspeech related interests.

<sup>827</sup> Lee (n 766).p.542.

<sup>828</sup> Lawrence Lessig, 'The Regulation of Social Meaning' (1995) 62 The University of Chicago Law Review 943.p.954.

## Chapter Six

### 6. The U. S. Supreme Court's Methods of Interpreting the First Amendment

The previous chapter examined the boundaries of freedom of speech under U.S Law. In that chapter, the study discussed the limitations of free speech under different forms. This chapter concerns how the Supreme Court has dealt with freedom of expression. It explores different approaches and how these approaches have affected the limitations of freedom of speech.

#### 6.1 Historical background

In the period that preceded the 20<sup>th</sup> century, the role of the Supreme Court, the highest United States' court was relatively minimal the role of the individual State jurisdictions was very significant<sup>829</sup> and cases were rarely brought before the Supreme Court.<sup>830</sup> However, this position changed completely from the second decade of the twentieth century when the scope of the protection of freedom of speech would have to be reconstructed.<sup>831</sup> In commenting on the Supreme Court's new role, one commentator stated that "the Court demolished the old common law institutions that bound freedom of expression in order to reconstruct the law on new and more liberal foundations"<sup>832</sup>. The remarks that follow do not, of course, offer a general theory of the Supreme Court. They can be more understood more appropriately as ranging shots, an attempt to establish the Court's role and to take the argument of how the Court's rule evolved.

The subject of the lengthy and often acrimonious debate about the Supreme Court's role is an issue that needs to be addressed. It is by no means an easy task to delineate the limitation of speech and to determine what counts as speech for the purpose of the first amendment. However, the U.S. Supreme Court's power, which overrides legislators, has

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<sup>829</sup> William W Van Alstyne, 'Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review' (1990) 53 Law and Contemporary Problems 79.p.82.

<sup>830</sup> Elisabeth Zoller, 'The United States Supreme Court and the Freedom of Expression' (2009) 84 Ind. LJ 885.p.888.

<sup>831</sup> Trager and Dickerson (n 12).p.60. The Supreme Court does not distinguish between the phrases freedom of expression or speech because they lead to the same result. See, Zoller (n 830).p.886.

<sup>832</sup> Zoller (n 830).p.888.

played a crucial role in expanding the scope of the Supreme Court's<sup>833</sup> acts and in its role the final arbiter.<sup>834</sup> The Supreme Court must decide when expression should be protected from others that are not.<sup>835</sup> It must demonstrate when the State's interference with freedom of speech is either allowed or prohibited.<sup>836</sup> In the face of these shifts, the Supreme Court is required to delineate what counts as expression for the purposes of the First Amendment. In the words of one commentator "the Court has a duty to enunciate rules that permit those freedoms to be exercised at least to the extent permitted by constitutional principle".<sup>837</sup>

In many cases, especially after World War I, the Supreme Court entered a new era of freedom of speech<sup>838</sup>. In the first case, *Schenck v. United States* (1919), the Supreme Court held that there was no such defence of a man who encouraged men not to join the military service. The Supreme Court based its decision on the fact that freedom of expression had limitations. The Supreme Court emphasised that "[t]he question in every case was whether the words were used in such circumstances and were of such nature as to create a clear and present danger that they would bring about the substantive evils".<sup>839</sup> The Supreme Court insisted very clearly that, in some circumstances, protected speech could be lose its protection. Thus, for the first time, the Supreme Court defined the limitations of freedom of speech and introduces the principle of "clear and present danger",<sup>840</sup> which has become a test to distinguish between protected and unprotected speech,<sup>841</sup> This test was developed by Holmes in *Abrams v. United States*.<sup>842</sup> According to him, "[n]ow nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger"<sup>843</sup>. In this test, Holmes aimed to focus on "the effects produced by the statements, and not their content". Focusing on the content rather than the consequence of expression would not make sense in this respect. Then, it is necessary, for legislators, the judge and the jury in their search

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<sup>833</sup> Trager and Dickerson.p.96.

<sup>834</sup> George P. Costigan. *The Supreme Court of the United States.*, Vol. 16, No. 4 (1907).p.264

<sup>835</sup> *Cohen v. California*, 403 U.S. 15 (1971).

<sup>836</sup> *Branzburg v. Hayes*, 408 U.S. 665 (1972).

<sup>837</sup> BeVier (n 443).p.326.

<sup>838</sup> Trager and Dickerson (n 12).p.60.

<sup>839</sup> *Schenck v United States* 249 US 47(1919).

<sup>840</sup> Trager and Dickerson (n 12).p.60

<sup>841</sup> Wallace Mendelson, 'Clear and Present Danger--From Schenck to Dennis' (1952) 52 *Columbia Law Review* 313.p.315.

<sup>842</sup> Earl Latham, 'The Theory of the Judicial Concept of Freedom of Speech' (1950) 12 *the Journal of Politics* 637.p.638.

<sup>843</sup> *Abrams v. United States*, 250 U.S. 616 (1919).

for the truth to predict the consequences that a statement produced in any of various forms under different circumstances might engender.<sup>844</sup> In the words of Holmes, “the character of every act depends upon the circumstances in which it is done”.<sup>845</sup> According to Trager and Dickerson, this view constitutes a significant influence on the Court’s discussion.<sup>846</sup>

Although the area between the interests protected by the First Amendment and the interests supposed by a legislature to justify their restriction are controversial, the Supreme Court has made it clear that freedom of expression should be protected.<sup>847</sup> The Supreme Court has written that “freedom [of expression]... is the matrix, the indispensable condition, of nearly every other form of freedom”<sup>848</sup>. This high standard for protection of freedom of speech opened the gate to constitutional jurisprudence in order to let freedom of expression prevail without infringement from the State. This is evident when the Supreme Court issued a rule in 1931, that the protection of freedom of expression was outside of the State’s action.<sup>849</sup> The Supreme Court prohibited States to “forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to incite or produce such action.”<sup>850</sup> Contrary to the previous rule, which restricted the public authority, the State can suppress and punish speech that contains “portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion "which" exposes the citizens. . .to contempt, derision, or obloquy”.<sup>851</sup> Also, the Supreme Court opens the door for the Government to “regulate expression on the basis of mere potential and largely hypothetical danger as well as freely dissect the contents of a statement in an effort to predict the consequences that it might produce”.<sup>852</sup> Throughout its construction of the freedom of expression doctrine, the Supreme Court has not concerned itself with State intervention when it was aimed to suppress speech that aroused violence against others.

Indeed, the Supreme Court’s distinctive role in protecting freedom of expression is obvious through the variety of free speech cases that led to the scope of this right being

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<sup>844</sup> Zoller (n 830).p.902.

<sup>845</sup> *Schenck v United States*, 249 US 47(1919).at52.

<sup>846</sup> Trager and Dickerson (n 12).p.61

<sup>847</sup> Elliot L Richardson, ‘Freedom of Expression and the Function of Courts’ (1951) 65 Harvard Law Review 1.p.3.

<sup>848</sup> *Palko v Connecticut*, 302 US 319,327 (1937). See also, Francois (n 670).p.1057.

<sup>849</sup> Robert G McCloskey and Sanford Levinson, *The American Supreme Court* (University of Chicago Press 2016).p.115.

<sup>850</sup> *Brandenburg v Ohio*, 395 US 444 (1969).at447.

<sup>851</sup> *Beauharnais v Illinois*, 343 US 250 (1952).

<sup>852</sup> Zoller (n 830).p.903.

changed. I do not mean by protection that it is to give free speech absolute protection, but the ability to deal with and evaluate a variety of free speech cases. In the words of Professor Bork, “[t]he Supreme Court regularly insists- that its results, and most particularly its controversial results, do not spring from the mere will of the Justices in the majority but are supported, indeed compelled, by a proper understanding of the Constitution of the United States”<sup>853</sup>. In *Brown v. Board of Education*, for example, the Supreme Court based its opinion in part on social equality. The Supreme Court stated that a Negro student being separated from others may affect “his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession”.<sup>854</sup>

Thus, the U.S. Supreme Court’s approach to freedom of expression represents a marked break from the free speech applications of other courts, which are characterised by the “conceptual or categorical” approach. The applied methodology has played a considerable role in drawing up the limitations of freedom of expression.<sup>855</sup> The rich case law of the U.S. Supreme Court shows its innovation in dealing with issues of free speech.<sup>856</sup> The veritable initiators of the transformation of freedom of expression in the United States are not only the theories that constitute freedom of expression but also the Supreme Court Justices themselves. Indeed, an understanding and analysis of the circumstances surrounding cases is an essential element that in order to highlight the development of the Supreme Court’s distinctive role. Sadurski explained that, “[t]he body judicial and scholarly doctrine generated by the First Amendment to the Constitution of the United States is by far the most influential...and it provides a fruitful point of references both as a positive inspiration and as a target of criticism”.<sup>857</sup> To put it plainly, the feature, given by the American constitution, is an alternative approach that enables judges to use their opinions formally.<sup>858</sup>

As discussed previously, the United States’ constitutional law of freedom of speech enshrines the three principles democracy, self-fulfilment and searching for truth which

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<sup>853</sup> Bork (n 433).pp.3, 4.

<sup>854</sup> *Brown v Board of Education of Topeka* 347 US (1954).at493.

<sup>855</sup> Ginsburg and Dixon (n 665).p.410.

<sup>856</sup> Lee C Bollinger and Geoffrey R Stone, *Eternally Vigilant: Free Speech in the Modern Era* (University of Chicago Press 2002).p.1.

<sup>857</sup> Sadurski (n 19).p.5.

<sup>858</sup> Scott Douglas Gerber, *To Secure These Rights: The Declaration of Independence and Constitutional Interpretation* (NYU Press 1996).p.12.

constitute its structure. However, the Supreme Court never confined itself within these theories.<sup>859</sup> In the words of Gates, “First Amendment expansionism has never entailed absolute devotion to free expression; the question has always been where to draw the line”<sup>860</sup>. In fact, the wide scope, the absolutist and pragmatic position of the First Amendment and the complexity of freedom of speech cases gives the Supreme Court an opportunity to set a rule that can be considered a reference for defining the boundaries of freedom of speech.<sup>861</sup> According to one commentator, “a substernal change in the law has been affected by the Court’s repeated statements and ruling that the Constitution does not protect more than has been traditionally safeguarded”.<sup>862</sup>

What has been said is just the basic contours of the Supreme Court’s role on freedom of expression. Indeed, the basic principles, raised by the Supreme Court to explain the spare words of the First Amendment<sup>863</sup> are a fruitful connection of the historical background to ensure extensive and powerful protection for the right of freedom of expression.<sup>864</sup> The next sections will discuss in detail the most influential approaches of the U. S. Supreme Court.

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<sup>859</sup> Barendt (n 1).p.48.

<sup>860</sup> Gates (n 180).p.320.

<sup>861</sup> Schauer, ‘Categories and the First Amendment: A Play in Three Acts’ (n 308).p.267.

<sup>862</sup> Erwin Chemerinsky, ‘History, Tradition, the Supreme Court, and the First Amendment’ (1992) 44 Hastings LJ 901.p.903.

<sup>863</sup> Bollinger and Stone (n 856).pp36-38.

<sup>864</sup> Mark Tushnet, ‘The Possibilities of Comparative Constitutional Law’ (1999) 108 The Yale Law Journal 1225.p.1230.

## Section I

### The Categorical Approach to Protecting Speech in American Constitutional Law

#### 6.2.1 Introduction

The Supreme Court has long sought to make a clear limitation between protected and unprotected speech. Over the past century, the Supreme Court has dealt with a variety of cases preserving the liberty of expression while recognizing that freedom of expression is not absolute.<sup>865</sup> The complex nature and variety of expressive issues, associated with one of America's most treasured rights, have required the Supreme Court to try to find appropriate approaches to dealing with these difficulties. As an attempt to set a rule that is able to preserve freedom of expression, the United States Supreme Court, therefore, has outlined different ways of dealing with freedom of speech cases. The goal for the establishment of these tests was to narrow the scope of the protection of free speech and to draw a plain line between forms of speech that deserve constitutional protection from others that do not.

The categorical approach or classification system can be considered the most common and influential approaches in the United States. In the words of Schauer, “[c]ategories are the tools of systematic thinking. They enable us to organize our ideas, to draw analogies, and to make distinctions”.<sup>866</sup> Also it can be defined as “those theories attempting to delimit first amendment protection by reliance on broad and abstract classifications of protected or unprotected speech”.<sup>867</sup> Categories, however, have a special prominence in legal reasoning; to a great extent, this is because of its impartial results and success in keeping judges' personal preferences out of their scales.<sup>868</sup> In this respect, categories are essential “for development and application of a rule of law in accord with the value of speech” and lead finally to removing ambiguity and lack of clarity in the rules.<sup>869</sup> Indeed, categories produce stability, certainty, and predictable

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<sup>865</sup> Alexander Tsesis, ‘The Categorical Free Speech Doctrine and Contextualization (2015)’.p.496.

<sup>866</sup> Schauer, ‘Categories and the First Amendment: A Play in Three Acts’ (n 308).p.265.

<sup>867</sup> Pierre J Schlag, ‘An Attack on Categorical Approaches to Freedom of Speech’ (1982) 30 UCLA L. Rev. 671.p.672.

<sup>868</sup> Laurent B Frantz, ‘Is the First Amendment Law? A Reply to Professor Mendelson’ [1963] California Law Review 729.p.749.

<sup>869</sup> Edward J Eberle, ‘The Architecture of First Amendment Free Speech’ [2011] Mich. St. L. Rev. 1191. pp.1225, 1227.

results in different contexts. In light of these features, the general constitutional theory would be able to predict the choice of method. Thus, without categories, the real basis of legal decision would be undermined.<sup>870</sup> In the words of Blocher, the categories approach “binds a decision-maker to respond in a determinative way to the presence of delimited triggering facts”.<sup>871</sup>

Unlike many liberal States, which have relied only on a balancing approach in their judicial process,<sup>872</sup> the Supreme Court has adopted different approaches to interpreting the first amendment.<sup>873</sup> First Amendment doctrine combines both balancing and categorical approaches, but they are subjected to different rhetoric,<sup>874</sup> “[c]ategorization is the taxonomist's style—a job of classification and labelling. When categorical formulas operate, all the important work in litigation is done at the outset”.<sup>875</sup> Although separate, these two approaches are related in an important and logical way. Thus, the rules, which govern both methods, can be seen as shortcut applications of strict scrutiny.

Delineating the category of speech and determining what counts as speech for the first amendment are questions that need to be addressed. Thus, this section begins by examining the meaning of the categories: what does it mean for speech to be “protected” or “unprotected”? Then, it tries to identify the evolution and to assess the desirability of the categorical approach.

### **6.2.2 What does the Categorical Approach Mean?**

The metaphors of categories are the tools that attempt to draw a clear limitation of speech by classifying speech to be either protected or unprotected.<sup>876</sup> By “a categorical” I mean a judicial classification that enables judges to rely on a formalistic and mechanical

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<sup>870</sup> Schauer, ‘Categories and the First Amendment: A Play in Three Acts’ (n 308).p.265.

<sup>871</sup> Joseph Blocher, ‘Categoricalism and Balancing in First and Second Amendment Analysis’ (2009) 84 NYUL Rev. 375.p.381

<sup>872</sup> Schauer, ‘Freedom of Expression Adjudication in Europe and America: A Case Study in Comparative Constitutional Architecture’ (n 33).p.5.

<sup>873</sup> Introduction to the Free Speech

Clause,<<http://Law2.Umkc.Edu/Faculty/Projects/Ftrials/Conlaw/Firstaminto.Htm>> Accessed 20 June 2017.’

<sup>874</sup> Daniel A Farber, ‘The Categorical Approach to Protecting Speech in American Constitutional Law’ (2009) 84 Ind. LJ 917.p.919.

<sup>875</sup> Kathleen M Sullivan, ‘Post-Liberal Judging: The Roles of Categorization and Balancing’ (1992) 63 U. Colo. L. Rev. 293.p.293.

<sup>876</sup> Schlag (n 867).p.672.

system.<sup>877</sup> In the words of Blocher, “[c]ategoricalism allows a judge to transform some background value into a rule that will govern all subsequent cases inside the category without any further reference to the background principle or value”.<sup>878</sup> Plainly this approach “guides us in the choice we must make with respect to the types of rules we wish to employ within the first amendment”.<sup>879</sup> Categorization is more like self-operation, the judge’s job is to determine the relevant rights and, then, to apply the appropriate standard of speech.<sup>880</sup> As the following parts show, this definition captures much of the work that the Supreme Court does under the name of categorical approach or multiple classification.

Categorical approach to the first amendment is divided generally into low and high value speech. Obscenity, libel, express incitement, commercial speech and child pornography are examples of speech categorised as low value speech, which gains less constitutional protection than other types of speech or non.<sup>881</sup> The classification of these kinds of speech as a low value speech do not come from a vacuum, but because “the speech belongs to a class of speech to which an unconditional rule applies; conversely, speech may be denied protection without regard to its value or the importance of the state interests posited if it belongs to a class which is not protected or if it falls outside all classes granted protection”.<sup>882</sup> Indeed, speech by no means can be treated at the same level of protection, otherwise low value may prevail over speech of high value. As Sadurski stated, classifying speech, emerges from the idea that “not all speech is of equal importance from the point of view of First Amendment values has long been an established doctrine of the United States Supreme Court”.<sup>883</sup> Thus, the reasoning is primarily analogical. Categoricalism represents a different kind of classifications. The focus is directly on the speech itself.

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<sup>877</sup> F Jay Dougherty, ‘All the World’s Not a Stooge: The Transformativeness Test for Analyzing a First Amendment Defense to a Right of Publicity Claim against Distribution of a Work of Art’ (2003) 27 Colum. JL & Arts 1.p.42.

<sup>878</sup> Blocher (n 871).p.382.

<sup>879</sup> Schauer, ‘Categories and the First Amendment: A Play in Three Acts’ (n 308).p.297.

<sup>880</sup> Kermit Roosevelt III, ‘Constitutional Calcification: How the Law Becomes What the Court Does’ [2005] Virginia Law Review 1649.p.1650.

<sup>881</sup> Trager and Dickerson (n 12).p.7. Also see Sadurski (n 19).p.41.

<sup>882</sup> Schlag (n 867).prong.3.

<sup>883</sup> Sadurski (n 19).pp.41, 42.

### 6.2.3 The Formation of the Categorical Approach

In *Near v. Minnesota*, the defendant was a newspaper publisher who had been publishing malicious, lewd, and defamatory statements. The Court held that the liberty of the press could not justify abuse against others. The Court stressed “[l]iberty of speech, and of the press, is also not an absolute right, and the state may punish its abuse”. Freedom of expression is protected unless, according to the Court, it contains, for example, malicious, scandalous, and defamatory material.<sup>884</sup> In 1942, the real establishment of the categorical approach began when the approach was broader in excluding other forms from speech protection.<sup>885</sup> In *Chaplinsky v. New Hampshire*, the Court affirmed a statute that prohibited some types of speech, namely speech that includes “lewd and obscene, the profane, the libelous, and the insulting or fighting words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace”, cannot be regarded as protected speech.<sup>886</sup> While, in this case, the Court categorised obscene speech as unprotected, there is no clear meaning of its definition.<sup>887</sup> However, in *Roth v. United States*, the Court clearly stated that a definition of one meaning to obscene speech was impossible because it was subject to different circumstances. In other words, each community has its own culture and habits that interpret speech differently. For example, the meaning of the term obscene in the United States is considerably different than in Egypt. Obscene “do not mean the same thing to all people, all the time, everywhere”. In fact, the constitutional protection, given to speech, is characterised with “fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people”. This is in contrast to obscene speech, which falls outside of first amendment protection.<sup>888</sup>

Defamation went through a different evolution, resulting in its transformation from protected speech to being unprotected at a specific norm. In *New York Times v. Sullivan*, the Court has defined the limitation of defamation. The Court stated that defamation could be protected unless the “statement was made with knowledge of its falsity or with

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<sup>884</sup> *Near v Minnesota*, 283 U S 697 (1931).

<sup>885</sup> Wayne Batchis, ‘On the Categorical Approach to Free Speech-And the Protracted Failure to Delimit the True Threats Exception to the First Amendment’ (2016) 37 Pace L. Rev. 1.p.2.

<sup>886</sup> *Chaplinsky V. New Hampshire*, 315 U. S. 568 (1942).

<sup>887</sup> Farber (n 874).p.921.

<sup>888</sup> *Roth v United State*,354 US 476 (1957).

reckless disregard of whether it was true or false”.<sup>889</sup> Furthermore, the Court held that freedom of expression covered speech whether or not it was directed to criticize the conduct of officials. The Court noted that “[t]he protection of the constitutional guaranty of freedom of speech and press does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered”. However, the constitutional guarantee of freedom of speech and the press excludes the criticism of a public official when either the criticism or defamatory statement is made with “actual malice”.<sup>890</sup> The United States of America’s courts have given the surrounding circumstances when making a judgment on the scales of freedom of expression.

The categorical approach was extended to cover a new form of unprotected speech. In *Brandenburg v. Ohio*, the Court ruled that speech could be excluded from the first amendment protection when it was “directed to inciting or producing imminent lawless action and is likely to incite or produce such action”.<sup>891</sup> One commentator says that the categorical approach introduces itself as a best approach in protecting freedom of speech. By establishing “a clear, rule-based test”, the Court categorises speech that threatens peace and security as unworthy of constitutional protection. This new categorisation has played a considerable role in protecting political dissidents from one side and shutting the door of unjustifiable governmental interference from another.<sup>892</sup>

Throughout the organ of categorical approach, the Court struggles to distinguish between protected and unprotected speech. This is obvious when the Court expanded the limitation of unprotected speech to cover two categories.<sup>893</sup> First, in the case of child pornography, in *Osborne v. Ohio*, the Court upheld possessing or viewing sexual material that involves children is not constitutionally protected because there are “compelling interests in protecting the physical and psychological wellbeing of minors and in destroying the market for the exploitative use of children by penalizing those who possess and view the offending materials”.<sup>894</sup> When the Court classified child pornography as unprotected expression, it merely aimed to protect public morals.<sup>895</sup> Second, commercial speech, in *Virginia v. Black*, the Court stated that symbols “encompass those statements

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<sup>889</sup> *New York Times v Sullivan*, 376 US 254 (1964).

<sup>890</sup> *New York Times Co v Sullivan* (1964).

<sup>891</sup> *Brandenburg v Ohio*, 395 US 444 (1969).

<sup>892</sup> Farber (n 874).p.921.

<sup>893</sup> *ibid*.p.924.

<sup>894</sup> *Osborne v Ohio*, 495 US 103 (1990).

<sup>895</sup> Tsesis, ‘The Categorical Free Speech Doctrine and Contextualization (2015)’ (n 746).p.515.

where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals” are falling outside free speech protection. Thus, advertisement that intent to intimidate a person or group cannot be protected.<sup>896</sup>

#### **6.2.4 The Metaphorical System of Protected and Unprotected of Freedom of Speech**

The categorical metaphor, which is based on rules rather than principles, employs markedly different forms. Under this view, the Court categorises speech to different levels depending on the subject matter.<sup>897</sup> For example, the Court differentiates speech that may cause immediate danger or be unlawful from other speech.<sup>898</sup> According to Professor Schauer, classifying speech into sub-categories is vital in drawing its limitations.<sup>899</sup> Thus, the question arises finally of just how we decide the case, or, more accurately, how the judge decides the case and what rules of guidance for the judge look like within a given first amendment category.

The first stage at which categoricalism operates in free speech cases is in the initial determination of whether an instance of speech is classified as either low or high value. Speech, such as obscenity and pornography and the like, is classified as having lower value than other speech and, thus, deserves limited or no constitutional protection.<sup>900</sup> For example, Justice Frankfurter says, “not every type of speech occupies the same position on the scale of values”.<sup>901</sup> Namely, the Supreme Court distinguished between protected and unprotected speech.<sup>902</sup> Some types of speech, including obscenity,<sup>903</sup> commercial speech,<sup>904</sup> child pornography,<sup>905</sup> and express incitement<sup>906</sup> can be classified as low value speech because “there are no moral or political reasons to accord of the usual freedom-

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<sup>896</sup> *Virginia v. Black*, 538 U.S. 343,344 (2003).

<sup>897</sup> Barendt (n 1).p.50.

<sup>898</sup> Dougherty (n 877).p.40

<sup>899</sup> Schauer, ‘Categories and the First Amendment: A Play in Three Acts’ (n 308).p.276. See also Schlag (n 867).p.672.

<sup>900</sup> Geoffrey R Stone, ‘Content Regulation and the First Amendment’ (1983) 25 Wm. & Mary L. Rev. 189.p.194.

<sup>901</sup> *Dennis v United States*, 341 U S 494 (1951).

<sup>902</sup> Schlag (n 867).p.672.

<sup>903</sup> *Miller v California*, 413 US 15 (1973).

<sup>904</sup> *Virginia State Bd of Pharmacy v Virginia Citizens Consumer Council*, 425 US 748 (1976).

<sup>905</sup> *New York v Ferber*, 458 US 747 (1982).

<sup>906</sup> *Dennis v. United States*, 341 U. S. 494 (1951).at544.

of-expression protection”<sup>907</sup> and, thus, have less or no constitutional protection. As one commentator stated, such speech enjoys limited protection “because of its content, and is not excluded from protection solely because of its categorization”.<sup>908</sup> The Supreme Court has distinguished between protected and unprotected speech by measuring the consequences of speech rather than only considering the specific instance of speech or expression itself. In other words, speech, which may have a negative impact, cannot be speech within a free expression framework. The idea of protecting speech is always correlating with the potential meaning of speech.<sup>909</sup> Law Professor Post stated that could speech not live up to protection under the First Amendment unless there were first a strong connection to social context.<sup>910</sup> Indeed, special protection, given to such types of speech, is due to special connection to public interest. Political speech, for example, receives a high level protection “because it is so closely connected to each of the basic interests, and because of its. . .connect[ion] to expressive and deliberative interests than expression that threatens individual libel; the injuries are, also, more easily remedied with group libel than individual”.<sup>911</sup>

Applying this approach, low value speech is subjected to different treatment. Defamation of public figures, for example, can be suppressed only “if the speaker knew that the statement was false or at least knew that he had no factual basis for the statement”.<sup>912</sup> Express incitement, which went through a similar evolution, may be suppressed only if it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action”.<sup>913</sup> Child pornography is not eligible for First Amendment protection because it is “harmful to the physiological, emotional, and mental health of the child easily passes muster under the First Amendment”.<sup>914</sup> Therefore, any restriction to this kind of expression would be justified.<sup>915</sup> It should be noted here that the low value determination can be used either as a standard to measure the level of constitutional protection or to determine the adequate restriction or intervention of the State.<sup>916</sup> As these

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<sup>907</sup> Sadurski (n 19).p.43.

<sup>908</sup> Cedric Merlin Powell, ‘The Mythological Marketplace of Ideas: RAV, Mitchell, and Beyond’ (1995) 12 Harv. BlackLetter LJ 1.p.21.

<sup>909</sup> Trager and Dickerson (n 12).pp.28, 29.

<sup>910</sup> Post, ‘Recuperating First Amendment Doctrine’ (n 706).p.1255.

<sup>911</sup> Joshua Cohen.p.237.

<sup>912</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).at279, 280.

<sup>913</sup> *Brandenburg v Ohio*, 395 US 444, 447 (1969).at447.

<sup>914</sup> *New York v. Ferber*, 458 U.S. 747 (1982).

<sup>915</sup> Farber (n 874). P.924.

<sup>916</sup> Trager and Dickerson (n 12).p.7.

cases show, treatment of speech varies from case to case and can suggest different levels of protection. In this regard, Greenawalt observes that “[a] legislature has chosen to punish the instances of speech within a category that cause the greatest harm, although it could also punish other instances within the category”.<sup>917</sup>

Speech, which deserves either a high value of protection, such as speech in media<sup>918</sup>, or a low value is subject to two main different levels of scrutiny. Firstly, when the State restricts high value speech, it must have a compelling need test -the highest level of justification- or what is so called content-based to support the restriction. Further, it must show that no draconian methods of ensuring adequate protection will be used either in the national interest or any other correlating compelling interest.<sup>919</sup> According to Cohen, this level is “specifying conditions for permissible regulation of expression in each category”.<sup>920</sup> The Court’s casual approach to content-based regulations is evident in many cases. In *United States v. O’Brien*, the Court struck down the respondent’s claim that burning a draft-card is an expression that deserves constitutional protection. We think the Court reasoned that it was clear that a government regulation was sufficiently justified if it was within the government’s constitutional power to further an important or substantial government’s interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>921</sup> The Court’s standard of review for content-based protection of speech is exemplified in *Texas v. Johnson*. The Court reversed the trial court’s decision that convicted the respondent of burning the American flag. Applying strict scrutiny, the Court found that the statute was poorly connected to the State’s compelling interest. The Court stated, the “petitioner’s interest in preventing breaches of the peace did not support respondent’s conviction because his conduct did not threaten to disturb the peace”. Thus, Johnson’s conduct is an expression that is subject to constitutional protection.<sup>922</sup> By its very nature, content-based gives freedom of speech a distinctive level of protection. However, according to Eric, this

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<sup>917</sup> Kent Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech* (Princeton University Press 1996).p.58.

<sup>918</sup> Farber (n 874).p.926.

<sup>919</sup> Barendt (n 1).p.53.

<sup>920</sup> Joshua Cohen, ‘Freedom of Expression’ [1993] *Philosophy & Public Affairs* 207.p.214.

<sup>921</sup> *United States v. O’Brien* 391 U.S. 367 (1968).

<sup>922</sup> *Texas v Johnson*, 491 US 397 (1989).

principle should its subject to closer judicial scrutiny “because it is very likely that they were framed to limit the communicative impact of speech”.<sup>923</sup>

Secondly, when the Government’s speech regulation is content-natural, this involved “factors such as the availability of alternative for and strength of the governmental interest”.<sup>924</sup> Under this principle, speech should be subject to intermediate scrutiny in order to justify the restriction. Under this test, it must show a substantial interest to justify the restriction.<sup>925</sup> Further it requires to show that there is no excess of the restriction to achieve the interest; in other words that less draconian measure would have been adequate to safeguard a substantial state interest.<sup>926</sup> Moreover, it must be certain that restricting speech is not the ultimate solution. For example, the police may prevent individuals from camping in the park during the day while allowing them to do so at an alternative time or after 5p.m. Police might say this way means that there is less distribution for the hikers and the users of park facilities.<sup>927</sup> According to Trager and Dickerson the State’s regulation is accepted because it is “not made to favour one viewpoint over others or to promote discussion of one topic while stifling discussion of others”.<sup>928</sup>

The Court’s content-natural approach is evident in many cases. For example, in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, the Court rejected a complete ban on advertising. It stated that commercial speech could be restricted unless at the first stage the activity was against the law and misleading.<sup>929</sup> In contrast, in *New York v. Ferber*, the Court affirmed the statute prohibiting the distribution of child pornography. The Court found that the prohibition of child pornography is justified under the First Amendment. According to many judges, “child pornography, like obscenity, is unprotected by the First Amendment if it involves scienter and a visual depiction of sexual conduct by children without serious literary, artistic, political, or scientific value”.<sup>930</sup> Obviously, the two cases of the content-natural principle showed a clear divergence in the content-natural application. While freedom of speech under the

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<sup>923</sup> Barendt (n 1),p.53.

<sup>924</sup> Schauer, ‘Categories and the First Amendment: A Play in Three Acts’ (n 308),p.301.

<sup>925</sup> Martin H Redish, ‘The Content Distinction in First Amendment Analysis’ [1981] *Stanford Law Review* 113,p.124.

<sup>926</sup> Barendt (n 1),p.51.

<sup>927</sup> Trager and Dickerson (n 12),p.7.

<sup>928</sup> *ibid.*,p.7.

<sup>929</sup> *Central Hudson Gas & Elec v Public Svc Comm’n*, 447 US 557 (1980).

<sup>930</sup> *New York v. Ferber*, 458 U.S. 747 (1982).

content-natural principle does not apply strict scrutiny, it protects freedom of speech subject to certain standards. Speech cannot be protected just because the speech has been subjected to less scrutiny. Once an instance of speech has fulfilled the content-natural standard, then it would deserve to be protected under the First Amendment.

There is one final point that needs to be illustrated before moving to the opinion that criticises the categorical approach. One may ask, what would rules of the content-based or content-natural principles look like respectively within a given first amendment category? To answer this, let us consider two hypothetical statutes. Firstly, suppose State A enacts a law prohibiting demonstrations in public areas. Secondly, suppose State A enacts a law prohibiting criticism of the anti-demonstrate law. While both cases revolve around the same matter, each case is subject to different treatment. The first is treated as content-natural and the second content-based. To explain this, the first amendment is concerned not only with the type of speech but, also, and perhaps even more fundamentally with the space of freedom given to people to exchange their ideas and emotions.<sup>931</sup>

It is apparent from the content-based and content-natural principles that United States jurisprudence has limited State control over the practice of freedom of speech. The Supreme Court formulated the principle to define the State's limitations. The Supreme Court made it clear that freedom of expression could not be restricted without adequate justification under certain circumstances.<sup>932</sup> It appears to draw a clear limit of freedom of speech and to reveal a trust of these principles which can be relied on. It seems to uphold freedom of speech more than lower States' courts.<sup>933</sup> It is clear from what has been discussed that the Court, by relying on the categorical approach, introduces sophisticated norms that can deal with different forms of speech. Henkin believes that the categorical approach "can be entrusted to a judiciary with reasonable expectation of some consistency, and subject to effective guidance by the Supreme Court".<sup>934</sup> The categorical method tends to be inclusive, justifiable and simple in offering useful guidance.<sup>935</sup> Proponents of this 'classification' approach, which subjects speech to different tests of

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<sup>931</sup> Stone (n 900).pp.197, 198.

<sup>932</sup> Redish (n 925).p.127.

<sup>933</sup> Barendt (n 1).p.53.

<sup>934</sup> Louis Henkin, 'Infallibility Under Law: Constitutional Balancing' (1978) 78 Columbia Law Review 1022.p.1048.

<sup>935</sup> Randall (n 360).p.84.

scrutiny, highlight several other advantages of this methodology. In their view, categorising speech serves to increase the principle of fairness and transparency. In the words of Professor Araiza, in some cases, the categorical approach can “provide enough of a thumb on the judicial scale to produce predictable results that do a reasonably good job of protecting the constitutional value at issue”.<sup>936</sup> Also, according to Professor Tsesis, this approach “will likely empower judges to full fill their responsibility of acting as a bulwark against government intrusion into free speech values”.<sup>937</sup>

Categorisation, thus, aims at giving a great power to the approach’s rules and these leave no room of freedom at the mercy of judges.<sup>938</sup> The application of the categorical principle needs no more than to “observe the facts, pick up those facts out of a list of factual settings and prescribed results, and then announce the result”.<sup>939</sup> To illustrate this, let us set up an example of treating freedom of speech according to the balancing approach. In order to assess free speech cases, balancing does not rely on specific rules, “it just requires judges to find, define, articulate, and justify the weights given to interests and values out of very few straws”.<sup>940</sup> Unlike the categorical metaphor, this method has no certainty and clarity, and this may lead to an unpredictable result or reduce the value of speech. According to Dougherty “the balancing approach views constitutional rights as “interests” that may be outweighed by other non-constitutional interests or limited by government conduct that is merely reasonable”. This should be unsurprising where the categorical approach is based on creating rules isolated from an individual’s interpretation.<sup>941</sup> Thus, the advantageous role of classification so far justifies the U.S Supreme Court placing greater reliance on this theory than the balancing approach.<sup>942</sup>

### **6.2.5 Critique of Categorical**

Despite the widespread use of the categorical approach, the method presents potential difficult analytic and operational problems. Opponents of the ‘hierarchical’ approach

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<sup>936</sup> William D Araiza, ‘Citizens United, Stevens, and Humanitarian Law Project: First Amendment Rules and Standards in Three Acts’ (2010) 40 Stetson L. Rev. 821.p.837.

<sup>937</sup> Tsesis, ‘The Categorical Free Speech Doctrine and Contextualization (2015)’ (n 865).p.503.

<sup>938</sup> Henkin (n 802).p.1048.

<sup>939</sup> Schauer, ‘Categories and the First Amendment: A Play in Three Acts’ (n 308).p.296.

<sup>940</sup> Henkin (n 802).p.1048.

<sup>941</sup> Dougherty (n 877).p.42.

<sup>942</sup> Sullivan (n 875).p.294.

challenge this methodology on various grounds. The first challenge is that this approach leaves no room for judges, the prosecutor, and the legislators to introduce their experiences, experiments, and legal analysis when dealing with cases. As Professor Sullivan has nicely put it, this can “inhibit judicial discretion, discipline the lower courts, and shrink the role of courts in decision making about public life”.<sup>943</sup> According to Schlag, this challenge leads to the conclusion that judges ignore the facts to allow the categorical approach to compel a conclusion one way or the other and, ultimately, this affects the protection of freedom of speech under the First Amendment.<sup>944</sup> This demonstrates that failure to examine the limitation of category affects the justice system as a whole. Also, this is completely contrary to the court’s nature, which is concerned with understanding and analysing the text.<sup>945</sup> The second challenge is that the categorical approach has no limitation in each category. For example, political speech, which receives a high value of protection, can be used by the government to expand speech restrictions under the justification of protecting national security because there is no specific measurement of endangering national security. There is no guarantee that the political speech, which we are talking about, falls under constitutional protection. The issue here is that the space given to the State to limit freedom of speech would minimise the scope of freedom of speech.<sup>946</sup> Alexander pointed out that “freedom of speech is indeed implicated by government's action, and that it is the ‘high value’ category of freedom of speech at that”.<sup>947</sup> Scanlon found that there was no clear limit under the category<sup>948</sup> and, consequently, this “inevitably yields overlapping and nonexclusive subcategories”.<sup>949</sup> The third challenge is unconnected with the former challenge; by dividing speech into subcategories, the method cannot distinguish between protected and unprotected speech. The circumstances surrounding an essential factor to determining expression are appropriately to be included under a concept of free speech.<sup>950</sup> For example, expressing an idea by distributing a leaflet in the way that causes either a letter in the road or preventing traffic cannot be accepted as a way of expressing an idea.

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<sup>943</sup> *ibid.*p.306.

<sup>944</sup> Schlag (n 867).p.734.

<sup>945</sup> Barendt (n 1).p.2.

<sup>946</sup> Schlag (n 867).p.698.

<sup>947</sup> Larry Alexander, ‘Low Value Speech’ (1988) 83 Nw. UL Rev. 547.p.553.

<sup>948</sup> Thomas M Scanlon Jr, ‘Freedom of Expression and Categories of Expression’ (1978) 40 U. Pitt. L. Rev. 519.p.540.

<sup>949</sup> Blocher (n 871).p.390.

<sup>950</sup> Trager and Dickerson (n 12).p.28.

Although this can be characterised as a form of speech, the distributor cannot avoid prosecution by claiming that the leaflet, which they distributed, included their ideas.<sup>951</sup> In short, the approach fails because it ignores social context; it does not link its rule with the medium. Schlag believes that “[t]he problem with this approach, apart from its falsehood, is that it is self-validating and, to a large extent, serves to insulate the courts from the real, if not the true, facts”.<sup>952</sup> As explained previously, freedom of speech under the first amendment is characterised by encompassing different types of speech and the forms of speech are subjects to different standards of scrutiny. It seems that, under the categorical approach, the categoriser is not free to organise sorts of speech into flexible boxes and this explains why the approach is “inadequate for analysing the complex problems involved in constitutional jurisprudence”.<sup>953</sup>

### **6.2.6 Section Summary**

In this chapter, I have tried to analyse the categorical approach since it looks to lawyers and judges in the context of actual litigation and to explain many issues related to it from different perspectives. It appears from the above points that the Court, by relying on the categorical approach, has chosen the safe way to achieving justice with freedom of speech issues where the categorical approach produces stability, certainty and predictable results in different contexts.<sup>954</sup> This is not surprising where “[t]he United States. . . offers the most protection to speech”.<sup>955</sup> These remarkable norms emerge from the fact that “American free speech adjudication is obsessed with categorization and definition”.<sup>956</sup>

Despite vituperative criticism, the categorical approach is dominant over other approaches, especially the balancing method. One commentator stated that “[t]here is currently a significant movement afoot at the Supreme Court, however, to eliminate balancing from constitutional law in favor of categorical approaches.”<sup>957</sup> Professor Araiza found that the rigid rule of the categorical approach was valuable because “they provide

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<sup>951</sup> *ibid.* pp.28, 29.

<sup>952</sup> Schlag (n 867).p.735.

<sup>953</sup> Tsesis, ‘The Categorical Free Speech Doctrine and Contextualization (2015)’ (n 746).pp.530, 531.

<sup>954</sup> Sullivan (n 875).p.306.

<sup>955</sup> Trager and Dickerson (n 12).p.7.

<sup>956</sup> Schauer, ‘Freedom of Expression Adjudication in Europe and America: A Case Study in Comparative Constitutional Architecture’ (n 33).pp.1, 2.

<sup>957</sup> Sullivan (n 875).p.294.

enough of a thumb on the judicial scale to produce predictable results that do a reasonably good job of protecting the constitutional value at issue".<sup>958</sup> Finally, the above discussed argument puts a common emphasis on the importance of the categorical method. Indeed, by applying the categorical approach, in the United States' courts introduce distinctive a legal system that is able to treat issues of freedom of speech far from governmental intervention. New wars, new opposition movements and new separatist groups- as well as new terrorist organisations- emerge frequently. The issues cannot be solved without trusted rules that are able to overcome these challenges.

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<sup>958</sup> Araiza (n 936).p.837.

## Section II

### 6.3 Balancing in Constitutional Jurisprudence

#### 6.3.1 Introduction

Against the approach discussed in the previous section, this section will examine the second approach to deal with free speech cases. The importance of this section emerges from the fact that speech cannot always be free everywhere. If there is no balance at all to the speech situation, harmful or offensive speech can dominate over moderate speech. In the words of McGoldrick, “[t]he idea of limitations is based on the recognition that most human rights are not absolute but rather reflect a balance between individual and community interests”.<sup>959</sup> It is logical that there should be a balance on freedom of speech to ensure that the speech can be practiced on a justifiable basis. For example, while many would agree that a penalty should exist for using mobile phones while driving, there are widely divergent views as to exactly what the penalty should be, and how the penalty should be imposed given the circumstances of any individual offence. The same can be said when balancing speech with other interests. In the words of some “[a] challenge common to [freedom of expression] is how to ensure that, where such restrictions are in principle necessary, they are implemented by the state in proportionate manner”.<sup>960</sup> A ground, such as national security, may be misused if there is no a clear balance between the rights and freedoms of others and certain public interest considerations.

This section is advocated to balance among rights, seeks to make comparison among rights. This comparison should be made at wide concept to avoid the clash among regulations. Therefore, instead of asking whether freedom of speech or (for example) the right to protect national security has greater value than other rights, we should ask (1) to what extent the protection of national security would be impaired if it collides with another interest, and (2) to what extent the values of free speech would be employed to protect national security. This argument is going to discuss how limitation of freedom of speech can be changed under the balancing approach. Also, it introduces the theoretical framework of value pluralism, which reconciles the conflicts between constitutional

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<sup>959</sup> D McGoldrick, ‘The Interface between Public Emergency Powers and International Law’ [2004] Int’l J. Const. L.p.383.

<sup>960</sup> D Moeckli and others, *International Human Rights Law* (2014).p.236.

values. The methodology of the limits of freedom of speech is applied to balance the value of speech with other interests. It is, therefore, worthwhile to devote a fair amount of space to the issue. The logic of this chapter, thus, is a direct consequence of the methodological inconsistency between the values of free speech on one hand and the political and cultural aspects of some states on the other. Furthermore, this section is designed to provide the operational justification for the normative proposal of free speech through adoption on numbers of norms. As I have said, I want to discuss freedom of speech from different perspective that makes free speech, laws and the related values more obvious. The core of the argument centres beyond the definition of the speech to an understanding of the other circumstances that related to freedom of speech.

### **5.3.2 The Meaning of Balancing**

On many occasions in the previous chapters, we demonstrated the importance of either balancing or weighing<sup>961</sup> the cases of free speech. The vital function emerges through two things: firstly, the use of a balanced method is considered to be an effective component when comparing values. Secondly, there is the vital role that helps to protect and define the limitations of freedom of speech against other values. Further, the importance of balancing or weighing rights emerges from the fact that almost all the current legal realms refer to balancing rights in their judgments. In the words of Professor Da Silva, “balancing or weighing rights is ubiquitous in law, a dominant feature of the current legal discourse”.<sup>962</sup> The examination of the meaning of balancing revealed different definitions. In the legal meaning, balancing is “[a] process sometimes used by state and federal courts in deciding between the competing interests represented in a case”.<sup>963</sup> Also, according to Professor Alexander Aleinikoff, “balancing refers to theories of constitutional interpretation that are based on the identification, valuation, and

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<sup>961</sup> In this thesis, the terms balancing and weighing are used synonymously.

<sup>962</sup> Virgílio Afonso Da Silva, ‘Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision’ (2011) 31 *Oxford Journal of Legal Studies* 273. pp.276, 274.

<sup>963</sup> The Free Dictionary <<http://Legal-Dictionary.Thefreedictionary.Com/Balancing>>accessed 6 April 2017.’

comparison of competing interest”.<sup>964</sup> Finally, some commentators recognise balancing as an ideal approach to protecting values.<sup>965</sup>

Notwithstanding that some scholars have criticised the balancing approach,<sup>966</sup> which will be analysed later on, most judges found that the rights could not be resolved without relying on a balancing mode. Among those, advocating such a theory, were Professor Winslade who stressed that judges had no choice but to apply balancing in their judgments. He added that balancing was a strategic approach “because it reminds us that adjudication is essentially a mode of practical decision making refined by the doctrines embodied in legal institutions”.<sup>967</sup> In fact, the performance of balancing is a considerable opportunity for judges to expand their legal practices through practicing a law-making’s role.<sup>968</sup> The importance of balancing emerges from the fact that the wise judgement on pluralism values cannot be based on mechanical or intuitionism approaches since it comes from the real experience of judgment.<sup>969</sup> Furthermore, for many theorists, an understanding of the general theory of law cannot occur without reference to balancing interests.<sup>970</sup> Indeed, the success of balancing in resolving many cases denotes that it is a modern approach that can deal with “current conceptions of law and notions of rational decision-making”.<sup>971</sup> Professors Sweet and Mathews make a similar point; they write that “[balancing] offers the best position currently available for judges seeking to rationalize and defend rights review, given certain strategic considerations, the structure of modern rights provisions, and the precepts of contemporary constitutionalism”.<sup>972</sup>

In one’s personal life, as in public policy, there is no mechanical procedure that can adjudicate competing value-claims such as intelligence and creativity, good and bad, fidelity and honesty and so on. This fact can be noticed through many of our daily interests that cannot be subjected to the traditional approach of judgment and requires such “calculative proficiency or smartness” to make a wise judgment. Therefore, we are

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<sup>964</sup> Aleinikoff (n 630).p.945.

<sup>965</sup> Steven Shiffrin, ‘First Amendment and Economic Regulation: Away from a General Theory of the First Amendment’ (1983) 78 Nw. UL Rev. 1212.p.1249.

<sup>966</sup> Da Silva (n 962).p.275.

<sup>967</sup> William J Winslade, ‘Adjudication and the Balancing Metaphor’ (1971) 14 *Logique et Analyse* 403.pp.403, 405.

<sup>968</sup> Sweet and Mathews (n 631).p.88.

<sup>969</sup> David Luban, ‘Business, Economics, and Regulatory Law and Public Law and Legal Theory’ (2001) <[http://paper.ssrn.com/paper.taf?abstract\\_id=264335](http://paper.ssrn.com/paper.taf?abstract_id=264335)>.

<sup>970</sup> Vincent Luizzi, ‘Balancing of Interests in Courts’ (1980) 20 *Jurimetrics* 373.p.375.

<sup>971</sup> Aleinikoff (n 630).p.944.

<sup>972</sup> Sweet and Mathews (n 631).p.78.

compelled to rely on weighting as an inevitable result of the fact that values are incommensurable (for there is no common means to measure them).<sup>973</sup>

When a court or authority moves to balancing rights, striking a balance will be either “one interest outweighing another” or “between or among competing interests”. In order to clarify the two forms, two cases are described.<sup>974</sup> Firstly, in the case of *New York v. Ferber*, the Court upheld that the distribution of child pornography fell outside legal protection. The Court found that legal protection of some material did not mean that full protection was given to all material since each case has different circumstances. The Court stated that “[w]hen a definable class of material. . . bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without [legal] protection”.<sup>975</sup> Secondly, in the case of *Tennessee v. Garner*, the Court recognised the respective rights of the suspect and the police officer. The Court stated that the police officer’s use of deadly force was not allowed at all times since there had to be an immediate threat to the officer or people. The Court stated that “[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable”.<sup>976</sup>

Moreover, the collision between two principles cannot be resolved without balancing. The establishment of what is the so-called “a relation of precedence” which is based on ‘realization and factualisation’. There is a great need for this relationship in collision cases and it cannot exist without weighing the principles.<sup>977</sup> As a condition of balancing, the optimization requirements are “characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but also what is legally possible”.<sup>978</sup>

In each of the above-mentioned cases, balancing is crucial in order to establish a new form that is able to confer a higher consequence for either judicial authority or rights alike. The practical utility of the approach is obvious through its mechanical mode in

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<sup>973</sup> David J Luban, ‘Value Pluralism and Rational Choice (2001)’.p.1.

<sup>974</sup> Aleinikoff (n 630).p.946.

<sup>975</sup> *New York v. Ferber*, 458 U S. 747 (1982).

<sup>976</sup> *Tennessee v. Garner*, 471 U S. 1 (1985).

<sup>977</sup> *Da Silva* (n 962).p.277.

<sup>978</sup> Robert Alexy and Julian Rivers, *A Theory of Constitutional Rights* (Oxford University Press, USA 2009).pp.47,48.

helping judges to apply analytical logic instead of traditional approach of interests.<sup>979</sup> The role of balancing cannot work as a sword, striking down regulations that were intended to affect the court's judgment, if the judges base their decisions on special interests rather than public objectives. In this regard, Robertson observed where "British judges are still overwhelmingly appointed from amongst civil liberty defenders, their objective 'balance' generally comes down in favour of property rights rather than human rights".<sup>980</sup> The uniqueness form of the approach does not derive from certain principles that only fit to one right solution. It is a comprehensive system that is capable of absorbing all cases without limitations.<sup>981</sup> Thus, the needs of balancing as a comprehensive meaning to resolving conflict is not merely a tempore but, also, it is most important especially in freedom of expression cases where the right is unqualified,<sup>982</sup> and for judges "when the laws as guides compel no particular resolution".<sup>983</sup>

### **6.3.3 Does Balancing of Interest have Limitations?**

After we discussed the meaning of balancing, it is vital to presuppose insights to its limitations. As pointed out in the meaning of the metaphor of balancing, this approach is rights-based on different forms and circumstances that lead to the expansion of its role worldwide.<sup>984</sup> In opposition to this assumption, it is argued that the comprehensive role of balancing cannot be applied in at least some sense.<sup>985</sup> In this regard, Habermas argues that the weighting is based on "arbitrarily or unreflectively rather than rationality, it would no place for rational choice".<sup>986</sup> The main problem, which confronts balancing, is incommensurability. In fact, balancing's reliance on incommensurable as a measurement of values is amongst the reasons that leads to the weakness of the balancing metaphor and make the balancing "nothing more than a disguised judicial decisionism".<sup>987</sup> Indeed, experience seems to reflect instances in some cases that values are incommensurable.

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<sup>979</sup> Dziauddin (n 429).p.239.

<sup>980</sup> Robertson, G. and Nicol, A. (2002) *Media Law*. London.p.x.

<sup>981</sup> Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Mit Press 1996).p.261.

<sup>982</sup> Karmini Pillay, 'The Cartoon Wars: Free Speech or Hate Speech?' (2010) 127 *South African Law Journal* 463.p.475.

<sup>983</sup> Luizzi (n 970).p.375.

<sup>984</sup> Sweet and Mathews (n 631).pp.87, 88.

<sup>985</sup> See, Da Silva (n 962).p.272. See also, Luban (n 969).p.2.

<sup>986</sup> Habermas (n 981).p.259.

<sup>987</sup> Da Silva (n 962).p.278.

Before analysing the ways in which the problems are incommensurable in the face of law, it is helpful to start with the definition of incommensurable. Although, there is no general agreement on the definition of incommensurable,<sup>988</sup> some defined it as follows: “[i]f values can be expressed in terms of a common value, or if everything that matters about two competing options can be expressed in terms of a common value, then the values or options are commensurable”.<sup>989</sup> Another writer said that, for example, incommensurable could be defined as, “A and B are incommensurate if it is neither true that one is better than the other nor true that they are of equal value”.<sup>990</sup> According to one commentator, the Judges’ role under the balancing metaphor missed the radical dimensions of judgment of legal fit.<sup>991</sup> John Mackie summarized this fact by stating that when a “judge, relying on his rational knowledge of natural law, may overrule even what appears to be the settled law of the land-unambiguous and regularly enacted statutes or clearly relevant and unopposed precedents”.<sup>992</sup>

In the legal realm, the philosophical debate is easier than values that need to balance them. These difficulties emerge through incommensurable values (rights, principles).<sup>993</sup> According to Raz, “incommensurability is not yet another valuation of the relative merits of two options alongside such valuations as having greater value or having equal value”.<sup>994</sup> Still according to him, in the case of incommensurability, choosing between two options leads to the impossibility of rational choice. For example, suppose one’s choice is between becoming a teacher or an officer. “He is equally suited for both, and he stands an equal chance of success in both”.<sup>995</sup> There is no difference for the person in becoming either a teacher or an officer because both choices have the same values. Therefore, the choice is incommensurable and “there is no room for reasons and comparisons, but only for independent will of agent”.<sup>996</sup>

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<sup>988</sup> Ruth Chang, *Incommensurability, Incomparability, and Practical Reason* (Harvard University Press 1997).p.1.

<sup>989</sup> Brett G Scharffs, ‘Adjudication and the Problems of Incommensurability’ (2000) 42 Wm. & Mary L. Rev. 1367.p.1390

<sup>990</sup> Joseph Raz, ‘Value Incommensurability: Some Preliminaries’, *Proceedings of the Aristotelian Society* (JSTOR 1985).p.117.

<sup>991</sup> Winslade (n 967).p.404.

<sup>992</sup> John Mackie, ‘The Third Theory of Law’ [1977] *Philosophy & Public Affairs* 3.p.3.

<sup>993</sup> Da Silva (n 962).p.284.

<sup>994</sup> Raz, ‘Value Incommensurability: Some Preliminaries’ (n 990).pp.123, 124.

<sup>995</sup> Raz, *The Morality of Freedom* (n 498).p.332.

<sup>996</sup> Da Silva (n 962).p.279.

Among several examples, John Finnis, argues with considerable sophistication that Ronald Dworkin's theory of legal decision-making, based on the possibility of decision-making, is among the different options without referring to rational judgment. According to Finnis, this view is empty and far from reality for many reasons. These are: 1) its lack of mechanical reasons or rules; 2) its lack of a foundation in any practical view; and 3) its remoteness far from a logical or rational judgment. According to him, "[a] natural law theory in the classical tradition makes no pretence that natural reason can determine the one right answer to those countless questions which arise for the judge who finds the sources unclear".<sup>997</sup>

With respect to the use of balancing or weighing as a common measure, Professor Scharffs points out that since our precise measurement gives one choice more priority than another, the outcome of balancing is limited and far from rationality. In other words, the conflict between values sometimes allows a value to prevail. This means that we missed one value on account of the other and, therefore, any effort to balance or weight is unjustified. Scharffs was precise when he concluded that "[t]he problems of incommensurability arise when we try to compare plural, irreducible, and conflicting values, or choose between options that exhibit or will result in the realization of plural, irreducible, and conflicting values". Consequently, the most crucial element, which limits balancing, is its reliance on single rather than plural unit of measurement.<sup>998</sup> In addition, Michael Stocker has tried to explain why balancing cannot work when it comes to plural values. He says that "[w]e are concerned not only with the correct ratios among opposing elements -which a beam balance would show- but also with each of these elements being in its own proper place". Also, it is considered that, "the elements that must be balanced may well not be on a single continuum".<sup>999</sup>

On many occasions, reliance on the balancing approach is not a preferred position to either individuals or courts alike. Many of our daily decisions are based on the notions of interest or disinterest, win or lose, and love or hate without referring to balancing. It is doubtful that one loves parents because, on balance, such conduct has no logical scale to measure it. Nor is one likely to hate terrorism because it is less or more horrible, or because the consequences of terrorism in one place are far greater than in the other.

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<sup>997</sup> John Finnis, 'Natural Law and Legal Reasoning' (1990) 38 Clev. St. L. Rev. 1.pp.7, 8,9,13.

<sup>998</sup> Scharffs (n 877).pp.1372, 1398, 1417.

<sup>999</sup> Michael Stocker, *Plural and Conflicting Values* (Clarendon Press 1992).p.148.

Sometimes, without proof, decisions derive from our experiences or circumstances. This fact can be applied in Court decisions.<sup>1000</sup> For example, in the case of *Loving v. Virginia*, the Court did not base its decision on balancing interests. The Court stated that it was unfair to apply general principles in order to remove racial classifications. The Court stated that “restricting the freedom to marry solely because of racial classifications violated the central meaning of the Equal Protection Clause”. Therefore, the Court based its decision on equality rather than balancing.<sup>1001</sup> Also, in the case of *Shelley v. Kraemer*, the Court rejected the lower court’s decision. The Court stated that it was fundamentally illogical to prevent people from their rights because of their race. The Court concluded that all people had the right in covenants in deeds of residential property without discrimination. In doing so, the Court did not purport to balance interest but based its decision on equality.<sup>1002</sup>

### **6.3.4 Balance and Freedom of Expression**

Freedom of speech is usually established and protected by constitutions. Balancing entered the field of freedom as a supportive tool to the judicial system. However, there is considerable divergence in applying this correctly.<sup>1003</sup> This comes from the fact that the limitations and protections of speech are based on different factors.<sup>1004</sup> Fred Schauer asserts that the boundaries of free speech “far more than the doctrine lying within those boundaries, turn out to be a function of a complex and seemingly serendipitous array of social, political, historical, cultural, psychological, and economic factors”.<sup>1005</sup> Therefore, at this stage, it is vital to discuss a synthetic approach for courts to balance cases relevant to freedom of speech where the balancing extends to cover various forms of freedoms.<sup>1006</sup>

In the United States of America, the main goal in establishing a balancing between diverging interests is to guarantee a proper application for a law especially when the case is relevant to freedom of expression. In the words of Professor David Bogen “in free speech cases. . . courts engage in balancing interests, they often do not know what they

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<sup>1000</sup> Aleinikoff (n 630).p.998.

<sup>1001</sup> *Loving v Virginia*, 388 US 1 (1967).

<sup>1002</sup> *Shelley v Kraemer*, 334 US 1 (1948).

<sup>1003</sup> Sangsuvan (n 659).p.715.

<sup>1004</sup> Alexander Tsesis, ‘Balancing Free Speech (2015)’ .p.4.

<sup>1005</sup> Schauer, ‘The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience’ (n 680).pp.6, 7.

<sup>1006</sup> Henkin (n 802).pp.1022, 1023.

are weighing or even, sometimes, which way the scale tilts”.<sup>1007</sup> Since then, the Supreme Court has given balancing a high level of protection. In free speech cases, courts do not follow a certain approach when it is relevant to balancing theory.<sup>1008</sup> However, before upholding such judgments, courts are required “to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of [freedom of expression]”.<sup>1009</sup> For example, in the case of *Connick v. Myers*, the Court demonstrated that balancing between freedom of expression and the State’s interest was at the top of its priorities.<sup>1010</sup> Therefore, the Court established content-neutral, which was based on time, place and manner of expression, to make a wise judgment between freedom of expression and the State’s interest.<sup>1011</sup> The Court stated that “courts. . . require[s] . . .adequate weight be given to the public’s important interests in the efficient performance of governmental functions and in preserving employee discipline and harmony sufficient to achieve that end”.<sup>1012</sup>

The Court has developed balancing methods to further the State’s interest when the case is relevant to speech.<sup>1013</sup> According to the Court “government may adopt reasonable time, place, and manner regulations, which do not discriminate among speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication”.<sup>1014</sup> This means that balancing is not only vital for courts or judges but, also, it is necessary for the individual and the State alike. On many occasions, the surrounding circumstances play a crucial role in determining whether or not speech deserves constitutional protection. For example, in the case *Schenck v. United States*, the Court affirmed the judgment that the circulating leaflets against the military during wartime were not be considered the kind of free speech that deserved constitutional protection. The Court asserted that the principle of protected speech could be changed depending on the surrounding circumstances. For example, protection of free speech would not protect a man who circulated leaflets to support terrorist groups. “The question in [a free speech] case is whether the words used are used in such circumstances and are

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<sup>1007</sup> Bogen (n 630).p.387.

<sup>1008</sup> R George Wright, ‘Does Free Speech Jurisprudence Rest on a Mistake: Implications of the Commensurability Debate’ (1989) 23 Loy. LAL Rev. 763.p.765.

<sup>1009</sup> *Schneider v State*, 308 US (1939).

<sup>1010</sup> *Connick v Myers*, 461 US (1983). at 142.

<sup>1011</sup> *City of Renton v Playtime Theatres*, 475 US (1986).

<sup>1012</sup> *Connick v. Myers*, 461 U.S (1983). (n 898). at 732.

<sup>1013</sup> Wright (n 1008).p.765.

<sup>1014</sup> *Buckley v. Valeo*, 424 U.S (1976).’at 18.

of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent”.<sup>1015</sup> Indeed, despite the lack of a legally available forum to prevent their circulation, the circulation of leaflets against national forces statues are narrowly tailored to achieve a compelling public purpose. In a similar vein, the case of *Holder v. Humanitarian Law Project* distinguished between freedom of expression and support of terrorism. The Court balanced individual rights and national and international security and affirmed the lower court’s opinions that supporting terrorist groups either directly or indirectly was illegal and could not be justified under the right to free speech and association. This was particularly so when the decision, relevant to terrorist cases “criminalizes not terrorist attacks themselves, but aid that makes the attacks more likely to occur”.<sup>1016</sup> We might distinguish between terrorist activities from an individual freedom advocating the use of peaceful approaches to achieve specific goals. Indeed, there are comparisons between practices of freedom of expression and such activities that pose a substantial enough social threat to warrant regulation, arrest, and conviction. If I am correct, balancing must not concern right v. right, but rather to what extent the right may impact public safety or some other important rights. This analysis extends beyond the narrow view regarding a much broader principle of constitutional law.

*Lovell v. City of Griffin* provides an interesting contrast to the former cases. The Court struck down the defendant’s convictions for distributing literature in streets and other public places. This demonstrates that freedom of expression cannot be prohibited merely because it is inconsistent with ordinances. Prohibiting a person from expressing his opinion in the streets in order to keep the city clean conflicts with the protection of freedom of speech. Indeed, reasonable and proper exercise of freedom of expression “does not deprive a municipality of power to enact regulations against throwing literature broadcast in the street”.<sup>1017</sup> Similarly, in the case of *Police Dept. of City of Chicago v. Mosley*, the Court invalidated the District Court statute that prohibited picketing near school buildings during school hours. The Court stated that “[a] state’s specifically permitting picketing for the publication of labour union views, while prohibiting other sorts of picketing, is censorship in its most odious form [and] unconstitutional”. Thus,

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<sup>1015</sup> *Schenck v United States*, 249 US (1919).

<sup>1016</sup> *Holder v Humanitarian Law Project*, 130 S Ct 2705 (2010).

<sup>1017</sup> *Schneider v. State*, 308 U.S (1939).

the government cannot prohibit freedom of expression if there is no reasonable reason that can distinguish between picketing forms.<sup>1018</sup> In both cases, we could imagine that free speech could not be exercised because of litter or picketing near school. Nevertheless, the Court would review a law allowing the practice of free speech on the basis of rational scrutiny. However, there is something deeper at stake. This transcends littering or picketing near a school and concerns freedom of expression as a substantial right that that must be protected. One more example occurred as recently as 2014 in the case of *Lane v. Franks*, when the Court invalidated the Eleventh Circuit’s judgment that “testimony the employee gave in the legislator’s trial was not protected”. In order to make a fair judgment on speech cases, two questions need to be asked. Firstly, whether the “employee speaks as a citizen on a matter of public concern”. If the answer is yes, then the next question should be “whether the government had an adequate justification for treating the employee differently from any other member of the public based on the government’s needs as an employer”.<sup>1019</sup> This approach demonstrates that freedom of speech is not an isolated right, but rather a fundamental right linked to other values in different circumstances.<sup>1020</sup> In addition, freedom of speech cannot be immune from such restrictions merely because it has constitutional protection.

The question of whether any interference is consistent with the free speech clause of the First Amendment was examined in dealing with the regulation of political campaign spending by organizations. In *Citizen United v. Federal Election Commission (FEC)* the dispute concerned the limits of freedom of expression. As to the facts, the applicant was Citizens United, a non-profit corporation, which released a film about the negative policy of Senator Hillary Clinton, a candidate for her party’s Presidential nomination, who was found guilty under the federal law which “prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech that is an ‘electioneering communication’ or for speech that expressly advocates the election or defeat of a candidate”. After the applicant’s appeal, the Supreme Court held that freedom of speech is an inherent right for all people and that the government cannot suppress it without ‘a compelling governmental interest’. According to the Court, “speakers may have influence over or access to elected officials does not mean that those officials are

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<sup>1018</sup> *Police Dept of City of Chicago v Mosley*, 408 US 92 (1972).at 5,1.

<sup>1019</sup> *Lane v Franks*, S Ct 2369 (2014).

<sup>1020</sup> Tthesis, ‘Balancing Free Speech (2015)’ (n 657).p.27.

corrupt. And the appearance of influence or access will not cause the electorate to lose faith in this democracy”. Taking into account the surrounding circumstances of the case, the Court decided that the expenditure ban which applied to individuals, corporations, and unions was unlawful.<sup>1021</sup>

There is one final point that needs to be illustrated before moving to the opinion that criticises the balancing approach. When the Court, in dealing with the cases, did not engage in simple balancing but rather in sophisticated balancing. Also, by relying on the balancing approach, the Court chose one of the rational ways to grasp the complex issues raised by the First Amendment. This is because, as Pound believes, a balancing approach “derive[s] from reason and workout philosophically”. As a part of balancing, the analytical method seeks to interpret the legal system logically rather than randomly.<sup>1022</sup> For example, *Christian Legal Society v. Martinez*, is a landmark U.S. constitutional case dealing with a group’s rights to freedom of speech and beliefs. The Hastings College of Law (CLS) sued The Christian Legal Society Chapter of the University of California for violation of the students’ freedom of expression. The Hastings College argued that the Christian Legal Society Chapter of the University of California forced its members to uphold the Christian faith in writing. The Supreme Court upheld that the Christian Legal Society violated the free speech clause of the First Amendment to the Constitution of the group’s rights to freedom of speech and religion. According to the Court, “[t]he society unreasonably suggests that the school alter its policy to allow exclusion based on belief but not on status, which would subject the school to the undue burden of discerning”.<sup>1023</sup> It seems that the Court would allow restrictions on freedom when there is a reasonable reason for restriction. In other words, limiting freedom of expression just for religion and sexual orientation cannot be justified.

The path, as taken by the Court, was a sensitive method of determining whether or not there was a logical reason to restrict freedom of expression. Tsesis concluded that, when judges use logic reasons, they rightly follow the appropriate way.<sup>1024</sup> Harlan Fiske Stone believes that balancing, which is based on logical reasons, is “the touchstone which will enable us to reach the golden mean between the extreme of flexibility and the extreme of

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<sup>1021</sup> *Citizen United v. Federal Election Commission (FEC)*, 08-205 U.S. (2010).

<sup>1022</sup> Roscoe Pound, *Jurisprudence* (The Lawbook Exchange, Ltd 1959).pp.38, 17.

<sup>1023</sup> *Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of Law v. Martinez*, 561 U.S. 661 (2010).

<sup>1024</sup> Tsesis.p.4.

rigidity, and ultimately to achieve a system which, though adaptable to the changing needs of a changing society, is not without symmetry and continuity”.<sup>1025</sup> In the case of *AG V Times Newspapers Ltd*, Lord Reid said that balancing of interest was not marginal, but it was inevitable to overcome conflicts of interest. In addition, “a court has to consider the propriety of some conduct or speech or writing, decision will often depend upon whether one aspect of the public interest definitely outweighs another aspect of the public interest”.<sup>1026</sup> This view is compatible with Lord Woolf’s when he went on to say that reaching a wise judgment is difficult task, but it can be achieved by striking a balance between conflicting interests.<sup>1027</sup> In addition, the absence of a general frame to organise the relationship between constitutional rights is evidence to the fact that balancing is an appropriate approach to resolving tension between rights.<sup>1028</sup> Thus, balancing aims to makes judges rightly assimilate various forms of expression that would lead to an excessively strong protection of speech at the expense of the involved competing public interests.

### 6.3.5 Critique of Balancing

Despite the considerable role of balancing on the judicial scale,<sup>1029</sup> freedom of speech cases have raised difficulties in courts when it was associated with balancing.<sup>1030</sup> A frequent criticism of balancing is that it has failed to define a comprehensive criterion that is able to stake a balance between cost and benefit.<sup>1031</sup> Laurent Frantz has come to this issue when he says that it is impossible to make a wise comparison between different interests and arrive at impartial results. This is basically because the independent standard does not exist.<sup>1032</sup> Indeed, the absence of a proper approach to resolving the clash between interests “creates uncertainty in the exercise of balancing between competing rights”,<sup>1033</sup> and “present the courts with insoluble problems”.<sup>1034</sup> Here, the exact nature of

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<sup>1025</sup> Harlan F Stone, ‘The Common Law in the United States’ (1936) 50 *Harvard Law Review* 4.p.8.

<sup>1026</sup> *AG V Times Newspapers Ltd* (1974).

<sup>1027</sup> ‘A v B Plc [2003] QB 195.’

<sup>1028</sup> Henkin (n 802).p.1031.

<sup>1029</sup> Aleinikoff (n 630).p.964.

<sup>1030</sup> Wright (n 1008).p.769.

<sup>1031</sup> David Kennedy, ‘International Human Rights Movement: Part of the Problem?’ (2002) 15 *Harv. Hum. Rts. J.* 101.pp.102, 103.

<sup>1032</sup> Frantz (n 868).p.748.

<sup>1033</sup> Dziauddin (n 429).p.246.

<sup>1034</sup> *AG V Times Newspapers Ltd* (1974). (n 914).

the objection is important. Some critics of balancing surely overstate their case by claiming that balancing has no rigid basis and they have no specific measurement to deal with incommensurability.<sup>1035</sup> Generalized balancing has been thought to offer increased arbitrariness in adjudication and this would “undermine a system of precedent and provide little guidance to lower court, legislators, administrators, and lawyers and clients”.<sup>1036</sup> As Justice Black stated, in many cases, weighing interests has failed to present itself as a proper approach that is able to value and compare competing social interests.<sup>1037</sup> Also, Habermas discussed that customary standards and hierarchies evidenced that values had to possess justificatory force in order to be relativized by other values because basically they lacked rationality.<sup>1038</sup> The balancer’s scale cannot simply resolve conflict between interests at the same level, such as personal and national interests. Here, the issue here is much deeper than expected. In the case of comparison between very general conflicting interests, the apparent difficulty is not the actual differences between them but rather from which perspective they should be viewed. As discussed by Fried, when the Court makes a judgment between very conflicting interests and bases its judgment on a single answer, the Court does nothing to reconcile the issue of competing interests.<sup>1039</sup> Indeed, when compared to the general public interest, values, such as liberty, freedom of speech and beliefs, cannot produce more than ‘a single unit of measure.’<sup>1040</sup> Therefore, this presupposes that a common unit of measure will be limited. This kind of balancing is problematic because “[i]t is difficult to apply a cost and benefit analysis in a situation where one right is deemed to benefit the general society compared to a right that brings benefit to individuals”.<sup>1041</sup> Similarly, in the case of freedom of expression, what has been said of the general values may be said equally well of the individual. Some commentators believe that it is difficult to apply balancing in a situation where freedom of expression is compared to a public interest such as national security.<sup>1042</sup> Since freedom of speech is not a secondary right, there can be no denying the difficulty of testing freedom of speech against other public interests because. In the

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<sup>1035</sup> Scharffs (n 989).p.1416.

<sup>1036</sup> Aleinikoff (n 630).p.973.

<sup>1037</sup> *Lathrop v Donohue*, 367 US 874 (1961).

<sup>1038</sup> Habermas (n 981).p.259.

<sup>1039</sup> Charles Fried, ‘Two Concepts of Interests: Some Reflections on the Supreme Court’s Balancing Test’ [1963] Harvard Law Review 755.p.763.

<sup>1040</sup> Scharffs (n 989).p.1417.

<sup>1041</sup> Dziauddin (n 429).p.244.

<sup>1042</sup> Aljamal (n 5).p.162.

words of Wright, “[c]ommensurating the right of freedom of speech with opposing state interests in a manner respectful of the nature of the rights at issue is generally impossible”.<sup>1043</sup>

However, incommensurability of values can be achieved when a judgment is based on rationality. Although all human values are incommensurable, this does not mean that they cannot be compared. According to Finnis, there is the possibility of resolving conflict between values and either filling or at least narrowing the gap between them. While we recognise that each choice has a value, we may ask reasonably: what is, for example, the common factor between being a lawyer or a teacher? The answer would be that both have high salaries and bright futures. Thus, incommensurability can be changed depending on that measure that we adopt.<sup>1044</sup> According to Professor Perry, it is obvious in a sense that incommensurability values do not mean these values cannot be compared. He observes that, “[i] cannot think of any two things that are not commensurable-that cannot be compared in terms of the same standard. Think of any two things. . . and then consider this standard: which of the two things you would prefer to talk about right now”.<sup>1045</sup> Also, this explains the importance of “developing a conception of reason that accounts for “incommensurability” to resolve conflicting issues.”<sup>1046</sup> James Griffin points out that the values cannot be fitted onto a single scale. Basically, this is because measurement is possible. For example, let us suppose that he is thinking about buying a car that will be big enough for his family. He considers carefully the many choices. Let us say, he decides to have a larger one than the normal brand that is more of a luxury car. Here, the value does not cause a problem for the person’s wishes because the order was based on his standard.<sup>1047</sup>

Moreover, the choice between incommensurable competing interests may be less difficult when the case is relevant to some circumstances. For example, the protection of freedom of expression does not mean that the individual is allowed to practice it without limitations. Freedom of expression can be restricted when the expression threatens

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<sup>1043</sup> Wright (n 1008).p.788.

<sup>1044</sup> John Finnis, *Fundamentals of Ethics* (Georgetown University Press 1983).p.87.

<sup>1045</sup> Michael J Perry, ‘Some Notes on Absolutism Consequentialism and Incommensurability’ (1984) 79 Nw. UL Rev. 967.pp.979, 980.

<sup>1046</sup> Scharffs (n 989).p.1402

<sup>1047</sup> James Griffin, ‘Are There Incommensurable Values?’ [1977] *Philosophy & Public Affairs* 39.pp.48, 49.

national security or the society's interests.<sup>1048</sup> In addition, in many free speech cases, balancing is an essential element to resolving conflict between interests. The flexibility, which it provides, gives a Judge wide scope to practice his duty on the basis of reasonableness and moderation.<sup>1049</sup>

### 6.3.6 Section Summary

In this section, I have tried to examine the connections between balancing and legal practice along with the totalitarian conception of surrounding circumstances and their effects on balancing multiple values. Overall, I have tried to articulate and to defend a conception of rationality that enables us not only to reason meaningfully about values but, also, to engage in judgments that can weigh up and balance multiple values. As shown, this principle has played a major role in setting the boundaries and limitations on freedom of speech that differed from case to case. Despite vituperative criticism, plural and conflicting values, and the accompanying problems of weighing conflicting interests against each other, balancing is a rational gift that leads to either resolving or at least easing understanding in many cases.

Indeed, the intractability of practical difficulties and the variety of cases contribute to our sense of hopelessness and helplessness. The temptations to increase public satisfaction and to reduce injustice are among the other reasons that require balancing as a flexible approach in the face of rigidity and traditionalist. As demonstrated early in this chapter, the balancing principle needs to not only to be set at the national level but, also, it is an important approach that characterises the instruments relating to international laws. So far, this explains why judges are required to use alternative approaches to achieve justice.<sup>1050</sup> Hence, I agree with Fred Schauer when he says that the boundaries of free speech “cannot be (or at least have not been) reduced to or explained by legal doctrine or by the background philosophical ideas and ideals”.<sup>1051</sup>

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<sup>1048</sup> Dziauddin (n 429).p.266.

<sup>1049</sup> Henkin (n 802).p.1047.

<sup>1050</sup> Scharffs (n 989).p.1374.

<sup>1051</sup> Schauer, 'The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience' (n 680).p.7.

## Chapter Seven

### 7. The Idea and Scope of Freedom of Expression within Islamic law

The previous chapters, especially Chapters 3, demonstrated that freedom of expression in the United States is based on solid theories. Also, it reveals that freedom of expression has rich resources to extend its scope of protection to cover different aspects. Therefore, it is vital at this stage to explore and examine the value that constitutes freedom of expression in Egypt and many Islamic countries.

#### 7.1 Introduction

Freedom of expression is has full protection under Islamic law.<sup>1052</sup> The Islamic law or Shari 'ah,<sup>1053</sup> which is “often described as a sacred law whose legal rules are, to a large extent, determined by religious considerations”,<sup>1054</sup> is considered to be the formal source of many Arab and Islamic countries. One commentator stated that “[m]ore than just establishing a religious and legal order, Islam is an institution of legitimacy in many States of the Muslim world. Many regimes in the Muslim world today seek their legitimacy through portraying an adherence to Islamic law and traditions”.<sup>1055</sup> In this light, it is not an exaggeration to say that speaking about freedom of expression in Islamic States requires first an understanding of Shari 'ah law. As discussed in the second chapter, freedom of expression is based on theories that played a considerable role in establishing a rigid base for its concept. Similarly, in the Islamic world, freedom of expression is based on norms and principles that are, however, different in structure and content from the western principles. Therefore, the questions that need to be addressed in this chapter are as follows. Firstly, what is the meaning of speech or what forms of activities should be considered to be speech and, subsequently, be covered by Islamic

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<sup>1052</sup> I mean by full protection to freedom of expression, the expression that not exceed the public moral and subject to Islamic law limitation. See, Ramzi Awad, *Alquyud Alwariduh Ealaa Huriyat Altaebir Fi Qawanin Aleuqubat Walqawanin Almukmilih Lah* (Drasuh Muqarinh) (dar alnahdah alearabiuh 2011),p.38.

<sup>1053</sup> I have used the terms ‘Islamic law’ and ‘Shari’ah’ interchangeably, as I see them to be technically synonymous concepts, for they both include the Qur’an, the Sunnah of Prophet Muhammad.

<sup>1054</sup> Brown (n 22).p.42.

<sup>1055</sup> Baderin (n 4).p.21.

law? Secondly, what is the justification of freedom of speech, in other words, why should speech be covered by a rule protecting freedom of speech?

The importance of revealing the meaning and justifications of freedom of speech under Islamic law is to highlight values and to democratise Islam, as it has been subject to debates<sup>1056</sup> for a long time, and to show the initial basies of Egyptian law. Thus, the chapter is divided into two main sections; namely: the concept and the bases that constitute freedom of expression in Islamic law. By doing this, many questions are answered. 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 and, in this case, to speech that differs from the justifications for speech as viewed by the western world. This should not be surprising since, according to Muhammad Ali, Islamic law “offers a solution of the most baffling problems which confront mankind today”.<sup>1057</sup> What can be said is that the role of religion, Islam in our case, acts as guidance for human rights including freedom of expression.<sup>1058</sup> Muslims usually look to Islamic law for safeguards to human dignity. Thus, as mentioned in the Introductory Chapter, the aim is to formulate the limitation of freedom of speech in the clearest and most precise fashion possible. This could serve as an evaluative guideline for freedom of speech cases under Egyptian law.

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<sup>1056</sup> Ali Khan, ‘The Reopening of the Islamic Code: The Second Era of Ijtihad’ (2003) 1 U. St. Thomas LJ 341.p.1.

<sup>1057</sup> Maulana Muhammad Ali, *The Religion of Islam* (Ahmadiyya Anjuman Ishaat Islam Lahore USA 2011). There is no page number.

<sup>1058</sup> Riffat Hassan, ‘Human Rights in Islam (1990)’. There is no page number.

## Section I

### 7.2 The concept and initial basis of Freedom of Expression in Islamic Law

#### 7.2.1 The concept of freedom of expression

Islam protects freedom of expression as one of the fundamental liberties guaranteed against state suppression or regulation. It is guaranteed by the Quran (the saying of God) and Sunnah (the report of what the Prophet said or did). Freedom of expression is regarded in Islamic law as the core of other freedoms since, without freedom of expression, public and private life cannot manage.<sup>1059</sup> Islam gives freedom of expression a high value of protection with quite broad limitations. This is evidenced through the assertion of the importance of freedom of expression either at a collective or individual level. According to Muhammed Kameel, freedom of expression under the Islamic concept means “to be free to think in his mind and to show his opinion without being afraid when declaring this expression of his opinion, and he can choose any way legitimate and permissible to express his opinion, as long as this aims the benefit of Islam and Muslims”.<sup>1060</sup> Also, it has been recognised as “the right to think independently about everything and take what guided him to understand and express his opinion by various means of expression”.<sup>1061</sup>

#### 7.2.2 The initial basis of Freedom of Expression

Although there is no specific meaning of freedom of speech,<sup>1062</sup> the meaning can be understood from many verses of the Quran, the Sunna of the Prophet, during the reign of the Rightly Guided Caliphs after him,<sup>1063</sup> and to understand Islamic instructions. Firstly, to begin with the Quran, in the chapter called Abraham, the Quran says: “Have you not

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<sup>1059</sup> Muhamad Swilm, *Alhuriyat Aleamah (Idrasuh Maqarinah)* (First, almisrih llnashr waltawzie 2015).p.330.

<sup>1060</sup> Kameel (n 23). p.14.

<sup>1061</sup> Yasri Alqisas , *Aldawabit Aljinayiyuh Lahuriyat Alraay Waltaebir (Drasih Maqarinah)* (dar aljamieuh aljadiduh 2014).p.30.

<sup>1062</sup> Muhamad Saud Albashar, ‘*Huriyat Alraay Fi Alaslaml Walnazam Alhadithuh (Drasuh Tahliliuh Tasilih Maqarinah)*’ (2009) <<http://saaaid.net/book/19/12460.pdf>>.

<sup>1063</sup> Abdulaziz Salman, *Alhamayuh Aldusturiuh Lahuriyat Alraay Waltaebir Fi Alfaqih Walqada’ Aldstwryi* (Samak, Dar Saad 2014).p.46, 47, 48.

considered how Allah presents an example, [making] a good word like a good tree, whose root is firmly fixed and its branches [high] in the sky? And the example of a bad word is like a bad tree, uprooted from the surface of the earth, not having any stability”.<sup>1064</sup> In these verses, the Quran distinguishes between the speech and word in either a good (Tayyibah) or evil sense (Khabithah).<sup>1065</sup> In the verse called Fussilat the Quran says, “And who is better in speech than one who invites to Allah and does righteousness and says, ‘Indeed, I am of the Muslims’”.<sup>1066</sup> What this verse says is that, through speech, one can reach a high degree of God’s favor by calling upon him in the right way. Moreover, the Quran gives Muslims a wide range to use freedom of expression as a tool to correct individuals’ or communal mistakes as well as to discuss public issues. This can be seen through two verses. In the first, God says “And let there be [arising] from you a nation inviting to [all that is] good, enjoining what is right and forbidding what is wrong, and those will be the successful”.<sup>1067</sup> In the second, God says “And those who have responded to their lord and established prayer and whose affair is [determined by] consultation among themselves, and from what we have provided them, they spend”.<sup>1068</sup> According to Salman, this verse gives a clear permission to practising freedom of speech at the high level.<sup>1069</sup>

Secondly, in Sunnah, Prophet Muhammad, ‘peace be upon him’<sup>1070</sup>, says, “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”.<sup>1071</sup> In this saying, the Prophet Muhammad has guided believers to command good and forbidding evil (al-amr bi 'l-msruf wa'l-nahy an al-munker) by the following three ways, namely, hand, tongue and heart (intention). Commenting on this incident, one commentator stated that these three ways referred to pure, symbolic and silent speech.<sup>1072</sup> Also, it does not only refer to different forms of expression, but the Prophet defines the scope of using this right here. According to Syed,

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<sup>1064</sup> Qu'ran, Abraham Verse.No24, 26.

<sup>1065</sup> Alqortobi, Tafsir Al-Quran, <<http://Quran.Ksu.Edu.Sa/Tafseer/Qortobi/Sura14-Aya26.Html#qortobi>> Accessed 20 July 2017.’

<sup>1066</sup> Qu'ran, Fussilat Verse.No 33.

<sup>1067</sup> Qu'ran, Aal-i-Imraan Verse.No 104.

<sup>1068</sup> Qu'ran, Ash-Shura Verse.No 38.

<sup>1069</sup> Salman (n 1063).p.46.

<sup>1070</sup> Muslims generally say this in veneration of Prophet Muhammad whenever his name is mentioned.

<sup>1071</sup> *Sahih Muslim*.

<sup>1072</sup> Aljamal (n 5).p.243.

this saying divided use of freedom of expression into two main forms. Firstly, the use of the hand to change evil (Munker) can only be used generally by either the government or those who are responsible for protecting national security. Secondly, individuals can use tongue or heart as a means of expression by normal speech or shouting by any peaceful manner.<sup>1073</sup> The Prophet of Islam has taken the importance of these words even further by allowing his companions to express their opinions and suggestions. The Arabic word for sharing and discussing public opinion is Shura. Generally, Shura aims to the attainment of the common good of the State and the Muslim community.<sup>1074</sup> On many occasions, the Prophet discussed Muslims issues with his companions and took their views even when these differed from his opinion.<sup>1075</sup>

Thirdly, in the era of the Rightly Guided Caliphs, the right to freedom of expression was practiced broadly. For example, there was Abu Bakr (the first Muslim ruler after the Prophet). After he was given the treaty to become the caliph following the Prophet (peace be upon him), Abu Bakr gave a short inaugural speech: “Oh people, as I have now been placed in a position of authority over you and I am not the best of you, if I do good, then help me, and if I do wrong then correct me”.<sup>1076</sup> In his speech, Abu Bakr guided Muslims to a tool for exchanging ideas between the ruler and the public.<sup>1077</sup> Also, determination of the meaning of speech can be understood from the sayings of Omar bin al-Khattab (the second Muslim ruler). Omar has taken the importance of words even further by considering the sword to correct the mistake of a ruler.<sup>1078</sup> What this example shows is that using a sword is a type of expression that in Islam falls within the dictionary of meaning of expression.

One last point, that needs to be raised here, is that under Shari’ah the different forms of expression can be seen in Muslim Acts of worship (Ibäddt). For example, when Muslims pray or perform Hajj (the one of the five pillars of Islam), they express forms of pure speech (with his tongue), symbolic speech (silent denunciation), and speech plus (with their hand). Moreover, many forbidden behaviours (hram) take, also, different shapes.

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<sup>1073</sup> Refaat Syed, Huriyat Altazahuruaneukas Tabieatiha Ealaa Altanzim Alqanunii Fi Misr Mae Alasharh ‘Iilaa Bed Alduwal Alearabiih (Drasuh Tahlilih).p.46.

<sup>1074</sup> Maimul Ahsan Khan, Human Rights in the Muslim World: Fundamentalism, Constitutionalism, and International Politics (Carolina Academic Press 2003).p.203.

<sup>1075</sup> Alqsas (n 1061).p.31.

<sup>1076</sup> Abd Al-Malik b. Hishām, Al-Sīrah Al-Nabawiyah ( No Publisher,1990). Chapter 6.

<sup>1077</sup> Salman (n 1063).p.47.

<sup>1078</sup> Syed.p.50.

For example, in the verse of Al-Humazah, God says “Woe to every Humazah Lumazah”. Ibn ‘Abbas said, “Humazah Lumazah means one who reviles and disgraces (others)”. Iben Kesan said, “Al-Humazah is with the tongue and Al-Lumazah is with the eye”.<sup>1079</sup> These examples emphasize that the Islamic concept of the meaning of freedom of speech covers the right of pure speech, symbolic speech and silence.

The picture of an Islamic concept of the meaning of speech, which emerges from the above discussion, is very clear. Islamic law is very rich in terms of forms of freedom of expression. Although Shari’ah and the American law (as discussed in Chapter 2) derived from different principles, norms, values, and traditions, they both reach the same treatment of meaning with regard to freedom of expression. In the words of Professor Kamali, “the basic notion of freedom and freedom of expression would appear to strike a common note in all legal traditions, including that of Islam”.<sup>1080</sup> Obviously, the absence of new forms of freedom of expression, such as leafleting and canvassing, picketing, patrolling, marching, parading, and demonstration from the primary sources of Islam, do not mean that the concept of Shari’ah fails to cover these meanings. Rather, the comprehensive concept of freedom of expression, as mentioned either in the Quran, Sunnah or the Prophet companions’ speeches, serve as clear evidence that Shari’ah sufficiently defined the meaning of freedom of expression.

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<sup>1079</sup> King Saud, Electronic Mushaf, <<http://Quran.Ksu.Edu.Sa/Tafseer/Qortobi/Sura104-Aya1.Html>>accessed 25 July 2017.’

<sup>1080</sup> Mohammad Hashim Kamali, Freedom of Expression in Islam, vol 4 (Islamic Texts Society Cambridge 1997).pp.7, 8.

## Section II

### 7.3. Is There Purpose of Freedom of Expression in Islamic Law?

Islamic law was conceived generally to ensure public order and welfare of the Muslim community, in a situation where individuals can discover truth, self - development<sup>1081</sup> and practice democracy.<sup>1082</sup> In general, there is no difference in the notion of freedom of expression under Islamic law and its western counterpart. However, the source of justification of freedom of expression under Shari'ah differs completely from other laws.<sup>1083</sup> Therefore, this section inquiries into the Shari'ah institutions that provide the basic evidence for the justification of freedom of expression.

#### 7.3.1 Discovery of Truth

Freedom of expression is characterised often with its commitment to forbidden evil and spreading the truth.<sup>1084</sup> One commentator stated, "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".<sup>1085</sup> Only through truth can any society find the virtue it is looking for. In contrast, when falsehoods spread through society, ultimately, truth and high values can disappear. Therefore, the priority of truth can be seen in the Quranic text (first source of Shari'ah) and in the authentic Sunnah of the Prophet (the second source of Shari'ah).

Islam puts truth and those who are steadfast affirmers of truth at the highest level of honour.<sup>1086</sup> In many verses, the Quran gives an explanation of how truth justifies freedom of speech. The Quranic text declares, "those will be with the ones upon whom Allah has bestowed favor of the prophets, the steadfast affirmers of truth, the martyrs and the righteous. And excellent are those as companions".<sup>1087</sup> This reference by the Qu'ran in

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<sup>1081</sup> Mohammad Hashim Kamali, *Freedom of Expression in Islam*, vol 4 (Islamic Texts Society Cambridge 1997).p.8.

<sup>1082</sup> Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (Fourth Edi, Westview Press 2007). p54.

<sup>1083</sup> Kamali (n 1080).p.8

<sup>1084</sup> *ibid*.p.9.

<sup>1085</sup> Aljamal (n 5).p.257.

<sup>1086</sup> *Islam Beacon*, Alsedq.

<<http://Www.Islambeacon.Com/Index.Php?Title=%D8%A7%D9%84%D8%B5%D8%AF%D9%82>>.

Accessed 30 July 2017.'

<sup>1087</sup> An-Nisa .Verse 69.

these verses to truth, reveals the importance of truth in Islam. The importance of truth is mentioned in several other verses of the Qu’ran, such as At-Tawba, God says, “O you who have believed, fear Allah and be with those who are true”.<sup>1088</sup> Ibn Katheer (may Allaah have mercy on him) said, “It means: be truthful and adhere to truthfulness, and you will be among its people and will be saved from calamity, and this will make a way out for you from your problems”.<sup>1089</sup> However, in the verse called An-Nisa, God says “Allah does not like the public mention of evil except by one who has been wronged”.<sup>1090</sup> Here, the Qu’ran defines the limitations of free speech and when it causes harm to others.<sup>1091</sup> However, this limitation can be dropped when the speaker is a victim of injustice. Then, public utterances of evil speech can be tolerated to accomplish justice among community members.<sup>1092</sup>

As one of the most important principles for Muslims, the importance of truth appears in several other places in the Sunnah of Prophet Muhammed. The Prophet said, “[y]ou must be truthful, for truthfulness leads to righteousness and righteousness leads to Paradise. A man will keep speaking the truth and striving to speak the truth until he will be recorded with Allaah as a *siddeeq* (speaker of the truth)”. According to one commentator, this indicates that truthfulness leads to morality (al-birr) and that the moral person is one who corresponds with the path of truth. Hence morality and rightness are the same.<sup>1093</sup>

The forgoing evidence suggests obviously that the person is required to follow the path of truth. Ibn Al-Qaim, divided truth into three types, namely speech, deeds, and silence (by heart). Firstly, truth of speech means that the tongue never utters a falsehood. Secondly, truth of deeds means that acts are done in a proper way. Lastly, truth by the heart means that the actor has real intentions to completely truthful.<sup>1094</sup> Ibn Al-Qaim stated, also, that truth is characterised by distinguishing between the people whom God is satisfied with and beneath them in the garden, and those who will be in the fire.<sup>1095</sup>

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<sup>1088</sup> Qu’ran, At-Tawba. Verse 119.

<sup>1089</sup> Alhafiz ‘abu Alfada’ Ibn Katheer, Tafsir Alquran Alkarim <<http://shamela.ws/browse.php/book-23604#page-656>>. Chpter4.p.204.

<sup>1090</sup> An-Nisa . Verse 148.

<sup>1091</sup> Kamali (n 1080).p.9.

<sup>1092</sup> ibid.p.9.

<sup>1093</sup> Islam Question and Answer, <<http://Islamqa.Info/En/2424>>accessed 29 July 2017.’

<sup>1094</sup> Islam Beacon, Alsedq. <<http://Www.Islambeacon.Com/Index.Php?Title=%D8%A7%D9%84%D8%B5%D8%AF%D9%82>>. Accessed 30 July 2017.’.

<sup>1095</sup> Islamway, Min Maeani Alsidq, <<https://Ar.Islamway.Net/Article/23619>>accessed 30 July 2017.’

### 7.3.2 Human Dignity

Human dignity is one of the most important principles recognised by Islamic legal theory. Islam gives human beings a high level of honour that distinguishes them from other creatures.<sup>1096</sup> Emphasising this point, one Muslim writer said, human dignity “is God-granted and is inherent in all human beings from conception to death. It cannot be taken away by any individual or institution”.<sup>1097</sup> Also, Kamali concluded that Islam valued human dignity as a great instrument for freedom of expression.<sup>1098</sup> Without freedom of expression, there would be no human dignity and the reverse is true, also. This can be demonstrated by examining the Qu’ranic text or the Prophet’s sayings; these insist on the importance of recognising human dignity.

As stated earlier, an important aspect of human dignity in Islam is recognising that every human being is entitled to human dignity regardless of religion, colour and nationality. This reflects not only a flexible characteristic but also illustrates the respect for peoples’ convictions and thinking inherent in Islam.<sup>1099</sup> In the words of AlTuwajiri, “Islam came to emphasize the authenticity of human dignity and to instill in man a sense of dignity”.<sup>1100</sup> This opinion can be demonstrated by the following Qu’ranic statement: “And we have certainly honored the children of Adam and carried them on the land and sea and provided for them of the good things and preferred them over much of what we have created, with [definite] preference”.<sup>1101</sup> As Ibn Kathir concluded on this verse is that God has given the progeny of Adam (human being) a high ranking that has never been given to any other creatures including the angels.<sup>1102</sup> Also, this verse asserted equality among humanity because all human beings shared the same features.<sup>1103</sup> One commentator noted, “the Quran uses the word ‘dignity to underscore the correspondent human rights and obligations, which should be together carried out to secure the human

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<sup>1096</sup> See e.g. 4th and 5<sup>th</sup> preambular paragraphs of the Universal Islamic Declaration of Human Rights adopted in September 1981.

<sup>1097</sup> Baderin (n 4).p.52.

<sup>1098</sup> Kamali (n 1080).p.11.

<sup>1099</sup> Kameel (n 23).p.29.

<sup>1100</sup> Abdulaziz Altuwajiri, *Alkiramuh Alainsaniuh Fi Daw’ Almaslamiah* (Second edi, ISESCO 2015) <<https://www.isesco.org.ma/ar/wp-content/uploads/sites/3/2015/11/الإسكانية-الكرامة-1999.pdf>>.p.9.

<sup>1101</sup> Qu’ran, Al-Israa Verse. Verse 70.

<sup>1102</sup> Ibn-Katheer. Chpter5.p.89.

<sup>1103</sup> Kamali (n 1080).p.11.

dignity”.<sup>1104</sup> Moreover, the Qu’ran, in fact, goes further in valuing human dignity by allowing a person to choose his religion without fear or punishment. The Quran proclaims, “There shall be no compulsion in [acceptance of] the religion. The right course has become clear from the wrong. So whoever disbelieves in Taghut and believes in Allah has grasped the most trustworthy handhold with no break in it. And Allah is Hearing and Knowing”.<sup>1105</sup> As Ibn Kathir concluded, this verse is a general declaration of the importance of human rights in Islam; this entitles the individual to follow his/her belief without fear or punishment.<sup>1106</sup> According to this interpretation, imposing restrictions on the articulation of what an individual may wish to believe compromises both his dignity and his right of freedom of expression.<sup>1107</sup> In this regard, Karnali concluded that “[f]reedom of belief [under Islamic concept], like all other freedoms, operates as a safeguard against the possible menace of oppression from superior sources of power”.<sup>1108</sup> Obviously, Islam has granted freedom of religion for Muslims or non-Muslims alike to worship in the way that suits them and protects their dignity.

Furthermore, to achieve human dignity, a great value has been ascribed to righteousness, to the extent that the Prophet considered, “there is no preference for Arabs over non-Arabs, nor for non-Arabs over Arabs nor red people over black people, nor for black people over white people. Preference is only through righteousness”.<sup>1109</sup> When degeneration spreads in society, righteousness becomes the only way to combat it and to reach the goal of human dignity. To put the same issue in a different way, the moral is based on human dignity and without it one cannot sense the value of dignity that God has given to human beings. Apparently, Islam acts as a safeguard to human dignity through its principles and rules that aim to give it a high value of protection.<sup>1110</sup>

Another important implication of this theory is that it grants rights to slaves. As mentioned, Islam denies discrimination among people regarding their colour, language and nationality. The issue of slavery in the pre-Islamic Arab society was widely

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<sup>1104</sup> Fathi Osman, ‘Islam in a Modern State: Democracy and the Concept of Shura’ [2001] MF Osman, *Islam in a Modern State: Democracy and the Concept of Shura* (Occasional papers series) 3.p.9

<sup>1105</sup> Qu’ran, Al-Baqara Verse. Verse 256.

<sup>1106</sup> Ibn-Katheer. Chapter 1.p.521.

<sup>1107</sup> Kameel (n 23).p.30.

<sup>1108</sup> Kamali (n 1080).p.87.

<sup>1109</sup> Sahih Alsunnah Alnabawyah,

<[http://Hadith.Islambeacon.Com/Ar/الصحيحة\\_الأحاديث](http://Hadith.Islambeacon.Com/Ar/الصحيحة_الأحاديث)>. Accessed 31 July 2017.’

<sup>1110</sup> Al-Tuwajri (n 1100).pp.8, 9, 10.

commonplace whether in the East or the West.<sup>1111</sup> However, after the advent of Islam the scope of slavery shrunk significantly. This is obvious in the declaration of Islam as a message for human beings and all are slaves to God. In the words of Khan “Islam...claims that slaves are by all means full, normal human beings; it is the socio-political and economic conditions of a society or state that made them slaves”.<sup>1112</sup> Thus, in the spirit of reformation, both the Qur'an and Sunnah greatly encourage manumission and other ameliorating rules in the treatment of slaves. According to one communicator, the system of Islam has succeeded in freeing slaves from the cruel bondage in two ways. Firstly, there is equality between slaves and other people as they are all servants or slaves (ibād) of one God. Secondly, on the one hand, expanding the scope and manner of freeing slave and, on the other hand, prohibiting many sources that lead to increased slavery.<sup>1113</sup> Moreover, there is a fair amount of evidence that the Prophet and his companions acted against slavery.<sup>1114</sup> Imam Al-Bukhari's reports<sup>1115</sup> are particularly instructive for our purpose because they are a selected collection of the Prophet's Sayings (ahadith), which encourage the emancipation of slaves.<sup>1116</sup> In one of the collections of Sahih Bukhari, the Prophet Muhammad (peace be upon him) is reported to have said, “Allah says, ‘I will be against three persons on the Day of Resurrection. . .2. One who sells a free person (as a slave) and eats the price...’”.<sup>1117</sup> This statement expresses Islam's desire to eradicate the sources of slavery. As discussed, the language of Shari'ah texts aimed to minimize slavery. As Khan stated, the Islamic system “adopts a comprehensive plan to release more and more slaves”.<sup>1118</sup> One may ask here why did Islam not prohibit slaves? Generally speaking, Islam could have forbidden slavery, but there was no easy solution to the issue of slaves in pre-Islamic Arab society. Therefore, the Islamic doctrine adopted a flexible approach to abolishing slavery instead of a complete clash with the tribal tradition.<sup>1119</sup> The consequence of simplicity of the method in treating slavery can be seen

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<sup>1111</sup> Baderin (n 4).p.53.

<sup>1112</sup> Khan (n 1074).p.218.

<sup>1113</sup> Islamway, Alraqu Fi Al'islam ... Shabhat 'Am 'Iiejaz,< <https://ar.islamway.net/article/5101>> Accessed 02'.Aug 2017.

<sup>1114</sup> Bernard K Freamon, ‘Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence’ (1998) 11 Harv. Hum. Rts. J. 1.pp.33, 34.

<sup>1115</sup> All scholars acknowledge the collections of Bukhari. See Freamon p.44.

<sup>1116</sup> Sahih Al-Bukhari, [Http://Sultan.Org/Bukhari/Index.Php?Saheh=54](http://Sultan.Org/Bukhari/Index.Php?Saheh=54)>accessed 03 Aug 2017.’

<sup>1117</sup> Sahih Al-Bukhari, <[http://Www.Hadithportal.Com/Index.Php?Show=hadith&h\\_id=2141&uid=&sharh=1673&book=33](http://Www.Hadithportal.Com/Index.Php?Show=hadith&h_id=2141&uid=&sharh=1673&book=33)> accessed 15 January 2018.’

<sup>1118</sup> Khan (n 1074).p.217.

<sup>1119</sup> *ibid*.pp216-219.

in the current times when Islamic countries abolished slavery<sup>1120</sup> as forbidden by Islamic jurists.<sup>1121</sup>

The above points illustrate Islam's values because of its role in promoting human dignity. This affirms the existence of freedom of expression in Islam regardless of the differences among humankind. The affirmation of the protection of human dignity means that Islam grants freedom of expression because Islam is universal religion, and this can be seen as a mercy for all human beings regardless of race, gender, language or beliefs. Commenting on this, Kamali says, "there is no evidence anywhere in the Shari'ah to qualify the broad and universal terms of [human dignity]".<sup>1122</sup> Islamic law aims to enable Muslims to exercise their right to self-fulfilment in the way that preserves their human dignity.

### 7.3.3 Democracy

Freedom of expression has been characterised often as a barometer of the democracy. This is because democracy is designed to cater to individuals' freedom. In the words of Osman, democracy "represents an ideal of justice, as well as a form of government. It develops a belief that freedom and equality are inherently good and that democratic participation in ruling secures, deepens and enhances human dignity".<sup>1123</sup> Thus, the scope of the Shari'ah recognises freedom of expression as a distinctive approach to ensure the welfare of humanity.<sup>1124</sup> Through free speech, people can discuss and exchange ideas in which the social and political system are formalised.<sup>1125</sup> As an inevitable result of freedom of expression, democracy is a mechanism that takes a wide scope of interest in Islamic law. In other words, one purpose of Islamic law is to expand public participation and to create interaction between the State and the nation. In short, Islamic law gives people a comprehensive authority to guide a ruler and State policy.<sup>1126</sup>

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<sup>1120</sup> Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse University Press 1996).p.175.

<sup>1121</sup> Freamon (n 1114).p.7.

<sup>1122</sup> Kamali (n 1080).p.12.

<sup>1123</sup> Irina Dmitrievna Eliferova, *Democratic Values and Muslim Countries: Prospects of Cooperation* (State University of New York at Binghamton 2008).p.5.

<sup>1124</sup> Feras Aabduljlyls, 'Hryt Altaebyr En Alray Kama Aqarahaha Alquran Alkrym' (2009) 3 *Alanbar University for Islamic Sciences* <file:///C:/Users/saleh/Downloads/القران قرررها كما الرأي عن التعبير حرية/القران الكريم.pdf>.p.153.

<sup>1125</sup> Hamad Mjid, *Alquyud Alwariduh Ealaa Huriyat Altaebir* (Maktabat Zain 2016).p.19.

<sup>1126</sup> Gudrun Kramer, 'Islamist Notions of Democracy' [1993] *Middle East Report* 2. No page number.

The scope of the Shari'ah recognises the institutions of State and the public participants as a principle of Islamic government.<sup>1127</sup> Although the Qur'an and Sunnah do not mention democracy by name, plainly, many ideals and values therein are in agreement with it. These values can be in the form of mutual consultation (Shura). According to Kramer, Shura "presented as the functional equivalent of Western parliamentary rule, and as the basis of an authentic Islamic democracy".<sup>1128</sup> Qur'anic regulations relating to the administration of justice, the duties of ensuring public order, welfare of humanity, maintenance of law and international relations etc., cannot be implemented without political participation, the rule of law, government accountability, freedoms and human rights. Under Islamic law, Shura was established as one of the most used Islamic principles to organise the relationship between the ruler and the ruled. Indeed, the relationship between the ruler and the people represents the cornerstones of democracy. According to Khan, this system "used to advise the Caliphs [ruler] according to the executive decision of the state".<sup>1129</sup> Also, Esposito holds the view that Shura is among other Islamic mechanisms that "can be used to support parliamentary forms of government with systems of checks and balances among the executive, legislative, and judiciary branches".<sup>1130</sup>

On the basis of Shura, the Qur'anic passage has entitled Muslims to be consulted about community affairs. Ash-Shura declared, "And those who have responded to their lord and established prayer and whose affair is [determined by] consultation among themselves, and from what We have provided them, they spend". In this text, the fact is that consultation is a basis for making wise decisions and only that can occur by exchanging ideas and opinions on the matters that have common interest. According to AlSaadi, Consultation within the framework of Islamic education highlights the advantage of the Muslim community as an interconnected society.<sup>1131</sup> It is interesting to note that Shura in Islam has two main characteristics; firstly, it upholds scripture in the name of Shura. Secondly, it correlates side by side with two of the five pillars of Islam (Arkanul Islam). In the words of Saad, these advantages of Shura "indicate the great

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<sup>1127</sup> Saad Habib, *Alshura Fi Al'islam* (Almajlis Alala Ieshouwon Alislamiyah ed).p.9.

<sup>1128</sup> Kramer (n 1126).

<sup>1129</sup> Khan (n 1074).p.203.

<sup>1130</sup> John L Esposito, *What Everyone Needs to Know about Islam* (Oxford University Press 2011).p.159.

<sup>1131</sup> Abdulrhman Alsaadi, *Taysir Alkarim Almanan Fi Tafsir Kalam Almanan* (Dar Ibn Aljawzi) <<https://archive.org/stream/WAQ51975/51975#page/n1595/mode/2up>>.p.1597.

statutes of Shura and its importance as a basis for Islamic governance and participation on it".<sup>1132</sup>

In another verse, the Qu'ran commanded the Prophet on the basis of Shura to involve others in making a decision of common interest, "and consult them in the matter. And when you have decided, then rely upon Allah".<sup>1133</sup> AlQortoby held the view that the observation that God Most High commanded the Prophet to consult the community was a clear indication of the importance and the potential benefit of consult.<sup>1134</sup> One commentator held a similar view when observing that consultation was a command of God before making decisions.<sup>1135</sup> Commenting on this, one Muslim writer says, "[i]f the prophet is addressed to involve the believers in decision-making regarding a common matter for which no specific revelation exists, all the believers a fortiori must follow this teaching".<sup>1136</sup> Further, manifestations of public participant observance in the early Islamic State are well documented in Prophet Muhammad's leadership chronicles and the rightly guided Caliphs after him. On a number of occasions, the Prophet solicited counsel from the Companions.<sup>1137</sup> One of the Companions said, "I have not seen anyone more diligent in consulting his companions than the Prophet".<sup>1138</sup>

The other form of Shura can be found in opposition or criticism (Muaradah). In our time, the opposition is a political party whose members have won seats on the representative body that may also be called the "parliament." In the words of Afifi, "opposition is a consequence of freedom of opinion which entitles individual to express opinions without fear or punishment".<sup>1139</sup> While the Qu'ran and Sunnah do not mention the Muaradah explicitly, it can be understood from its meaning.<sup>1140</sup> The Qu'ran states, "And let there be [arising] from you a nation inviting to [all that is] good, enjoining what is right and forbidding what is wrong, and those will be the successful".<sup>1141</sup> According to Ibn-Katheer, this verse makes it clear that there must be a group of Muslims who uphold responsibility

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<sup>1132</sup> Habib (n 1127).pp.9, 10.

<sup>1133</sup> Qu'ran, Aal-i-Imraan Verse. Verse 159.

<sup>1134</sup> Abo Abdullah Alqortoby, Aljamie Li'ahkam Alquran (Second, Dar Alkutob Almisryah) <<http://shamela.ws/browse.php/book-20855#page-1593>>.. Chapter4.p.250.

<sup>1135</sup> Habib (n 1127).p.10.

<sup>1136</sup> Osman (n 1104).p.10.

<sup>1137</sup> Habib (n 1127).pp.21, 12.

<sup>1138</sup> Kamali (n 1080).p.42.

<sup>1139</sup> Muhammed Afifi , Almujtamae Al'iislamii Waswil Alhukm (First Edit, Dar Alaetisam 1980).p.93.

<sup>1140</sup> Jabir Qamiha, Almuearadat Fi Al'islam Bayn Alnazariat Waltatbiq (Daraljla' 1998).p.75.

<sup>1141</sup> Qu'ran, Aal-i-Imraan Verse. Verse 104.

to call others to good and act against evil.<sup>1142</sup> It is further understood from the verse At-Tawba in which the Qu’ran stated, “The believing men and believing women are allies of one another. They enjoin what is right and forbid what is wrong”.<sup>1143</sup> Thus, it is understood that a group of people, either men or women, are obligated to command to right and are forbidden from evil either on an individual or at a State level. While these two verses support the command to right and forbid evil, it is plainly indicative of the legitimacy of opposition and the freedom of expression in all aspects of life.<sup>1144</sup>

Muaradah is validated, also, by the Sunnah of the Prophet who proclaims, “the best form of jihad is to utter a word of truth to a tyrannical ruler”.<sup>1145</sup> This Hadith grants a high reward for the person who fights injustice and tyranny by speech truth before a tyrannical ruler. Also, this mean that the person present himself to danger for the sake of achieving the public interest regardless of the consequence that may occur. This course of speech by the Prophet established the importance of opposition (Muaradah) in government as part of the Sunnah. According to Kamali, “every citizen is entitled to disapprove 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”.<sup>1146</sup>

The picture of an Islamic polity that emerged from these guidelines is very clear. Muaradah is a legitimate right for all members of the community. All the civil, political, social, and economic matters can be criticised. There is no room for either government or public authority to restrict or prevent people from expressing their opinions. In fact, the rulers are obliged to ensure that the right of people to criticise is protected. Criticism is one of the most effective approaches to correct mistakes either at an individual or State level. No one is above criticism since all are equal before the law. This is the beauty and potential of Islam. This has been the distinctive feature of the Muslim community who work to achieve public interest.

Although Islam does not regulate the manner in which Shura is practiced, it opens the scale to practice Shura in different ways.<sup>1147</sup> Shura can take a form of advice from the

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<sup>1142</sup> Ibn-Katheer’. Chpter.2. p.78.

<sup>1143</sup> Qu’ran, At-Tawba Verse.p.71.

<sup>1144</sup> Kameel (n 23).p.27

<sup>1145</sup> Kamali (n 1080).p.50.

<sup>1146</sup> Kamali (n 1080).p.50.

<sup>1147</sup> Habib (n 1127).p.40.

ruler, public referendum and discuss public or private interest.<sup>1148</sup> Thus, whether democracy under the Islamic perspective is expressed as either consultation or advice or any other forms, it is only a matter of form and not of substance.<sup>1149</sup> In fact, no democracy can be practically operative unless there is a solid basis of public participation. If democracy is viewed through a strict dichotomy of ruler and ruled, it can neither reach the goals of the State nor nation. Therefore, the correlation of rights and duty among people or between the ruler and ruled is one of the most important principles that Islamic law asserts.

### 7.3.4 Chapter Summary

It may be obvious from this presentation that the modern democratic process can be found in Islamic law. According to Al-Aqqad, it is not too much of an exaggeration to say that democracy is an Islamic product since no human knew democracy before Islam emerged.<sup>1150</sup> The influence of Islamic approaches attracts many western scholars, such as Schacht and Strothmann to praise the Islamic system. In the words of Schacht, “Islam means more than religion, it also represents legal and political theories, and the wholesale saying that it is a complete system of culture that includes both religion and state”.<sup>1151</sup>

The result of the foregoing discussion shows that democracy, discovering truth, and human dignity are consequences of the comprehensiveness of the Islamic model, which has always asserted people’s right to justice and consultation.<sup>1152</sup> The Islamic justice order is based on the divine will and Sunnah (Prophet saying); this means that it cannot be conceptually flawed and riddled with operational contradiction, deformities, and failures. The discussion concludes by rejecting the notion that the Islamic system is unable to offer a solid base for democracy<sup>1153</sup> or those who deny the relationship between Islam and democracy.<sup>1154</sup> To formulate final conclusions about the theories characterized in the Islamic system, one can look at the wide success of Islam theories in catering to

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<sup>1148</sup> Osman (n 1104).p.13.

<sup>1149</sup> Abbas Al qqad, *Aldiyumuqratiat Fi Al’islam* (Nahdat masr 2005).p.31.

<sup>1150</sup> *ibid.*p.29.

<sup>1151</sup> Cited in Muhammed Alriys, *Alnazariat Alsiyasiuh Fi Al’islam* (Dar-Alturath).p.29.

<sup>1152</sup> Ahmed Khurshid, ‘Islam and Democracy: Some Conceptual and Contemporary Dimensions’ (2005) 2 *Policy Perspectives* 15.p.16.

<sup>1153</sup> Michael Bratton, ‘Briefing: Islam, Democracy and Public Opinion in Africa’ (2003) 102 *African Affairs* 493.p.493.

<sup>1154</sup> Eliferova (n 1123).p.4.

community order. One commentator stated, “[Islamic] system possesses vertical consistency as well as horizontal harmony in a way that can ensure the establishment of peace and a just socio-political order for all human beings in an era when the whole world is becoming a global city”.<sup>1155</sup> In general, Islamic norms are established with a wide scope of flexibility to be followed in every country or epoch.<sup>1156</sup> For this reason, Muslims’ attempts to export western theories to improve or change the scope of freedom of expression would be unjustified because Islamic law is an ideal form that could be followed all on its own.

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<sup>1155</sup> Khurshid (n 1152).p.16.

<sup>1156</sup> Azizah Y Alhibri, ‘Islamic Constitutionalism and the Concept of Democracy’ (1992) 24 Case W. Res. j. Int’l L. 1.p.26.

## Chapter Eight

### 8. Freedom of Expression in Egyptian Law

#### 8.1 Introduction

The previous chapter set out a meaning and justification of freedom of speech under the Islamic concept. In that chapter, the study examined the meaning of speech and the reasons that justify the protection of freedom of speech in Islam. This chapter is concerned with the freedom of expression under Egyptian law within the context of speech protected by the free speech provisions in this document. It explores the implications of Islamic theories for important aspects of freedom of speech and how these theories have affected the Egyptian courts' decisions. A cursory glance at the justification of free speech under the Islamic concept should be enough to confirm the previous chapter's theoretical conclusion that the Islamic model is valid for all times and places.

Egyptians take pride in the fact that they practice democracy. Since the beginning of the last century, they have recognised the right of freedom of expression through their constitution.<sup>1157</sup> This system has enabled the country to build a solid basis for democracy in later periods. Democracy flourishes when people are given the space to express their opinions freely. The democratic system has also contributed to the fact that Egypt is recognised as one of the most developed Islamic systems and an ideal choice where the State can learn and develop its legal system.<sup>1158</sup>

Egyptian legal norms are characterised by many factors. Firstly, the Egyptian legal system is rich with a wide range of rules that allow for understanding of the Islamic law and its application in real terms. Secondly, many Islamic countries consider the Egyptian case to be a symbol for Islamic States. Indeed, the country provides an excellent opportunity to assess the effects of Islamic variations on the structure and uses of the legal system.

However, there is a vexing question as to why does freedom of expression lead to debate in an Islamic country like Egypt? The Egyptian Constitution is unusual when compared

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<sup>1157</sup> Abdullah Zalata, 'Huriyat Alraa Wa'ltaebir Fi Aldustur'  
<<http://www.ahram.org.eg/News/51429/4/354706/حرية-والتعبير-الرأى-قضايا>> accessed 11 November 2017.

<sup>1158</sup> Brown (n 42).p.16

with western constitutions since it has its own perspective regarding freedom of statement. Does this mean that the Egyptian Constitution allows anyone to say anything without limitation? The Supreme Constitutional Court asserted that the right to freedom of expression can be regulated in certain limited circumstances such as national security, obscenity, breach of peace and property, commercial speech and so on.<sup>1159</sup> In other words, the Supreme Constitutional Court works as a guardian of the freedoms that have constitutional protection.<sup>1160</sup> Thus, even under a constitution that stipulates explicitly its protection, freedom of speech does not enjoy absolute protection.

In all democratic states, even in a country that proclaims freedom of expression as a positive right, like the USA, there are certain approaches to determining the limitation of freedom of speech. As an Islamic country, Egypt relied on Islamic religion as a main source of its constitution as stipulated explicitly under article 2 of the Constitution.<sup>1161</sup> Commenting on this, one stated, “Islamic law is, for [Egyptian] constitutional purposes, a source of general moral principles that must be interpreted anew in every day and age and must take evolving notions of human welfare into account”.<sup>1162</sup> However, the distinction between the Egyptian and western approaches pertains perhaps to the latitude and parameters of the limitation. As will be discussed, the Egyptian courts rely on norms and principles that are completely different from those of non-Islamic States.

The main objective of this part is to answer the three main questions raised in the study’s introductory chapter and, more specifically, the question about the differences in standards between the United States of America and Egypt with regard to the application of freedom of speech. Thus, the study examines these differences in structure and in substance, between, on the one hand, freedom of speech in the United States of America, and, on the other hand, Egyptian law on freedom of speech. Since the study aims to examine the areas of difference between the two systems, the discussion considers necessarily different aspects of freedom of expression. Indeed, in the areas of restriction freedom of speech in the case of threatening national security, defamatory speech directed to public figures, obscenity, blasphemous speech or hate speech, there is a clear

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<sup>1159</sup> Emad Mulukhih, *Alhuriyat Aleamat Wafqh Almutaghayirat Alsiyasiuh* (Munsha’at almaacarif, Alexandria 2014).p.156

<sup>1160</sup> Moustafa Tamir, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (Cambridge University Press 2007). p.6

<sup>1161</sup> According to article 2 of Egyptian constitution,

<sup>1162</sup> Lombardi and Brown (n 22).p.423.

divergence in the bases that constitute restrictions in either the United States of America or Egypt. Therefore, in order to explain how Egyptian law works, this chapter is divided into two main sections. In Section I, I begin with some introductory remarks about the historical account of freedom of expression in Egypt and about speech under the Egyptian Constitution. In order to understand the court's approach, it is important to have at least a passing familiarity with some important theories of Islamic law upon which the court drew. Thus, in Section II, I discuss in detail the classical methods of interpreting Shari'ah and of developing legitimate State law. In addition, I show the importance of interpretation in approaching the Qu'ran and other sacred text.

## 8.2 Historical background

Freedom of speech and expression is one of the Egyptian Constitution's basic features of fundamental liberties. Similar to the situation of free speech in the United States of America, the Egyptian Constitution's text recognises the legal right of freedom of expression. The Egyptian Shari'ah Courts were adopted in the late ninetieth century as a pre-requisite of Islamic society in order to deal with personal-status matters.<sup>1163</sup> Arguably, the inclusion of personal status was the first step towards expanding the Constitution's scope to include further Islamic affairs. In the early twentieth century, many Arab countries sought to include Islamic legal norms in their constitutions as a consequence of the ending of the colonial period and to prove their Islamic identity.<sup>1164</sup> According to commentators, the demand was for State law to be consistent with Islamic law, was more obvious in Egypt because of the growing role of Islamic groups.<sup>1165</sup>

As a result of constant demand to establish Egyptian constitutionalism in order to be compatible with modernity, the 1923 Constitution asserted that protection of some human rights must include the freedom of opinion. Article 14 of the Constitution stated that "[f]reedom of opinion is guaranteed and everyone has the right to express verbally,

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<sup>1163</sup> Alex Schank, 'Constitutional Shari'a: Authoritarian Experiments with Islamic Judicial Review in Egypt, Iran, and Saudi Arabia' (2013) 102 Geo. LJ 519.p.529.

<sup>1164</sup> Nathan J Brown and Adel Omar Sherif, 'Inscribing the Islamic Shari 'a in Arab Constitutional Law' [2004] Islamic law and the challenges of modernity 55.p.60.

<sup>1165</sup> Lombardi and Brown (n 22).pp.388, 389.

in writing, photography or any other way within the limitation of law”.<sup>1166</sup> One commentator stated that this Constitution was “an important step in the constitutional and political development of Egypt and, also, it transferred Egypt from dependency to a legally independent state”.<sup>1167</sup> However, the constitutional rights were minimised greatly under the British dominance of power and, more particularly, the King’s extensive powers.<sup>1168</sup>

The most significant change was in 1952 when the free officer’s revolution “ended the era of British influence and the monarchical system and began the era of the Egyptian republic”.<sup>1169</sup> As a consequence of these developments, the 1923 Constitution was replaced by a new Constitution. Despite the significant change that took place under the regime of Jamal’Abd al-Nasir which lasted for almost seventeen years, no real change was brought about, especially on human rights and the application of Islamic law.<sup>1170</sup>

The 1971 Constitution occurred the most significant constitutional reform affecting the Islamic judiciary. Article 2 stated, “Islam is the religion of the state, Arabic is its official language, and the principles of Islamic Sharia are a primary source of legislation”.<sup>1171</sup> The inclusion of Shari’ah with the Constitution was seen as “a historic first-time consecration of Islam’s religious law in an Egyptian constitution”.<sup>1172</sup> Further, according to some, this Article played a crucial role in filling the gap between the Islamic Shari’ah and the legislation. Also, in the view of some jurists, this Article is a “revival of Islamic norms that have always been inherent in [the] religio[n] tradition and society”.<sup>1173</sup> In terms of freedoms, the Constitution asserted that human rights must include freedom of expression, and Article 47 stated, “[f]reedom of opinion is guaranteed. Every individual has the right to express his opinion and to publicize it verbally or in writing or by

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<sup>1166</sup> ‘The Constitution of Egypt 1923,’ <<http://Egyptlayer.over-Blog.Com/2013/10/1923.Html>> accessed 20 Aug 2017.’

<sup>1167</sup> Muhammed Hammad, *Qash Aldustur Almsri: Marik Wa Wathiq Wa Nsos* (First Edit, Maktabih Jaziruh Alward 2011).pp.127, 128.

<sup>1168</sup> Abdalla Ahmed, *The Student Movement and National Politics in Egypt, 1923-1973* (American Univ in Cairo Press 2008).pp.1-5.

<sup>1169</sup> David Lunde, ‘Constitutions and Democratic Consolidation: Comparing Egypt and Tunisia’.p.27.

<sup>1170</sup> Shannon M Roesler, ‘Modern Legal Reform in Egypt: Shifting Claims to Legal Authority’ (2006) 14 *Cardozo J. Int’l & Comp. L.* 393.p.417.

<sup>1171</sup> ‘The Constitution of the Arab Republic of Egypt, 1971.’ <<http://Idpbarcelona.Net/Docs/Recerca/Mediterranea/Fichas/Egipto/Constitucion.Pdf>> accessed 21 Aug 2017.’

<sup>1172</sup> Oussama Arabi, ‘Beyondpower: Neo-Sh A Å fiismorthe Islamicconstructveme Taphorin Egypt’ShighconstitutionalCourt Policy’. p.326.

<sup>1173</sup> Brown and Sherif (n 1164).pp.64, 65.

photography or by other means within the limit of law. . .”<sup>1174</sup> Thus, the real issue does not concern its existence but, rather, the exercise of this right. As stated in Article 47, the exceptions determine the extent and context of the exercise of freedom of expression.

As a consequence of recent developments and to ensure effective protection and application of the human rights including freedom of expression, guaranteed by the Constitution, in 1979 the Egyptian Government established a Supreme Constitutional Court (al-Mahkama al-Dustariyya al’Ulyf) and endowed it with broad powers.<sup>1175</sup> As will be discussed later, the Supreme Constitutional Court (SCC) has played an influential role in determining Shari’ah principles in two ways. Firstly, the Court struck down all legislations that contravened Shari’ah.<sup>1176</sup> Secondly, the Court has developed an approach in which the Egyptian Courts distinguish between the laws that are consistent with Shariah from others that are not.<sup>1177</sup> In this regard, one commentator stated that “[t]he Court consistently worked to curtail executive powers, expand freedom of expression, and shield groups active in civil society from state domination”.<sup>1178</sup> To grasp this premise, a clear understanding of the meaning and scope of free speech is vital. This is the focus of the following discussion.

### **8.3 The Meaning of Freedom of Expression under the Constitution**

In Egypt, freedom of speech and expression is a nebulous fundamental right. This is enshrined in all Egyptian Constitutions starting from the 1923 Constitution<sup>1179</sup> until Article 65 of the 2014 Constitution which states, “[a]ll individuals have the right to express their opinion through speech, writing, imagery, or any other means of expression and publication”.<sup>1180</sup> Although there is an explicit guarantee of freedom of speech and expression, the Constitution elaborates on the various forms of this right. The Article is broad enough to cover all modes of communication. In case 44, the SCC explains that

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<sup>1174</sup> The Constitution of the Arab Republic of Egypt, 1971<<http://idpbarcelona.net/docs/recerca/mediterranea/fichas/egipto/constitucion.pdf>>accessed 21 Aug 2017.’

<sup>1175</sup> Clark B Lombardi, ‘Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State’ (1998) 37 Colum. J. Transnat’l L. 81.pp.83, 84.

<sup>1176</sup> Brown and Sherif (n 1164).p.70.

<sup>1177</sup> Clark B Lombardi.p.84.

<sup>1178</sup> Tamir (n 1160).p.1.

<sup>1179</sup> Salman (n 1063)..p.245.

<sup>1180</sup> Egypt’s constitution of 2014,<[https://www.constituteproject.org/constitution/Egypt\\_2014.pdf](https://www.constituteproject.org/constitution/Egypt_2014.pdf)>accessed 22 Aug 2017

freedom of expression is simply multiple rights, everyone has the right to say, write or draw what he pleases so long as he does not commit a breach of the law or the rights of people.<sup>1181</sup>

Speech and expression can occur in the form of conventional and unconventional activity. The conventional way involves communication by writing, spoken words, or art. In contrast, unconventional expression means one can communicate his/her ideas through any medium. This encompasses commonplace forms such as demonstrations where people can express their opinions by raising boards or burning flag and so on.<sup>1182</sup> In Case 160, the SCC asserted the right of demonstrations as a form of freedom of expression.<sup>1183</sup> Interestingly, remaining silent or showing no emotion is a form of speech that is also protected under Egypt's Constitution. Related to this form of expression is strike. One commentator states that strike is conducted in a non-verbal way and deserves to be treated in the same manner as verbal speech.<sup>1184</sup> Article 15 of the Constitution has guaranteed this right; it stated that “[s]triking peacefully is a right which is organized by law”.<sup>1185</sup> A group of workers can express their message by leaving their work and keeping silent before a governmental department to show their dissatisfaction about the work policy or any other matter.<sup>1186</sup>

The concept of freedom of speech and expression also encompasses freedom of the press.<sup>1187</sup> In any event, whichever term is employed, ‘freedom of speech’, ‘freedom of expression’, and ‘freedom of the press’ are always treated equally because they all entail the right to speak one’s mind. Professor Emad argues that aesthetic nonverbal expression should be considered as expression that deserves constitutional protection only if the expression does not threaten national security, public morals and the rights of others. He says that many actions and nonverbal representations are the most beneficial ways to

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<sup>1181</sup> Salman (n 1063).p.246.

<sup>1182</sup> Refaat Syed, Huriyat Altazahur W Aineikas Tabieatiha Ealaa Altanzim Alqanunii Fi Jumhuriat Masr Alearabiih (Not Mentioned).p.58.

<sup>1183</sup> High Constitutional Court Decision of 3 Dec 2016, Al-Jarda al-Rasmiyya, The Official Gazette, Cairo, No 50, 15/ 12/ 2016.

<sup>1184</sup> Amal Abdulmety, Haqa Al’iidrab Waltazahur Fi Alnazam Alsiyasyah Almoasirah (darAlnahduh Alarabiah 2012).p.24.

<sup>1185</sup> Egypt’s constitution of

2014,<[https://www.constituteproject.org/constitution/Egypt\\_2014.pdf](https://www.constituteproject.org/constitution/Egypt_2014.pdf)>accessed 24 Aug 2017

<sup>1186</sup> See generally Kameel (n 23).pp.328, 329.

<sup>1187</sup> Article 70 of Egypt’s constitution of 2014 has asserted on the freedom of press. It stated that “[f]reedom of press and printing, along with paper, visual, audio and digital distribution is guaranteed. Egyptians -- whether natural or legal persons, public or private -- have the right to own and issue newspapers and establish visual, audio and digital media outlets. . .”. See Egypt’s constitution of 2014.

create public opinion.<sup>1188</sup> The role of the press and publishers are among the most important uses of freedom of expression; this form can be practiced by publishing or presenting films, drawings and singing. Thus, what the SCC says about freedom of speech is also valid for freedom of the press and vice versa.

What can be said then is that freedom of expression under the Egyptian Constitution has taken different forms. The discussion of all these means of freedom of speech showed that generally, the variety of speech did not arouse disputes as regards whether or not it was speech and whether or not it ought to be covered by free speech law. The above discussion further showed that, while some free speech laws (especially in the Arab world), such as the Egyptian Constitution, explicitly covered different types of speech without subjecting speech to certain classifications, the Egyptian 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.

#### **8.4 The Supreme Constitutional Court Method of Interpreting Islamic Law**

Since becoming an independent country in 1979,<sup>1189</sup> Egypt's SCC has many duties, among them the authority to interpret legislative texts.<sup>1190</sup> Ultimately, the SCC is responsible for giving an interpretation of Article 2, which stipulates, "Islam is the religion of the state, and the Arabic language is its official language. The principles of Islamic law are the chief source of legislation".<sup>1191</sup> Thus, the SCC is not supposed to enforce a segregation between State and religion. Rather, it is supposed to act as an instrument to make constitutional jurisprudence consistent with Islamic standards. Article 2's abstract or open-textured nature has led the Court to play a huge and significant role in developing Islamic rules to be consistent with modernity.<sup>1192</sup>

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<sup>1188</sup> Mulukhih (n 1159).pp.139, 144.

<sup>1189</sup> Alhussain Fthi, 'Almahkama Aldusturia Alulya .. Hayya Qadayiya Mustaqla Lilfasl Fi Dusturiat Alqawanin' <[http://noreed.horizon-studios.net/7\\_634\\_](http://noreed.horizon-studios.net/7_634_)«العليا-الدستورية-المحكمة»> accessed 3 September 2017.

<sup>1190</sup> See the Egyptian Constitution 1971, Article 174-178.

<sup>1191</sup> The Constitution of the Arab Republic of Egypt after amendment. Cited in Eds Boyle, Kevin, and Adel Sherif, *Adel Human Rights and Democracy: The Role of the Supreme Constitutional Court of Egypt* (CIMEL, Book Series 3, 1996).p.288.

<sup>1192</sup> Lombardi and Brown (n 22).p.418.

Since its founding, attempts have been made to introduce Islamic Law into Egypt's judicial system. In 1993, the SCC examined past rulings to identify those that met the two criteria. Firstly, the SCC must be able to find a direct and clear text either in the Qu'ran or one of the few Sunnah. Secondly, the SCC must be convinced that the rules are not subject to certain circumstances. This means that the SCC wants to be assured that legislations is "absolutely certain with respect to their authenticity and meaning".<sup>1193</sup> In doing so, the SCC has started to build its approach on a comprehensive principle that had wide agreement and could not be rejected by Islamic scholars.<sup>1194</sup> Although, the SCC did not explicitly define a certain approach to including Shari'ah in the legislation, it seems, as we will see, that it has relied on the Qu'ran, Sunnah and Ijtihad as a basis of its decisions.<sup>1195</sup>

These principles are extremely broad and can be applied in any number of ways. However, as mentioned, the SCC has opted to follow a strict way to articulate a complete theory about the interpretation of the Shari'ah or the piece of legislation that must be considered Islamic. In order to understand how these principles can be applied in specific cases, one must understand how the Islamic principles work.

The Qu'ran and Sunnah are considered to be the most important sources of Shari'ah. To the SCC, the Qu'ran and some texts of Sunnah are the final laws to govern all aspects of human life.<sup>1196</sup> However, the language and the messages of these two sources sometimes increase debate. In some cases, the words of the two sources have no specific meaning, and thus, are subjected to different interpretations. In the words of Professor Hallaq, "[m]etaphorical words and overly general language [of the Quran and Sunnah] had to be interpreted to yield specific meaning and, to do so, the jurists developed linguistic rules in order to resolve such problems".<sup>1197</sup> For example, in Case No. 8 of Judicial Year 17, the SCC received a written complaint from the father of two girls against the Minister of Education with regard to the order not to allow his two daughters to complete their studies because they wore veils, particularly the full-face veil known in Egypt as the niqab. The SCC stated that multiple Islamic scholars had clearly determined that different

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<sup>1193</sup> Lombardi, 'State Law as Islamic Law in Modern Egypt: The Incorporation of the ShariI, a into Egyptian Constitutional Law'.pp.178, 184.

<sup>1194</sup> Lombardi and Brown (n 22).p.420.

<sup>1195</sup> See, Lombardi (n 1193).pp.178-200. See also, Lombardi, 'Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State' (n 1175).pp.197-102.

<sup>1196</sup> Lombardi (1093).p.185.

<sup>1197</sup> Hallaq (n 27).p.19.

interpretations of the Qu'ranic verse in relation to the parts of a woman's body that must be covered were possible. This arose from the fact that God's will and the Prophet's tradition in this matter was not definitive. Consequently, the SCC moved to the guidance of scholars (*ulama*) to define the limitations of a woman's freedom to dress in such a manner to ensure consistent application without contradicting the fundamental principles of Shari'ah. The Islamic scholars state that women are bound by Shari'ah to cover all their bodies except their faces and hands and some scholars included feet. The SCC accepted this opinion for two reasons: firstly, it is consistent with the general principle of Shari'ah; secondly, it was based on the opinions of most scholars. Therefore, the SCC ruled that the complaint was unconstitutional and dismissed the case.<sup>1198</sup>

When the SCC is convinced that no accurate text either in the Qu'ran and Sunnah exists, that no general agreement among Muslim scholars has been reached about such cases, or all authoritative sources appear to be silent on a matter in question, the SCC starts to apply its own reasoning with what is the so-called *ijtihad*. According to one commentator, this form "is not a source but an activity and struggle to discover the law from the main texts and to apply it to a new situation".<sup>1199</sup> Although some old Muslims scholars<sup>1200</sup> have minimised the right to practice *ijtihad*, the SCC has opened the scope for the judges to practice it widely.<sup>1201</sup> That is to say, the SCC tries to carry out the commandments of the faith and to respect morality and justice within a new framework.

The SCC's hybrid approach to textual interpretation raises interesting questions. How will the Court interpret Shari'ah? And how will the SCC employ its interpretations in order to serve human rights? To answer these questions, it is vital at this stage to understand that the main goals of Shari'ah were confined to the protection of religion, self, reason, honour, and property.<sup>1202</sup> In its 1993 opinion, the SCC indicated that its scope in practicing *ijtihad* was not limitless:

"It is necessary that *ijtihad* occur within the frame of the universal roots of the Islamic Shari'a (al-usul al-kulliyya li-'l shari'a al-Islamiyya) . . . building practical rulings and, and in discovering them, relying on the justice of the Shari'a, [and] expecting the result

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<sup>1198</sup> Supreme Constitutional Court, Case No 8 of Judicial Year 17 (18 May 1996) available at <http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-18-Y17.html>.

<sup>1199</sup> Abdulaziz Al-Rodiman, 'The Application of Shari'ah and International Human Rights Law in Saudi Arabia' (Brunel University 2013).p.1.

<sup>1200</sup> Zubaida Sami, *Law and Power in the Islamic World*, vol 34 (IB Tauris 2005).p.25.

<sup>1201</sup> Lombardi (n 1195).p.99.

<sup>1202</sup> Supreme Constitutional Court, Case No 7 of Judicial Year 8 (15 May 1993) available at <http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-7-Y8.html>.

of them to be a realization of the general goals of the Shari'a (al-maqasid al-'amma li-'l Shari'a), among which are the protection of religion, life, reason, honor and property".<sup>1203</sup>

As discussed in the previous chapter, all the theories of Islamic legislation aimed to offer the highest level of human rights protection; these have a strong link with the five necessities that Shari'ah aimed to preserve under the so called 'maqasid al-sharia'. According to one commentator, this potential benefit "refers to is what jurists perceived could be achieved by the process of induction from the scriptural sources in order to promote a certain benefit (sing. maslaha, plur. masalih) or to prevent a result that would cause harm (darar)".<sup>1204</sup> Knowledge of the general goals and the maqasid as the form of utilitarian reasoning seems to help the justices to interpret Shari'ah to be consistent with modernity and the variety of cases. According to Professor Qaraḍāwī, the doctrine of maqasid al-sharia is the proper approach to understanding Islam in reality. He adds that the benefit of using maqasid al-sharia is not only protecting individual rights, but it succeeds also in covering community interests as a whole.<sup>1205</sup>

The goals, which the theory refers to, is what the SCC could achieve by means of the process of induction from the different sources in order to either promote a certain benefit or to prevent a result that would cause harm (darar). Indeed, the wide scope, given to the Court to interpret the Shari'ah, has played a considerable role in the variety of sources that the SCC considers for the public interest. In the words of Lombardi and Brown, the Court "simply used the tradition in a creative way to create a new approach to Islamic legal thinking in the context of constitutional thought".<sup>1206</sup> The SCC takes this advantage to mean that Shari'ah does not stand on rigid principles and that Shari'ah can be found whenever a potential benefit arises to support or to prevent harm at either an individual or community level. For example, in a 1995 opinion, the SCC suggested that, in considering the limitations of Shari'ah, a Muslim had to bear in mind always that, "whatever God prohibits to us is likely to harm us, and what he requires of us or makes permissible in certainly beneficial".<sup>1207</sup> This means apparently that the Islamic

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<sup>1203</sup> Supreme Constitutional Court, Case No 7 of Judicial Year 8 (15 May 1993) available at <http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-7-Y8.html>.

<sup>1204</sup> Reem Khalil, 'Maqasid Al-Shari'a: A Tool of Mediation in the Politics of the Egyptian Supreme Constitutional Court (2016)', p.4.

<sup>1205</sup> Yusuf Alqaraḍāwī, *Dirāsah Fi Fiqh Maqāsīd Al-Sharī'ah: Bayna Al-Maqāsīd Al-Kullīyah Wa-Al-Nusūḥ al-Juz'īyah* (Third, Dar Alshuruq 2008).pp.11, 12, 13.

<sup>1206</sup> Lombardi and Brown (n 22).p.432.

<sup>1207</sup> Supreme Constitutional Court, Case No 35 of Judicial Year 9 (14 Aug 1994) available at <http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-35-Y9.html>.

instructions seek always to achieve benefits and to prevent harm. Also, it implies more broadly that the freedom of people including freedom of expression is preserved by Shari'ah whenever there is an optional benefit for them. However, the SCC does not take this to mean that people can do whatsoever they want without limitations. Indeed, the SCC takes Shari'ah to mean that freedom of expression is protected unless it causes harm to others.<sup>1208</sup>

From the above discussion, it can be said that, despite the SCC's short life span to date, it has played a considerable role in transferring the Islamic judicial concept to be interpreted in a wider sense. It shows that, notwithstanding the criticism of the wide scope given to judges to interpret Shari'ah,<sup>1209</sup> the above discussion is evidence that the SCC has succeeded in creating a theory of Shari'ah that draws upon widely-held notions of its nature. A close study of the purpose of Shari'ah and its implementation throughout Islamic history suggests that, to the degree that these actions are intended to communicate a point of view, Islamic law is relevant to all times and places.

The adoption of *ijtihad* gave rise to the SCC's approach to dealing with different issues, including human rights cases. Soon this approach was termed *new-ijtihad*.<sup>1210</sup> The adoption of *new-ijtihad* is termed modern and anything not computable with the old view that "looking for specific rules that all (*mujtahids*) over the years had articulated and held to be binding".<sup>1211</sup> Then, the crux of the argument is on whether or not the SCC's approach is additional to Islamic norms rather than if it applies only Islamic principles or concurs with Islamic. For something to be modern, it needs to be applicable to all times and places rather than agreeing only with the old-*mujtahid* views or the so-called *taqlid*. Essentially the SCC is not part of old views of *mujtahids* in the sense of its own values.

If one looks at the SCC, it can be deduced that its approach is to solve the problems with a modern view. One commentator stated that the SCC "over the last twenty years developed a creative new theory of Islamic law. Employing this method, the Court has interpreted sharia's norms to be consistent with international human rights norms and with liberal economic policies".<sup>1212</sup> Indeed, the new form, which the SCC introduced to

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<sup>1208</sup> Supreme Constitutional Court, Case No 42 of Judicial Year 16 (20 May 1995) available at <http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-42-Y16.html>.

<sup>1209</sup> Lombardi (n 1195).p.122.

<sup>1210</sup> Lombardi (n 1193).p.185.

<sup>1211</sup> *ibid*.p.186.

<sup>1212</sup> Lombardi and Brown (n 22).p.380.

the legal concept as the new compatible methodology to meet the needs of changing circumstances and correspond to new contexts, is evidence of the SCC's distinctiveness. This should be not surprising when, as Brown stated, the SCC "earned a reputation of being the most powerful court in the Arab world and at times has stood out on a global level for the audacity of its ruling".<sup>1213</sup>

## **8.5 The Role of the Supreme Constitutional Court in Protecting Freedom of Expression**

The rule of law and human rights are among the most important functions of the Supreme Constitutional Court (SCC) in Egypt. The role and position of the SCC is vital in the judicial system. The Egyptian Constitution (EC) asserts the importance of the SCC, stipulating in Article 192, "[t]he Supreme Constitutional Court is exclusively competent to decide on the constitutionality of laws and regulations, interpret legislative texts".<sup>1214</sup> The SCC acts as an independent authority, and its decisions are binding over other authorities in the state. It has judicial power to examine the validity of such laws. This power has given the SCC a crucial responsibility in assuring individual rights and in maintaining a 'living Constitution' of which the broad provisions are continually applied to complicated new situations.<sup>1215</sup>

For the sake of ensuring high effectiveness in the work of the Constitution, if the SCC decides that a law enacted by Parliament or a state legislature curbs or threatens to curb fundamental rights of citizens, it may declare that law unlawful or unconstitutional. If any law is inconsistent with the spirit or letter of the EC, or if the government oversteps its legal bounds, it is for the SCC to invalidate it. This function of the SCC "plays a key role in promoting constitutional democracy, safeguarding the rights and liberties of individuals".<sup>1216</sup> Fahmi wrote that, through the practice of judicial review, the SCC ensures that the will of the people, as expressed in the EC, is supreme over both

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<sup>1213</sup> Nathan J Brown, 'Egypt: A Constitutional Court in an Unconstitutional Setting' [2013] New York.p.1

<sup>1214</sup> 'Egyptian Constitution 2014,<[https://www.constituteproject.org/constitution/Egypt\\_2014.pdf](https://www.constituteproject.org/constitution/Egypt_2014.pdf)> accessed 26 Aug 2017.'

<sup>1215</sup> Clark B Lombardi, 'Egypt's Supreme Constitutional Court: Managing Constitutional Conflict in an Authoritarian, Aspirationally Islamic State' (2008) 3 J. Comp. L. 234.p.240.

<sup>1216</sup> Laith K, Nasrawin. Protecting Human Rights Through Constitutional Adjudication - Jordan as a Case Study, (2016) 25. Digest of Middle East Studies.264-284.p.276.

legislative and executive authority decisions to protect freedom of expression.<sup>1217</sup> With this purpose, the SCC has played a distinctive role in demolishing old common law institutions, which bound freedom of expression with political power, to reconstruct the law on new and more justifiable foundations.

### **8.5.1 The Constitutional Court as the Bulwark of Rights**

The SCC, as a clear implementation of the theory of democracy, human dignity, and discovery of truth in Islamic law (discussed previously in Chapter Six), has the responsibility to ensure that freedom of expression covers all walks of life. The role of the SCC in the protection of human rights is so important that it cannot be exaggerated. Freedom of speech—political, artistic, and otherwise—is governed ultimately by the EC. Also, offering judicial protection of freedoms guaranteed by that constitution is one of the SCC’s most common duties. The extensive protection of freedom of expression that reigns in Egypt today, at both the social and political levels is essentially all to the credit of the SCC. One commentator stated, “the SCC made itself the focal point of reform efforts, thus attracting constitutional petitions that enabled the court to expand its exercise of judicial review”.<sup>1218</sup> It is thanks to the SCC that the right to speak one’s mind has been progressively supported as one of the fundamental values of Egyptian society that cannot be compromised.<sup>1219</sup> The following discussion aims to demonstrate how the SCC protects freedom of expression under different circumstances.

### **8.5.2 The SCC and its Role of Protecting Freedom of Expression: From Whom?**

It is clear by now that the SCC must protect freedom of expression. But protect them from whom? The primary purpose for the establishment of the SCC was to provide access to justice and organise the relationship between individuals and state authorities. If supervisory authority power has been used by the SCC, it has the power to scrutinise the

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<sup>1217</sup> Khalid Fahmi, *Huriyat Alraay Waltaebir Fi Daw’ Alaitifaqiat Alduwaliyh Wa,ltashrieat Alwataniuh Wa,lsharieuh Alaslmyh Wa, jarayim Alray Waltaebir* (Second Edi, Dar alfikr aljamiei 2012).

<sup>1218</sup> Tamir Moustafa, ‘Law versus the State: The Judicialization of Politics in Egypt’ (2003) 28 *Law & Social Inquiry* 883.p.902

<sup>1219</sup> Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (Cambridge University Press 2007).p.6.

extent to which such laws governing freedom of expression are compatible with provisions of the Constitution. The SCC can declare any such laws to be unconstitutional and, hence, all courts must abide by the SCC's finding in any future court cases to which the unconstitutional law would be applicable. Thus, the SCC has the crucial responsibility of applying the rule of law without fear, favour or prejudice. The SCC also has the responsibility of protecting human rights from unconstitutional actions. In Egypt, the SCC is the ultimate arbiter on constitutional matters, and this empowers it vis-a-vis other institutions to act in defence of human rights.<sup>1220</sup> The following discussion will explore the SCC's role in protecting the right of freedom of expression.

The first example concerns limits on public authorities, which might restrict the freedom to march and demonstrate. In Case No. 160, Year 36 (3 Dec 2016), the applicant demanded the right to organise a peaceful march as granted by the EC. The police did not permit the applicant to organise the march, referring to Article 10(1), which entitles the police to restrict meetings, marches, or demonstrations. The SCC struck down the President's decision about Article 10(1) of Law 107/2013, which gave public authorities the right to limit public meetings, processions, and peaceful demonstrations. The SCC referred to Article 73 of the EC, which states, “[c]itizens have the right to organize public meetings, marches, demonstrations and all forms of peaceful protest. . . . The right to peaceful, private meetings is guaranteed, without the need for prior notification. Security forces may not attend, monitor or eavesdrop on such gatherings”.<sup>1221</sup> The Court stated in its ruling that organising public meetings, processions, and peaceful demonstrations is among the most important rights guaranteed by the EC and that any restriction to this right must be narrowed, be necessary, and subject to the EC.<sup>1222</sup> Based on this judgment, the SCC asserted the rule of law where political power is restricted to protect fundamental rights. The SCC emphasised that freedom of expression is a principle that supports the freedom of an individual to exchange ideas, experience, and knowledge without government influence or intervention.<sup>1223</sup> A threat that is extremely unlikely to become a reality but is also extremely grave does not justify suppressing speech in the SCC's

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<sup>1220</sup> Almahakamuh Aldusturiuh Aloulya Wa' huquq Al'iinsan fi Misr, <<https://www.democracy.ahram.org/El/InnerPrint.aspx?NewsID=208%0D>> accessed 20 June 2018.

<sup>1221</sup> Egyptian Constitution, 2014.

<sup>1222</sup> Supreme Constitutional Court of Egypt Case No 160 of Judicial Year 36 (Dec 3, 2016) available at [www.cc.gov.eg/Images/L/373831.pdf](http://www.cc.gov.eg/Images/L/373831.pdf).

<sup>1223</sup> Supreme Constitutional Court of Egypt Case No 160 of Judicial Year 36 (Dec 7, 2016), available at [www.cc.gov.eg/Images/L/373831.pdf](http://www.cc.gov.eg/Images/L/373831.pdf).

view. Thus, the mere advocacy of lawlessness, without direct attempts to engage in or bring about such actions, should not be regulated. This is because the SCC allows individuals to take any abstract position they would like with respect to a particular issue. It is necessary, in the SCC's view, to open up a wider area for practicing freedom of speech. The SCC, in other words, aimed to block attempts to restrict significant amounts of formerly protected speech by preventing unjustified intervention by the public authority on the one hand, which would seriously impact people's right to practice freedom of expression, and give wider protection to practice freedom of expression, on the other hand. The SCC considers that "the constitution wanted to guarantee freedom of expression, to dominate its concepts of the manifestations of life in its innermost depths, thus preventing public authority from imposing its guardianship on the common mind".<sup>1224</sup> This judgment relating to freedom of expression emphasises the crucial role of this right in maintaining democratic order.

However, in Case No 234, Year 36 (3 Dec 2016), the SCC allowed the government to suppress freedom of expression when it threatened national security or caused harm to others. In this case, the applicant was charged for participating in a demonstration that led to the disruption of people's interests and threatened national security. He argued that Article 107/2013 was unconstitutional and that his conviction should be reversed. The SCC, however, rejected the applicant's position, arguing that protection of the right of freedom of expression is not limitless. Freedom of expression does not mean the right to say or write at any time or place what one wishes. In some circumstances, it is necessary to restrict freedom of expression to protect national security and the public interest of the nation. Further, the SCC supported the right of judges to balance conflicting interests, recognising that when other rights conflict with the right to free speech, the competing rights should be considered to determine which has priority. The SCC concluded that the prevention of demonstrators does not violate the EC. Speech is protected until it is actually likely to incite unlawful action.<sup>1225</sup> This means that only a very narrow range of liability exists for speech that allegedly motivates others to commit illegal acts. One more point before moving to another example: In the case of demonstrations, requesting prior authorization to demonstrate does not mean this gives authorities the power to suppress or prohibit the proposed demonstration or protest activity. Rather, this power is exercised

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<sup>1224</sup> Supreme Constitutional Court of Egypt Case No 44 of Judicial Year 7 (May 7, 1988), available at <http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-44-Y7.html>.

<sup>1225</sup> Supreme Constitutional Court, Case No 234, Year 36 (3 Dec 2016).

only to ensure that the demonstration will not pose a risk to people or property.<sup>1226</sup> Also, the SCC, using the above criteria, has differentiated between expression that constitutes a threat to national security and expression characterised as merely political speech. The SCC 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 the EC. By saying that, the SCC considered freedom of expression to be a cornerstone of a strong democratic community.

Similarly, in Case No.195, Judicial Year 19 (decided on 2 June 2001), the applicant, an active member of a syndicate organisation, was fired because of his role in violating syndicate rules. He argued that many articles of the Law of Syndicate Labour were unconstitutional, such as Article (26), which entitles the Board of Directors of Syndicate Labour to issue a decision by the majority to suspend the activity of any member for violating the honour of the profession. The SCC emphasised that the establishment of syndicates were an inherent right in a democratic society as they enable the members of syndicates to take part in the community activities, and this cannot be achieved without allowing them to express their opinions freely. Also, the SCC shared the view of the Board of Directors of Syndicate Labour and found that the applicant's allegation did not match legal norms. The SCC held that the Board of Directors of Syndicate Labour did not err and that the applicant's conviction for breaching the honour of the profession was consistent with the EC.<sup>1227</sup> This decision certainly emphasised the importance of practicing freedom of expression within the limits of the law.

In another example, the SCC, in Case No 160 (6 June 2018), struck down Article 42/2002 regarding civic associations and foundations, which gave government authorities wide scope to limit the roles of civic associations and foundations, such as to stop the activities of an association. The SCC, based on its role to decide on the constitutionality of laws and regulations, found that Article 42/2002 had plainly restricted many constitutional rights: first, the right of assembly that guaranteed under Article 75 of the EC, stipulating that “[c]itizens have the right to form non-governmental organizations and institutions on a democratic basis, . . . They shall be allowed to engage in activities freely.

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<sup>1226</sup> Refaatat Syed, Huriyat Altazahur Wanekas Tabieatiha Alaa Altanzim Alqanunii Fi Jumhuryat Masr Alarabiyah Maa Alasharh Eilaa Baad Alduwal Alarabiyah (Drasuh Tahlilyah) (Not Mentioned).p.59.

<sup>1227</sup> Supreme Constitutional Court, Case No 195 of Judicial Year 19 (2 June 2001) available at <http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-195-Y19.html>.

Administrative agencies shall not interfere in the affairs of such organizations. . .”,<sup>1228</sup> second, the right to freedom of expression and exchange of ideas that is guaranteed under Article 65. According to the SCC, this does not violate only the EC but also many international charters, such as Article 20 of the Universal Declaration of Human Rights. The SCC therefore struck down Article 42/2002. This case demonstrated that striking down such laws is important for maintaining democratic order. In other words, civic associations as a form of freedom of expression should be immune from lawless actions. In this respect, the SCC emphasized in its judgment that freedom of assembly is a *sine qua non* element of a democratic society and that this freedom is a requirement of pluralism, tolerance, and broadmindedness. The SCC stated, “civil society organizations are the mode of contract between the individual and the state, as they are able to improve the personality of the individual as the basic rule in building society, by raising awareness and spreading knowledge and public culture”.<sup>1229</sup> The importance of protecting this right, according to Fahmi, emerges from the fact that without civic association and foundation people cannot exchange ideas and opinions; such a lack negatively affects the development and progress of the community.<sup>1230</sup>

Another significant judgment in the face the lawless decisions is Case No 44, Judicial Year 7 (decided on 7 May 1988). In summary, the SCC considered Article 4(7) of the Political Parties System, which banned leaders or members of a party from participating in any party or organization that has called for undermining the peace treaty between Egypt and Israel. The SCC reverted to its stance in deciding on the constitutionality of laws and regulations and struck down Article 4(7). The SCC reinstated the political rights of the opposition. In a ruling issued in 1988, the SCC found that Article 4(7) of Law 40/1977 of the Law of Political Parties had restricted the right to political participation and freedom of expression in violation of the Article 47 (concerning the right of freedom of speech) and Article 62 (concerning political rights) of the EC, thus affirming that political participation and freedom of expression deserve special protection, and that it is a fundamental component of any developed system.<sup>1231</sup> Members of political parties in

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<sup>1228</sup> Egyptian Constitution, 2014.

<sup>1229</sup> Supreme Constitutional Court, Case No 22 of Judicial Year 37 (6 June 2018) available at [www.cc.gov.eg/Images/L/385495.pdf](http://www.cc.gov.eg/Images/L/385495.pdf) accessed .

<sup>1230</sup> Khalid Fahmi, *Huriyat Alrai Wa'ttaebir Fi Daw' Alaitifaqiat Alduwaliyh Wa' Ltashricat Alwataniuh Wa'lsharih Alaslamyh Wa' Jrayim Alraay Wa'ttaebir* (Dar alfikr aljamiei 2012).p.40.

<sup>1231</sup> Supreme Constitutional Court of Egypt Case No. 44 of Judicial Year 7 (May 7, 1988), available at <http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-44-Y7.html>.

any meeting or demonstration expressing their opinions and ideas are, no doubt, engaging in a form of speech that falls under constitutional protection. That is, the rights to freedom of assembly and freedom of expression cannot be separated as both of them are vital for delivering opinions and exchanging ideas, which helps, in the end, the progress and development of the community.

The following is another example of how the SCC supports freedom of expression against unconstitutional laws that control and suppress that right. In summary, the applicants in Case No 47, Judicial Year 3 (decided on 11 June 1983), were members of a lawyer's association. Their membership in the association had been ended because of Law 125/1981. They argued that Law 125/1981 relating to certain judgments of the lawyers' association breached Article 56 of the EC, which states that "[t]he establishment of syndicates and unions on a democratic basis is a right guaranteed by law, . . . The law shall regulate the participation of syndicates and unions in implementing social programs and plans, raising the standard of productivity among their members, and safeguarding their assets".<sup>1232</sup> When the case reached the SCC, the court took into account Article 62 of the EC, which stipulates that "[c]itizens shall have the right to vote and express their opinions in referendums according to the provisions of the law. Their participation in public life is a national duty".<sup>1233</sup> The SCC also considered the distinctive role of the syndicate and the importance of consolidating the principles of voting rights and freedom of expression through the selection of the members and voting. The SCC ruled that Law 125/1981 failed to meet certainty and foreseeability criteria for the restriction of freedom of voting and freedom of expression. Thus, the SCC found that Law 125/181, which related to some judgments of the lawyers' association, was unconstitutional.<sup>1234</sup>

Likewise, in Case No 42, Judicial Year 16 (decided on 20 May 1995), the SCC gave protection of freedom of expression priority over public figures. The applicant was accused of publishing libel and insults against public figures without cause in a way that tended to injure the plaintiffs' reputations among certain segments of society. Article 123 (2) of the Penal Code on Libel and Slander, "compel the accused to commit a libel offense against a public official to submit the evidence within five days". The applicant argued that the short period that was given to him was not enough to submit evidence regarding

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<sup>1232</sup> Egypt's Constitution, 1971.

<sup>1233</sup> Egypt's Constitution, 1971.

<sup>1234</sup> Supreme Constitutional Court, Case No 47 of Judicial Year 3 (11 June 1983) available at [hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-47-Y3.html](http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-47-Y3.html).

the corruption of public figures; thus, he demanded overturn the Article. The SCC agreed with the applicant and found that a very short period to submit evidence would negatively affect the right of people to criticise the work of lawyers. Further, the Court found that Article 123 (2) violates Article 47 of the EC, which states that “[f]reedom of opinion is guaranteed. Every individual has the right to express his opinion and to disseminate it verbally, in writing, . . . or by other means within the limits of the law. Self-criticism and constructive criticism is a guarantee for the safety of the national structure”.<sup>1235</sup> The SCC emphasized the particular importance of freedom of expression, especially when it is directed to criticising public figures in the public interest. Thus, the SCC found Article 123(2) unconstitutional.<sup>1236</sup> Clearly, the SCC, in this case, extended the EC’s scope of protection by giving libellous statements constitutional 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’. This decision also emphasised the important role of freedom of expression in political debates.<sup>1237</sup>

The following discussion will explore the role of the SCC in protecting freedom of the press. In Case No 25, Judicial Year 22 (decided on 5 May 2001), the applicant was an employee of a company that specializes in printing, publishing and distribution, demanded for overturn Article 17 of the Law On Joint Stock Companies, Partnerships Limited by Shares & Limited Liability Companies,<sup>1238</sup> issued under Law No 159, Year 1981, amended under Law 3, Year 1998, which includes a prior agreement from the Council of Ministers to establish newspapers. The prior agreement, according to the SCC, to establish a newspaper contradicted Article 47 of the EC concerning the right to freedom of expression and Article 48 of the EC concerning the right of freedom of the press, which states that “[f]reedom of the press, printing, publication and mass media shall be guaranteed. Censorship of newspapers is forbidden. Warning, suspension or abolition of newspapers by administrative means are prohibited. . .”.<sup>1239</sup> The SCC

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<sup>1235</sup> Egypt’s Constitution, 1971.

<sup>1236</sup> Supreme Constitutional Court of Egypt Case No 42 of Judicial Year 16 (May 20, 1995), available at [hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-42-Y16.html](http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-42-Y16.html)

<sup>1237</sup> Refaat Syed, *Huriyat Altazahur w Aineikas Tabieatiha Ealaa Altanzim Alqanunii Fi Jumhuriat Masr Alearabiih* (No publisher and date mentioned).p.59.

<sup>1238</sup> The Law in Arabic.

‘Quanūn Sharikāt al-Musāhamah wa-Sharikāt al-Tawšiyah bi-al-As’hum wa-al Sharikaāt Dhāt al-Mas’ ūlīyah al-Mahdūdah’.

<sup>1239</sup> Egypt’s Constitution, 1971.

stressed that an individual's right to establish a newspaper was guaranteed under Article 209 of the constitution<sup>1240</sup> and asserted the importance of freedom of the press and its crucial role in the dissemination of news and public issues, which contributes to a rise in the level of awareness among community members. Therefore, the SCC held that the ban on individuals from publishing newspapers constituted a violation of the EC.<sup>1241</sup>

We have seen from several cases discussed above how the SCC protected different forms of freedom of expression and justified extension of constitutional protections in some cases. Therefore, some conclusions can be drawn from the above examination of SCC cases. First, the right of freedom of expression is not limitless. Second, it appears that a general formula for legally restricting freedom of expression in the context of protecting the public interest is uncertain. Each case has different circumstances; therefore, they are subject to different judgments. This is, obviously, a consequence of the space given to authorities to demonstrate that restrictions are necessary to protect lives, property, and the national interest. In other words, before being allowed to punish people for what they have said or written, the government has to clearly prove that their speech presents a danger, such as rioting, destruction of property, or forceful overthrow of the government. Lastly, from examination of the case regarding protection of reputations, it appears that the constitution protects speech even when it is directed toward criticising public figures, unless that criticism was made with 'actual malice'. That is, public issues should be uninhibited, robust, and wide open, and that may well include vehement, caustic, and sometimes unpleasantly sharp attacks on the government and public officials.

### **8.5.3 The Role of the SCC of Making Human Rights Consistent with International Law**

The SCC introduced a distinctive legal concept regarding the EC by selectively accommodating international human rights standards.<sup>1242</sup> Article 93 of the 2014 EC provides that "[t]he State shall be bound by the international human rights agreements,

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<sup>1240</sup> Article 209 of the Egypt's constitution 1971 stated that "[t]he freedom of public or private corporations or companies and of political parties to publish or own newspapers is protected in accordance with the law.

The ownership, the funding and the possessions of newspapers are subject to the control of the people, as defined by the Constitution and the law".

<sup>1241</sup> Supreme Constitutional Court of Egypt Case No 25 of Judicial Year 22 (May 5, 2001) available at <http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-25-Y22.html>

<sup>1242</sup> Tamir (n 1219).p.7.

covenants and conventions ratified by Egypt. . .”.<sup>1243</sup> Accordingly, public authorities, in protecting human rights, are subject to both regional and international standards as well as human rights norms. In the words of Lombardi and Brown, “the SCC interpreted the Constitution's rule of law provisions to incorporate into the Egyptian Constitution a requirement that the government respect international human rights norms”.<sup>1244</sup>

In Case No. 22, Judicial Year 8 (4 January 1991), the SCC defined the limitation of human freedoms by asserting that substantial freedoms ought to be consistent with international legal norms and any violation or insufficient protection of these freedoms represents a violation to the individual freedoms guaranteed to Egyptians.<sup>1245</sup> The SCC sought to establish high norms of behaviour that would achieve the highest form of justice and transparency. As the SCC put it, “the rule of the law which restricts a ‘legal state’ and dominates its activities, ought to be outlined and demarcated in line with standards that are generally recognized and broadly applied in democratic countries”.<sup>1246</sup>

On many occasions, the SCC used international human rights norms and documents in its decisions to shed light on the progression of the EC.<sup>1247</sup> For example, in Case No 23, Judicial Year 16 (18 March 1995), the SCC commented on Article 73 of Law 47/1972, which restricted members of the State Council from marrying foreign women. The SCC stated in its ruling that the right to choose a wife is a genuine right for society members and requiring them to choose a spouse of a specific nationality contradicted personal liberty. Thus, the SCC struck down Article 73 because it violated personal liberty guaranteed by the EC; it further conflicted with international treaties, such as the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Also, in Case No 153, Judicial Year 21 (3 June 2000), the SCC referred to international and U.S. law as examples for protecting the right of civic association to highlight the importance of civic associations and their role in the progress

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<sup>1243</sup> Egyptian Constitution

2014, <[https://www.constituteproject.org/constitution/Egypt\\_2014.pdf](https://www.constituteproject.org/constitution/Egypt_2014.pdf)>accessed 02 Sep 2017.’

<sup>1244</sup> Clark B Lombardi and Nathan J Brown, ‘Do Constitutions Requiring Adherence to Shari’a Threaten Human Rights-How Egypt’s Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law’ (2005) 21 Am. U. Int’l L. Rev. 379.

<sup>1245</sup> Supreme Constitutional Court, Case No 22 of Judicial Year 8 (January 4, 1991) at <http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-22-Y8.html>.

<sup>1246</sup> Case No. 2, judicial Year 8 (January 4, 1992), SCC vol, V, Part I, 89, cited in Clark Lombardi, ‘State Law as Islamic Law in Modern Egypt: The Incorporation of the Shari’a into Egyptian Constitutional Law’ p.153.

<sup>1247</sup> Lombardi.p.245.

and development of societies.<sup>1248</sup> The international standards used by the SCC, according to Boyle, “demonstrated an openness to international law not frequently found in the highest courts of many countries whether in the developed or developing world”.<sup>1249</sup>

Thus, the SCC’s protection of human rights is supposed to be an agglomeration of other democratic states, such as the U.S., which has had a considerable effect on the Egyptian judiciary.<sup>1250</sup> In the words of Lombardi, “the Court has tried to ensure that it interprets the constitutional provision guaranteeing individual rights in such a way that there are no inconsistencies with other constitutional provisions”.<sup>1251</sup> Indeed, the SCC has guaranteed not only the practice of freedom of expression; it has also introduced a sophisticated protection of many rights that have strong links to the freedom of expression and consistence with international law standards.<sup>1252</sup>

It is worth noting, in this respect, that co-operation between national and international entities for the protection of human rights, including freedom of expression, should be seen as a positive interaction because it enables national systems to develop and promote the protection of human rights. However, this interaction should be limited to the laws that do not contradict national values and principles, which may differ from those on the international level.<sup>1253</sup>

To conclude, the establishment of the SCC was welcomed with relative optimism by the Egyptian legal community in the hope that it would serve as an effective judicial tool to protect human rights, enhance access to justice, and advance the rule of law. This brief review of many Egyptian SCC rulings, which uphold, support, and defend the principles of human rights, including freedom of expression, is a clear reminder of the SCC’s important protection of the EC and Egyptian people from many forms of interferences, which may have a negative effect on freedoms and the democratic process as a whole.<sup>1254</sup> According to Tamir, the “Supreme Constitutional Court provided institutional openings

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<sup>1248</sup> Supreme Constitutional Court of Egypt Case No. 44 of Judicial Year 7 (May 7, 1988), available at <http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-44-Y7.html> (n 11).

<sup>1249</sup> Eds Boyle, Kevin, and Adel Sherif, *Adel Human Rights and Democracy: The Role of the Supreme Constitutional Court of Egypt* (CIMEL, Book Series 3, 1996).

<sup>1250</sup> Eds Boyle, Kevin, and Sherif (1249).pp. 113, 91.

<sup>1251</sup> Lombardi.p.149.

<sup>1252</sup> Fahmi (n 1217).p.126.

<sup>1253</sup> Laith K. Nasrawin, *Protecting Human Rights Through Constitutional Adjudication - Jordan as a Case Study* (2016) 25. *Digwst of Middle East Studies*. 264-284.p.278.

<sup>1254</sup> Anis Al-Qasem, ‘Democracy, the Rule of Law and Islam, Edited by Eugene Cotran and Adel Omar Sherif, *Kluwer Law International*, 1999, 578 Pp’ (1999) 6 *Yearbook of Islamic and Middle Eastern Law Online* 505.p.283.

for political activists to challenge the state in ways that fundamentally transformed patterns of interaction between the state and society”.<sup>1255</sup> The role of the SCC is to uphold the rule of law and enable people to practice their rights guaranteed by the EC. The SCC’s complex role in this system derives from its authority as an independent and powerful judicial institution. Indeed, the SCC offers a good system for assigning cases based on clear norms and includes many balances to ensure fairness and judicial integrity.

In the broadest sense, the Court is specially aimed towards the following three objectives:

Firstly, the Court focusses on enhancing the rule of law by ensuring that the rules issued by public authorities comply with the spirit and principles of the EC.

Secondly, the Court aims to foster a broader understanding of human rights by taking international experiences in protecting fundamental rights into account.

Thirdly, the Court strengthens judicial independence by striking down laws issued by high authorities in the state.

The SCC is the most powerful institution in Egypt, the repository of the nation’s sovereignty. In its exercise of that responsibility, the SCC has already earned much respect both at home and abroad. If it continues to perform in the way that it has to date, it is likely to gain even more admiration.

## **8.6 Chapter Summary**

The above discussion has demonstrated that Egyptian law has passed through many stages and changes until it has reached its current form. Although as represented in the Constitution, Egyptian free speech law protects a wide range of speech, it is not absolute. The above discussion showed that, if the Constitution was reconstituted, its provision would be: no branch of national or local Government shall abridge either individual freedom of speech or that of the press with the exception, generally speaking (1) when speech presents a direct means of inciting unlawful conduct; (2) contains obscenity, insult, or slander; and (3) constitutes a threat to national security. Furthermore, the SCC

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<sup>1255</sup> Moustafa (n 1218).p.901.

has played a considerable role in supporting the protection of free speech at the local level as well as being consistent with international human rights norms.<sup>1256</sup>

The discussion of Egyptian free speech reveals also the significant influence of Islamic norms on the SCC's method. As shown above, the SCC has used the Ijtihad approach in dealing with cases whereby the main two sources of Islam Qu'ran and Sunnah are silent. The SCC takes this advantage to mean that Shari'ah does not stand on rigid principles and that either Shari'ah or the Islamic role can be found whenever there is a potential benefit to support or to prevent harm at either an individual or community level. As Chapter Six showed, the American Supreme Court's categorical and balancing approach is completely different to this approach. However, this does not remove the fact that both approaches play distinctive roles in their judicial systems.

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<sup>1256</sup> Osama Alhenayna, and Mohammed Al-Wariqat, 'Dawr Almahkamat Aldusturiat Fi Taeziz Maham Alqada' Dirasah MqarnAH (Al'urdun - Misr),2013'.

## Chapter Nine

### 9. The Limitation of Freedom of Expression in Egyptian Law

#### 9.1 The System of Limitations

All people are entitled to express ideas and opinions on various aspects. The Egyptian Constitution guarantees freedom of speech and expression to all people. This can take the form of criticism, support or suspension without fear of punishment. The implications of the Egyptian Constitution's new era either from the 1971 Constitution or the 2014 Constitution assert this right. Article 65 of the 2014 Constitution provides that "[f]reedom of thought and opinion is guaranteed. All individuals have the right to express their opinion through speech, writing, imagery, or any other means of expression and publication".<sup>1257</sup> However, Egyptian law does expressly list some restrictions on the right to freedom of expression in order to protect the public interest. Article 12 of the 1971 Constitution stipulated, "Society shall be committed to safeguarding and protecting morals, promoting genuine Egyptian traditions. . .".<sup>1258</sup> Also, Article 53 of the 2014 Constitution stated, "Discrimination and incitement of hatred is a crime punished by Law".<sup>1259</sup> Furthermore, as the SCC stated, freedom of expression ought to be practiced within the law. The Egyptian government is permitted to either prevent or punish speech based on its viewpoint or topics but must have a compelling reason for doing so.<sup>1260</sup>

The broad nature of freedom of expression as a form of reform indicates clearly that this right should be immune to restrictions. In Egypt, individuals, whether citizens or foreigners, are entitled to claim the right by invoking the constitutional provision. They can also protection under the Constitution if they are charged with violating the restrictions on freedom of speech. From the Constitution's point of view, the Egyptian government is entitled to curtail their freedom of speech and expression since they are

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<sup>1257</sup> Egyptian Constitution 2014, <[https://www.constituteproject.org/constitution/Egypt\\_2014.pdf](https://www.constituteproject.org/constitution/Egypt_2014.pdf)> accessed 02 Sep 2017.'

<sup>1258</sup> Egypt's Constituion of 1971, <[http://www.palatauruscentrostudi.eu/doc/EGY\\_Constitution\\_1971\\_EN.pdf](http://www.palatauruscentrostudi.eu/doc/EGY_Constitution_1971_EN.pdf)> accessed 01 Sep 2017.'

<sup>1259</sup> Egyptian Constitution 2014, <[https://Www.Constituteproject.Org/Constitution/Egypt\\_2014.Pdf](https://Www.Constituteproject.Org/Constitution/Egypt_2014.Pdf)> accessed 22 Aug 2017.' (n 1078).

<sup>1260</sup> Supreme Constitutional Court of Egypt Case No. 44 of Judicial Year 7 (May 7, 1988), available at <http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-44-Y7.html>.

subject to the Egyptian laws. Nevertheless, Kameel expresses the view that the right of expression should be kept in tandem with the national ethos and public morals as stipulated in the written laws.<sup>1261</sup> Whilst the right is guaranteed, it does not necessarily mean that it can be exercised in any way as one likes. One commentator states that freedom of expression “may be subject to certain limitations concerning the manner of its exercise in order to avoid inflicting harm either upon other individuals and groups or society in general”.<sup>1262</sup> On many occasions, the Supreme Constitutional Court has expressed that freedom of speech, as protected by the Egyptian Constitution, is not absolute.<sup>1263</sup> According to Justice Salman, freedom of expression does not mean freedom to say anything without limitations.<sup>1264</sup>

The legal principle of freedoms including freedom of expression implies that any interference with this right should be curtailed by the law. According to one commentator, restrictions on freedom of expression “must be accurate and not ambiguous, and that the words used in the text do not lead to the expansion or narrowing of the restriction. . . and these laws must be published so that individuals will have knowledge of what is legitimate and what is prohibited”.<sup>1265</sup> This means that, up to a point, any restriction should be certain but not beyond an individual’s knowledge about the limitations of freedom of expression. This ensures that the individual’s right will not be overburdened in return for restrictions on freedom of expression. Indeed, the permission to limit freedom of speech is confined to the necessity that led to the restriction. Any excess or misuse in using power to limit or restrict speech is a violation of the Constitution.<sup>1266</sup>

## 9.2 Limitations

Having demonstrated that in Egypt, similarly to American law, freedom of speech is not an absolute right, the study turns to examine five limitations imposed on the right to free

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<sup>1261</sup> Kameel (n 23).p.356.

<sup>1262</sup> Boyle, Kevin, and Adel Sherif (n 1249).p.249.

<sup>1263</sup> Supreme Constitutional Court, Case No 42 of Judicial Year 16 (20 May 1995) available at <http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-42-Y16.html>. (n 1115). see also, Supreme Constitutional Court, Case No 44 of Judicial Year 7 (7 May 1988) available at <http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-44-Y7.html>.

<sup>1264</sup> Salman (n 1063).p.247.

<sup>1265</sup> Ramzi Eiwad, Alquyud Alwariduh Alaa Huriyat Altaebir Fi Qanun Aluqubat Wal Qawanin Almukmalah (dar alnahdah alarabiuh 2011).p.22.

<sup>1266</sup> Salman (n 1063).p.156.

speech in Egypt. These are thought to be divergent from American law, namely, protection of the reputation of others, the protection of public morals and the protection of national security.

### **9.2.1 Freedom of Expression v. the Protection of the Reputation of Others**

The protection of the reputation of others is a legitimate ground for restricting the right to freedom of expression. Protection against defamation is regarded as a sound reasons for proscribing freedom of expression. In Egypt, an individual's reputation is highly prized and strongly protected. Whether true or false, a defamatory statement, which tends to injure the individual's or groups'<sup>1267</sup> reputation among respected segments of society (public place), and occurs either through pure speech (photographs, pictures, statues, cartoons, etc., whether in books, magazine or film) or symbolic speech (signs and gestures), is a crime that deserves punishment. The Cassation Court, Egypt's highest court of ordinary (non-constitutional) civil and criminal justice, asserted that "respect for freedom of private life of citizens and not to the attack on their honour and reputations".<sup>1268</sup> According to Egyptian law, the concept of defamation can be classified as follows:

#### **9.2.1.1 Slanderous Accusation (Qadhf)**

Slander, in Article 302/1 of the Egyptian Penal Code, is defined as

"[w]hoever attributes to another, by any of the methods prescribed in Article 171 of this law, matters which if they were true would necessitate inflicting on the person to whom they are attributed, die penalties prescribed legally or lead necessarily to despising him among patriots and fellow citizens".<sup>1269</sup>

According to Egypt's law, slander involves all meanings that lead to despising dignity.<sup>1270</sup> The following examines the conditions where alleged slander statements were found to be a crime. It appears that the Egyptian Penal Code has formulated three different tests

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<sup>1267</sup> Alqsas (n 1061).pp.293-296.

<sup>1268</sup> Cassation Court, 1844 (1990).

<sup>1269</sup> Egypt's Criminal Code,

<[https://www.unodc.org/res/cld/document/criminal\\_code\\_of\\_egypt\\_english\\_html/Egypt\\_Criminal\\_Code\\_English.Pdf](https://www.unodc.org/res/cld/document/criminal_code_of_egypt_english_html/Egypt_Criminal_Code_English.Pdf)>accessed 14 Sep 2017.'

<sup>1270</sup> Alqsas (n 1061).p.312.

in order to determine whether a statement is slanderous, which are based on the attribution; publicness; and criminal intent.

Firstly, attribution: slander is considered to be a crime when it is directed against a specific person either in a direct or indirect manner, whether in writing or spoken words or any other form of speech, attempting to discredit that person's character, reputation or family that would cause that person to be shunned or avoided.<sup>1271</sup> This means that, if the instance of speech does not lead to the person being despised among his community members, the speech is not slanderous; for example, if someone says that you are a bad football player or that you do not belong to a famous family. According to one commentator, this kind of speech is completely different from the cases of slander that are directed only to "honour and dignity".<sup>1272</sup> Moreover, the rules do not discriminate whether the slander is direct or indirect, true or false, or just a repetition of rumours or stories flowing from third parties.<sup>1273</sup> In the eyes of Egyptian law, when the slanderous statement is made about a live person with names and adjectives which are straightforwardly slanderous in the customary usage of most people, this is an offence that invokes punishment. The Court of Cassation, the highest court at the ordinary judicial body<sup>1274</sup> defined slander as the state of mind that can be understood not only by direct speech but also via surrounding circumstances,<sup>1275</sup> for example, when an expression by either word or gesture indirectly attacks the family of the person whom it concerns by saying, for instance, your mother is rich because she sleeps outside the home.<sup>1276</sup>

It is worth noting here that directing slander without attributing it to a specific person is not considered a crime. In that case, the situation is completely different from the statement directed against a specific person, family, or society.<sup>1277</sup> This is because the meaning that it conveys cannot generally be proven without evidence. In other words, slander requires proof of its veracity since the mere gesture of slanderous words is enough for the offence to have occurred. According to Alasyuti, directing hurtful speech without

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<sup>1271</sup> Kameel (n 23).pp.370, 371. See also, Hamdi Alasyuti, *Alsb Walqadhif Wahuriyat Alraaa Waltaebir* <<http://www.anhri.net/wp-content/uploads/2012/02/السب-والقذف-والتعبير-الرأى-حريية-والقذف-السب>>.p.20.

<sup>1272</sup> Alqsas (n 1061).p.299.

<sup>1273</sup> Alasyuti .p.17.

<sup>1274</sup> Boyle, Kevin, and Adel Sherif (n 1249).p.132.

<sup>1275</sup> Alqsas (n 1061).p.294. Also, see Court of Cassation, No 37392 ,Year 73 (7 May 2005).

<sup>1276</sup> Court of Cassation, No1168, Year 19 (16 Jan 1950).

<sup>1277</sup> Alqsas (n 1061).p.293.

attributing it to a specific name or title means that there are no facts or information and, thus, there is no slander.<sup>1278</sup>

Secondly, publicness: Egypt's Law has asserted that there can be no slanderous crime without publicness. Under Article 171 of the Penal Code, publicness can be created by talking, shouting, writing, or using any other forms of speech in a public place in such a way that can be understood.<sup>1279</sup> This includes abuse that can be seen on TV and social media, as it can be watched by many people in that way.<sup>1280</sup> Indeed, Egypt's law cannot accommodate slander in publicness under its threshold of freedom of speech. Shedding light on the publicness factor, Alqas' interpretation says that abuse by magazines is more dangerous than abuse in public places because the influence of the first case is much stronger than the latter.<sup>1281</sup> However, the publicness in abuse cases is excluded from legal restriction when it takes place either in government departments such as complaints cases.<sup>1282</sup> According to Article 309, abuse is excluded in "what either litigant imputes to the other litigant in the verbal or written defence before the court".<sup>1283</sup> In case No 8439 of Year 70 (8 Dec 2003), the Court of Cassation stated that the boundaries of permissible criticism ought to be protect the reputation and dignity of others.<sup>1284</sup> Also, abuse can occur in private places,<sup>1285</sup> such as during a meetings of friends. However, in some cases,<sup>1286</sup>

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<sup>1278</sup> Alasyuti (n 1271).p.19

<sup>1279</sup>According to article 171 "[t]alk or shouting shall be considered publicly made if it is declared openly or reiterated via any mechanical method at a general meeting, on a public road or any other frequented place, or if it is declared openly or reiterated, such that anyone found on that road or in that place can hear it, or if it is diffused by wireless or any other method. The deed or hint shall be considered publicly made if it takes place at a general meeting, on a public road, or at any other frequent place, or if it takes place such that whoever is found on that road or at that place can see it. Writing, drawings, pictures, photographs, sings, symbols and other representation method shall be considered as publicly displayed, if they are distributed without differentiation to a number of people, or if they are displayed such that whoever is found on the public road or at any frequent place can see them, or if they are sold or offered for sale at any place". See, 'Egypt's Criminal Code, <[https://www.unodc.org/res/cld/document/criminal\\_code\\_of\\_egypt\\_english\\_html/Egypt\\_Criminal\\_Code\\_English.pdf](https://www.unodc.org/res/cld/document/criminal_code_of_egypt_english_html/Egypt_Criminal_Code_English.pdf)>accessed 17 Sep 2017.'

<sup>1280</sup> Alasyuti (1271).p.24

<sup>1281</sup> Alqas (n 1061).p.310.

<sup>1282</sup> *Court of Cassation, No 28123, Year 67 (4 Apr 2007)*.

<sup>1283</sup> Egypt's Criminal Code,

<[https://www.unodc.org/res/cld/document/criminal\\_code\\_of\\_egypt\\_english\\_html/Egypt\\_Criminal\\_Code\\_English.pdf](https://www.unodc.org/res/cld/document/criminal_code_of_egypt_english_html/Egypt_Criminal_Code_English.pdf)>accessed 18 Sep 2017.'

<sup>1284</sup> *Court of Cassation, No 8439, Year 70 (8 Dec 2003)*.

<sup>1285</sup> Alasyuti (1271).p.26.

<sup>1286</sup> The Court of Cassation has asserted that record telephone's abuse must be subjected to the Court permission. See, *The Court of Cassation, in case No 8862, Year 65 (2 Dec 2003)*.

telephone abuse is the only way that can be criminalised in private cases<sup>1287</sup> because, in such cases, the criminal intent is more obvious than in other cases.<sup>1288</sup>

Thirdly criminal intent: slander is among the crimes that need to produce the factor or element of criminal justice. According to Egyptian law, it is presumed that, in slander cases, the defendant is not guilty of the alleged crime unless and until there has been criminal intent.<sup>1289</sup> Criminal intent is based on two elements: firstly, the perpetrator's knowledge that his or her slander of another, if it were true, would have a negative effect on the target's relationships and reputation among his local community members.<sup>1290</sup> Secondly, there is the intention of publicness when the abuse is committed by a publication method such, TV, social media, newspaper. . . etc.<sup>1291</sup>

However, the only way, in which the criminal intent can be excluded from being part of slander, is when the abuse is not attributed to a specific person or group. The intention to protect the public interest is sufficient evidence to avoid criminal prosecution. According to the Court of Cassation, in many slander cases, criminal intent is considered to be the corner stone of proving the crime. However, when the abuse is attributed to public employees, the intention can be used as a tool to prove the truthfulness of slander when it is based on valid intention.<sup>1292</sup> In other words, it is impossible to falsely abuse public employees, for instance, of things like corruption, bribery or theft. According to Egypt's law, slander is not permissible by claiming without basis that they do or have done something that is considered to be a crime especially when those accusations are attributed to public employees. It should be noted here that establishing criminal intent is subject to the court's interpretation. For example, if the slanderous words hold two meanings, the court can evaluate the meaning to decide whether or not it holds criminal intent.<sup>1293</sup>

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<sup>1287</sup> Article 308, paragraph 1 of the Penal Code stated that "whoever abuses another by telephone, shall be punished with the penalties in Article 302..."

<sup>1288</sup> Kameel (n 23).p.372.

<sup>1289</sup> The Court of Cassation, in case No 18756, Year 67 (11 Feb 2007).

<sup>1290</sup> The Court of Cassation, in case No 33006, Year 69 (5 Jun 2003).

<sup>1291</sup> Kameel (n 23).p.373. See also, Alqsas (n 1061).p.305

<sup>1292</sup> The Court of Cassation, in case No 19644, Year 59 (20 Dec 1993).

<sup>1293</sup> Alasyuti (n 1271).p.34.

### 9.2.1.2 Insult (Sabb; Shatm)

Insult is another area that has a direct impact on freedom of expression. In Egyptian law, insult means cursing at another person in a way that leads to despising his or her honour or dignity.<sup>1294</sup> This might be done by either spoken or written words or by any other form of speech. The law has defined three principles for insult to be subject to punishment. These principles are, namely, outrage of one's honour or dignity; publicness; and criminal intention.

First, outrage of honour or dignity. Speech that insults people either directly or indirectly in a way that injures his or her dignity or which tends to lower him in the esteem of right-thinking members of society, is considered to be an offence of insult.<sup>1295</sup> The factor of outrage of honour and dignity is considered to be the only element that differentiates insult from slander. To put it more plainly, in the case of slander, the abuse of attribution should not be directed to general matters such as 'you rigged the company documents', whereas, in the case of insult, the attribution should not be directed to a specific matter, for instance, 'you are a criminal or a hustler'.<sup>1296</sup> If it remains unclear in a case whether the action constitutes slander or insult, the judge or court can refer to the surrounding circumstances in order to understand the meaning.<sup>1297</sup> For example, a person, who points out to a judge or public employee the money in his hand would not be permitted to escape prosecution by claiming that the expressed sign referred to riches or power. Indeed, especially in freedom of expression cases, the medium is a vital factor in distinguishing whether an expression deserves protection or not.<sup>1298</sup> In the words of Schauer, "freedom of expression can be traced to the fact that 'expression' can have two meanings, meanings that are often uncritically interchanged in this context".<sup>1299</sup>

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<sup>1294</sup> According to Article 306 of the Penal Code "[a]ny cursing that comprises no attribution of a specific fact, but constitutes in any aspect an outrage of one's honor or dignity, shall be punished...". See, 'Egypt's Criminal Code, <[https://www.unodc.org/res/cld/document/criminal\\_code\\_of\\_egypt\\_english\\_html/Egypt\\_Criminal\\_Code\\_English.pdf](https://www.unodc.org/res/cld/document/criminal_code_of_egypt_english_html/Egypt_Criminal_Code_English.pdf)> accessed 20 Sep 2017.'

<sup>1295</sup> The Court of Cassation, in case No 3418, Year 79 (25 Feb 2012).

<sup>1296</sup> Kameel (n 23).p.377.

<sup>1297</sup> The Court of Cassation, in case No 3418, Year 79 (25 Feb 2012).

<sup>1298</sup> Trager and Dickerson (n 12).p.28.

<sup>1299</sup> Schauer.p.50.

Second, publicness as articulated in Article 171. Egyptian law considers insult, whether committed by telephone, spoken, written, or any other method of publicness, to be a violation of freedom of speech, and Egyptian law classifies it as a restricted speech.<sup>1300</sup> The publicness can take place in open or public places where a group of people may have heard the insult.<sup>1301</sup> However, this does not require the victim to hear or be present while the insult occurred.<sup>1302</sup> Furthermore, as mentioned, publicness can take different forms: it can take places on social media, TV or during any public meeting. This means that if such an act occurred in closed places, such as houses, offices, or private property that do not include a different sample of people, this would not excluded it from being declared a crime.<sup>1303</sup>

Third, Criminal Intent. Speech, which qualifies as insult, cannot be criminalised unless the insulting party has knowledge and intention to publish his/her insult widely. Thus, if the insult happens in either a private house or office or in place not open to the public, there would be no public crime.<sup>1304</sup> Similarly, there would be no sufficient insult or crime if a person mentioned words to another without knowledge and intention to insult such people who speak foreign languages.<sup>1305</sup>

### **9.2.1.3 Does Egypt's Law Protect Criticism of Public Officials?**

Article 302, paragraph 2 of the Penal Code allows for more extensive freedom of expression in cases that involve criticism of public figures. This includes governmental employees; persons holding public office and/or responsible for the public administration and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sports and so on. Freedom of expression is especially important for the democratic process and that the limits of permissible criticism are wider with regard to public persons than in relation to private citizens. The law rules that, holding to the following four conditions, individuals have a right to

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<sup>1300</sup> See Article 171 at 'Egypt's Criminal Code, <[https://www.unodc.org/res/cld/document/criminal\\_code\\_of\\_egypt\\_english\\_html/Egypt\\_Criminal\\_Code\\_English.pdf](https://www.unodc.org/res/cld/document/criminal_code_of_egypt_english_html/Egypt_Criminal_Code_English.pdf)>accessed 21 Sep 2017.'

<sup>1301</sup> The Court of Cassation, in case No 28062, Year 59 (30 Apr 2001). See also, Kameel.p378.

<sup>1302</sup> Alqsas (n 1071).p.315

<sup>1303</sup> The Court of Cassation, in case No 10068, Year 59 (04 Jun 1992). See also, Kameel (n 23).p.378. See, Alasyuti (n 1271).pp.63-66.

<sup>1304</sup> The Court of Cassation, in case No 15237, Year 61 (27 Dec 1995). See also, Alqsas (n 1071).p.316.

<sup>1305</sup> Alqsas (n 1071).p.316.

criticise or even, in some cases, to slander governmental employees or those of a similar status.<sup>1306</sup> Firstly, the attribution of abuse can be directed against any official. Secondly, the abuse should not be directed at the employee's personality but at his or her services. Thirdly, the intention of criticism should be aimed at developing or protecting the public interest. Lastly, the attribution to the public employees should be introduced with sufficient evidence regarding the slander's truthfulness.<sup>1307</sup> Indeed, the reason behind this approach towards slanderous statements directed at officials is that such criticism or comment on public matters aims to protect the public interest. In the words of one commentator, "[w]henver public official, for any unlawful reason, refrain from fulfilling their duties correctly and thus violate the public faith in them, the correction of their corruption is both a right and a duty".<sup>1308</sup> In case No 42 of Year 16, the SCC provided that the citizens' free opinions and ideas on public and political issues were essential tools for national security. The SCC added that, when criticisms of politicians or public figure did not infringe upon the law, it ought to be immune to any restrictions.<sup>1309</sup> It should be noted here that, whilst criticism is permissible, the Penal Code asserted certain boundaries to permissible criticism, such as that it "occurs in good faith and does not exceed to the duties of the position, representation or public service, providing the crime perpetrator shall establish the fact of all work assigned thereto".<sup>1310</sup> The Court of Cassation reiterated that freedom of expression was guaranteed for people to criticise public officials but this should be taken within the limits of permissible criticism.<sup>1311</sup> In short, the limits of acceptable criticism are established to put state authority under individuals' supervision in order to ensure the highest degree of justice and transparency.

### **9.2.2 Freedom of Expression v. the Protection of Public Morals**

The protection of public morals is another legitimate ground for restricting the right to freedom of expression. There is no self-measurement of public morals but rather they are

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<sup>1306</sup> Alqas (n 1071).p.310.

<sup>1307</sup> Alasyuti (n 1271).

<sup>1308</sup> Boyle, Kevin, and Adel Sherif (n 1249).p.131.

<sup>1309</sup> Supreme Constitutional Court, Case No 42 of Judicial Year 16 (20 May 1995) available at <http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-42-Y16.html>. (n 1115).

<sup>1310</sup> Egypt's Criminal Code, <[https://www.unodc.org/res/cld/document/criminal\\_code\\_of\\_egypt\\_english\\_html/Egypt\\_Criminal\\_Code\\_English.pdf](https://www.unodc.org/res/cld/document/criminal_code_of_egypt_english_html/Egypt_Criminal_Code_English.pdf)>accessed 16 Sep 2017.'

<sup>1311</sup> Court of Cassation, No 37392 ,Year 73 (7 May 2005). See also, The Court of Cassation, in case No 3087, Year 62 (8 May 2000).

the values and ideals that are derived from heavenly principles in the way that sets apart one community from another.<sup>1312</sup> In Egypt, protection of public morals is one of the most important principles that the Constitution is keen to protect.<sup>1313</sup> Protection of morals tends to preserve the community principles and values from any acts or speech that threaten it.<sup>1314</sup> In this respect, Article 178 of the Criminal Code outlines strict rules on the situations where public morals are violated. It states, “[w]hoever makes or holds, for the purpose of trade, distribution, pasting or displaying printed matter, manuscripts, drawings, advertisements, carved or engraved pictures, manual or photographic drawings, symbolic signs, or other subjects or pictures in general, if they are against public morals, they shall be punished. . .”.<sup>1315</sup> This article presumes to protect and preserve the moral fabric and cultural identity of Egyptian society. One commentator pronounced, “the ultimate goal of criminalising violation of public morals is to protect the community from corruption and perversion in its different forms”.<sup>1316</sup>

Since either obscene or pornographic material constitutes a real threat to public morality, Egyptian law has sought not only to fight these acts but, also, the manners that led to their commission. In this respect, Egyptian law has imposed excessive rules on incitements of indecency and adultery.<sup>1317</sup> The Court of Cassation held that the facilitation of incitement of obscene or any other indecent form of behaviour was a crime that deserved punishment. The concept of pornography is not restrictive and extends to all forms of speech that have a significant effect on individuals.<sup>1318</sup> Thus, it is not surprising that restrictions on obscene or pornographic material would be extended to cover either the

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<sup>1312</sup> Mazin Alnabar, ‘Alnizam Aleam W Aladab Aleamah Fi Alqanun’ <[http://www.bibliodroit.com/2016/08/blog-post\\_77.html](http://www.bibliodroit.com/2016/08/blog-post_77.html)> accessed 13 January 2018.accessed 24 Sep 2017.

<sup>1313</sup> Article 12 of Egypt’s Constitution 1971 stated that “[s]ociety shall be committed to safeguarding and protecting morals, promoting the genuine Egyptian traditions and abiding by the high standards of religious education, moral and national values, and the historical heritage of the people, scientific facts, socialist conduct and public manners within the limits of the law. The State is committed to abiding by these principles and promoting them”. Also, Article 10 Egypt’s constitution 2014 stated that “Family is the basis of society and is based on religion, morality, and patriotism. The state protects its cohesion and stability, and the consolidation of its values”.

<sup>1314</sup> Fahmi,p.281.

<sup>1315</sup> Egypt’s Criminal Code, <[https://www.unodc.org/res/cld/document/criminal\\_code\\_of\\_egypt\\_english\\_html/Egypt\\_Criminal\\_Code\\_English.pdf](https://www.unodc.org/res/cld/document/criminal_code_of_egypt_english_html/Egypt_Criminal_Code_English.pdf)>accessed 22 Sep 2017.’

<sup>1316</sup> Ramzi Awad, Alquyud Alwaridah Alaa Huriyat Altaebir Fi Qanun Aleuqubat Walqawanin Almukmilah Lah (Derasah Muqarinah) (dar alnahdah alearabiuh 2011).pp.139, 141.

<sup>1317</sup> Article 269 of the Penal Code stated that “whoever is found on a public road or a traveled and frequented place inciting the passers with signals or words to commit adultery shall be punished ...”.

<sup>1318</sup> The court stated that incitement should be serious and effective. See, *Court of Cassation, No 2052*, Year 37 (27 Feb 1968).

conventional and unconventional forms of speech whether in the form of books, films, photographs or other images.

Some publishing is under constraint due to its role in producing obscene and indecent materials. The Court of Cassation held that published books, which portrayed women and girls as a cheap commodity for practicing sex and were an advocacy for pornography, were criminal offences that constituted a real threat to the community's values and principles.<sup>1319</sup> Similarly, the Administrative Court struck down Government departments' decisions of non-cooperation to suspend sexual websites. The Court held that sexual websites constituted a real threat to Egyptian values and principles and, therefore, the bans on sexual websites were legitimate and necessary for the protection of morals.<sup>1320</sup>

So far as possible publicness in adultery and indecency arguments should be distinguished from private and bona fide cases. They should not be confused. The Court of Cassation upheld that immoral crimes could be excluded from Article 171 of the Penal Code if there was no publicness.<sup>1321</sup> Also, in another case, the North Cairo Court stated that the publication of books or stories that contained references to public morals was not a crime if the books were introduced under bona fide.<sup>1322</sup> For example, some universities or schools show naked persons to students for educational purposes. Plainly, as mentioned previously, Egyptian law is keen to protect public morals, especially in the cases that are characterised by their publicness and intentions to demolish public morals and thus are real threats to community values.<sup>1323</sup>

Indeed, the monitoring of the publications of indecent materials produces real benefits to the community. There is no doubt that the publication or dissemination of such indecent material has a negative effect on public morals. Moreover, as long as publication or dissemination of such material is exercised within the proposed limits, many of the negative phenomena, such as harassment and other immoral acts, disappear. Thus, the restriction of such material is necessary not only to protect public morals but, also, it can offer a valuable opportunity to create decent publications that are able to perceive and

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<sup>1319</sup> *The Court of Cassation, case 2481, Year 3 (20 Nov 1933).*

<sup>1320</sup> Administrative Court, case 10355, Year 63 (12 Jul 2005). at <http://qadaya.net/?p=4478>.

<sup>1321</sup> If there is no publicness in immoral crimes, the crime deserve penalty under prong 3 of Article 385 of the Penal Code. See, *The Court of Cassation, case 2116, Year 23 (1 Jul 1954).*

<sup>1322</sup> *North Cairo Court, case 3978, Year 3 (30 Jan 1986).* Cited in Lotfi Muhammed, *Malaf kadaia huriyat alray walltababer fi massr (Almussah alfnyah, Alqahiruh,1993)*

<sup>1323</sup> Fahmi (1217).p.283.

protect community values. According to this argument, the problem of pornography is confined to its harmful consequences either at an individual or a collective level.

### **9.2.3 Freedom of Expression v. the Protection of National Security**

National security is one of the exceptions that can limit freedom of expression in Egypt. It is pleaded often in most general terms that the purpose of a limit on freedom of speech simply exists to protect society from such dangers that may threaten its safety. Although Egyptian law protects freedom of expression, this does not mean that the law of free speech opens the gates widely for States to limit the right to free speech.<sup>1324</sup> On the contrary, the government cannot limit or ban of this right without sufficient justification for its restriction.<sup>1325</sup> Article 47 provides that “[f]reedom of opinion is guaranteed. Every individual has the right to express his opinion and to disseminate it verbally, in writing, illustration or by other means within the limits of the law. Self-criticism and constructive criticism are guarantees for the safety of the national structure”. Also, Article 48 states, “[f]reedom of [expression] shall be guaranteed. . . However, in the case of declared state of emergency or in time of war, limited censorship may be imposed. . . in matters related to public safety or for purposes of national security in accordance with the law”.<sup>1326</sup> As Sayed described, the protection of national security is a legitimate right for the State to strike a balance between the interest of the State and individuals.<sup>1327</sup>

The Administrative Court considered the issue of national security in case No 7174 of Year 44 (14 Sep 1992). In this case, the main issue was the legitimacy of restraining the publication of Aietimad Khurshid’s book entitled ‘Secrets of the Trail’, which criticised the Egyptian intelligence service. The author was convicted and sentenced to a year’s imprisonment, and the book was confiscated. The Court’s argument was that Khurshid had violated the principles of criticism in a way that reflected poorly on the reputation of the intelligence service and Egyptian national security as a whole. The Court stated that freedom of expression was an initial right, but this did not mean that anyone could

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<sup>1324</sup> Salman (n 1063).p.154.

<sup>1325</sup> Administrative Court, case 5569, Year 37 (date not mentioned). Cited in Lotfi Muhammed, Malaf kadaia huriyat alray walltababer fi massr (Almussah alfnyah, Alqahiruh,1993)

<sup>1326</sup> ‘Egypt’s Constituion of 1971, <

[http://www.palatauruscentrostudi.eu/doc/EGY\\_Constituion\\_1971\\_EN.pdf](http://www.palatauruscentrostudi.eu/doc/EGY_Constituion_1971_EN.pdf)> accessed 26 Sep 2017’

<sup>1327</sup> Refaat Syed. Huriyat altazahur Wanekas Tabieatiha alaa Altanzim Alqanunii fi Jumhuryat Masr Alarabyah maa Alasharh eilaa baad Alduwal Alarabyah (drasuh tahlilyah) (No date nor publisher mentioned). pp.76, 77.

express his/her opinions without limitation. Therefore, the Court considered that the author's conviction for expression of her views was justified in order to protect national security.<sup>1328</sup>

Also, in case No 18572 of Year 84 (27 Jan 2015), the accused were members of demonstrations that took place before the public department. During the march, the demonstrators carried out many anti-lawful acts, such as attacking security forces and damaging public and private property, which constituted a real threat to public security. The primary Court convicted the accused of the intention to commit crimes in a way that constituted a real threat to the safety of citizens and national security. The Court of Cassation shared the primary Court's views and found that the acts committed by the accused violated the basic principles of freedom of expression. The Court emphasised that free expression ought to be practiced in a peaceful manner. Therefore, it shared the primary Court's decision that the offenders ought to be convicted of violations of the peace and security.<sup>1329</sup>

Similarly, in case 15575 of Year 61(29 Dec 2007), the Court gave the protection of national security and public safety priority over the right to freedom of expression. Although freedom of opinion and expression are guaranteed according to Articles 47 and 48, the Court insisted that protection of freedom of expression was not limitless. The grave impact of terrorism on national security legitimises the restrictions on freedom of expression. The Court stated that the government had a wide power to suspend terrorist websites and activities that posed a threat to national security.<sup>1330</sup>

Decisions on national security matters at the national level have received a wide margin of appreciation under Egyptian law. This is because the government's services demonstrate expertise when it comes to questions of national security.<sup>1331</sup> However, the government must have a compelling reason to limit freedom of expression for the purpose of national security. Consequently, any restriction of that right must be justified in terms of Article 47 and 48. Besides being provided by Egyptian law, it must be necessary, also, for the protection of national security.<sup>1332</sup> In case 7741 of Year 57 (4 Feb

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<sup>1328</sup> Administrative Court-individuals section, case No 7174, Year 44 (14 Sep 1992). Cited in Lotfi Muhammed, *Malaf kadaia huriyat alray walltababer fi massr* (Almussah alfnayah, Alqahiruh,1993)

<sup>1329</sup> Court of Cassation, No 18572, Year 84 (27 Jan 2015).

<sup>1330</sup> Administrative Court, case 15575, Year 61 (29 Dec 2007). at <http://qadaya.net/?p=4478>.

<sup>1331</sup> Abdulmoty (n 1184).p495.

<sup>1332</sup> Awad (1316).p.319.

2003), the Court did not share the Ministry of the Interior's opinion and rejected their claim that the demonstration might constitute a threat to national security because the Ministry of the Interior failed to demonstrate that the rejection was necessary for the purposes of national security. The Court emphasised the particular importance of free expression for citizens and demonstrators alike. Therefore, it considered that the claimants' order to organise a demonstration was a legitimate right that gained full protection under the Egyptian Constitution.<sup>1333</sup>

A number of conclusions can be drawn from the above examination of protection of national security cases. Firstly, it appears that a general formula for legally restricting freedom of expression in the context of national security is subject to different considerations. Each case requires a consideration of the specific relevant context and bears in mind a number of different elements. Secondly, freedom of expression can be limited when its exercise causes a real threat to national security. Thirdly, the Egyptian Government can restrict speech, but it must have a compelling reason for doing so. Lastly, and related to the third point, Egyptian Courts are concerned with the content of the expression restricted by the government rather than the type of expression. The Courts distinguish between speech for peaceful purposes and language that promotes terrorist activities. In fact, from the current discussion on restrictions on freedom of expression in the context of national security, there is one common sub-theme relating to institutional design. The discussion reveals that, although freedom of expression in Egypt is not the only prioritised right, there is a strong indication of the Courts' commitment that shows the country's strength in defending freedom of expression.

#### **9.2.4 Freedom of Expression v. Processions and Protests**

The protection of processions and protests are another legitimate ground for protecting the right to freedom of expression. The right of processions and protests could be restricted when its exercise causes a real threat to national security or human life. Processions and protests, which tend to express public opinions in which people take part in to show their opposition to something or their support for something and occur either in the form of pure speech (photographs, pictures, statues) or symbolic speech (sign and gesture) or both of them.

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<sup>1333</sup> Administrative Court, case 7741, Year 57 (4 Feb 2003). at <http://qadaya.net/?p=4478>.

The Egyptian Constitution in its implementation of the theory of democracy, as discussed previously in Chapter Seven, allows people to demonstrate. This has been obvious from the first constitution issued in 1923, which stipulated under article 20 people's right to organise peaceful public meetings.<sup>1334</sup> Also, the last constitution that was issued in 2014 asserted people's right to demonstrate. Article 73 stated, "[c]itizens have the right to organize public meetings, marches, demonstrations and all forms of peaceful protest, while not carrying weapons of any type, upon providing notification as regulated by law... Security forces may not to attend, monitor or eavesdrop on such gatherings".<sup>1335</sup> In a free and democratic society, it is almost too obvious to have to state that people are allowed to use public spaces to make their views heard and that this avenue of speech must always be open. Any attempt to stifle such demonstrations or processions contradicts the basic right to freedom of expression. Egyptian law, therefore, has given protest and processions a wide margin of protection. Article 3, according to Law No.107 for 2013, defined a processions as "every march of individuals in a public place, or road, or square that exceeds ten to peacefully express opinions or issues that are not political". It further recognises demonstrators as "every gathering of individuals in a public place, or proceeds on the public roads and squares that exceeds ten to express their opinions or demands, or political discontentment in a peaceful manner".<sup>1336</sup> The study here aims to find how the jurisprudential approach of Egyptian law strikes a balances between free speech and the right to protests and processions.

The Supreme Constitutional Court has recognised the importance of citizens being able to express their opinions without fear of interference or punishment, within the limits set by law.<sup>1337</sup> Therefore, whenever the rights or reputation are threatened of others or national security or public order, the SCC considers in is a violation of Article 73 of the Constitution. 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 following lines will explore the extent to which processions and protests can be restricted, in the context of Egyptian law. The first set of examples is Case No 232 of

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<sup>1334</sup> Egypt's Constitution, 1923.

<sup>1335</sup> Egypt's Constitution, 2014.

<sup>1336</sup> Law No.107 for 2013 For Organizing the Right to Peaceful Public Meetings, Processions and Protests, <[http://Www.Constitutionnet.Org/Sites/Default/Files/Protest\\_law\\_issued\\_nov\\_24.Pdf](http://Www.Constitutionnet.Org/Sites/Default/Files/Protest_law_issued_nov_24.Pdf)> Accessed 06 July 2018.'

<sup>1337</sup> Supreme Constitutional Court, Case No 37 of Judicial Year 11 (6 Feb 1993) available at <http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-37-Y11.html>.

Judicial Year 36 (decided on 7 May 2017), in which the applicant participated in a demonstration. Public prosecution charged him and many other people for participating in an unlawful demonstration that threatened public interests in violation of Articles 1, 2, 3, 4, 7, 8, 16, 19, 21 of the Presidential Law No 107/2013 for organizing the right to peaceful public meetings, processions and protests and sentenced them to two years of jail time and a fine in the amount of 10000 Egyptian Pound. The applicant appealed and claimed unconstitutionality of the Law 107/2013. The SCC found the punishment of the applicant and other people was justified in order to protect national security and the public interest. Therefore, it considered the applicant's conviction and punishment and upheld that the demonstration did violate the constitution.<sup>1338</sup> The Court's decision, certainly, emphasised the particular importance of free expression to be practiced within the limits of law.

Similarly, members of the 6 Oct group were charged for three years in prison for their role in unlawful procession. The applicants appealed the judgment. The Court of Cassation emphasized the public interest inherent in the right of freedom of expression and to engage in processions and demonstrations. However, in this case, the Court found that the demonstrators caused a real threat to national security and public interest by attacking police men and destroying private property; therefore, the Court found that the accused their deserved punishment under Article 19 of the Law 107/2013. The Court concluded that prevent demonstrations due to threatening national security and public interests consistence with Article 7 of the Law 107/2013.<sup>1339</sup> The Court thereby contributed clearly to the right of public authority to restrict freedom of expression when it exceeded its limitation. Thus, the Court rejected the appeal.

Also, the Court of Cassation received individuals' appeals after the administrative authority had charged them under Article 32 of the Punishment Law for participating in unlawful demonstrations in such a way that constituted a real threat to national security and public interests. The Court of Cassation based its analysis on the premise of rule of law and found that the relevant judgment met the standards of restriction of a demonstration. The Court, by referring to the margin of appreciation of courts, found that the reasons for punishment were sufficient and proportionate. In the Court's opinion, the

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<sup>1338</sup> Supreme Constitutional Court, Case No 232 of Judicial Year 36 (decided on 7 May 2017) available at <http://www.cc.gov.eg/Images/L/379200.pdf>.

<sup>1339</sup> Court of Cassation, Case No 18572 of Judicial Year 84 (decided on 27 Jan 2015) available at <http://www.cc.gov.eg/Images/H/111234351.pdf>.

restrictions and punishment was justified to protect public interests and national security; thus, the restrictions and punishments were necessary for the sake of democratic society. Thus, the Court rejected the appeal.<sup>1340</sup>

The above-mentioned cases demonstrate that processions and protests are protected by law. However, this right can be restricted as long as this restriction aims to protect interests related to national security and public and private property. That is, these rights can be limited by law to protect the interests of others, but only when the limitation is proportionate and necessary in a democratic society. Emphasizing this point, the SCC in Case No 86 of Judicial Year 18 (decided on 6 Dec 1997) stated, “[t]he Validity of governmental regulation must be determined by assessing the degree of infringement of the right of association against the legitimacy, strength, and the necessity of the governmental interests and the means of implementing these interests”<sup>1341</sup>. So, for example: the right to free speech will not protect a person who tries to insult or make slanderous accusations against another but it will protect criticism of a public figure; the right to protest won’t protect violent gatherings but it will protect peaceful protests. That is, protecting the right of protests and processions does not mean that this right is limitless.<sup>1342</sup> Thus, restrictions, as the above cases show, are justified.

### 9.3 Chapter Summary

The discussion reveals that, although different forms of freedom of expression in Egypt is protected, the judicial commitment demonstrates a strong sense of protection for the reputation of individuals, public morals, processions and protests and national security. Under Egyptian law, freedom of expression is not only a symbol of a democratic society but is also the right of all members of the community. Egyptian law constitutes a method of achieving social progress by allowing freedom of expression within limitations. As defined by the Egyptian Constitution, it embraces many freedoms including freedom of expression. However, it should be consistent with the underlying values of Egyptian

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<sup>1340</sup> Court of Cassation, Case No 18989 of Judicial Year 84 (decided on 18 May 2015) available at <http://www.cc.gov.eg/Images/H/111237867.pdf>.

<sup>1341</sup> Supreme Constitutional Court, Case No 86 of Judicial Year 18 (6 Dec 1997) available at <http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-86-Y18.html>.

<sup>1342</sup> Refaat Syed, *Huriyat Altazahur w Aineikas Tabieatiha Ealaa Altanzim Alqanunii Fi Jumhuriat Masr Alearabiih* (No publisher and date mentioned).p.77.

community values and principles. Therefore, restrictions on freedom of expression “can only be upheld on such grounds as the prevention of disorder or crime and the protection of health, morals, and the rights and freedom of others”.<sup>1343</sup> It is obvious from this argument that, under Egyptian law, freedom of expression is not limitless.

The above discussion showed that if the Egyptian Constitution were to be reconstituted, its provisions would be: No branch of government, shall abridge any form of freedom of speech except (1) when speech presents a direct and imminent danger of inciting unlawful conduct; (2) contains obscenity or is sexually explicit; or (3) constitutes a threat to national security. 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 offensive content. That is, some speech, which is undoubtedly offensive, can gain constitutional protection. According to the SCC, such speech is vital for public progression. For this reason, the SCC struck down an authorised law that imposed on a person who was accused of a slanderous crime to introduce at the first investigation and within five days a sufficient proof for his attribution to public officials. Otherwise, his right to criticise would be neglected and he would be subject to prosecution. The SCC ruled that individuals and the media should be free to criticise and should not be prosecuted even when the speech was harsh since it was the best way to reach the core of the truth.<sup>1344</sup> This equation has given the right to free speech a preferred position over other values and principles, such as equality and human dignity. I believe that all law criteria are important and scrutiny of all these aspects cannot be neglected, even or especially by liberal democratic societies. As long as these criteria are concerned with the protection of the reputation of others, public morals and national security, restrictions on freedom of expression can be justified.

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<sup>1343</sup> Boyle, Kevin, and Adel Sherif (n 1249).207.

<sup>1344</sup> Supreme Constitutional Court, Case No 42 of Judicial Year 16 (20 May 1995) available at <http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-42-Y16.html>.

## Chapter Ten

### 10. Conclusion

#### 10.1. Conclusion

The main aim of this thesis was to elaborate upon and analyse the limitations of freedom of expression in the United States of America and Egypt. Judicial experience in both Egypt and the United States of America has demonstrated the importance of examining the limitation of freedom of expression in these two countries. The research indicates that the respective laws appear to offer a high-level protection to freedom of expression as discussed throughout the thesis. The theories that constitute freedom of expression in both countries are based on a solid foundation. The different views of freedom of expression should establish a positive basis for understanding the limitations of freedom of expression.

This study argues that freedom of expression in its various forms is an important fundamental right that should be afforded legal protection.<sup>1345</sup> It is necessary to acknowledge the limitations of freedom of speech within a country's constitutional framework in order to ensure efficient and sufficient protection of this right. This would impose positive obligations on a government to ensure that the right is available to every citizen. From this standpoint, this study calls upon Eastern and Western scholars alike to investigate more carefully and deeply the differences between Egyptian law and American law because they each represent Eastern and Western thought well respectively and therefore give insight into broader differences. Thus, there should be a clear understanding of freedom of speech and its implications. Also, courts need to be explicit when they address freedom of expression cases.

Undoubtedly, the development of protections for freedom of expression, either in the United States of America or in Egypt, is advantageous and should be encouraged. The right to freedom of expression in U.S. American law has evolved in the 20th century from the protective stages to reach "the comparative free speech jurisprudence".<sup>1346</sup> The solid foundation of the right to freedom of expression built in the United States of

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<sup>1345</sup> See Chapter Two.

<sup>1346</sup> Barendt (n 1).p. 49.

America bears testimony to the fact that “[t]he body of judicial and scholarly doctrine generated by the First Amendment. . . is by far the most influential and elaborate development of the principle of freedom of speech”.<sup>1347</sup> Similarly, Egypt is characterised among many Arab countries with a long history of protection for free speech. Further, many Islamic countries consider Egypt an ideal for Islamic States; Egypt is easily the best example for other Islamic nations for how a state can develop its legal system.<sup>1348</sup> One commentator has pointed out, “[e]nlightened interpretations of Islamic law were permitted. . . (in Egypt) and had actually contributed to the positive developments mentioned by the delegation in many fields”.<sup>1349</sup> These views have shown Egypt’s ability to enhance the realisation of universal human rights norms within the dispensation of its law.

The distinctive features of the two countries allows the conceptual analysis for the purpose of understanding how each country deals with freedom of expression. Also, it allows for a comparative approach to discover similarities, dissimilarities, strengths and weakness. The study has three focal points pertaining to the definition of the limits of freedom of expression. Firstly, it discusses the meaning of freedom of expression. Secondly, it examines the principles that constitute freedom of expression in each country. Thirdly, it examines the courts’ methods for dealing with freedom of expression cases.

Chapter Two shows that the concept of speech in a pure or symbolic form is problematic, and at in too many instances the definition depends upon circumstances. That is, context or framing can change speech from protected to unprotected speech. Pure speech as a form of conventional speech includes written, spoken and artistic speech subject to different meanings. For example, political speech is generally protected under free speech principles, but when such speech incites violence or supports a terror group, the situation would be changed from protected to restricted speech. Similarly, symbolic expression is a form of unconventional speech that can be expressed in different ways, such as demonstration, canvassing and picketing. In such cases, the content and effect of

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<sup>1347</sup> See Chapter Three. See also Wojciech Sadurski, *Freedom of Speech and Its Limits*, vol 38 (Springer Science & Business Media 1999),p.5.

<sup>1348</sup>Nathan J Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf*, vol 6 (Cambridge University Press 2006),p.16.

<sup>1349</sup> Cited in Mashood Adebayo Baderin, ‘Modern Muslim States Between Islamic Law and International Human Rights Law’ (Nottingham University 2001),p.339.

the message can be interpreted positively or negatively by its context and medium. Positive symbolic expression may occur by using normal symbols in a peaceful manner such as pasting images and posters on walls, while it can be interpreted as negative when it causes disruption, such as marches during rush hours.

Chapter Three, Section I, shows that free speech protection may be extended to many areas on instrumental grounds, i.e., on the basis that protection is necessary to foster functioning and independent values that can serve human progress. The free speech principle raises the value of speech by arguing that speech should be immune to any restrictions except conduct that leads directly to violence.<sup>1350</sup>

Many scholars have built their arguments on three basic principles: truth, democracy, and individual autonomy. The arguments discussed in this section hold in common a general concept of speech that can be applied in various situations. However, this does not mean that reliance on one principle to justify freedom of speech is a preferable approach. Professor Lawrence Byard Solum makes it clear when he says, “[i]n order to salvage a justification for the freedom of expression, the theorist may be driven to rely on a plurality of principles in the hope that the weaknesses of each is buttressed by the strengths of the others”.<sup>1351</sup> Indeed, the search for truth, individual autonomy and self-government can take different forms and has been argued many ways, but they all present ways to serve freedom of speech and draw a clear limit to that speech. This section presents an account of freedom of expression that provides at least a few answers to general questions and provides a better understanding of the values of expression and better judgment about the scope and limitations of the speech. Section II shows that the offence and harm principles play a considerable role in determining the limitation of freedom of expression. These principles distinguish between protected and unprotected speech; that is, speech that is harmful or offensive to individuals, ethics, or religion falls outside free speech protection. It should be noted here that the standards of the two principles vary and are subject to different judgments. To be precise, the cultures of people who live in liberal countries differ considerably from those who live in Islamic

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<sup>1350</sup> Barendt (n 1),p.7.

<sup>1351</sup> LB Solum, ‘Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech’ (1988) 83 Nw. UL Rev. 54.LB Solum, ‘Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech’ (1988) 83 Nw. UL Rev. 54, p.82.

states. Acts and statements that may be seen as normal in one country can be considered offensive or harmful in another.

Chapter Four explains that, while freedom of expression has wide protection under international law, its scope and limits are uncertain. In many cases that have been discussed, freedom of expression cannot be restricted unless there is a compelling interest to do so. The European Convention On Human Rights (ECHR), for example, defined situations of restricted expression. However, liberty and security sometimes collide. Therefore, the European Court of Human Rights has adopted the doctrine of the margin of appreciation to balance conflicting interests. In many cases under the European Court, judicial balancing may be both clearly feasible and desirable.<sup>1352</sup> Indeed, a balancing approach to substantive rights can allow for as much enjoyment of such rights as is compatible with the state's realization of its vital security needs. Furthermore, applying this doctrine, the States parties of the ECHR have an opportunity to have their national law applied on the international stage.

Chapter Five revealed that the scope of freedom of expression in the United States has changed considerably and become wider than it has been. That is, initially the judicial form of freedom of expression was either protected or not protected, but the last century has witnessed the Supreme Court departing from a narrow definition of speech to a broader one. This development has not only changed the legal scope of freedom of expression but also the understanding of this right.<sup>1353</sup> In the words of Friedman, “[t]here is a difference between burning one’s income tax records in order to destroy evidence of tax evasion and doing so in order to protest an oppressive tax system”.<sup>1354</sup> Indeed, adopting the principles of two factors: the intention of the speaker, and likelihood of the message being understood—or what so called ‘Spence’s test’ enables many courts to distinguish between protected and unprotected speech. Furthermore, the two forms that are examined in this chapter—symbolic expression and speech plus—have also played a considerable role in defining the limitation of speech. But, this cannot be achieved without relying on a balancing approach.

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<sup>1352</sup> Rosenfeld, M., 2005. Judicial balancing in times of stress: Comparing the American, British, and Israeli approaches to the war on terror. *Cardozo L. Rev.*, 27, p.2079.p.2139.

<sup>1353</sup> Nadia Ahmad, ‘The Canadian Charter of Rights and Freedoms: An Example of Canadian Dependence on the United States or Commitment to International Law’ (1997) 6 *J. Int’l L. & Prac.* 329,p.335.

<sup>1354</sup> Friedman (n 209),p.589.

Chapter Six considers the main concepts that apply in the United States for interpreting the First Amendment's mainly categorical and balancing approach. This chapter illustrates the categorical approach that focuses on classifying types of speech. This approach relies on specific rules and simply requires judges to apply them. The importance of the categorical approach cannot be denied. It should lead to wise judgment, based on explicit rules with enough necessary information about cases and considering all the relevant interests with a predictable outcome. In the words of Schauer, "general categories are the most important way we have of incorporating the constitutionally mandated preference for free speech values into a legal system populated by human beings of less than perfect ability and less than perfect insight".<sup>1355</sup>

On the other hand, in its general meaning, a balancing approach is based on finding a compromise for two conflicting interests. This means that the rules of precedence will be subordinate to balancing rules, which are characterised by a changeable nature depending on the circumstances surrounding each case. One author has stated, "there is no place for unconditional and absolute relations of precedence when it comes to weighing principles".<sup>1356</sup> This approach has been used in many cases and enables judges to make a wise judgment depending on surrounding circumstances rather than specific rules. It aims to prevent judges from wrongly suppressing expression—which would lead either to the violation of freedom of speech and an excessively strong protection of other interests— or the protection of low-value speech at the expense of other interests.

Chapter Seven considers many initial bases that support freedom of expression in Egypt and Islamic countries; the Qu'ran, Sunnah (the report of what the Prophet said or did) and the era of the Rightly Guided Caliphs demonstrate clearly that freedom of speech in Egypt is based on a solid foundation. Also, this chapter reveals that Islamic law provides principles to justify free speech, particularly the discovery of truth, human dignity, and democracy. The values of freedom of expression under Islamic law have proven that freedom of expression is necessary to foster the principles and values that can serve human progress. Therefore speech should be immune from any restrictions except when it hurts others.

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<sup>1355</sup> Schauer, 'Categories and the First Amendment: A Play in Three Acts' (n 308). p.307.

<sup>1356</sup> Da Silva (n 962). p.277.

Chapter Eight considers the historic development and the meaning of freedom of expression under Egyptian law. This chapter also discusses the role of the Supreme Constitutional Court in protecting freedom of expression. The Egyptian Supreme Constitutional Court (SCC) represents a modern development in the judicial scale. It offers an interesting case study of the extent to which there is endogenous change in the concept and the limitations of freedom of expression. The SCC has opened the scope for the judges to practice Ijtihad to communicate the point of view that Islamic law is relevant to all times and places. However, cases of freedom of expression vary depending on circumstances. Therefore, the court has given judges a margin of appreciation to deal with each issue in isolation.<sup>1357</sup> For example, demonstration is a right protected under Article 73 of the constitution, but when it causes a real threat to public security, local authorities have the right to restrict it.

Furthermore, the SCC plays a distinctive role in promoting freedom of expression in the way that positively effects Egyptian political and social life. This can be seen when the SCC struck down the court and local authority's decision to restrict freedom of expression in practice. Also, the SCC has a significant role in the preservation of freedom of expression and gives it a wider scope through the issuance of numerous decisions that comply with international human rights standards. Indeed, reconsideration of the scope of freedom of expression used by the SCC is vital not only to improve Egyptian freedom of expression law, but also Islamic law.

Chapter Nine discusses the limitation of freedom of expression under Egyptian law. Even though the constitution protects a wide range of speech, its protection is not absolute. The chapter has shown that if the constitution were reconstituted, its specific provision would be as follows: no branch of government, shall abridge freedom of speech or of the press except (1) when speech presents a direct danger to people or property; (2) contains obscenity or is sexually explicit; (3) contains slanderous accusation (qadhf) or insult (sabb; shatm), and/or (4) constitutes a threat to national security. The reverse is also true; unless an instance of 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 is undoubtedly due to the significant influence of Islamic principles, which dictate that freedom of expression should be immune, except

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<sup>1357</sup> See in general Supreme Constitutional Court, Case No 64 of Judicial Year 21 (7 Mars 2004) available at <http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-64-Y21.html>.

when it causes harm to others. As shown above, these principles have played a major role in setting boundaries for freedom of speech in Egypt's law of freedom of speech. The above discussion demonstrates that all the restrictions to freedom of speech, as established by Egyptian law, are consistent with Islamic principles. Causing harm to another, such as slanderous accusation or insult, is a main justification in restricting freedom of expression and is criminalised under Egyptian law. It should be noted here that the relationship between expression and assembly is somewhat mysterious and not well understood. Assembly is a form of expression, but what distinguishes it from other forms of expression is that sometimes it may take some forms of violence that may negatively effect national security or public life. Therefore in many cases, we see that freedom of expression associated with assembly is more often restricted and kept under observation of local authorities observation than other forms of freedom of expression.

There is an obvious similarity between speech that is criminalised under Egyptian law and some expressions that fall outside America's First Amendment protection, as both laws exclude speech or other expressions that cause harm to others from constitutional protection. The discussion of Egypt's free speech law also reveals that it is balanced between the right of freedom of expression and the public interest. Balancing between different interests is often referred to as a judicial test set by many Egyptian's courts in order to determine the scope of free speech protection. There are certain types of expression that no court could regard as protected by any constitutional right.

## **10.2. Findings of the Study**

It must be noted that the questions posed in this study's Introductory Chapter are not intended to 'criticize' or 'praise' this or that State or to judge whether an opinion is 'correct', but rather to illustrate for readers how circumstances in various cases could change the limitations on freedom of expression. Many scholars have extensively discussed freedom of expression, but neither Egyptian nor even American scholars have examined the limitations on the right to freedom of speech in the light of the differences between the two laws in theory and in practice.

It has emerged from the analyses and arguments herein that there is certainly a strong protection of freedom of expression discourse under both Egyptian and American law.

Although the manifestation of this may have been eclipsed by the traditional emphasis on the differences of scope between the two legal regimes, this research refutes the incompatibility theory and reveals the existence of a large positive common ground between Egyptian and American laws. The study concludes that there is a common standard of justification between the two laws, especially, in the freedom of speech justification.<sup>1358</sup> This does not obscure their differences of scope and application, but rather establishes a positive basis for managing their differences through the development of complementary methodologies between the two legal systems.

It is imperative to say limitations to freedom of speech are not controversial. Freedom of speech is not absolute, either in Egypt or in the United States of America. In the United States of America, in some circumstances, it is forbidden to utter or publish obscene material or incite violence. Under Egyptian law, freedom of speech is also subject to legal restrictions. However, as demonstrated, incompatibility between Egyptian law and American law does exist at the level of individual restrictions that each system imposes on free speech. In this regard, many areas, such as speech threatening national security, are often raised as an example of differences between these two jurisdictions. While American law on freedom of speech, as an implementation of liberal theory, gives a protection to some offensive speech, Egyptian law prohibits offensive speech under the Egyptian Penal Code.<sup>1359</sup> One commentator stated, “[t]he 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”.<sup>1360</sup>

An analysis of the scope of the right to free speech in America can be illuminating in Egypt or any other Arab country through moderate, dynamic and constructive interpretations of the Shari’ah rather than with hard-line and static interpretations of it. This is particularly so in respect of the right to free speech. We have shown by reference to the SCC, which emphasises the importance of moderation and has adopted constructive views, that this can greatly enhance the understanding of Egyptian law.<sup>1361</sup>

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<sup>1358</sup> See Chapter Three: Section Two, and Chapter Six.

<sup>1359</sup> See Chapter Three: Section Two, and Chapter Eight.

<sup>1360</sup> Aljamal (n 5),p.358.

<sup>1361</sup> See Chapter Seven.

By contrast, the United States of America could also take advantage of some lessons of Egyptian laws on freedom of expression. A number of cases mentioned in Chapter Eight show that Egyptian law protects speech up to the point where it threatens national security, violates public morals and injures the reputation of others, for instance. Indeed, reliance on the United States of America's Supreme Court to use a balance or categorical approach in free speech cases is insufficient to protect either national security or public morals.<sup>1362</sup> This pragmatism would make it an appropriate legal framework for the development of principles of public interest.

Both Egyptian law and the United States of America's jurists and scholars need to adopt an accommodating and complementary approach to achieving the noble objective of clarifying the limitations on freedom of expression. The objective must be to combine the best of both systems for all humanity. This proposal requires that harmonisation between Egyptian law and American law depends only on taking advantage of the legal practices of both systems. The right to freedom of expression right has been subjected to different norms and applications in the United States and Egypt, which means that there were several key differences. But this should not raise conflict between the two laws, as both countries have introduced different styles for dealing with freedom of expression rights. This study is neither calling for the dissemination of liberal ideology in Egypt nor are we claiming that Egyptian principles should be applied in the United States. This study wants to focus on a cooperative approach that would boost the confidence of both countries' legalists and lead to a more positive inclination towards the boundaries of freedom of expression.

The important harmonising elements are: the demonstration of good faith, an appreciation of free speech, and the abandonment of prejudice between Egyptian and American advocates' to the right to freedom of expression. The detailed examination of the American free speech law in the light of Egyptian law demonstrates the possibility of the constructive harmonisation of most of America's free speech norms with Egyptian law. The conflicts between Egyptian law and America's free speech rights law arise mainly from points of interpretation; these are largely and mutually reconcilable.

Finally, this research concludes that whatever definition or understanding we ascribe to freedom of expression, the bottom line is the protection of people's choice. It may be

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<sup>1362</sup> See Chapter Five. See also Trager and Dickerson (n 12), p.28.

said that in the world today there is no civilisation or philosophy that would not subscribe to that notion of the protection of freedom of expression. It may be difficult but not impossible to evolve a universal standard in that respect.

### **10.3. Originality of the Work**

It is important to point out that other research has been conducted on the issue of freedom of expression in Egypt and the United States, but none have covered the principles and development of freedom of expression in one study. There is no lack of discussion on the different practical applications of freedom of expression in independent research papers and journals, but these examples have rarely discussed the differences between the United States and Egypt in one study. As far as the writer is aware, this study is the first study that compares the limitations of freedom of expression between Egyptian law and American law in a broad sense. The research undertaken in this thesis has ensured that much pertinent literature has been gathered and presented in accordance with the objectives of this research. Indeed, Egyptian law, which is based on Islamic principles, and American law, which is derived from liberal ideology, have long histories in the protection of freedoms, including freedom of expression. Therefore, there is a possibility to take advantage of their understanding and to activate their role in the field of human rights to balance views between liberal and Islamic States.

### **10.4. Contribution to the Literature**

This thesis has provided a cohesive and systematic investigation of the literature in relation to the aspects of the issue of freedom of expression with the aim of promoting a clear understanding to apparent conflicts between different jurisdictions. It has presented a comprehensive discussion on the role of national courts, justice systems on the issues and challenges as well as the benefits of adopting different approaches. This thesis has provided a valuable contribution to the literature by presenting the research in such a way that it could serve as a helpful resource to jurists, policy-makers, legislators and all members of the human rights organisations as they move forward and find ways to adopt its important findings within freedom of expression practices.

## **10.5. Future Research**

It is hoped that this study paves the way for future researchers to focus on the issue as to whether or not the law either in Islamic or liberal countries are able to make consistent changes and meet their respective communities' requirements. The writer also suggests that a future study on this subject should cover the scope and the impact of Egyptian and American law on the right to free speech.

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