
***Right To Freedom of Speech, Personal Security, & Issue of
Blasphemy as a Non-Traditional Security Threat: From
Western Perspective***

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Abstract

Freedom of speech and personal freedom are natural and constitutional rights of every citizen in a society. However, the interpretation of these rights is varied from society to society according to their respective socio-cultural, politico-constitutional, and religious milieu. Human beings are confronted with paradox of blasphemy and freedom of speech. This issue has divided into western society into two schools of thought – Contextualists and Non-Contextualists. The misinterpretation of blasphemy and right to expression of opinion has created great stir in the circle of scholars at different periods. This led the state to introduce stringent laws to restrict freedom of speech against the state. This resulted in the persecution of prominent scholars and other people. If this existing non-traditional security is kept un-noticed then it will definitely lead to anarchical situation in any society. This will radicalise the society based on mutual intolerance. There is need to take serious notice of this prevailing paradox of the right to freedom to expression, issue of blasphemy, and personal security of the common people in the world.

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Introduction

The concept of blasphemy has gained global identity. Several incidents like *The Satanic Verses affair*, Danish newspaper cartoons controversy,¹ death of Dutch film director,² deportation of Dutch MP from Britain,³ the decision of the British government to award knighthood to Salman Rushdie,⁴ or the enactment of blasphemy laws in Pakistan,⁵ abolition of the blasphemy law in England.⁶ In Pakistan, the blasphemy laws of late 1980s are highly debated among various circles.⁷ On ground of blasphemy, Salman Taseer, ex-Governor of Punjab was killed by his own security guard.⁸ Likewise, Asia Bibi, a Christian lady was sent behind the Bar on the same ground.⁹ Salman Rushdie's book 'The Satanic Verses' has severely hurt the emotions of the Muslim community across the world, because his work was extremely derogatory and against Islamic teachings.¹⁰ Likewise, Jylland Posten also tortured the sentiments of the Muslims. This created mass demonstration in Pakistan and in the rest of Muslim countries. West misconstrued these demonstrations as intolerance towards freedom of speech or expression in Muslim countries. This issue needs legal, and constitutional solution instead of philosophical one.

¹ *Muslim anger at Danish cartoons.* Accessible on <http://news.bbc.co.uk/2/hi/europe/4361260.stm>.

² *Gunman kills Dutch film director.* Accessible on <http://news.bbc.co.uk/2/hi/europe/3974179.stm>.

³ "Dutch MP Geert Wilders deported after flying to Britain to show anti-Islamic film". Accessible on *The Telegraph*, 12 Feb 2009.

⁴ "Salman Rushdie is knighted by the Queen", *The Telegraph*, 25th June 2008.

⁵ Section 295-C inserted into Pakistan Penal Code (Act XLV of 1860).

⁶ The common law offence of blasphemy was abolished by the promulgation of Criminal Justice and Immigration Act 2008

⁷ International organizations, human rights groups from inside and outside and some states have been consistently demanding the abolition of this law on the ground that it is a discriminatory law against the minorities and curtails human rights like freedom of expression and freedom of religion.

⁸ "Blasphemy Law claims another life". January 04, 2011. Accessible on <https://www.dawn.com/news/596195>

⁹ "Asia Bibi spends Seventh Christmas Behind the Bars". December 29, 2016 <https://www.christiansinpakistan.com/asia-bibi-spends-seventh-christmas-behind-the-bars/>

¹⁰ What happened to the Book Burners? *BBC News Magazine*, February 13, 2009 <http://news.bbc.co.uk/1/hi/magazine/7883308.stm>

Muslims being part of the international community is bound to comply with international treaties and agreements pertaining to human rights including the right to freedom of expression. However, they are also bound to abide by the Islamic injunctions. The research article is consisted of three main parts. Part first of the paper deals with the explanation of the concept of right to freedom of speech and the concept of blasphemy Part second deals with the offence of blasphemy from Islamic perspective and that of Pakistan's legal system. The third part deals with the concluding remarks on the issue.

Conceptualisation of Freedom of Speech: From Non-Traditional Security Perspective

Rationality and the capability to speak give a distinctive status to human being from the rest of creatures. Suppression of ideas results in a social stagnation, and degeneration of a society. The U.S. Supreme Court held in Jehovah's case: "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."¹¹ The concept of 'freedom of speech' is a wider in scope and encompasses freedom of holding opinions, freedom to demonstrate, freedom to write and publish one's ideas and in modern times, freedom of both print and electronic media. The west in itself is divided into two camps on the concept of freedom of speech – Contextualists and Non-Contextualists.

Contextualists trace¹² the history of free speech back to the Greek City States, especially Athens. Socrates, the Greek philosopher, was poisoned to death for expressing and sharing his ideas. Under the Roman Empire, the ordinary citizens enjoyed very restricted freedom to express their opinions, contrary to Greek Isegoria. It was called the liberates--

¹¹ West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

¹² See Robert Hargreaves. *The First Freedom, a History of Free Speech* (Sutton Publishing Gloucestershire. 2002); & Arlene W. Saxonhouse. *Free Speech and Democracy in Ancient Athens* (Cambridge University Press, 2006).

literarily means freedom from slavery.¹³ Freedom of speech was only the prerogative of the members of the Senate, where elites could speak to elites, and the rest were deprived of such right. During the reign of Tiberius, the situation was temporarily improved by introducing some democratic values¹⁴ Later on single rule of the emperor replaced republic form of government. The Middle Ages witnessed an aggravated situation with respect to freedom of speech. Speaking against the king, his authority, the church or its canons was declared as treason. Galileo was charged for speaking against established Biblical doctrines on ground of his idea that the Earth was not at the centre of the Universe and that it revolved around the Sun.¹⁵ Similarly, Tyndale was convicted and awarded the death sentence for his literary work of translating the Bible into English.¹⁶ However, later on many liberal philosophers like Locke, Hobbes, Rousseau, Mill, Wilkes, Paine and Voltaire were immensely influential. They contributed to encourage the right to freedom of expression in their societies. In addition, successful revolutions in France and America also aided in the development of this concept.

Nevertheless, despite all the development even in modern times, freedom of speech still seems to be one of the most vulnerable and susceptible human values. The outbreak of the First World War curbed individual liberties on the pretext of “national interests”. The US judiciary refrained to intervene from such state of affairs. Similarly, British Parliament was also reluctant to interfere in it. Contrary to this, US Congress took punitive steps to suppress public’s criticism against the

¹³ See Wir Szubski, *Libertas as a Political Idea at Rome During the Late Republic and Early Principate* (Cambridge University Press, 1950), (transferred to digital printing 2004), pp. 1-4.

¹⁴ “Fascinating History: Tiberius and Freedom of Speech”. Article Published on Aug. 16 2005 on

<http://fascinatinghistory.blogspot.com/2005/08/tiberius-and-freedom-of-speech.html>

¹⁵ See William R. Shea and Mariano Artigas. *Galileo in Rome: The Rise and fall of a Troublesome Genius* (Oxford University Press, 2003).

¹⁶ Michael P Farris. *From Tyndale to Madison: How the Death of an English Martyr Led to the American Bill of Rights* (B & H Publishers Tennessee, 2007), p. 37.

war. The Espionage Act of 1917 and Sedition Act of 1918¹⁷ made it virtually illegal to criticise the war or the government in any manner. The Act specified twenty years in prison or a fine of \$10,000 by stating:

Whoever, when the United States is at war, shall wilfully obstruct the recruiting or enlistment service of the United States, and whoever, when the United States is at war, shall wilfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the military or naval forces of the United States, or the flag..... urge, incite, or advocate any curtailment of the production in this country of anything or things necessary or essential to the conduct of the war...¹⁸

This law was challenged before the Supreme Court. The Court supported it by arguing that “the government had the legitimate authority to curtail free speech in time of “national emergency”.”¹⁹ In consonance with this, same practice was repeated at end of Second World War by taking oath of loyalty from teachers, lawyers, and other professionals.²⁰ Some were hanged to death.²¹ Thousands were imprisoned. Freedom of speech had always been censored.

¹⁷ See The Sedition Act of 1918. The atmosphere of suppression continued even after the war. The focus shifted from Germans to communists, Bolsheviks and “reds” generally. A. Mitchell Palmer, Wilson’s Attorney General argued that communism was “eating its way into the homes of the American workman”. In his essay “The Case Against the Reds,” Palmer charged that “tongues of revolutionary heat were licking the altars of the churches, leaping into the belfry of the school bell, crawling into the sacred corners of American homes, seeking to replace marriage vows with libertine laws, burning up the foundations of society.” With strong support from the public and the American establishment, in 1919 Palmer intensified the attacks on political dissent that had begun during the war. See Avrich, Paul, Sacco and Vanzetti: *The Anarchist Background* (Princeton University Press, 1991); Kennedy, David M. Over Here, *The First World War and American Society* (NY: Oxford University Press, 2004).

¹⁸ See Espionage Act of 1917.

¹⁹ *Schenck v. United States*, 249 U.S. 47 (1919).

²⁰ *New York Times*, 19 October 1950, pp. 35-36.

²¹ For example Julius and Ethel Rosenberg, about whom it is now commonly believed that, they were hanged innocently. Nobel prize-winner, Jean-Paul Sartre, called the case "a legal lynching which smears with blood a whole nation". See Rosenberg Trial at <http://www.spartacus.schoolnet.co.uk/USARosenbergT.htm>

At the end of cold war, there was paradigmatic shift in the global politics. Gulf war was broken out. Religion and civilization were perceived as threat to global peace and security. However, the 9/11 incident changed security paradigm from traditional to non-traditional security. Military security prevailed over the human security. Individual liberty in various parts of the world is curtailed on the pretext of national security.²²

1.1. Various Approaches To Freedom of Speech & Blasphemy:

Right to freedom of speech is a contested concept. In various societies, it is perceived and interpreted differently according to their political, constitutional, and socio-religious milieu. This led to division of scholars into two schools of thought - Consequentialist,²³ and the Non-Consequentialist.²⁴

1.1.1 From Consequentialist School Perspective

During 19th and 20th Century, majority of the liberal writers were prominent advocates. Some views of the Consequentialist scholars are as follows:

Some of Consequentialists are of the view that speech promotes truth. It helps to discover the truth. These writers include John Milton, Oliver

²² The Detention Centre of Guantanamo Bay is one such shameful example of modern day history in terms of human rights and civil liberties violations; where many individuals have been detained extra-judicially.

²³ For example John Stuart Mill. *On Liberty*. Indianapolis: Hackett Publishing Press, 1978; Ingber, S. *The Market Place of Idea: A legitimate Myth*, Duke Law Journal, 1984 Feb 1, p. 6; Bollinger, L. *the Tolerant Society*, New York, Oxford University Press 1986.

²⁴ See Laurence H. Tribe. *American Constitutional Law*, (Foundation Press, 2000), 12-1, p. 576 1978; See also Thomas I. Emerson, "Toward a General Theory of the First Amendment" (1963). *The Yale Law Journal*, Vol.72, No. 877, 1962-63. Accessible on http://digitalcommons.law.yale.edu/fss_papers/2796_7-8_1966.

Wendell Holmes, Louis Brandeis, and John Stuart Mill.²⁵ To John Stuart Mill, the suppression of right to express opinion leads to suppression of ideas irrespective of their veracity. A false idea also gets rectification from the society through debates and exchange of views.²⁶ According to Classic Marketplace theory, ‘truth is discovered through competition with falsehood and an authoritatively imposed truth is plagued with the danger of error.’²⁷ The theory of truth about the freedom of speech was subjected to severe criticism on various grounds. It is argued that the objective “truth” does not exist. Suppose it exists, then human intellect cannot identify it. Free discussion does not necessarily contribute to discover the truth. Some critics of this theory cited the example of Germany, when Nazis propagated the racial inferiority of the Jews. That propaganda was widely accepted at that time. However, this did not make this theory true.²⁸ Despite all the criticism and the shortcomings, the argument holds its strength that free speech helps us to discover the truth.

Right to freedom of speech in modern democracy is *sine qua non*. Both complement one another. Freedom of speech promotes tolerance in a society. It also helps to formulate policy in a state in an effective manner. It is considered the linkage between the general public and their political leadership.²⁹ However, sometimes this right to freedom of speech is misused in a modern democratic era. An individual or a segment in a society expresses an unpleasant and unacceptable view about someone’s religion or socio-cultural norms that it receives very great resistance from the majority of the society. Sometimes this majority uses fair or foul methods to handle that unpleasant or hatred point of view. Here it needs to

²⁵ See for details K Greenawalt. *Speech, Crime and the Uses of Language* (New York: Oxford University Press, 1989).

²⁶ See for details John Stuart Mill. *On Liberty*. (Indianapolis: Hackett Publishing Press, 1978).

²⁷ S Ingber. *The Market Place of Idea: A legitimate Myth*, *Duke Law Journal*, 1984 Feb 1, p. 6.

²⁸ See for details R Hargreaves. *The First Freedom, A History of Free Speech* (Sutton Publishing Gloucestershire 2002).

²⁹ See for details John Meikle, A. *Political Freedom* (New York: Harper and Brothers, 1960).

be taken into account that stance of the majority is not required to be right as evident in human history.

Majority's decision sometimes leads to suppress the voice of an individual for expressing his or her views on some novel idea in a society. The death of Socrates is its living example. Mill calls this practice as 'the tyranny of the majority'.³⁰ Despite this discrepancy of a philosophical nature, freedom of speech is considered as an integral part of the democratic system. Brison states: "our system of freedom of expression rightly requires us to be sufficiently thick-skinned so that we do not suffer cognitive dysfunction when victimised by hate speech."³¹

Consequentialists' views can be summarized as freedom of speech promotes exposure and deterrence of authority by public officials, personality development, sense of dignity, independence of judgment, etc.

1.1.2 Non-consequentialist Approach

The Non-Consequentialist school considers freedom of speech as an end in itself. Professor Laurence Tribe opines: "the freedom of speech must be regarded not merely as a means to an end, but as an end in itself."³² Professor Emerson also holds the same views.³³ The non-consequentialists support freedom of speech on the following justifications.

Under a social contract, people gave up some of their rights to a government in order to receive or maintain social order through law. Consent is the corner stone of the government.³⁴ The theory implies that individuals are autonomous to govern themselves and ought to be

³⁰ John Stuart Mill. *On Liberty*, (Indianapolis: Hackett Publishing Press, 1978), pp. 67-68.

³¹ Susan J Brison. "The Autonomy Defence of Free Speech", *Ethics*, Vol. 108, No. 2, Jan 1998, p. 335.

³² See T Tribe. *American Constitutional Law*, 12-1, p. 576, 1978.

³³ See T Emerson. *Toward a General Theory of the First Amendment*, 7-8, 1966.

³⁴ See any book on Social Contract theory e.g. Locke, John, *The Second Treatise of Government in Two Treatises of Government*, Peter Laslett, ed. (Cambridge: Cambridge University Press, 1988); Pettit, Philip. *Republicanism: A Theory of Freedom and Government*,(NY: Oxford U.P., 1997).

protected from governmental intervention in the personal domain. This theory has a significant influence in promoting the idea that people should be left free, and their right of free speech may not be interfered with by the state.³⁵ This theory has an immense influence on modern thinking in contemporary Western society. Nevertheless, for many writers, this theory is still a hypothesis, which has no corroboration from human history. David Hume, in his essay “On Civil Liberty” has stressed upon “social contract” as a convenient fiction.³⁶

Some of the scholars like Thomas Scanlon consider the freedom of speech as indispensable for personal autonomy of an individual in a society. David Hume is of view that human being should be treated as a rational being.³⁷ Similarly, Mill considers autonomy as freedom of an individual from governmental interference in his or her personal capacity.³⁸

Another argument of Non-Consequentialists is that free speech is important for dignity and equality of an individual. Mill in support of this concept said: ‘the fullest liberty of expression is required to push our arguments to their logical limits, rather than the limits of social embarrassment. Such liberty of expression is necessary for the dignity of persons’.³⁹ In the words of Greenawalt:

Every human being in a society is morally bound to listen the point of view of his or her fellow beings as a token of mutual respect, rather than to foreclose the opportunity to speak and to listen each other. The suppression of expression of opinion is

³⁵ For discussion of Social Contract theory as a justification for freedom of speech, see Susan J Brison. *The Autonomy Defence of Free Speech*, Source: *Ethics*, Vol. 108, No. 2, Jan 1998; K Greenawalt. *Speech, Crime and the Uses of Language*, Oxford University Press New York, 1989.

³⁶ David Hume, *Essays, Moral, Political, and Literary*, Eugene F. Miller, ed. (Indianapolis, IN: Liberty Fund, Inc. 1987), p. 42

³⁷ Ibid. See also Thomas Scanlon, “A Theory of Freedom of Expression”, *Philosophy and Public Affairs*, Vol.1, No. 2, pp. 204-226, 1972

³⁸ Susan J brison. “The Autonomy Defence of Free Speech”, *Ethics*, Vol. 108, No. 2, Jan 1998, pp. 324.

³⁹ See for details J.S Mill. *On Liberty*. (Indianapolis: Hackett Publishing Press, 1978).

contemptuous for the citizens. All the people should be equally treated to exercise the right to expression their opinion.⁴⁰

Many critics argue that freedom of speech cannot be justified by a non-consequentialist approach.⁴¹

1.2. Are there boundaries of Free Speech?

Brendan O’Neill, one of the libertarians and editor of the anti-censorship website,⁴² on the limits of free speech once commented: “I believe that there should be no limit at all on free speech.”⁴³ Modern day liberalists like O’Neill argues that freedom of speech is an absolute right without having any limit. For them, any sort of limitation is unacceptable. If the free speech is restricted, then they argue: “We are on a slippery road towards a tyranny.” It is important to highlight the possible damages caused by the words before going to analyse the opinions of these liberalists. Words no doubt have power and sometimes more than acts. And many times words use to change the fate of humanity and history of this world. Majority of the writers including liberalists acknowledge the cost of speech.⁴⁴ Here are some example in which one would see that these are only words and nothing else, which can cause damage and hence have been made illegal.

- Agreement to commit an offence → Conspiracy
- Offer to agree, order, request, inducement to commit an offence → Abetment, Criminal Solicitation

⁴⁰ K. Greenawalt. *Speech, Crime and the Uses of Language*, (New York: Oxford University Press, 1989), p.33.

⁴¹ See S Fish. *There's No Such Thing as Free Speech...and it's a good thing too* (New York: Oxford University Press, 1994); & G Himmelfarb. *On Liberty and Liberalism: The Case of John Stuart Mill* (New York: Alfred A. Knopf, Inc. 1974).

⁴² www.spiked-online.com/index.php/site/author/Brendan%20O.Neill.

⁴³ Julian Joyce, “The Limits of Freedom of Speech”, *BBC News*, 26th Nov 2007 on <http://news.bbc.co.uk>.

⁴⁴ For discussion of costs of speech, see Frederick Schauer. “Uncoupling Free Speech”, *Columbia Law Review*, 2321-57, 1992.

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- Threat of death or grievous injury → Criminal Intimidation
 - Falsely pretending to hold a public office or to get some benefit dishonestly →
Cheating, Cheating by Personating, Fraud
 - Giving False Evidence → Perjury
 - Using disgracing and insulting words about a court of law or a judge → Contempt of Court
 - Disclosing state secrets to the enemies in times of war →
Sedition, Treason
 - Insulting another individual by use of words either published or spoken → Defamation,
Libel, Slander
 - Defaming God, religious personalities and sacred books →
Blasphemy

In all the above examples, these are only words, which have the damaging effects and as such have been declared unlawful. Let us ignore the notion of legal offences or crimes which can be caused by use of words. Also, keep the notion of the offence principle or mental harm that speech can cause on one side. Sometimes the use of words can cause injury, which cannot be measured or counted and which is sometimes irreparable. For example defaming a politician can cause a political death to that political leader. Similarly, accusing someone with a false accusation of adultery can result in splitting off of family relationship. Likewise, scandalizing armed forces at the time of war can shatter their morale and the state can face a defeat. In the words of Webster: “For words are not, as is sometimes, claimed, neutral and harmless instruments. They can be as lethal, almost, as bullets and can cause great offence, and personal distress. That is why absolute freedom of speech is ultimately no more desirable than absolute freedom to murder.”⁴⁵

⁴⁵ R Webster. *A Brief History of Blasphemy: Liberalism, Censorship and ‘The Satanic Verses’*. The Orwell Press, 1990. p. 46.

It is therefore inferred that no society has ever existed where speech has not been restricted to some extent. Even the strongest supporters and pioneers of the modern concept of freedom of speech like John Stuart Mill would call for some sort of restriction. He states: “All that makes existence valuable to anyone depends on the enforcement of restraints upon the actions of other people. Some rules of conduct, therefore, must be imposed—by law in the first place, and by opinion on many things, which are not fit subjects for the operation of law’.⁴⁶ The idea of absolute freedom of speech has never been supported by any jurisdiction in the history. The only written constitution that guarantees freedom of speech in an unqualified manner (as far as the wording is concerned) is the U.S Constitution, where it states that: “Congress shall make no law . . . abridging the freedom of speech, or of the press (U.S. Constitution First Amendment)”⁴⁷

In the U.S. where freedom of speech is considered to be one of the most precious human rights, even there, the majority of modern day writers agree that this right can never be of an absolute nature. In the word of Brison:

“Contemporary philosophers and legal theorists’ writing on free speech join the Court in rejecting First Amendment absolutism. Some argue that certain reasons for restricting speech are always impermissible or presumptively invalid. Others advocate some sort of balancing between free speech interests and other interests, for example, the interest in security. Even on the balancing approach, however, the value of free speech is taken to justify weighing interests with "a thumb on the scales" in favour of speech.”⁴⁸

Freedom of speech, which is a right, is in no sense of supreme nature. It must be seen in the framework of other rights. A balance approach needs to be adopted between speech and other interests. Various schools of

⁴⁶ See for details Mill’s *On Liberty*.

⁴⁷ This constraint applies to the states as well by virtue of the Fourteenth Amendment.

⁴⁸ Brison’s *The Autonomy Defence of Free Speech* ..., p. 318.

thought have put forward their argument in favour of supporting and denying absolutism in freedom of speech.

1.2.1. The Liberal Argument

Liberty is normally considered as a political value. Classical Liberal Theory (CLT) is associated with the social contract theory. In CLT, liberty has been taken in a utilitarian perspective. It has been normally considered as a protection from authoritative or tyrant government, where the individual happens to be free in his domain.⁴⁹ Mill is considered as very influential and authoritative to advocate the concept of liberty. He defines the term liberty as: “Liberty, in its true sense, means freedom from restraint. In this sense, every law, and every rule of morals, is contrary to liberty.”⁵⁰ Mill described his book ‘On Liberty’ as “a kind of Philosophic text-book of a single truth”.⁵¹ While explaining his one ‘simple principle’, he says:

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. The principle, that the sole end for which mankind is warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection.⁵²

⁴⁹ For Example see F Rosen. *The Origins of Liberal Utilitarianism: Jeremy Bentham and Liberty*. In R. Bellamy, ed., *Victorian Liberalism: Nineteenth-century Political Thought and Practice* (London: Routledge, 1990).

⁵⁰ *Edinburgh Review, Westminster Review*, I (1824), 508.

⁵¹ John Stuart Mill. *Collected Works of John Stuart Mill*. Edited by J. M. Robson, (Toronto: University of Toronto Press, 1963, vol. 21: 262.

⁵² John Stuart Mill. *The Autobiography of John Stuart Mill*. Edited by John Jacob Coss. (New York: Columbia University, 1924).

⁵² See Mill’s *On Liberty*..., pp. 72-73.

This “simple principle” elaborates that the individual is sovereign, and his sovereignty is absolute, except where it injures others. For Bentham, society or community was a “fictitious body,” a term denoting more than a sum of individuals.⁵³

Mill discusses the concept of liberty from two perspectives: liberty of thought and discussion (self-regarding acts); and liberty of action (other regarding acts). In former case, he meant liberty without any chain, or simply absolute freedom of thought on all subjects, practical or speculative, scientific, moral, or theological.”⁵⁴ In the latter case, the liberty of action is related with rights of other fellow beings in the society. However, the latter was considered to be as important as the liberty of thought itself and inseparable from it.⁵⁵ Together they formed the basis for freedom of speech. However, unlike the liberty of discussion was subjected to the harm principle.

1.3.Prevaling Views Regarding Boundaries of Speech

Almost all the philosophers, scholars, and jurists agree that there should be certain limits of expressive freedom. Determining boundaries of speech is a daunting task. Among the philosophers, Mill is most associated with the themes of freedom and liberty. A careful analysis of his work reveals that he deals with the boundaries of free speech in a hasty manner. In the words of Raphael Cohen – Almagor, two or three times throughout the book (*On Liberty*), with one of the limitations mentioned only in a footnote, the most well-known limitation relates to incitement statements and is illustrated by a short discussion about an excited mob gathering outside the corn dealer’s home.... Thus, we do not find in Mill’s writing a systematic discussion of the boundaries to free expression. Instead, Mill

⁵³ Jeremy Bentham. *An Introduction to the Principles of Morals and Legislation*, (Dolphin edition, 1961), p. 18.

⁵⁴ See Mill’s *On Liberty*..., p. 75.

⁵⁵ *Ibid.*

provides ad hoc proposals as solutions to special cases”.⁵⁶ In the West, there are two prevailing principles to restrict the use of free speech.

1.3.1. The Harm Principle

The aforementioned discussion manifested that John Stuart Mill had the credit to give idea of liberty and of free speech and staunchly supported them. It resembles with the liberal argument about the relationship between free speech and blasphemy. Mill restricts freedom of speech when it encroaches on the rights of other citizens in the society. However this is a narrow restriction on freedom of speech. If the principle of harm is taken in the narrowest sense i.e., only physical harm, then a lot of controversies will remain unsolved. If its scope is widened to include mental harm, public welfare etc., then it seems that the freedom of speech has been reduced into nullity and that it is all dependent on the will of the executive as a “political prize” and not as a right. For Mill, harm was the boundary of liberty, but where was the boundary of harm, he hasn't determined.

1.3.2. The Offence Principle

Joel Feinberg is said to be one of the pioneers of this principle. According to him, the harm principle is so narrow that speech which would cause damage will escape prosecution, if we apply the harm principle alone. He states that offence takes place on three main grounds. Thus, one is offended when:

- a. One suffers a disliked state;
- b. One attributes that state to the wrongful conduct of another; &
- c. One resents the other for his role in causing one to be in that state.⁵⁷

⁵⁶ R Cohen-Almagor. “The Offence To Sensibilities Argument as Grounds for Limiting Free Expression: The Israeli Experience”, *International Journal of Politics and Ethics*, Vol. 2 No. 2, p. 102.

⁵⁷ J Feinberg. *Offense to Others*, (NY: Oxford University Press, 1985).

To this theory of offence principle, Feinberg attaches two conditions: the “reasonable avoidability standard” and the “Volante standard”.⁵⁸ According to them, a speech will not be termed as offensive, if the audience had consented voluntarily to remain silent and listen to it, despite the chance to avoid it without facing a reasonable disappointment. These standards are again subject matter of controversy. In the issue of Salman Rushdie, it was perhaps on this basis that British Muslims protested against the publication of *The Satanic Verses* and criticized and advised that if there was any offensive material in the book for them, they could reasonably avoid it by just “not reading it.”

The offence principle theory has two shortcomings. Firstly, the term offence is vague and at the same time very broad. It widens the quantum of restrictions that can be imposed on a speech. Secondly, the reasonable avoidability condition makes the principle too narrow, so a speech that ought to have been restricted would go unchecked on the ground that the audience could avoid it. Likewise, the principle being so closely associated with the human intellect that it is very hard to inscribe objectively recognisable criterion for its determination. For laws do not apply on speculations and assumptions, they need ascertainable evidence to act. However, despite all the shortcomings and vagueness, the principle is widely applied in different legal systems and its importance cannot be overlooked easily.

Along with the harm and offence principles, contemporary writers discuss many other principles by which speech can be restricted. Sometimes these principles overlap each other.

1.3.3. Hate Speech Principle

The notion is normally used in a legal context rather than philosophical perspective. Using the plain meaning, it means speech that causes a discomfort to the other. Sometimes notions near to hate speech are also

⁵⁸ J Feinberg. *Offense to Others*, Oxford University Press New York, 1985.

used that include group defamation and offence to sensibilities.⁵⁹ Some liberalists would justify the ‘Hate Speech Principle’ on the basis of harm speech theory. Scanlon defends this principle on the basis of “Mill harm principle”:

There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on these acts. These harms are: (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.⁶⁰

At same time Ronald Dworkin while disapproving the Hate Speech Principle, holds that restricting so called hate speech violates individual’s right of independence and autonomy. The only price of hate speech is the “moral harm” and we have no right to be protected against such “moral harm”.⁶¹

Conclusion

The above discussion shows the paradoxical history of freedom of speech. Socrates was punished with death for speaking freely, but in his life he always rejected the idea of free speech. The Greek and the Roman

⁵⁹ For discussion of these notions see R Cohen-Almagor. *The Offence to Sensibilities Argument as Grounds for Limiting Free Expression: The Israeli Experience*, International Journal of Politics and Ethics Vol. 2 No. 2, pp.101-117 and Susan J Brison. *The Autonomy Defence of Free Speech*, Source: Ethics, Vol. 108, No. 2, Jan 1998, pp. 312-339.

⁶⁰ Thomas Scanlon. “A Theory of Freedom of Expression”, *Philosophy and Public Affairs*, 1972, Vol. 1, No. 2. p. 213.

⁶¹ R Dworkin. *The Coming Battles over Free Speech*, (New York Review of Books, 1992), p. 58.

democrats advocated free speech, but in many instances they suppressed the free voice brutally, as happened to Socrates. Saint Paul and his disciples struggled to exercise their right to speak and to profess their religion, but when they prevailed, they and their successors proved to be one of the worst suppressors.⁶² In Middle Ages, as many would not know Galileo, Tyndale and Martin Luther who were not liberalists or secularists. In fact they were strong believers of the Christian faith. Martin Luther has been even reported to have urged killing the Jews and burning the Synagogues. The American liberalists after securing their victory from the British occupation were reluctant to allow unpopular voices.⁶³ In modern times history has witnessed how liberties were curtailed in the events of World Wars, the Cold War, and the Anti-Terror war. This is the story of the liberal world and not the world under totalitarian regimes.

The philosophical theories with regard to speech, almost all of them are subject to serious critique and none of them stands on concrete footings. We without any doubt acknowledge freedom of speech as a fundamental human right. If we were to prioritise different human rights, right to live will come in a first place. If that right is not

⁶² At one occasion Paul himself was present at the first recoded burning of books in the name of Christianity. See R Hargreaves. *The First Freedom, a History of Free Speech*, Sutton Publishing Gloucestershire 2002.

⁶³ For Example Francis Hopkinson, who was one of the signatories of the Declaration of Independence said: "The liberty of the press hath been justly held up as an important privilege of the people? But when this privilege is manifestly abused, and the press becomes an engine for sowing the most dangerous dissensions, for spreading false alarms, and undermining the very foundations of the government, ought not that government upon the plain principles of self-preservation, to silence by its own authority such a daring violator of its peace, and tear from its bosom the serpent that would sting to its death." Another leading figure John Adam demanded not a 'free press', but a 'well regulated' press. He said: "There is nothing in the world so excellent that it may not be abused...When people are corrupted, the press may be made an engine to complete their ruin...and the freedom of the press, instead of promoting the cause of liberty, will but hasten its destruction". See Ibid. and John Adams, *Revolutionary Writings* [1763], No. iii, The Online Library of Liberty at <http://oll.libertyfund.org>.

absolute and subject to some qualifications,⁶⁴ how can the freedom of speech be regarded as immune from such qualifications or immunity?

No theory of freedom of speech can resolve law related issues on its own. Mill's harm principle, which lies at the centre of these theories, is not the answer to all the problems. A variety of inevitable cases like libel, slander, pornography, privacy laws, contempt of court laws etc. cannot be covered by the harm principle. If we extend the scope of harm to cover mental harm as well, then the scope of censorship becomes very wide and it becomes very hard to differentiate it from the offence principle, which is normally considered to be a very vague term and sometimes no more than an outcome of over sensitivity etc.

A general outline has already been prescribed by the European Convention of Human Rights. Article 10 says:

- Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
- 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 rights of others, for preventing the disclosure of information received in

⁶⁴ Even the right to live or protection of life is not an unqualified right, otherwise there would not have been a Death sentence for different capital offences, private defense (where right of private defense may extend to causing death of the assailant) would not have been an exception or defense to criminal liability and members of armed forces would have been never asked to sacrifice their lives for state in times of war.

confidence, or for maintaining the authority and impartiality of the judiciary.

The purpose of quoting this ruling is obvious; we want a theory of priorities.