TO WHAT EXTENT DOES THE RIGHT TO
FREEDOM OF EXPRESSION CAN LEGITIMATELY
BE RESTRICTED?
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ABSTRACT

The main purpose of this paper is to address the pertinent scopes and restrictions prevalent to exercise the right to freedom of expression in this modern age. For this purpose, the paper will refer to certain regional and international instruments along with discussion of relevant cases. However, it will cover the historical context of the right to freedom of expression in relation to democracy, autonomy, and community. Besides, to understand the extent and limitation of the right to freedom of expression this paper will consider all the major international human rights treaties. Focusing on the restrictions to the right to freedom of expression, this article will evaluate the current restrictions to this particular right discussing the scopes of some of the speeches such as contemptuous speech, seditious speech, hate speech, obscenity, defamatory speech, hate propaganda, libel and slander, fighting words etc. Finally, this research descriptively discusses the elements of three-part test which is recognised for restricting the right to freedom of expression. This particular test includes that in order to limit the right to freedom of expression, the restriction must be “provided by law”, it must “pursue a legitimate aim”, and it must be “necessary in a democratic society”.

CHAPTER I

BACKGROUND AND CONTEXT

1.1 Introduction

The right to freedom of expression is regarded as one of the most significant rights for a democratic country for the development of its people.\(^1\) This fundamental right has been emerged as an essential one through the passage of time. However, if we trace the modern root of this right, it can be found that it came into being by its recognition under the 1968 English Bill of Rights and subsequent debate within the Parliament in the 17\(^{th}\) century.\(^2\) Further, this right was prolonged by two succeeding instruments \textit{i.e.} the \textit{United States Bill of Rights}\(^3\) and the \textit{French Declaration of the Rights of Man and the Citizen}, 1789.\(^4\) However, it has finally been recognised by the first international instruments namely the \textit{Universal Declaration of Human Rights} (UDHR), 1948 which is now regarded as a source of customary law.\(^5\)

As regards this right, Mr. Justice Cardozo very lucidly stated in the case of \textit{Palko v. Connecticut},\(^6\) “[f]reedom of thought and speech... is the matrix, the indispensable condition of nearly every other form of freedom.” Nowadays, it has become a form of

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\(^{3}\) Later it was added to the \textit{United States Constitution} in 1791.
\(^{4}\) Alfredsson & Eide (n 2).
historical development of political, social, and educational institutions of every society. As a consequence, the proper upholding and safeguard of this right pave the way of developing the representative democratic system in a way of establishing pluralism, tolerance, and broadmindedness among the people. The right to freedom of expression is related to many other rights such as the “right to information,” the “right to share,” the “freedom of press,” the “freedom of opinion”, the “right to freedom of religion,” the “right to know,” the “right to privacy” etc. Without exercising the right to freedom of expression with satisfaction, these rights cannot be exercised. The people have the right to share their ideas and views complying with certain restrictions as documented under many regional and international instruments. Therefore, it is said that even though this right is an essential one, it is not an absolute right.

It is very obvious and usually expected that the right to freedom of expression should not necessarily include the right to say whatever an individual person wishes and/or pleases

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14 Handyside v. United Kingdom (1976), Application No. 5493/72
to express in an ordered society. For example, with certain exceptions seditious speech, 
hate speech, obscenity, defamatory speech, hate propaganda, libel and slander, fighting 
words are mostly prohibited in many countries.\textsuperscript{16} So far, it has been a settled principle 
that in every restriction to the right to freedom of expression, there must be advance and 
express ways as to how and when this right is restricted.\textsuperscript{17} Under the regional and 
international instruments and case precedents, it has been recognised that to determine 
legality of restriction or interference of this right by the state, some criteria must be 
fulfilled such as the restriction must be prescribed by law; must “pursue a legitimate 
aim”; and must be “necessary in a democratic society”.\textsuperscript{18} Besides, this right needs to 
involve the balancing of competing public interests. There must have a balance against 
public health and safety considerations including public interest.\textsuperscript{19} It has been proven that 
striking the right balance between the freedom of expression and its restrictions is 
difficult both regionally and internationally.\textsuperscript{20} Truth be told, in both well-established 
democratic countries as well as undemocratic countries, it is really a difficult task.\textsuperscript{21}

Mary Law Review 211, 212.
\textsuperscript{17} Yves De Montigny, ‘The Difficult Relationship between Freedom of Expression and Its Reasonable 
\textsuperscript{18} \textit{Universal Declaration of Human Rights} (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 
29(2); \textit{International Covenant on Civil and Political Rights} (adopted 16 December 1966, entered into force 
23 March 1976) 999 UNTS 171 (ICCPR) art 19(3), art 22 & 21; \textit{African Charter on Human and Peoples’ 
(ACHR) art 11, 15 & 16; \textit{Convention for the Protection of Human Rights and Fundamental Freedoms 
(European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 
September 1953)} (ECHR) art 10(2); European Convention on Human Rights (ECHR) art 11.
\textsuperscript{19} Steven J. Heyman, ‘Righting the Balance: An Inquiry into the Foundation and Limits of Freedom of 
\textsuperscript{20} Jamie Frederic Metzl, ‘Rwandan Genocide and International Law of Radio Jamming’ [1997] 91 AM. J. 
INT’L.L. 628.
1.2 Research Methodology

The methodology employed in this research will initially take a theoretical approach on the right to freedom of expression. This gives an understanding on the need within a “democratic social order” for a balance between the public interest and the right to freedom of expression where neither one is given a supreme importance. This research is based on an analytical approach and critical appraisal of many Statutes and judicial decisions of Courts of mainly the United Kingdom (UK), the United States of America (USA), Canada, Australia, and so on. For the purpose of this research, relevant reports, journal articles, and internet materials have been collected from various sources and considered to discuss the main issues.
CHAPTER II

HISTORICAL CONTEXT AND THE SCOPE OF THE RIGHT TO FREEDOM OF EXPRESSION

2.1 Introduction

The term “freedom of expression” means the right to do or say what anyone wants without any person hindering him/her. Freedom of expression is a public liberty that denotes things that individuals say, write, or act in order to show their thoughts, opinions, and ideas. Freedom of opinion and expression are fundamental rights of every human being, which is vital for “individual dignity and self-actualization”. This right also establishes essential foundations for democracy, peace, rule of law, stability, “sustainable and comprehensive development”, and contribution in “public affairs”. States have an obligation to admiration, protect as well as promote the rights to freedom of opinion and expression. Through contemplating the preceding meaning, it can be said, in short, that freedom of expression includes the right to say, write, or act to show someone’s feelings exclusive of anybody’s restriction on it.

25 Ibid.
Besides, expression includes having “interpretations or opinions”, “printing articles” or “books” or “leaflets”, “speaking loudly”, “television or radio broadcasting”, “creating works of art”, “communication across the internet”, some methods of “commercial information” and numerous other activities.27 Likewise, freedom of opinion and expression are necessary for the fulfillment and gratification of a wide range of other human rights including “freedom of association” as well as assembly, “freedom of thought”, religion or belief, the “right to education”, the “right to take part in social life”, the “right to vote” and all other political rights related to participation in “public affairs”.28

Additionally, it is pertinent to say that the system of democracy cannot survive without the rights mentioned above. “Freedom of opinion and expression” are important in and of themselves for the promotion of individuals’ autonomy.29 Freedom of expression, including artistic expression, is vital for the growth, and appearance of persons’ identities in society as well. Besides, free, distinct, and independent media are essential in any society these days to encourage as well as protect “freedom of opinion and expression” and all other human rights.

Further, by simplifying the free flow of information and ideas on matters of common concern, and by safeguarding transparency as well as accountability, “self-governing media” constitutes one of the foundations of a democratic society. Now, a question may

be pertinent as to what kind of expression is necessary to the operation of democratic government. If democracy denotes representative government, then only a very narrow kind of human expression will fall within the freedom’s scope. “Representative government” can exist in a community where dance, painting, and music are subjected to restriction.\textsuperscript{30} Indeed, representative government can exist where most discussion is prescribed.\textsuperscript{31} So long as citizens are competent to vote and to communicate with their elected representatives, the government will be representative.\textsuperscript{32}

Generally, two arguments have been made in support of freedom of expression.\textsuperscript{33} The first is that the freedom is an important precondition to democracy.\textsuperscript{34} Safeguard must be given to any expression, which is indispensable to the process of a demonstrative form of government.\textsuperscript{35} The second argument is that the freedom must be protected if we are to respect the autonomy of people.\textsuperscript{36} An “autonomous individual” is one who is free to express himself or herself to others as well as to obtain the communications of others exclusive of interference by the state.\textsuperscript{37} Also these theories offer little guidance regarding the accurate extent of the freedom because neither gives a complete explanation of the freedom.\textsuperscript{38}

\textsuperscript{30} Ibid.
\textsuperscript{31} Ibid.
\textsuperscript{33} Ibid.
\textsuperscript{34} J Van der Westhuizen, ‘Do we have to be Calvinist Puritans to enter the new South Africa?’ [1990] 6 SAJHR 430-31.
\textsuperscript{35} Dale Gibson, ‘Reasonable Limits under the Canadian Charter of Rights and Freedoms’ [1985] 15 Man LJ 27.
\textsuperscript{36} Ibid.
\textsuperscript{37} Ibid.
\textsuperscript{38} Mackay v Manitoba [1989] 2 SCR 357 at 366-67 per Cory J.
2.2 The Roots of Freedom of Expression

The contemporary roots of the foundation of the right to freedom of expression can be sketched from 17th century when document such as the English Bill of Rights of 1968 provided the right to freedom of speech through a debate within the Parliament.39 It is mentioned in the introductory part that this particular right has been eventually extended by the Bill of Rights of the US and the French Declaration of the Rights of Man and the Citizen.40 These two declarations redesigned the source of freedom of expression in the era of United Nation (UN) from 1946 till 1948 while finally it was established and the provision of freedom of expression was included in the UDHR.41 Besides, theories of freedom of speech and expression can be found in early human rights documents like the Magna Carta of 1215, England’s Bill of Rights, 1689, the Declaration of the Rights of Man and of the Citizen, adopted during the French Revolution in 1789.42 However, the awareness of freedom of expression has been acknowledged today in many international, regional and national laws of different States.

2.2.1 International Regulations of the Right to Freedom of Expression

The UDHR is regarded as the first international document that recognises the right to freedom of expression on 10 December, 1948.43 The UDHR was considered as a non-binding resolution for long which has become a part of the international customary law

43 Brownlie (n 5).
eventually. Article 19 of the UDHR depicts, “Any individual has the right to freedom of opinion and expression, which implies the right of not to being disturbed for his opinions and that to seek, receive and spread, without border considerations, information and ideas through any means of expression.” It seems that this Article recognises the broad principle on the right to freedom of information and expression to all individuals without any interference including the “right to seek, receive and impart information and ideas through any media” and irrespective of borders. Nevertheless, this Article itself does not impose any limitations in the exercise of this right. Yet again, this right is limited under Article 29(2) of the UDHR which says that the restrictions of exercising the right to freedom of expression have to be determined by the concerned law with a view to safeguarding “due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society.”

Another international instrument that recognises this right in symmetry with the UDHR is the International Covenant on Civil and Political Rights (ICCPR), 1966. Article 19 of the ICCPR specifies that everyone has the right to freedom of expression and opinion entailing “freedom of seek, receive and impart information, and ideas through any media regardless of frontiers.” However, this same Article includes the restrictions to be followed to exercise this particular right saying that restrictions have to be “provided by

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45 The UDHR, art. 19.
46 Article 19(1) & (2) read as follows:
   1. Everyone shall have the right to hold opinions without interference.
   2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”
law” and are “necessary in a democratic society” with purpose of respecting the rights or reputations of the human beings as well as for protecting “national security” and maintaining “public order” or “public health” or morals.\textsuperscript{47}

It is important to mention here that under Chapter IV of the ICCPR, a “Human Right Committee” is to be established in order to monitor the implementation of the rights recognised under this particular Covenant. The mechanisms of bringing any objection under this committee have been included in the \textit{Optional Protocol to the International Covenant on Civil and Political Rights}.\textsuperscript{48}

\textbf{2.2.2 Regional Regulations of Freedom of Expression}

Just after two years of adoption of the \textit{UDHR}, the \textit{European Convention on Human Rights} was adopted on 4 November, 1950. Article 10 of the \textit{European Convention on Human Rights (ECHR)}, 1950 depicts, “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.” In order to protect this recognised right, the European Court of Human Rights was established under the Convention that became operative on 1 November, 1998 which is working on a permanent basis.\textsuperscript{49} It is clear from this Article that it does not avert the states from

\textsuperscript{47} The \textit{ICCPR}, art. 19(3).

\textsuperscript{48} Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

necessitating the society of “radio-fusion, cinema or television, a special authorization regime.”

If we look at features of this Article, it seems that the language of this Article is weaker than the language of Article 19 of the ICCPR in many aspects. To be more specific, it is seen that Article 10 of the ECHR does not create a right as an independent one i.e. the “right to hold opinions without interference”. Besides, this Article does not even expressly refer to the “right to seek information”, and “right to information and ideas”. Nonetheless, Article 10 discusses the restrictions of the right to freedom of expression in detail in comparison to other international instruments in this regard. It unpacks the rudiments of the right in more detail making clear reference to a variety of material circumstances in which this right may be restricted. In particular, those restrictions are permitted which are “prescribed by law” and are “necessary in a democratic society” in the interests of “national security”, “territorial integrity” or “public safety”, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the “authority and impartiality of the judiciary.”

50 The ECHR, art 10(1).
51 Article 19 provides as follows:
“(1) Everyone shall have the right to hold opinions without interference.
(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through other media of his choice.
(3) The exercise of the rights provided for in para 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 reputation of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals.”
52 The ECHR, art. 10(2).
The *American Convention on Human Rights* was adopted on 22 November, 1969 in San Jose (Costa Rica) which includes the right to freedom of expression under Article 13 which stipulates:

> “Everyone has the right to freedom of thought and expression. It includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. In the exercise of the right provided shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: (a) respect for the rights or reputations of others; or (b) the protection of national security, public order, or public health or morals.”

As regards restriction to the right to freedom of expression, this Convention entails three situations to be complied such as the restrictions have to defined in a precise and clear manner by particular law both in formal and material sense; the restrictions have to serve compelling objectives authorized by the Convention itself; and the restrictions have to be “necessary in a democratic society” to serve the compelling objectives of the Covenant.

The *African Charter on Human and People Rights* was adopted in June 1981 at the 18th Conference of Heads of State and Government in Nairobi (Kenya) in which the right to freedom of expression is recognised under Article 9 of the *ACHPR*. This Article reads as,

> “Every individual shall have the right to receive information as well as the right to disseminate opinion within the law.” It is seen from this provision that the concerned

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53 The *ACHR*, art. 13.
54 John Vida, ‘Human Rights in International Settlements’ [1999] Bucureti, Editura Lumina Lex 650; Article 9 states as follows:
> “Everyone has the right to information. Everyone has the right to express and disseminate his opinions within the laws and regulations.”
African Commission pays a very little concentration on the right to freedom of expression as it recognises this right merely to the extent that such right is not infringed upon by domestic law. In this regard, in a very famous case of Media Rights Agenda and Others v. Nigeria,\textsuperscript{55} the Commission held that the right which is to be restricted “in accordance with law” should be considered to require such margins to be done in term of national laws corresponding to the standard of international human rights. Remarkably, the Human Rights Act (HRA), 1998 of the UK, includes the right to freedom of expression under Article 10\textsuperscript{56} corresponding to the provisions of other national and international regulations.

### 2.3 Freedom of Expression and the Democracy

The term “democracy” occasionally denotes to something more than a form of government. It sometimes refers to a social context in which an individual is able to participate in various social goods and to progress as a free and thinking person, if this is what democracy means, afterward the possibility of the freedom will be much broader.

\textsuperscript{55} [2000]AHRLR 200.

\textsuperscript{56} Article 10 reads as follows:

“1. 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.

2. 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 confidence, or for maintaining the authority and impartiality of the judiciary.”
One of the important terms in political science is democracy. Democracy as a term derived from the Greek word “demos” or people, is defined, basically, as government in which the supreme power is vested in the people. The 16th US President Abraham Lincoln delineated democracy as a “government of the people, by the people and for the people.” Furthermore, the term democracy refers, very frequently, to a method of group decision-making characterized by a kind of equality among the participants at an essential stage of the cooperative decision-making.

Likewise, four aspects of this definition should be noted: first, democracy concerns collective decision making, by which it means decisions that are made for groups and that are binding on all the members of the group, secondly, this definition denotes to cover a lot of different varieties of groups that may be called democratic, thirdly, the definition is not planned to carry any normative solidity to it, fourthly, the equality essential by the definition of democracy may be more or less deep. In this regard, David Bentham said that when we speak of democracy, we have learnt to think of institutional arrangements such as “competitive elections”, “multipartyism”, the “separation of powers”, and so forth. In that sense, democracy is the institutionalization of freedom which is an important aspect of the same. This is displayed in majority rule, and in the centrality of

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the legislative body through which the representatives of the people act. This is a formal characteristic of democracy.\textsuperscript{62}

Nevertheless, in this matter, democracy is a complicated moral idea about the individual and not simply a form of political organisation.\textsuperscript{63} Those who support freedom of expression because it is necessary to the process of democratic government usually describe democracy as representative government for they see representative government as an uncontroversial goal and a legitimate ground for judicial review.\textsuperscript{64} However, much of the involuntary appeal of their theory pulls upon the wider meaning of democracy.

Additionally, it can be argued that the democratic theory is inadequate as a description of the freedom.\textsuperscript{65} In making this argument, it will be helpful to look to the US where this theory has been the subject of dispute.\textsuperscript{66} Besides, in the Canadian context, it is easy to see why freedom of expression came to be linked to the idea of democratic government, prior to the entrenchment of the \textit{Charter of Rights}, the Canadian Constitution did not give exact protection to freedom of expression.\textsuperscript{67} The courts are renowned that the value of an informed and intelligent citizenry was implied in the choice of a parliamentary form of government. In determining this form of government, the Constitution could be seen as

\textsuperscript{63} Helge Rønning, ‘Tools for Democracy or for Surveillance: Reflections on the Rule of Law on the Internet’ in Gripsrud, Jostein & Hallvard Moe (eds.), \textit{The Digital Public Sphere: Challenges for Media Policy} (Göteborg, Nordicom, 2010).
asserting the values, which motivate freedom of expression if the courts were to provide
any protection to the freedom, they had to find some basis for it in the form of
government set out in the Constitution.68

Furthermore, a democratic government is one that is responsible to its community and
seeks to represent their interests.69 If a government is to act democratically, then the
people must have a chance to express views on matters of public importance and to
express those views to their political representatives.70 The most significant protection of
the democratic interpretation of the First Amendment right to free speech is made by
Alexander Meiklejohn. He sees democracy in the US as the consequence of something
like a social contract embodied in the American Constitution and free speech as a
prerequisite of democratic government or self-government.71

Additionally, after the premise of democratic government set out in the American
Constitution, the right to free speech follows by deduction According to Meiklejohn, the
benefit of the democratic clarification is that it helps to describe the limits of the freedom.
He appreciates that the freedom to express cannot be unqualified, only speech, which is
relevant to the procedures of government, should be protected.72 Discussion of public
matters is safeguarded while discussion of private matters is not. Within this domain of
public speech the freedom is unqualified, that is, it cannot be balanced off in

68 Ibid.
70 Ibid.
71 Ergin Ergül Rumi, A Source of Inspiration for Universal Justice and Peace (Konya: Konya Metropolitan
Municipality, 2014) p. 49.
72 Ibid.
contradiction of other rights or interests. 73

On the other hand, John Hart Ely in his book Democracy and Distrust create a more recent statement of the democratic argument. Ely is not as confident as Meiklejohn that the democratic interpretation will yield a clear line distinguishing speech, which is protected from speech, and may be subjected to regulation. He considers that defining the limits of the right involves an imprecise balancing of competing interests. 74 Nevertheless, he also considers that recognising the democratic basis of the freedom will give a better idea of its scope and of the weight that should be attached to it when it comes into encounter with other interests. 75

Nonetheless, according to Ely, the actual value of the democratic interpretation is that it offers a justification for the entrenchment of the freedom against the will of the legislature and for the position of the judiciary as the defenders of the freedom. 76 He argues that the right to free speech is not in encounter with the principles of representative government and majority rule. 77 What are sometimes characterized as two conflicting American ideals the protection of popular government on the one hand, and the protection of subgroups from denials of equal concern and respect on the other

77 Ibid.
including the right of free speech in fact can be understood as arising from the common
duty of representation.\textsuperscript{78}

If government is to be responsive to the interests of its citizens, then those citizens must
be able to discuss political matters and to interconnect with their political representatives.
Ely argues that appointed and life-tenured judges cannot and should not act as reflectors
of conventional values.\textsuperscript{79} Detached from the will of the citizenry, judges are unsuited to
make value judgments.\textsuperscript{80} The legislature is the place where substantive values should be
identified and accommodated but, says Ely, judges are well suited to the role of guardians
of the process of representation.\textsuperscript{81} The independence of the judiciary does put them in a
position tangibly to assess claims that either by blocking the channels of change or by
performing as symbols to majority tyranny, our elected representatives in fact is not
demonstrating the interests of those whom the system presumes they are.\textsuperscript{82}

On the other hand, Ely’s democratic explanation of the freedom offers a value-neutral
basis for judicial review of government action, and it offers a way of reconciling the right
of free speech with the principle of majority rule.\textsuperscript{83} The demands of representation
provide the justification and the standard for judicial intervention, but does the idea of
democracy provide a premise from which we can deduce the sorts of expression that
should be protected? What speech must be protected if government is to be truly

\textsuperscript{79} Jonathon Glassman ‘Sorting out the Tribes: The Creation of Racial Identities in Colonial Zanzibar’s
\textsuperscript{81} Jane Campbell, ‘Multiracialism and Politics in Zanzibar’ [1962] 77(1) Political Science Quarterly 72, 87.
\textsuperscript{82} Ibid.
and Democracy 59, 71.
representative? Only the right to vote is not enough, for a government to be
crepresentative its citizens must be able to interconnect with their elected representatives.\(^{84}\)
However, does representation necessitate more than this? Does it require that citizens be
able to interchange information and ideas about political and moral issues, as both
*Meiklejohn* and *Ely* believe? A community who is exposed to a wide variety of ideas and
information will be better well versed and have a broader outlook.\(^{85}\) *Meiklejohn* includes
within the category of protected speech, literature, philosophy, science and fine art. All
forms of speech which contribute to the development of intelligence and sensitivity to
human values” in the public are protected.\(^{86}\)

Moreover, in *Meiklejohn*’s view Self-government can exist only in so far as voters
acquire the intelligence, integrity and generous devotion to the general prosperity that, in
theory, casting an election is assumed to express.\(^{87}\) However, does representative
government require an intelligent, value-sensitive population? It would seem to require
only that citizens be able to register their preferences with their political leaders, not that
these preferences be of a certain quality, a government, which carries out the choices of
its citizens, even if those citizens are neither intelligent nor value-sensitive, is still a
representative government.\(^{88}\) A freedom with the broad scope that *Meiklejohn* would give
to it speech which contributes to the development of an intelligent and sensitive citizen or

\(^{84}\) B. Obinna Okere, ‘The Protection of Human Rights in Africa and the African Charter on Human and
Peoples Rights: a comparative Analysis with the European and American System’ [1984] 6(2) Human
Rights Quarterly 141, 159.

\(^{85}\) Ibid.

\(^{86}\) Onder Bakircioglu, ‘The Application of the Margin of Appreciation Doctrine in Freedom of Expression

Law Review 103, 122.

\(^{88}\) Ibid.
even the narrower scope supported by Ely political discussion among citizens, is not a condition precedent of representative government. The premise of representative government will not yield what is claimed for it.  

Nevertheless, *Meiklejohn’s* argument is not so easily set aside. Unlike Ely, *Meiklejohn* does not focus his argument exclusively on the idea of representation. The Constitution, he says, establishes self-government and self-government is more than a system in which the preferences of citizens are represented. Inherent in the notion of self-government of democratic government is a moral idea about the citizen, the citizen has the potential to make informed and intelligent moral and political judgments, and value is placed not simply on the choices made, however, also on the capacity to make choices. An environment is democratic if it encourages the development of these capacities.

Furthermore, freedom of expression, then, is not a condition precedent of illustrative government; rather it is something, which advances the ideal of self-governance by advancing the capacity of citizens to make intelligent choices. With this version of the democratic theory, democracy is a complex ideal. It breaks on a moral view of the individual, which attaches value to certain human capacities. If this is what democracy means, then *Ely’s* hope for an assessment unbiased justification and definition of the freedom seems lost, besides, for this version of the theory, democracy is not simply a

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80 Ibid.
92 Ibid.
given from which freedom of expression can be instigated deductively. It is, instead, a focus for argument about what is to be valued in a human being and about what speech will advance that which we value.\textsuperscript{94} As well, Meiklejohn’s claim that there is a firm line between public speech, which is protected as well as private speech, which is not, is no lengthier reasonable.\textsuperscript{95}

Consequently, the public speech category has been extended to include all speech, which contributes to the development of the citizen as an intellectual and value-sensitive person. If the freedom is given such a broad scope, it is unreasonable to think that other values cannot limit it; limitations in order to protect the values of privacy, reputation, fair trial and so forth seem necessary. The connection is that both freedom of expression and representative government advance certain capacities in the individual and certain ways of life. Under representative government, individuals are allowed to determine their own interests and to make value judgments.\textsuperscript{96}

What is more, freedom of expression matters because it is important to individual development, individual development may be part of the democratic ideal, but its value does not derive from its contribution to the political process.\textsuperscript{97} We do not value intelligence and value-sensitivity in the individual because these capacities in some way contribute to the operation of government. Instead, we judge the political process by its

contribution to that which we value in human beings. 98 Meanwhile the focus of the democratic theory has shifted from the process of political representation to the development of capable citizens, the description of the theory as democratic is misleading. 99 The democratic theory has recognised that freedom of expression and representative government are connected, but it has misunderstood the nature of that connection. 100

Consequently, an individual who makes worth judgments and who participates in the governing process will practice important human goods and will improve as an intelligent and value-sensitive individual. 101 Likewise, in the exercise of free expression, individuals participate in various forms of human good such as friendship and self-government and improve as thinking human beings, the democratic theory, consequently, faces a dilemma. 102 If the theory is disturbed with the requirements of representative government, then it cannot account for much of the expression, which the exponents of the theory have assumed it protects. 103 It cannot justify artistic expression or even political discussion among the citizenry. If the concern of the theory is wider than the requirements of political representation, it may be able to support a wider scope of protection. Its focus, however, will have shifted from the political process to the

100 Ibid.
102 Bakircioglu (n 85).
individual. It will have ceased to be a democratic theory and have become a theory about individual right.\textsuperscript{104}

The freedom needs no longer be acceptable, as a requirement of democratic government, the values, which motivate the freedom, should not be concealed behind the outward value-neutrality of representative government.\textsuperscript{105} Adherence to the democratic view leaves the freedom vulnerable to conceptual confusion and to the certainty that its scope will be ever narrowed. If democracy is the basis of the freedom, why should the will of the majority to restrict free speech is constrained? And why should anti-democratic speech or even speech separate to the political issues of the day be protected? If freedom of expression is to be of use when it is most needed in defense of speech that is unpopular with the political majority, then its academic basis must be clear.\textsuperscript{106}

\subsection*{2.4 Freedom of Expression and Autonomy}

An important alternative to the democratic theory is a theory based on the idea of individual autonomy.\textsuperscript{107} According to this theory, the government is morally bound to respect the autonomy or liberty of individuals and may not obstruct with their freedom to express themselves to others and to receive the expressions of others.\textsuperscript{108} The word

\textsuperscript{104}Ibid.
autonomy is also defined in different ways such as the term autonomy suggests a broad freedom from government interference, one broad enough to include all forms of human action.\textsuperscript{109} Is this the proper scope of freedom of expression? Are all-human actions to be protected subject only to such reasonable limits as may be demonstrably justified in a free and democratic society? Such a freedom would require the courts to assess the importance of all legislation, which restricted an individual's actions, a responsibility which seems beyond their institutional competence.\textsuperscript{110}

Furthermore, those who see autonomy as the justification for the freedom use the term to mean the absence of outside barriers to an person’s actions drawing on the liberal idea that the state ought not to favor one individual’s conception of the good over another’s, if autonomy in this intelligence is the basis of freedom of expression then the freedom’s scope will be very comprehensive indeed covering every action of the individual. If any form of external restraint is prima facie wrong, then no particular class of human action is set apart for special protection, all action must be protected.\textsuperscript{111} This is an extensive claim for a constitutional right even one subject to reasonable limits; those who suppose that autonomy is the basis of the freedom rarely argue that its scope is this broad.\textsuperscript{112}

\begin{flushleft}
\textsuperscript{109} Ibid.
\end{flushleft}
Nevertheless, frequently the term autonomy refers to a capability in individuals to make choices and to conduct their lives in a way that is true to their purposes.\(^{113}\) If freedom of expression is established on autonomy in this sense then its scope will be something less than all human actions.\(^{114}\) Its opportunity will extend only to those forms of expression, which are of particular significance to the development and practice of the person's capacity for intelligent and morally sensitive thought.\(^{115}\) Much of the appeal of the autonomy-based explanation of the freedom originates from this second meaning. Yet this meaning is not mentioned in the writings of the liberal proponents of this justification.\(^{116}\)

However, why the scope should be limited to acts of communication is not immediately ostensible from the term autonomy.\(^{117}\) Thomas Scanlon defines the freedom as: the consequence of the view that the powers of a state are limited to those that citizens would recognise while still regarding themselves as equal, autonomous, rational agents. To regard himself as autonomous, a person must respect himself as independent in deciding what to believe and in assessing competing reasons for action. Are all human actions equally worthy of constitutional protection? Or is there a sub-category of human action,

\(^{114}\) Ibid.
which is admirable of special protection? The proponents of the autonomy-based theories do not claim that every human act is sheltered by the freedom.¹¹⁸

Besides, they assume that the freedom protects communication. Freedom of expression is entrenched in the Constitution and made the subject of judicial concern because it protects a special category of human action; an activity eligible of judicial protection in a political community that is otherwise governed by majority rule. If freedom of expression does not protect all likely human actions, then what special category of action does it protect? For Scanlon, if persons are to be autonomous, they must be free in thought and choice.¹¹⁹ However, individuals are still free to think and make decisions, even if they are not free to communicate their thoughts and to receive the benefit of others’ thoughts. The state can repeal the freedom and still an individual is autonomous in the sense of being independent in thought and choice.¹²⁰

Likewise, if individual autonomy is the basis for freedom of expression, then it must mean something more than freedom from others.¹²¹ By autonomy Scanlon does, certainly, mean something more. An autonomous individual cannot accept without independent consideration, the verdict of others as to what he should consider or what he should do. To be autonomous, an individual must be treated as capable of making

¹¹⁸ Ibid.
¹¹⁹ Fombad (n 110).
¹²¹ Ibid.
decisions for him or herself.\textsuperscript{122} It is not enough that an individual's thoughts and decision-making processes are free from interference; the government must not prevent him or her from receiving information and ideas from others on the grounds that it believes he or she is not capable of making judgments for himself or herself. In Scanlon’s view, freedom of expression does not protect a certain class of expressive acts as valuable in themselves; rather it excludes certain reasons for limiting expression.\textsuperscript{123} Different theories might be proposed: that censorship is degrading because it suggests that the speaker or writer is not worthy of equal concern as a citizen or that his ideas are not worthy of equal respect, that censorship is insulting because it denies the presenter an equivalent voice in politics and therefore denies his standing as a free and equal citizen or that censorship is grave because it hinders a person’s development of his own personality and integrity.\textsuperscript{124}

The government cannot protect an individual from coming to have false beliefs by pre-selecting available information. If the government contains an individual's access to information and ideas because it does not regard that person as accomplished of making independent judgments, it will have failed to recognise his or her autonomy. Ronald Dworkin’s view of free expression is similar to Scanlon’s but that Dworkin focuses his concern on the individual speaking rather than the individual listening. In an article


discussing freedom of the press, Dworkin advocates several alternatives to those theories of the freedom which focus on the interests of the listener.\textsuperscript{125}

Likewise, the state must treat the judgments that a citizen makes as worthy of equal respect.\textsuperscript{126} This is so, says Dworkin, because citizens must be treated as capable of forming and acting upon intellectual formations of how their lives should be lived. The state must not favour one individual’s conception of the good over another’s.\textsuperscript{127} To constrain an individual’s freedom of speech would be to violate this requirement of neutrality; meanwhile the grounds for such restriction would be the undesirability or inferiority of the restricted view.\textsuperscript{128} However, is it a failure of respect, and a moral wrong, if we do not regard citizens as equally competent or their ideas as equally sensible?

Certainly, we disapprove the views of some individuals because we consider that those views are mistaken and denote poor judgment as well as while the state may permit free expression of ideas, it does not permit all ideas to be acted upon.\textsuperscript{129} Besides, Dworkin articulates that criticism of ideas and restriction of actions are not denials of equal concern and admiration.\textsuperscript{130} For Dworkin, the state fails to show individuals the required respect only if it prohibits free expression of their ideas, yet to criticize an individual's ideas and to prevent that person from acting upon them is to treat his or her ideas as less

\textsuperscript{126}\ Ibid.
\textsuperscript{127}\ Ian Brownlie, Guy S. Goodwin-Gill. Basic Documents on Human Rights (5th edn, Oxford University Press, 2006) p. 171.
\textsuperscript{129}\ Hardinge (n 75).
\textsuperscript{130}\ Manfred Nowak, UN Covenant on Civil and Political Rights CCPR Commentary (2nd edn, N.P. Engel Publishers, 2005) p. 442.
sensible or worthwhile than those of others.\textsuperscript{131} The language of autonomy and respect does not tell us why anything should turn on the distinction between criticism of ideas and suppression of ideas.\textsuperscript{132} Besides, Scanlon’s attempt to base freedom of expression on the requirement that we respect the decision-making capacity of the listener is incomplete in the same way.\textsuperscript{133} He does not believe that assessing the decisions individuals make or restricting their freedom to act upon those decisions is wrong. Individuals will make many incorrect decisions, but still they must be allowed the freedom to receive information and to make decisions on the basis of that information.\textsuperscript{134} Besides, autonomy does not indicate why criticism of ideas and restriction of action is acceptable while prohibition of the exchange of ideas is not.\textsuperscript{135} Whether we are referring to the autonomy of the speaker or the listener, the word autonomy refers to, nonetheless does not specify, a moral idea about the individual, an idea that undertakes that individuals are not all equal in their decision-making capacity, but considers, nevertheless, that they must be permitted to exchange ideas and to exercise their decision-making capacity. Freedom of expression has moral connotation but trusting on the opaque language of autonomy and respect, Scanlon and Dworkin do not illuminate what that significance is.\textsuperscript{136}

As per the theory of justice, John Rawls contends that free speech is a requirement of justice. Rawls constructs an original position in which free and rational persons,

\begin{itemize}
\item \textsuperscript{131} Ibid.
\item \textsuperscript{133} Ibid.
\item \textsuperscript{135} W.H. Ingrams, \textit{Zanzibar Its History and Its People} (Frank Cass and Company Limited, 1967) p. 229.
\item \textsuperscript{136} Issa G. Shivji, et al., \textit{Constitutional and Legal System of Tanzania} (Mkuki na Nyota Publishers Ltd, 2004) p. 526.
\end{itemize}
concerned to further their individual assistances however, denied certain information about them, choose the principles, which will govern their association. The parties’ choice of certain values, Rawls claims, establishes a connection between these principles and the conception of the person, which the original position represents. The beginning of the person contained in the original position has two aspects, the rational and the reasonable. The rational refers to the motivation of the parties; the reasonable refers to the restrictions on available information. He claims that there are two principles of justice, which the parties in the original position would choose.

Likewise, the first principle is that individual is to have an equal right to the most extensive total system of basic liberties compatible with a similar system of liberty for others. Freedom of speech is one of the fundamental autonomies. The rational refers to the motivation of the parties; the reasonable refers to the restrictions on available information. The parties are to choose principles, which they believe will best advance their conception of the good. They are, however, behind a veil of ignorance and do not know what skills and facilities they have, or what their conception of the good is.

Consequently, the innovative position is a construction designed to model a specific commencement of the person. The parties' choice of certain values, Rawls claims, founds a connection concerning these principles and the commencement of the individual, which

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137 Alfredsson & Eide (n 2).
139 Ibid.
142 Ibid.
the original position represents.\textsuperscript{143} The conception of the person contained in the original position has two aspects, the reasonable and the reasonable. The original position, then, represents a moral view of the person which values the advancement of the conception of the good chosen by the person and requires that the person’s conception not be treated as more or less worthy of advancement than that of any other person.\textsuperscript{144}

Besides, the parties will choose principles, which do not favour one conception of the good at the expense of another, but will select a certain distribution of primary goods.\textsuperscript{145} Primary goods are those things that it is rational to want whatever else one wants on the grounds that they will advance all conceptions of the good.\textsuperscript{146} Rawls claims that freedom of speech is one of the primary goods, which would be chosen in the original position. It is rational to want free speech because it is part of a framework, which allows individuals to pursue whatever they consider to be the good life.\textsuperscript{147}

 Nonetheless, it is far from clear that the parties in the original position would agree upon a right to free speech.\textsuperscript{148} They would not choose principles, which support one formation of the good at the expense of another. Even if it is rational for each individual to want a right to free speech for himself or herself, it does not follow that a general right to free

\textsuperscript{144} Guy S. Goodwin-Gill, \textit{Free and Fair Elections: New expanded edition} (Published by Inter-Parliamentary Union, 2006) p. 99.
\textsuperscript{145} Maher (n 95) p. 1287.
speech a right to free speech for all persons is rational.\textsuperscript{149} A general right of free speech innovations some conceptions of the good and constrains others. In protecting freedom of speech we favour speech over silence, interaction over isolation. An individual is not required to speak to others but, if he chooses to, he will be protected from interference.\textsuperscript{150}

Likewise, our belief that his ideas are bad or wrong and our fear that others might believe them are not grounds, which will justify limit of his freedom of expression. Nor is it a ground to restrict his freedom that we find his speech objectionable or offensive and those we do not wish to hear it.\textsuperscript{151} Our oppositions must be supported by reasons, which represent significant countervailing interests or values. We cannot be forced to stop and listen to those views, and yet we cannot avoid their frequent intrusion into our lives. The protection of free speech favors those beginnings of the moral that include communication, open discussion and social intercourse. It limits those conceptions that prefer authoritarianism and social isolation.\textsuperscript{152}

Besides, the justification for free speech cannot lie as Rawls supposes in its usefulness to all conceptions of the good. Freedom of expression is justified only if we consider some conceptions of the good to be more worthy of advancement than others.\textsuperscript{153} In deriving freedom of expression from the original position, Rawls assumes the greater worth of certain ways of life but this assumption contradicts his formal disagreement. The original position in place of demonstrating the correctness of certain values is in truth premised on

\begin{itemize}
\item \textsuperscript{149} Ibid.
\item \textsuperscript{150} Ibid.
\item \textsuperscript{152} \textit{The Sunday Times v United Kingdom} [1979-80] 2 EHRR 245.
\item \textsuperscript{153} Ibid.
\end{itemize}
certain values. Rawls and Dworkin have both suggested an additional justification for freedom of expression.\textsuperscript{154}

Moreover, the freedom, they say, is important to an individual's self-development. Included in Dworkin's enumeration of justifications for freedom of expression is the importance of the freedom to an individual's development of his own personality and integrity.\textsuperscript{155} Rawls accepts that liberty of conscience, which he defines to include freedom of speech is one of the social conditions necessary for the development of this capacity. In his justification of liberty in general, and free speech in particular, the idea of self-development plays a central role. The parties in the original position seek to secure not only what is necessary to achieve their conception of the good, but also what is necessary to advance their capacity to form and revise such a conception.\textsuperscript{156}

Nevertheless, why is speech or expression important to an individual's self-development? Freedom of expression is said to involve the freedom to speak and listen to others. But an individual who is prohibited from communication or listening to others is still in control of his or her thoughts and decision-making processes.\textsuperscript{157} If freedom of expression is necessary to individual development, then that development is not simply self-development.\textsuperscript{158} The importance of free expression indicates that others have a role to

\textsuperscript{154} R v. Cheltenham Commissioner [1841] 1 QB 467.
\textsuperscript{158} Ibid.
play in the individual’s development, but either Dworkin or Rawls offers no explanation of the significance of communication or social interaction to individual development.\textsuperscript{159}

Unless freedom of expression is a general right to be free from state interference of every kind, then its justification must include some explanation of the value of the particular activities it protects.\textsuperscript{160} Each of the arguments for free expression discussed in this section Scanlon’s autonomy, Dworkin’s equal concern and respect and Rawls’ advancement of conceptions of the good has focused on only one feature of freedom of expression.\textsuperscript{161} Each has focused on the fact that it is a freedom a right not to be interfered with, but none of the arguments has explained the positive dimension of the freedom what the individual is free to do.\textsuperscript{162}

Furthermore, Scanlon, Dworkin, and Rawls each undertake that the scope of the freedom is limited to the activity known as speech or announcement. But none of their explanations of the freedom accounts for the value of declaration.\textsuperscript{163} If autonomy denotes freedom from external interference with any of an individual’s activities, then it cannot illuminate a freedom, which offers defense to a limited and special class of activities. But autonomy is often used to mean something other than freedom from others.\textsuperscript{164} If

\begin{itemize}
\item \textsuperscript{159} Ayubu Rioba, ‘Media Tanzania’s Transition to Multiparty Democracy: An Assessment of Policy and Ethical Issues’ [2008] PHD Thesis: University of Tampere 1, 25.
\item \textsuperscript{160} Mogens Schmidt. Limits to the restrictions of freedom of expression – Criteria and Application, available at <http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/experts_papers.htm> accessed on 7 June 2016.
\item \textsuperscript{161} Ibid.
\item \textsuperscript{164} Ibid.
\end{itemize}
autonomy means a capacity in the individual to make judgments and to provide intellectual direction to his life, it can justify the freedom. Autonomy in this sense is an ideal, which freedom of expression may advance.  

Additionally, this autonomy is not something that the individuals have automatically so long as they are free from external interference in how they choose to conduct their lives. It is something, which must develop and which the political unobstructed can advance by creating the conditions for its development. It is a multifarious moral idea, which deserves careful examination. Scanlon, Dworkin, and Rawls provide no such examination. These writers can go no further than their liberal premises permit. They expect that the political public must not favor a particular way of life and that an individual is a social being by choice and not by nature. Freedom of expression will not fit with these beliefs.

2.5 Freedom of Expression and the Community

To begin with, the democratic and the autonomy-based theories are incomplete as explanations of freedom of expression and so are unable to settle the limits of its scope. The proponents of each of these theories tried to explain a freedom, which they assumed extended to protect communication. In attempting to account for the special protection of

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165 Ibid.
communication, they have transformed the original meaning of the central concepts of democracy and autonomy.\textsuperscript{169} When we stare closely at both democratic and autonomy based theories, we can see that they point to another explanation of the freedom. They propose that the justification for freedom of expression deceits not in the value of democratic meaning representative government or individual autonomy meaning liberty but in the value of social communication.\textsuperscript{170} Through communication we develop as human beings in the capacities we value such as rational thought, moral judgment and emotional attachment. These characteristically human capacities can only develop in society.\textsuperscript{171}

According to \textit{C.B. Macpherson}, human society is the medium across which human capacities are developed.\textsuperscript{172} A society of some kind is an essential condition of the development of individual capacities. If we hold that certain capacities are valuable, it follows that we should not impair their exercise.\textsuperscript{173} It also follows that we should try to create an environment in which these human capacities are encouraged to develop. Freedom of expression is an important part of such an environment.\textsuperscript{174} Across communication with one another we expertise certain forms of good and we develop fully as human beings.\textsuperscript{175} If we see individual improvement not as the surfacing of a

\textsuperscript{169} \textit{Handyside} (n 14).


\textsuperscript{171} Ibid.


\textsuperscript{174} Ibid.

\textsuperscript{175} I. Kant, \textit{An answer to the Question ‘What is Enlightenment?’} (Cambridge: University Press, 1970) pp. 54-60.
personality, which is already set, however, as the growth of definite human capacities, later the significance of the freedom becomes stronger the importance of freedom of expression to individual growth defends why we should not prevent individuals from expressing their views or prevent them from hearing the views of others, even when we may properly criticize those views and pass laws which preclude them from being put into effect.\(^{176}\)

Furthermore, permitting individuals to hear and assess the opinions of others is no guarantee that they will always make knowledgeable decisions; nonetheless this freedom is essential if they are to develop as thinking beings capable of making judgments. As *Mr. Justice Jackson* of the American Supreme Court said, the danger that citizens will think wrongly is serious but less dangerous than deteriorate from not thinking at all.\(^{177}\)

*John Stuart Mill* supported freedom of expression on the utilitarian ground that the genuineness is most probable to appear in a society that permits the unrestricted exchange of ideas. But in Mill’s writing there are frequent suggestions that the freedom may also be justified because consideration of different points of view will cultivate intellect and judgment.\(^{178}\) This period in Mill’s argument protects him from the standard sessions made against the claim that the freedom is justified because truth is most likely to emerge from its exercise.\(^{179}\)

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\(^{179}\) Ibid.
Similarly, for there are times when the truth will not emerge from the marketplace of ideas the general community and particular individuals will make mistakes and occasionally with slight danger of error, the state can censor certain ideas and protect the individual from coming to hold false beliefs.\footnote{Ibid.} If truth and only truth is what we value, then censorship is completely sensible. By censoring false ideas, the state can constraint their spread. But if we value the capacity to make judgments about truth then suppression of any idea, true or false, makes no sense and it is essential to the development of individuals that they be allowed to express their views to others. In enunciating their ideas, individuals give shape to that which is originally inchoate and confused.\footnote{Ibid.}

Besides, in communicating themselves to others they become persons with a particular personality and point of view. Since Charles Taylor has observed that speech is the activity by which we gain a kind of explicit self-aware consciousness of stuffs which as such is always connected to an unreflective experience which precedes it and which it illuminates and hence transforms.\footnote{Ibid.} Nevertheless, communication is valuable in another way. By communicating we participate in certain forms of human good communication, friendship, self-government as well as other activities or ways of life that are valuable. Communication or social interaction is an end in itself.\footnote{Ibid.} By connecting an individual customs relationships and associations with others family, friends, church gathering, countrymen, co-workers, through entering into argument with others an individual


participates in the improvement of knowledge besides in the direction of the community. The value committed to freedom of expression, then, is based on a recognition that the good of the individual is bound up with the community. Expression is the way we interact with others and so participate in social goods such as friendship and self-government along with through expression we develop our human capacities.\(^\text{184}\)

### 2.6 Conclusion

Freedom of expression is a significant pointer of a democratic society as well as expansion, if freedom of expression is prevailing in a country or society, other democratic rights and freedoms will spontaneously be ensured.\(^\text{185}\) Because, by exercising the freedom, people can participate in decision making across free access to information as well as ideas.\(^\text{186}\) Hence, to understand the presence of freedom of expression and its existing ambits as well as limits, it is essential to understand the local political context, history, and cultures of a country.


CHAPTER III

AMBIT OF THE RIGHT TO FREEDOM OF EXPRESSION AND OTHER RELATED RIGHTS

3.1 Introduction

Indeed, the right to freedom of expression is a fundamental and inalienable right of all individuals in all its forms and manifestations which includes the right to communicate through media of any kind such as print, electronic, or audio-visual.\textsuperscript{187} It should not be forgotten that this right is essential for the development of democratic system of any country in concern.\textsuperscript{188} In order to find the truth of any incident, the right to freedom of expression is necessary for maintaining the balance between steadiness and variation in many societies for successful operation of democracy.\textsuperscript{189} This right is essentially important for enjoying and safeguarding other recognised human rights.

Through the passage of time, it has been established that this right includes the freedom of discussion, dissemination of knowledge and ideas.\textsuperscript{190} Moreover, the rights derived from the right to freedom of expression cannot be denied merely for the reason that the ideas or information is distasteful and unpopular.\textsuperscript{191} Besides, these rights are available so

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\textsuperscript{187} Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal [1995] AIR (SC) 1236.
\textsuperscript{188} Ibid.
\end{flushright}
long as the concerned expression is not malicious, libelous, untrue or reckless.\footnote{Saxena v Chief Justice [1996] AIR 921 (SC).} In addition to that, the right to freedom of expression is closely connected to the concept of journalistic freedom of expression and freedom of press.\footnote{Prager and Oberschlick v Austria App No. 15974/90 (ECHR, 1995); Lopes Gomes Da Silva v Portugal App No. 37698/97 (ECHR, 2000).} The journalists have an obligation to disseminate information in the matter of public interest to the common people.\footnote{Inspector General of Police v All Nigeria Peoples Party and Others [2007] AHRLR 179; Von Bulow v Von Bulow [1987] 811 F.2d 136.} For this purpose, they may not compromise on any ground so as not to deprive people from tracking down pertinent news.\footnote{BladetTromso and Sensaas v Norway App no. 21980/93 (ECHR, May 20, 1999); Obsidian Finance Group, LLC and Kevin D. Padrick v Crystal Cox 12 F.Supp.2d 1220 (2011); Lovell v City of Griffin [1938] 303 U.S. 444; Laura Durity, ‘Shielding Journalist-“Bloggers”: The Need to Protect Newsgathering Despite the Distribution Medium’ (2006) 5 Duke L & Tech Rev 1; David Domingo & Ari Heinonen, ‘Weblogs and Journalism A Typology to Explore the Blurring Boundaries’ (2008) 29(1) Nordicom Review 1, 3; Richard Davis, A Symbiotic Relationship Between Journalists and Bloggers (Joan Shorenstein Center on the Press, Politics and Public Policy, 2008) p. 156.} Nevertheless, it is well accepted by the people that this right should not be absolute rather it should have certain legitimate limitations. To continue this discussion, the related rights of the freedom of expression are described in the following:

### 3.2 Freedom of Opinion

It has already been discussed in Article 19(1) of the ICCPR that it enshrines that the right to hold opinions without interference is an independent right. For this reason, many people allege that the right to hold opinion is an absolute right which should not be restricted at all. \textit{General Comment No. 10 of the United Nations Human Rights Committee on Freedom of expression} (Paragraph 1) expressly recommended that this
right should not even be limited by any law or any other lawful way.\textsuperscript{196} If restriction is imposed upon the right to hold opinion, then it would amount to interference to the conscious or subconscious mind of the people which is proscribed by the alleged Article of the \textit{ICCPR}.\textsuperscript{197}

In respect to the right to hold opinion and the limitations of exercising this right, in the case of \textit{Yong-Joo Kang v. Republic of Korea},\textsuperscript{198} the accused was a supporter of the North Korean communist regime who was convicted for his prejudicial activities.\textsuperscript{199} His activities were regarded as threat to the national security of the Republic of Korea.\textsuperscript{200} When he was confined in imprisonment, he was tried to convert his ideology from his alleged Communist opinions.\textsuperscript{201} In this regard, the Human Rights Commission expressed that this act of converting his ideology amounts to violation of the right to hold opinion under the said provision.

From the discussion made, it is clear that people have the right to hold opinion along with the right to express the same as guaranteed under many laws. However, it should always be remembered that someone’s opinion should not be harmful for someone else’s reputation as the way of expressing opinion \textit{i.e.} the right to freedom of expression is a qualified right. The limitations imposed in exercising this right must be followed by every individual in concern.

\textsuperscript{196} See also Principle 5 of Johannesburg Principles on freedom of expression.
\textsuperscript{197} Nowak (n 129) p. 442.
\textsuperscript{198} Par 7.2 of HRC Judgment, 16 July 2003, Available at <http://www.unhcr.org/refworld/category, LEGAL, HRC, KOR, 404887efa, 0.html> accessed at 21 July 2016.
\textsuperscript{199} Ibid.
\textsuperscript{200} Ibid.
\textsuperscript{201} Ibid.
3.3 Freedom of Press

There is no doubt that the right to freedom of expression has great importance to exercise the other human rights of the people. This particular right is relevant to the context of broadcasting which is covered by the right to freedom of expression. It is believed that the concept of the right to freedom of press is nothing but a species of the freedom of expression. This right is connected with the freedom of journalists to serve the society by disseminating information, sometimes even without compromising on any ground, to the general people. In the matter of public interest, journalists must not compromise on any ground, so as not to deprive people from obtaining relevant information. However, these universal right is also not absolute and are subjected to certain restrictions. In respect of journalistic freedom of expression, it is to be considered as to whether the material published is prejudicial to any trial or not since it may bring bad luck for any accused person in concern.

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202 See Laugh it off Promotions CC v. SAB International (Finance) BV tia Sabmark International [2006] 1 SA 144 (CC) at paras 45 and 46.
205 Ibid.
207 UDHR, Art. 29.
208 UDHR, Art. 10; ICCPR, Arts. 14 and 16; ECHR, Art. 6; AfCHPR, Arts. 3, 7 and 26; ECtHR, Arts. 5, 6 and 7, and the 7th Protocol to the Charter, Arts 2-4; ACHR, Arts. 3, 8, 9 and 10; the Sixth Amendment to the United States Constitution; the Constitution of the People’s Republic of Bangladesh, Art. 35(3); the Criminal Procedure Code (India), Sec. 304.
In order to exercise this right the journalist must comply with certain well-known precedents such as the report published should have true factual basis while the journalists should also act in good faith; and previous research should be done before publication complying with journalistic ethics. When any speech becomes insulting or offensive to any individual and it is proven that the person making the same is ultimately responsible for the statement made, then the person’s such speech would not be protected under the right to freedom of expression. It is necessary to mention here that Article 12 of the UDHR and Article 17 of the ICCPR prohibit unlawful attack on someone’s honor and reputation. As a consequence, no one is permitted to cause injury to any person’s reputation in the garb of exercising freedom of expression and freedom of press.

209 Stângu v. Romania App no 57551/00 (ECtHR, 9 November 2004); H.N. v. Italy App no 18902/91 (ECtHR, 27 October 1998); Savitch v. Moldova App no 11039/02 (ECtHR, 11 October 2005); Colombani and others v. France App no 51279/99 (ECtHR, 25 June 2002); Herrera Ulloa v. Costa Rica [2004] I.A.C.H.R. 3; Gaudio v. Italy App no 43525/98 (ECtHR, 21 February 2002); Maroglou v. Greece App no 19846/02 (ECtHR, 23 October 2003); Lomakin v. Russia App no 11932/03 (ECtHR, 17 November 2005).

210 Frankowicz v. Poland App no 53025/99 (ECtHR, 16 December 2008); Azevedo v. Portugal App no 20620/04 (ECtHR, 27 March 2008); Zakharov v. Russia App no 14881/03 (ECtHR, 5 October 2006); Raichinov v. Bulgaria App no 47579/99 (ECtHR, 20 April 2006); Gavrilocevic v. Moldova App no 25464/05 (ECtHR, 15 December 2009); Csanics v. Hungary App no 12188/06 (ECtHR, 20 January 2009); A/S Diena v. Latvia App no 16657/03 (ECtHR, 12 July 2007).

211 Article 12 of the UDHR reads as follows:
No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 17 of the ICCPR reads as follows:
1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Whatsoever, the freedom of press and freedom of expression comprise the “right of access” to the information and right to know of the general people.213

3.4 Freedom of Religion

The individual’s right to freedom of opinion and expression, and freedom of religion are protected by both the UDHR and ICCPR. Article 18 protects the right to “freedom of thought, conscience and religion” whereas Article 19 of the UDHR provides every individual with the fundamental right to “freedom of opinion and expression.” It is to be mentioned here that Article 18(1) of the ICCPR is analogous to the expression of terms to protect the freedom of thought, conscience and religion set out in the UDHR. Article 18 of the UDHR reads as: ‘[e]veryone has the right to freedom of thought, conscience and religion … [including the] freedom to change his religion or belief, and […], to manifest his religion or belief in teaching, practice, worship and observance.’214 The term “manifestation” within the meaning of this right is closely associated with the belief of preaching religious values.215 For this reason, the ambit of the right to freedom of expression is being extended to videos or “religious sermon”,216 spoken expression to materials published on Internet, and social media with video sharing websites.217

215 Eweida and Others v United Kingdom App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) 82.
Above and beyond, taking together both the right of individuals to freedom of expression and the right to freedom of religion, it would be found that they are in general entitled to promote their religious belief; however, they have to be lawfully.\textsuperscript{218} At present, the way of teaching and promoting religious belief is extended to make and publish sermon or video through Internet and/or social media.\textsuperscript{219} Thus, an individual is entitled to exercise his right to freedom of expression through the religious sermonentailing his religious belief and teachings. Under the purview of freedom of religion, “proselytism” includes “speech, preaching, soliciting, canvassing, distributing tracts and teaching about one’s religion and persuading others to convert or to follow the message delivered by the person or group of persons engaged in the same.”\textsuperscript{220} In Kokkinakis\textsuperscript{221} case, it is depicted that theoretical limitation on exercising proselytism can be continued as a determination to defend the right of the target to the peaceful enjoyment of their freedom of religion.

According to Kopp\textsuperscript{222} case, any intervention to individuals’ rights must accordingly be based on a particularly precise provision. It is emphasized that when there will be conflict between two fundamental rights \textit{i.e.} the right to freedom of expression and right to freedom of religion or protect religious sentiments, it is to be determined as to whether the restrictions are being followed during exercising the concerned rights.\textsuperscript{223} Nevertheless, the mechanism of resolving such disputes is still unsettled. For instance,

\begin{itemize}
\item \textsuperscript{218}Adrian Smith v Trafford Housing Trus [2012] EWHC 3221 (Ch).
\item \textsuperscript{219}JL and another (n 248).
\item \textsuperscript{220}Ortiz v Guatemala Case no 10.526 (IACHR, 16 October, 1996); Howard O. Hunter, Polly J. Price, ‘Regulation of Religious Proselytism in the United States’ [2001] BYU L Rev 537.
\item \textsuperscript{221}Kokkinakis (n 246).
\item \textsuperscript{222}Kopp v Kopp, App. No. 00–3965 (United States Court of Appeals, Eighth Circuit, February 19, 2002).
\end{itemize}
the Danish cartoons which mocked Prophet Mohammed\textsuperscript{224} triggered a huge uproar in the Muslim community around the world.\textsuperscript{225}

### 3.5 Right to Know and Access to Information

The right of freedom of expression extends to all types of expression including disseminating ideas of individuals or information of any matter irrespective of content or the mode of communication.\textsuperscript{226} This right is a two-fold right, so when someone’s right to freedom of expression is curtailed; simultaneously the right of all others to impart and seek the particular information is violated.\textsuperscript{227} Therefore, the right to freedom of expression requires, in the one hand, that no one be arbitrarily limited in the exercise of their individual right to express themselves and on the other, it implies a collective right of all others to impart and receive any information whatsoever and have access to the thoughts expressed by others.\textsuperscript{228} It also includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide audience as possible.\textsuperscript{229}


\textsuperscript{225} See “Rs 51 crore reward for Danish cartoonist's head,” The Indian Express (18 February, 2006); “Bounty Offered on Cartoonists,” The Hindustan Times (18 February, 2006); “Death fatwa on cartoonist,” The Times of India (21 February, 2006); “Toon Trouble Across India,” The Times of India (18 February, 2006); “Violence Spreads Over Cartoon Controversy,” The Washington Post (8 February, 2006); “Danish Embassy in Tehran Attacked,” The Guardian (6 February, 2005).

\textsuperscript{226} Autronic AG judgment of 22 May 1990, Series A. no. 178, para 47.


\textsuperscript{228} Ibid.

\textsuperscript{229} Ibid.
All relevant information and views, including unpopular and marginal ones, have some opportunity to be aired, examined, and debated on the Internet.\textsuperscript{230} It is important for its open and relatively equal chance for participation in the cultural sphere. For example, let’s talk about search engines which are regarded as the new linchpins of the Internet.\textsuperscript{231} A large and growing part of the Internet’s large and growing volume of information flows through them. They are the librarians, messengers, critics, and inventors bringing order to the chaotic online accumulation of human knowledge and creativity, creating new information flows and reorienting others, wielding the power to elevate content to prominence or consign it to obscurity and devising new technologies and business models in their relentless drive to better describe complex online realities.\textsuperscript{232} Search engines, being the most dominant media on the internet, have a right to Freedom of Expression; specifically the right to impart information. The internet has an abundance of information; search engines ensure the efficient access to the required information thereby imparting information to the masses, as per their requirement.\textsuperscript{233}

\begin{thebibliography}{9}
\end{thebibliography}
Generally, in the case *Claude Reyes et al. v. Chile*, interpreting Article 13 of the *American Convention* the Inter-American Commission indicated a positive obligation of the State to provide its citizens with access to the information as far as possible. The right to freedom of expression includes that the right enshrines imparting “information and ideas of all kinds” e.g. paintings, books, films, statements in radios interviews, and information pamphlets and with any kind of information. Again, restriction has to be followed to exercise this right because all types of information cannot be conveyed such as “pornography” or “blasphemous statement” should not disseminated based on circumstances of a country otherwise it may cause threat to the national security of a particular country.

### 3.6 Right to Privacy

The right to the protection of the law against interference with one’s privacy and attacks upon one’s reputation is recognised under Article 12 of the *UDHR* and Article 17 of the *ICCPR*. Unquestionably, privacy and reputation are valuable assets or properties of a man. Thus, it is said earlier that we should not be allowed to injure the reputation of a man in the name of freedom of expression. However, in cases involving a conflict between freedom of expression and the right to privacy, the legal grounds of various

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235 Nowak (n 129) p. 443.
236 Jacob & White (n 124).
237 *Rama Doyal* (n 211); *Gertz* (n 211); *Ouko* (n 211).
national and regional courts suffers from a lack of clarity, consistency and transparency.\textsuperscript{238}

It is seen that the courts of all kinds used to disagree that there exists a conflict between freedom of expression and right to privacy in defamation cases which has been changed by the time and the courts are recognising such conflicts in practice.\textsuperscript{239} Nowadays, it is popularly recognised that no right will get priority over the other rights because the court should make a balance between competing rights.\textsuperscript{240} In this concern, several courts usually use a number of criteria which includes determining as to whether a criticism is acceptable to the status e.g. politician,\textsuperscript{241} “public servant,”\textsuperscript{242} “public figure,”\textsuperscript{243} or a “private individual,”\textsuperscript{244} of the plaintiff of a defamation suit,\textsuperscript{245} “whether the content,”\textsuperscript{246} and/or tone\textsuperscript{247} of the statement is offensive or insulting;\textsuperscript{248} “whether the expression was

\begin{footnotesize}
\begin{enumerate}
  \item Mahmudov v Azerbaijan App no 35877/04 (ECtHR, 18 December 2008); White v Sweden App no 42435/02 (ECtHR, 19 September 2006); Minelli v Switzerland App no 14991/02 (ECtHR, 14 June 2005); Pedersen v Denmark App no 49017/99 (ECtHR, 17 December 2004); Abebery v France App no 58729/00 (ECtHR, 21 September 2004); Riolo v Italy App no 42211/07 (ECtHR, 17 July 2008); Lesnik v Slovakia ECHR 2003-IV 169 & 179; Radio France v France ECHR 2004-II 125 & 148.
  \item Ibid.
  \item Lange v Atkinson [2000] 1 NZLR 257 (PC); Lange v Australian Broadcasting Corp (1997) 189 CLR 520.
  \item Karman v Russia App no 29372/02 (ECtHR, 14 December 2006); Jerusalem v Austria ECHR 2001-II 75&83; Curtis Publishing Co. v Butts [1967] 388 U.S. 130.
  \item Tammer v Estonia ECHR 2001-I 267&280.
  \item Lingens v Austria [1986] 8 EHR 407.
  \item Scharsach v Austria ECHR 2003-XI 127; Brunet-Lecomte v France App no 13327/04 (ECtHR, 20 November 2008); Constantinescu v Romania ECHR 2000-VIII 31.
  \item Nikowitz v Austria App no 5266/03 (ECtHR, 22 February 2007).
  \item Chauvy v France [2004] ECHR (Application no. 64915/01).
\end{enumerate}
\end{footnotesize}
merely a statement of fact”249 or “value judgment;”250 “whether the statement involves public debate or public interest;”251 “whether the statement was made in good faith and complied with a reasonable ethical standard”252 etc. It is a matter of great importance that the right to privacy does not prohibit any publication of matter which is of public or general interest.253 To me, when any matter is so significant that it relates to public interest, then it becomes right of the journalists to reveal information to the public. However, the journalists should maintain confidentiality of sources which are crucial to the media’s gathering of information while disclosure of such sources would otherwise result in a “chilling effect” in the sources.254

3.7 Conclusion

From the above discussion, it is clear that the right to freedom of expression is very essential to exercise many other rights such as the right to privacy, the right to freedom of religion, the right to know and access to information, the right to freedom of press etc. However, it has been portrayed throughout the entire discussion that exercising these rights along with the right to freedom of expression is not unqualified rather limitations have to be followed which are established so far by the relevant laws and precedents.

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250 Keller v Hungary App no 33352/02 (ECHR, 4 April 2006); Falter Zeitschriften GmbH v Austria App no 13540/04 (ECHR, 8 February 2007); Lombardo v Malta App no 7333/06 (ECHR, 24 April 2007).
251 Vides Aizsardzības Klubs v Latvia App no 57829/00 (ECHR, 27 May 2004); Krasulya v Russia App no 12365/03 (ECHR, 22 February 2007); Thoma v Luxembourg, ECHR 2001-III 73; TønsbergsBlad AS v Norway App no 510/04 (ECHR, 1 March 2007).
252 Juppala v Finland App no 18620/03 (ECHR, 2 December 2008); Fressoz and Roire v France App no 29183/95 (ECHR, 21 January 1999); BladetTromsø (n 194); McVicar v the United Kingdom App no 46311/99 (ECHR, 5 May 2002).
CHAPTER IV

CERTAIN UNPROTECTED RIGHTS UNDER THE PURVIEW OF FREEDOM OF EXPRESSION

4.1 Introduction

The right to freedom of expression is a comprehensive right as it is deemed that freedom of opinion and expression applies to all persons equally. It is necessary to be protected everywhere and for everyone, irrespective of who they are and where they live. Besides, it must be respected and protected equally online as well as offline. While content-based limits are generally impermissible, there are some narrow omissions. Special categories of expression that may be restricted for being contempt of court, misleading commercial speech, hate speech, obscene speech, and defamatory speech etc. with an apprehension of causing imminent violence and true threats to the people in general.

4.2 Contemptuous Speech

Contempt of court is a comprehensive common law doctrine. It was described by Joseph Moscovitz, in an often cited article in the Columbia Law Review, as the mythological sea of the legal world, assuming an almost immeasurable diversity of forms. Before examining the legal background regulating freedom of expression and the administration of justice in different countries, it is useful to look at their status under international

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255 J. Moskovitz, ‘Contempt of Injunctions, Civil and Criminal’ [1943] 43 Col. LR 780.
laws.\textsuperscript{256}

The main international and regional human rights tools on civil and political rights such as the \textit{ICCPR}, the \textit{ACHR}, the \textit{ECHR}, and the \textit{ACHPR} all protect both freedom of expression and the supervision of justice. The administration of justice, particularly the right to a fair trial and the presumption of innocence, is protected in Article 14 (1) and (2) of the \textit{ICCPR} which states that every person charged for criminal offence is entitled to a reasonable and public hearing by a capable, independent and unprejudiced tribunal recognised by law while such person would be presumed to be innocent until he is proved as guilty. Therefore, the same provision restricted any press or individual to express something which is prejudicial to the court obstructing the fair trial of criminal cases defining the same as contempt of court.

Nobody can be allowed to interfere with the administration of justice while exercising his freedom of expression.\textsuperscript{257} Contempt of court is considered as one of the ground to restrict the freedom of speech and expression. In the exercise of the right to freedom of speech and expression, nobody can be allowed to interfere with the administration of justice\textsuperscript{258} or to lower the prestige or authority of the court even in the garb of criticizing judgments of the court.\textsuperscript{259} Freedom of speech and expression is important; nonetheless much more important is the effectiveness of the administration of justice without which the rights guaranteed by the Constitution will merely be embellishment.\textsuperscript{260} It is for this reason that

\begin{itemize}
  \item \textsuperscript{257} \textit{FCC v. Paifca Foundation} [1978] 438 US 726.
  \item \textsuperscript{258} \textit{Namboodripad v. Nambair} [1970] AIR (SC) 2015.
  \item \textsuperscript{259} \textit{Daphtary v. Gupta} [1971] AIR (SC) 1132.
  \item \textsuperscript{260} Ibid.
\end{itemize}
the constitution specifically provided for the Supreme Court’s power to commit for contempt of court.\textsuperscript{261} However the law relating to contempt of court must be reasonable and must not be as such as stifles the freedom of speech and expression.\textsuperscript{262}

There is also a clear difficulty in finding practical equivalents between the contempt of court principles, which exist in common law systems, and the unequal principles, which exist in civil law and other jurisdictions.\textsuperscript{263} There is both a need and a basis to develop international standards in this area.\textsuperscript{264}

4.3 \textit{Misleading Commercial Speech}

Commercial speech is kind of speech that suggests a commercial transaction. The most typical example of commercial speech is an advertisement.\textsuperscript{265} Nevertheless, other speech related to commercial trades may be regulated as commercial speech, too. For example, the disclosures required for the public sale of safeties are commercial speech and regulated as such.\textsuperscript{266} However, speech itself does not become commercial speech simply because it is sold. The commercial speech rule has been originally established under the First Amendment case law in the US then does not have its counterpart in Europe, closer examination of the European jurisprudence hints, however, that the commercial speech has already and increasingly does give the European courts and scholars a splitting

\begin{itemize}
\item \textsuperscript{261} \textit{The Sunday Times} (n 151).
\item \textsuperscript{264} Report of the Committee on Contempt of Court (Cmdn. 57994, 1974) para.166.
\item \textsuperscript{265} Rumi (n 70).
\item \textsuperscript{266} Nike, \textit{Inc., et al. v. Marc Kasky}, On Writ of Certiorari to the Supreme Court of California, Brief of Amicus Curiae, Centre for Individual Freedom in support of Petitioners, February 28, 2003, No. 02-575, 6.
\end{itemize}
headache.\textsuperscript{267}

Important to each attempt by the government to regulate speech due to its commercial character, therefore, is the question of whether the speech is, in fact, commercial in the constitutional sense.\textsuperscript{268} Commercial speech may be disqualified if it is false or misleading, or if it advertises an illegal product or service.\textsuperscript{269} Even if it fits in none of these categories, the government may regulate it more than it may control fully protected speech.\textsuperscript{270} Furthermore, the government may generally need disclosures to be included in commercial speech, see the section on Obligated Speech, below.\textsuperscript{271} The Supreme Court has recommended the four-prong Central Hudson test to determine whether a governmental regulation of commercial speech is constitutional.\textsuperscript{272} This test asks initially that whether it fears a lawful action and is not misleading and then whether the asserted governmental interest in restricting it is substantial to protect the commercial speech at issue.\textsuperscript{273}

Despite the more lenient standard of review applied to the regulation of commercial speech, the Court often strikes down commercial speech regulations that burden too much on speech, particularly if the speech is neither false nor misleading. In \textit{Liquor art},

\textsuperscript{270} Ibid.
\textsuperscript{273} Ibid.
Inc. v. Rhode Island, the Court took industrial action down a state statute that prohibited disclosure of trade prices in advertisements for alcoholic beverages. In the process, the Court made clear that a total exclusion on the dissemination of truthful, non-misleading commercial messages for reasons unrelated to the safeguarding of a fair bargaining process will be subject to a stricter assessment by the courts than a regulation designed to protect consumers from misleading, deceptive, or aggressive sales practices.

The court has also demonstrated a willingness to strike down commercial speech regulations where the government’s chosen methods of achieving a legitimate goal are too burdensome on the speakers. In Lorillard Tobacco Co. v. Reilly, the Supreme Court smeared the Central Hudson assessment to attack down most of the Massachusetts attorney general’s regulations governing the advertising and sale of cigarettes, smokeless tobacco, and cigars. The Court struck down the outdoor advertising regulations under the fourth prong of the Central Hudson test, finding that the prohibition of any advertising within 1,000 feet of schools or playgrounds proscribed advertising in a substantial portion of the major metropolitan areas of Massachusetts and that such a burden on speech did not constitute an equitable fit between the means and ends of the regulatory scheme. Similarly, a ban on all signs of any size seems ill suited to target the problem of highly visible billboards, as opposed to smaller signs.

276 Ibid.
278 Ibid, 339.
In *Thompson v. Western States Medical Center*, the Court struck down Section 503A of the *Food, Drug, and Cosmetic Act* of the US which exempts compounded drugs from the food and drug administration’s standard drug approval requirements as long as the providers of those drugs abide by several restrictions, comprising that they refrain from advertising or promoting particular compounded drug. In one hand, the Court instigated that the speech restriction in this case helped important governmental interests. Nevertheless, the court wrote that the Government has failed to prove that the speech restrictions are not more widespread than is necessary to attend the governmental interests, as several non-speech-related processes of serving those interests might be possible here. Moreover, the court noted that it had rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information. It is possible, given recent developments that the court is now moving towards a higher degree of protection for at least some truthful commercial speech.

Commercial speech comes in many shapes and forms, in many variables. The increasing presence of businesses in the society with their growing involvement in debates on issues of public concern cannot be ignored. It has nonetheless proved to be

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283 Ibid.
hard to find a point of equilibrium between the rights of commercial actors to freely express their opinion and the requirements of protecting the public, consumers and other competitors against unfair or deceptive practices.\textsuperscript{288} The commercialization of political life and politicization of commercial life make the distinction between political and commercial not easy.\textsuperscript{289} The mere fact that a business entity, in its own name, takes position on a particular issue, cannot automatically lead to the denial of the right to freedom of speech.\textsuperscript{290} A considerable trouble in categorizing and defining this type of speech lead to an uncertainty with regard to the scope of its protection.\textsuperscript{291} Most commentators on the notion of commercial speech stick with the question whether advertising can be accorded a level of protection equal to political or artistic speech.\textsuperscript{292} Hence, the view put forward here is that a middle category of speech has to be singled out, which is a mix of profitable self-interest and comment on issues of public concern. Indeed, the commercial statements, even partly commercial are more resistant then political or artistic speech.

\textbf{4.4 Hate Speech}

Hate speech is generally expressed as speech that maligns a person or group based on race, ethnicity, gender, religion; sexual positioning or disability receives full First Amendment protection.\textsuperscript{293} Speech that is projected to incite imminent violence or convincingly threaten individuals, however, can be restricted as bordered above. Whereas

\begin{flushleft}
\begin{footnotesize}
\textsuperscript{288} Ibid.
\textsuperscript{289} \textit{Sunday Times} (n 151); \textit{Observer and Guardian v. United Kingdom} [1992] 14 EHRR 153.
\textsuperscript{291} Ibid.
\textsuperscript{292} Ibid.
\textsuperscript{293} Massaro (n 16).
\end{footnotesize}
\end{flushleft}
the US does not limit hate speech, it understands that the most operational weapon in combating hate speech is not destruction, but tolerant, truthful and intelligent counter-speech. Prohibition prejudiced or offensive speech can be countered constructive, raising the profile of the offensive speech and causing hateful philosophies to fester in dangerous, sometimes hidden ways.\textsuperscript{294} It is to be said that persuasion not guideline is the solution. The US’s strong constitutional securities for and confidence in freedom of expression do not mean that it sits idly by as individuals and groups seek to spread toxic vocabularies of hatred. Rather, the US deploys an array of policies to reach out to affected communities, provide conflict resolve services, and enhance dialogue.\textsuperscript{295}

Likewise, there is no universally acknowledged definition of the term “hate speech” in international law. The term is usually used to refer to expression that is insulting, insulting, intimidating or harassing or which insights violence, hatred or discrimination against individuals or groups well-known by a specific set of characteristics.\textsuperscript{296} Under international law, states are only required to prohibit the most severe forms of hate speech, such as the support of national, racial, or religious hatred that constitutes incitement to discrimination, enmity or violence under Article 20 of the \textit{ICCPR}. Hate speech legislation should not be neglected by governments to discourage citizens from engaging in legitimate democratic debate on matters of general interest.\textsuperscript{297}

In the European context, \textit{ECHRI} case law makes a distinction between, on the one hand,
genuine and serious encouragement to extremism and, instead, the right of persons including journalists and politicians to precise their views freely and to offend, shock or disturb. In line with ECHR case law, the EU Framework decision on contending certain forms and expressions of racism and xenophobia by means of criminal law orders that the Member States shall make punishable an intentional public incitement to violence or hatred as well as the public condoning, denial or gross trivialization of certain international crimes when agreed out in a manner likely to incite to violence or hatred.298 According to article 1 of the ECHR, publicly inciting to violence or hatred absorbed against a collection of persons or a member of such a group based on their race, colour, religion, descent or national or folkloric origin should be made as punishable offence by particular states.299

4.5 Obscene Speech

Obscenity is exclusive in being the only type of speech to which is regarded as harmful to the individuals. If we take the First Amendment of the US Constitution into consideration, it would be found that at the time of the adoption of this Amendment, obscenity was outward from the protection envisioned for speech and press.300 Consequently, obscenity may be banned simply because a legislature settles that banning it protects the social interest in order and morality.301 No genuine harm, let alone compelling governmental interest, need be shown in order to ban it. The important

299 Response to the UN Plan of Action, an Implementation Strategy 2013/2014 was drafted at the UN Inter-agency meeting (Vienna, November 2012).
300 Roth (n 190).
inquiry in obscenity cases is whether the speech at issue actually constitutes obscenity.\textsuperscript{302}

This willpower is by no terms a simple one. It can be addressed here that obscenity is not synonymous with pornography, as most pornography is not legally obscene. The First Amendment, in fact, protects most pornography.\textsuperscript{303} Besides, to be obscene, pornography should, at a minimum, depict or describe patently offensive hard-core sexual behavior. The Supreme Court has created a three-part test, known as the “Miller test”, to determine whether a work is indecent.\textsuperscript{304} The “Miller test” necessities whether the normal person applying contemporary community values would find that the work, taken as a whole, appeals to the prurient interest, whether the work depicts or describes, in a clearly belligerent way, sexual conduct specifically demarcated by the applicable state law, and whether the work, taken as a whole, lacks thoughtful literary, artistic, political, or scientific value.\textsuperscript{305}

The Supreme Court has elucidated that only the first and second spikes of the “Miller test” appeal to prurient interest and patent impoliteness are issues of fact for the jury to determine applying modern-day society standards.\textsuperscript{306} As for the third prong, the proper inquiry is not whether an ordinary member of any fixed community would find serious literary, creative, political, or scientific value in allegedly obscene material; nonetheless

\begin{footnotesize}
\begin{enumerate}
\item R. Carver, ‘Malawi’ in Who Rules the Airwaves?: Broadcasting in Africa (Article 19 and Index on Censorship: London, 1995) 44.
\item M. Legassick, ‘Race, Industrialisation and Social Change in South Africa: The Case of RFA Hoernle’ [1976] 75 African Affairs 299.
\item Observer and Guardian (n 288).
\item Ibid.
\end{enumerate}
\end{footnotesize}
whether a reasonable person would find such value in the material, taken as a whole. The Supreme Court has allowed one exemption to the rule that the First Amendment, one does not protect obscenity has a constitutional right to acquire obscene material in the privacy of his own home. Nevertheless, there is no legitimate right to provide obscene material for private use or even to acquire it for private use.

Moreover, obscenity may be limited under the First Amendment, but there has been a long debate over what constitutes obscenity and how it should be controlled. The US Supreme Court demarcated obscenity in 1973 as expression that the average person, applying contemporary group standards, would find appeals to prurient interests, depicts or describes sexual comportment in a patently offensive way, and lacks serious literary, artistic, political or scientific value, when taken as a whole. A court evaluates each element individualistically and will not classify countenance as obscene unless all factors exist. For instance, if a book uses coarse language and depicts sexual conduct but, taken as a whole, does not appeal to voyeuristic interests or has literary value, it is not obscene given such high standards, it is rare for the courts to discover expression obscene.

### 4.6 Defamatory Speech

Criminal defamation is defined as a situation where defamation is an offence under the criminal law of the state. In such conditions, alleged defamation will usually be charged

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308 *Miller* (n 300).
309 Ibid.
310 *Sunday Times* (n 151).
by state prosecutors and tried in the criminal justice system with the probability of a sentence of imprisonment being imposed upon conviction. On the other hand, civil defamation describes a civil wrong or tort. At this instant, whether a person has been defamed is determined by a private action beforehand the civil courts. If defamation is discovered, monetary compensation may be ordered, or some other remedy, such as publication of a correction or apology. Even systems that preserve an offence of criminal defamation usually also have the possibility of litigating defamation through a civil suit. The boundary lines between freedom of expression and the rights of the person to good name and privacy in Japan were clarified by Supreme Court doctrine in the latter half of the 1960s, as jurists and scholars expressed moderate concern about violence of the pen and the public nuisance created by weekly pulp magazines and some newspapers.

In the US, defamatory speech is a false statement of fact that damages a person’s personality, fame or reputation. It must be a false statement of fact; statements of opinion, however abusive they may be, cannot be defamation in the US law. In the US defamation law, there are different standards for public officials and private individuals. Speakers are afforded greater protection when they comment about a public official, as opposed to a private national. In 1964, the US Supreme Court ruled that

312 Jersild v. Denmark, Judgment of September 23, 1994, Series A No. 298.
314 Ibid.
315 Ibid.
316 Ibid.
317 Information in Lentia and Others v. Austria, Judgement of 24 November 1993, Series A, No. 276, para. 32.
public officials could prove defamation only if they could determine actual hatred, that is, that the speaker acted with knowledge that the defamatory statement was false or with imprudent disregard of whether it was false or not.319

This decision was later extended to shield public figures, in addition to public officials. Defamation of private individuals can be established if the statements were false and damaged to the person’s reputation without showing actual malice.320 Only individuals, not groups, can be defamed. Even where courts find defamation, they do not impose criminal punishment.321 Instead, courts may require the speaker to publish an improvement to the defamatory statement and/or to financially reimburse the victim. The laws of defamation provide our society with an exclusive, highly complex, unsatisfactory apparatus by which some of its individuals can defend their repute after others have implemented their freedom of speech.322

Talking about a balancing mechanism, artists are restricted in their commentary on others and indeed, others are restricted in their commentary on artists.323 There are two species of defamation: the first one “libel” which is defamation in concrete form such as a letter, book, painting, photograph, sculpture, film or video tape, and the second one is “slander”

319 “Right to freedom of expression shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers” Article 19 (2), ICCPR, 1966.
which is impermanent such as speech or gestures.\textsuperscript{324} The distinction is rooted in history. Whilst slander has its origins in the early jurisdictional battle between the common law courts and the ecclesiastical courts, the origins of libel go back to the Star Chamber where the laws were developed to restrict the political influence of the newly invented printing press and to provide an alternative to newly outlawed dueling.\textsuperscript{325} Some might say that its purpose is not markedly different today. From these beginnings the law of defamation has grown in substantive bulk and procedural complexity, and only four jurisdictions have wholly or partly codified these laws in legislative form. These are Queensland, New South Wales, Tasmania and the Australian Capital Territory.\textsuperscript{326} The other States and Territories enjoy a pastiche of piecemeal legislation which is subject to the historical vagaries of the common law. The whole is a canvas that might have been created by jurisprudential cubists.\textsuperscript{327} This diversity of law creates considerable problems for many litigants. As much media is now nationally networked, a defamatory statement made in one jurisdiction will frequently also be published in several others.\textsuperscript{328}

In such cases the defamed person has a right of action in each of those States but this is one instance where abundance does not add to one’s quality of life or justice.\textsuperscript{329} To do this would be extraordinarily expensive, what may be defamatory in one State may not be defamatory in another; a defence that exists in one may apply quite differently in

\begin{footnotesize}
\textsuperscript{324} Ibid.
\textsuperscript{327} Beauharnais (n 295).
\textsuperscript{329} Ibid.
\end{footnotesize}
another.\textsuperscript{330} The litigant’s likelihood of success is something of a lottery.\textsuperscript{331} Although it has been much discussed, it appears unlikely that the States will introduce a uniform defamation law. It should be remembered that regulating whether a statement is capable of being defamatory one looks not to the intention of the author but the validity of it upon the individual by whom it is heard or seen. One asks not, what was the artist saying? But, rather, what does the ordinary rational observer understand the artist to have said? One looks to affect, not intention.

\section*{4.7 Conclusion}

Commonly, the UN system and Regional System have established a lot of jurisprudence concerning how right to freedom of expression must be practiced and ensured by the States as well the criteria for preventive this right.\textsuperscript{332} The overhead discussion is the guidance in the next chapter for assessing examining the laws and policies governing the freedom of Expression.\textsuperscript{333} It should be noted that under international law the States are required to fully comply with human rights obligations even though the national legislations provides a less level of protection or is in inconsistencies with international norm. There is also a requirement to think clearly about the escaping of harm and offence in harmonizing human rights with each other and to develop an awareness of how freedom of expression might work in society.\textsuperscript{334} This paper introduces such an approach

\begin{flushleft}
\textsuperscript{330} Hustler Magazine, Inc. v. Falwell [1988] 485 US 46.\\
\textsuperscript{331} David Hickie, “Askin: Friend to Organised Crime” The National Times (13-19 September 1981) 1, 8.\\
\textsuperscript{332} Article 13, American Convention on Human Rights, available at <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm> accessed on 25 July 2016.\\
\textsuperscript{333} Ibid.\\
\end{flushleft}
that at the end, it would the responsibility of professionals to debate these problems among themselves and come to well-versed and well-considered positions that they can present to their community.\textsuperscript{335}

\\textsuperscript{335} Ibid.
CHAPTER V

EVALUATION OF THE RESTRICTIONS TO EXERCISE THE RIGHT TO FREEDOM OF EXPRESSION

5.1 Introduction

Categorically, the rights which are universally recognised such as the right to freedom of expression are not unqualified rather they are subject to certain specified restrictions.\(^{336}\) It is seen that the UDHR itself specifies in its provision that the rights and freedoms which are recognised in the UDHR can be restricted with only by law with a view to:

- a) “securing due recognition and respect for the rights and freedoms of others; and
- b) meeting the just requirements of morality, public order and the general welfare in a democratic society.”\(^{337}\)

Under the purview of this provision, it is established that every such restriction must be established in advance, expressly, restrictively and clearly. However, for deciding legitimacy of limitation or interference of a right by the state, the following criteria must be fulfilled in accordance with Article 29(2) of the UDHR, numerous other international accords\(^{338}\) and cases\(^{339}\): (i) be “prescribed by law”; (ii) “pursue a legitimate aim”; and (iii) be “necessary in a democratic society”. Therefore, both realm of many relevant statutes

\(^{336}\) UDHR, art 29(2); ICCPR, arts 19(3), 22 & 21; ACHPR, arts 9, 10 & 11; ACHR, art 11, 15 & 16; ECHR, art 10(2); Chaplinsky v New Hampshire [1941] 315 US 567.

\(^{337}\) UDHR, art 29(2).

\(^{338}\) ICCPR, art 19; ECHR, art 10(2).

\(^{339}\) Sürek v Turkey App no 24122/94 (ECtHR, 8 July 1999); Young, James and Webster v United Kingdom ECHR 1981- II 59.
and precedents of the courts, such restrictions have been endorsed to accumulate which either directly or indirectly constrain freedom of expression.\textsuperscript{340}

It can be said that the restrictions have come into play because of an expectation the form of the expression can be regulated. In one hand, it is to be taken care of as to when a particular expression is made, in which place the concerned expression is made, and what was the method of making the expression On the other hand, to determine the legitimate restrictions of the right to freedom of expression by the competent Court, the Court needs to get answer of the above questions.\textsuperscript{341}

Analogous to the Article 29(2) of the \textit{UDHR}, Article 19(3) of the \textit{ICCPR} permits limitations on the rights recognised in article 19(2),\textsuperscript{342} but those limitations must be:

(1) “provided by law and

(2) necessary for respect of the rights or reputations of others, for the protection of national security, public order, or public health or morals.”

Moreover, the Human Rights Commission (HRC) in its \textit{General Comment No. 34} has depicted that “[w]hen a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself...the relation between right and


\textsuperscript{342} Par 12.2 of HRC Judgement, available at <http://www.unhcr.org/refworld/country, HRC, KOR, 4562d8cf2, 3f588ef77, 0.html> accessed on 26 July 2016.
restriction and between norm and exception must not be reversed.”\textsuperscript{343} Besides that, the HRC stipulated that:

“\textit{Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be “provided by law”; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality...Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.”}\textsuperscript{344}

Moreover, Australia’s Joint Parliamentary Committee on Human Rights emphasized on taking measures by the state to prevent the maneuver of a free and independent media.\textsuperscript{345} Along with, it has expressed its concern about content-based restrictions that may prevent the expression of views which might cause public uproar and/or political debate.\textsuperscript{346}

The above discussion makes it clear that in order to exercise the right to freedom of expression, certainly restrictions have to be conformed which can be categorized into three uniform terms as discussed in the following:


\textsuperscript{344} Ibid, para 22.


\textsuperscript{346} Ibid.
5.2  Provided by Law

The long-time practice shows that in order to be “provided by law”, the limitations must have a legal basis and the law in question must be sufficiently precise, clear, rigorous and contain a measure of protection against arbitrariness by public authorities.347 A law would not be sufficiently precise if fails to provide detailed rules on the subject.348 To become a clear and rigorous, it is to be mentioned as to under what conditions a law would curtail the right to freedom of expression.349 Moreover, when a law would curtail the rights and freedoms of individuals, the government of a particular country has to show that it passes the test of strict scrutiny just to withstand the validity of such a law.350 The previous requirement has been established due to make the government realize that the rights and freedoms of the individuals are necessary to gain a compelling government purpose in every democratic country.351

In regards of this requirement, the HRC very clearly requires that a law to restrict the right to freedom of expression must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to

349 Ibid.
the public. Simultaneously, when discretion would be given to the authorities by such laws, the discretion must not be unfettered for the purpose of restricting the right to freedom of expression. Proper guidelines have to be given to the people who are liable for executing any sort of restriction of this particular right.

The earlier requirements of restricting the right to freedom of expression are significant to enable the people to understand their obligations and to foresee as to whether particular action is unlawful. Besides, clear and specific provisions are required since they can prevent potential arbitrary acts which are tantamount to prior restriction, or that form certain disproportionate liabilities for the expression of protected expressions.

5.3 **Legitimate Aim**

To pursue legitimate aim, the Government must have an aim to protect national security and public order. Moreover, the reasons behind an interference with a right must be adequately justified to pursue the same. It has been established that in order to pursue legitimate aim, the restriction of the right to freedom of expression must be for the protection of the reputation of others, protection of national security, protection of public order, protection of public health, protection of public morals etc. These terms are described in the following in detail:

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352 *General Comment No. 34* (n 342) para 25.
353 Ibid.
354 Ibid.
355 Principle 1 of the Johannesburg Principles on freedom of Expression.
356 *General Comment No. 34* (n 342).
357 *Tuşalp v Turkey* App nos 32131/08 & 41617/08 (ECtHR, 21 February 2012); *Tatár and Fáber v Hungary* App no 26005/08 & 26160/08 (ECtHR, 12 June 2012).
358 Ibid.
5.3.1 Protection of the Reputation of Others

In course of applying the rights to freedom of expression sometimes may encounter with others rights.\(^{359}\) For instance, it may conflict with the right to privacy.\(^{360}\) This situation increases the classic human rights conflict between freedom of expression and protection of the personality.\(^{361}\) Consequently, the respect for the rights and statuses of others justify restrictions on the right to freedom of expression for the purposes of protection of freedom of religion, the protection against refinement and the protection of minorities.\(^{362}\) States are bound to provide the statutory limitation for the purpose of sheltering others’ rights. Criminal law, civil and administrative may ensure the protection of the rights and other repute. The principle of proportionality should be observed when a State decides to do so; hence there is a danger that this freedom could be demoralized.\(^{363}\)

5.3.2 Protection of National Security

The term national security may be invoked only if its ‘genuine purpose and demonstrable effect’ is to protect the country’s ‘existence or its territorial integrity against the use or threat of force.’\(^{364}\) Grave cases of political and military threat to the entire nation can justify the restrictions on the right to freedom of expression for the purpose of protection.

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\(^{361}\) Ibid.

\(^{362}\) Ibid.

\(^{363}\) Ibid.

of national security.\textsuperscript{365} The phrase “in the interests of national security, territorial integrity or public safety” includes a threat of the desertion of soldiers, even in peacetime, in that it tends to weaken the role of the army as an instrument to protect society from internal or external threats;\textsuperscript{366} or the possibility that the public disclosure of confidential information about the security service by its former members might damage its efficacy.\textsuperscript{367} In other words, procuring or disseminating military secrets, publishing any material aiming at incitement of violence to overthrow legitimate government as well as the propaganda for war fall within the permissible restrictions.\textsuperscript{368} When the State chooses to restrict on this ground they should not too lightly in an attempt to justify infringements on the right to freedom of expression that might be unnecessary and impermissible because they do not serve its stated purpose.\textsuperscript{369}

Public security and related concepts such as state security, internal security, public security, and public safety are so vague that they may be, and frequently have been, invoked by governments to suppress precisely the kinds of speech that provide fortification against government abuse, such as information or expression exposing circumvention of the democratic process, attacks on opposition parties, damage to the environment, and other forms of wrongdoing by government officials and their associates. In the case of \textit{Keun-Tae Kim v. Republic of Korea,}\textsuperscript{370} the Republic of Korea

\begin{thebibliography}{9}
\bibitem{arrowsmith1978} \textit{Arrowsmith v United Kingdom} [1978] 19 DR 22.
\bibitem{sunday1988} \textit{The Sunday Times} (n 151); \textit{The Observer and Guardian} (n 288).
\bibitem{ibid} Ibid.
\end{thebibliography}
found in violation of freedom of expression for failure to justify how the publication threatens public security.\textsuperscript{371}

Free expression of opinion and ideas is possible in organized society and to preserve the right it is necessary to prohibit utterances, which threaten to overthrow an organized government by unlawful or forceful means.\textsuperscript{372} The security of the State is a matter of concern when there is serious and aggravated form of public disorder as distinguished from ordinary breach of public or public safety, which does not involve any danger to the State.\textsuperscript{373} Freedom of expression must yield when security of State is involved.\textsuperscript{374} A reasonable restriction on the exercise of the right to know or right to information is always permissible in the interest of security of state.\textsuperscript{375} Security of the state has to be distinguished from the security of the government. Peaceful and orderly opposition of the government with the object of changing the government cannot be suppressed.\textsuperscript{376}

The security of the state is a matter of concern when there is a serious and serious form of public disorder as distinguished from ordinary break of public order or public security, which does not contain any danger to the state. The security of the state is endangered by crimes of violations intended to overthrow the government, by wagering war or rebellion against the government, or by external aggression or war, but the security of the state is not endangered by minor breaks of public order or tranquility, such as unlawful

\textsuperscript{372} Strombrog (n 371).
\textsuperscript{373} Attorney General v. Leveller Magazine Ltd. [1979] AC 440.
\textsuperscript{374} PUCL v. India [2004] AIR (SC) 1442.
\textsuperscript{375} Ibid.
\textsuperscript{376} Ibid.
assembly, riot affray, rash driving and the like. However, incitement to violent crimes like murder, which is an offence against public order, may endanger the security of the state.

5.3.3 Protection of Public Order

The expression “public order” includes absence of all acts, which are a danger to the security of the state and absence of insurrection, riot, turbulence or crimes of violence, but not acts which merely disturb the security of others.\(^{377}\) The expression “in the interest of” enables the Parliament to make laws to curb the tendency to break the peace, even though no break of the peacetime has actually taken place. However, for restriction to be valid, the exercise of the right must have a rational nexus with the possible reach of public order.\(^{378}\) For public order, there must be an immediate threat to public safety, peace, or order.\(^{379}\) Further, there must be nexus between the restriction and the achievement of public order.\(^{380}\) However, whether in particular case an utterance would have a tendency to create a breach of public order is to be determined objectively from the conditions in which the utterance is made, the nature of the audience and the like.\(^{381}\) In the interest of public order, the state may prohibit creating loud and raucous noises in streets and public places regulate the hours and the place of public discussion and the use


\(^{378}\) Ibid.

\(^{379}\) *Cantwell* (n 297).


\(^{381}\) Ibid.
of the public streets for the purpose of exercising the freedom of speech.\textsuperscript{382}

\section*{5.3.4 Protection of Public Health}

Protection of public health has a minor practical relevance in freedom of expression.\textsuperscript{383} States are permitted to prohibit misleading publications on health-threatening substances drugs, medicine, poisons, and radioactivity or on social or culturally inspired practices negatively affecting health female genital mutilation, dowry debts and bride burning.\textsuperscript{384}

In the case of \textit{Omar Sharif Baban v. Australia},\textsuperscript{385} a detainee who has been removed from one location to another for contributing in starvation strike, the HRC held that a hunger strike may be subsumed under the right to freedom and expression protected by that article 19 of the ICCPR, and in the light of the concerns invoked by the State party about the health and safety of prisoners, including young children, and other persons, steps lawfully taken to remove the hunger strikers from a location giving rise to these concerns may properly be understood to fall within the legitimate restrictions provided for in article 19(3) of the ICCPR and hence no violation by this act.

\section*{5.3.5 Protection of Public Morals}

A law may impose reasonable restrictions on speech, which lead to undermine public morality,\textsuperscript{386} whether any speech is likely to destabilize decency or morality is to be

\begin{footnotes}
\item\textsuperscript{382} \textit{Schneider v. New Hampshire} [1942] 315 US 568.
\item\textsuperscript{383} \textit{Bridges v California} [1941] 314 US 252.
\item\textsuperscript{385} Communication No. 1014/2001, UN Doc. CCPR/C/78/D/1014/2001 (2003).
\item\textsuperscript{386} \textit{Ranjit v. Maharastra} [1956] AIR (SC) 881.
\end{footnotes}
determined to the probable effect it may have on the people to whom it is addressed.\textsuperscript{387} The test of judging a work should be that of ordinary man or common sense and prudence and not an out of the ordinary or hypersensitive man.\textsuperscript{388} The concept of obscenity has different meaning in different cultures; even it is different between or among communities in the same culture.\textsuperscript{389} So, age, culture and the like of the audience thus become material.\textsuperscript{390} Again, use of mere abusive language without any suggestion of obscenity to the person in whose presence it is uttered will not be a speech offending decency or morality.\textsuperscript{391}

For example, in the UK, a political party opposed to abortion in 2002 general election submitted for broadcasting a video that controlled graphic footage of an actual abortion counting image of aborted fetuses, which BBC refused to transmit on grounds of taste and decency.\textsuperscript{392} The judge refused to give permission to apply for judicial review. The court of appeal reversed the decision, but the House of Lords set aside the judgment of the Court of Appeal holding that on the basis acceptance by the claimant that party political broadcasts were subjected to the same restriction on transmission of offensive material as other programmers there had been no ground for interfering with the decision of the BBC that, applying the standard laid down by parliament, the claimant’s video

\textsuperscript{388} Ajay Goswami v. India [2007] AIR (SC) 493.
\textsuperscript{389} Kartar Singh v. Punjab [1956] AIR (SC) 541.
\textsuperscript{390} Ibid.
\textsuperscript{391} Ibid.
should not be transmitted.\footnote{Regina Pro-Life Alliance v. B.B.C [2004] 1 AC 185.}

## 5.4 Necessary in a Democratic Society

The notion of necessity\footnote{Council Directive (EC) 95/46 concerning on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31.} implies that the interference corresponds to a “pressing social need” and, in particular, that it is proportionate\footnote{David Yunin, ‘Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation’ [1994] 82 California Law Review 871, 874-75.} to the legitimate aim pursued.\footnote{Ibid.} As regards Article 19(3) of the ICCPR, the HRC has made clear its view that the requirement under this provision limiting the right to freedom of expression be ‘ecessary imposes a substantial burden of justification on government agencies.\footnote{Ibid.}

Still, it is considered that the UDHR and ICCPR are silent under this particular criteria, nonetheless the Johannesburg Principle made clear about this one.\footnote{Ibid.} It states that no limits of freedom of expression or opinion unless would be executed the government establish that the restrictions is necessary in democratic society.\footnote{Ibid.} Besides, in European system this is the main test applied by the Court in determining the suitability of restriction on freedom of expression under ECHR and it must comply with the genuine interest of democracy and is not merely political expediency in mask.\footnote{Smith (n 25).} The term necessary proposes the existence of pressing social needs.\footnote{Ibid.} In American system any State that executes limitations upon
freedom of expression are appreciative to demonstrate that they are “necessary in a democratic society” to serve the compelling objectives pursued. However, under the African system, the Declaration of the Principle of Freedom of Expression states in Rule II that, “any restrictions on freedom of expression shall be stipulated by law and be necessary in a democratic society.”

Dealing with the test of proportionality, it can be said that the proportionality must have effects between the procedures responsible for restrictive the rights or freedoms and its objectives. The test of proportionately must be established in that the expression poses a serious threat to “national security” and “public order” where the “least restrictive means” are also available. In this case, for the purpose of maintaining public order, any restrictions to the right to freedom expressions that disseminate information about alleged violation of human rights standards are protected. Further, the law must clearly indicate the scope of any discretionary power bestowed upon the government or the Court and the manner of its exercise. At this instant, when the least restrictive means such as applying the requirement to specific class of forums without any discrimination would be available to the restrictions, the test of proportionality of legitimate aim would be fulfilled. For instance, regarding the right to freedom of expression and freedom of

religion, under the purview of Eweida\textsuperscript{408} case, to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed State must be neutral and impartial.\textsuperscript{409}

In short, the way of applying this discussed test of necessity for a democratic society can be explained by saying that the extensiveness of the restriction must be taken into consideration so that it can be determined as to how much the extensiveness of the of the alleged expression for which how much restriction would be required. After that, the practice of other contracting states must be taken into account so that other countries’ justification can be considered with particular care. Next, the information, idea, or opinion which is disseminated must be taken into consideration along with the media of communication through which the same has been done. In case of informed opinion, it has been suggested by many Courts that any interference caused to exercise the right to freedom of expression could be removed without serious adverse consequences.\textsuperscript{410}

\textbf{5.5 Conclusion}

Indeed, the right to freedom of expression is an imperative pointer of a democratic society and development. If freedom of expression is prevailing in a nation or society, other democratic rights and freedoms will automatically be ensured. Because, by exercising the freedom, people can contribute in decision-making through free access to information and ideas.\textsuperscript{411} To understand the presence of freedom of expression and right

\begin{flushleft}
\textsuperscript{408} Eweida (n 214).
\textsuperscript{410} Ibid.
\end{flushleft}
to information, we need to understand the local political context, history and cultures. The guarantees of the rights do not hang only on the relevant laws, but social, political and cultural processes. Above and beyond, keeping all other restrictions and unprotected speeches in mind to exercise the right to freedom of expression, at present, the three-part test is also followed at large. Under this test, the restriction must be prescribed by laws requiring the restriction to be clear, precise, and foreseeable. It is important for the general people to know as to what extent he/she can exercise the right to freedom of expression while they must know as to what will be the consequence of crossing the prescribed limit of exercising the same. Furthermore, is any restriction is brought into effect; it has to “pursue a legitimate aim” at protecting national security, other people’s rights, public order etc. Lastly, the restriction must be necessary for a democratic country requiring proportionality for the same. However, in all cases it must be remembered that least restrictive means has to be maintained to execute the restriction so that the degree of gravity of the any speech liable to be an offence is taken into account before determining punishment for the same.

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412 Ibid.
CHAPTER VI

CONCLUDING REMARKS

6.1 Conclusion

To conclude, it can be said without any doubt that the right to freedom of expression is a must for exercising many other human rights while it should be kept in mind that this right is not an absolute one. As concluding remarks, it can be addressed here that “expression” is a broad concept that has been held by many courts to encompass every form of subjective idea and opinion capable of communication to others and any act, which is accomplished of conveying some kind of connotation.413 This embraces political, traditional and artistic expression, bulletin besides information, business expression and advertising, audio-visual, electronic and internet-based modes of expression, as well as spoken, written and sign language.414 Examples include news, posters, pamphlets, banners, books, dress, legal submissions, teaching, religious discourse and human rights discussion.415 The right to freedom of expression defends almost all mediums of expression, delivered the expression conveys or attempts to convey a meaning.416

414 Ibid.
416 Ibid.
Nevertheless, not all forms of expression are protected. Expressive conduct delivered in the form of criminal damage to third party’s property is not safeguarded expression.\textsuperscript{417} Forcefulness is also not a safeguarded expression.\textsuperscript{418} This means that while the notion of expression is a very broad one, the way people can exercise the freedom of expression can be limited.\textsuperscript{419} Announcement of a commercial background may be reflected expression, although the right is conferred on human beings and not corporations. Commercial expression has been discovered to be less important than social or political expression, and limitations on it have been being more easily justified. It can be remembered here that hate speech and pornography may introduce expression, as even offensive expression is still expression, however, such expression may not be protected under the \textit{Human Rights Act}, 1998 since under Section 12(b) the right to freedom of expression may be limited if it is necessary to protect the rights and reputation of others.\textsuperscript{420}

Likewise, as limitation on the freedom of expression must comply with the requirement of legality i.e. must be recognised in advance, expressly, restrictively and clearly, in a law in formal and material sense. The laws that set restrictions to freedom of expression must be drafted in the clearest and most specific terms possible, as the legal outline must provide legal certainty to the public, so as to enable the individuals to understand their responsibilities and to foresee whether exact action is unlawful. Interference based solely on an administrative provision or vague statutory authorization violates this Article, even

\textsuperscript{418} Ibid.
\textsuperscript{420} Ibid.
if made public and approved by legislature, is not sufficient because it is not legally binding on the public authorities. Inexplicit or ambiguous legal provisions are incompatible with this provision, because they can support potential illogical acts that are tantamount to prior censorship, or that establish unequal liabilities for the expression of protected speech. Together with this requirement, the legitimate aim of such restriction must be for the protection of other’s rights and national security, as well as for the maintenance of public order while it has to be proved that these are necessary for a democratic country.

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