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Justifying Limitations on Freedom of Expression for Contempt of Religion

Dr. Moha. Waheduzzaman*

Abstract: *In the recent past, there have been the cases of making abusive remarks against Prophet Muhammad, drawing cartoons of him, and burning the Holy Quran in public. These incidents no doubt outrage the religious feelings of people belonging to the religion of Islam. Besides this, they also contribute to violence and riot and the consequential deaths of people around the world. There are, however, literatures which seek to justify these conducts having a very liberal and extended view of the right to freedom of expression. They argue as if there should not be any limitation on freedom of expression so far that relates to contempt of any religion. I argue that freedom of expression howsoever valuable that might be, is a qualified as opposed to an unqualified human right. Hence, its exercise cannot extend to making abusive remarks against religious personages or defiling or burning the Holy Book(s) of any religion. If it is acknowledged by all including the relevant stakeholders of the United Nations, this might help reducing the chances of human casualties and deaths of people caused by alleged blasphemous conducts with respect to any religion. Foreseeing this significance, I aim to revisit the justification and limits of freedom of expression in the backdrop of contempt of religion.*

Keywords: Freedom of expression, justification of freedom of expression, limits of freedom of expression, human rights, contempt of religion.

1. Introduction

I would prefer beginning with reference to an incident of a very recent time. On 28 June 2023, Salwan Momika, an Iraqi immigrant living in Sweden, burnt the Holy Quran outside a mosque of Stockholm.[1] The incident outraged religious feelings of the Muslims around the world.[2] In the recent past, there has been the occurrence of similar incidents drawing either the cartoons of Prophet Muhammad or depicting him in a way perceived offensive by the Muslims of the world.

* Associate Professor, Department of Law, University of Dhaka.

1 Alissa J. Rubin and Isabella Kwai, 'Sweden Is Condemned in the Muslim World for Allowing Burning of Quran' (*The New York Times*, 29 June 2023) <https://www.nytimes.com/2023/06/29/world/middleeast/quran-burning-stockholm-sweden.html> (last visited: 24 November 2023).

2 ibid.

To cite just a few of them, in September 2005, a Danish newspaper called *Jyllands-Posten* published cartoons of Prophet Muhammad which were republished in several European newspapers in 2008. In both the cases, the incident led not merely to protests by Muslims around the world but also to violence and riots in some Muslim countries.[3] Again, in March 2011, the Holy Quran was burnt publicly by a Christian pastor in Florida, the online video dissemination of which motivated riots in Afghanistan that resulted in the deaths of twelve people.[4]

Prophet Muhammad was again depicted offensively in a video trailer entitled *Innocence of Muslims* "released on the U.S.-based YouTube website in 2012."[5] The film clips prompted not only violence and human casualties in the Muslim world but also diplomatic tensions between the Western countries and the Arab world. Regarding the trailer's vast impact, Fiss rightly remarks: "The scope of the damage it caused in both human casualties and diplomatic tensions was unprecedented for an online clip. The crisis prompted a domino effect of mass protests around the Muslim world, many of which turned violent, causing deaths and political unrest."[6]

The liberal view sought to justify the above cited events on the ground of a very liberal and extended view of the right to freedom of expression.[7] Banning those conducts, in their view, would impinge on the right to freedom of speech.[8] Fiss's arguments may be quoted as representing this liberal view:

> Accusations of blasphemy block ideas from spreading and stifle the oxygen needed for any society to breathe intellectually, to thrive culturally, and to develop democratically. Tolerating blasphemous speech can only strengthen the fabric of debate in society and add a layer of nuance to people's judgments through assertion, irony, humor, provocation, or satire. In prohibiting discussions of religious beliefs, anti-blasphemy advocates license states to determine which conversations on religion are admissible, and which are too controversial. However, pluralism requires peaceful expression of divergent views, with no fear of retribution or attack.[9]

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[3] Tim Jensen, 'The Muhammad Cartoon Crisis. The Tip of an Iceberg' (2006) 31 (2) *Japanese Religions* 173-85; M. Christian Green, 'Between Blasphemy and Critique: Freedom of Religion and Freedom of Speech' (2014) 29 (1) *Journal of Law and Religion* 176.

[4] Green, ibid.

[5] Joelle Fiss, 'Anti-blasphemy offensives in the digital age: When hardliners take over' *The Brookings Project on U.S. Relations with the Islamic World* Analysis Paper (No. 25, September 2016) 18.

[6] Ibid 18-19. For detail of how the video of *Innocence of Muslims* sparked deaths and an international diplomatic crisis, see, ibid 18-23. See also, Green (n 3) 177.

[7] See, Fiss (n 5) 6-23.

[8] Ibid.

[9] Ibid 7.

In the wake of the above cited incidents[10]and the above liberal view,[11]I aim to revisit the philosophical justification and limits of freedom of expression. Though I do not claim to create something completely *de novo*, this would show that the freedom of expression is a *qualified* as opposed to *unqualified* human right and hence cannot extend to making abusive remarks against religious personages or defiling or burning the Holy Book of any religion. Acknowledgement of this proposition by the relevant stakeholders of the United Nations[12] might help reduce the chances of human casualties and deaths of people caused by alleged blasphemous conducts with respect to any religion.

The article consists of *four* broad sections. This Introductory section introduces the readers to the background, objective, and significance of the article. Section 2 reflects on the theories of free speech and identifies *four* principal philosophical justifications for freedom of expression in the legal and political discourse. Section 3 first shows that freedom of expression is a *qualified* human right both nationally (for example, in the Bangladeshi jurisdiction) and globally (in the international Human Rights law).It then justifies limitations on freedom of expression generally. Finally, it contextualises the limitations concerning the contempt of religions in general and the religion of Islam in particular.[13] Section 4 summarises the arguments of the article and concludes.

2. The Justification of Freedom of Expression

The philosophical justification of freedom of expression that exists in the legal and political discourse may broadly be divided into *four* categories. They are: (a) discovery of truth; (b) personal development; (c) democratic participation; and (d) autonomy.[14] They are analysed below in brief.

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[10] *Supra* texts accompanying notes 1-6.

[11] *Supra* texts accompanying notes 7-9.

[12] The relevant stakeholders of the United Nations in this respect might include the States parties to the International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee (HRC) established under the ICCPR, and the United Nations Human Rights Council (UNHRC), the main intergovernmental body under the United Nations for human rights. The HRC, for example, in General Comment No. 34 observes that 'prohibitions on display of lack of respect toward any religion including blasphemy laws' are incompatible with the Covenant rights of freedom of expression. Waheduzzaman argues that this observation of the HRC has been internally inconsistent so far as the *freedom of expression* at the one hand and its *restriction* on the "public order" ground at the other hand is concerned. See, Moha. Waheduzzaman, 'The Right to Freedom of Expression and Hurting Religious Feelings: Global Perspective' (2023) 1 *ELCOP Journal on Human Rights* 7-26.

[13] For contemptuous conduct with respect to the religion of Islam, see, *supra* texts accompanying notes 1-6.

[14] I have been inspired to adopt this four-fold justification of freedom of expression from Badamchi's analysis. See, Devrim Kabasakal Badamchi, 'Justifications of freedom of speech: Towards a double-grounded non-consequentialist approach' (2014) *Philosophy and Social Criticism* 1-21.

2.1 Discovery of Truth

The discovery of truth as justification for freedom of speech was first developed by John Stuart Mill in his influential work *On Liberty*.[15] Mill argues that widespread freedom of speech is necessary to realise truth in human affairs since one can only gain justified confidence in his view in the open clash of debate.[16] Diversity of opinions is thus essential for reaching the truth. Harel remarks: "Speech has an instrumental value in promoting truth and promoting truth is socially valuable."[17] Indeed, how the protection of speech may be conducive in the long run to the discovery of truth is well reflected in the following passage of Harel on Mill's work:

> But why should truth and falsehood grapple with each other? Why should not we simply censor falsehood and thus guarantee the victory of truth? Why is the victory of truth guaranteed? A philosophically sophisticated version of the argument was developed by John Stuart Mill who identified three distinct claims. In Mill's view: (1) if a censored opinion contains truth, its silencing is damaging as it lessens the probability that truth be revealed. In his view: "complete liberty of contradicting and disproving our opinion, is the very condition which justifies us in assuming its truth"; (2) if conflicting opinion each contain some truth, the clash between them is the only method of discovering what the truth is; and (3) even if the opinion has no truth in it, challenging the accepted position contributes to its vitality and decreases the chances that it degenerates into a prejudice or dogma. Mill famously contrasted "dead dogma" with "living truth" and he maintained that: "Truth gains more even by the errors of one who, with due study and preparation, thinks for himself, than by the true opinions of those who only hold them because they do not suffer themselves to think".[18]

Mill's view has been immensely influential, particularly in the Anglo-American world. In *Abrams v US*, Justice Holmes in his dissenting opinion argued that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[19] After Justice Holmes's observation, the *discovery of truth* argument has also come to be known as the *marketplace of ideas* argument.[20] About the particular appeal of the *marketplace of ideas* argument in the Anglo-

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[15] J. S. Mill, *On Liberty* (1859).

[16] Matteo Bonotti and Jonathan Seglow, 'Freedom of Expression' <https://doi.org/10.1111/phc3.12759>accessed on 24 November 2023).

[17] Alon Harel, 'Freedom of Speech' <http://ssrn.com/abstract=1931709>accessed on 24 November 2023. See also Gehan Gunatilleke, 'Justifying Limitations on the Freedom of Expression' (2021) 22 *Human Rights Review* 93 (holding that freedom of expression has consequentialist and epistemic value and John Stuart Mill's defence of the freedom of expression points to its epistemic value).

[18] Harel, ibid (internal citations omitted).

[19] *Abrams v US* (1919) 250 US 616.

[20] Harel (n 17).

American world, Harel writes: "The claim that robust discussion is conducive to the discovery of truth has a particular appeal in the Anglo-American world and it has been analogized to the traditional justification for the adversary system based on cross-examination."[21]

Despite Mill's influence in literature and Anglo-American jurisprudence, it has been subject to sustained criticism. Mill's approach has been categorised as consequentialist in that free speech is required to promote the discovery of truth and hence does not account for our intuition that free speech is valuable in itself, not simply as an instrument.[22] Furthermore, Mill's position has been regarded as over-intellectualised ignoring the fact that much speech is not concerned with truth, say, for example, football chants.[23] Some theorists have pointed out that "the argument from truth presupposes a process of rational thinking and, consequently, the less rational individuals are, the less forceful the theory is. Most sceptical of all have been those who have argued against the claim that truth is objective and maintain that truth is being created rather than discovered."[24] It has also been argued that the so-called *marketplace of ideas* is not open to everyone who wants to communicate her ideas.[25] Disparities of power and money may have a destructive influence on the robustness of public discourse.[26]

2.2 Personal Development

Personal development or self-fulfillment is another ground to justify the freedom of expression of individuals. Here self-fulfillment differs from merely satisfying one's preferences. Instead, self-fulfillment is viewed as a normative concept/ideal which "presupposes striving towards improvement and perfection."[27] Harel rightly observes: "This view is based on a certain vision of human beings as striving towards improvement and growth. It is understood by some theorists to be rooted in Aristotelian conceptions of good life. Most significantly it maintains that by exercising the right to free speech, individuals "instantiate or reflect what it is to be human"."[28]

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[21] F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press 1982) 16. See, Harel (n 17).

[22] K. Greenawalt, 'Free Speech Justifications' (1989) 89 (1) *Columbia Law Review* 118-155. See, Bonotti and Seglow (n 16).

[23] Bonotti and Seglow, ibid (internal citations omitted).

[24] Harel (n 17) (internal citations omitted).

[25] See, Harel (n 17).

[26] Ibid.

[27] Ibid.

[28] Ibid (internal citations omitted).

Restrictions on freedom of expression thus hinder the personal development of the individuals. Barendt formulates the main argument of the *personal development* theory in these words: "Restrictions on what we are allowed to say and write, or (on some formulations of the theory) to hear and read, inhibit our personality and its growth."[29]Badamchi encompasses all types of development of human personality under the theory: "People need to express their opinions freely and be listened to and criticized by others since this is important for developing their personalities and ideas. That is, free speech is necessary for intellectual, emotional and spiritual development of one's personality."[30]

In this context, it may be pertinent to consider also Joseph Raz's account of the theory of personal development.[31] Raz's theory is founded on the idea that "cultural diversity is a good in itself to be protected because distinct ways of life are significant for the personal development and identification of individuals."[32] Raz holds free expression as a public good. "It is part of public culture not only in showing the absence of censorship but also in providing access to the expressions of various ways of life."[33] In Raz's view, the expression of opinion reflects the lifestyle of individuals. Therefore, argues Raz, when restriction is imposed on the expression of opinion, it is indeed the lifestyles that are restricted/censored.[34]

Like the theory of discovery of truth, the theory of personal development has also been subject to criticism. Since, under the theory, free speech is designed to facilitate, sustain, and maximise self-fulfillment— it is consequentialist. It does not recognise free speech as valuable in itself. It rather treats the right to freedom of expression as an instrument to achieve some other ends. Harel criticises the theory: "Opponents of this argument have pointed that it is difficult to see why free speech is more fundamental to self-growth and self-fulfillment than other liberties. After all, other no-speech activities are as essential to self-growth and self-fulfillment as much as speech."[35] Furthermore, it is also doubtful that all forms of speech that are currently protected are indeed congenial to self-development/ self-fulfillment.[36]

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[29] Eric Barendt, *Freedom of Speech* (Oxford University Press 2007) 15.

[30] Badamchi (n 14) 6.

[31] Joseph Raz, 'Free Expression and Personal Identification' (1991) 11 (3) *Oxford Journal of Legal Studies* 303-24.

[32] Badamchi (n 14) 8.

[33] Ibid 7.

[34] Ibid.

[35] Harel (n 17) (internal citation omitted).

[36] Harel (n 17).

It has also been argued that the justification that the theory of *personal development* offers, considers free speech as a human need.[37] In this 'human need' context, Barendt criticises the theory by stating that : "it is far from clear that unlimited free speech is necessarily conducive to personal happiness or that it satisfies more basic human needs and wants than, say, adequate housing and education."[38]

So far Raz's version is concerned, it has been argued that Raz's theory "does not offer us any clue regarding the regulation of speech, especially certain categories of hate speech."[39] Badamchi rightly asks, "[i]s any kind of speech valuable for personal identification or, if not, what are the categories of speech that can be regulated?"[40]

2.3 Democratic Participation

Freedom of expression is considered as the prerequisite of democracy. However, in the context of democratic participation as rationale for freedom of speech, there are different conceptions of democracy: "[i]s democracy valuable as a procedural method on grounds of fairness and equality? Or is it based on the greater likelihood of desirable decisions to emerge from a democratic process?"[41] It is usually the latter conception that has attracted attention of the theorists while deliberating on the rationale for free speech. Even in the latter conception, there are several democracy-based arguments. Of them, I will reflect briefly on the theories of Meiklejohn and Sunstein only.[42]

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[37] Badamchi (n 14) 6.

[38] Barendt (n 29). See also the criticism of Badamchi: "Nevertheless, it is still difficult to argue for the priority of free speech compared with other human needs even if we accept that it has an instrumental value for personal development." Badamchi (n 14) 7.

[39] Badamchi (n 14) 8.

[40] Ibid. See also this remark of Badamchi: "While Raz's theory seems to offer a stronger ground by linking free speech and identification with distinct ways of life, this theory still needs to define the boundaries for regulating categories of hate speech." Ibid.

[41] Harel (n 17).

[42] See, Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (Harper & Brothers Publications 1948). See also, Alexander Meiklejohn, 'The First Amendment is an Absolute' (1961) *The Supreme Court Review* 245-66. See, Cass R. Sunstein, *Democracy and the Problem of Free Speech* (Free Press 1995). Apart from Meiklejohn and Sunstein's theory, one can see also R. Dworkin, Foreword. In I. Hare & J. Weinstein (Eds.), *Extreme Speech and Democracy* (pp. v-ix). Oxford University Press; J. Weinstein, 'Participatory democracy as the central value of American free speech' (2011) 97 (3) *Virginia Law Review* 491-514 (arguing that it would be illegitimate for any government to enact laws that affect citizens' vital interests unless they have had the opportunity to speak out in favour or against them); R. Post, 'Participatory democracy and free speech' (2011) 97 (3) *Virginia Law Review* 477-489 (maintaining that citizens cannot reasonably regard themselves as authors of law unless they have had substantive opportunity to influence the course of discussion).

Meiklejohn is regarded as the primary and an ardent advocate of democratic justification who develops a theory of interpretation of the United States Constitution.[43] Meiklejohn's view may be better understood from what Alon Harel writes of his theory. To quote Harel:

> The democratic defense of free speech is based on the necessity to make all information available to the sovereign electorate. As the people need to make decisions, they ought to be provided with the information necessary to make such decisions. Restricting speech is therefore detrimental to the democratic process, as it undermines the ability of individuals to reason politically. Furthermore, freedom of speech seems to rely on the perception that politicians are servants rather than masters. Freedom of speech is necessary to communicate the electorate's wishes to the government and thus to guarantee accountability on the part of the government. It follows also that freedom of speech is essential to supervising and monitoring the politicians. Politicians who are subjected to the power of popular opinion are more likely to react to the pressure of public opinion and decide in accordance with the interests of the electorate.[44]

Meiklejohn thus speaks of deliberative political participation which is possible only when people have freedom of speech. Badamchi considers this kind of freedom of speech as a constitutive component of political participation.[45]

Like Meiklejohn, Sunstein also develops his theory in the context of the United States Constitution. Referring to Madisonian understanding of politics, Sunstein considers people as "the sovereign whose exercise of sovereignty is manifested in deliberative political Participation."[46] Apart from considering free speech as a constitutive component of deliberative political participation, the significance of Sunstein's theory lies in that it divides speech into political and non-political speech and argues that political speech is a high-value speech that requires high standard of protection.[47] Interestingly, Sunstein includes also "art and literature in his definition of political speech because he considers most artwork as a contribution to social deliberation."[48]

But why political speech deserves a higher standard of protection than protection rendered to non-political speech? The answer is to be found in the distinction between the characteristics of political and non-political speech.[49]

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43 Harel (n 17).

44 Harel (n 17) (internal citations omitted).

45 Badamchi (n 14) 10.

46 Ibid.

47 Ibid. "Sunstein calls his theory a two-tier First Amendment theory of free speech." Ibid. In first tier belongs the political speech and in second-tier belongs the non-political speech. Ibid 10-11.

48 Ibid.

49 Ibid.

Sunstein identifies the characteristics of political speech in that the "political speech aims to contribute to public deliberation and political participation, which ultimately serves the functioning of democracy. That is, political speech contributes to democracy as an important component of public deliberation."[50] This unique characteristic of political speech pertaining to democracy requires different and higher standards of protection.[51]

While arguing for higher standard of protection for political speech, Sunstein did not mean that the second-tier non-political speech may be subjected to too much regulation. Instead, Sunstein argues that "his theory allows much room for challenges to regulatory efforts aimed at any speech, including non-political speech."[52] Sunstein lists *impermissible government justification* for the regulation/censorship of any speech:

> In general, government cannot regulate speech of any sort on the basis of (1) its own disagreement with the ideas that have been expressed, (2) its perception of the government's (as opposed to the public's) self-interest, (3) its fear that people will be persuaded or influenced by ideas, (4) its desire to ensure that people are not offended by the ideas that speech contains.[53]

The democracy-based arguments as delineated above have also suffered criticism. It has been argued that the theory "cannot defend the free speech rights of resident non-citizens who lack formal voting rights."[54] It has been said also that the theory is "limited as it is applicable only to political speech."[55]In the same vein, Badamchi identifies two major limitations of democratic justification of free speech: protection of non-political speech and speech that advocates the overthrow of democracy itself.[56] The right to information is considered part of free speech for democratic deliberation. Interestingly, this democratic rationale of *information* that is commonly believed to lead to reasoned decisions has been criticised also. As Harel writes: "[t]his naive assumption ignores not only common sense and historical experience but also the vast contemporary literature of behavioral economics indicating that information often is detrimental to the making of reasoned decisions."[57]

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50 Ibid.

51 Ibid 11.

52 Ibid (internal citation omitted).

53 Sunstein (n 42) 155. Quoted in Badamchi (n 14) 11.

54 Bonotti and Seglow (n 16) 4.

55 Harel (n 17).

56 Badamchi (n 14) 9.

57 Harel (n 17).

2.4 Autonomy

Autonomy is another significant ground to justify free speech. It is viewed as one of the "several characteristically liberal arguments made in favour of protecting speech."[58] In literature, there are different meanings and versions of autonomy-based arguments. Harel remarks, "autonomy based argument is in effect a family of arguments."[59] Briston identifies six distinctive meanings of autonomy for defending the right to free speech.[60] Bonotti and Seglow urges for differentiating between "speaker—and listener—centred theories and also between a procedural right to autonomy and the substantive ideal of a life which includes critical deliberation."[61] Harel speaks of a negative conception of autonomy and a positive conception of autonomy. As to the content of negative and positive conceptions of autonomy, Harel writes:

> Under the negative concept of autonomy, autonomy is designed to protect individuals from outside control of the state and to maintain a personal space for the individuals; in contrast the positive conception is designed to guarantee the actual exercise of autonomy. It is not merely the protection from outside or external interference which counts as autonomy- enhancing but the actual, active exercise of one's deliberative powers.[62]

Leaving aside the above stated different formulations of autonomy grounded arguments, I would rather reflect on the autonomy grounded theories of John Stuart Mill, Ronald Dworkin and Thomas Scanlon.

Mill is generally understood to justify free speech in the discovery of truth.[63] But Badamchi argues that, besides discovery of truth, Mill's theory "allows us to develop a listener-based autonomy justification for free speech."[64] Daniel Jacobson also holds a similar view that "Mill's argument is not straightforwardly consequentialist in the sense that a marketplace of ideas maximizes true belief and that Mill's argument concerns justification rather than truth."[65]

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[58] Ibid.

[59] Ibid.

[60] See, S. Briston, 'The Autonomy Defense of Free Speech' (1998) 108 *Ethics* 312-39.

[61] For detail, see, Bonotti and Seglow (n 16) 2-3.

[62] Harel (n 17).

[63] See generally, section 2.1 of this article.

[64] Badamchi (n 14) 11.

[65] Ibid 12. See also Daniel Jacobson, 'Why Freedom of Speech Includes Hate Speech', in Jesper Ryberg, Thomas S. Peterson and Clark Wolf (eds) *New Waves in Applied Ethics* (Palgrave Macmillan 2007) 73.

In *On Liberty*, Mill argues that any received opinion even if that is whole truth should face contestation and criticism.[66] Otherwise, the held opinion, writes Badamchi, "would be no more than a prejudice with little comprehension of rational grounds."[67] Mill adds that without contestation, the meaning of any opinion will be lost and the "dogmas will prevent the growth of real convictions from reason or personal experience."[68] Individuals thus "are required to hear all the opinions, regardless of the nature of those opinions, to develop justified criticisms as part of whatever conception of good they want to follow in life."[69] The State, therefore, should treat individuals as rational and autonomous beings and should allow them all the information and advocacy that might be helpful to a rational and autonomous person making a choice.[70]

Dworkin develops his arguments based on what he calls moral independence.[71] On moral independence, Dworkin writes:

> People have the right not to suffer disadvantage in the distribution of social goods and opportunities, including disadvantage in the liberties permitted to them by the criminal law, just on the ground that their officials or fellow citizens think that their opinions about the right way for them to lead their own lives are ignorable or wrong. I shall call this (putative) right *the right to moral independence*.[72]

The right to moral independence as described above by Dworkin "recognizes the autonomy of individuals in making their decisions without being forced or hindered."[73] Badamchi well perceives Dworkin's argument: "[t]he government's imposition of one conception of good over others prevents individuals making autonomous choices . . . because, in this way, the government does not recognize individuals as equal citizens who can decide how to live their lives."[74] Dworkin thus "founds his argument of moral independence on the principle of equal respect and concern for all citizens as a foundational principle of political morality."[75] Yong also identifies the justificatory foundation of the right to moral independence in the principle of equality.[76]

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66 See, Mill (n 15). Alternatively, one can see, JS Mill, *On Liberty* (Prometheus Books 1986) 60-61.

67 Badamchi (n 14) 11-12.

68 Ibid 12 (internal citation omitted).

69 Ibid.

70 Greenawalt (n 22) 150.

71 Badamchi (n 14) 12.

72 Ronald Dworkin, 'Is there a Right to Pornography?' (1981) 1 (2) *Oxford Journal of Legal Studies* 194 (emphasis added).

73 Badamchi (n 14) 12.

74 Ibid 13.

75 Ibid 12.

76 Caleb Yong, 'Does Freedom of Speech Include Hate Speech?' (2011) 17 *Res Publica* 392-93.

Scanlon's justification of free speech based on autonomy asserts that, as a general principle, "the powers of a state are limited to those that citizens could recognize while still regarding themselves as equal, autonomous, rational agents."[77] To elaborate further the view of Scanlon: "To regard himself as autonomous, a person must see himself as sovereign in deciding what to believe and in weighing competing reasons for action . . . An autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do."[78] A similar reference to sovereignty of the person is made by Nagel also.[79] To be stated otherwise, this view holds persons as "autonomous agents, and autonomy is identified with what can be labelled sovereignty – immunity from certain forms of external control. An individual is sovereign if she does not accept without questioning the judgments of others."[80]

Scanlon regards this principle as a Millian principle which restricts governmental authority over the lives of individuals.[81] In this view, "a government is not entitled to censor speech on the grounds either that its audience will form harmful beliefs or that it may commit harmful acts as a result of these beliefs."[82] In this sense, Scanlon's Millian principle is similar to Dworkin's moral independence principle in that "both principles forbid illegitimate state suppression on the ground that the speech is ignorable, wrong, or harmful to others."[83] Scanlon's view of autonomy-based arguments may well be concluded with the following observations made by Badamchi:

> The individual has a right to hear views and opinions and to consider acting on them as a requirement of being an autonomous person . . .He may decide to rely on the judgment of others but, even for this, he has to evaluate freely and independently the opinions and evidence that are proposed by others. Thus, individuals not only have a right to free speech but also a right to hear and evaluate the speech of others freely and independently.[84]

Autonomy-based arguments have also been subject to criticism. In identifying the limitations of autonomy grounded views, Badamchi observes

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77 Thomas Scanlon, 'A Theory of Freedom of Speech' (1972) 1 (2) *Philosophy and Public Affairs* 215.

78 Ibid 215-16.

79 See, T. Nagel, 'Personal Rights and Public Space' (1995) *24 Philosophy and Public Affairs* 96.

80 Harel (n 17). Scanlon distinguishes between autonomy as a constraint on justifications for authority and moral autonomy understood as the actual ability to exercise independent rational judgments. See, Harel, ibid. See also Thomas Scanlon, 'Freedom of Expression and Categories of Expression' (1979) 40 *University of Pittsburgh Law Review* 533.

81 Badamchi (n 14) 13.

82 Ibid. See also Scanlon (n 77) 213.

83 Badamchi (n 14) 13.

84 Ibid.

that the "autonomy-based arguments fail in some respect to differentiate between different categories of speech. The same principle of the right to autonomy (Mill's justification in one's criticism, moral independence in Dworkin, and the Millian principle in Scanlon) seems to apply to all categories of speech with the same force."[85]

In criticising the autonomy-based arguments, Bonotti and Seglow observe that "much speech does not consist of propositional content apt for individuals rationally to evaluate: many instances of hate speech, pornography, fake news, and deceptive advertising fall into this category."[86] In this respect, Harel's argument is noteworthy. Harel argues that certain forms of speech, such as, "pornography and racist speech hinder, exclude and silence women and minorities"[87] and hence "restricting such forms of speech may be conducive to the very protection of the right to free speech."[88] Under this view, therefore, the protection of autonomy itself may "justify restrictions on speech as the exercise of the right to free speech presupposes an environment which is conducive to deliberation and some forms of speech are detrimental to the exercise of such a right."[89]

Another criticism made against autonomy-based arguments is that substantive autonomy is over-inclusive. Bonotti and Seglow observe, "since autonomy involves myriad life choices and there is plausibly some right to it, it is unclear why freedom of speech, as just one incident of autonomy, requires its own special right."[90]Another frequent criticism of the autonomy argument, as Badamchi identifies, is that "in reality, individuals' choices hardly reflect their self-mastery."[91] Sunstein points out that there are real-life obstacles, such as, lack of education, information and opportunities that hinder exercising full autonomy.[92]

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[85] Ibid. However, in a later article on free speech, Scanlon seems to rectify this weakness when argues that "political speech, as a category, should have a higher standard of protection because, where political issues are concerned, governments are partisan and unreliable." Badamchi, ibid (internal citation omitted). See, Thomas Scanlon, 'Freedom of Speech and Categories of Expression', in Thomas Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy* (Cambridge University Press 2003) 98.

[86] Bonotti and Seglow (n 16) 3.

[87] Harel (n 17).

[88] Ibid.

[89] Ibid.

[90] Bonotti and Seglow (n 16) 3 (internal citations omitted).

[91] Badamchi (n 14) 13.

[92] Sunstein (n 42) 143. Referring to Sunstein's arguments, Badamchi, however, rightfully observes, "Although these criticisms are valuable and point out realistic conditions of exercising of autonomy, they do not go beyond merely addressing how difficult it is to act as fully autonomous individuals. Thus, they are hardly challenges to the principle of autonomy considered as an essential element of human dignity." Badamchi (n 14) 14.

It has also been criticized that the autonomy arguments promote "a sectarian view that is reasonably rejectable in political liberal terms."[93]

Within the limited space of the article, I have depicted enough the rationales of free speech. However, the conclusion of this section without a brief reflection on Badamchi's latest addition on the rationale of free speech would make the present analysis somewhat incomplete. Badamchi divides the above-delineated four justifications of free speech into two categories as being *consequentialist* and *non-consequentialist* justifications.[94] Badamchi considers 'discovery of truth' and 'personal development' as consequentialist justifications whereas 'democratic participation' and 'autonomy' as non-consequentialist justifications.[95]Badamchi argues that whereas the discovery of truth and personal development may offer good justifications for free speech, a stronger and better ground for free speech can be constructed by articulating two non-consequentialist justifications for free speech – democratic participation and autonomy.[96] Badamchi calls this the *double-grounded non-consequentialist* justification for free speech and, importantly, considers democratic participation and autonomy as complementary principles.[97]

It would be interesting to know how 'autonomy' and 'democratic participation' complement each other. As a justification for free speech, autonomy alone fails to distinguish between different types of speeches.[98] Therefore, it seems to run the risk of suggesting that any type of speech is protected.[99] Democratic participation as a justification may offer a valuable remedy to this problem of autonomy.[100] Democratic participation arguments categorise speech into political and non-political, prioritises political speech over any other forms of speech, and argues for the highest possible standard of protection for political speech. Like autonomy, democratic arguments may also suffer from weaknesses. Democratic participation arguments struggle to include non-political/non-democratic speech and speech that aims to overthrow democracy itself. Autonomy here may come in aid of democratic arguments. Autonomy-based arguments allow for all individuals

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93 Bonotti and Seglow (n 16) 3. See also J. Cohen, 'Freedom of Expression' (1993) 22 (3) *Philosophy and Public Affairs* 222.

94 Badamchi (n 14) 1.

95 Ibid.

96 Ibid. Badamchi holds that 'discovery of truth' and 'personal development' although may offer good reasons for free speech eventually require empirical proof for validation. This requirement of empirical validation makes them weak foundations for free speech due to the uncertainty of finding empirical proof. Ibid 18.

97 Ibid 1.

98 Ibid 19.

99 Ibid.

100 Ibid.

to "have an equal right to pursue whatever conception of good they think is the best."[101] Autonomy as a justification thus incorporates also non-democratic speech under the free speech principle.[102] This is how Badamchi's *double-grounded non-consequentialist* justification redresses the weaknesses of each other and thus also complements each other.[103]

After knowing the justifications of free speech generally and Badamchi's *double-grounded non-consequentialist* justification in particular, I may now turn to the query of the limits of freedom of expression.

3. The Limits to Freedom of Expression

3.1 Freedom of Expression: A Qualified Human Right

Before embarking on the philosophical justification of the limits to freedom of expression, I shall first draw on the nature of freedom of expression as a human right. I shall do this from both the national and international law perspectives. As an example of national law perspective, I shall consider the Bangladeshi jurisdiction. So far as the Bangladeshi jurisdiction is concerned, the Human Rights (HRs) have been enshrined in two different Parts of its Constitution. Economic, Social and Cultural (ESC) rights have been laid down in Part II as Fundamental Principles of State Policy (FPSP)[104] whereas Civil and Political (CP) rights have been laid down in Part III as Fundamental Rights (FRs). The ESC rights as embodied in Part II as FPSPs are expressly declared by the Constitution to be judicially non-enforceable.[105] On the contrary, the CP rights as embodied in Part III are judicially

[101] Ibid.

[102] Ibid.

[103] Apart from Badamchi, for more recent work on the justification of freedom of expression and relevant issues one can see also, Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012); James Weinstein, 'Hate Speech Bans, Democracy, and Political Legitimacy' (2017) 32 (3) *Constitutional Commentary* 527-83; Matthew Kramer, *Freedom of Expression as Self-Restraint* (Oxford University Press, 2021).

[104] The FPSPs of Part II, however, do not only incorporate ESC rights. See, Muhammad Ekramul Haque, 'Does Part II of the Constitution of Bangladesh Contain Only Economic and Social Rights?' (2012) 23 (1) *Dhaka University Law Journal* 45-51. Waheduzzaman shows that the FPSPs of Part II of the Bangladesh Constitution may broadly be divided into three categories: principles relating to the spirit of the national liberation struggle; principles relating to ESC rights; and miscellaneous principles. See, Moha. Waheduzzaman, 'Inclusion and Enforcement of ESC Rights under State Constitutions: An Appraisal' (2015) 3 *Jahangirnagar University Journal of Law* 61-64.

[105] See, Article 8 (2) of the Constitution. It states, "The principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens, but *shall not be judicially enforceable*" (emphasis added). However, there have been scholarly developments on

enforceable Fundamental Rights and they generally constitute a limitation on the part of the State to enact laws in derogation of them.[106]

A careful reading of Part III of the Bangladesh Constitution would reveal that the FRs enshrined therein may be of *three* types on the basis of imposing restrictions on them: (a) fundamental rights upon which *no* restriction may be imposed;[107] (b) fundamental rights upon which *only* reasonable restrictions may be imposed;[108] and (c) fundamental rights upon which *any* restrictions may be imposed.[109]

The right to freedom of expression which this article deals with falls under type (b) of the above classification. To be specific, the right to freedom of speech and expression and freedom of the press is guaranteed by Article 39 (2) (a) (b) of the Constitution. Under the Article, reasonable restrictions may be imposed by law upon the right to freedom of expression on *seven* grounds: (1) security of the State; (2) friendly relations with foreign States; (3) public order; (4) decency or morality; (5) contempt of court; (6) defamation; and (7) incitement to an offence.[110] Thus, within the scheme of the Bangladesh Constitution, freedom of expression is not an absolute or unqualified human/fundamental right. Rather, it is a qualified

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the non-justiciability issue of ESC rights/FPSPs in Bangladesh. See, for example, Muhammad Ekramul Haque, 'Economic, Social and Cultural Rights: Transformation of Non-Justiciable Constitutional Principles to Justiciable Rights in Bangladesh' in M Rafiqul Islam and Muhammad Ekramul Haque (eds), *The Constitutional Law of Bangladesh: Progression and Transformation at its 50th Anniversary* (Springer 2023) 337-52; Muhammad Ekramul Haque, 'Constitutional Protection of Economic and Social Human Rights: Intention of the Constitution-Makers and Judicial Interpretations' in Ridwanul Hoque and Rokeya Chowdhury (eds), *A History of the Constitution of Bangladesh: The Founding, Development, and Way Ahead* (Routledge 2023) 181-92; Moha. Waheduzzaman, 'Economic, Social and Cultural Rights under the Constitution: Critical Evaluation of Judicial Jurisprudence in Bangladesh' (2014) 14 (1&2) *Bangladesh Journal of Law* 1-42; Moha. Waheduzzaman, 'Judicial Enforcement of Socio-Economic Rights in Bangladesh: Theoretical Aspects from Comparative Perspective' in Dr. M Rahman (ed) (2011) *Human Rights and Environment* 57-80.

[106] See, Article 26 (2) of the Constitution. It states, "The State shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent of such inconsistency, be void."

[107] For fundamental rights of this type, see, for example, Article 27 and Article 39 (1) of the Constitution. Article 27 states, "All citizens are equal before law and are entitled to equal protection of law." Article 39 (1) states, "Freedom of thought and conscience is guaranteed."

[108] For fundamental rights of this type, see, for example, Article 36 (freedom of movement), Article 37 (freedom of assembly), Article 38 (freedom of association), Article 39 (2) (freedom of speech and expression and freedom of the press), Article 41 (freedom of religion) and Article 43 (protection of home and correspondence) of the Constitution.

[109] For fundamental rights of this type, see, for example, Article 40 (freedom of profession or occupation) and Article 42 (rights to property) of the Constitution.

[110] See, sub-article 2 of Article 39 of the Bangladesh Constitution.

or conditional human/fundamental right.[111]

So far as the international human rights law is concerned, the right to freedom of expression features in two documents, namely, the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). Article 19 of the UDHR reads: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." The content of the said right is a bit more elaborated in Article 19 of the ICCPR. Paragraph 1 of Article 19 recognizes the right to hold opinion without interference whereas Paragraph 2 of the said Article speaks specifically of the right to freedom of expression. Paragraph 2 reads: "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."

However, like the national jurisdiction of Bangladesh, the international norms also recognise restrictions on freedom of expression. Paragraph 3 of Article 19 of the ICCPR expressly mentions that the exercise of freedom of expression provided for in paragraph 2 carries with it, special duties, and responsibilities. It may, therefore, be subject to restrictions imposed by law. Paragraph 3 enumerates these grounds of restriction: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order, or public health or morals.[112]

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[111] In this context, it may not be out of place to mention few other jurisdictions where freedom of expression is a *qualified* human right. Article 19 (1) of the Indian Constitution guarantees for Indian citizens the freedom of expression. But the said freedom may be subjected to reasonable restrictions by law under Article 19 (2) on the grounds of 'sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency, morality or in relation to contempt of court, defamation or incitement to an offence'. In the same vein, Article 19 of the Pakistan Constitution of 1973 secures freedom of speech subject to State's authority to impose reasonable restrictions by law 'in the interest of the glory of Islam or the integrity, security or defence of Pakistan, friendly relations with foreign States, public order, decency, morality or in relation to contempt of court, or commission of or incitement to an offence'. Similarly, Article 16 (1) of the South African Constitution of 1996 protects freedom of expression. But Article 16 (2) clearly states that such freedom does not extend to 'propaganda of war, incitement of imminent violence, advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm'. Likewise, the First Amendment to the US Constitution guarantees, *inter alia*, the freedom of expression. But such freedom is not accorded to certain categories of speech, such as, 'incitement, defamation, fraud, obscenity, child pornography, fighting words and threats' <https://www.britannica.com/topic/First-Amendment/Permissible-restrictions-on-expression>accessed on 8 December 2023.

[112] See, sub-paragraphs (a) and (b) of paragraph 3 of Article 19 of the ICCPR.

Thus, under both the national and international human rights law regimes, the right to freedom of expression is a *qualified* as opposed to an *unqualified* human right. I would now explore the philosophical justification behind the above-stated limitations/restrictions that can potentially be put on the exercise of freedom of expression.

3.2 Justifying Limitations on Freedom of Expression

The preceding sub-section reveals that the domestic and international law[113] authorises the State to impose limitations on freedom of expression in order to advance broad aims such as national security, public order, public health and public morals. In short, the limitations are based on the grounds of state security and public interest. It implies that the right to freedom of expression should give way for any overriding social interest or compelling state necessity. And this is perhaps essential if human beings are meant to live as social beings. Cane's rationalisation is worthy to quote in this respect:

> It is easy enough to accept Hart's idea that freedom is a basic human value. Human beings are individuals, and being able to express that individuality in one's choices and actions is an essential component of human well-being. *Alongside the individuality of human beings, however, their other most noticeable characteristics is sociability*. It is not just that most people choose to live in (larger or smaller) communities or that most people belong to various overlapping and interacting groups. People are also heavily reliant on those communities and groups, and on their relationships with other human beings. *If individual freedom is a precondition of human flourishing so, too, is membership of communities and groups, and a rich network of social interactions*.[114]

Individual freedom understood in the light of the above-quoted passage[115] is of little or no value in the absence of restraints. To quote Cane again:

> Value is a function of scarcity. Just as time would have little or no value if human beings were immortal, so individual freedom would have little or no value in the absence of external constraints. In this light, it seems hard to justify giving the individual's interest in freedom of choice lexical priority over the interest in social cooperation and coordination.[116]

Wellborn also acknowledges the rights of others and of society as a whole when says, "[t]o protect society, the law must protect the individual. But it must also continuously balance out the rights of the individual against the rights of

[113] (n 110), (n 111), and (n 112), and the accompanying texts.

[114] Peter Cane, 'Taking Law Seriously: Starting Points of the Hart/Devlin Debate' (2006) 10 *The Journal of Ethics* 37(internal citations omitted) (emphasis added).

[115] Ibid.

[116] Ibid 37-38 (internal citation omitted).

others and of society as a whole."[117]

The above observations of Cane and Wellborn contemplate balancing between individual freedom and social interests. These views are commensurate in part with the *consequentialist* approach to protecting the speech. The *consequentialist* camp regards the protection of speech as a means to promote social welfare. It, therefore, follows that speech which is not conducive to social welfare deserves no protection.[118] The *deontological* camp, however, "is typically less willing to conduct "balancing" of speech concerns with other non-speech concerns."[119]

It is, however, not immediately necessary to take sides either of the *deontological* or *consequentialist* camps. It is enough that limitation on freedom of expression has been acknowledged in both domestic and international law.[120] And those limitations pertain to the urgent considerations of the State. Referring to those limitations, Gunatilleke argues that the individual concerned owes others a 'duty of justice' to refrain from engaging in the impugned conduct.[121] Harel also emphasises the urgent considerations of State to triumph over individual freedom when says:

> Most advocates of protecting speech concede that urgent considerations often override the concern for protecting speech. Yet concerns which justify limitations on speech ought to be more urgent, more weighty or different in kind than concerns justifying their limitations of most other liberties.[122]

Within the limited space of the article, I have attempted to justify the limits to freedom of expression based on State security and public interest. This now requires to be contextualised with respect to contempt of religion.

3.3 Contextualising the Limitations with Contempt of Religion

Contextualising contempt of religion with the limits of freedom of expression discussed in the preceding sub-section virtually requires establishing a nexus between contempt of religion and the State security and public interest. Fair criticism of religion in this respect should be distinguished from contempt of religion. There is no point objecting the fair and constructive discussion or criticism of any religious leader or any precepts of religion. What is objectionable is the mere abusive and offensive remarks against the religion or any religious

[117] Charles Wellborn, 'Public versus Private Morality: Where and How Do We Draw the Line?' (1978) 20 (3) *Journal of Church and State* 495.

[118] Nagel (n 79) 86-89. See, Harel (n 17).

[119] Harel, ibid.

[120] See, (n 110), (n 111), and (n 112), and the accompanying texts.

[121] Gunatilleke (n 17) 91-108.

[122] Harel (n 17).

personage.[123]

In an earlier work, I argued that a "person should be allowed to preach his belief (or, even his non-belief), but why should he be allowed to commit such conducts like burning of a religious book or making derogatory comments against any religious personage in the name of freedom of expression."[124] I furthermore argued:

> . . . we should not forget that he is an individual alone and hence cannot be allowed to play with the emotion and religious feelings of multitude of people. From amongst those vast multitudes, some may become violent and eventually the incident may lead to riot and deaths of many people. Why should not he then be compelled to take the responsibility for the mass disorder and deaths of people?[125]

In the present article, I have dealt particularly with the instances of abusive remarks against any religious personage (by means of drawing cartoon or by any other means) or burning the holy religious book publicly.[126] Regarding these types of conduct, I argued in the earlier work the following:

> These instances of conduct can in no sense be viewed as *criticism* of religion rather they are sheer *contempt* of religion. These conducts have the tendency to stir up the breach of peace. Sometimes they lead to riot and deaths of people also. These conducts thus cannot be seen as exercise of freedom of expression; they are rather abuse of the exercise of freedom of expression.[127]

The above stated types of conduct not only spark mere protest but also lead to violence, riots, and the deaths of people.[128] Broadly speaking, they have the tendency to stir up the breach of peace and public disorder. The maintenance of peace and order in the society is one of the highly revered functions of the State. To state otherwise, for broader concerns of security and public interest, the States may prohibit the contemptuous conduct with respect to religion of the types particularly delineated in this article.[129]

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[123] What is fair criticism and what are abusive/offensive remarks may be decided in each case by the courts. The burning of holy religious books in public or drawing cartoons of religious personages may, however, be easily identified as instances of contempt of the respective religion.

[124] See, Waheduzzaman (n 12) 14.

[125] Ibid.

[126] See, (n 1—6) and accompanying texts.

[127] Waheduzzaman (n 12) 22-23 (internal citation omitted) (emphasis original).

[128] See, (n 1—6) and accompanying texts.

[129] Ibid.

If law is seen as means to serve certain end, I must say that one of the ends of criminal law is or should be to maintain order and peace in the society. In this context, I might profitably refer to the Wolfenden Committee Report on *Homosexual Offences and Prostitution* in the United Kingdom (UK). The British Parliament constituted the Wolfenden Committee (named after its chairman Lord Wolfenden) to report on *Homosexual Offences and Prostitution* in the UK. The Committee in its Report recommended that the consensual homosexual activity between adults in private should be decriminalized.[130] But, the Wolfenden Report, even after adopting this liberal position on the question of criminalising adult homosexual behaviour, recognised that the maintenance of *public order* is one of the functions of the criminal law. The Committee perceived the functions of the criminal law in these words: "Its function, as we see it, is to preserve *public order* and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others . . ."[131]

Cane argues that whether a particular conduct should be criminalized depends on "whether particular consequences of conduct provide a reason to criminalize that conduct."[132] I hold that the concerns of *public order* (mentioned specifically in the Wolfenden Report)[133] and *breach of peace* should be regarded as 'consequences of conduct' for which criminal law may be set in motion against any concerned person.[134] It has already been shown that the contempt of religion of the types particularly delineated in this article stir up the *breach of peace* and *public disorder*.[135]

According to Murphy, criminal law exists "to prevent the use of freedom to abuse the freedom and destroy the rights of others."[136] And, in my view, when a person defames a religious personage abusively or defiles or in particular burns the Holy Book of any religion, he thereby does not exercise but abuses his right to freedom of expression. Recently, on 07 December 2023, Denmark has banned the "improper treating" of religious texts in public. Under the new law, anyone found guilty of the offence may be fined or sentenced upto two years of imprisonment.[137] Certainly this new law has been made in the wake of a series of Quran desecrations

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[130] Report of the Committee on Homosexual Offences and Prostitution, Cmd 247, 1957 (UK). See, Cane (n 114) 21.

[131] Report of the Committee on Homosexual Offences and Prostitution, Cmd 247, 1957 (UK), paragraph 13 (emphasis added). See, Cane, ibid.

[132] Cane (n 114) 36.

[133] See, *supra* texts accompanying note 131.

[134] I held this view in my earlier work also. See, Waheduzzaman (n 12) 23.

[135] See, (n 1—6) and accompanying texts.

[136] Jeffrie G Murphy, 'Another Look at Legal Moralism' (1966) 77 (1) *Ethics* 52.

[137] See, *infra*, (n 142).

in public, but the law would be applicable for desecration or defiling of religious text of any religion.[138]

Thus, the crux of the matter is not whether contempt of religion may be prohibited by criminal law, rather the crux of the matter is (or should be) whether the law applies equally for the contempt of all religions in the society. Thus, the *principle of non-discrimination* must be followed while criminalising contempt of religion. Section 295A of the Bangladesh Penal Code, 1860 may be cited as an example of following the *principle of non-discrimination* while dealing with the offences relating to religion. Section 295A reads as under:

> Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of the citizens of Bangladesh, by words, either spoken or written, or by visible representations insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.[139]

From the above analysis, two things may be claimed with some credibility. *First*, the content of freedom of expression cannot extend to making abusive remarks against any religious icon or defiling or burning the Holy Book(s) of any religion. *Second*, these aggravated forms at least of the contempt of religion may be prohibited by penal statutes of States subject to the following of *non-discrimination* principle. If these can be agreed upon, then, I may hold that the liberal view to defend these conducts having a very extended meaning of the right to freedom of expression fails.[140]

4. Conclusion

I aimed to examine the philosophical justification and limits to freedom of expression in the context of contempt of religion. I mentioned the recent incidents of contemptuous conduct concerning the religion of Islam.[141] For this reason, the justification of limitations on freedom of expression may seem to have been articulated especially concerning the religion of Islam. But I hold that the thesis it presents should hold good for contempt of any religion of the world.[142] Any

[138] Ibid.

[139] Section 295A was inserted by section 2 of the Criminal Law (Amendment) Act, 1927 (Act No. XXV of 1927). It may be noted in this respect that Section 295A of the Indian Penal Code, 1860 also follows a similar non-discrimination principle while dealing with offences relating to religion.

[140] For the liberal view in this respect, see, *supra* notes 7, 8 and 9 and the accompanying texts.

[141] See, (n 1—6) and accompanying texts.

[142] Very recently on 07 December 2023, Denmark banned the "improper treating" of religious texts in public. Under the new law, anyone found guilty of the offence may be fined or sentenced upto two years of imprisonment. <https://www.nytimes.com/2023/12/07/world/europe/denmark-quran-burning-ban.html>accessed on 8 December 2023. No doubt this new law is made in the

attempt to justify a limitation on freedom of expression, however, presupposes a rudimentary understanding of the justification of free speech itself. I, therefore, first reflected on the theories of free speech and identified the 'discovery of truth', 'personal development', 'democratic participation' and 'autonomy' as the main justificatory grounds of freedom of expression.[143]

True, the right to freedom of expression may be conceived very broadly.[144] However, this does not mean or imply that the protection of speech is absolute or that no restriction may ever be imposed on its exercise. I have shown that both domestic and international law conceive limitations on its exercise.[145] Freedom of expression, therefore, is a *qualified* as opposed to an *unqualified* human right.[146] The grounds of limitation though more than one are broadly perceived as state security and public interest.[147]

Recent contemptuous conduct with respect to the religion of Islam led to violence, riots and deaths of people.[148] Contempt of religion thus has the tendency to destabilise peace and public order. The maintenance of peace and public order is a widely acknowledged function of states. The States' concern for peace and public order is nothing but concern for 'State security and public interest'. This is how contempt of religion is eventually related to 'State security and public interest', the main/core ground for imposing restriction on freedom of expression.[149]

The contempt of religion of the types particularly delineated in this article cannot, therefore, be a form of freedom of expression. These conducts/expressions are abuse of the human right of freedom of expression. If this is acknowledged by the relevant stakeholders of the United Nations, perhaps we would experience a better world where there would be least chances for human casualties and deaths of people caused by alleged blasphemous conducts with respect to a religion.

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wake of a series of Quran desecrations in public, but the law would be applicable for desecration or defiling of religious text of any religion. Likewise, this article though premised on the recent contemptuous conduct with respect to the religion of Islam, its aim to justify limitations on freedom of expression would hold good for contempt of any religion.

143 See generally, section 2 of this article.

144 This is assumed due to in part the wider scope of the philosophical justification of freedom of expression founded on various perspectives, see, ibid.

145 See generally, section 3.1 of this article.

146 Ibid.

147 See generally, section 3.2 of this article.

148 See, (n 1—6) and accompanying texts.

149 See generally, section 3.3 of this article.