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VRIJE UNIVERSITEIT

**FREEDOM OF EXPRESSION IN ISLAM AND LIBERAL DEMOCRACIES:  
A COMPARISON**

ACADEMISCH PROEFSCHRIFT

ter verkrijging van de graad Doctor aan  
de Vrije Universiteit Amsterdam,  
op gezag van de rector magnificus  
prof.dr. J.J.G. Geurts,  
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## Abstract

This study analyses the tensions between freedom of expression in Islam and liberal democracies. It aims to examine and analyse several aspects that characterise a comparison between the boundaries of freedom of expression in Islam and liberal democracies.

This study revolves around freedom of expression in liberal democracies and its boundaries, freedom of expression in Islam and its boundaries, blasphemy, and apostasy in Islam, and a comparison between the boundaries of freedom of expression in Islam and freedom of expression in liberal democracies.

Chapter 2 discusses several issues related to freedom of expression in liberal democracies. Since freedom of expression is closely connected to the concept of freedom, this chapter discusses Isaiah Berlin's two concepts of freedom, negative freedom and positive freedom, to understand the boundaries of freedom of expression in liberal democracies.

Chapter 3 discusses the subject matter of freedom of expression from an Islamic perspective. It first discusses the justifications for freedom of expression in Islam, followed by the corroborative evidence for freedom of expression in Islam. The second part of this chapter is dedicated to the boundaries of freedom of expression in Islam.

Chapter 4 deals with two subjects: blasphemy and apostasy. The first part of this chapter discusses the relationship between blasphemy and offense, and argues to separate blasphemy from apostasy, and discusses various standpoints on repentance from blasphemy. The second part of the chapter explores the different viewpoints on apostasy in Islam.

Chapter 5 compares the boundaries of free speech in Islam and liberal democracy. It explores the difference in terms of content and through the lens of the nature of the community. Finally, this chapter explores how the boundaries of freedom of expression are conceptually different or comparable in liberal democracy and Islam. To this end, it also discusses some case studies.

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# Chapter 1

## Introduction

### 1. Introduction

Freedom of expression is a heated and highly debated subject. The tensions it elicits are frequently discussed in the news. In the Netherlands, the murder of Dutch filmmaker and columnist Theo van Gogh (November 2nd, 2004) has primarily been discussed as an attack on freedom of speech. This incident triggered me to delve further into the subject of this thesis. Since the man who murdered Theo van Gogh, Mohammad Bouyeri, is a Dutch-Moroccan Muslim, the debate about freedom of speech very much concerns Islam. Before the murder of Theo van Gogh, freedom of expression was hardly discussed in the Dutch news. Thus, we can say that a Muslim caused freedom of expression to be a prominent topic in the public debate. Other examples of incidents that sparked debates about freedom of expression and Islam around the world are the Salman Rushdie affaire (1989),<sup>1</sup> The Danish Cartoon Crisis (2005),<sup>2</sup> the anti-Islam film *Innocence of Muslims* (2012),<sup>3</sup> and the Charlie Hebdo shooting (2015).<sup>4</sup> These incidents inspired me to compare Islamic conceptions of freedom of expression with that of Western liberal democracies.

The debate on freedom of expression and Islam is, in my opinion, not confined to the boundaries of freedom of expression but touches on many more issues, as I will point out through this study. It can be related to the broader question of how freedom in general is perceived in liberal democracies and Islam. It appears that freedom in liberal states is, first of all, an individual right. A liberal state is not to interfere with an individual's freedom, and by extension, not to impede the freedom of expression of its citizens. Freedom, in particular freedom of speech, is considered one of the typical Western liberal values that is lacking in Islam.

Many Muslims also conceive unrestricted freedom of expression as a specific Western value alien to Islam, even though many Muslim majority countries have also endorsed the human rights charter, including freedom of expression as a human right. In their perception, freedom of expression is a right to attack Islam, vilify, and mock the Prophet of Islam, Muhammad, and thereby to offend Muslims. Furthermore, some Muslims might believe that there is no such thing as freedom of expression, but they are entirely unaware that freedom of expression is crucial for certain principles and institutions in Islam. This study endeavours to remedy these lacunae. Throughout this dissertation, I will point out the complexity of the subject of freedom of expression in Islam and in liberal democracies. This complexity is due to the fact that both

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<sup>1</sup> For more information about the Salman Rushdie affair, see chapter 5.

<sup>2</sup> The Danish Cartoon Crisis took its name from an incident in Denmark. On September 30<sup>th</sup>, 2005, *Jyllands-Posten*, a Danish newspaper, published a dozen cartoons satirizing the Prophet Muhammad. Worldwide, hundreds of thousands of people protested against the cartoons, killing almost 250 people.

<sup>3</sup> This American film led to worldwide protests and left several scores dead.

<sup>4</sup> On January 7<sup>th</sup>, 2015, two gunmen (Saïd Kouachi and Chérif Kouachi) forced their way into the office of the *Charlie Hebdo* and killed eight journalists of the weekly satirical magazine. They also killed a guest, a receptionist, and later on, two police officers. The reason for this attack was the publication of cartoons mocking the Prophet Muhammad.



Muslim majority states and liberal democracies have their own socio-political systems with their own value systems, which makes a comparison on an equal base complex. This study revolves around the following main question:

What aspects characterize the boundaries of freedom of expression in Islam and liberal democracies and how do they compare?

This main question is answered through the following sub-questions:

- What are the boundaries of freedom of expression in liberal democracies?
- What is the evidence corroborating freedom of expression in Islam?
- What are the boundaries of freedom of expression in Islam?
- How do blasphemy and apostasy in Islam relate to freedom of expression?
- How do blasphemy and apostasy in Islam relate to each other, and what are the standpoints of Muslim scholars on these subjects?
- Where do the boundaries of freedom of expression in Islam stand in relation to the limits of freedom of expression in liberal democracies?

This study will constitute a thorough comparison between freedom of expression in Islam and liberal democracies. It draws, among others, upon Arabic sources from both the classical period and modern period of Islam. It also draws upon philosophical approaches on freedom and freedom of expression and several European Court cases.

## **2. Theory and Methods**

There are interesting works on the subject of freedom of expression in Islam and in liberal democracies. The core contribution of this study is to analyse the tensions between freedom of expression in Islam and liberal democracies. It considers the institutional foundations of freedom of expression in Islam as these are functioning in the premodern context and the challenges they pose to Muslims in modern context of human rights and liberal societies. The study explores the controversial tension between the boundaries of freedom of expression in Islam and the way this human right is cheered and protected in liberal democracies. It discusses the tension not only in terms of conflictive views, but also demonstrates the potential for an eventual reconciliation between the two worlds of ideas.

In order to answer the main and sub-questions above and since this work is a comparative study, it draws upon several sources. One of the most important sources is to be found in European court cases regarding freedom of expression in liberal states that were not only vested by domestic courts but also judged by the European Court of Human Rights. By discussing the boundaries of freedom of expression drawn by European judges, it becomes clear what they consider to be valid reasons to curtail free speech. Since freedom of expression is a part of freedom, the concept of freedom plays a vital role in this work. Therefore, this study draws upon several Western philosophers whose work contributed significantly to define the notion of freedom, such as John Stuart Mill (d. 1873), Hannah Arendt (d. 1975), Isaiah Berlin (d. 1997), Hans Blokland (b. 1960), and Charles Taylor (b. 1931).

Consequently, this work also has a philosophical approach. The discussion of freedom of expression in Islam is based on both classical and modern literature. A modern study about freedom of expression in Islam that merits special attention is *Freedom of Expression in Islam*,<sup>5</sup> written by Professor Mohammad Hashim Kamali. Some of the themes discussed by Kamali will be compared to the liberal discourse on free speech.

Offense, blasphemy, and apostasy are subjects closely related to freedom of expression and will also be discussed in this thesis. As will become clear later, incidents such as the Danish Cartoon Crisis and the Charlie Hebdo shooting are related to freedom of expression and offense. Naturally, offense is very subjective, people get offended for very different reasons. Some people get offended when a male wears a pink T-shirt, while others get offended when a female has a crew cut. In this dissertation, I will not discuss such trivial offenses but refer to profound offenses coined by the late Joel Feinberg (d. 2004) in his book *Offense to Others* (1985),<sup>6</sup> which will be used in this study.

Blasphemy and apostasy in Islam are not only closely related to freedom of expression, but are also interrelated. Blasphemy is a form of profound offense, not only because it shows irreverence to something deemed sacred, but it also involves a hostile and contemptuous attack on the fundamentals of religion, thereby offending the sensibilities of its adherents.<sup>7</sup> Muslim scholars generally consider a Muslim who commits certain aspects of blasphemy as an apostate. Changing or abandoning one's religion is nowadays considered a fundamental right by liberal democracies. It is viewed as something encompassed by human rights. However, the mainstream view of Islam, which is based on some narrations, holds the opinion that apostasy from Islam is punishable in this world and, according to the Qur'an, in the hereafter. In some countries, apostasy is punishable by imprisonment and even capital punishment. At the same, some modern scholars argue that there is no proof for implementing capital punishment for apostasy. Strikingly, they employ an evidence-based approach by also examining the Qur'an and the Sunnah.

For almost half a century, there has been a tendency in liberal states to abolish or reform blasphemy laws. The relationship between blasphemy laws and freedom of expression is often a source of heated debate. This has been the case in the aftermath of the Danish Cartoon crisis. Again, many in the West cogitate the Danish Cartoons as freedom of expression, whereas most Muslims were infuriated by the offensive nature of the cartoons and conceived it as a clear case of blasphemy. In Islam, blasphemy is proscribed, and like apostasy, the death penalty can be applied in certain countries. In liberal democracies, blasphemy rarely leads to a lawsuit because it's an arduous task to prove the contemptuous intention. Moreover, freedom of speech in liberal democracies is either warranted by the Constitution or by international covenants and the declaration of human rights. For example, in the United States, the Constitution and the US Bill of Rights protects freedom of speech and safeguards the Bill of rights itself through a vast number of precedents that curtail the qualifications that might be placed on them. Therefore, the government's capability to constrain freedom of speech is firmly curtailed. An exception might be when there's a clear case of hate speech that can incite violence and loss of life, disparage certain protected groups or individuals, or pose a serious threat to the social order of a society.

The Qur'an and the *ḥadīth* (pl. *aḥādīth*) are, as mentioned above, the two primary sources of the Islamic law and are often referred to in this study. For the translations of the meanings of

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<sup>5</sup> Kamali, Mohammed Hashim, *Freedom of Expression in Islam*, Cambridge: The Islamic Text Society, 1997.

<sup>6</sup> Feinberg, Joel, *Offense to Others*, New York: Oxford University Press, 1985.

<sup>7</sup> Feinberg, *Offense to Others*, p. 192; Kamali, *Freedom of Expression in Islam*, p. 213.

the verses of the Qur'an, I use different translations, depending on which translation best adheres to the original Arabic and the context of the discussions. For the translations of the *ḥadīth* I use existing translations and, where necessary, make minor modifications. It should be noted that the differences of opinion among Muslim scholars regarding the boundaries of freedom of expression, blasphemy, and apostasy are due to the different interpretations of the primary texts.

In this study, the opinions of different authoritative Sunni Muslim scholars -both classical and modern- will be analysed in relation to freedom of expression. A famous *ḥadīth* underscores the importance of scholars in Islam: "...the scholars are the heirs of the Prophets. The Prophets did not leave behind dinars or dirhams, rather they left behind a heritage of knowledge, and the one who acquires it acquires an abundant portion."<sup>8</sup>

Examples of classical scholars are the founders of the four Sunni schools of law: Abū Ḥanīfa (d. 767), Mālik ibn Anas (d. 795), Muḥammad ibn Idrīs al-Shāfi'ī (d. 820), and Aḥmad Ibn Ḥanbal (d. 855). Other scholars of the classical period that are referenced are Abū Ḥāmid al-Ghazālī (d. 1111) and Ibn Taymiyyah (d. 1328), because many Muslims hold both scholars in high esteem and their works are frequently read and referred to. In order to analyse how freedom of expression and its boundaries are implemented in our day and age, I will also refer to modern Muslim scholars who have discussed the topic. For example, as I point out in chapter 3, some modern scholars have conducted in-depth studies about *shūra* or mutual consultation, its importance from the viewpoint of the Islamic legal texts, and convincingly argue that *shūra* can be implemented nowadays on several levels: from state level to family level, individually and collectively etc. To stick to our subject, he proves that without freedom of expression, there is no *shūra*.

There are two kinds of moralities in political philosophy: a thin morality and a thick morality. A thin morality is one formed by general and universal principles, whereas a thick morality is one that comes about through deliberation conditioned by culture, history, and tradition. As such, liberal democracies can be conceived as *thin* societies, and Muslim majority countries can be construed as *thick* societies. *Thick* societies are socio-centric and focus on the well-being of society as a whole, whereas *thin* societies are individualistic and focus on maximizing personal freedoms. These two kinds of moralities affect the boundaries of freedom of expression. As will become clear later, freedom of expression is more curtailed in a thick society than in a thin society.

Another way to explore the boundaries of freedom of expression is using ethical theories. I employ the following ethical theories: consequentialism, deontology, and virtue ethics.

Dignity and tolerance are two significant concepts in setting the boundaries of freedom of expression in Islam and liberal democracies. In Islam and liberal democracies, dignity is a natural right. In both Islam and liberal democracies, speech that affects someone's dignity can be restricted. However, at the same time, tolerance is also essential in freedom of expression, and the dividing line between tolerance and the protection of human dignity is not always clear.

In comparing the boundaries of freedom of expression in Islam and liberal democracies, it is essential to explore the influence of the nature of liberal and Muslim communities. However, in comparing the nature of both communities, I must establish some caveats. First, although

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<sup>8</sup> Abū Dāwūd, *Sunan*, tr. Ahmad Hasan, vol. III, p. 1034, *ḥadīth* no. 3634. According to al-Albānī this *ḥadīth* is authentic, see al-Albānī, *Ṣaḥīḥ Sunan Abī Dāwūd*, p. 407.

Muslim communities are all monistic communities, they differ among themselves. Consequently, the boundaries of freedom of expression vary among Muslim communities. Secondly, due to, among other things, its highly complex historical tradition, the nature of a liberal community is more complex than that of a Muslim community. Renowned liberals such as Locke, Constant, Mill, Dworkin, and Rawls had different ideas about the liberal state.<sup>9</sup> Besides its internal diversity, liberalism varies nationally, regionally, and in time. Consequently, liberalism can be approached and interpreted in different ways.<sup>10</sup> I will confine myself to a social approach. From a social point of view, I consider Islamic society as a social-oriented society that deems its citizens interdependent and emphasizes social harmony, and liberal democracy as an individualistic society in which its citizens are considered independent and equal.

### 3. Study Outline

As mentioned before, this study aims to examine and analyse several aspects that characterise a comparison between the boundaries of freedom of expression in Islam and liberal democracies. To this end, the study is divided into 6 chapters.

Chapter 2, *freedom of expression in Liberal Democracies*, discusses several issues related to freedom of expression in liberal democracies. This chapter starts with analysing the most principled judgment regarding inciting discrimination and intolerance: *Féret v. Belgium*. This case is also highly controversial due to the dissenting opinion of three out of seven judges of the European Court of Human Rights. Chapter 2 discusses in depth the concept of freedom in liberal democracies, primarily based on Isaiah Berlin's (1909-1997) famous essay *The Two concepts of liberty*. A closer look at the origin of freedom of speech reveals that it is closely connected with the emergence of political freedom and, more precisely, with the nascency of the concept of freedom. Berlin's two concepts of freedom, negative freedom and positive freedom, also help understand the boundaries of freedom of expression in liberal democracies. Negative freedom or freedom *from* is the area in which a person is to be left alone and reflects the classical liberal standpoint. This concept envisages freedom as a *possibility* to action. Positive freedom or freedom *to* is not only a *possibility* to action but the action itself. It is the liberty in which a person is a subject and not an object, in which people can formulate and shape their lives and achieve their ideals and goals, without being thwarted or decided by others. Consequently, a human is a rational, active, and willing being who bears responsibility for his or her choices. I argue that positive freedom is preferable to negative freedom because we appreciate freedom not simply for being left alone but also achieving things in life. In line with this argumentation, I argue that freedom of expression is more than protection from state inference (negative freedom), but that in academic literature, several justifications of freedom of speech are mentioned: discovery of truth, self-fulfilment, human progress, citizen participation in a democracy, and the much-needed control of the government.

Chapter 3 discusses the subject matter of freedom of expression from an Islamic perspective. I first concentrate on the justifications for freedom of expression in Islam: upholding human

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<sup>9</sup> Asad, *Is Critique Secular? Blasphemy, Injury, and Free Speech*, p. 19.

<sup>10</sup> Bell, Duncan, *What is Liberalism?*, p. 687-8, in *Political Theory*. 42 (6): 682-715.

dignity and the discovery of truth. I argue that freedom of expression in Islam is primarily a positive freedom. I then focus on the corroborative evidence for freedom of speech in Islam. The purport of discussing the corroborative evidence for freedom of expression is to demonstrate that it is essential for the functioning of several foundations and institutions of the *Sharī'a*, such as *ḥisba*, *nasīha*, *shūra*, and *ijtihād*.

The second session of this chapter 3 is dedicated to the boundaries of freedom of expression in Islam. It consists of two parts: the moral and legal boundaries of freedom of expression in Islam. Moral violations of free speech in Islam are reprehensible but are not punishable according to the laws of the *Sharī'a*. However, moral violations of freedom of speech in Islam can ruin someone's reputation or undermine dignity and integrity. Legal violations of freedom of speech are reprehensible and punishable in Islam. Some of these criminal offenses restricting free speech in Islam also limit freedom of expression in liberal democracies, as I shall point out in chapter 5.

Chapter 4, *Muslim Legal Discussions on Blasphemy and Apostasy*, deals with two subjects: blasphemy and apostasy. In the first part of this chapter, I expound on what constitutes blasphemy in Islam, and I argue that blasphemy is a kind of profound offense. I then concentrate on arguments to separate blasphemy from apostasy and discuss various standpoints on the issue of repentance from blasphemy. The issue of apostasy is not only debated in Muslim majority countries, but it is also extremely relevant for Western Muslims. For Muslims living in liberal democracies, freedom of religion is a fundamental right which safeguards their right to practise their religion. However, freedom of religion also entails the right to change one's religion, including stepping out of Islam. This is a dilemma for Western Muslims; on the one hand, they have the freedom to practise their religion in a liberal democracy, but on the other hand, most Muslim scholars view apostasy as prohibited, based on certain *aḥadīth*. In the second session of this chapter, I explore the different viewpoints on apostasy in Islam.

Chapter 5, *The Boundaries of Freedom of Expression in Islam and Freedom of Expression in Liberal Democracies*, compares, as the title suggests, the boundaries of free speech in Islam and liberal democracy. This chapter consists of three major parts. The first part explores the difference in terms of content, concentrating on four levels. I first examine how the *context* plays a role for courts to set boundaries for freedom of expression. I then explore some ethical theories to evaluate the boundaries of freedom of expression, then compare thick and thin societies concerning free speech and how dignity and tolerance relate to the boundaries of freedom of expression. The second part explains the difference of boundaries of freedom of expression in Islam and liberal democracies through the lens of the nature of the community. The last part of this chapter explores how the boundaries of freedom of expression are conceptually different or comparable in liberal democracy and Islam. To this end, I also discuss some case studies, which, among others, reveal that liberal states themselves vary in setting the boundaries of freedom of expression due to the so-called margin of appreciation.

The final chapter is devoted to the conclusions and the sub-questions of the study. At the end of this work, the reader should have a clear conception of the objectives and boundaries of freedom of expression in Islam and liberal democracies. The reader can then decide how much overlap there is between freedom of expression in Islam and liberal democracies and, to a certain extent, Islamic and liberal values.

## Chapter 2

# Freedom of Expression in Liberal Democracies

**“Some people's idea of free speech is that they are free to say what they like but if anyone says anything back, that is an outrage.” Sir Winston Churchill**

### 1. Introduction

In the Netherlands, as in other Western liberal democracies, the subject of freedom of expression has become a controversial issue. Shocking events such as the assassinations of Pim Fortuyn and Theo van Gogh, the Danish cartoons affair, and the Paris *Charlie Hebdo* shooting ignited debates concerning the scope and limits of the right to freedom of expression. Is free speech<sup>11</sup> under attack or is there simply too much of it? These are the two most prevalent opposing opinions emerging from the heated debate around freedom of expression. These two questions revolve around the boundaries of freedom of expression, therefore the main question in this chapter is: what are the boundaries of free speech in liberal democracies?

I will explore this topic around three sub-questions. The first is directly related to the notion of whether freedom of expression should be perceived as an absolute value – closely connected with self-expression, autonomy, or individualism – or as a vehicle to achieve goals and values. Consequently, the first sub-question is as follows: does freedom of expression belong to so-called negative or positive freedom? Freedom has become a highly complex concept in our time, and there is no clear answer to the question ‘what is freedom’? Therefore, in order to answer the first sub-question, I will draw upon several scholars that defined modern ideas of freedom. Isaiah Berlin (1909–1997) was a political philosopher who wrote on various subjects such as the history and impact of political forces, pluralism, modern politics individual philosophers, and freedom.<sup>12</sup> Berlin’s ideas of freedom are still highly relevant in our time and age. As we shall see later, his ideas of freedom are extremely useful to look into the boundaries and objects of freedom of expression. The same goes for Hannah Arendt (1906–1975), who wrote about the concept of freedom through the lense of a political theorist. Her writings on the subjects are, like those of Berlin, heavily influenced to the Second World War. Finally, social and political theorist Hans Blokland (born 1960) elaborated extensively on Berlin’s ideas regarding freedom and on broader aspects of freedom in Western society.

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<sup>11</sup> Throughout this study the term freedom of expression is used synonymously with freedom of speech and free speech. I agree here with Larry Alexander who writes that freedom of speech covers more than spoken language. Everybody agrees that freedom of speech or free speech covers written language as well. Furthermore, it is difficult to perceive how it is separated from pictographs, sign language, films, images, plays, etc. In liberal democracies freedom of speech is legally protected and extends to media of communication and expression, as well as to musical performances and abstract artistic. Therefore, freedom of speech refers to freedom of communication and freedom of expression. See Alexander, Larry, *Is There a Right of Freedom of Expression?*, Cambridge: Cambridge University Press, 2005, p. 7-8.

<sup>12</sup> For an overview of the wide variety of subjects that Berlin has dealt with, see for example: Jahanbegloo, Ramin, *Conversations with Isaiah Berlin: Reflections of an Historian of Ideas*, London: Orion Books Limited, 1993.

After setting out the concept of freedom and how freedom of expression relates to it, I will address the next sub-question: where are the boundaries of free expression as drawn by Dutch and European judges? Although freedom of expression is considered a core value of our society and a cornerstone of our democracy, it is not an absolute right, nor is it sacrosanct. As I will demonstrate, freedom of expression can collide with other fundamental rights such as freedom of religion, the non-discrimination principle, and the right to privacy. By delving into several court cases, I will explore which boundaries European judges usually draw when it comes to freedom of expression. This brings me to the final sub-question of this chapter: does freedom of speech involve moral and/or legal responsibility? As I will elaborate on later in this chapter, narrowing the boundaries of freedom of expression to the law, i.e. saying: 'That's for the courts to decide', is insufficient for a well-ordered society<sup>13</sup> to function properly. This is because in a well-ordered society, *inter alia*, citizens deal with each other in a civilized manner. That is to say: citizens are aware of which behaviours lead to harmony or tensions in a society. However, these behavioural norms can vary across cultures which can create tensions in multicultural societies. The following case demonstrates not only the boundaries of freedom of expression but also the challenges of a liberal democracy that is also multicultural.

## **2. *Féret v. Belgium*: The Boundaries of Freedom of Expression**

As previously established, the ongoing debate of freedom of expression centers around two primary positions. The majority position supposes that peaceful societies set boundaries on freedom of expression. The second position presumes that freedom of expression is absolute and limits thereto should be individually determined. The case of *Féret v. Belgium* is a useful one to explore the boundaries of freedom of expression in liberal democracies as it was not only brought to the domestic court, but also to the European Court of Human Rights. Furthermore, *Féret v. Belgium* is considered the most principled judgment regarding inciting discrimination and intolerance.<sup>14</sup> This case is also highly controversial due to the dissenting opinion of three judges of the European Court, as we shall see later.

Daniel Féret is a Belgian physician and former president and member of the political party *Front National* in Belgium, as well as owner of the website of the *Front National*. He was editor-in-chief of leaflets, posters, and owner of the website of the *Front National*. During the election campaigns, Féret and his party distributed leaflets and posters between July 1999 and October 2001 which evoked numerous complaints from both individuals and civil associations that were filed against Féret. The distributed leaflets and posters called *inter alia* for the precedence of Belgians and Europeans and pleaded against the Islamization of Belgium. Immigrants were accused of fostering a criminogenic environment and being profiteers of Belgian government services such as benefits. The leaflets argued immigrants must be repatriated to convert their vacant homes in shelters for homeless Belgians. The Centre for Equal Opportunities and the Fight against Racism ("the Centre") filed a complaint against a particularly acrimonious leaflet entitled "National Front Program". This program advocated for the repatriation of immigrants, and announced it wanted to "oppose the

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<sup>13</sup> See p. 26-7 for a description of a well-ordered society.

<sup>14</sup> Nieuwenhuis, Aernout. J., *Over de grens van de vrijheid van meningsuiting*, Fourth Edition, Nijmegen: Ars Aequi Libri, 2015, p. 333.

Islamization of Belgium", "stop the pseudo-integration policy", "return non-European unemployed," "reserve for Belgians and Europeans priority welfare", "stop fertilizing socio cultural associations help to the integration of immigrants," "reserve the right to asylum (..) to people of European descent who are actually prosecuted for political reasons" and "understand the expulsion of illegal immigrants as a simple application of the law."<sup>15</sup> In addition, the program advocated for stricter regulation of homeownership in Belgium, preventing sustainable integration of extra-European families and the formation of ethnic ghettos in the territory to "save our people from the risk posed by the conquering Islam."<sup>16</sup> In October 2001, a new complaint was filed against a poster with the title "This is the couscous clan", depicting a veiled woman and a man wearing a turban holding a placard which included the inscription: "the Quran says: Kill the infidels to the point of making great slaughter." Underneath was written in red letters "FN says NO!"<sup>17</sup>

On February 19<sup>th</sup>, 2002, Féret was interviewed by the police about these complaints. Due to the accumulation of complaints about the various leaflets and the National Front party program, Féret's parliamentary immunity was lifted at the request of the Principal Public Prosecutor at the Brussels Court of Appeal.

On November 14<sup>th</sup>, 2002, the prosecution summoned Féret, his assistant, and the non-profit organization National Front to appear before the Brussels Criminal Court and answer several charges connected to the content of the leaflets, posters, and the *Front National* website. On June 4<sup>th</sup>, 2003, the Brussels Criminal Court refused to suspend the proceedings while a filed rehabilitation application by Féret was still pending. Later on, in June 2003, the Brussels Criminal Court declared an appeal by Féret about the jurisdiction inadmissible, and on March 10<sup>th</sup>, 2004, the Court of Cassation dismissed his appeal against the judgment of the Court of Appeal. On June 29<sup>th</sup>, 2004, Féret was sworn in at the Brussels-Capital Region Council, furnishing him new political immunity. On June 23<sup>rd</sup> 2004, the Public Prosecutor reactivated the lawsuit by filing its written submissions. After holding a full trial on February 20<sup>th</sup> 2006 at the Brussels Court of Appeal, by April 18<sup>th</sup> 2006 the same court sentenced Féret to a sentence of 250 hours of community service to be served in the integration of people of foreign nationality sector, with supplementary imprisonment for ten months. Furthermore, he is ineligible for election for a period of ten years, and he was ordered to pay EUR 1 to each of the plaintiffs.

Although the Brussels Court of Appeal stated that "In determining the penalty to be applied (...), the court takes account of the circumstances it did not discover incitement to actual violence in the documents provided by the prejudices (...), that incitement and use of discrimination, segregation and hatred constitute no less serious violations of democratic values that must be punished firmly (...)." <sup>18</sup> In other words, although the court admits that Féret did not actually incite violence, it deems that Féret has sown the seeds of discord and that his views are incongruous with constitutional values such as tolerance, social placidity, and non-discrimination. The court admits the sentence is indeed severe but is in line with the relevant sections of the Act of 30 July 1981 to suppress certain acts motivated by racism and xenophobia. Before the European Court of Human Rights, Féret complained that the sentence imposed by the Belgian State infringed on his right of freedom of expression, referring that the Court of Appeal made excessive application of the restrictions permitted by paragraph 2

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<sup>15</sup> ECHR 16 July 2009, *Affaire Féret c. Belgique (Requête no 15615/07)*, my translation.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.



of Article 10, which guarantees the right to freedom of expression and states:  
"1. Everyone has the right to freedom of expression. This right includes freedom to hold opinions and freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers. (...)  
2. The exercise of these freedoms carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law which are necessary in a democratic society (...) defense order (...) [and] the protection of the reputation or rights of others (...)."

To assess whether the Belgian State ruled correctly, the European Court of Human Rights first established that freedom of expression constitutes one of the essential foundations of a democratic society. It is only appropriate to interfere with the right of freedom of expression for imperative reasons of overriding public interest.

Examples of crucial reasons to intervene are discrimination, intolerance, segregation, racism or hatred against a group. In several reports of the European Commission against Racism and Intolerance (ECRI) concerning Belgium, ECRI notes that Belgian authorities have made significant progress in combatting racial hatred. However, ECRI strongly recommends Belgian authorities to remain vigilant regarding racism, anti-Semitism, and xenophobia.

Besides freedom of expression, the European Court emphasizes that "tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic and pluralistic society. It follows that in principle it may be considered necessary in democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including intolerance religious), if it is ensured that the "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued (regarding hate speech and advocating violence see, *mutatis mutandis*, *Sürek v. Turkey* (No. 1) [GC], No. 26682/95, § 62, ECHR 1999 IV, and especially *Gündüz v. Turkey*, No. 35071/97, § 40, ECHR 2003 XI)." <sup>19</sup>

Given the nature of the *Front National's* distributed leaflets and posters, which contain elements that clearly incite segregation, discrimination, or hatred against a group, community, or their members because of race, color, descent, or national or ethnic origin and implicitly to violence, the European Court concurred with the Belgian courts in relying on the Act of 30 July 1981 to suppress certain acts motivated by xenophobia or racism. Therefore, the interference on Ferét's free speech by the Belgium State was just and protected the rights and reputation of others and maintained the public order.

The European Court also addressed the issue of hate speech, and considered that hate speech is not limited to the actual call for a criminal act or an act of violence, but includes any act of ridiculing, insulting, or defaming parts of the population and specific groups. These acts are sufficient for a state to intervene in order to safeguard the dignity or safety of these parts or groups of the population. There is no room for political speeches that incite hatred based on cultural, ethnic, or religious prejudice and pose a threat to political stability and social peace in democratic states. The fact that Féret is a politician does not exonerate him from the responsibility of dealing with freedom of expression in a responsible manner. On the contrary, the European Court argues that politicians in their public speeches - in which they have the right to defend their views and which may disturb, shock, or offend a section of the population

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<sup>19</sup> ECHR 16 July 2009, *Affaire Féret c. Belgique (Requête n° 15615/07)*, my translation.

(cf. *Handyside v. United Kingdom*, 7 December 1976, § 49, series A No. 24) - are required to avoid comments that might foster intolerance. Since politicians have the very seizure of power as their ultimate goal, they should be particularly cautious regarding the protection of democracy and its principles. She believes that politicians should be particularly careful in terms of defending democracy and its principles, as their ultimate goal is.

The European Court found that the incitement of discrimination against foreigners constitutes a fundamental infringement of the rights of people and should therefore justify governmental consequences for everyone, including politicians. It follows that in this case, the content of the distributed leaflets promotes segregation, hatred, intolerance, and xenophobia, all of which are incongruous with the principles of a pluralistic democracy.

### Similar Cases

In following cases, the outcome is the same: the European Court concurs with the restriction imposed on freedom of expression by the national court because values such as social peace, tolerance, and non-discrimination have been violated.<sup>20</sup> For instance, in *Norwood v. United Kingdom*, we see the same line of argumentation. Mark Anthony *Norwood* (1962) was a member of the extreme right-wing British National Party. After the events of 9/11, Norwood displayed in the window of his residence between November 2001 and 9 January 2002 a large poster supplied by the BNP. The poster depicted the words “Islam out of Britain – Protect the British People” with the Twin Towers in flames accompanied by a crossed out star and crescent moon symbol. After a complaint from a member of the public, the poster was removed. Norwood refused to attend an interview at the local police station the very next day. He was charged with an aggravated offence and convicted by both the Oswestry Magistrates' Court and the High Court, and fined 300 GBP. Although Norwood pleaded not guilty because the message of the poster was aimed at Islamic extremism and argued “that to convict him would infringe his right to freedom of expression under Article 10 of the Convention,”<sup>21</sup> Lord Justice Auld of the High Court ruled that the poster was “a public expression of attack on all Muslims in this country, urging all who might read it that followers of the Islamic religion here should be removed from it and warning that their presence here was a threat or a danger to the British people.”<sup>22</sup>

Norwood complained before the ECHR that the criminal proceedings against him infringed his right to freedom of expression under Article 10 of the Convention. He adduces that free speech is not merely inoffensive but includes also the contentious, irritating, heretical, unwelcome, provocative, and eccentric, provided that it does not intent to provoke violence. He also states that “criticism of a religion is not to be equated with an attack upon its followers.”<sup>23</sup> Additionally, Norwood lives in a rural area unknown of any religious or racial tensions and it is not proven that even a single Muslim saw the poster.

The European Court dismissed the plea and referred to Article 17 of the Convention, which states: “Nothing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is

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<sup>20</sup> Cf. Nieuwenhuis, *Over de grens van de vrijheid van meningsuiting*, pp. 333-4.

<sup>21</sup> ECHR 16 November 2004, Application no. 23131/03 by Mark Anthony Norwood v. United Kingdom, p. 2.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*, p. 4.

provided for in the Convention.” The European Court continues that “the general purpose of Article 17 is to prevent individuals or groups with totalitarian aims from exploiting in their own interests the principles enunciated by the Convention.”<sup>24</sup>

The European Court concurred with the domestic courts' assessment, namely that the images and words on the poster equated to public expression of attack on all Muslims in the United Kingdom. The message of the poster is linking Muslims as a whole with a grave act of terrorism is incompatible with the values promulgated and guaranteed by the Convention, notably social peace, tolerance, and non-discrimination. Consequently, the display of the poster constituted an act that does not fall under the protection of Articles 10 or 14 but rather falls within the meaning of Article 17. The European Court declared Norwood's complaint inadmissible.

In a similar case, *Jean-Marie Le Pen v. France* (20 April 2010) there is the same reasoning behind the interference in the right of freedom of expression of a politician. Jean-Marie Le Pen (1928) was the president of the French “National Front” party. After giving interviews in both the French newspaper *Le Monde* (19 April 2003) and in the weekly *Rivarol* (30 April 2004), in 2005 Mr. Le Pen was convicted and fined 10.000 euros for “incitement to discrimination, hatred, and violence towards a group of people because of their origin or their membership or non-membership of a specific ethnic group, nation, race or religion, on account of statements he had made about Muslims in France.”<sup>25</sup> Mr. Le Pen made the following statements:

“When I tell people that when we have 25 million Muslims in France we French will have to watch our step, they often reply: ‘But Mr. Le Pen, that is already the case now!’ – and they are right.”<sup>26</sup>

“The day we will have, in France, not more than 5 million but 25 million Muslims, it is they who will command. And the French will be walking as close as possible to the walls [“raseront les murs”], go of the sidewalks and lower their eyes. When they do not, they are told, “Why do you have to look at me like this? Are you looking for a fight? And you just have to go away, otherwise you get a punch”.”<sup>27</sup>

Mr. Le Pen appealed the decision, but the Paris Court of Appeal upheld the previous verdict and fined him again for 10.000 euros. The Court of Appeal argued that Mr. Le Pen's statements suggest that the security of the French people depends on rejecting the Muslim community. It held that Mr. Le Pen's comments are an incitement to hatred, discrimination, or violence toward the French Muslim community and therefore cannot be justified by freedom of expression. In 2009 the Court of Cassation concurred with the Paris Court of

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<sup>24</sup> Ibid.; on the same page it states: “The Court, and previously, the European Commission of Human Rights, has found in particular that the freedom of expression guaranteed under Article 10 of the Convention may not be invoked in a sense contrary to Article 17 (see, inter alia, *W.P. and Others v. Poland*, (dec.), no. 42264/98, 2 September 2004; *Garaudy v. France*, (dec.), no. 65831/01, 24 June 2003; *Schimanek v. Austria*, (dec.) no. 32307/96, 1 February 2000; and also *Glimmerveen and Hagenbeek v. the Netherlands*, nos. 8348/78 and 8406/78, Commission decision of 11 October 1979, Decisions and Reports 18, p. 187).”

<sup>25</sup> *Le Pen v. France* (application no. 18788/09), p. 1.

<sup>26</sup> Ibid.

<sup>27</sup> CINQUIÈME SECTION DÉCISION SUR LA RECEVABILITÉ de la requête n° 18788/09 présentée par Jean-Marie LE PEN contre la France, p. 2.

Appeal and rejected “an appeal lodged by Mr. Le Pen in which he argued that his statements were not an explicit call for hatred or discrimination and did not single out Muslims because of their religion, and that the reference to Islam was aimed at a political doctrine and not a religious faith.”<sup>28</sup>

The case was finally being brought to the European Court, where Mr. Le Pen complained that his right to freedom of expression had been breached. The European Court emphasized that it attached the utmost importance to freedom of expression in a democratic society. This applies even more in a political context, where freedom of expression does entail not only opinions, ideas, or information being received favorably, but also those that offend, shock or disturb. Every politician who discusses a matter of public interest may resort to a level of provocation or exaggeration, provided they respect the right and reputation of others. Mr. Le Pen is an elected politician, who represents his voters, defends their interests, and takes up their concerns and consequently, the European Court holds the strictest supervision of violation of his freedom of expression. Mr. Le Pen addressed issues related to the settlement and integration of immigrants in France. This entails that statements made by Mr. Le Pen could sometimes lead to incomprehension and misunderstanding, which lends credence to the State’s interference in his freedom of expression. According to the European Court, there were relevant and sufficient reasons given by the domestic courts for the conviction of Mr. Le Pen. The Muslim community in France as a whole was presented by Mr. Le Pen’s comments in a disturbing light, plausibly to incite feelings of hostility and rejection. By presenting the religious tenets and rapid growth of the Muslim community as a latent threat to the security and dignity of the French people, Mr. Le Pen set peoples against each other. The European Court found the imposed penalty by the domestic courts proportionate and the interference in his right to freedom of expression necessary.<sup>29</sup>

### *Free Speech and Islam*

In addition to pertaining free speech, the aforementioned cases have something else in common: Islam. The debate around Islam has been escalated due to events like 9/11, the attacks in Madrid in 2004, the influx of migrants of predominantly Muslim countries, and the presence of Muslims in Europe. Politicians, organizations, and individuals not only wonder what the role of Islam is in Europe but also severely object to its presence. Some of them go one step further: they state that most problems in the West are related to Islam. For example, the Dutch politician Geert Wilders, leader of the *Partij van de Vrijheid (Party for Freedom)*, once stated in an interview in *Trouw* (a Dutch newspaper): “Ninety-nine percent of all problems in the world are in one way or another affected by Islam. That’s the reality, Yes, also in the Netherlands.”<sup>30</sup>

The assassination of Theo van Gogh, the Danish cartoon affair, the Paris *Charlie Hebdo* shooting, and other events related to free speech, have given a new dimension to the Islam debate. The atmosphere in this debate is that liberal values and Islamic values are incompatible with each other. Free speech is a core value that only exists in liberal democracies and is alien to Islam.

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<sup>28</sup> Le Pen v. France (application no. 18788/09), p. 2.

<sup>29</sup> *Ibid.*, p. 2.

<sup>30</sup> *Trouw*, 16 October 2004.

### *The dissenting judges*

As mentioned earlier<sup>31</sup>, the case *Féret v. Belgium* is highly contentious due to the dissenting opinion of three of the total seven judges. In this section, I want to elaborate on their arguments for dissent. Hungarian judge András Sajó was one of the three dissenting judges, his arguments were also supported by judges Vladimiro Zagrebelsky and Nona Tsotsoria. In expounding his dissenting opinion, he first states that he shares the Court's fears about the dangers of intolerance and agrees that the long-term impact of xenophobic propaganda is a major problem for democratic societies. However, he fears that freedom of expression will be sacrificed to a non-discrimination policy, using methods that restrict the fundamental rights guaranteed by the Convention without compelling reasons and therefore rejects the majority's conclusion that there was no violation of Article 10 of the Convention. Judge Sajó argues that the majority of the disputed statements are taken from the National Front Program distributed during an election campaign in 1999.

This program not only clearly reflects the party's interest in illegal immigration (see, for example, point 4 "Socia", of the program) but also criticizes the Government and other political parties for their immigration policy. Therefore, many of Mr. Féret's statements clearly fall within the sphere of political criticism and this is further supported by the fact that the party was never banned. Mr. Féret was acquitted of the charge of the impugned remarks at the trial which saw Mr. Féret's conviction. Furthermore, the judgment admits that Mr. Féret's remarks are a matter of political discourse. According to the Court's settled case-law, political discourse can be restricted only if there are compelling reasons to do so, it is up to the State to prove that such a pressing need exists and the measures applied must be the least restrictive. In Mr. Féret's statements, there is no appeal to use violence against a part of the population, in which the national authorities enjoy a wider margin of appreciation. Judge Sajó adduces that the Court has taken Mr. Féret's contentious remarks in isolation without in the context of the whole publication and as he carries on: "The protection of political discourse requires the appreciation of statements in the context of the whole publication, not by isolating them from the rest of the text or message, nor can they be combined with other statements chosen by chance. Combining different declarations in a single message presupposes that the public is also in a position to do so in the same way as national authorities. Is it fair to attribute an Islamophobic meaning that appeared in September 2001 (the caricature of the "couscous clan") to texts distributed in 1999?"<sup>32</sup>

Judge Sajó also rejects the judgment to qualify Mr. Féret's statements as racist. First, neither the judgment of the majority of judges nor the Belgian authorities assert that the policy proposed by Mr. Féret leads him to engage in discrimination or genuine segregation. Second, the statements quoted do not refer to inferiority or the superiority of a race, nor do they refer to an identifiable group of individuals with innate biological characteristics. This doesn't mean that the statements done by Mr. Féret have the potential to incite discrimination, segregation, or hatred. Although the domestic courts and the European Court hold this judgment, Judge Sajó argues a potential impact on the rights of others is not sufficient to restrict a human right. The statements of Mr. Féret are to be seen as legislative proposals and as part of his political party running for election and its leader's political and parliamentary activity. It is feasible that undeniably racist individuals may share a number of his opinions,

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<sup>31</sup> See p. 1.

<sup>32</sup> ECHR 16 July 2009, *Affaire Féret c. Belgique (Requête no. 15615/07)*, my translation.

but one cannot be found guilty by association. Furthermore, the judgment refers *de facto* to a broader definition of hate speech and Article 4 of the Preamble to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) only requires the punishment of incitement to racial discrimination and the encouragement of acts of violence directed against any race or group of persons of another color or ethnic origin. This article does not apply in this case for two reasons: (1) it is a recommendation –which has no binding force– and (2) it pertains only to the media. Sajó goes on to say, that the impact of television and radio is much bigger than that of websites and disparate leaflets. In principle, all expressions of hate speech fall under the protection of Article 10 of the Convention, and only hate speech that clearly aims at the destruction of other freedoms and rights are excluded from the protection of the Convention. In other words, only hate speech that contains elements of incitement that are based on intolerance or leads to violence is punishable. Judge Sajó reiterates that Mr. Féret’s remarks do not call for action or constitute an offence but rather criticize government policy: “They do not call for boycotting, refusing to serve or avoiding migrants. Even if the “unenlightened masses” yielded to intolerance (in their attitude or mentality), they could not influence the provision of social services to immigrants.”<sup>33</sup> Opinions, including offensive ones, are compatible with democratic order and there must be compelling reasons to regulate free speech.

### *Fostering intolerance*

Intolerance does not happen overnight, rather it is a long-term mental process, the result of a multitude of interactions of people of the same sensitivity interactions reinforce one another. However, the judgment of the majority of judges is that there do exist cases of sudden emotion associated with the incitement of hatred, possibly leading to xenophobic or discriminatory private behavior, or even to genuine violence. It can also lead to the support of movements and political parties whose objectives and actions are incompatible with democracy and the protection of human rights. But this is, as Judge Sajó continues, “a problem for militant democracy, whose standards apply more to political parties than to individuals.”<sup>34</sup> In referring to John Stuart Mill, Judge Sajó states that “public opinion is protected because, in a democracy, only an unfettered exchange of ideas brings us closer to the truth or, for the more skeptical, allows us to make better informed political and personal decisions by taking into account the arguments of all participants in the political process.”<sup>35</sup> Humans are reasonable enough to make informed choices and no political power should draw up a catalog of false or unacceptable ideas. However, according to Judge Sajó, this is precisely what the European Court has done its judgment: perceiving humans as incapable of resisting their irrational emotions and therefore incapable of responding to arguments and counterarguments. In a democracy, which is based on a spirit of tolerance and openness, the participation of doubtful political movements in political discourse, does not undermine democracy, rather it diminishes the risk of extremism. Incitement to hate does not necessarily lead to violence or other criminal acts and the same is true for the unjustified fear that defamation of a group would undermine the public order. The contentious statements should be taken in the light of elections and “in a democracy, elections do not constitute a source of

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<sup>33</sup> ECHR 16 July 2009, *Affaire Féret c. Belgique (Requête no 15615/07)*, my translation.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

danger imposing particular restrictions on speech. On the contrary, freedom of expression is what allows intelligent political choice and responsible behavior. All these speculations about danger deny the power of counter-argumentation and independence of judgment.”<sup>36</sup>

Finally, the imposed sentence – ten months imprisonment and ten years ineligibility – is disproportionate because the offense does not meet the criteria of a pressing social need (cf. *Sürek v. Turkey*). After all, the potential of a series of isolated political statements not directly affecting the public order or the rights of others do not create a pressing social need. To sum up, the statements made by Mr. Féret are political in nature and do not directly lead to stirring up the provocations of acts of intolerance or violence.

### 3. Freedom: what is it?

Anyone who wishes to understand the history of freedom of expression will soon discover that it is interwoven with freedom. Indeed, the origin of freedom of expression is closely connected with the emergence of political freedom and more precisely the nascency of the concept of freedom.<sup>37</sup> Although the concept of freedom has been explored and aspired to through history, its perception can vary, making it impossible to reach a consensus. Hannah Arendt notes that “to raise the question, what is freedom? seems to be a hopeless enterprise.”<sup>38</sup>

In his renowned work, *Two Concepts of Liberty*, British liberal philosopher Isaiah Berlin (1909 – 1997) discerns two major concepts of freedom. The first sense of political freedom is what Berlin calls the negative sense. The notion of negative freedom refers, according to Berlin, to “...the question: 'What is the area within which the subject — a person or group of persons — is or should be left to do or be what he is able to do or be, without interference by other persons?’”<sup>39</sup> Thus, negative freedom implies the non-interference of others; being left alone. In the context of negative freedom, Berlin notes that absolute freedom does not exist, because humans have different activities and purposes which do not always harmonize with each other. If every human being has the right to pursue various goals in life, a certain minimum extent of personal freedom must exist which may not be violated.<sup>40</sup> Although it follows “that a frontier must be drawn between the area of private life and that of public authority”, Berlin states that people are largely interdependent and therefore “the liberty of some must depend on the restraint of others.”<sup>41</sup> Occasionally, the freedom of some needs to be constrained to ensure the freedom of others. It is not feasible to remain absolutely free in a society with others, and therefore to preserve as much freedom as much as possible, we must give up some of it. It is not clear upon which principles this should be done, yet a

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<sup>36</sup> Ibid.

<sup>37</sup> Dommering, Egbert, *Het verschil van mening: geschiedenis van een verkeerd begrepen idee*, Amsterdam: Uitgeverij Bert Bakker, 2016, p. 57; See also Bury, John Bagnell, *A History of Freedom of Thought*, London: Williams & Norgate, 1913. Bury argues that freedom of speech is a part of freedom of thought. Although nowadays, freedom of expression is taken for granted and as a natural right, it has, historically always been problematic in human societies. This can be readily seen in ancient Greece, where Socrates was ordered by the authorities to withhold to express his thoughts.

<sup>38</sup> Arendt, *Between Past and Future. Six Exercises in Political Thought*. p. 143.

<sup>39</sup> Berlin, *Liberty, Incorporating Four Essays on Liberty*, p. 169.

<sup>40</sup> Ibid., p. 170-1.

<sup>41</sup> Ibid., p. 171.

minimum of our personal freedom must be preserved.<sup>42</sup> There must always be an area of non-interference, delimited by a recognizable demarcation, which betokens negative freedom and implies in this context freedom *from*. For some philosophers such as John Stuart Mill (1806-1873), negative freedom is particularly important at the level of individual freedom; being free *from* the interference of the state.<sup>43</sup> From this, it can be inferred that a person who conceives freedom as simply being left alone by the state and happens to live in a laissez-faire dictatorship feels more free compared to living in a full-fledge democracy with stifling bureaucratic rules.

The second sense of freedom which Berlin mentions and discusses is positive freedom or freedom *to*. It is the liberty in which a person is the subject and not an object, in which people can formulate and shape their lives and achieve their ideals and goals without being thwarted or impacted by others (internal or external pressures). This entails that a human is a rational, active, and willing being who bears responsibility for his or her choices. At first glance, these concepts of freedom do not differ much from each other, but, as Berlin notes, these two concepts have developed in divergent directions. It is positive freedom against which Berlin adopts a critical stance, for it can result in totalitarian regimes such as Nazi-Germany or communism. Presumably, the recent collapsed so-called 'Islamic State' would be an example of the misuse of Berlin's positive freedom.

### 3.1. Two Selves

In expounding how positive freedom can be misused, by dictators for instance, Berlin discerns two kinds of selves: the dominant self, which is identified with reason and focuses on the long-term, and the 'lower' self. The latter is characterized by the pursuit of immediate desires and pleasure, and needs to be disciplined by the dominant self to achieve one's real nature. The real self is presented as something more comprehensive than the individual self, the real self is conceived as a larger entity, such as a state or a race, and by imposing its will all upon its recalcitrant members of such an entity the real self attains not only his own higher freedom but also the higher freedom of his members. This is, as Berlin observes, the argumentation and language of dictators: it is legitimate to coerce someone for his own good, even though the lower self of this person abhors doing something, because it is in service of their higher self and will lead to a higher level of freedom or to other higher goals like justice or public health.<sup>44</sup>

Towards the end of his essay, Berlin makes it unequivocally clear that he is in favor of pluralism of values combined with the negative concept of freedom since there are so many human goals that are not only incongruous but are also in constant rivalry with each other.<sup>45</sup> All in all, as Hans Blokland -who has commented extensively on Berlin- points out, there are two major differences between negative and positive liberty. First, a person's negative liberty is the area in which a person can run their life unhindered by others. The larger this private area, the greater the individual freedom.<sup>46</sup> Whereas positive liberty or autonomy of a person

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<sup>42</sup> Ibid.

<sup>43</sup> Ibid., p. 173-4.

<sup>44</sup> Ibid., p. 179-181.

<sup>45</sup> Ibid., p. 216.

<sup>46</sup> Blokland, Hans, *Wegen naar vrijheid: autonomie, emancipatie en cultuur in de westerse wereld*, Amsterdam: Boom, 1995, p. 48.



is derived from their wish to be in control of their own existence,<sup>47</sup> negative liberty is on the *interpersonal* level, only other humans can impede this freedom. Negative liberty refers, as Blokland rightfully observes, to the relationships between people at a certain limited moment. Positive freedom, which partly covers negative freedom, is a much broader concept since its scope is not restricted to the *interpersonal* level, but also extends to the *intrapersonal* level. For the latter, there can be internal obstacles -such as ignorance, urges, passions, instincts or psychological factors that are hard to control - which can thwart one's attempts to be master of one's own life. Positive freedom is also broader because determining how autonomous a person is can only be assessed over a certain period of time and not at a fixed limited moment.

It can be said that autonomy partly includes negative freedom, for a person who is not free cannot be master of his own life. However, if others are limiting someone's private domain to secure long-term autonomy and this occurs with his permission - presumably he has desires that he cannot control and wants to suppress with others' help- then there is no restriction of freedom here. There is, however, restriction of freedom when others impose limitations on him without his permission because they believe that his desires go against his higher objectives and therefore need to be suppressed. When their presumption is right, the person's freedom in question is being circumvented at that moment, but his autonomy is ensured. Since something cannot simultaneously be restricted and remain the same, freedom is not entirely covered by autonomy.<sup>48</sup>

Secondly, as Blokland continues and relying on Charles Taylor's interpretation of Berlin's two concepts of liberty, negative freedom forms an *opportunity* concept, while autonomy constitutes an *exercise* concept. This entails that if someone chooses to leave all possibilities that life offers him unused and, in this inactivity, is not being impeded by anyone, he can be considered free in a negative sense. However, he cannot be qualified as an autonomous personality in a positive sense, because it takes much more to be master of his own life. He has to look closely for alternatives, to other ideas, values, styles, tastes and evaluate what role his wishes and desires play and should play in his life. Consequently, he needs to suppress desires which are contrary to his higher life goals which undermine his integrity.<sup>49</sup> Charles Taylor, who I just mentioned before, connects positive freedom –being an *exercise* concept– with self-realization. According to Taylor, the failure to achieve his self-realization can be due to inner and as well as external obstacles. Examples of inner obstacles are false consciousness or inner fears, while external coercion is a good example of an external obstacle.<sup>50</sup>

Blokland notes that it remains to be seen whether Berlin would still stick to the idea of negative freedom being the [only] correct type of freedom in our day and age. One could also get the impression that Berlin always declines positive freedom; this is, however, not true. A common thread throughout Berlin's work is his crusade against the widespread monistic conviction that there is only one correct answer for any question and that all correct answers can be ordered harmoniously in one known rational system. This conviction has, according to Berlin, led to inertness, intolerance, and atrocities. Against this conviction, he states that there are many worthwhile but conflicting values that inevitably have to be weighed against

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<sup>47</sup> Ibid., p. 51, 122.

<sup>48</sup> Ibid., pp. 122-3.

<sup>49</sup> Ibid., p. 123.

<sup>50</sup> Taylor, Charles, *What's Wrong with Negative Liberty*, in: *Philosophy and The Human Sciences, Philosophy papers 2*, Cambridge: Cambridge University Press, 1985, pp. 212-4.

each other.<sup>51</sup> Berlin also states the following: “To assume that all values can be graded on one scale so that it is a mere matter of inspection to determine the highest, seems to me to falsify our knowledge that men are free agents, to represent moral decision as an operation which a slide-rule could, in principle, perform”.<sup>52</sup>

Generally, Berlin has an aversion to value-absolutism and monism,<sup>53</sup> he opposes thinkers with a rationalistic background (like Spinoza, Montesquieu, Rousseau, Burke, Locke, Kant, Fichte, Hegel, and Marx) who believe that there can be only one correct answer to all questions.<sup>54</sup> Charles Taylor has argued the same, quoting Berlin he observed:

“In the end, men choose between ultimate values; they choose as they do because their life and thought are determined by fundamental moral categories and concepts that are, at any rate over large stretches of time and space, a part of their being and thought and sense of their own identity”.

Here, according to Taylor, Berlin invokes “the ideal of freedom to choose ends without claiming eternal validity for them”. Although, according to Berlin life is not merely making choices, it’s an ongoing battle between values, Taylor notes that “nevertheless much of what we accept as normative is deeply anchored in our past and identity.”<sup>55</sup>

Henk Haenen observes, Berlin highlights the risks of a political strategy that is going to fill in the liberty of the citizens with the *good*. Coercion and legitimation of dictatorship lie in wait, and precisely for this reason, he initially pleads in favor of negative freedom. This liberty is a protection of the citizen against the power of the government (laid down in the so-called classical civil rights) and Berlin is critical with regards to so-called social civil rights. The government needs to moderate her exercise of power concerning these rights.<sup>56</sup>

But at the same time, as Blokland explains, Berlin certainly doesn’t plead for *laissez-faire* since it is obvious to him that this kind of social-economic system in the nineteenth century wasn’t able to create the minimum conditions to actually make use of the obtained negative liberties. Therefore, Berlin considers state intervention to be justifiable to safeguard these conditions.<sup>57</sup>

“Legal liberties are compatible with extremes of exploitation, brutality, and injustice. The case for intervention, by the state or other effective agencies, to secure conditions for both positive, and at least a minimum degree of negative, liberty for individuals, is overwhelmingly strong. Liberals like Tocqueville and J.S. Mill, and even Benjamin Constant (who prized negative liberty beyond any modern writer), were not unaware of this.”<sup>58</sup>

Negative liberties that cannot be used due to lack of knowledge, income, or health, should be distributed more equally through political intervention. However, according to Berlin, a clear distinction should be made between the *conditions* for freedom and freedom itself; they are

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<sup>51</sup> Blokland, *Wegen naar vrijheid*, pp. 33-4.

<sup>52</sup> Berlin, Isaiah, *Liberty, Incorporating Four Essays on Liberty*, Edited by Henry Hardy, New York: Oxford University Press, 2002, p. 216.

<sup>53</sup> *Ibid.*, p. 43;

<sup>54</sup> *Ibid.*, p. 55.

<sup>55</sup> Taylor, Charles, *A Secular Age*, Cambridge, Massachusetts, and London, England: The Belknap Press of Harvard University Press, 2007, p. 582.

<sup>56</sup> Haenen, Henk, *Afrikaans denken: ontmoeting, dialoog en frictie. Een filosofisch onderzoek*. Doctoral dissertation, Amsterdam: Vrije Universiteit Amsterdam, 2006, p. 188.

<sup>57</sup> Blokland, *Wegen naar vrijheid*, p. 59.

<sup>58</sup> Berlin, *Introduction*, in: *Liberty*, p. 38.

and remain two separate entities. Likewise, it is essential to recognize that the sacrifice of a part of one's negative freedom for the benefit of other values always remains a sacrifice, a limitation of freedom, no matter how urgent or high the moral reasons are.<sup>59</sup>

Thus, the context in which both negative and positive freedom operates is extremely important. Blokland notes that Berlin emphasized that "freedom at the individual level and freedom at the political level must be adequately discriminated".<sup>60</sup> What is decisive from a negative freedom point of view is the non-interference in individuals' private sphere, irrespective of whether someone lives under a democratically chosen government or an autocratic rule. An individual who conceives freedom simply as to be left alone may feel freer "under autocratic rule than in a democracy."<sup>61</sup>

Thus, as Blokland continues, a person can voluntarily waive a portion of his or her individual negative liberty to benefit from more positive freedom in the political domain. However, this entails a certain degree of limitation of one's negative freedom even though one gets something in return.<sup>62</sup>

As long as the private sphere, in which a person can operate unhindered by others, is guaranteed, and he can freely set out his own life goals, Berlin considers positive freedom or autonomy as a legitimate and honorable value.<sup>63</sup> He states: "'Positive' liberty, conceived as the answer to the question, 'By whom am I to be governed?', is a valid universal goal. I don't know why I should have been held to doubt this, or, for that matter, the further proposition, that democratic self-government is a fundamental human need, something valuable in itself, whether or not it clashes with the claims of negative liberty or of any other goal; valuable intrinsically and not only for the reasons advanced in its favour by, for example, Constant – that without it negative liberty may be too easily crushed; or by Mill, who thinks it an indispensable means – but still only a means – to the attainment of happiness."<sup>64</sup>

Again, just like Berlin agrees that negative freedom can degenerate into a justification for the law of the jungle of whoever has the superior firepower wins, positive freedom can be perverted into a totalitarian theory<sup>65</sup>, or as Berlin calls it "the apotheosis of authority".<sup>66</sup>

In the twentieth century, there has been sufficient emphasis on the more disastrous implications of negative freedom. However, according to Berlin the aberrations of positive freedom have not adequately been demonstrated, and he concludes "hence the greater the need, it seems to me, to expose the aberrations of positive liberty than those of its negative brother."<sup>67</sup>

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<sup>59</sup> Blokland, *Wegen naar vrijheid*, p. 60; Berlin, *Two Concepts of Liberties*, in *Liberty*: p. 172. Here Berlin states: "But a sacrifice is not an increase in what is being sacrificed, namely freedom, however great the moral need or the compensation for it. Everything is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience. If the liberty of myself or my class or nation depends on the misery of a number of other human beings, the system which promotes this is unjust and immoral. But if I curtail or lose my freedom in order to lessen the shame of such inequality, and do not thereby materially increase the individual liberty of others, an absolute loss of liberty occurs. This may be compensated for by a gain in justice or in happiness or in peace, but the loss [of freedom] remains..."

<sup>60</sup> Blokland, Hans, *Modernization and Its Political Consequences. Weber, Mannheim, and Schumpeter*, Translated by Nancy Smyth Van Weesp, New Haven and London: Yale University Press, 2006, p. 113.

<sup>61</sup> *Ibid.*; see also Snel, *Recht van spreken*, p. 58.

<sup>62</sup> *Ibid.*

<sup>63</sup> Blokland, *Wegen naar vrijheid*, p. 60.

<sup>64</sup> Berlin, *Liberty*, p. 39.

<sup>65</sup> Blokland, *Wegen naar vrijheid*, p. 60.

<sup>66</sup> Berlin, *Liberty*, p. 40.

<sup>67</sup> Berlin, *Liberty*, p. 40; Blokland, *Wegen naar vrijheid*, p. 60.

Positive freedom, dressed in sheep's clothing as a promise of more freedom, remains, according to Berlin a threat to individual freedom in this day and age. This fact is the underlying reason Berlin chose to concentrate primarily on the excesses of positive freedom.<sup>68</sup>

### 3.2. Positive or negative freedom?

In my opinion, Berlin's criticism of positive freedom is not only flawed, but also a caricature of positive freedom. I strongly believe that the time in which he lived played a significant role in shaping his critique of positive freedom. At the age of eight, Berlin witnessed the Russian Revolution in Petrograd. After returning to his birth town Riga, he left Latvia with his parents for England at the age of ten. We should not forget that Berlin wrote his essay in 1958, only a few years after the Second World War ended and during the Cold war. At that time the former Soviet Union and its allies were considered totalitarian regimes and posed a great danger to -as Samuel Huntington calls it- the "free world" or the Western world.

In his exposition on positive freedom, Berlin fails to establish a clear cause and effect relationship of why autonomy inevitably leads to totalitarianism. Again, for Berlin, positive freedom or autonomy is tantamount to a distinction between the two selves. On one side we have "the 'real', or 'ideal', or 'autonomous' self",<sup>69</sup> and on the other side we have "the 'lower' self which is then contrasted with irrational impulses, uncontrolled desires, my 'lower' nature, the pursuit of immediate pleasures, my 'empirical' or 'heteronomous' self, swept by every gust of desire and passion."<sup>70</sup> Berlin views autonomy here as self-mastery and goes on to state that the real self can be conceived as a collective whole. Berlin writes:

"Presently the two selves may be represented as divided by an even larger gap; the real self may be conceived as something wider than the individual (as the term is normally understood), as a social 'whole' of which the individual is an element or aspect: a tribe, a race, a Church, a State, the great society of the living and the dead and the yet unborn. This entity is then identified as being the 'true' self which, by imposing its collective, or 'organic', single will upon its recalcitrant 'members', achieves its own, and therefore their, 'higher' freedom."<sup>71</sup>

Berlin fears that people who adhere to self-rule and share certain views about how a state should function will impose their collective will on others who hold deviant views. Not only is Berlin unclear why self-rule is tantamount to the distinction of the two selves, but he neglects that "positive freedom is a cluster of concepts, at the heart of which is the notion that self-rule or self-determination is valuable in itself."<sup>72</sup> The idea of the autonomous individual is not

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<sup>68</sup> Blokland, *Wegen naar vrijheid*, p. 60; see also Ramin Jahanbegloo, *Conversations with Isaiah Berlin*, p. 41-2, where Berlin states: "Certainly the weak must be protected against the strong, and liberty to that extent be curtailed. *Negative liberty must be curtailed* if positive liberty is to be sufficiently realized; there must be a balance between the two, about which no clear principles can be enunciated. Positive and negative liberty are both perfectly valid concepts, but it seems to me that historically more damage has been done by pseudo-positive than by pseudo-negative liberty in the modern world. That, of course, may be disputed."

<sup>69</sup> Berlin, *Liberty: Two Concepts of Liberty*, p. 179.

<sup>70</sup> *Ibid.*, p. 179.

<sup>71</sup> *Ibid.*, p. 179.

<sup>72</sup> Ramsay, Maureen, *What's Wrong with Liberalism? A Radical Critique of Liberal Philosophy*, London and Washington: Leicester University Press, 1997, p. 57.

the prerogative of would-be totalitarians<sup>73</sup> but is the core value of liberalism.<sup>74</sup> This involves matters like the right to self-determination, privacy and autonomy, and modern individualism. The latter is increasingly identified with liberalism.<sup>75</sup> Berlin's claim that positive freedom inevitably leads to totalitarianism, imposition, and coercion, can only hold if self-rule or autonomy in itself is a false ambition of positive freedom.<sup>76</sup> This is, of course, absurd, not only since we have established that self-rule is a core value of liberalism, but we also observed that autonomy is in itself of value to negative freedom. Adherents of negative freedom consider human beings capable of making rational and autonomous actions and therefore they value self-rule.<sup>77</sup> As I explain in the next section, it seems that Berlin's fear of how freedom leads to totalitarianism stems from two primordial elements: (1) the lack of plurality of values and (2) a sovereign will of the majority. All this is to a large extent, interconnected with the *Rechtsstaat*<sup>78</sup> or the rule of law, which prevents the rise of a totalitarian regime by, for instance, protecting minorities against a tyrannical majority. Surprisingly, Berlin doesn't discuss the *Rechtsstaat*, a concept so inextricably bound with liberal democracy. Nor does he explain how both concepts of freedom relate to fundamental rights of the *Rechtsstaat*, such as freedom of expression, freedom of religion, or the non-discrimination principle. Thus, Berlin's main objection to positive freedom -that it inevitably leads to totalitarianism- doesn't hold in a democratic state where the rule of law prevails.

Therefore, I shall now discuss why positive freedom is more suitable in our current societies. I want to return to Charles Taylor, who, as we saw before, considers Berlin's negative freedom an opportunity-concept and positive freedom an exercise-concept. Berlin defines freedom as the *possibility* of action, not to the activity itself.<sup>79</sup> Thus, a hermit, or a person who resides voluntarily on an uninhabited island, or someone who enters a building with hundreds of doors but decides not to open a single door can all be considered free according to Berlin's definition of freedom. They can all be considered free according to Berlin not only because they have an opportunity, but also because they are not hindered by other humans. Taylor refers here to the "crude, original Hobbesian concept" of negative freedom, in which there is no obstacle. This conception of freedom according to Taylor is too simple, for if we incorporate freedom with a certain amount of self-realization -the latter being considered extremely important in a liberal society-, then this implies that freedom is also an exercise concept, for "some degree of exercise is necessary for a man to be thought-free."<sup>80</sup>

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<sup>73</sup> Ibid.

<sup>74</sup> Snel, Johan, *Recht van Spreken, Het geloof in de vrijheid van meningsuiting*, Zoetermeer: Uitgeverij Boekencentrum, 2010, p. 85.

<sup>75</sup> Ibid.

<sup>76</sup> Ramsay, *What's Wrong with Liberalism?*, p. 57.

<sup>77</sup> Ibid.

<sup>78</sup> See Caenegem, R.C. van, *An Historical Introduction to Western Constitutional Law*, Cambridge: Cambridge University Press, 1995 (reprinted 2003), p. 16: According to Van Caenegem, the word *Rechtsstaat* is relatively new considering that it appeared in the beginning of the nineteenth century in Germany. He mentions two works by which it became widespread: *Die Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates* (Tübingen, 1832-4) by Robert von Mohl and *Der Rechtsstaat. Eine publizistische Skizze* (1864) by Otto Bähr. This German word was taken literary in the Dutch language. In 1870 it appeared for the first time in a text concerning Johan Rudolph Thorbecke (1798-1872), the founder of the Dutch Constitution of 1848. *Etat de droit* is the phrase which is used in France, where it is quite recent. Rule of law is the English equivalent and Van Caenegem gives different descriptions for the *Rechtsstaat*: 'the state where the rule of law prevails', 'the state under law' or 'the law-based state'.

<sup>79</sup> Ibid., p. 69.

<sup>80</sup> Taylor, *What's Wrong with Negative Liberty*, p. 213.

The exercise of freedom of self-realization not only requires the removal of external obstacles but also clearing out internal barriers. Therefore, freedom cannot be regarded as a pure opportunity-concept. Self-realization or any exercise-concept of freedom sets certain conditions regarding someone's motivation, for as Taylor expounds "you are not free if you are motivated, through fear, inauthentically internalized standards, or false consciousness, to thwart your self-realization."<sup>81</sup> In other words, when it comes to freedom, it is impossible not to put "some restrictions on motivation among the necessary conditions of freedom" and narrow it down to simply the absence of external barriers.<sup>82</sup> And even if freedom is perceived as the absence of external obstacles, we can readily discriminate between the different kinds of infringements on freedom; some are trivial while others are a serious blow to freedom. We value restrictions of freedom as serious, less serious, or trivial within a societal context, conceiving that certain purposes and activities are more significant than others. Taylor gives an example: putting up a traffic light near someone's home might be called a restriction of freedom because previously the person could cross the intersection near his home as he liked, but now he has to wait until the light is green. But in a serious political debate, it is not truly an infringement on freedom because "the reason is that it is too trivial, the activity and purposes inhibited here are not really significant".<sup>83</sup>

On the other hand, a law that forbids someone from practicing his religion is a serious blow to freedom. It becomes clear from these two examples that freedom is more than the absence of external barriers, the absence of external barriers is related to the significance of activities and what is deemed important for human purposes. Because humans are purposeful beings, as Taylor observes, we discriminate and evaluate "the significance of different kinds of freedom based on the distinction in the significance of different purposes".<sup>84</sup> But at the same time, along with our purposes, we also evaluate our feelings and desires and qualitatively differentiate them as lower or higher, base or noble, trivial or significant, bad or good. Some of our goals and therefore, also our freedoms can be frustrated by internal obstacles, such as irrational fear or spite.<sup>85</sup> For example, if someone has a fear of public speaking and therefore is prevented from doing the job he wants, then this fear is being experienced as an obstacle. The person in this example is not been made freer if all of his external obstacles have been lifted, for his fear is an internal obstacle. Also, we cannot always understand our feelings and desires, and sometimes experience our desires and feelings incorrectly. Our deeper purposes can be frustrated by our fundamental desires. Someone who is ruled by his strongest desire cannot be deemed as free. On the contrary, discriminating among motivations and acting upon rational motivations is freedom, whereas acting on irrational motivations such as fear is not freedom, it even denies freedom. We experience some feelings and desires as restraints, because they are irrational and therefore not ours, for "we see them as incorporating a quite erroneous appreciation of our situation and of what matters to us".<sup>86</sup> Thus there are two reasons why freedom can be hemmed in not only by external barriers but also by internal obstacles. First, how we attribute freedom is determined depending on a set of more and less important purposes. Freedom depends on whether our purposes are fulfilled. Not carrying out our significant purposes due to the misappreciation of our desires

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<sup>81</sup> Ibid., p. 215-6.

<sup>82</sup> Ibid., p. 217.

<sup>83</sup> Ibid., p. 218.

<sup>84</sup> Ibid., p. 219.

<sup>85</sup> Ibid., p. 220.

<sup>86</sup> Ibid., p. 225.

and feelings, makes us experience them as hindrances because we don't regard them as ours. Freedom is accompanied by recognizing one's significant purposes and realizing them, which requires self-understanding. Without self-understanding there is no true freedom and freedom can no longer be understood as an opportunity-concept as we have seen in the concept of negative freedom.<sup>87</sup>

### 3.3. Hannah Arendt on Positive Freedom

Political philosopher Hannah Arendt (1906–1975), a contemporary of Berlin<sup>88</sup>, also makes a distinction between two kinds of freedom in her work *Between Past and Future*. The first kind of freedom she presents is intertwined with politics, for freedom is the *raison d'être* of politics. In the political realm, on Arendt's account, freedom is "a fact of everyday life" and "the reason that men live together in political organization at all".<sup>89</sup> It is this freedom which we take for granted and seldom becomes the goal of political action. This is the very opposite of the second concept of freedom presented and described by Arendt; "inner freedom", "the inward space into which men may escape from external coercion and *feel* free" and is politically irrelevant.<sup>90</sup> This "inner, nonpolitical freedom" can only be a "worldly tangible reality" when interacting with others, not when we interact with ourselves.<sup>91</sup>

For Arendt, there is "an interdependence of freedom and politics", for this nexus can expound that "the highest purpose of politics" is security, and security makes freedom feasible outside the political realm.<sup>92</sup> Although I agree with Arendt, she fails in my opinion to clarify it adequately. I shall therefore add two points why freedom needs politics and why the liberal credo "the less politics the more freedom"<sup>93</sup> referred to by Arendt, is untenable. First, freedom needs politics because it needs structure, for structure creates space for each individual to flourish, and politics sets up laws, regulations, and rules which contribute to the formation of structure.<sup>94</sup> From this perspective, coercion is not the antipode of freedom, but chaos is, because chaos engulfs the created space of the individual.<sup>95</sup>

Secondly, politics, and more precisely liberalism as Michel Foucault points out, needs freedom because it is a consumer of freedom:

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<sup>87</sup> p. 227-9.

<sup>88</sup> Berlin and Arendt have met each other, *inter alia*, twice in New York. It seems that Berlin was not in favor of Arendt's ideas. In a famous interview with Ramin Jahanbegloo he stated: "I do not greatly respect the lady's ideas, I admit. Ramin Jahanbegloo: "Why"? Isaiah Berlin: "Because I think she produces no arguments, no evidence of serious philosophical or historical thought. It is all a stream of metaphysical free association. She moves from one sentence to another, without logical connection, without either rational or imaginative links between them". See Ramin Jahanbegloo, *Conversations with Isaiah Berlin*, p. 82.

<sup>89</sup> Arendt, *Between Past and Future*, p. 146.

<sup>90</sup> *Ibid.*, p. 146.

<sup>91</sup> *Ibid.*, p. 148.

<sup>92</sup> *Ibid.*, p. 149.

<sup>93</sup> *Ibid.*

<sup>94</sup> Brinkgreve, Brinkgreve, Christien, *Het verlangen naar gezag: over vrijheid, gelijkheid en verlies van houvast*, Amsterdam/Antwerpen: Uitgeverij Atlas Compact, 2012, p. 36.

<sup>95</sup> Dahl, Robert A., *On Democracy*, Second Edition, With a New Preface and Two Chapters by Ian Shapiro, New Haven and London: Yale University Press, 2015, p. 51-2, Here Dahl notes we will not gain more freedom if the democratic state is abolished entirely as anarchist claim. Exactly the opposite will happen: disorder and unbearable violence.

“This governmental practice... is a consumer of freedom inasmuch as it can only function insofar as a number of freedoms actually exist: freedom of the market, freedom to buy and sell, the free exercise of property rights, freedom of discussion, possible freedom of expression, and so on. The new [*liberal*] governmental reason needs *freedom* therefore; the new art of government *consumes freedom*. It *consumes* freedom, which means that it must produce it. It must produce it, it must organize it. The new art of government, therefore, appears as the management of freedom, not in the sense of the imperative ‘be free’, with the immediate contradiction that this imperative may contain. The formula of liberalism is not to be ‘free’. Liberalism formulates simple the following: I am going to produce what you need to be free. I am going to see to it that you are free to be free. And so, if this liberalism is not so much the imperative of freedom as the management and organization of the condition in which one can be free, it is clear that at the heart of this liberal practice is an always different and mobile problematic relationship between the production of freedom and that which in the production of freedom risk limiting and destroying it. Liberalism as I understand it, the liberalism we can describe as the art of government formed in the eighteenth century, entails at its heart a productive/destructive relationship [with] freedom. Liberalism must produce freedom, but the very act entails the establishment of limitations, controls, forms of coercion, and obligations relying on threats, etcetera”.<sup>96</sup>

In the light of Foucault’s analysis, Conor Crummey gives a simple but sharp example of how liberalism produces freedom and freedom assures the continuance of liberalism. The functioning of the economic market is vital for a liberal state. Therefore, the liberal state *produces* market freedom by establishing a legislative framework guaranteeing the stability of the currency, etc. The liberal state then *consumes* this freedom through the economic growth it brings about. Thus, the (market) freedom results in growth, wealth, and prosperity and preserves the liberal system. This ongoing relationship between production and consumption is at the heart of any specific freedom yielded by the liberal state.<sup>97</sup>

Foucault goes on to show not only how liberalism simultaneously produces and consumes freedom, like a cyclic process, but paradoxically, it also lays down rules and regulations for freedom to exist. For example, free trade is vital for a liberal state. We can only practice free trade if we establish precautionary actions “to avoid the effects of one country’s hegemony over others”.<sup>98</sup> Similarly, the internal market requires freedom for buyers and sellers to operate, but the preservation of freedom of the internal market is accompanied by the prevention of the effects of monopolies, for which anti-monopoly legislation necessary.<sup>99</sup>

This observation of Foucault is fully in line with Arendt’s perception that freedom requires security, for security makes freedom feasible outside the political realm.<sup>100</sup> Like Berlin, Arendt intertwines freedom with plurality: both of them are two central features of action.

Since we have now established that freedom and politics are interdependent, I want to turn to the meaning of freedom according to Arendt. Freedom is more than being a free man status, such as getting away from home or meeting other people. Freedom makes sense in

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<sup>96</sup> Foucault, Foucault, Michel, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979*. Translated by Graham Burchell. New York: Palgrave Macmillan, 2008, pp. 63-4.

<sup>97</sup> Crummey, *The Context of Liberty: A Re-Examination of Mainstream Conceptions of Freedom*, p. 9.

<sup>98</sup> Foucault, *The Birth of Biopolitics*, p. 64.

<sup>99</sup> Ibid.

<sup>100</sup> Arendt, Hannah, *Between Past and Future. Six Exercises in Political Thought*. New York: The Viking Press, 1961, p. 146; see also Borren, Marieke, *Amor Mundi. Hannah Arendt's Political Phenomenology of World*, Doctoral dissertation, Amsterdam: F & N Eigen Beheer, 2010, p. 170: “...Arendt views political action as a source of freedom, rather than as a restraint upon it.”



our intercourse with others, not with ourselves. As we have just seen, politics guarantees security; security, in turn, makes freedom feasible. The quintessence of activities *outside* the political realm is designated by the word freedom.<sup>101</sup> Arendt doesn't equate freedom with free will, because then we have to conclude that freedom was unknown to the ancients, which is absurd. Freedom only exists in associating and in action with others, not in the intercourse with one's self.<sup>102</sup>

Nor is freedom the power to command, to dictate action, for this is a matter of strength or weakness.<sup>103</sup> Additionally, the Christian doctrine of *liberum arbitrium*<sup>104</sup> that freedom is to do good for the sake of salvation is too simple.<sup>105</sup>

Freedom, according to on Arendt, is more than "simply the ability to choose among a set of possible alternatives (the freedom of choice so dear to the liberal tradition)"<sup>106</sup>, freedom is inherent to action. As Arendt states: "Men are free – as distinguished from their possessing the gift for freedom – as long as they act, neither before nor after; for to be free and to act are the same."<sup>107</sup> Elsewhere Arendt writes: "All these liberties, to which we might add our own claims to be free from want and fear, are of course essentially negative; they are the results of liberation but they are by no means the actual content of freedom, which, as we shall see later, is participation in public affairs, or admission to the public realm."<sup>108</sup> Thus, Arendt believes, freedom is positive ("freedom to") and postulates a public space of action.<sup>109</sup> Like Berlin, Arendt notices the hazardous side of freedom and aims to restrain it. The problem lies in the sovereign will of the community, which is indivisible. This entails that the danger of a tyrannical unit of the community imposing its will on individuals who hold a different opinion is always present.<sup>110</sup> Here, we can see how both Berlin and Arendt hold plurality in high esteem for the sake of freedom. The presence of the sovereign will of the community and the absence of plurality are ingredients for a police state or other forms of totalitarianism.<sup>111</sup>

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<sup>101</sup> Ibid., p. 148-9.

<sup>102</sup> Ibid., p. 163.

<sup>103</sup> Ibid., p. 152.

<sup>104</sup> See Arendt, *Between Past and Future*, p. 151, where she gives the following definition of *liberum arbitrium*: "a freedom of choice that arbitrates and decides between two given things, one good and one evil, and whose choice is predetermined by motive which has only to be argued to start its operation "And therefore, since I cannot prove a lover, / To entertain these fair well-spoken days, / I am determined to prove a villain, / And hate the idle pleasures of these days."

<sup>105</sup> Ibid., p. 157.

<sup>106</sup> Passerin d'Entrèves, Maurizio, *The Political Philosophy of Hannah Arendt*, London and New York: Routledge, 1994, p. 67.

<sup>107</sup> Arendt, *Between Past and Future*, p. 151; see also Borren, *Amor mundi: Hannah Arendt's political phenomenology of world*, p. 73, who concludes that "...freedom in the Arendtian sense does not refer to freedom of choice or freedom of will, but to contingency and to the inherent spontaneity and unpredictability of action and speech. This implies that I never know what my words and deeds will bring about because of the world's inalienable plurality.

<sup>108</sup> Arendt, Hannah, *On Revolution*, London: Penguin Books, 1963, Reprinted in 1990, p. 32.

<sup>109</sup> Birmingham, Peg, *Hannah Arendt and Human Rights: The Predicament of Common Responsibility*, Bloomington & Indianapolis: Indiana University Press, 2006, p. 61.

<sup>110</sup> Gloukhov, *Arendt on Positive Freedom*, p. 14. Here Gloukhov states: "Benjamin Constant, John Stuart Mill, and Isaiah Berlin all warned of this."

<sup>111</sup> See also Borren, *Amor mundi: Hannah Arendt's political phenomenology of world*, p. 191: "In her [Arendt's] view any mode of sovereignty should be suspected as being grounded in the confusion of politics with rule. In her mind, the political, as the realm of freedom, does not allow for sovereignty. The abolishment of the plurality of states would, she fears, lead to a police state."

In the next sections, I discuss critiques of Berlin's division of liberty and negative freedom and positive freedom in connection with freedom of expression and a plea for the rule of law.

### 3.4. Only one concept of freedom?

Berlin and others have been criticized for their division of liberty into negative freedom (freedom *from*) and positive freedom (freedom *to*). In his famous paper "Negative and Positive Freedom" (1976), Gerald C. MacCallum Jr. asserts that this division not only remains unclear but has consequently diverted attention to how freedom is to be understood. Freedom is always to be regarded as a triadic relation taking the format "x is (is not) free from y to do (not do, become, not become) z," *x ranges over agents*, *y ranges over such "preventing conditions" as constraints, restrictions, interferences, and barriers*, and *z ranges over actions or conditions of character or circumstance*. The reason the concept of freedom is not always obvious is due to the context of the discussion in which freedom takes place.<sup>112</sup>

Due to the context in which freedom operates, MacCallum argues that the conventional characterization of freedom *from* and freedom *to* fails to distinguish the two genuinely different kinds of freedom. Rather, this characterization serves "only to emphasize one or the other of two features of every case of the freedom of agent". Consequently, arguing that freedom *from* is the only freedom or freedom *to* is more important than the other, fails to say anything pertinent about two kinds of freedom. The only statement which can be made which can be said is that one is emphasizing "only part one part of what is always present in any case of freedom". In other words, freedom is always a combination of both freedom from and freedom to. MacCallum further argues that there is always one concept of freedom operating, while people differ in the parameters of this triadic relation of freedom, for example, what can count as an infringement, interference, or obstacle to, and what persons are. Is a man who is left unguarded but has been locked in chains unfree because of the *presence* of the locked chains or because of the *absence* of the key? Is an adherent of negative freedom allowed to answer the latter? Is a person with no diploma (*absence* of training) and thus not in a position to accept a job unfree because of the *presence* of political, social, economic barriers preventing him from proper training? In answering such a question, some adherents of positive freedom will point to with the *presence* of the alleged barriers and

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<sup>112</sup> MacCallum classifies three cases in which there is, apparently, lack of clarity on freedom, but it becomes more clear and present from the context in which it operates:

- (1) *Cases where agents are not mentioned*: for example, expressions "free will", "free society", or "the property is free of (or from) encumbrance". Although in these cases agents are not mentioned, it refers to people, because only humans have free will, live in a free society, and can own a property such as a piece of land which, in this case, they can use as they wish.
- (2) *Cases where it is not clear what corresponds to the second term*: for example, "freedom of choice" or "freedom to choose as I please". Here, the context in which freedom operates is crucial. In a political context one usually thinks of legal constraints or interferences. For example, "Smith is free to leave to country" can be read as "Smith is free *from* legal restrictions on travel *to* leave the country". Alternatively, one could approach this example from a social angle. Smith can leave the country because there are no social impediments; he has not promised anybody to remain, he has enough money for an airline ticket
- (3) *Cases where it is not clear what corresponds to the third term*: for example, "freedom from hunger". The expression can be regarded as figurative, whereby it doesn't relate to anyone's freedom. Being free from hunger is then something that is not present or get rid of, like "today the sky is free from clouds".

consequently shift from the traditional argument that the absence, lack, or deprivation of something counts as an obstacle to freedom. Because of these alleged points of difference, it is unjustifiable and futile to classify writers such as Occam, Erasmus, Hobbes, Lock, Bentham, Constant, J.S. Mill, Tocqueville, Jefferson, Burke, and Pain as adherents of the negative freedom and authors such as Plato, Epictetus, St. Ambrose, Montesquieu, Spinoza, Kant, Herder, Rousseau, Hegel, Fichte, Marx, Bukharin, Comte, Carlyle, T.H. Green, Bradley and Bosanquet as adherents of positive freedom. Consequently, this dichotomous classification is unavailing and contributes to the distortion of major views on freedom.<sup>113</sup>

On a similar note, Goodin argues that there is only one fundamental concept of freedom and that the discussion between the proponents of negative and positive freedom is merely a discussion about the proper emphasis on the elements of the triadic relation of freedom. Positive freedom emphasizes the relationship between x and z, negative freedom between x and y.<sup>114</sup> The two notions of freedom are not absolute contradictions, but “only incomplete references to the same underlying conception of freedom.”<sup>115</sup> Thus, the distinction between negative and positive freedom is concealment and distraction from what freedom is. This is in line with Feinberg, who states: “In the typical case, then, “freedom from” and “freedom to” are two sides of the same coin, each involved with the other, and not two radically distinct kinds of freedom, as some writers have suggested. Indeed, it is difficult fully to characterize a given constraint without mentioning the desires it does or can constrain (that is, desires other than the exclusive desire to be relieved of *it*).”<sup>116</sup> Finally, MacCallum’s XYZ-scheme makes it clear that a statement about freedom is only politically relevant when it can be interpretable in this schematic.<sup>117</sup>

There are several reasons to object to the XYZ-scheme. The most significant problem of this scheme is, as Blokland points out, that it takes the solitaire person as a starting point. It neglects the individual’s social environment in a sense that his environment is not an inexhaustible source of possible impediments, but rather a condition to acquire and exercise autonomy. In other words, the community in which he happens to live does not always form a barrier that needs to be overcome for the purpose of his freedom. Rather, the community can be the source for indispensable material and intangible conditions for freedom.<sup>118</sup> This can be readily seen in obtaining a career. A person who wants to become a physician cannot do this on his own, he requires proper study and training from others.

### 3.5. Should freedom have a goal?

The classical laissez-faire liberal standpoint of perceiving freedom as a negative concept, as sole freedom from something, undermines why we appreciate freedom.<sup>119</sup> We value freedom not just for being free from impediments or having choices and opportunities that only exist

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<sup>113</sup> MacCallum, “Negative and Positive Freedom”, *The Philosophical Review*, Volume 76, Issue 3 (Jul., 1967), pp. 312-334.

<sup>114</sup> Goodin, Robert E., *Reasons for Welfare: The Political Theory of the Welfare State*, Princeton: Princeton University Press, 1988, p. 308.

<sup>115</sup> *Ibid.*, p. 307.

<sup>116</sup> Feinberg, Joel, *Social Philosophy*, Englewood Cliffs, New Jersey: Prentice-Hall, 1973, p. 10.

<sup>117</sup> Blokland, *Wegen naar vrijheid*, p. 131.

<sup>118</sup> Blokland, *Wegen naar vrijheid*, p. 133.

<sup>119</sup> Ramsay, *What's Wrong with Liberalism?*, p. 63.

on paper.<sup>120</sup> Freedom is only valuable to us when it becomes practically meaningful,<sup>121</sup> when it is a condition in which we have the opportunity to become or do something else. We are free if we can achieve the objectives that we as individuals set ourselves, at least to a certain extent.<sup>122</sup> Conversely, “opportunities without the means of making use of them”,<sup>123</sup> are useless. We are not free if we at least partially, never realize our life plan.<sup>124</sup> Stanley Fish writes that “like expression, freedom is a coherent notion only in relation to a goal or good that limits and, by limiting, shapes its exercise”.<sup>125</sup> In other words, we value freedom not just to be left alone, but “because it will enable us to do something else.”<sup>126</sup> When freedom is not bound up with human desires, purposes, and interests, it is nothing more than a phrase or a punchline. Living an autonomous life –something so dear to liberals– means more than being free from the impediments of others. An independent life means being at liberty to make choices that really matter and achieve one’s goals. An individual living in the desert or floating around in the ocean is, admittedly, free from others, but doesn’t have genuine choices and opportunities that enable him to do something else. In the next section, we will explore whether freedom of expression can be conceived as a negative or positive freedom.

#### 4. Free Speech: Freedom of Expression or Freedom to Expression?

Although nowadays freedom of expression is considered a core value within a liberal democratic society, it seems that many have neglected or are ignorant of its possible goals. Freedom of expression is deemed as intrinsically good in liberal democracies. As stated

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<sup>120</sup> Cf. Blokland, *Wegen naar vrijheid*, p. 128; Goodin, *Reasons for Welfare*, p. 309.

<sup>121</sup> Goodin, *Reasons for Welfare*, p. 308. Here Goodin gives an example when freedom is less meaningful when the required elements are missing. He quotes the following passage which pertains the newly liberated slaves of the Southern part of America: “In 1865 emancipation from chattel slavery permitted black Americans one kind of freedom. No one would deny that this freedom was a significant and meaningful one. With their freedom blacks advanced their material income and their economic welfare. They gained a degree of independence that was significantly greater than they were allowed in bondage. Yet this freedom was incomplete. Unlike the indentured servants of Colonial America, blacks received no freedom dues: land redistribution was aborted and the blacks were forced to begin their lives as free men and women without money, without tools, without work animals, without assets of any kind. Their economic, political, and social freedom was under constant attack by the dominant white society determined to preserve racial inequalities. The economic institutions established in the postemancipation era effectively operated to keep the black population a landless agriculture labor force, operation tenant farms with a backward and unprogressively technology. What little income was generated in excess of the bare essentials of life was exploited by monopolistic merchants.” See Ransom, Roger L. and Richard Sutch, *One Kind of Freedom: The Economic Consequences of Emancipation*, Second Edition, Cambridge: Cambridge University Press, 2001, p. 198.

<sup>122</sup> Zamagni, Stefano, “Fraternity, gift, and reciprocity in Caritas in Veritate”, in Adrian Pabst (ed.), *The Crisis of Global Capitalism*, Eugene (Oregon): Cascade Books, 2011, p. 166. Here Zamagni points out that freedom consist of three constituent elements: autonomy, immunity, empowerment. Autonomy is about freedom of choice. Someone is only free if he can choose. In Berlin’s sense this means he enjoys positive freedom. Immunity concerns negative freedom; “the absence of coercion by external subjects”. Empowerment pertains not only the capacity to choose, but rather to achieve the goals that someone sets himself.

<sup>123</sup> Goodin, *Reasons for Welfare*, p. 309.

<sup>124</sup> Zamagni, *Fraternity, Gift, and Reciprocity in Caritas in Veritate*, p. 166.

<sup>125</sup> Fish, Stanley, *There’s No Such Thing As Free Speech and It’s A Good Thing, Too*, New York | Oxford: Oxford University Press, 1994, p. 108.

<sup>126</sup> Ramsay, *What’s Wrong with Liberalism?*, p. 42.

earlier, all liberal democracies are cognizant of fundamental rights and freedom of expression is one of them. No single liberal democracy has legislature preferred freedom of expression over other fundamental rights. Therefore, freedom of expression should be treated in conjunction with other fundamental rights such as the non-discrimination principle, freedom of religion, and the right to privacy. In the previous section, we discussed the two concepts of freedom following the views of Berlin. We will now focus on whether free speech is a negative freedom or a positive freedom, or perhaps a combination of both. In general, without explicitly referring to Berlin's two concepts, in most literature, the following justifications of freedom of expression are mentioned: discovery of truth, self-fulfillment, human progress, citizen participation in a democracy, and the much-needed control of the government.<sup>127</sup> Furthermore, as Raphael Cohen-Almagor argues, "free speech is important because it allows us to communicate with others. People are social beings. We do not like to be solitary beings. We need to connect with others, speak to others, live in the company of others."<sup>128</sup> Free communication also serves social integration and stability. Freedom of expression makes it possible in a society characterized by diversity for opinions of all groups to exist in the open and be recognized as part of the social debate. Thus, it makes adequate decisions more likely. Shutting off certain groups endangers the stability of mutual relationships.<sup>129</sup>

Dignity as a justification for freedom of expression is generally overlooked. As I will point out later, the limitation of free speech is often warranted when it offends human dignity. However, a person who is denied freedom of speech cannot address his problems, injustice, or issues to the state in which he happens to live, and is thus automatically been deprived of human dignity. Therefore, I believe that free speech is not only a condition for human dignity but, as Steven Heyman correctly writes "both of these values are essential to a liberal democratic society."<sup>130</sup>

Let us return once more time to Berlin's two concepts of freedom. Negative freedom or freedom *from* refers to non-interference by others as Berlin expounds "By being free in this sense I mean not being interfered with by others. The wider the area of non-interference the wider my freedom."<sup>131</sup> Classical liberal philosophers and politicians such as John Stuart Mill mainly refer to the non-interference of government towards its citizens. Many of the fundamental rights in liberal democracies are negative rights and fit in the framework of negative freedom, although the scope of negative rights, of course, varies from state to state. For example, the right to own firearms is a negative right in the USA, which may not be infringed on by the state, while in most European countries, it is unlawful to keep and bear arms. Freedom of creed, religion, and speech are, from this perspective, negative rights; it is incumbent upon society not to interfere with the individual who utilizes these rights, unless

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<sup>127</sup> Barendt, Eric, *Freedom of Speech*, Oxford: Oxford University Press, Second Edition, 2007, pp. 6-23; Cohen-Almagor, *Between Speech and Terror: The Charlie Hebdo Affair*, p. 2; Dahl, *On Democracy*, pp. 96-97; Greenawalt, Kent, *Fighting Words: Individuals, Communities, and Liberties of Speech*, Princeton: Princeton University Press, 1995, pp. 3-6; Hawtho, Alan, *Free Speech*, London and New York: Routledge, 1998., pp. 17, 27, 177; Nieuwenhuis, *Over de grens van de vrijheid van meningsuiting*, p. 22; Stokum, *Godslastering, discriminerende uitingen wegens godsdienst en haatuitingen*, pp. 49-54; Fish, *There's No Such Thing as Free Speech And It's a Good Thing*, p. 123.

<sup>128</sup> Cohen-Almagor, *Between Speech and Terror: The Charlie Hebdo Affair*, p. 2.

<sup>129</sup> Dijk van, Jos, *Dit kan niet en dit mag niet, Belemmering van de uitingsvrijheid in Nederland*, Utrecht: Otto Cramwinckel Uitgever, 2007, p. 201; Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech*, p. 5.

<sup>130</sup> Heyman, Steven J., *Free Speech and Human Dignity*, New Haven & London: Yale University Press, 2008, p. 1.

<sup>131</sup> Berlin, Isaiah, *Liberty, Incorporating Four Essays on Liberty*, Edited by Henry Hardy, Oxford: Oxford University Press, 2002, p. 170.

it is harmful to others. Freedom of speech is then conceived to be the individual who decides on the purpose of free speech.

Positive freedom or freedom *to* is about the liberty to shape one's life, how people can achieve their goals and ideals. Since people have different ideas, different interests, different goals, and different ideals, positive freedom is far more complex than its counterpart. Values such as democracy, individualism, and self-determination pertain to the framework of positive freedom, are championed in the name of freedom and, for many people, form a concrete expression of freedom. Positive freedoms are about autonomy, controlling one's own life, unused opportunities, a way to infuse people's own lives, and society with content and meaning. This presupposes ideals and values which can clash and lead to conflicts.<sup>132</sup>

Although negative freedom is preferred in classical liberalism and is also favored by Berlin, it is incumbent that the government provides a minimum set of resources to achieve these ideals in our day and age. To make good use of free speech, the government should provide resources such as education, that allows for the use of free speech.

Citizens should also be entitled to a certain right to information in the public sphere for the same reason; there's no point in freedom of expression without informed citizens.<sup>133</sup>

However, could it be that free speech is both a negative and positive freedom? This question can perhaps be answered in the affirmative by looking at John Stuart Mill's arguments for freedom of speech. In the second chapter of his renowned book *On Liberty* (published in 1859), Mill endeavors to connect individual freedom with social progress. Freedom of opinion and freedom of expression (Mill mentions these two concepts separately) are both necessary to society as a whole. For the discovery of the truth, which is Mill's ultimate goal, he mentions four reasons why free speech should be tolerated. First, even the most different opinion can be true and should be expressed because nobody is infallible. This is closely connected with Mill's second argument, that a general rejected opinion may still hold a part of the truth which is absent in the general or prevailing opinion. Third, contesting a prevailing opinion that is the absolute truth will lead to a better understanding of this opinion. Finally, not challenging the general meaning will result in taking the doctrine for granted, rendering it attenuated or even in danger of being lost.<sup>134</sup>

Snel, a Dutch historian, rightfully observes that for Mill negative freedom in the form of unfettered expression is the best guarantee for truth. In his view, the positive opportunity to discover useful knowledge and insights depends on the maximum - negative - freedom of seeking the truth. In Mill's optimistic idea maximum individual freedom and maximum freedom of speech will lead to the best insights. Due to this individual freedom, society as a whole will benefit the most. Finding the truth can only be achieved in a process of trial and error. According to Mill, the maximum degree of freedom of expression of the individual is the best guarantee to achieve maximum freedom for society as a whole.<sup>135</sup>

For Mill, all kinds of opinions and expressions are welcome and the only restriction is when harm is done to other individuals, known as Mill's 'harm principle'. As an example, he gives the now-famous speech related to the corn dealers:

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<sup>132</sup> Snel, *Recht van spreken*, pp. 58-9.

<sup>133</sup> Dijk van, *Dit kan niet en dit mag niet. Belemmering van de uitingsvrijheid in Nederland*, p. 214.

<sup>134</sup> Mill, John Stuart, *On Liberty*, Boston: Ticknor and Fields, 1863, pp. 101-2; Gray, John, *Mill on Liberty: A defence*, London and New York: Routledge, second edition, 1996, p. 104; Ten Cate, Irene "Speech, Truth and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses," *Yale Journal of Law & the Humanities*, vol. 22 (2010), p. 38.

<sup>135</sup> Snel, *Recht van spreken*, p. 60.

“An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard. Acts of whatever kind, which, without justifiable cause, do harm to others, maybe, and in the more important cases absolutely require to be, controlled by the unfavourable sentiments, and, when needful, by the active interference of mankind.”<sup>136</sup>

In the next section, I will point out that Mill’s harm principle being the only barrier in restricting free speech is not only flawed but also dangerous for sustaining a liberal democracy that preserves tolerance and the protection of minorities.

I now want to turn to the second justification of freedom of expression: self-fulfillment.<sup>137</sup> Not only is freedom of expression often associated with self-fulfillment, this also applies to freedom. As we have seen before, freedom is only useful when it serves a purpose, when it offers the possibility to do or become something else.

If freedom does not serve a purpose, it becomes an end in itself. The same applies to freedom of expression; the ends are being confused with the means. When freedom of expression becomes an end in itself, we can say anything that comes to mind. This includes the right to offend others.<sup>138</sup> A champion and exponent of this opinion is Ayaan Hirsi Ali who proclaimed in a lecture in 2006 for the international press in Berlin that she has the right to offend (especially when it comes to Islam and Muslims). Insulting fellow citizens under the pretext of free speech doesn’t help improve social cohesion and doesn’t benefit a state in any way. It rather constitutes an act of indecency, as Bas van Stokkom puts it. And it absolves one from dealing with freedom responsibly. Decency is broader than being polite: it also allows one’s opponents to offer a rebuttal.<sup>139</sup>

However, free speech in terms of self-fulfillment can, as Dommering argues, cultivate independent, argumentative citizens.<sup>140</sup> Dommering draws upon the classical case *Whitney v. California* (1927) in which Justice Louis Brandeis gave his opinion regarding the purpose and boundaries of free speech:

"Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech, there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one."

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<sup>136</sup> Mill, *On Liberty*, pp. 107-8.

<sup>137</sup> Although it is a somewhat hard to precisely define self-fulfillment, and it is often equated with self-realization and self-actualization, the following description is suitable: "...self-fulfillment consists in carrying to fruition one’s deepest desires or one’s worthiest capacities. It is a bringing of oneself to flourishing completion, an unfolding of what is strongest or best in oneself, so that it represents the successful culmination of one’s aspirations or potentialities. In this way self-fulfillment betokens a life well lived, a life that is deeply satisfying, fruitful, and worthwhile." See Gewirth, Alan, *Self-fulfillment*, Princeton: Princeton University Press, 1998, p. 3.

<sup>138</sup> Dommering, *Het verschil van mening*, p. 359-60.

<sup>139</sup> Stokkom, Bas van, *Mondigheid tegen elke prijs. Het vrije woord als fetisj*. Den Haag: Boom Juridische uitgevers, 2008, p. 12.

<sup>140</sup> Dommering, *Het verschil van mening*, p. 360.

We see here that the exposure to evil, in this example, the burning of women, creates judgment and contributes to the discovery of the truth. Freedom of speech, or rather in my opinion freedom *to* speech, cultivates the necessary civil courage which should help a state in fighting evil. Consequently, self-fulfilment is tantamount to democratic virtues in which free speech cultivates tolerant and argumentative citizens.<sup>141</sup>

## 5. Which boundaries of free expression are been drawn by European judges?

In this section, I will focus on several limitations of free speech such as intolerance, racism, offense, and hate speech. Before going further into the subject, I want to emphasize at the outset, that in general, limiting free speech in a liberal democracy is something that is subjected to several conditions. Free speech is a fundamental right that can only be restricted by a liberal state when there are compelling reasons to do so.<sup>142</sup> Thus, a liberal democracy distinguishes itself from a dictatorship in which there is usually no room for free speech, free press, and critique of the government is severely punished.

Again: *Féret v. Belgium*

In exploring the boundaries of freedom of expression, I want to return to the case of *Féret v. Belgium*. This case contains several contradictory issues about the limitation of free speech, which makes it an extremely useful case study. Free speech is indispensable for every parliamentarian to openly discuss issues and policies in the political debate. Parliamentary immunity is, in line with this idea, intended to protect Members' freedom of expression and freedom of the political debate. In some liberal states like Belgium, parliamentarians enjoy wider freedom of expression than others, in the sense that they enjoy immunity outside the parliament. This infers that they can also address societal challenges in the public discourse in a way that may 'disturb, shock, or offend.' However, freedom of speech as a fundamental and human right and a component of democracy, is not absolute. The same is true for other closely related fundamental rights such as freedom of religion, the non-discrimination principle, and the right to privacy. In some cases, there is a collision of fundamental rights, and when brought to court, after evaluating the specific circumstances and interests of the case, the court decides which fundamental right should take precedence. In other words, it is impossible to set any general rules that cover all cases.<sup>143</sup> In the case of *Féret v. Belgium*, the court had to weigh the free speech of a parliamentarian -both inside and outside the

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<sup>141</sup> Ibid., p. 360.

<sup>142</sup> It should be noted that the extent to which free speech is protected, varies from one state to the other. For example, in comparing the United States, the United Kingdom and Australia, Katharine Gelber states that "of the three countries being considered, Australia possesses the weakest free speech protections. Australia lacks an explicit free speech protection at the federal level in either constitutional or statutory form. Two subnational jurisdictions (one state and one self-governing territory) have enacted charters of rights that protect human rights, including freedom of speech. In language similar to that used in permitting restrictions on freedom of expression in Article 10(2) of the European Convention on Human Rights, both these statutes acknowledge that freedom of speech has attached to it special duties and responsibilities, and that lawful, reasonable restrictions on that right may be applied." See Gelber, Katharine, *Free Speech after 9/11*, Oxford: Oxford University Press, 2016, p. 23-4.

<sup>143</sup> Groen, Lisanne and Martijn Stronks, *Entangled Rights of Freedom. Freedom of Speech of Religion and the Non-discrimination Principle in the Dutch Wilders Case*, The Hague: Eleven International Publishing, p. 13.



parliament- against the prohibition of discrimination, the prohibition of incitement to hatred, and race hatred, and the prohibition of group defamation. Féret alleged before the European Court of Human Rights a violation of Article 17 of the European Convention on Human Rights. Article 17 of the ECHR, the prohibition of abuse of the rights, is a general clause and is unique under the ECHR in the sense “that the addressees of this prohibition are not only the Contracting States but also private individuals and groups.”<sup>144</sup> As we saw before, the European Court rejected Féret’s complaint that his right to free speech was violated under the misuse of Article 17 of the European Convention on Human Rights. From this verdict of the European Court, which followed the earlier judgment of the Belgium Court, we can conclude that freedom of speech is a fundamental right with the proviso that it is not absolute. On the contrary, freedom of speech is not above other fundamental rights, values, and prohibitions such as the right of liberty and security of person, freedom of thought, conscience and religion, the right of privacy, human dignity, tolerance, the prohibition of discrimination and the prohibition of collective expulsion of aliens. The rights mentioned above, values, and prohibitions are all deemed necessary for a liberal democracy based on the *Rechtsstaat*.

Although Féret argued that his statements are purely political and were aimed at only the Belgian government and political parties and not at immigrants, we see that his arguments are inadmissible to the European Court. As a matter of fact, the statements made by Féret were no rational arguments but merely xenophobic and racist slogans in which communities of immigrants are presented as grotesque and criminogenic.

### 5.1. Hate speech

In this section I shall discuss how liberal states often address hate speech and pose questions such as: is allowing this kind of speech laudable and beneficial or not? Should it be defended at any cost or not? Should it be regulated? In answering these questions, I will argue that Mill’s aforementioned harm principle is untenable. Except for the US, all liberal democracies prohibit and penalize hate speech. It remains somewhat unclear why the US differs from European countries in protecting hate speech.

#### Definition and scope

It is somewhat difficult to precisely define hate speech. Some scholars like Susan Brison limit the definition of hate speech to a face-to-face or direct level. Brison argues that pornography which is extremely violent and degrading does qualify as hate speech against women and subsequently gives the following definition of hate speech: “...it constitutes face-to-face vilification, creates a hostile and intimidating environment, or is a kind of group libel.”<sup>145</sup> Others such as David van Mill expand this definition by including indirect speech because he believes that hate speech can also be experienced indirectly. I agree with him because although some speech is formulated generally or veiled, it can have an impact on a person or a group. A statement like “disabled people are the parasitizes of our societies unless they are

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<sup>144</sup> Arai, Yutaka, *Prohibition of Abuse of the Rights and Freedoms Set Forth in the Convention and of Their Limitation to a Greater Extent Than is Provided for in the Convention (Article 17)*, in *Theory and Practice of the European Convention on Human Rights*, Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds), Antwerpen-Oxford: Intersentia, 2006, p. 1085.

<sup>145</sup> Brison, Susan J., “The Autonomy Defense of Free Speech”, *Ethics*, Vol. 108, No. 2 (Jan., 1998), p. 314.

willing to work and they should not be receiving *social benefits* from the state” is an example of indirect hate speech. It contains a clause that not all disabled people are bad, but they should meet certain criteria: they should work and refrain from receiving social security. All forms of speech promoting hatred against a person or a group of persons fall under hate speech. Usually, this kind of speech is aimed at persons who share in forms of identity such as religion, race, gender sexuality, or ethnicity.<sup>146</sup> Hate speech sometimes goes together with fighting words, expressions that are personal and so poisonous that an immediate response is inevitable. In a manner of speaking, the only option is a violent reaction.<sup>147</sup> According to Joel Feinberg, the doctrine of fighting words finds its provenance in the US Supreme Court case of *Chaplinsky v. New Hampshire* (1942). Jehovah’s Witness Walter Chaplinsky had been arrested for distributing literature on the streets of Rochester, New Hampshire. The contents of this literature caused a public disturbance. On the way to the police station for booking, he uttered in great anger the following words to the City Marshall: “You are a Goddamned racketeer” and “a damned Fascist, and the whole government of Rochester are Fascists or agents of Fascists.”<sup>148</sup> Chaplinsky was convicted on the basis of violating the law<sup>149</sup> that ‘No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.’<sup>150</sup> The conviction was upheld all the way to the highest court because the used fighting words<sup>151</sup> are not protected by the US constitution. We see here that fighting words are unprotected because they are not an “essential part of any exposition of ideas.”<sup>152</sup>

The purport of hate speech can go further than merely creating a hostile environment or intimidation and discrimination, it can lead to inciting violence, both verbal and non-verbal. For example, the Ku Klux Klan burning a cross in the garden of an African-American implies an immediate threat of harm, “but it also brings with it an association, full of historical narratives, that violence against African-Americans is justified.”<sup>153</sup>

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<sup>146</sup> Mill, David van, *Free Speech and the State. An Unprincipled Approach*, Nedlands, West Australia: Palgrave Macmillan, 2017, p. 81. See also Richard Moon, *Religion and Hate Speech in Canada*, p. 502-3, in *Blasphemy and Freedom of Expression*, Jeroen Temperman and András Koltay, Cambridge: Cambridge University Press, 2017: “Hate speech, either explicitly or implicitly, claims that the members of an identifiable group should not be regarded as full members of the community and/or that they share dangerous or undesirable traits – that they are by nature violent or corrupt. Whether the speech takes the form of an insult directed at the members of a particular group or a claim about the group that is made to the members of the general community, its message is that the target group’s members are inferior or dangerous and should be treated accordingly.”

<sup>147</sup> Russell-Brown, Kathryn & Davis, Angela J., *Criminal Law*, Los Angeles: SAGE Publications, 2015, p. 37; Van Stokkom, *Strafbaarstelling ‘religieuze haat’ in Engeland en de Verenigde Staten*, p. 172, in Stokkom, B.A.M. van, H.J.B. Sackers en J.P. Wils, *Godslastering, discriminerende uitingen wegens godsdienst en haatuitingen*, Meppel: Boom Juridische uitgevers, 2007.

<sup>148</sup> *Ibid.*, p. 228.

<sup>149</sup> *Ibid.*, p. 229.

<sup>150</sup> <http://caselaw.findlaw.com/us-supreme-court/315/568.html>

<sup>151</sup> [https://www.law.cornell.edu/wex/fighting\\_words](https://www.law.cornell.edu/wex/fighting_words): Fighting words are, as first defined by the Supreme Court (SCOTUS) in *Chaplinsky v New Hampshire*, 315 U.S. 568 (1942), words which “by their very utterance, inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

<sup>152</sup> Nieuwenhuis, *Over de grens van vrijheid van meningsuiting*, p. 129.

<sup>153</sup> Van Mill, *Free Speech and the State*, p. 82. In the same book, on p. 51 van Mill explains that cross burning is considered as fighting words: “In *R.A.V. v. City of St. Paul* the Court struck down a ban on cross burning because

## 5.2. Jeremy Waldron: The Harm in Hate Speech

One of the most comprehensive and significant works on hate speech is Jeremy Waldron's *The Harm in Hate Speech* (2012). Although Waldron primarily addresses the US for not restricting hate speech and explains why hate speech is suppressed in European countries, his argumentation helps our understanding of the boundaries of free speech in a liberal democracy. Waldron concentrates primarily on dignity, since hate speech attacks and undermines dignity and simultaneously the public good. To start with the latter, inclusiveness is an important value of liberal democracy. Our modern society sponsors and fosters inclusiveness and recognizes our diversity in race, ethnicity, appearance, and religion. Living and working together despite our differences is a great challenge.<sup>154</sup> According to Waldron, this means that: "Each group must accept that the society is not just for them; but it is for them too, along with all of the others."<sup>155</sup> In his plea, why hate speech should be acknowledged, Waldron borrows the term "well-ordered society" from John Rawls. For many liberal constitutionalists, a well-ordered society is, first of all, a free society that protects free speech, even when it may disturb, shock, or offend a section of the population. In addition, it is a well-ordered society based on assurance, dignity, security, and consequently, "they live their lives and go about their business."<sup>156</sup> For Waldron, dignity should not be confused with honour or (self-) esteem, but should be understood in the sense of a person's fundamental right to be considered as a member of the society in good standing, belonging to a minority group does not prevent from interacting socially.<sup>157</sup>

A well-ordered society provides dignity and justice to its citizens and assures a commitment to these fundamental principles. According to Waldron, these fundamentals are: "that all are equally human, and have the dignity of humanity, that all have an elementary entitlement to justice, and that all deserve protection from the most egregious forms of violence, exclusion, indignity, and subordination."<sup>158</sup>

A well-ordered society cannot do without the law in upholding these principles:

"But just because assurance is a low-key background thing, the prime responsibility for its provision that falls upon the ordinary citizen is to refrain from doing anything to undermine it or to make the furnishing of this assurance more laborious or more difficult. And this is the obligation that hate speech laws or group defamation laws are enforcing."<sup>159</sup>

Hate speech or group defamation implies the explicit denial of these fundamentals for some group in society.<sup>160</sup> In a well-ordered society, everyone matters; every person is entitled to a

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it was deemed to single out a particular form of fighting words, and hence violated content neutrality. It was decided that notions of racial superiority and the expression of racial hatred are as valid in the protected realm of public discourse as arguments about what the tax rate should be. *Virginia v. Black* weakened the *R.A.V.* ruling somewhat, but affirmed the view that racist hate speech in public discourse is fully protected. It was ruled acceptable to prohibit some cross burning (on the lawn of an African-American family) because of its extreme form of intimidation (i.e. for its consequences) but in other instances, (at a Klan rally, for example) it is classified as "core political speech" and is fully protected."

<sup>154</sup> Waldron, Jeremy, *The Harm in Hate Speech*, Cambridge and London: Harvard University Press, 2012, p. 4.

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid.*, p. 16.

<sup>157</sup> *Ibid.*, p. 105.

<sup>158</sup> *Ibid.*, p. 82-3.

<sup>159</sup> *Ibid.*, p. 93-94.

<sup>160</sup> *Ibid.*, p. 83.

certain level of assurance to carry out normal day-to-day activities, either at work or outside work. Citizens feel secured against being humiliated, discriminated, or terrorized. They don't have to worry that their dignity and proper pride might be affected. It goes without saying that a person is assured of some basic kind of dignity and can focus on what is important to him in social interactions: its opportunities and pleasures.<sup>161</sup> But "when a society is defaced with anti-Semitic signage, burning crosses, and defamatory racial leaflets, that sort of assurance evaporates."<sup>162</sup>

Hate speech primarily targets this implicit social sense of assurance, especially among vulnerable minorities who rely on it. Hate speech is more than just autonomous self-expression, its bigotry aims at excluding certain people. To reinforce their message and undermine this assurance, they defile it with visible utterances of hatred, contempt, and exclusion.<sup>163</sup> The result is: "what was implicitly assured is now visibly challenged, so that there is a whole new set of calculations for a minority member to engage in as he sets out to do business or take a walk in public with his family."<sup>164</sup>

Moreover, hate speech seeks more than to undermine the public good of implicit assurance; it endeavors to establish a rival public good. People who publish hate speech (be it in words, symbols, leaflets) want to express to others that they are not alone; they want to coordinate and proliferate their message.<sup>165</sup> Waldron provides a clear example of this: he refers to Frank Collin, the leader of the Nazis who in 1977 attempted a demonstration in Skokie (a suburb of Chicago and known for its large Jewish population) and stated: "We want to reach the good people—get the fierce anti-Semites who have to live among the Jews to come out of the woodwork and stand up for themselves."<sup>166</sup>

Admittedly, hate speech law will drive the loathing underground, but at the same time that is precisely the object: to make clear that hate-mongers are isolated, embittered individuals. By these laws, they are unable "... to contact and coordinate with one another in the enterprise of undermining the assurance that is provided in the name of society's most fundamental principles. True, there is a cost to this: such laws may drive racist sentiment out of the marketplace of ideas into spaces where it cannot easily be engaged. However, the notion that what we most need for expression and publication of this kind is a great debate in which Nazis and liberals can engage one another honestly and with respect for each other's points of view is a curious one."<sup>167</sup>

Waldron's argument for restricting hate speech is fully in line with the verdicts of European judges. We already saw in *Ferét v. Belgium* that the European Court ruled that in a democratic society there is no place for xenophobic and racist slogans in which communities of immigrants are presented as grotesque and criminogenic and can lead to hatred or even violence against foreigners. In a similar case, *Le Pen v. France*,<sup>168</sup> the European Court ruled the same. Jean-Marie Le Pen was the formal leader of the France far-right wing political party Front National, and being convicted in France for inciting hatred, discrimination, and violence. On April 2<sup>nd</sup> 2004, the Paris Criminal Court sentenced Le Pen to a fine of 10,000 euros for his

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<sup>161</sup> Ibid., p. 84-8.

<sup>162</sup> Ibid., p. 85.

<sup>163</sup> Ibid., p. 88.

<sup>164</sup> Ibid., p. 88-9.

<sup>165</sup> Ibid., p. 94-5.

<sup>166</sup> Ibid., p. 95.

<sup>167</sup> Ibid., p. 95.

<sup>168</sup> ECHR 20 April 2010, 18788/09.

statements about the day on which there will not be 5 but 25 million Muslims in France, that the French have to clean the streets and have to behave submissively or otherwise get a beating.<sup>169</sup> This judgement was upheld on 24 February 2005 by the Paris Court of Appeal and on April 20<sup>th</sup> 2010 by the European Court of Human Rights. Based on the previous decisions and in the case of *Vejdeland and others v. Sweden*<sup>170</sup> that the European Court of Human Rights has maintained a consistent line.<sup>171</sup> Tor Fredrik Vejdeland and three other individuals belonging to the organization National Youth went to an upper secondary school and distributed leaflets by leaving them in or on the pupils' lockers. The leaflets contained, among others, the following message:

“Homosexual Propaganda (Homosexpropaganda)

In the course of a few decades society has swung from rejection of homosexuality and other sexual deviances (*avarter*) to embracing this deviant sexual proclivity (*böjelse*). Your anti-Swedish teachers know very well that homosexuality has a morally destructive effect on the substance of society (*folkkroppen*) and will willingly try to put it forward as something normal and good.

- Tell them that HIV and AIDS appeared early with the homosexuals and that their promiscuous lifestyle was one of the main reasons for this modern-day plague gaining a foothold.

- Tell them that homosexual lobby organisations are also trying to play down (*avdramatisera*) paedophilia, and ask if this sexual deviation (*sexuella avart*) should be legalised.”<sup>172</sup>

On July 11<sup>th</sup>, 2005, the four applicants were convicted by the District Court for the statements in the leaflets. The District Court ruled that these statements went beyond an objective debate of homosexuals as a group and considered the intention of the applicants as an agitation against a national or ethnic group. The applicants were sentenced to two months' imprisonment, a suspended sentence combined with a fine, and probation combined with 40 hours of community service.<sup>173</sup> In Sweden, the offense of agitation against a national or ethnic group is punishable. In this criminal case, National Youth argued that it wished to denounce the lack of objectivity in Swedish education. The court on appeal upheld this defense based on freedom of speech, but the Swedish Supreme Court did not uphold this decision and the ECtHR confirmed this last decision.<sup>174</sup> These court cases show a consistent line; there is no protection of hate speech or other kinds of expressions and actions which constitute intolerance. It also gainsays the frequently used slippery slope argument. Proponents of the protection of hate speech only restrict hate speech when there is a 'clear and present danger.' Only when it is proven that there is a direct link between harmful expression and the resulting harmful action is it legitimate to proscribe freedom of expression.<sup>175</sup> They fear that once hate

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<sup>169</sup> Nieuwenhuis, *Over de grens van vrijheid van meningsuiting*, p. 333.

<sup>170</sup> ECHR 9 February 2012, Application no. 1813/07

<sup>171</sup> Dommering, Egbert, “Féret en daarna”, in M.J. Geus (ed.), *25 jaar Mediaforum, een blik vooruit via de achteruitkijkspiegel: 25 jaar rechtspraak media- en communicatierecht*, Amsterdam: Otto Cramwinckel, 2013, p. 162.

<sup>172</sup> ECHR 9 February 2012, Application no. 1813/07.

<sup>173</sup> Ibid.

<sup>174</sup> Dommering, *Féret en daarna*, p. 162.

<sup>175</sup> Cohen-Almogor, *Hate and Racist Speech in the United States – A Critique*, p. 122, available at: <http://www.thecritique.com/articles/the-charlie-hebdo-affair-between-speech-terror/>

speech is forbidden more forms of offensive freedom of expression will be banned. It will have a 'chilling effect' on free speech as a whole. The flaw in this line of reasoning is the presumption that free speech is absolute and an end in itself. As I will point out later in this chapter, in liberal democracy freedom of expression is not the only fundamental right and value. Other fundamental rights are equally important, such as the right to liberty and security of a person, the right to the peaceful enjoyment of one's possessions, and the prohibition of discrimination.

## **6. Does freedom of speech involve moral and/or legal responsibility?**

Before going further in discussing whether free speech involves any moral and/or legal accountability, I want to make some general remarks regarding the relationship between social values and the law. When discussing the boundaries of free speech, it is usually done from the perspective of the one who utilizes free speech, the sender, in relation to the state. In this vertical relationship, the discussion mostly revolves around how the state can intervene in limiting free speech and more importantly, how far can an individual express his opinion. This is not surprising, for as we have already seen, autonomy, and against this background self-expression, is highly valued in liberalism and is the core value of liberal democracy. Thus, intervening in free speech is conceived as restricting someone's autonomy, the latter is, as we just saw, regarded as intrinsically valuable in liberalism. Rarely does the discussion revolves around the position of the receiver; what impacts do certain forms of speech or forms of expression have on the individual or group in question. In this section, I will deal with the horizontal relation: citizens amongst themselves. I will argue that the effects of freedom of expression on its recipients are of equal importance as the right to utilize it.

### **6.1 Legal Moralism, Offense, and Harm: Joel Feinberg: Offense to Others**

What to do if words or actions do not incite violence, but are so offensive that it is self-evident that the intention behind them is to produce "unpleasant or uncomfortable experiences—affronts to sense or sensibility, disgust, shock, shame, embarrassment, annoyance, boredom, anger, fear, or humiliation—from which one cannot escape without unreasonable inconvenience or even harm?"<sup>176</sup> In his book *Offense to Others* (1985) the late professor Joel Feinberg endeavors to answer this question. Feinberg suggests that Mill's Harm Principle is not sufficient for a liberal society to rely on. Feinberg defines the Harm Principle as follows: "It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is probably no other means that is equally effective at no greater cost to other values."<sup>177</sup> Feinberg argues that liberal societies are also in need of the Offense Principle which reaches further than the Harm Principle: "It is always a good reason in support of a proposed criminal prohibition that it is probably necessary to prevent serious offense to

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<sup>176</sup> Feinberg, *Offense to Others*, p. 5.

<sup>177</sup> *Ibid.*, p. xiii.

persons other than the actor and would probably be an effective means to that end if enacted.”<sup>178</sup>

Although Feinberg admits we should approach the subject of offensiveness with the greatest caution,<sup>179</sup> he denotes why offense in some cases should be tackled: “we demand protection from nuisances when we think of ourselves as trapped by them, and we think it unfair that we should pay the cost in inconvenience that is required to escape them.”<sup>180</sup> I admit that there is an overlap with hate speech (especially when it comes to what Feinberg calls *profound offense*), but I also believe the subject of offense is broader. Hate speech aims to attack the dignity of a person or group, whereas offense is, as we just have seen, to produce unpleasant or uncomfortable experiences. As David van Mill points out, liberal democracies apply a kind of an Offense Principle “where citizens are penalized for a variety of activities, including speech, that would escape prosecution under the harm principle. Wandering around the local shopping mall naked, or engaging in sexual acts in public places are two obvious examples.”<sup>181</sup>

Offense is a highly relevant subject if we look at the *Charlie Hebdo* affair (2015). At the same time, we can see that liberal democracies do not adequately deal with the issue of offense. Except for hate speech, most courts in liberal states do not take offense as a serious justification to limit freedom of expression. This is for two reasons: (1) Offense is subjective, a *person* who heard, saw, or read a message finds it offensive and *another* does *not*. (2) Because offense is subjective, it requires psychological evaluation and this entails that another profession decides constitutional matters, something with judges are reluctant to accept. Therefore, judges usually dismiss offense.<sup>182</sup> To determine the seriousness of an offense, Feinberg uses the following standards:

1. *The magnitude of the offense*, which is a function of its intensity, duration, and extent.
  - a. *Intensity*. The more intense a typical offense taken at the type of conduct in question, the more serious is an actual instance of such an offense.
  - b. *Duration*. The more durable a typical offense taken at the type of conduct in question, the more serious is an actual instance of such offense.
  - c. *Extent*. The more widespread the susceptibility to a given kind of offense, the more serious is a given instance of that kind of offense.
2. *The standard of reasonable avoidability*. The more difficult it is to avoid a given offense without serious inconvenience to oneself the more serious is that offense.
3. *The Volenti maxim*. Offended states that were voluntarily incurred, or the risk of which was voluntarily assumed by the person who experienced them, are not to count as "offenses" at all in the application of a legislative "offense principle."
4. *The discounting of abnormal susceptibilities*. (This can be thought of as a kind of corollary of 1.) Insofar as offended states occur because of a person's abnormal susceptibility to offense, their seriousness is to be discounted in the application of a legislative "offense principle."<sup>183</sup>

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<sup>178</sup> Ibid.

<sup>179</sup> This explains why Feinberg discerns two kinds of offense: “profound offense” and “offensive nuisances merely”.

<sup>180</sup> Ibid., p. 5.

<sup>181</sup> van Mill, "Freedom of Speech", available at <https://plato.stanford.edu/archives/win2017/entries/freedom-speech>

<sup>182</sup> Cohen-Almagor, *Between Speech and Terror: The Charlie Hebdo Affair*, p. 2.

<sup>183</sup> Feinberg, *Offense to Others*, p. 35.

Feinberg gives several (hypothetical) examples of offenses that he submits to the above-mentioned standards. The most compelling factor to penalize an offense is the *standard of reasonable avoidability*. Films that display horrible racist images<sup>184</sup> in order to please secret 'black-haters' so that they have 'a pleasant evening' and played in privately owned places is reasonably avoidable and "the Offense Principle... will not warrant legal prohibition of the films".<sup>185</sup> But, as Feinberg continues, we acknowledge "that severe restrictions should be made on announcements and advertisements. A black need not suffer the direct humiliation and stinging affront to his dignity and self-respect that would come from his being forced into the audience for a "folk film." He can simply stay away, and avoid the worst of it. But if the city is blanketed with garish signs announcing the folk films, or worse than that, signs that dispense with euphemisms and advertise "shows that put niggers in their place," then the affronts are no longer private; the offense is no longer avoidable, and its nature no less profound. The signs will be even more deeply offensive than those inviting participation in cannibalistic banquets..., since they can be expected to inflame the blacks, who are the direct object of their insult, in the manner of fighting words, further frustrating them since violent response cannot be permitted. The offense of conspicuous advertisements, even nongraphic ones (though graphic ones are the worst), is so great that any restriction of them short of interference with the minimum basic right of communication is warranted."<sup>186</sup>

The planned Nazi demonstration in Skokie discussed previously is something that was not easily avoidable for the Jewish residents. On the contrary, by wearing Nazi uniforms accompanied with the swastika, the Nazis deliberately wanted to offend the Jewish community in the most intensely, profoundly, and personal way. The sole motivating purpose for the Nazis in Skokie was to impose offense on its Jewish residents, and "this spiteful and malicious through and through" offense, is "thus lacking measurable social value. In the purest hypothetical cases, at least, where for some people the offense cannot possibly be avoided, and the menacing abuse of the displayed symbols is the sole "message" communicated, the offense principle clearly justifies prohibition, whether by a preliminary injunction, by on the spot "cease and desist orders," or by general prohibitory statute."<sup>187</sup> In the concept of free speech as a positive freedom, the Offense Principle justifies the prohibition of offensive speech which is so intense, durable, extensive, and hard to avoid. This is further justified if the offensive speech doesn't have any social value. That is to say, it doesn't give a meaningful contribution to the reasons for which value free speech: discovery of truth, self-fulfillment, human progress, citizen participation in a democracy, and the much-needed control of the government.<sup>188</sup> Like hate speech, offensive speech sows the seeds of discord and to views that are incongruous with constitutional values such as social placidity, tolerance, and non-discrimination.

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<sup>184</sup> See for example Feinberg, *Offense to Others*, p. 158: "The main features could be stories of uppity blacks put in their place by righteous whites, taunted and hounded, tarred and feathered, tortured and castrated, and in the climactic scenes, hung up on gallows to the general rejoicing of their betters. The aim of the films would be to provide a delicious catharsis of pent-up hatred."

<sup>185</sup> Feinberg, *Offense to Others*, p. 159.

<sup>186</sup> *Ibid.*, p. 162.

<sup>187</sup> *Ibid.*, p. 164.

<sup>188</sup> Cf. Mondal, Anshuman, *Islam and Controversy: The Politics of Free speech After Rushdie*, Basingstoke: Palgrave Macmillan, 2014, p. 4, who states: "...freedom of speech is not an end in itself but a means towards achieving mutual understanding, so too is dialogue only a means towards the achievement of social justice, which is a goal that lies beyond discourse even if it is nevertheless only conceivable within and through it."



There is another argument that I need to make. Offensive speech is more than just a form of ordinary ‘communication’, due to the relation between the speaker and the recipient. Offense speech is a power relation between the powerful speaker and the subordinate recipient, or as Anshuman Mondal beautifully puts it:

“Offensive speech acts are therefore ‘performative’ statements that do work in the world by establishing a relation of domination and subordination within a ‘total speech situation’, as are speech acts that respond to them by ‘taking’ offence.”<sup>189</sup> “What is being performed in the giving or taking of offence is power or, rather, to be more precise, the positioning of oneself in a power relation. To give offence is to display one’s ability to do so; to take offence is to signal one’s subordinate position in that power relation, to display a vulnerability that marks oneself as a victim or object of power – to perform one’s powerlessness.”<sup>190</sup>

In liberal democracies, which are often multicultural societies, offensive speech often relates to minorities. In the powerful relationship of offensive speech, minorities are the subordinate vulnerable recipients. The examples which Feinberg provides and which I discussed all involve minorities: both Jews and Afro-Americans are minorities. Events in Europe such as the publishing of the Satanic Verses by Salman Rushdie, the Danish cartoons affair, and the Paris *Charlie Hebdo* shooting have all to do with offense and are related to another minority group: Muslims. While minorities are vulnerable and often subordinate and therefore more prone to the negative consequences of offensive speech, the opposite is true for the dominant group. This explains why “Western liberals very rarely ‘take offence’ because a dominant group can easily ignore offensive speech acts directed against it; such acts do not disturb the structural advantage they enjoy.”<sup>191</sup> Moreover, in addition to being more capable of ignoring offensive speech than subordinate groups, dominant groups are able to return offense more easily too. This is why, as Anshuman Mondal rightfully points out, “for instance, there are so few racially abusive epithets that can be directed against white people, and why they carry so little force – is ‘honky’ really comparable as a term of abuse to ‘nigger’?”<sup>192</sup> Or consider the following scene from the movie *Full Metal Jacket* (1987) when Gunnery Sergeant Hartman yells at his recruits: “There is no racial bigotry here. I do not look down on niggers, kikes, wops, or greasers. Here you are all equally worthless.”

The same can be said for the following slang and invective referring to homosexuals and women: cocksucker, cunt, fagot, slut, fag, queer, ‘you dumb fuck’, slag; similar offensive terms for heterosexual men are much less available in the English language.<sup>193</sup> Therefore, I concur with Katharine Gelber when she purpose to empower minorities with what she calls the ‘speaking back policy’, which is a speech-enabling policy. The fact that she speaks from a predominantly American viewpoint and concentrates on hate speech does not diminish her arguments to ameliorate the negative effects of offensive speech. Briefly, Gelber believes that the effects of hate speech should be combated by more speech; that is to say that the targets (usually minorities) of hate speech become able to respond by rebutting the messages contained within hate speech. The advantage of the speaking back policy is that it fits in every constitutional environment, including that of the US. Hate speech policy, i.e. restricting hate

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<sup>189</sup> Mondal, *Islam and Controversy: The Politics of Free speech After Rushdie*, p. 5.

<sup>190</sup> *Ibid.*, p. 23.

<sup>191</sup> *Ibid.*, p. 26.

<sup>192</sup> *Ibid.*, p. 27.

<sup>193</sup> *Ibid.*

speech collides with the First Amendment of the US constitution, whereas the speaking back policy does not. As such, the proposed speaking back policy is more compatible with a liberal constitution than hate speech policy.<sup>194</sup> I do, however, have certain doubts as to whether the speaking back policy as envisaged by Gelber is sufficient to cope with hate speech. Even today, a large group of the dominant population simply does not accept minorities expressing their opinion. How often do we hear that minorities, such as foreigners -people with a non-Western background, Muslims, etc.- should adopt the dominant position? And if they don't accept the dominant position then they are not integrated, or even further, they should return to their country of origin. After all, why should we as liberals accept those who don't embrace all our liberal values?

In addition, it is the duty of a liberal state based on the *Rechtsstaat* that minorities, just like freedom of expression, are protected. In a well-ordered society, both minorities and the dominant population should live their lives without fearing that their dignity, reputation, or let alone their lives are at stake. I agree with Raphael Cohen-Almagor who notes: "Are the statements "A Good Muslim Is A Dead Muslim" and "Jews should be gassed" merely an expression of (political) opinion that are shielded by the Free Speech Principle? In themselves, those statements are harmful and they might lead to killing."<sup>195</sup> And even if they don't lead to killing, such statements don't contribute to mutual understanding but "undermines peoples' equal status in society, that degrades them."<sup>196</sup>

Thus, since a liberal state is not only based on democracy but also on the *Rechtsstaat*, I will argue that freedom of expression should be viewed and judged in the light of the *Rechtsstaat*.

## 6.2. A revaluation of the *Rechtsstaat*

Previously, I argued that positive freedom is a more appropriate concept of political freedom in this day and age. Admittedly, there is always the danger that the majority imposes its view of freedom to a minority which can lead to totalitarianism, characteristic "for its consistent nonrecognition of civil rights"<sup>197</sup> and "its subordination of all spheres of life to the demand of politics."<sup>198</sup> Nevertheless, in a democratic rule of law or *Rechtsstaat*, a parliament elected by the people must respect fundamental rights like freedom of religion, freedom of expression, and the right to privacy. In this way, minorities are protected against a tyrannical majority. Both Arendt and Berlin view plurality as a prerequisite for a democratic *Rechtsstaat*. The rise of the idea of the *Rechtsstaat* is linked with fundamental rights, especially freedom rights and the principle of equality. The *Rechtsstaat* is based on four pillars. The first one is that government intervention may only be based on general rules. Not only is this standard directed against arbitrariness and summary justice, but it also turns out that the government is bound by law. The second pillar is, as we have previously seen, the separation of powers, a division of power among the different government agencies. This allocation should ensure, among other things, that the legislative and executive power do not coincide. Otherwise the

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<sup>194</sup> For a full discussion of Katharine Gelber's speaking back policy, see Gelber, Katharine, 'Speaking Back': *The Likely Fate of Hate Speech Policy in the United States and Australia*, in Ishani Maitra & Mary Kate McGowan (eds.), *Speech & Harm, Controversies Over Free Speech*, Oxford: Oxford University Press, 2012. p. 50-71.

<sup>195</sup> Cohen-Almagor, *Hate and Racist Speech in the United States – A Critique*, p. 101.

<sup>196</sup> *Ibid.*

<sup>197</sup> Arendt, *Between Past and Future*, p. 149.

<sup>198</sup> *Ibid.*, p. 149.

executive power can set rules enabling it to intervene. In a *Rechtsstaat*, the executive power can only restrict freedom of citizens when this power is based upon the law. Therefore, the system of checks and balances can be conceived as a guarantee of the freedom of the citizens. The third pillar consists of legal protection by the independent judge. The judge can give judgment if the government infringes the legal norms.<sup>199</sup> It follows that an essential element of the *Rechtsstaat* is a judiciary system that is independent of the administrative and political authorities. Only the judges are entitled to reprimand the government in conscience and complete freedom and even coerce it to obey the law and restore justice. Van Caenegem rightly notes that “a judiciary which is in the hands of the government would turn the *Rechtsstaat* into a hypocritical farce.”<sup>200</sup>

In the fourth pillar, the existence of fundamental rights comes forward; citizens must be protected against governmental power. Although the first three pillars concede that the lawgiver allots the executive power with draconian powers, and the judge can only deem if the exercise thereof is in agreement with the law, it is the fundamental rights that provide a more substantive limitation of the behavioral alternatives of the government, to which the legislator is also bound. Therefore, a *Rechtsstaat* without fundamental rights is not readily imaginable.<sup>201</sup>

From the above, we can conclude that it is not only characteristic for a *Rechtsstaat* that the state’s components are subjected to law, but that certain safeguards forestall the abuse of power. The *Machtstaat* (‘state based on might’) or the *Polizeistaat* (‘police state’) is the opposite of the *Rechtsstaat*, “where the arbitrary will of the persons in power prevails and the rulers do not have to observe legal norms.”<sup>202</sup>

Fundamental rights -such as freedom of expression- apply to everyone, but they are not vital to the majority, because majorities will still exercise their rights. This doesn’t apply only to democracies, but also dictatorships.<sup>203</sup> Absolute rulers such as Hitler, Stalin, and Mao probably had more support than any elected democratic leader. Their regimes didn’t lack any democracy, but the *Rechtsstaat* was missing. The ruling majorities in the Third Reich, the Soviet-Union or the Chinese People's Republic were not necessarily oppressed by the state. What was missing in these regimes was the rights of individuals and minorities. For those who hold human rights in high esteem, the *Rechtsstaat* is more important than democracy. The *Rechtsstaat* operates as a counterweight to the law of the strongest and is an indispensable correction to democracy and the power of the majority. Fundamental rights in a *Rechtsstaat* are primarily needed to protect individuals and minorities. This doesn’t mean that the *Rechtsstaat* only benefits the minorities, it is also in the interest of the majority. The characteristic of a *Rechtsstaat* is the taboo on violence. Political conflicts -like civil wars, which are unfortunately universal- can be settled peacefully.<sup>204</sup> It ensues that in a *Rechtsstaat* there’s no place for free speech inciting violence. Hate speech is abhorrent. It collides with rights and values such as human dignity and tolerance. We have seen in this chapter that hate speech mostly affects minorities because of their vulnerable subordinate social position and that their protection is a duty of the *Rechtsstaat*. Both hate speech and offensive speech can

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<sup>199</sup> Nieuwenhuis et. al., *Hoofdstukken Grondrechten*, pp. 1-2.

<sup>200</sup> Caenegem, *An Historical Introduction to Western Constitutional Law*, p. 16.

<sup>201</sup> Nieuwenhuis et. al., *Hoofdstukken Grondrechten*, pp. 1-2.

<sup>202</sup> Caenegem, *An Historical Introduction to Western Constitutional Law*, p. 16.

<sup>203</sup> It is, of course, also possible that the minority rules the majority. Examples of the past are the white-minority rule in South-Africa and European colonialism.

<sup>204</sup> Snel, *Recht van spreken*, p. 76-7.

lead to social exclusion and violence. It is true that offense is subjective, and this entails that the offense principle can only come into effect when there is a wrongful offense; the rights of others are violated. For example, finding certain fashion (a man wearing a pink shirt) or haircuts (a crewcut on a woman) offensive can never be banned by the offense principle. In other words, proscribing freedom of speech can only be done when there are compelling reasons to do so. The context in which freedom of expression operates is crucial in determining whether to proscribe it. In a *Rechtsstaat* there is no prioritization of fundamental rights such as freedom of expression. In some cases, they may overlap, be complementary or collide with each other. In case of the latter, and this is most likely with the horizontal application of fundamental rights in liberal democracies, it will be necessary to weigh up the interest of the different parties involved. This entails that fundamental rights are not absolute and that reasonable limitations can be placed on them.

### **Conclusion**

This chapter has explored the possibilities of freedom of expression in liberal democracies. The justifications for freedom of expression - discovery of truth, self-fulfillment, human progress, citizen participation in a democracy, and the much-needed control of government - indicate that freedom of expression is likely more a positive freedom than a negative freedom, and freedom *to* expression is more appropriate than freedom of expression. The aforementioned justifications and other functions of free speech relate to responsibility. The cases discussed in this chapter show that European judges can set boundaries to free expression, if justified. Inciting to violence, discrimination, intolerance, or sowing the seeds of discord are examples that are incongruous with the constitutional values of liberal democracy. Chapter 3 will provide affirmative evidence for freedom of expression in Islam and the boundaries of free speech. This chapter will show that Islamic law has its justifications for freedom of expression, but that its outlook is more centered on communities. Chapter 5 will make a thorough comparison between the boundaries of freedom of expression in liberal democracies and Islamic law.

## Chapter 3

### Freedom of expression in Islam

This chapter examines the subject of freedom of expression from an Islamic perspective, based on the Qur'an, *Sunna* and *fiqh*. In the previous chapter, we saw that in liberal democracies, there are several justifications for freedom of expression, and as such, freedom of expression is framed predominantly as positive freedom. We also saw that there can be compelling reasons to curtail freedom of expression. Following the structure of chapter one, I begin with the justifications for freedom of expression, I will then examine various foundations and institutions of the *Shari'a* to discern any corroborating evidence for freedom of expression in Islam. Finally, I will consider reasons given to justify restrictions of free expression in Islam. The subject matters of apostasy and blasphemy will be treated in the next chapter, due to the scope and intricacies of both and because they are closely intertwined.

#### Introductory Remarks

In chapter 2, I discussed two concepts of freedom: negative freedom and positive freedom. Negative freedom is freedom *from*; it is the area where someone can go about their business unmolested. Negative freedom implies not being interfered with by others, being left alone.<sup>205</sup> Positive freedom, or freedom *to*, is the freedom in which a person is a subject and not an object, in which people can formulate and shape their lives and achieve their ideals and goals, without being thwarted or decided by others (internal or external pressure). This means that a person is a rational, active, and willing being and bears responsibility for his choices.<sup>206</sup> Positive freedom is broader than negative freedom, it is about the autonomy of an individual, a core value in liberalism. Freedom of expression can be understood as both negative or positive freedom. As a negative freedom, which is the classical laissez-faire liberal standpoint, free speech is primarily conceived as a right without impediments. Freedom of speech conceived as a positive freedom is not only a right but serves as a purpose. In most literature,<sup>207</sup> the following justifications for freedom of expression are mentioned: discovery of truth, self-fulfilment, human progress, citizen participation in a democracy, and the much-needed control of the government. Free speech is a fundamental right that should only be restricted by a liberal state when there are compelling reasons to do so. Freedom of expression is, as Eric Barendt rightfully observes, "under the ECHR ... a *negative* liberty protected against state interference, though in some circumstances a state may be required to protect its exercise."<sup>208</sup> Thus, limiting free speech in a liberal democracy is subject to several conditions. Freedom of expression also implies responsibility, which concurs with the concept of positive freedom: a human is a rational, active, and willing being who bears responsibility

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<sup>205</sup> Berlin, *Liberty*, Incorporating *Four Essays on Liberty*, p. 169.

<sup>206</sup> *Ibid.*, p. 179.

<sup>207</sup> Barendt, *Freedom of Speech*, pp. 6-23; Cohen-Almagor, *Between Speech and Terror: The Charlie Hebdo Affair*, p. 2; Dahl, *On Democracy*, pp. 96-7; Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech*, pp. 3-6; Hawthorn, *Free Speech*, pp. 17, 27, 177; Nieuwenhuis, *Over de grens van de vrijheid van meningsuiting*, p. 22; Stokum, *Godslastering, discriminerende uitingen wegens godsdienst en haatuitingen*, pp. 49-54; Fish, *There's No Such Thing as Free Speech And It's a Good Thing*, p. 123.

<sup>208</sup> Barendt, *Freedom of Speech*, pp. 65-6.

for his or her choices. Like any other fundamental right, freedom of expression is not absolute. Furthermore, as there is no prioritization of fundamental rights, when a conflict between fundamental rights occurs, it is up to the judge to decide which fundamental right should be restricted. For example, free speech may conflict with other fundamental rights such as freedom of religion and the non-discrimination principle. A well-ordered society is a free society that protects free speech, even when it may disturb, shock, or offend a section of the population. At the same time, a well-ordered society is based on assurance, dignity, security, tolerance, and the ability for people to live their lives and go about their business in peace. Citizens feel secured against being humiliated, discriminated against, or terrorized and don't have to worry that their dignity and proper pride is affected. Curtailing freedom of expression takes effect when this implicit social sense of assurance is affected.

This chapter aims to examine the justification and grounds for the boundaries of freedom of expression in Islam. In this sense, this chapter is a prelude to chapter 5, in which I will compare and contrast freedom of expression in a liberal democracy and in Islam. However, in general, the question is whether a comparison can be made at all between liberal democracy and Islam. I see two major obstacles to this; 1) Islam is a revealed religion and as such its socio-political system is divinely inspired. The interpretive/legal tradition that emerges 'around' this revelation defines, reconstructs, and develops such a system,<sup>209</sup> while liberal democracy is a secular system of man-made laws and policies. 2) Islam is *inter alia* based on a religious community known as *ummah*, with its own value system. Because this religious community has deeply shared standards and values, there is a more unified morality in this community. Furthermore, since Muslims are scattered across the world in different nation-states, there exist many variants of this value system. Nevertheless, there is, as Ellethy puts it, "a spiritual and universal bond between Muslims."<sup>210</sup> In political philosophy, there are two kinds of moralities: a thin morality and a thick morality. Dale Snauwaert, while referring to Micheal Walzer, defines both moralities as follows: "A thin morality is one constituted by general and universal principles. A thick morality is that which is constituted by deliberation conditioned by history, tradition, and culture."<sup>211</sup> As such, Muslim majority countries can, just like many countries in Africa and Asia, be construed as *thick* communities. Liberal democracies are *thin* communities and often pluralistic. In a *thin* community, people are at liberty to live their lives as they wish. Because a thin community comprises different, diverse, and controversial individuals and groups, people need tolerance to coexist in the same place. In the previous chapter, we noted that when tolerance is affected by freedom of expression, the latter can be curtailed. Despite these two major differences, I will endeavour to make a comparison between freedom of expression in Islam and liberal democracies. There are two major

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<sup>209</sup> See Ellethy, Yaser, *Islam, Context, Pluralism and Democracy: Classical and Modern Interpretations*, London and New York: Routledge, Taylor & Francis group, 2017, p. 191: "We should always be reminded...that this is not about a comparison between two religions or political systems, but this is rather about the acceptability of a religion to a human made socio-political system. Again, the boundaries between the divine and the human should not escape our notice in this context."

<sup>210</sup> Ibid., p. 203-4.

<sup>211</sup> Snauwaert, Dale T., *Response: The "Thick and Thin" of Democratic Moralit*, p. 167, *Philosophy of Education Archive* (2003): 167-169.

. See also, Walzer, Michael, *Thick and Thin: Moral Argument at Home and Abroad*, Notre Dame (Indiana): University of Notre Dame Press, 1994.

p. 4, who states: "This dualism is, I think, an internal feature of every morality. Philosophers most often describe it in terms of a (thin) set of universal principles adapted (thickly) to these or those historical circumstances. I have in the past suggested the image of a core morality differently elaborated in different cultures."

reasons for making such a comparison. First, the world has become a global village; due to modern technology, news is shared in a split second around the world. Secondly, all liberal democracies include Muslim communities. Many controversial incidents related to freedom of expression and Islam, such as the Salman Rushdie affair, the murder of Theo van Gogh, the Danish cartoons affair, and the Paris *Charlie Hebdo* shooting all occurred in liberal democracies. These events raise questions such as whether Islam is compatible with liberalism and if Muslims can peacefully coexist with liberal societies. Before dealing further with the subject of freedom of expression in Islam, it is appropriate to make some general remarks regarding freedom in Islam. Continuing with the two concepts of liberty of Berlin, the Islamic view focuses on positive freedom or freedom *to*. There is freedom of choice (*'ikhtiyār*), but this is conceptualised differently than in a liberal society. Free choice in liberal democracy doesn't necessarily serve a goal, it is up to the individual to set a goal. More importantly, an individual is presumed to be able to make his choice unhindered. According to Islam, the ultimate goal of a Muslim is the balance between proper conduct (*iṣlāḥ*) and enjoyment in this life and to be saved from the punishment of Hell and to enter Paradise (*Jannah*). This can *inter alia* be seen in the following verse of the Qur'an:

But seek, through that which Allah has given you, the home of the Hereafter; and [yet], do not forget your share of the world. And do good as Allah has done good to you. And desire not corruption in the land. Indeed, Allah does not like corrupters.<sup>212</sup> [28:77]

Consequently, freedom according to Islam means having free choice and being responsible for one's actions, it is associated with trust or *amāna* in the Qur'an:

Indeed, We offered the Trust [*Amāna*] to the heavens and the earth and the mountains, and they declined to bear it and feared it; but man [undertook to] bear it. Indeed, he was unjust and ignorant. [33:72]<sup>213</sup>

Although *amāna* has several different meanings in different contexts, in this verse it refers to responsibility (*taklīf*) and the acceptance of injunctions and interdictions with their associated conditions. The one who fulfils this responsibility will be recompensed, while the one who omits it will be punished.<sup>214</sup> Thus, freedom in Islam is not an end itself, but a means to finally enter *Jannah*. One has the freedom to choose for Islam, to have the freedom to believe in its tenets of faith and to commit righteous acts, which will hopefully lead to admission in *Jannah*. Freedom of expression is a part of freedom and understood to contribute positively to the functioning of several foundations and institutions of the *Sharī'a*. As such, freedom of expression is, like freedom, not an end in itself. Free speech can enhance social cohesion among members of the Islamic community, and it upholds human dignity and contributes to the discovery of truth.

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<sup>212</sup> SAHIH INTERNATIONAL Translation, <https://quran.com/28>

<sup>213</sup> SAHIH INTERNATIONAL Translation, <https://quran.com/33>

<sup>214</sup> Ibn Kathīr, Abū al-Fidā' Ismā'īl ibn 'Umar, *Tafsīr al-Qur'ān al-'Azīm*, 5 vols., Beiroet: Dār al Sadar, second edition, 2004, vol. 4, p. 253.

## 1. Justifications for Freedom of Expression in Islam

I begin this section with the main objectives of freedom of expression in Islam, as in the previous chapter I demonstrated that in a liberal democracy we value freedom when it becomes practically meaningful. As such, freedom is not an abstract concept, but a condition in which we have the opportunity to become or do something else. Thus, we consider ourselves free if we can achieve the objectives that we as individuals set. In relation to this, positive freedom is more appropriate than negative freedom and this entails that freedom of expression or rather freedom *to* expression is appreciated for achieving various goals. Like in liberal democracies, freedom of expression in Islam has several objectives: upholding human dignity and discovery of truth. In this section, I shall discuss these goals.

### 1.1. Human Dignity and Discovery of the Truth

In his pioneering work *Freedom of Expression in Islam* it becomes clear that the contemporary Muslim scholar Mohammed Hashim Kamali treats freedom of expression in Islam as a positive liberty. Freedom of expression has, as Kamali states, two objectives: upholding human dignity and discovery of the truth. Freedom of expression is, according to him, an integral part of self-development. This entails that curtailing the expression of an individual in any form - speech, writing, propagating – will have a negative impact on both his dignity and his aspiration for personal growth.<sup>215</sup> Unfortunately, due to imposing heavy restrictions on freedom of expression and opinion in many Muslim majority countries, individuals are still lacking both dignity and personal growth. For the latter, as another contemporary Muslim scholar observes, in all liberal states freedom of expression is widely practiced and citizens can express their opinion without censorship and restrictions. Due to free expression and other factors, many of these countries achieved great progress in various fields.<sup>216</sup>

According to the Qur'an, human dignity (*karāma*) "is the natural right of every human being"<sup>217</sup>:

"And We bestowed dignity on the children of 'Adam and provided them with rides on the land and in the sea, and provided them with a variety of good things and made them much superior to many of those whom We have created."<sup>218</sup> (17:70)

Ibn Kathīr explains that Allah tells about His honor to the sons of Adam, i.e. humankind, and honoring them in His creation by creating them in the best stature and power of speech. He then refers to another verse:<sup>219</sup>

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<sup>215</sup> Kamali, *Freedom of Expression in Islam*, p. 8-9.

<sup>216</sup> Basyūnī, 'Abd al-Salām, *The Freedom of Opinion in Islam*, Translated by Ahmad Rami Shahid, Riyadh: International Islamic Publishing House (IIPH), 2007, p. 65-6.

<sup>217</sup> Kamali, *Freedom of Expression in Islam*, p. 11.

<sup>218</sup> English translation: Justice Mufti Taqi Usmani, [www.quranexplorer.com/Quran/?Sura=17&FromVerse=70&ToVerse=70&Script=Hide&Reciter=Mishari-Rashid&Translation=Eng-Mufti-Taqi-Usmani-Audio&TajweedRules=Tajweed-ON](http://www.quranexplorer.com/Quran/?Sura=17&FromVerse=70&ToVerse=70&Script=Hide&Reciter=Mishari-Rashid&Translation=Eng-Mufti-Taqi-Usmani-Audio&TajweedRules=Tajweed-ON). In my opinion this translation is closer to the Arabic than SAHIH INTERNATIONAL Translation.

<sup>219</sup> Ibn Kathīr, *Tafsīr al-Qur'ān al-'Azīm*, Vol. III, p. 280.



“We have certainly created man in the best of stature.”<sup>220</sup> (95:4)

Both verses of the Qur’an refer to humankind as a whole. Human dignity is an integral part of every human being and not something exclusive to Muslims.

The discovery and vindication of truth are perhaps the most important objective of freedom of expression in Islam. I agree with Kamali that if there is a direct clash between human dignity and the quest for truth, it is reasonable to assume the latter would normally prevail. The following Qur’ānic text sets the boundaries of free speech in Islam:<sup>221</sup>

“Allah does not like the evil words to be said openly except from anyone wronged.”<sup>222</sup> (4:148)

The meaning of this verse is that in normal conditions, it is proscribed to insult or demean other people.<sup>223</sup> The reason for this restriction is obvious: using evil, hurtful, immoral, or obscene language can seriously damage someone’s dignity. However, the latter part of this verse allows the lifting of this restricting for the victims of injustice to make their voices heard. They may be granted *the opportunity of expressing* their views, without any restriction, if it serves the cause of truth and justice. The utterance of evil speech may be permitted for a witness in a court of law, even if it violates someone’s dignity, provided it contributes to establishing the truth or justice. For example, the court witness in reference may offer several observations that might compromise someone’s dignity. At the same time, and this is beyond the scope of freedom of expression, there are instances where the freedom and dignity of an individual may take precedence over seeking the truth. This can be readily seen in the prohibition of espionage and the infringement on the inviolability of housing in the Qur’an:<sup>224</sup>

“O you who have believed, avoid much [negative] assumption. Indeed, some assumption is sin. And do not spy or backbite each other. Would one of you like to eat the flesh of his brother when dead? You would detest it. And fear Allah; indeed, Allah is Accepting of repentance and Merciful.”<sup>225</sup> (49:12)

“O you who have believed, do not enter houses other than your own houses until you ascertain welcome and greet their inhabitants. That is best for you; perhaps you will be reminded.”<sup>226</sup> (24:27)

Thus, personal freedom such as the sanctity of the home and other forms of privacy *must not be curtailed under cover* of seeking the truth. In other words, the means do not justify the ends.

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<sup>220</sup> SAHIH INTERNATIONAL Translation, <https://quran.com/95>

<sup>221</sup> Kamali, *Freedom of Expression in Islam*, p. 9.

<sup>222</sup> English translation: Justice Mufti Taqi Usmani, available at <http://www.QuranExplorer.com/Quran/?Sura=4&FromVerse=148&ToVerse=148&Script=Hide&Reciter=Mishari-Rashid&Translation=Eng-Mufti-Taqi-Usmani-Audio&TajweedRules=Tajweed-ON>

<sup>223</sup> Ibid.

<sup>224</sup> Kamali, *Freedom of Expression in Islam*, p. 9.

<sup>225</sup> Sahih International Translation, <https://quran.com/49>

<sup>226</sup> Sahih International Translation, <https://quran.com/24>

Before I discuss the corroborating evidence for freedom of expression in Islam as proposed by Kamali, I want to make two short introductory remarks. First, the evidence for freedom of expression as discussed by Kamali is based on some of the foundations and institutions of the *Sharī'a*, namely *shūra* (mutual consultation), *ijtihād* (independent reasoning), *naṣīḥa* (sincere advice), and *ḥisba* (commanding good and forbidding evil). Secondly, even though Muslim scholars hold these foundations and institutions of the *Sharī'a* in high esteem, there is not always a direct awareness among Muslim scholars regarding the involvement of freedom of expression. In the following sections, I shall therefore emphasize the role of freedom of expression in the aforementioned foundations and institutions of the *Sharī'a*.

## 2. Corroborating Evidence for Freedom of Expression in Islam

In the previous chapter, we saw that the subject of freedom of expression is often in the news when it relates in one way or another with Islam. A common response that follows is that there is no freedom of expression in Islam, or it has been greatly restricted. As such, the liberal perspective and the Islamic perspective are *diametrically opposed* to each other when it comes to freedom of expression. This view is further bolstered by some Muslims who not only perceive freedom of expression as an exclusive liberal value but also consider it a tool used to exploit to vehemently attack Islam and Muslims. For example, as we shall see in chapter 4, when the *crisis over the Danish cartoons* of Prophet Mohammed broke out in 2005, many Muslims considered that the West was not only waging war against Muslims but attacking Islam itself. I will demonstrate, however, that some institutions and principles of Islamic law cannot function without freedom of expression and will present affirmative evidence for freedom of expression in Islam. Like any other right, freedom of expression has its boundaries, therefore, my second question is: what are the boundaries of freedom of expression in Islam? I will discuss these at two levels: the moral restraints and the legal restraints. The reason for this breakdown is that in Islam, some actions are morally reprehensible, but not punishable, while some acts constitute a criminal offense. For example, *qadhf* or a slanderous accusation is a violation of freedom of speech in Islam and is punishable as a criminal offense. This outline will help better understand chapter 4, in which I compare the limits on freedom of expression in liberal democracies and Islam.

As mentioned elsewhere, Mohammad Hashim Kamali discusses some principles in Islam which serve as affirmative evidence of freedom of expression. In this section, I shall discuss Kamali's evidence. My intention here is not to prove the validity of these foundations and institutions, as they are recognized by all Sunni scholars of Islam, but rather to demonstrate that freedom of expression plays a vital role within their functioning. Second, although Islamic principles such as *ḥisba*, *naṣīḥa*, *shūra*, and *ijtihād* are usually conceived and treated as separated subjects, I will refrain from doing so as I believe that there is significant overlap and interdependence between them,<sup>227</sup> which will become clear after my discussion thereon.

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<sup>227</sup> Cf. Kamali, Mohammad Hashim, *Sharī'ah Law: An introduction*, Oxford: Oneworld Publications, 2008, , p. 164 where he states that "we need to combine *ijtihād* with the Qur'ānic principle of consultation (*shūrā*) and make *ijtihād* a consultative process."

## 2.1. *Shūra* (Mutual Consultation)

My aim in discussing the concept of *shūra* is not to be comprehensive. Indeed, there are, as Ahmad al-Raysuni rightfully notes, hundreds of books and articles written about this important principle in Islam.<sup>228</sup> Our interest in this section is primarily to explore how the concept of *shūra* serves as evidence for freedom of expression in Islam. My approach in this section is twofold; I will first give a general presentation of the concept of *shūra*, followed by a discussion of how it relates to freedom of expression.

### *Definition*

In its linguistic-lexical meaning, the word *shūra* is derived from the root *sh-w-r* and means “to gather honey; extract it from the small hollow in the rock in which it had been deposited by the wild bees” or “to extract honey from hives or other places.”<sup>229</sup> In relation to *shūra* the verb *ta-shā-warū* means “they consulted one another, or consulted together, they debated together in order that they might see one another’s opinion.”<sup>230</sup> Likewise the idiom *shūra* denotes “a mutual debate in order that one may see another’s opinion”.<sup>231</sup> Since *shūra* is an antithesis of *fawḍa* or chaos, it is fair to say that *shūra* is “a collective endeavor for seeking an objective truth.”<sup>232</sup>

Usually, *shūra* relates to the principle of Islamic government, requiring “the head of the state and government leaders to conduct community affairs through consultation with community members.”<sup>233</sup>

There are only two Qur’ānic passages about *shūra*, namely 42:38 and 3:159. The fact that the 42<sup>nd</sup> *Surah* of the Qur’ān was named *al-Shūra*, is evidence of the significance of consultation in Islam.<sup>234</sup> Verse 38 of this *Surah* contains the word *shūra* and reads as follows:

“And those who answer the Call of their Lord, and perform *as-Salāt* [the prayer], and who (conduct) their affairs by mutual consultation (*shūra*), and who spend of what We have bestowed on them.” (42: 38)<sup>235</sup>

Mutual consultation in this verse means, according to Qur’an commentator Ibn Kathīr, that a decision may not be made without consulting each other and that we can help each other by sharing ideas about issues such as war.<sup>236</sup> The fact that *shūra* is mentioned here side by side with three pillars of Islamic faith renders it an obligatory principle in Islam. It is remarkable to note that this verse was revealed in Mecca, thus before the establishment of the Islamic State

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<sup>228</sup> Al-Raysuni, Ahmad, *Al-Shūrā: The Qur’anic principle of consultation, a tool for reconstruction and reform*, translated from the Arabic by Nancy Roberts, London - Washington [D.C.]: The International Institute of Islamic Thought, 2011, p. IX.

<sup>229</sup> Lane, *Arabic-English Lexicon*, Vol. II, p. 1617.

<sup>230</sup> *Ibid.*

<sup>231</sup> *Ibid.*

<sup>232</sup> Hasan, Ahmad, *The Doctrine of Ijmā’ in Islam: A Study of the Juridical Principle of Consensus*, New Delhi: Kitab Bhavan, 1992, p. 26.

<sup>233</sup> Kamali, *Freedom of Expression in Islam*, p. 41.

<sup>234</sup> Al-Raysuni, *al-Shūrā: The Qur’anic Principle of Consultation*, p. 8.

<sup>235</sup> Sahih International Translation, <https://quran.com/42>

<sup>236</sup> Ibn Kathīr, *Tafsīr al-Qur’ān al-‘Azīm*, vol. 4, p. 406.

in Medina.<sup>237</sup> This indicates that *shūra* is not only an obligation for political leaders -where is it usually referred to- but also for common Muslims in their ordinary affairs.

After the Islamic state was founded, the order for *shūra* followed in the form of a Qur'ānic decree. A verse revealed in Medina laid down the textual basis for *shūra* as a principle for an Islamic government. The Prophet, who was now head of state, was then commanded to consult his companions and after reaching a decision to put his faith in Allah and implement it,<sup>238</sup> as the following verse of the Qur'ān makes it clear:

...and consult them in the affairs. Then when you have taken a decision, put your trust in Allah, certainly, Allah loves those who put their trust (in Him). (3:159)<sup>239</sup>

The above verse makes it clear that the ruler of a country cannot rule without consulting others. Although the Prophet Muhammad was sent by Allah, and thus guided by the Divine revelations, he always consulted his companions and the deputies of the tribes of his adherents before making a decision.<sup>240</sup> It is narrated that Abū Hurayrah, said: "I [Abū Hurayrah] have not seen anyone consult others more than the Prophet did."<sup>241</sup>

Ibn 'Atiyyah (d. 1147) notes that *shūra* relates both to the freedom of expressing an opinion and *ijtihād*:

"...And *shūra* is based on different opinions, and the consultant considers that discord and opts, if Allah Most High guides him to what He wants from him, he [the consultant] should continue and do it while trusting Allah, and this is the utmost objective of *ijtihād* in this matter, and in this manner, Allah the Most High ordered His prophet to do by this verse."<sup>242</sup>

Thus, *shūra* is the result of obtaining the opinion of the adviser and giving meaning to it.<sup>243</sup> Ibn Taymiyyah's view is in line with the above; he states that Allah has made it obligatory for his Prophet to consult his companions. The goal was not only to conquer their hearts but also to set an example for the following generations. Moreover, at the time of the Prophet, the companions could also give their opinion on issues that had not been revealed to the Prophet, such as war and other earthly matters. This indicates that in addition to consulting the Prophet, everyone should consult each other on issues that are not stipulated in the Qur'an or Sunnah or where there is no consensus among the scholars. When the ruler consults his companions and one of them indicates that he must follow a principle in a particular matter as prescribed by the Quran, Sunnah, or consensus, he must agree to this. Except for explicit text-based rules extracted from the Qur'ān, Sunnah, and the consensus, no other source must be given obedience, regardless of how much knowledge the ruler has of religion and worldly matters. When there is a dispute among Muslims about an issue, the ruler must ask each of

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<sup>237</sup> Kamali, *Freedom of Expression in Islam*, p. 41.

<sup>238</sup> Ibid.

<sup>239</sup> Sahih International Translation, <https://quran.com/3>

<sup>240</sup> Hamidullah, Muhammad, *Introduction to Islam*, London: MWH London Publishers, 1979, p. 100.

<sup>241</sup> *The Translation of The Meaning of Jāmi' al-Tirmidhī, Kitāb al-Jihād, Ma ja fi al-mashwarah (about consultation)*, vol. 1, *hadīth* no. 1720, p. 721; al-Mubarakpuri, *Tuhfat al-Ahwadhi bisharh Jāmi' al-Tirmidhi*, vol. 5, *hadīth* no. 1767, p. 306.

<sup>242</sup> Ibn 'Atiyyah, Abū Muḥammad 'Abd Al-Ḥaqq Ibn Ghālib, *Al-Muḥarrar al-Wajīz fī Tafsīr al-Kitāb al-'Azīz*, Edited by, 8 vols., second edition, Beirut: Dār al-Khair, 2007, vol. 2, p. 405; Ellethy, *Islam, Context, Pluralism and Democracy: Classical and Modern Interpretations*, p. 246-7.

<sup>243</sup> Ibn 'Atiyyah, *Al-Muḥarrar al-Wajīz fī Tafsīr al-Kitāb al-'Azīz*, vol. 2, p. 405, footnote 6.

them to give his opinion and state the reasons behind it. The opinion that is most in accordance with the Qurʾān or the Sunnah must be followed as Allah says:<sup>244</sup>

O you who believe! Obey Allah and obey the Messenger (Muhammad SAW), those charged with authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result.<sup>245</sup> (4:59)

According to ibn Kathīr, this verse indicates that it is always necessary to refer to the Qurʾān and the Sunnah for a judgment. Mujahid and others who belong to the *salaf* (the pious predecessors) held the same opinion. Therefore, this verse is an order from Allah that when people have a dispute, they are obligated to refer to the Quran and the Sunnah to come to a judgment. It is, therefore, the Quran and the Sunnah that determines and testify to the truth and nothing else.<sup>246</sup>

On many occasions, the Prophet not only consulted his companions, he also gratefully accepted unsolicited advice. Both classical biographer ibn Hishām and modern author Muḥammad Ḥusayn Haykal refer to the following incident about the battle of Badr that occurred on March 13, 624 CE. The Muslim army sets out to the springs of Badr till they reached the first water well and the Prophet dismounted with the intention to camp. Al-Ḥubāb ibn Mundhir ibn al Jamūh, who was a skilled soldier and cognizant of the area, approached the Prophet and gave him the following unsolicited advice:<sup>247</sup>

“O Prophet of God, is this spot where you have dismounted a place to which God has guided you and, therefore, may we neither step beyond it nor stay for behind it? Or is this simply a question of ordinary war strategy, of measure and moves and counter measures and moves? Muhammad answered, “It is indeed the latter, just as you said.” Al-Ḥubāb then said, “O Prophet of God, this is not a good place to be. We should move forward until we reach the well closest to the enemy. There we would bring a trough to it to fill with water and then fill the well with sand. We would fight the enemy; and when we withdraw we would be able to drink, whereas they would not.”<sup>248</sup>

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<sup>244</sup> ‘Uthaymīn, Muḥammad bin Ṣāliḥ, *Sharḥ Kitāb al-Siyāsah al-Sharīyah li-Shaykh al-Islām ibn Taymiyyah Raḥimah Allāh*, Beirut: al-Dār al-‘Uthmāniyah, 2004, p. 451-456.

<sup>245</sup> Here I combined the two following translations in order to acquire the most accurate translation: [www.quranexplorer.com/quran/?Sura=4&FromVerse=59&ToVerse=59&Script=Usmani&Reciter=Mishari-Rashid&Translation=Eng-Yusuf%20Ali&TajweedRules=On&Zoom=5.2](http://www.quranexplorer.com/quran/?Sura=4&FromVerse=59&ToVerse=59&Script=Usmani&Reciter=Mishari-Rashid&Translation=Eng-Yusuf%20Ali&TajweedRules=On&Zoom=5.2) of Yusuf Ali, and Sahih International Translation, <https://quran.com/24>

<sup>246</sup> Ibn Kathīr, *Tafsīr al-Qurʾān al-‘Azīm*, vol. 2, p. 70.

<sup>247</sup> Ibn Hishām, Abū Muḥammad Abdul-Malik, *Summarizing the Sirah of ibn Hishām*. Trans. by Sulaima al-Skeikh Muhammad. Corrected and revised by F. Amira Zrein Matraji. Beirut: Dar el Fikr, 1998, p. 130; Haykal, Muḥammad Ḥusayn, *The life of Muḥammad*, Translated from the 8th edition by Ismā‘īl Rāgī A. al-Fārūqī, Indianapolis: North American Trust Publications, 1976, p. 223.

<sup>248</sup> Haykal, *The Life of Muhammad*, p. 223-4. The modern scholar Al-Mubarakpuri narrates a slightly different version of the occasion: "Has Allah inspired you to choose this very spot or is it strategy of war and the product of consultation?" The Prophet replied "It is strategy of war and consultation." Al-Ḥubāb said: "This place is no good; let us go and encamp on the nearest water well and make a basin or reservoir full of water, then destroy all the other wells so that they will be deprived of the water." The Prophet approved of his plan and agreed to carry it out, which they actually did at midnight", see Al-Mubarakpuri, Safiur-Rahman, *The Sealed Nectar (Ar-Raheequl-Makhtum)*, Riyadh: Darussalam, 2002, p. 258.

The Prophet, immediately agreeing, stood up to go forward with his army. He reminded all his companions “that he is but a man like them, that all decisions have to be taken by all of them in consultation with one another, that he will not decide anything without them finally, and that he stands in great need of their good counsel.”<sup>249</sup>

This incident makes two things clear. 1) That *shūra* was binding upon the Prophet despite the fact he was sent by Allah. From this, it can be readily deduced that *shūra* is prescribed for every Muslim, both rulers and laymen. 2) The fact that the Prophet gratefully welcomed unsolicited advice demonstrates that often *naṣīḥa* (advice) is an integral part of *shūra* or that there is at least a significant overlap between them.

Additionally, the Prophet’s companions continued using *shūra* after his death. When ‘Umar bin al-Khattab, the second Rightly Guided Caliph, was dying after being stabbed with a dagger, he entrusted the choice of the next caliph to six people who were consulted about this. These six persons were ‘Uthman, ‘Ali, Tallah, al-Zubayr, Sa‘id, and ‘Abdur-Rahman bin ‘Awf. All these companions agreed to appoint Uthman as Caliph after his death.<sup>250</sup>

The Rightly Guided Caliphs (632-61) were succeeded by the Umayyad caliphs (661-750) and the ‘Abbasid caliphs (750-1258), respectively. During the period of ‘Abbasid caliphs, Islamic jurisprudence (*fiqh*) took an independent course and the four Sunni canonical schools of law were founded, which are still authoritative. The first school of law was the school Imam Abū Ḥanīfa (703-767). He had a unique teaching method compared to other scholars; when someone asked a question or a question arose, he had his students debate it. He did not position himself as superior to his students but was equal to them and did not impose his opinion on them.<sup>251</sup>

The above shows that Imam Abū Ḥanīfa’s teaching method is based on *shūra*. And due to this interactive approach in the creation of legal rules, we can say that the Hanafi law school is mainly a product of the students of Abū Ḥanīfa and not a product of his own opinions. The discussions were not only about existing problems, but also hypothetical problems for which solutions were also worked out. Because of their tendency for hypothetical *fiqh*, where an issue was often introduced with the question, “What if so and so happened?” They were known as the people of *ahl al-Ra’y* (the opinion people).<sup>252</sup>

Based on this evidence, it is fair to define *shūra* as Yaser Ellethy does:

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Ibn Kathīr also narrates a slightly different version of this occasion: Ibn Ishāq stated, “The Messenger of God went out to urge his men on the well, and when he reached the nearest source at Badr, he stopped there. “It was related to me [ibn Hishām] by some men of the Banū Salama, that they had been told that Al-Ḥubāb b. Mundhir b. al-Jamūh said, ‘O Messenger of God, is this the place about which God revealed to you what we should not advance beyond nor stop before? Or is this a question of opinion, warfare and tactics?’ “He replied, ‘It’s one of opinion, warfare and tactics.’

“Al-Ḥubāb then said, ‘Well, O Messenger of God, this isn’t a place to stop. We should go ahead till we get to the well nearest to their force and stop there. We should then stop up the well behind it and build a cistern and fill it with water. The we can fight them and have water to drink, while they’ll have none.’ “The Messenger of God commented, ‘You’ve had a good idea!’”, see Ibn Kathīr, Ibn Kathīr, Abū al-Fidā’ Ismā‘īl ibn ‘Umar, *The Life of the Prophet Muḥammad: Al-Sīra al-Nabawiyya*. Translated by Trevor Le Gassick, Reviewed by Muneer Fareed, 4 vols., Reading: Garnet, 2000, vol. II, p. 267.

<sup>249</sup> Haykal, *The Life of Muḥamad*, p. 224.

<sup>250</sup> Ibid., vol. 4, p. 406.

<sup>251</sup> Zahra, Muhammad Abū, *The Four Imams*, London: Dar Al-Taqwa, 2005, p. 163.

<sup>252</sup> Philips, Abū Ameenah Bilal, *The Evolution of Fiqh*, Riyadh: International Islamic Publishing House, 2000, p. 65.

“The general Islamic principle of collective participation of the members of society or their representatives in the procedure of free opinion exchange on all common issues beyond the religious explicitly established rules to reach the best possible decisions.”<sup>253</sup>

Here we see how *shūra* relates to freedom of expression. All participants in this process must be able to express their opinions freely, otherwise *shūra* will never achieve its goal: to reach the best possible decisions. Ahmad al-Raysuni holds the same opinion and states that “promoting an atmosphere of freedom and initiative” is essential for true consultation. Al-Raysuni goes on to state that: “true consultation is marked, first and foremost, by freedom of thought and the freedom to express oneself with total honesty. If it lacks these two freedoms, it becomes nothing but a distraction or a manoeuvre in the guise of consultation. In other words, although it may take the form of consultation and be referred to by this name, it is ultimately nothing but a ruse. Consequently, freedom of thought and freedom of expression are conditions for the validity of consultation. Moreover, they are both a precondition and a concomitant condition; in other words, if we wish to engage in genuine consultation, it must be both preceded and accompanied by freedom. Under these circumstances, consultation becomes a practical outworking of freedom of thought and expression. At the same time, it serves to reinforce the exercise of these freedoms and guarantee their survival.”<sup>254</sup>

If participants cannot lay their views and arguments on the table freely, the outcome is certainly not a true reflection of the members’ thoughts and offers a distorted picture. The outcome in this scenario is not a *shūra*-based one.

### *Shūra today*

This brings me to how we can utilize *shūra* nowadays. Again, I do not wish to hold a lengthy discussion, but merely mention some possibilities. Generally speaking, following Ahmad al-Raysuni, *shūra* can be utilized for rebuilding certain Islamic principles and as a tool for reform and reconstruction.<sup>255</sup> Before we move on to some of the subjects in which *shūra* plays an important role, I want to mention some limitations. To effectuate *shūra* in our day and age, it needs to be systematized and institutionalized, for if the practice of consultation is not organized and regulated in complex societies, it will not be fruitful. However, since details of the implementation of *shūra* are lacking, it is legitimate to ask: “If it is truly necessary and vital to organize and regulate the practice of consultation, then why was this not specified by the Messenger of God, and why is there no mention of relevant details either in the Qur’an or in the Sunnah? Moreover, if Islamic law has specified no particular way of organizing the practice of consultation, why should we do what we have not been commanded to, or commit ourselves to something that has not been required of us?”<sup>256</sup>

The response is that not only for *shūra*, but also for other principles and institutions -such as seeking knowledge and education and to educate others, adjudicating fairly between people, commanding good and prohibiting evil, setting aside wealth and land as religious endowments (*waqf*)- Islam has not laid down a clear-cut system. This is because the organization and regulation of these Islamic principles, including *shūra*, are subjected to evolution and change. Although many Islamic principles are obligatory, the organization, procedures, methods, and laws vary across time and place. For example, the pursuit of

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<sup>253</sup> Ellethy, *Islam, Context, Pluralism and Democracy: Classical and Modern Interpretations*, p. 251.

<sup>254</sup> Al-Raysuni, *al-Shūrā: The Qur’ānic Principle of Consultation*, p. 33.

<sup>255</sup> Al-Raysuni, *al-Shūrā: The Qur’ānic Principle of Consultation*, pp. 119 and 144.

<sup>256</sup> *Ibid*, pp.127-8.

knowledge and education was during the time of the Prophet both effective and serious, but also spontaneous, simple, and flexible. After the era of the Rightly Guided Caliphs, this changed, and soon untold numbers of schools and universities, both private and public appeared. These educational institutions had and have their own programs, curricula, methods, and levels. Remarkably, the Prophet never commanded or even suggested these institutions, systems, methods, degrees, or certificates. Rather, Muslims themselves took the initiative to bring them into existence and to adjust them over time to their circumstances. To fulfill the obligation of the pursuit of knowledge and education, it is of vital importance that the various organizational and administrative measures and tasks must adapt to the new challenges and requirements of Islamic societies. Again, Islamic law does not explicitly prescribe organizational procedures.<sup>257</sup> Nevertheless, Islamic law does hold “a number of general governing principles of relevance to every area of life and every one of life’s legitimate functions.”<sup>258</sup> In other words, as Yaser Ellethy puts it, narrowing down *shūra* to a specific methodology without considering the changing circumstances would have led to a great dilemma for Muslims. Moreover, the purpose of *ijtihād* would have become void in these cases. Ellethy notes that it is a clear fact that “*shūra* was practiced differently in the case of each of the four Rightly Guided Caliphs of the classical Islamic era leaves no doubt that it was a general conceptual principle rather than a detailed practical process.”<sup>259</sup> There are countless examples of practicing *shūra* in the modern context. At the national level, a government can consult people on various subjects. For the latter, depending on the subject, it is not always necessary that all people are consulted, sometimes, it suffices to consult representatives or experts. Most Muslim majority countries have a *Majlis al-Shūra* (Consultative-Council/Chamber), which operates alongside the head of state and his government.<sup>260</sup> However, having said this, we must not ignore that the authority and influence of a *Majlis al-Shūra* varies from country to country. For example, In Egypt, under the rule of former President Mubarak, the *Majlis al-Shūra* was largely symbolic and powerless. Saudi Arabia is an absolute monarchy and the members of the *Majlis al-Shūra* are appointed by the King. Since November 29<sup>th</sup>, 2003, the responsibilities of the Consultative Council were expanded by royal decree from being merely an advisory body to include some legislative functions.<sup>261</sup> A municipality wishing to redevelop a neighbourhood can consult local residents on how and what should be done. *Shūra* can also play a role in the affairs of the household, where spouses can consult each other before making a decision. Additionally, the opinion of children, once they have attained puberty, can be taken into account.<sup>262</sup> Now, after elaborating why it is highly recommended or even necessary to organize and regulate *shūra*, I want to briefly discuss a related issue: democracy.

### *Democracy*

At the beginning of this section, I touched upon the Islamic government and how it relates to *shūra*. It is often advocated that the concept of *shūra* favors the compatibility of democracy

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<sup>257</sup> Ibid, p. 128-9.

<sup>258</sup> Ibid, p. 129.

<sup>259</sup> Ellethy, *Islam, context, pluralism and democracy: classical and modern interpretations*, p. 249.

<sup>260</sup> Al-Raysuni, *al-Shūrā: The Qur’ānic Principle of Consultation*, p. 56.

<sup>261</sup> Kapiszewski, ‘Saudi Arabia Steps Toward Democratization or Reconfiguration of Authoritarianism?’, p. 470

<sup>262</sup> Doi, Abdur Rahman I., *Shari’ah: The Islamic Law*, London: TaHa Publishers Ltd., 1997, pp. 17-8.



and Islam.<sup>263</sup> In recent years, many Muslim majority countries have in one way or another adopted an electoral system to establish a government. This is due to prominent scholars and intellectuals who “leave the door of *ijtihād* open in the practice of *shūra*”,<sup>264</sup> but also concur with the open and unrestricted approach of *shūra*. Consequently, this results in that modern scholars and intellectuals accept “that a modern system of free elections, guaranteed to all members of the society, regardless of their belief, race, color or social class, for choosing a ruler of a Muslim state can be attributed to the concept of *shūra*.”<sup>265</sup> Democracy has several objectives, such as achieving justice, fairness, equality, and preventing tyranny. (As we saw before, these aims justify freedom of expression in liberal democracies). These objectives are all fully in line with the teachings of Islam. Since democracy also envisages the participation of people in managing their affairs, it is also a system based on human actions and therefore has its faults and shortcomings. Even the keenest advocates of democracy acknowledge that of all the political systems available, it is “the best of the bad” or the least undesirable.<sup>266</sup> Some Islamic scholars object vehemently against the implementation of democracy, perceiving it as against the Islamic Law, and fearing that Islamic peoples in a full-fledged democracy will choose to depart from Islamic ideals. The question that must be raised here is: “is it in this case the fault of democracy or is it the Islamic peoples to blame for making such a choice?” In this case, democracy should be thanked for revealing the thoughts and desires of people. It is a reason to adhere even more to democracy, not to reject or malign it.<sup>267</sup> After all, any process, call it democracy or anything else, that allows people to express their opinions, feelings, and thoughts freely, represents the truth (one of the justifications of freedom in both liberal democracies and Islam). This enables us to perceive things the way they really are. Nobody with a sound mind objects to knowing the truth about things. Moreover, the abolition of the *Sharīʿa* that has taken place hitherto in Muslim countries has not come about by democratic means, but by dictatorial ones.<sup>268</sup> If, hypothetically, Islamic peoples were to choose something that would be perceived as a deviation from Islam, what would the solution be to such an unfortunate situation? Running away from the facts or ignoring them is not the solution. Abolishing or adopting certain laws is not the right answer either. The remedy lies in a process of consciousness-raising, education, explanation, enculturation, and dialogue.<sup>269</sup> Freedom of expression plays a vital role in this process. When people can express their opinions, feelings, and thoughts freely, it leads to better insights and awareness of the populace. The proponents of a state based on Islamic values can anticipate these acquired insights. Furthermore, since *shūra* is the result of a collective opinion, it is more likely that it is correct. In addition, the power of *shūra* also lies in the fact that it brings people closer together and ensures that people can share their vision on matters of common interest. In this way, *shūra* prevents disagreement and division among people.<sup>270</sup>

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<sup>263</sup> Esmaeili, Hossein, Marboe, Irmgard and Rehman, Javid, *The Rule of Law, Freedom of Expression, and Islamic Law*, Oxford and Portland: Hart Publishing, 2017, p. 33.

<sup>264</sup> Ibid.

<sup>265</sup> Ibid, p. 250.

<sup>266</sup> Al-Raysuni, *al-Shūrā: The Qur’ānic Principle of Consultation*, p. 157-8.

<sup>267</sup> Ibid., p. 160.

<sup>268</sup> Ibid., here Al-Raysuni claims that never before has it happened that a Muslim population has voted for something that clearly contravenes Islamic law.

<sup>269</sup> Ibid., p. 160-1. Naturally, I admit this process cannot be localized in a globalized world of ideas and borderless cultural exchanges. Muslims should decide which methods and ideas comply with Islam.

<sup>270</sup> Kamali, *Freedom of Expression in Islam*, p. 42.

I want to conclude this section with a critical observation of Ahmad al-Raysuni. The principle of *shūra* “will only succeed and endure in an atmosphere of freedom: freedom of conscience, freedom of thought, and freedom of speech. In a climate of freedom, people think and express themselves without fear or intimidation, misgivings, impediments, or precautions.”<sup>271</sup> This is, in my opinion, not limited to *shūra*, but also applies to *ijtihād* and *naṣīḥa*. In the two following sections, I will argue that freedom of expression is an essential requirement for the functionality of *ijtihād* and *naṣīḥa*.

## 2.2. *Ijtihād* (independent reasoning)

*Ijtihād* (from the root *j-h-d*), means “to strive.”<sup>272</sup> In the broadest sense, it means the maximum utilization of human reason to clarify and explain the *Sharīʿa*. It covers a variety of spiritual processes, ranging from the interpretation of the Quranic texts to assessing the authenticity of the *ḥadīth*. *Qiyās*, or analogical reasoning, is a specific form of *ijtihād*, the method whereby the principles established by the Qur’an, Sunnah, and *ijmaʿ* are extended and applied to find a solution for new problems that have not been expressly arranged for.<sup>273</sup> *Ijtihād* or independent reasoning by Muslim scholars is validated by the Qur’ān<sup>274</sup> and the Sunnah<sup>275</sup>.

Although all Sunni schools of law recognize the principle of *ijtihād*, there is a dispute among Muslim scholars who is entitled to exercise *ijtihād*. Is only the *mujtahid* (a competent scholar qualified to exercise *ijtihād*)<sup>276</sup> entitled to exercise *ijtihād*? And what is the role of the layman in the process of *ijtihād* regarding subjects the *mujtahid* would have less or no knowledge of? Can or should the layman with a keen insight be involved in the process of *ijtihād*? Other disputes regarding *ijtihād* are whether the *mujtahid* is entitled to exercise *ijtihād* beyond his school of thought (*madhhab*), is *ijtihād* nowadays only a collective process, and whether the

<sup>271</sup> Al-Raysuni, *al-Shūrā: The Qur’ānic Principle of Consultation*, p. 167.

<sup>272</sup> Lane, *Arabic-English Lexicon*, vol. 1, p. 473; Wehr, *A Dictionary of Modern Written Arabic*, p. 143.

<sup>273</sup> Doi, *Shariah: The Islamic Law*, p. 78.

<sup>274</sup> Muslim scholars refer usually to some verses as a justification of *ijtihād*. See e.g., Q. 2:150; 4:83, 105.

<sup>275</sup> The famous *ḥadīth* of the companion of Mu’ādh bin Jabal (d. 639) is often referred to as a proof of *ijtihād*: When the Apostle of Allah (may peace be upon him) intended to send Mu’ādh ibn Jabal to Yemen, he asked: How will you judge when the occasion of deciding a case arises? He replied: I shall judge in accordance with Allah’s Book. He asked: (What will you do) if you do not find guidance in Allah’s Book? He replied: (I will act) in accordance with the *Sunnah* of the Apostle of Allah (may peace be upon him). He asked: (What will you do) if you do not find guidance in the *Sunnah* of the Apostle of Allah (may peace be upon him) and in Allah’s Book? He replied: I shall do my best to form an opinion and I spare no pains. The Apostle of Allah (may peace be upon him) then patted him on the breast and said: Praise be to Allah Who has helped the messenger of the Apostle of Allah to find a thing which pleases the Apostle of Allah. See Abū Dāwūd, *Sunan*, tr. Ahmad Hasan, vol. III, p. 1019 *ḥadīth* no. 3585. Another *ḥadīth* often used as evidence for *ijtihād*: If a ruler/judge passes a judgment having exerted himself to arrive at what is correct, and he is indeed correct, he will have two rewards. If he passes judgment having exerted himself to arrive at what is correct, but it is incorrect, he will have one reward. See <https://sunnah.com/abudawud:3574> and Abū Dāwūd, *Sunan*, tr. Ahmad Hasan, vol. III, p. 1013 *ḥadīth* no. 3567.

<sup>276</sup> For the requirements to be a *mujtahid*, see for example: al-Shanqīṭī, *Mudhakkirah uṣūl al-fiqh ‘alā Rawḍat al-nāzir lil-imām Ibn Qudāmah al-Ḥanbalī*, al-Manṣūrah, Miṣr: Dār al-Yaqīn, 1999, p. 527; Kamali, *Principles of Islamic Jurisprudence*, p. 476-80; Doi, *Shariah: The Islamic Law*, p. 79; Rahim, *The Principle of Islamic Jurisprudence*, p. 163; Nyazee, *Islamic Jurisprudence*, p. 151; Al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Sharīʿah*, Vol. IV, p. 119; Faruki, Kemal A., *Islamic Jurisprudence*, New Delhi: Adam Publishers, 1994, p. 163.

door of *ijtihād* is closed by the end of the tenth century.<sup>277</sup> In this section, I discuss how it is related to freedom of expression.

### *Is ijtihād possible without freedom of expression?*

In general, constant *ijtihād* is being regarded as a protection against error in understanding Islamic law. An important proviso in this is the correct functioning of the mechanism of *ijtihād*. Even though the concept of *ijtihād* on an individual level after the 10<sup>th</sup> A.D. century is contested,<sup>278</sup> collective *ijtihād*, which necessitates freedom of expression, is accepted and operative. Whereas individual *ijtihād* has always been considered as purely presumptive conjecture or *ẓann*, collective *ijtihād* is believed to be free from error.<sup>279</sup> However, it remains debatable who may exercise *ijtihād* in collective form and at which level. Is it on absolute (*Mutlaq*) level or only on certain specific questions and issues which have not arisen before or have not been settled so far by the classical *mujtahidūn*?<sup>280</sup> But let us focus on the latter, on which everybody seems to agree. Collective *ijtihād* is closely connected to the concept of *ijma'* or consensus. *Ijma'* is an important principle of jurisprudence in the Sunni schools of law. If competent Muslim scholars reach an agreement or rule on a certain issue, it becomes binding for Muslims. Thus, *ijma'* is considered as being free from error; as some prophetic traditions state.<sup>281</sup>

The scale of the *jamā'a* depends on the number of Islamic scholars at a time. It may happen that the *jamā'a* only consists of two or even one scholar. For example, al-Tirmidhī narrates that scholar Abdullah ibn al-Mubarak (d. 797) stated that initially the *jamā'a* was represented by Abū Bakr and 'Umar (probably because they were not only rulers but also religious authorities). But when they died, ibn al-Mubarak reported that Abū Hamzah al-Sukkari was the *jamā'a*.<sup>282</sup> Imam Abū Ishāq Al-Shāṭibī (d. 1388) adds that in his time, the *jamā'ah* was Muhammad ibn Aslam and those who follow him.<sup>283</sup> Al-Shāṭibī goes on to state that it is the Islamic scholars who are the vast majority (*al-sawād al-a'ẓam*), even if they are few (*wa 'in qallū*). If, hypothetically speaking, the common people (*'awām*) oppose the Islamic scholars, they outnumber them by far, but they do not represent the *jamā'a*. On the contrary, Islamic scholars are the most significant and represent the *jamā'a*. In other words, no authority can be given to the consensus of the common people.<sup>284</sup>

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<sup>277</sup> For discussions on closing the gate of *ijtihād*, see Hallaq, Wael B. "Was the Gate of Ijtihad Closed?" *International Journal of Middle East Studies* 16, no. 1 (1984): 3–41.

<sup>278</sup> Lapidus, Ira M., *A History of Islamic Societies*, New York: Cambridge University Press, 2014, pp. 132-3; Hallaq, "Was the Gate of Ijtihad Closed?", p. 3-4.

<sup>279</sup> Faruki, *Islamic Jurisprudence*, p. 77-9.

<sup>280</sup> *Ibid.*, p. 81.

<sup>281</sup> See e.g. al-Tirmidhī, *The Translation of The Meaning of Jāmi' al-Tirmidhī, ḥadīth* no. 2173, p. 887: "Indeed, Allah will not gather my ummah, or he said 'The ummah of Muhammad' to agree on falsehood; the hand of Allah is with the *jamā'a* (community, the congregation of the Muslims) and he who breaks from it is plunged into Fire." According to al-Albānī this *ḥadīth* is authentic, see al-Albānī, *Ṣaḥīḥ Sunan al-Tirmidhī*, Vol. 2, p. 457.; see also *Ibid.*, *ḥadīth* no. 2174, p. 887: "Allah's hand is with the *jamā'a*." Al-Tirmidhī (*Ibid.*, *ḥadīth* no. 2173, p. 888) states that the explanation of *jamā'a* is according to Islamic scholars, the scholars of *fiqh*, knowledge, and *ḥadīth*.

<sup>282</sup> *Ibid.*, p. 888.

<sup>283</sup> Al-Shāṭibī, Abū Ishāq Ibrāhīm, *al-I'tisām*, Cairo: al-Maktabah al-Tijārīyah al-Kubrā, 1914, vol. 2, p. 267.

<sup>284</sup> *Ibid.*, p. 266-7.

Muhammad Iqbal (d. 1938) points out that *ijma* in modern times can only take one form. According to him, the power of *ijtihad* from individual representatives of the Sunni school of laws will turn into a Muslim legislative assembly. In this way, laymen with a keen insight into certain issues can also contribute to legal discussions. This is the only way to strengthen and evolve the legal system of Islam.<sup>285</sup> Iqbal then states that free discussion is vital to exclude or at least reduce erroneous interpretations:

“The Ulema should form a vital part of a Muslim legislative assembly, helping and guiding free discussion on questions relating to law. The only effective remedy for the possibilities of erroneous interpretations is to reform the present system of legal education in Muhammadan countries, to extend its sphere, and to combine it with an intelligent study of modern jurisprudence.”<sup>286</sup>

Iqbal thus points out that freedom of expression is crucial for the correct functioning of *ijtihad* in modern times. Al-Alwani (d. 2016) urges that merely acknowledging the importance of *ijtihad* is not enough. To ensure the proper functioning of *ijtihad*, the right kind of intellectual and cultural atmosphere is required. Creating an environment of complete freedom of thought and expression is the first step towards such an atmosphere.<sup>287</sup> The contemporary scholar and former president of the Islamic Society of North America (ISNA) Muzammil H. Siddiqi also points out that there cannot be true *ijtihad*, “unless scholars are free to express their opinions and other scholars are free to criticize them if they make errors. Freedom of expression is inherent in the concept and practice of *ijtihad*. This means that the democratization of Muslim societies and basic freedom for scholars is *sine qua non* for this process to work.”<sup>288</sup> From the above, it becomes clear that freedom of expression is crucial for the correct conducting of *ijtihad* in modern times. Just as we have seen in the previous section about the subject of *shura*, collective *ijtihad* “will only succeed and endure in an atmosphere of freedom: freedom of conscience, freedom of thought and freedom of speech. In a climate of freedom, people think and express themselves without fear or intimidation, misgivings, impediments, or precautions.”<sup>289</sup>

### 2.3. *Naṣīḥa* (Sincere advice)

In the section on *shura*, we touched upon the subject of *naṣīḥa* and noted how the two concepts are sometimes interwoven. According to Lane, *naṣīḥa* means “sincere, honest or faithful advice or counsel and conduct; direction to that which is for the good of a person who is the object, by words or speech. Or good advice or counsel; direction to what is good or sedulousness, or earnestness, in advice or counsel; or sincere or honest conduct; or benevolence, desire for what is good for the person who is the object.”<sup>290</sup>

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<sup>285</sup> Iqbal, Muhammad, *The Reconstruction of Religious Thought in Islam*, Edited and annotated by M. Saeed Sheikh, with a new introduction by Javed Majeed, Stanford: Stanford University Press, 2013, p. 138.

<sup>286</sup> *Ibid.*, p. 139-40.

<sup>287</sup> Al-Alwani, Taha Jabir, *Issues in Contemporary Islamic Thought*, Herndon: International Institute of Islamic Thought, 2005, p. 67.

<sup>288</sup> United States Institute of Peace, *Special Report: Ijtihad Reinterpreting Islamic Principles for the Twenty-first Century*, p. 4-5.

<sup>289</sup> Al-Raysuni, *al-Shūrā: The Qur’ānic Principle of Consultation*, p. 167.

<sup>290</sup> Lane, *Arabic-English Lexicon*, p. 2802.

Both the Qur'an and the Sunnah speak of *naṣīḥa*. In Surah al-'Arāf, we see that the Prophets Noah, Hūd, Ṣāliḥ and Shu'aib informed their people that the nature of their mission was to warn as a sincere adviser does:

I convey to you the messages of my Lord and advise you; and I know from Allah what you do not know. (7:62)<sup>291</sup>

I convey to you the messages of my Lord, and I am to you a trustworthy adviser. (7:68)<sup>292</sup>

And he turned away from them and said, "O my people, I had certainly conveyed to you the message of my Lord and advised you, but you do not like advisors." (7:79)<sup>293</sup>

And he turned away from them and said, "O my people, I had certainly conveyed to you the messages of my Lord and advised you, so how could I grieve for a disbelieving people?" (7:93)<sup>294</sup>

In the following *ḥadīth* the Prophet states firmly that religion (Islām) is *naṣīḥa*:

"The *dīn* (religion) is *naṣīḥa* (advice, sincerity)." We said, "To whom?" He said, "To Allah, His Book, His Messenger, and to the leaders of the Muslims and their common folk."<sup>295</sup>

In this short narration, the Prophet expounded the essence of Islam. A possible interpretation is that one's religion cannot be complete unless he fulfils the *naṣīḥa* to Allah, His book (the Qur'ān) and the other issues mentioned in this *ḥadīth*. The meaning is not that *naṣīḥa* is all there is to Islam, but that *naṣīḥa* is one of the most important pillars of this religion. These pillars include Islam, *imān* (faith), and *ihsān* (acting as if you see Allah).<sup>296</sup> Similarly, the Prophet once said:

"Al-Ḥajj [the pilgrimage] is [the gathering at] Arafat."<sup>297</sup>

As is known, the pilgrimage consists of many rituals, but the most important and dominant ritual is that of Arafah. As a result, the Prophet called the pilgrimage Arafah. In the same way, Islam is actually *naṣīḥa*.<sup>298</sup>

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<sup>291</sup> Translated by Sahih International, <https://quran.com/7>

<sup>292</sup> Ibid.

<sup>293</sup> Ibid.

<sup>294</sup> Ibid.

<sup>295</sup> Muslim, *Ṣaḥīḥ Muslim*, Vol. 1, *ḥadīth* no. 95. English translation by Zarabozo, see Zarabozo, Jamaal al-Din M., *Commentary on the Forty ḥadīth of al-Nawawī*, 3 vols., Boulder: Al-Basheer Company for Publications and Translations, 1999, vol. 1, p. 479-80, vol 1, p. 477.

<sup>296</sup> Zarabozo, *Commentary on the Forty Ḥadīth of al-Nawawī*, vol. 1, p. 479.

<sup>297</sup> Tirmidhī, vol. II, *ḥadīth* no. 2985, p. 270; Sunan Ibn Majah, vol. IV, *ḥadīth* no. 3015, p. 279. According to al-Albānī this *ḥadīth* is authentic, see al-Albānī, *Ṣaḥīḥ Sunan al-Tirmidhī*, Vol. 3, p. 194.

<sup>298</sup> Zarabozo, *Commentary on the Forty ḥadīth of al-Nawawī*, vol. 1, p. 479-80.

Giving sincere advice or *naṣīḥa* is obligatory for a Muslim if his co-believer asks for it. This is done by making it clear to the questioner what the correct approach is.<sup>299</sup> This is based on the following *ḥadīth*:

“If somebody asked the advice of someone else, then the latter should advise him.”<sup>300</sup>

In fact, as Zarabozo points out, giving sincere advice contributes to strengthening Muslim society as a whole. In other words, *naṣīḥa* is not only obligatory in Islam, but its very purport is to strengthen fraternity among the believers. Among other things, *naṣīḥa* plays an important role in protecting the Muslim society from evil. This entails, as Kamali points out, that *naṣīḥah* is only valuable when it is based on sincerity. When *naṣīḥa* is devoid of sincerity, or even worse, based on hypocrisy or bad intentions, its outcome cannot be called *naṣīḥa*. Kamali goes on to state that conviction and moral courage are mandatory for *naṣīḥa* to be effective.<sup>301</sup> However, Zarabozo makes it clear that there is another crucial requirement for the advisor to provide valuable *naṣīḥa* to the person who seeks his or her advice. Since the questioner acts upon the advice given to him, it is crucial that the advice in question should be correct. If not, this could lead to serious negative consequences for the seeker of advice even though the adviser is sincere. Thus, it is required that the adviser know what he is advising on. If the adviser doesn't possess the necessary knowledge or expertise, he should refrain from giving advice. This is because even though the adviser may assume he is giving sound advice, in reality, he might be giving advice that is harmful to the one he is advising.<sup>302</sup>

### 2.3.1 Giving *naṣīḥa*: publicly or privately?

One of the important purposes of *naṣīḥa* is to correct each other's actions by advising one another.<sup>303</sup> The *Sharī'a* does not modulate the way in which sincere advice is given, this remains at the discretion of the individuals in all cases.<sup>304</sup> However, we can find some guidance on this in the Qur'ān and the Sunnah. First, it is highly recommended advising someone should be done in private. When it is done in public, the individual in question can experience the process as an embarrassment, belittlement, or even an insult, even though the intentions of the adviser are sincere. This is all the more relevant when someone is advising another about something he is doing wrong.<sup>305</sup> Ibn Rajab (d. 1393) points out that pious predecessors would advise people covertly to the extent that some said: “Whoever advised his brother regarding what is between them, it is advised. Yet whoever advised him in front of people, it is a reprimand.”<sup>306</sup> Advising in private applies to both rulers and common people. This is illustrated in the following *ḥadīth*:

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<sup>299</sup> Al-Jazā'irī, Abū Bakr Jābir, *Minhāj al-Muslim*, Madinah al-Munawwarah: Dār al-'Ulūm wa al-Ḥakam, 2000, p. 155.

<sup>300</sup> Al-bukhāri, *Ṣaḥīḥ Al-bukhāri*, vol. 3, Chapter 68, p. 208.

<sup>301</sup> Kamali, *Freedom of Expression in Islam*, p. 38.

<sup>302</sup> Zarabozo, *Commentary on the Forty hadith of al-Nawawi*, vol. 1, p. 497.

<sup>303</sup> *Ibid.*, p. 493.

<sup>304</sup> Kamali, *Freedom of Expression in Islam*, p. 37.

<sup>305</sup> Zarabozo, *Commentary on the Forty hadith of al-Nawawi*, p. 494.

<sup>306</sup> Ibn Rajab, 'Abd al-Raḥmān ibn Aḥmad, *Jāmi' al-'Ulūm wal-Hikam: (a collection of knowledge and wisdom)*, rendered into English by Muhammad Fadel, Mansoura, Egypt: Umm Al-Qura, 2002, p. 114.

"Whoever wishes to give advice to a ruler about a matter should not do so publicly. Instead, he should take him by his hand and be alone with him [to talk to him] about it. If he accepts the advice from him [the matter is finished successfully]. If he does not [accept the advice], the person has fulfilled [the obligation] upon him."<sup>307</sup>

Imām al-Shāfi'ī (d. 820) wrote the following couplet about being advised in private:

*"Come to me with your advice when I am alone  
and do not advise me in the crowd,  
as advice amongst the people is a scolding.  
Hence, I do not like to hear it aloud.  
If you disobey me and do not heed my words,  
do not feel sad when you are not followed."*<sup>308</sup>

### 2.3.2 Consequences for neglecting *naṣīḥa*

So far, we have seen that *naṣīḥa* plays an important role in strengthening the brotherhood among believers. In this section, I want to focus on the negative consequences of neglecting *naṣīḥa*. Giving sincere advice is vital for the well-being of Muslim society as a whole. *Naṣīḥa* is one of the key factors safeguarding Muslim society from the *dissemination of evil*.<sup>309</sup> In regard to the *ḥadīth*<sup>310</sup> mentioned earlier, we see two groups of Muslims mentioned: the leaders and the common folk. Muslim leaders are of two kinds, namely religious leaders and rulers or political leaders. The religious leaders of Islamic scholars are the source of regeneration and spiritual force, they have a deep understanding of the Qur'ān and the Sunnah and how to apply the *Sharī'a* in daily life. As such, they are responsible for guiding the Muslim community as a whole. In case these religious leaders are corrupted or fail to educate the common folk, this leads to the decay of the common people. Therefore, religious scholars are to be sincere and only give rulings according to sound proofs. This entails that compromising truth either for money, popularity, or both not only runs counter to being sincere, but it will also have devastating consequences for society as a whole.<sup>311</sup>

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<sup>307</sup> Musnad Aḥmad, *ḥadīth* no. 15333, vol. 24, p. 49, English translation by Zarabozo, see: Zarabozo, *Commentary on the Forty hadith of al-Nawawi*, p. 491. According to al-Albānī the chain of narrators (*isnād*) of this *ḥadīth* is authentic and all the narrators of this *ḥadīth* are trustworthy, see # 1/187, p. 521.

<sup>308</sup> Badi, Jamal Ahmed, *Commentary on the Forty Hadith of Imam Al-Nawawi: Timeless Prophetic Gems of Guidance and Wisdom*, New York: Islamic Learning Foundation, Revised Edition, 2018, p. 262. English translation by Jamal Ahmed Badi. The original Arabic text can be found in Al-Shāfi'ī, Abū 'Abdullāh Muḥammad bin Idrīs, *Dīwān al-Imām al-Shāfi'ī*, Beirut: Dār al-Ma'rifah, 2005, p. 74.

<sup>309</sup> *Ibid.*, p. 495.

<sup>310</sup> "The religion is to be sincere (in advice)." We asked (The Messenger of Allah): "To whom (one should be sincere)?" He said: "To Allah (by believing in Him alone and not associating anyone with him in worship), His Book, His Messenger and the grand imāms of Muslims as well as their public."

<sup>311</sup> Zarabozo, *Commentary on the Forty hadith of al-Nawawi*, p. 492; Rahman, Fazlur, *Major Themes of the Qur'ān*, Minneapolis: Bibliotheca Islamica, 1994, p. 41.

#### 2.4. *Hisba*: commanding good and forbidding evil

Commanding good and forbidding evil, which is known in Arabic as *al-amr bi'l-ma'rūf wa'l-nahy 'an al-munkar*, is an essential Qur'ānic principle that underlies many Islamic laws and institutions. This principle sometimes functions as a replacement description of Islam and is the supreme goal of *Sharī'a*. This principle also forms the ethical core of Islamic governmental power. Accordingly, if their condition and capacity permit, citizens have the right to speak about or pursue what they consider to be right.<sup>312</sup> There are at least ten verses in the Qur'an referring to *hisba*,<sup>313</sup> such as:

And let there be [arising] from you a nation inviting to [all that is] good, enjoining what is right and forbidding what is wrong, and those will be successful.<sup>314</sup> [Qur'an 3:104]

You are the best nation produced [as an example] for mankind. You enjoin what is right and forbid what is wrong and believe in Allah.<sup>315</sup>  
[Qur'an 3:110]

They believe in Allah and the Last Day, and they enjoin what is right and forbid what is wrong and hasten to good deeds. And those are among the righteous.<sup>316</sup> [Qur'an 3:114]

*Hisba* is also known as *ihtisāb*; both words are derivatives of the root *h-s-b* meaning good deed, reward, measure, and judgement.<sup>317</sup> However, some scholars differentiate between the terms. According to a Muslim scholar, *ihtisāb* solely and exclusively means confronting evildoers to preserve the Islamic public order. He notes that the Caliph 'Umar used to inspect the market and forbid unfair trade practices and cheating. As a result, with the expansion of the Islamic imperium, Caliphs appointed a *muhtasib* or an official to conduct this duty in various countries.<sup>318</sup> Thus, some scholars confine the role of the *muhtasib* as a market inspector and the *muhtasib* was also called *'āmil al-sūq* and *sāhib al-sūq*.<sup>319</sup> For example, chapter twenty of Al-Marwādī's masterpiece *Kitāb al-Aḥkām al-Ṣulṭāniyyah, named fī aḥkām al-ḥisba*,<sup>320</sup> has been translated as "On the Market Supervisor's Office" by Professor Wafaa H.

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<sup>312</sup> Kamali, *Freedom of Expression in Islam*, p. 28; Quadir, Razi H., *Vrijheid van meningsuiting in de islam*, Den Haag: Uitgeverij U2pi, 5<sup>th</sup> edition, 2015, p. 23.

<sup>313</sup> Esmaeili et. al., *The Rule of Law, Freedom of Expression, and Islamic law*, p. 122.

<sup>314</sup> Translated by Sahih International, available at <https://quran.com/3>

<sup>315</sup> Ibid.

<sup>316</sup> Ibid.

<sup>317</sup> Iqbal, Zafar and Lewis, Mervyn. L, *An Islamic Perspective on Governance*, Cheltenham: Elgar, 2009, p. 263.

<sup>318</sup> Basyūnī, *The Freedom of Opinion in Islam*, p. 42-3.

<sup>319</sup> Mottahedeh, Roy and Stilt, Kirsten "Public and Private as Viewed through the Work of the *Muhtasib*", p. 1, in *Social Research: An International Quarterly*, v70 n3 (2003): 735-748., p. 1. The scholar R.P. Buckley has written a monograph on the subject of the *Muhtasib*; see R.P. Buckley, *The Book of the Islamic Market Inspector* (New York: Oxford University Press, 1999).

<sup>320</sup> al-Māwardī, Abū al-Ḥasan 'Alī Ibn Muḥammad Ibn Habīb, *al-Aḥkām al-Ṣulṭāniyya*, Edited by Aḥmad Jād, Cairo: Dar ul Ḥadīth, 2006, p. 349.



Wahba.<sup>321</sup> However, if we examine the role that al-Māwardī ascribes to the *muḥtasib*<sup>322</sup> in this chapter, it is obvious that the role of the *muḥtasib* is much broader than merely a market inspector, as suggested by the English designation. This chapter begins with “the market supervision, or public morals office, *ḥisba*, is an injunction to promote good if obviously forsaken, and prohibit evil if manifestly done.”<sup>323</sup> Al-Māwardī mentions the vital role of the *muḥtasib* regarding commanding the good on three levels: the rights of Allah, the rights of people, and that which is common to both. He mentions several examples: in the first case, he is obligated to command people to establish the Friday prayer if a town doesn’t perform it. It is also up to the *muḥtasib* to ensure that people pay off their debts, to maintain the rights of people. An example of the third category is that the *muḥtasib* compels a man to fulfil his obligations as a father to his child (after it has been proven he is the father), whom the father denies, and to censure him if he continues to disown the child.<sup>324</sup> Towards the end of this section, it will become clear that freedom of expression plays a vital role in implementing *ḥisba*.

In the introduction on *ḥisba*, Abū Ḥāmid al-Ghazālī (d. 1111) emphasizes the importance of this Qur’ānic principle. *Ḥisba* is the greatest pillar of religion, the maintenance of which prompted Allah to send all the Prophets. Al-Ghazālī then goes on to state the negative consequences of not applying *ḥisba*. He predicts that without the application of *ḥisba*, prophethood would be rendered meaningless and religion lost, laziness, ignorance and corruption would be rampant, and the Islamic lands had been devastated.<sup>325</sup>

The following *hadīth* is another proof of *ḥisba*:

“Whoever amongst you sees something abominable should set it right with his hand; if he has not enough power to do it, then he should do it with his tongue, and if he has not enough power to do it then he should (abhor it) from his hearth, and this the least of faith.”<sup>326</sup>

In this *hadīth*, the Prophet has made it clear that the removal of evil, or at least the wish to do so, is an essential characteristic of the creed of a Muslim. This *hadīth* shows what attitude a Muslim should take towards evil. A true believer will never accept evil or be content with it, if he is confronted with evil, he will fight it and do everything to take it away.<sup>327</sup>

In his work *al-Furūq* ("The Differences"), the scholar al-Qarāfī (d. 1285) discusses three conditions for the implementation of *ḥisba*. First, the person who calls for commanding good and forbidding evil should be knowledgeable about what the *Sharī’a* dictates is good and should be promoted and likewise, what the *Sharī’a* ordains as evil and must be prevented. Someone ignorant of this should not be involved with *ḥisba*. Secondly, one must be

<sup>321</sup> al-Māwardī, Abū al-Ḥasan ‘Alī Ibn Muḥammad Ibn Habīb, *The Ordinances of Government: al-Aḥkām al-Sultāniyya wa-l Wilāyāt al-Dīniyya*, Translated by Wafaa H. Wahba, Reading, England: Garnet Publishing, 1996, p. 260.

<sup>322</sup> See al-Māwardī, Abū al-Ḥasan ‘Alī Ibn Muḥammad Ibn Habīb, *The Ordinances of Government: al-Aḥkām al-Sultāniyya wa-l Wilāyāt al-Dīniyya*, Translated by Wafaa H. Wahba, Reading, England: Garnet Publishing, 1996, p. 260: here professor Wafaa H. Wahba translates *muḥtasib* as market inspector. However, dr. Asadullah Yate who also translated al-Māwardī, Abū al-Ḥasan ‘Alī Ibn Muḥammad Ibn Habīb, *al-Aḥkam as-Sultaniyyah: The laws of Islamic governance*, Translated by Asadullah Yate, London: Ta-Ha Publishers, 1996, reprinted 2005, retains the Arabic word *muḥtasib*.

<sup>323</sup> al-Māwardī, *The Ordinances of Government*, p. 260.

<sup>324</sup> Ibid., p. 267.

<sup>325</sup> al-Ghazālī, Abū Ḥāmid Muḥammad b. Muḥammad, *Iḥyā’ ‘Ulūm al-Dīn*, Edited by ‘Alī Muḥammad Muṣṭafa and Sa’īd al-Muḥāsani, 6 vols., Damascus: Dār al-Fayḥā’, 2010, Vol. 3, p. 336.

<sup>326</sup> Muslim, *Ṣaḥīḥ Muslim*, Vol. 1, *hadīth* no. 78.

<sup>327</sup> Zarabozo, *Commentary on the Forty Hadith of al-Nawawi*, Vol. 3, p. 1197.

reasonably certain that attempts to stop an evil do not lead to greater evil. As an example, al-Qarāfī mentions someone trying to stop another from drinking wine, which will almost certainly result in the death of the wine drinker or the person. Thirdly, one must be almost certain that attempts to order good and counter evil will lead to the desired result. If one of the first two conditions cannot be met, then it is forbidden to perform *ḥisba*. In the absence of the last condition, *ḥisba* is no longer an obligation but only recommended.<sup>328</sup>

The principle of *ḥisba* can be used both on the state level<sup>329</sup> and the individual level in a modern Muslim majority society. In both cases, *ḥisba* can be a justification for freedom of expression. For members of a Muslim majority society, *ḥisba* can serve as a tool to express their concern about how the government conducts its responsibilities and duties. However, history shows that modern Islamic countries such as Iran, Pakistan, and Iran have used the principle of *ḥisba* to interfere with individual freedoms, including that of expression, if it is seen as against 'religion'.<sup>330</sup> Moreover, from a classical point of view, we see that the use of the principle of *ḥisba* is twofold: individuals can express themselves when feeling unfairly wronged and the state can intervene in case evil is openly committed. For example, al-Marwadi states that in certain cases, it is permissible for a person to complain -thus expressing his opinion- to the *muḥtasib* when he feels that his rights have been infringed. Likewise, the *muḥtasib*, who operates on behalf of the state, can express his opinion if he witnesses evil and wrongdoing. For example, he may reprimand a Muslim who eats openly during the daytime during Ramadan (the month of fasting) without excuse.<sup>331</sup> Despite the dual nature of *ḥisba*, al-Marwadi gives ample proof that freedom of speech is vital to the proper functioning of *ḥisba*. Therefore, we can readily conclude that "without freedom of expression, it would be inconceivable to command good or to forbid evil".<sup>332</sup>

### 3. The Boundaries of Freedom of Expression in Islam: Moral and Legal Restraints

What are the boundaries of freedom of expression in Islam? To answer this question, I shall explore some themes from the manuals of Islamic jurisprudence that clearly indicate the boundaries of freedom of expression in Islam. As the title suggests, this section is divided into two parts: the limitation of freedom of 1) expression from a moral perspective and 2) from a legal perspective. The reason for this separation is that moral violations of freedom of expression are reprehensible but not punishable in Islam. On the other hand, there are some violations of freedom of speech which are conceived as criminal offenses, carrying specific

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<sup>328</sup> Al-Qarāfī, Shihāb al-Dīn Aḥmad Ibn-Idrīs, *al-Furūq: al-Qawā'id al-Saniyah fi al-Asrār al-Fiqhiyah*, ed. 'Abdul Ḥamīd Handāwī, Ṣaydā: al-Maktabah al-'Asriyah, 2011, vol. IV, p. 199.

<sup>329</sup> According to the Pew Research Center, *Hisba* has already been implemented in some Muslim majority countries. For example, *Hisba* "And in sub-Saharan Africa, two countries in the region (Nigeria and Somalia) have religious police. In Nigeria, the Hisbah (religious police) are funded and supported by governments in several states, where they enforce their interpretation of sharia law." And "in Malaysia, state Islamic religious enforcement officers and police carried out raids to enforce sharia law against indecent dress, banned publications, alcohol consumption and *khalwat* (close proximity to a member of the opposite sex), according to the U.S. State Department, available at <https://www.pewresearch.org/fact-tank/2014/03/19/religious-police-found-in-nearly-one-in-ten-countries-worldwide/>.

<sup>330</sup> Esmaeili et. al., *The Rule of Law, Freedom of Expression, and Islamic law*, p. 122.

<sup>331</sup> al-Māwardī, *The Ordinances of Government*, p. 268.

<sup>332</sup> Kamali, *Freedom of Expression in Islam*, p. 28

penalties. The first subjects discussed are those affecting someone's dignity. The previous chapter demonstrated that, with the exception of the United States, in all liberal democracies there is room for limitations on speech acts that aim to attack dignity. Dignity is also addressed on some verses of the Qur'an and some hadiths speak about honor and dignity as coupled concepts.<sup>333</sup> Historically, honor has evolved to dignity, as exemplified by the Universal Declaration of Human Rights.<sup>334</sup> From an Islamic perspective, modern scholar Mohammed Hashim Kamali convincingly argues for dignity being a direct and unqualified right for every human being regardless of religion, race, or color. Kamali refers to the following Qur'anic text:

And We bestowed dignity on the children of Adam and provided them with rides on the land and in the sea, and provided them with a variety of good things and made them much superior to many of those whom We have created (al-Isrā', 17:70)<sup>335</sup>

This verse of the Qur'an is self-evident in the establishment of dignity as the right of every human being. Dignity is not earned by creditable work, but an expression of God's mercy and favour.<sup>336</sup> Any conduct affecting someone's dignity is forbidden in Islam. Thus, every kind of speech, writing, or expression which damages someone's dignity is, according to the *Sharī'a*, eligible for prohibition. Ahmad ibn al-Naqib al-Misri notes there are three types of oppression:

The first is consuming property through falsehood; the second, oppressing Allah's servant by killing, hitting, breaking bones, or causing wounds; and the third, oppressing them through spoken abuse, cursing, reviling, or accusing them of adultery or sodomy without proof. The Prophet said in an address to the people at Mina during his farewell (last) pilgrimage:<sup>337</sup>

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<sup>333</sup> Some scholars use honor and dignity as interchangeable terms. I agree with Hamid Andishan that using honor and dignity as interchangeable terms is an oversimplification. Briefly, "dignity represents a value everyone possesses simply in virtue of being human, regardless of social hierarchy or religious preference. Honour, on the contrary, demonstrates a status which someone achieves because of a religious or societal preference", see Hamid Andishan, "Honour or Dignity? An Oversimplification in Islamic Human Rights", in: *Human Rights Review* (2019) 20:461–475, p. 1. To back up his argument, Andishan, in the same article, refers to Peter Berger and Charles Taylor. According to Berger "dignity refers to an intrinsic worth that... the individual possesses, regardless of any social prototype." In a societal context, honor is related to something what members of a society achieve, such as a loyal soldier or a dedicated mother. Taylor, views dignity as a sign on the individual level and which is on par with equality. In other words, people feel valuable and recognized regardless of their achievements. Honor has a sense of preference, it is being achieved by a person after he has contributed to actualizing common values of a society. Thus, Taylor attaches dignity to individualism and honour to community and collective values. Taylor's view of dignity is in line with Jeremy Waldron who states that "dignity in the sense of a person's basic entitlement to be regarded as a member of society in good standing", see Waldron, *The Harm in Hate Speech*, p. 105.

<sup>334</sup> Cf. Margalit, Avishai, *The Decent Society*, Eng. trans. Naomi Goldblum, Cambridge, Massachusetts: Harvard University Press, 1996, p. 43.

<sup>335</sup> English translation Mufti Taqi Usmani, available at <https://www.quranexplorer.com/chapters/al-isra>.

<sup>336</sup> Kamali, Mohammad Hashim, *The Dignity of Man: An Islamic Perspective*, Cambridge: The Islamic Text Society, 2002, p. 1.

<sup>337</sup> Al-Misri, Ahmad ibn Lu'lu' Ibn al-Naqib; Nuh Ha Mim Keller, *Reliance of the Traveller: The Classic Manual of Islamic Sacred Law 'Umdat al-Sālik, in Arabic with Facing English Text, Commentary, and Appendices*, Beltsville, Maryland: Amana Publications, 1994, p. 667.

“Verily your blood (lives) and your property and your honour (*a’rāḍakum*) are as sacred unto you as sacred is this day of yours, in this month of yours, in this city of yours.”<sup>338</sup>

As mentioned above, certain expressions are clearly forbidden according to the Qur’an and the *ḥadīth*, but don’t merit judicial punishment. In these cases, which fall under moral constraints, the act is considered a sin, and the perpetrator is held accountable in the afterlife. Other violations of freedom of expression in Islam come under the heading of legal restraints and are indictable. In the two following sections, I shall review some violations of freedom of expression in Islam, and explore why these kinds of expressions are forbidden.

### 3.1. Moral Restraints

I will start by discussing subjects which are reprehensible in Islam but don’t merit legal punishment. The examples selected are only a few of many themes that reflect the moral violation of free speech in Islam. The subjects were selected for two driving reasons; first, the themes selected are generally known among Muslims, but, in my opinion, increased awareness of how they relate to free speech is necessary. Second, some of these themes are also considered reprehensible in liberal democracies, therefore, they are particularly suited to comparisons of the boundaries of freedom of expression in Islam and liberal democracies, which I shall discuss in chapter 5. *This is all the more* relevant for the themes that I discuss in the next section: the legal restraints on free expression in Islam. However, due to this selection, several themes such as calling to religious innovation or *bid’a*, rebellious transgression or *baghy*, and dissimulation or *taqiyya* will not be discussed in this section.<sup>339</sup> In general, the following *ḥadīth* makes it clear that it is forbidden in Islam to harm a person, humiliate him, and abuse him. Thus, someone’s blood, honor, and wealth are sacrosanct:

Don't nurse grudge and don't bid him out for raising the price and don't nurse aversion or enmity and don't enter into a transaction when the others have entered into that transaction and be as fellow-brothers and servants of Allah. A Muslim is the brother of a Muslim. He neither oppresses him nor humiliates him nor looks down upon him. The piety is here, (and while saying so) he pointed towards his chest thrice. It is a serious evil for a Muslim that he should look down upon his brother Muslim. All things of a Muslim are inviolable for his brother in faith: his blood, his wealth, and his honor.<sup>340</sup>

Other narrations read:

“Everything of a Muslim is sacred to a Muslim: his property, honour and blood. It is enough evil for any man to despise his brother Muslim.”<sup>341</sup>

“The most prevalent kind of usury is going to lengths in talking unjustly against a Muslim's honour.”<sup>342</sup>

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<sup>338</sup> Muslim, *Ṣaḥīḥ Muslim*, Vol. 3, *ḥadīth* no. 1679.

<sup>339</sup> For more information on these and other subjects, see Kamali, *Freedom of Expression in Islam*, p. 132-62.

<sup>340</sup> Muslim, *Ṣaḥīḥ Muslim*, Vol. 4, *ḥadīth* no. 2564.

<sup>341</sup> Abū Dāwūd, *Sunan Abū Dāwūd*, vol. 3, *ḥadīth* no. 4864. According to al-Albānī this *ḥadīth* is authentic, see al-Albānī, *Ṣaḥīḥ Abī Dāwūd*, vol. 3, *ḥadīth* no. 4882. p. 198.

<sup>342</sup> Abū Dāwūd, *Sunan Abū Dāwūd*, vol. 3, *ḥadīth* no. 4858. According to al-Albānī this *ḥadīth* is authentic, see al-Albānī, *Ṣaḥīḥ Abī Dāwūd*, vol. 3, *ḥadīth* no. 4876. p. 197.

The fact that honour is mentioned with life and property as inviolable is illustrative of how serious it is taken in Islam to violate someone's honour. This will become clearer in the following subjects.

### 3.1.1 *Ghība* (Backbiting)

Backbiting or in Arabic *ghība* is forbidden in the Qur'an and strongly condemned in the *Sunna*. In the Qur'an backbiting is put on par with suspiciousness and overly-criticising:

O you who believe, abstain from many of the suspicions. Some suspicions are sins. And do not be curious (to find out the faults of others), and do not backbite one another. Does one of you like that he eats the flesh of his dead brother? You would abhor it. And fear Allah. Surely Allah is Most-Relenting, Very-Merciful. (49:12)<sup>343</sup>

The scholar Ibn Qudamah al-Maqdisi (d. 1290) defines *ghība* as "a Muslim mentions his Muslim brother in a manner that the latter dislikes, whether by referring to a defect in his body, such as shortness and squint; or in his lineage, as to say, for example, that his father is immoral or indecent; or in his morality, as to say, for instance, that he is dirty."<sup>344</sup>

*Ghība* is defined by the Prophet himself alongside with *buhtān* or slander as we see in the following *ḥadīth*:

"The prophet said: "Do you know what is backbiting (*ghība*)? They (the Companions) said: Allah and His Messenger know best. Thereupon he (the Prophet) said: Backbiting implies your talking about your brother in a manner which he does not like. It was said to him: What if that (failing) which I mention is actually found in my brother? He said: If (that failing) is actually found (in him) what you assert, you in fact backbited him, and if that is not in him, you in fact slandered him (*bahattah*)"<sup>345</sup>

This passage makes it clear that backbiting is forbidden in Islam because it may ruin a person's reputation. Despite the severe warning to those who practice *ghība*, Muslim scholars have made some exceptions for *ghība* in case of necessity (*ḍarūrah*). In these cases, it's not only a matter of tolerating a lesser evil, that is *ghībah*, but it sometimes becomes necessary to criticize others in their absence or even expose their secrets. The reason for granting a concession here is to secure a higher interest (*maṣlaḥa 'ulyā*). This may include preventing harm to society, protecting the essential values, or serving the cause of justice.<sup>346</sup> In his famous work *Riyāḍ al-Ṣāliḥīn*, chapter 256, the scholar al-Nawawi gives several reasons when it is permissible to speak badly about people, such as injustice, asking for a fatwa, and seeking help.<sup>347</sup>

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<sup>343</sup> English translation Mufti Taqi Usmani, available at <https://www.quranexplorer.com/chapters/al-hujraat>

<sup>344</sup> Ibn Qudamah al-Maqdisi, Ahmad ibn 'Abd al-Rahman, *Mukhtasar Minhaj al-Qasidin (Towards the Hereafter)*, Cairo: Dar al-Manarah, 2002, p. 187.

<sup>345</sup> Muslim, *Ṣaḥīḥ Muslim*, Vol. 4, *ḥadīth* no. 2589.

<sup>346</sup> Kamali, *Freedom of Expression in Islam*, p. 119-20.

<sup>347</sup> "Know that talking about people is permitted for a sound legal reason which can only be realised by doing that. There are six reasons for which it is allowed:

We see here that freedom of expression or rather freedom *to* expression, to stick to Isaiah Berlin's concept of freedom, serves purposes such as discovery of the truth and warding off evil.

Calumniation, slandering or saying untrue things about a person all fall under the definition of *buhtān*.<sup>348</sup> The word *buhtān* appears a number of times in the Qur'an, among others in chapter 24:

*And why, when you heard it, did you not say, "It is not for us to speak of this. Exalted are You, [O Allah]; this is a great slander (buhtān 'aẓīm)"? (24:16)*<sup>349</sup>

In this verse, the great slander, also known as the incident of *Ifk*, refers to the slander of 'Ā'ishah bint Abī Bakr, who was the wife of the Prophet. In summary, the leader of the hypocrites, 'Abdullah bin Ubayy Salūl started to spread lies about 'Ā'ishah having committed adultery with Ṣafwān ibn al-Mu'aṭṭal al-Sulamī. Falsely accusing someone of committing adultery is known as *qadhf*, discussed at greater length in section 4.1. From that moment, the

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1. Being a victim of injustice. The person who has been wronged is permitted to complain about that to the ruler or qadi or others in authority or those who have the power to rectify the injustice. He says, "So-and-so has wronged me."

2. Seeking help to alter something objectionable or to return someone who disobeys Allah to the correct path. He says to the one he hopes will remove what is objectionable (*munkar*), "So-and-so is doing such-and-such, so restrain him from it. That is allowed if his aim is to remove that objectionable. Otherwise, it is forbidden.

3. Asking for a fatwa. He says to the mufti, "My father (brother, spouse or so-and-so) has wronged me by such-and-such. Can he do that? How can I be saved from it and obtain my right and remove the injustice?" This is permitted as it is legal argument, but it is better to be more circumspect and say, "What do you say about a man, person or spouse who does such-and-such?" Then he will obtain what he desires without mentioning him specifically, although it is nonetheless permitted to mention him specifically.

4. Warning the Muslims about evil and advising them. There are various forms of that. Part of that is invalidating the testimony of witnesses and transmitters. That is permitted by consensus. Indeed, it is mandatory because of need. Another instance is consultation about someone as a potential in-law, partner, keeper of a deposit or employee, or the like, or neighbour. Then the one consulted must not conceal his state and must mention his bad qualities with the aim of giving good advice. Another case is when someone sees someone learning *fiqh* frequenting an innovator or impious person to study with them and he fears that the student of *fiqh* will be harmed by that. Then he must give him good advice by explaining the person's situation, always provided that his intention is to give advice. This is something in which it is possible to err and the speaker may be moved by envy to do that and Shaytan confuses the matter for him so that he imagines that it is good advice. Another case is when someone has guardianship which he does not administer properly, either because he does not deal properly with it, or is impious or neglectful or the like. Then it is obliged to mention that to the one with general authority so that he can remove it and appoint someone who will look after it properly, or in order that he knows that about him so that he can deal with him appropriately and not be deceived by him.

5. When someone is open about his impiety or innovation, like someone who drinks wine openly, oppresses people, imposes tolls on people and taxes property unjustly and engages in false matters. What he does openly is mentioned, but it is forbidden to mention other faults he has unless it is for another justifiable cause.

6. Recognition. When a person is known by a nickname, like al-A'mash (the blear-eyed), al-A'raj (the lame), al-Asamm (the deaf), and the like, it is permitted that they be known as that but it is forbidden to use it to deprecate them. It is better if there is another way of identifying the person.

These are six reasons which scholars mentioned and there is agreement on most of them. The evidence for that in sound hadiths is well-known." Available at <http://bewley.virtualave.net/riyad8.html>, Translated by Aisha Bewley. For another English translation see Al-Nawawī, Abū Zakarīya Yahya Ibn Sharaf, *Riyād aṣ-Ṣāliḥīn*, Translated into English by Soliemān Al-Maiḥūb, Beirut: Dār al-Kutūb al-'Ilmiyah, 1999.

<sup>348</sup> Lane, *Arabic-English Lexicon*, vol. I, p. 263

<sup>349</sup> <https://quran.com/24>

reputation of ‘Ā’ishah was severely damaged. Verses 11-20 of this chapter were all revealed to prove the innocence of ‘Ā’ishah and her reputation was cleansed. There are two important lessons to be learned from this. 1) People are innocent until the opposite is proved. In the case of ‘Ā’ishah, there were no four witnesses produced to prove that she committed adultery, thus, the hypocrites were slandering. 2) It is imperative to think well of good people. When something unbecoming and unsubstantiated is told about a good person, the response must be to think well of him and harbor only good feelings about him.<sup>350</sup> The latter is underpinned in the following *hadīth*:

“Allah forgives my followers those (evil deeds) their souls may whisper or suggest to them as long as they do not act (on it) or speak.”<sup>351</sup>

In another verse of the Qur’an, there is a stern warning for the dealing in slandering:

Woe to every slanderer (*Humazah*) and backbiter (*Lumazah*). (104:1)<sup>352</sup>

Ibn Kathīr states that *al-Hammāz* refers to slander by speech (*bi-’lqawl*) and *al-Lammāz* to slander by action (*bi-’lfi’l*). This implies that the person in question scorns people and denigrates them. Both Mujāhid and ibn Zayd state that *Hamz* is done by the hands and eye (action), and *Lamz* is carried out with the tongue (speech).<sup>353</sup> Qurṭubī states that *Hammāz* is the one who slanders and speaks evil in the face of a man, and *al-Lammāz* is the one who slanders behind someone’s back. He also explains that *Hamz* means slandering by action and *Lamz* by speech, and refers to someone who likes to find fault with everybody.<sup>354</sup> This verse shows that there is a stern warning against damaging someone’s reputation and dignity. Although this chapter of the Qur’an was revealed regarding Al-Akhnas ibn Shurayq, because he drove a wedge between people through both speech and action, the rule for slandering is general and thus applies to anyone who commits this heinous act.<sup>355</sup>

### 3.1.2 *Namīma* (Talebearing)

*Namīma* is malicious gossip in telling one person what another said or quoting someone’s words to another with the intention to worsen relations between them.<sup>356</sup> Just as we have seen with backbiting, there is ample evidence from the Qur’an and Sunnah that talebearing is unlawful. The word *namīma* appears in the Qur’an:

<sup>350</sup> Ibn Kathīr, *Tafsīr al-Qur’ān al-‘Aẓīm*, vol. IV, p. 32-38.

<sup>351</sup> al-Bukhārī, *Ṣaḥīḥ Al-Bukhārī*, vol. 8, *hadīth* no. 6664. *Sunan Ibn Mājah*, vol. 3, *hadīth* no. 6664 reads almost the same: Verily, Allah has exonerated my *Umma* from the evil suggestion their hearts prompt with so long as it does not put them in to action or express them and (from the action) it (*umma*) is coerced to do”.

<sup>352</sup> Hilālī, Taqī al-Dīn and Khan, Muhammad Muhsin, *Interpretation of the Meanings of the Noble Qur’an in the English language*, Riyadh: Darussalam, 2000, vol. 9, p. 352.

<sup>353</sup> Ibn Kathīr, *Tafsīr al-Qur’ān al-‘Aẓīm*, Vol. V, p. 254.

<sup>354</sup> Qurṭubī, *Mukhtaṣar Tafsīr al-Qurṭubī*, Vol. IV, p. 587.

<sup>355</sup> Al-Ṣābūnī, Muḥammad ‘Alī, *Ṣafwat al-tafsīr: Tafsīr lil-Qur’ān al-Karīm, jāmi’ bayna al-ma’t’hūr wa-al-ma’qūl, mustamadd min awthaq kutub al-tafsīr--al-Ṭabarī, al-Kashshāf, al-Qurṭubī, al-Ālūsī, Ibn Kathīr, al-Baḥr al-muḥīṭ--wa-ghayrihā bi-uslub muyassar, wa-tanzīm ḥadīth, ma’a al-‘ināyah bi-al-wujūh al-bayānīyah wa-al-Lughawīyah*, Beirut: al-Maktabah al-‘Aṣrīyah, 2005, p. 1545-6.

<sup>356</sup> Al-Misri, *Reliance of the Traveller*, p. 731.

A scorner, going about with malicious gossip (*namīm*) (68:11)<sup>357</sup>

The following *hadīth* shows a stern warning for the one who practices *namīma*:

A *Qattāt* will not enter Paradise.<sup>358</sup>

Muhammad Muhsin Khan, the translator of *Ṣaḥīḥ Al-Bukhārī* into English, defines a *Qattāt* as follows:

“A *Qattāt* is a person who conveys disagreeable, false information from one person to another with the intention of causing harm and enmity between them.”<sup>359</sup>

The practice of *namīma* will lead to serious negative consequences in a community or a society as a whole, such as affecting social cohesion, security, and social placidity. Although classical Islamic literature considers *namīma* to be merely oral, with the advent of the Internet (and Social Media) there are additional ways to spread misinformation to provoke harm and enmity between people.

### 3.1.3 *La'n* (Cursing)

There are several definitions for cursing, but briefly, its object is “to put someone far away from the divine mercy.”<sup>360</sup> Cursing is the perfect opposite of blessing because a curse or a blessing “is a wish, expressed in words, that evil or good may befall a certain person.”<sup>361</sup> According to al-Nawawi, cursing a sincere Muslim is prohibited by unanimous consensus of all Islamic scholars.<sup>362</sup> This is based on the following *hadīth*:

“Cursing a believer is like murdering him, and whoever accuses a believer of disbelief, then it is as if he had killed him.”<sup>363</sup>

It is permissible, but not recommended nor rewarded by Allah, to curse those with objectionable character traits by saying “Allah curse oppressors,” “Allah curse the corrupt,” “Allah curse the statue makers,” and so forth. Well-known authentic *hadīths* confirm that the Prophet used to curse in general terms, such as “Allah curse her who wears false hair and her who arranges it for another”; “Allah curse him who eats usurious gain (*riba*)”; “Allah curse those who makes statues”; “Allah curse him who surreptitiously changes property-line makers”.<sup>364</sup>

There are differing opinions of whether cursing a specific person is permissible. Ibn Taymiyyah states the following:

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<sup>357</sup> <https://quran.com/68>

<sup>358</sup> al-Bukhārī, *Ṣaḥīḥ Al-Bukhārī*, vol. 8, *hadīth* no. 6056.

<sup>359</sup> *Ibid.*, 55n2.

<sup>360</sup> Al-Misri, *Reliance of the Traveller*, p. 656.

<sup>361</sup> Encyclopedia of Religion and Ethics, vol. 4, p. 367.

<sup>362</sup> Al-Misri, *Reliance of the Traveller*, p. 772.

<sup>363</sup> Bukhārī, *Ṣaḥīḥ Al-Bukhārī*, vol. 8, *hadīth* no. 6105.

<sup>364</sup> Al-Misri, *Reliance of the Traveller*, p. 772-3.



It is absolutely allowed to curse those whom Allah and His Messenger have cursed, but with regard to the cursing of specific people, if it is known that the person died in unbelief [kufr], then it is allowed to curse him. But with regard to a specific [Muslim] evildoer, we should not curse him, because the Prophet forbade cursing ‘Abd-Allah ibn Himār who used to drink wine, although he had cursed the wine-drinkers in general; however, cursing a specific person if he is an evildoer or preaching heresy (*bid‘a*) is a point of dispute among the scholars.<sup>365</sup>

Al-Ghazālī indicates that it is unlawful to curse a particular person who commits acts of disobedience, such as stealing, adultery, drinking wine, consuming usurious gain, or one who is making statues. He makes one exception; it is lawful to curse someone who is known to have died in a state of unbelief such as Abū Jahl, Abū Lahab, Pharaoh, and Hamman. To curse means to exclude one from the mercy of Allah, while not knowing in which state the corrupt person in question or non-Muslim will end his life. The Prophet personally cursed people, but this can be explained by the fact the Prophet knew that those would die in unbelief. Likewise, making supplications that evil befalls a person is tantamount to cursing and therefore blameworthy, even if it concerns an oppressor. It’s also objectionable to curse any animals or inanimate objects.<sup>366</sup>

### 3.2. Legal Restraints

In the previous section, we discussed some violations of freedom of expression in Islam, which are reprehensible but are not punishable according to the laws of the *Sharī‘a*. In this section, I shall discuss some violations of free speech that are both reprehensible and punishable in Islam. As I shall demonstrate in chapter 5, some of these criminal offenses that restrict the practice of free speech in Islam are also restrictions on freedom of expression in liberal democracies.

#### 3.2.1. *Qadhf* (Slandering Accusation)

*Qadhf* or slanderous accusation is a *ḥadd*, or fixed offense, and therefore differs from other kinds of slander such as *buhtān*. *Qadhf* specifically refers to a false accusation of fornication or sodomy by a chaste Muslim man or woman.<sup>367</sup> The slanderous accusation is mentioned in the following verse of *Qur‘ān*:

And those who accuse chaste women and then do not produce four witnesses - lash them with eighty lashes and do not accept from them testimony ever after. And those are the defiantly disobedient. (24:4)<sup>368</sup>

<sup>365</sup> Ibn Taymiyyah, Ibn Taymiyyah, Aḥmad ibn ‘Abd al-Ḥalīm, *Majmū‘a al-Fatāwā*, Edited by ‘Amir Jazzār; Anwar Bāz, al-Manṣūrah: Dār al-Wafā, 2nd edn, 2001, 6/511, p. 306.

<sup>366</sup> Al-Misri, *Reliance of the Traveller*, p. 773.

<sup>367</sup> Al-‘Uthaymīn, *Sharḥ Kitāb al-Siyāsah al-Shar‘īyah li-Shaykh al-Islām ibn Taymiyyah Raḥimah Allāh*, p. 330; Doi, *Sharī‘ah: The Islamic Law*, p. 246; al-Marghīnānī, *al-Hidāyah*, p. 233; Al-Misri, *Reliance of the Traveller*, p. 665, 667, 983; Ibn Rushd, *The Distinguished Jurist’s Primer*, translated by Imran Ahsan Khan Nyazee; reviewed by Mohammad Abdul Rauf, Reading: Garnet Publishing, 2000, Vol II, p. 531; Ibn ‘Ābidīn, Muḥammad Amīn ibn ‘Umar, *Radd al-Muḥtār ‘alā al-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār*, al-Riyād: Dār ‘Alām al-Kutub, 2<sup>nd</sup> edition, 2003, vol. VI, p. 79.

<sup>368</sup> Translation by Sahih International, available at <https://quran.com/24>

False accusation of adultery is a severe offense in Islam because it attacks the honour, reputation, and dignity of a chaste person. It is incumbent upon a Muslim to safeguard the dignity and honour of fellow Muslims and not to commit fault-finding to expose someone's hidden failings. If the accusation of fornication (*zinā'*) cannot be proven by producing four witnesses to the act at the same time and in the same place, the accuser will be penalized with eighty stripes.<sup>369</sup> If the accuser is a slave, he will receive forty lashes. Where the accused person is not chaste, but fornication cannot be proven, then the judge will impose a discretionary punishment (*ta'zīr*). There are explicit phrases of *qadhf* such as 'O fornicator' (*yā zānī*) or 'O homosexual' (*yā lūṭī*) which merits the prescribed punishment. When it comes to implicit phrases such as 'O prostitute' (*yā qaḥḥba*), 'O harlot' (*yā fājira*), or to make a rude gesture of putting horns on someone (*ja'alti lahu qurūnan*), i.e., indicating you are cheating on your mate or spouse, the slanderer needs to give an explanation what is exactly meant by such phrases and gestures. If he means to slander someone, then he is to receive the prescribed punishment of eighty lashes. If these phrases are merely meant as invectives, then the *ḥadd* punishment is dropped, but a judge can enforce a *ta'zīr* or discretionary punishment. According to Imams Ibn Ḥanbal and al-Shāfi'ī, the offence of slander is a violation of the Right of Man and therefore the *ḥadd* punishment for *qadhf* is dropped when the plaintiff forgives the slanderer.<sup>370</sup> Imam Abu Ḥanīfī holds that *qadhf* is a violation of the Right of Allah and therefore the victim of slander is not entitled to grant forgiveness to the culprit either before or after it has been filed to the authorities.<sup>371</sup> Imam Mālik holds an intermediate position, he does not allow the victim of slander to grant forgiveness after it is reported to the authorities, but the victim may forgive the offender before the authorities have been notified.<sup>372</sup> The modern scholar Abū Bakr al-Jazā'irī (d. 2018) rightfully explains the wisdom for the fixed punishment for *qadhf*: "The preservation of the honor ('*ard*) of the Muslim and protecting his dignity (*karāmatihī*). It is also a preservation of the purity of the society from the spread of lewdness and indecencies among the Muslims, while they are the just and pure people."<sup>373</sup>

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<sup>369</sup> Doi, *Sharī'ah: The Islamic Law*, p. 247.

<sup>370</sup> Al-Hajjāwī, Sharaf ud-Din Abī Manja Mūsa ibn Aḥmad ibn Salim Al-Maqdisi As-Salihi, *Zād ul Mustaqnī*, Makkah: *Matba'ah al-Nahdah* al-Hadithah, second edition, 2001, p. 232; Ibn Rushd, *The Distinguished Jurist's Primer*, Vol II, p. 533; Kamali, Mohammad Hashim, *Crime and Punishment in Islamic Law: A Fresh Interpretation*, New York: Oxford University press, 2019, p. 154; Peters, Rudolph, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century*, New York: Cambridge University Press, 2005, p. 63-4.

<sup>371</sup> Ibn Rushd, *The Distinguished Jurist's Primer*, Vol II, p. 533; Kamali, *Crime and Punishment in Islamic Law: A Fresh Interpretation*, p. 154; Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century*, p. 63.

<sup>372</sup> Ibn Rushd, *The Distinguished Jurist's Primer*, Vol II, p. 533; Kamali, *Crime and Punishment in Islamic Law: A Fresh Interpretation*, p. 154.

<sup>373</sup> al-Jazā'irī, *Minhaj Al-Muslim: A Book of Creed, Manners, Character, Acts of Worship, and Other Deeds*, vol. 2, p. 504; al-Jazā'irī, *Minhāj Al-Muslim*, p. 707.

### 3.2.2 *Iftirā'* (Libel)

*Iftirā'*, also known in Arabic as *firyah*,<sup>374</sup> means forging lies about a person and similar guilty acts such as maliciously accusing an individual of criminal acts.<sup>375</sup> In the Qur'an, *iftirā'* refers to fabricating and in the manuals of Islamic law, *iftirā'* is treated as a sub-category of *qadhf*. Therefore, the rules that apply to *qadhf* also apply to *iftirā'*. As such, there is a maximum of eighty stripes for *iftirā'*. The upshot is that all other forms of false accusation, which do not fall under the scope of *qadhf*, amount to criminal libel and merits a penalty of *ta'zīr* or discretionary punishment.<sup>376</sup>

Ibn Taymiyyah explains this in more detail:

"If forging lies and similar guilty acts cannot be retaliated in the same manner, a penalty may be executed on the guilty. Of this category is the penalty imposed by the Book, the *Sunnah* and the consensus (of all Muslims) on the one who accuses others of adultery...If a free man falsely accused a *muhsan* with (any of the two kinds of adultery): fornication or sodomy, he is to suffer the relative penalty which is eighty stripes; if the accusation was other than these, then the accuser would be beaten *ta'zīran* (in the matter and to the extent the judge deems fit). This penalty is a right solely of the accused, it can never be executed (on the accuser) unless the accused demands it, the jurists being agreed unanimously to that. If the accused chose to forgive the accuser, the relative penalty would be dropped, in the opinion of the majority of the learned men in the Law, since the personal right in retaliation and in the theft (of property) has priority. It is also said that the penalty, in this case, would not be dropped, since (the accusation of adultery) involves a sin (violating a commandment of Allah) and is, at any rate, unlike the other penalties. The penalty connected with accusation of adultery is executed only if the accused was a *muhsan*, i.e., a free chaste Muslim. But he who is notorious for his debauchery, no penalty (relative to accusation of adultery) is executed on his accuser, nor is it executed on the accuser of an infidel or a slave; though such accuser is (usually) punished with beating (to the extent the ruler deems fit)."<sup>377</sup>

We observe here in Ibn Taymiyyah's explanation that it is paramount to preserve the honour, reputation, and dignity of an upright person. The plaintiff who is known as an upright person is entitled to bring his case before a court. The judge can impose an appropriate punishment on the accused. This may consist, as Kamali points out, of financial reparation for the plaintiff due to damages caused by libel. The amount to be paid out depends on the social status of the plaintiff, the harm caused, and the prevailing custom of the community.<sup>378</sup>

Kamali also notes that *iftirā'* differs from simply telling lies (*kadhib*). The intention of *iftirā'* is to defame another person, and therefore *is accompanied by malice, which is not the case with telling lies. He goes on to say that to ascertain whether there is a matter of iftirā', one must examine whether the expression – in any form, including speech, drawing, writing – qualifies*

<sup>374</sup> According to Lane, *firyah* is a substitute from *iftirā'*. See Lane, *An Arabic-English Lexicon*, vol. II, p. 2391.

<sup>375</sup> Ibn Taymiyyah, Ahmad ibn 'Abd al-Ḥalīm, *The Political Shariyah on Reforming the Ruler and the Ruled (al-Siyāsah al-shar'īyah fī iṣlāḥ al-rā'ī wa-al-ra'īyah)*, Translated by Abdul-Ghaffar al-Hanafi, Beirut: Dār al-Fiqh, 2005, p. 234; Kamali, *Freedom of Expression in Islam*, p. 175.

<sup>376</sup> Kamali, *Freedom of Expression in Islam*, p. 175.

<sup>377</sup> Ibn Taymiyyah, *The Political Shariyah on Reforming the Ruler and the Ruled*, p. 234-5.

<sup>378</sup> Kamali, *Freedom of Expression in Islam*, p. 176.

under the Qur’anic criterion of “the public mention of evil”<sup>379</sup>, and not merely a crime. To qualify as “the public mention of evil”, the expression in question must violate the dignity and honour of the person(s) involved.<sup>380</sup>

Because telling lies, libel, and false accusation – all being abuses of free speech – are not amenable to retaliation (*qiṣāṣ*), a discretionary punishment (*ta’zīr*) will be imposed by the judge.<sup>381</sup> For example, in commenting on the verse which mentions “the public mention of evil”, ibn Kathīr quotes the scholar ‘Abdul-Karīm bin Mālik al-Jaziri who stated about this verse that if a man insults you, you can insult him in retaliation. But if he calumniates you, you may not calumniate him.<sup>382</sup> Thus, if someone says to another “o fornicator” (*yā zānī*) he cannot respond with “no, you are” (*lā, bal ant*), because this means “you are a fornicator” and both expressions are crossing the bounds. Even though the reply (“no you”) comes off as an equivalent to correct the mistake of the false allegation of kindness, it only results in two intended accusations of adultery (*zinā*).<sup>383</sup> As a matter of fact, the reply “no, you are”, doubles the burden of proving fornication to both parties. Thus, if both persons in question cannot produce four witnesses, both expressions will be deemed as *qadhf*.

If a person feels that he is mentally tortured and dishonoured because he has been called “O transgressor (*Fāsiq*),” or “O malignant (*khabīth*),” or “O unbeliever (*kāfir*),” he can initiate a lawsuit. When the judge rules *in favor* of the claimant, the offender is to be punished, which is left to the discretion of the judge.<sup>384</sup>

### 3.2.3. *Shatm* (Insult)

Generally speaking, an insult is “an offensive remark or action.”<sup>385</sup> This short definition shows that insult is closely connected to the subject of offense, which we have discussed thoroughly in chapter two. Thomas Conley describes an insult as “an expression of a severely negative opinion of a person or group in order to subvert their positive self-regard and esteem; and often we consider insults to be examples of verbal abuse.”<sup>386</sup>

Insult is probably the most controversial subject in the scope of freedom of expression as envisaged in Islam and liberal democracies. For in the latter, insulting is relatively subjective and certain liberal values and customs such as satire can bring about insult. For example, in France, the principle of *laïcité* -which underscores the indivisibility and the neutrality of state law- gives free expression extraordinary protection, which translates into special protection

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<sup>379</sup> Qur’an, 4:148, the interpretation of the complete verse is: Allah does not like the public mention of evil except by one who has been wronged. And ever is Allah Hearing and Knowing, <https://quran.com/4>.

<sup>380</sup> Kamali, *Freedom of Expression in Islam*, p. 176.

<sup>381</sup> Ibid.

<sup>382</sup> Ibn Kathīr, *Tafsīr al-Qur’ān al-‘Azīm*, vol. II, p. 116; see also Al-Juzīrī, Abd al-Rahmān ibn Muḥammad ‘Awaḍ, *al-Fiqh ‘alā al-Madhāhib al-Arba’ah*, Beirut: al-Maktabah al-Aṣriyah, 2003, p. 1227, who states that if a person has been insulted, he may insult the other person in retaliation as long as he is not telling lies. This is according to Al-Juzīrī analogous to “And the retribution for an evil act is an evil one like it” (Qur’an 42:40).

<sup>383</sup> Al-Juzīrī, *Fiqh ‘alā ‘l-madhāhib al-arba’ā*, p. 1225.

<sup>384</sup> al-Marghīnānī, Burhān al-Dīn al-Farghānī, *Al-Hidāyah: the Guidance, a translation of al-Hidāyah fī sharḥ Bidāyat al-mubtadī, a classical manual of Ḥanafī law*, Translated by Imran Ahsan Khan Nyazee, vol. 2, Bristol: Amal Press, 2008, p. 242.

<sup>385</sup> <https://dictionary.cambridge.org/dictionary/english/insult>, accessed 31-03-2021

<sup>386</sup> Conley, Thomas, *Toward a Rhetoric of Insult*, Chicago and London: The University of Chicago Press, 2010, p. 2-3.

of the right to satirize.<sup>387</sup> The Charlie Hebdo affaire (2015) made it clear that satirizing the Prophet Muhammad is an extremely sensitive subject. Even though blasphemy is a kind of insult due to its nature, scope, and intricacies, and because it is closely linked to apostasy, it will be separately discussed in chapter 4.

The normative perspective is that insulting someone is disliked in Islam and that in some instances, a person can be punished under *ta'zīr* or discretionary punishment, as we have seen in the case of *Iftirā'*. I shall come back to this point at the end of this section.

Numerous narrations detest the offense of insult:

"A [true] believer is not a defamer nor a curser nor obscene nor shameless."<sup>388</sup>

In commenting on this *ḥadīth*, al-Ṣan'ānī states that insulting someone is tantamount to attacking his honour and this *ḥadīth* makes it clear that insulting and cursing are not among the qualities and characteristics of a complete believer.<sup>389</sup> In a similar vein, al-Mubārakfūrī explains that one is not a complete believer if he indulges in insulting, cursing, being obscene, or shameless. He also notes that insulting boils down to wronging people.<sup>390</sup>

The following *ḥadīth* contains the same terms as the previous one: "Insulting a Muslim is *Fusūq* (evil doing) and fighting him is [like] *Kufr* (disbelief)."<sup>391</sup>

Kamali points out here that insult may lead to fighting and that fighting is a greater offence than an insult. The word *kufr* (disbelief) in this narration is used metaphorically to underscore the enormity of fighting.<sup>392</sup> Having said that, most Islamic scholars deem it permissible to say '*yā fāsiq*' or to say 'o mischief-doer' (*yā mufsid*) to an evildoer who openly commits sins, provided that the purport is to give him sincere advice. It is also permissible to advise others about the perpetrator by explaining his situation or restraining his misconduct.

Again, the purport here is to be sincere and not drive a wedge between him and others. In principle, it is permissible to answer back to the one who started offending as this kind of avenging is entirely in line with the following verse of the Qur'an.<sup>393</sup>

"And whoever avenges himself after having been wronged - those have not upon them any cause [for blame]."<sup>394</sup>

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<sup>387</sup> Alicino, Francesco, "Freedom of Expression, Laïcité and Islam in France: The Tension between Two Different (Universal) Perspectives", in *Islam and Christian-Muslim Relations*, 27:1, 51-75, 2016, p. 61.

<sup>388</sup> Tirmidhī, *ḥadīth* no. 1984, vol. 1, p. 806. According to al-Albānī this *ḥadīth* is authentic, see al-Albānī, *Ṣaḥīḥ Sunan al-Tirmidhī*, Vol. 2, *ḥadīth* no. 1977, p. 370.

<sup>389</sup> Ṣan'ānī, Muḥammad ibn Ismā'īl, *Subul al-Salām: Sharḥ Bulūgh al-Marām min Jam' Adillat al-Aḥkām*, 4 vols. Cairo: Dār al-Ḥadīth, 1994, vol 4, p. 677.

<sup>390</sup> Al-Mubārakfūrī, 'Abd al-Raḥmān ibn 'Abd al-Raḥīm, *Tuḥfat al-Aḥwathī bi Sharḥ Jāmi' Al-Tirmithī*, 10 vols., Mau (U.P., India): Maktabah al-Fahīm, n.d., vol. 6, p. 95.

<sup>391</sup> Bukhārī, *Ṣaḥīḥ Al-Bukhārī*, vol. 9, *ḥadīth* no. 7076, p. 132; Muslim, *Ṣaḥīḥ Muslim*, vol. 1, *ḥadīth* no. 116, p. 120. N.B. Muhammad Muhsin Khan, who has translated *Ṣaḥīḥ Al-Bukhārī*, has wrongfully translated the *qitāluh* as killing whereas the correct meaning is fighting. Muḥammad Mahdī Sharīf, the translator of *Ṣaḥīḥ Muslim*, has correctly translated *qitāluh* as fighting.

<sup>392</sup> Kamali, *Freedom of Expression in Islam*, p. 180; Cf. also Al-Mubārakfūrī, *Tuḥfat al-Aḥwathī*, vol. 6, p. who states almost the same when commenting on this narration.

<sup>393</sup> Ṣan'ānī, *Subul al-Salām*, vol 4, p. 663-4.

<sup>394</sup> <https://quran.com/42>

This is also fully in line with the words of the Prophet: "When two persons indulge in abusing each other, the beginner will be the sinner so long as the oppressed does not transgress the limits."<sup>395</sup>

Furthermore, the following narration exemplifies how the Prophet dealt with horrible execration. He simply answered 'The same on you':

"The Jews came to the Prophet and said to him, "As-sāmu 'alayka (i.e., Death be upon you; making it look like Peace be upon you (As-salāmu 'alayaka)." He replied, 'The same on you.' " 'Ā'ishah said to them, "Death be upon you, and may Allah curse you and shower His wrath upon you!" Allah's Messenger said, "Be gentle and calm, O 'Ā'ishah! Be gentle and beware of being harsh and of saying evil things." She said, "Didn't you hear what they said?" He said, "Didn't you hear what I replied (to them)? have returned their statement to them, and my invocation against them will be accepted but theirs against me will not be accepted."<sup>396</sup>

This extract makes it clear that good deeds such as praying at night and volunteering fasting are being wiped out by *inter alia* insults:

"Someone said. "O Messenger of Allah, So-and-so spends her nights praying and her days fasting, but she maliciously injures her neighbours with her tongue." He replied, "There is no good in her, she is amongst the dwellers of hell."<sup>397</sup>

At the beginning of this section, I briefly pointed out that certain forms of insults are punishable. When a particular utterance is generally known to be rude and insulting, then, as with *iftirā'*, a judge can impose an appropriate punishment (*ta'zīr*) on the offender. The question that arises is, what to do with someone who makes various statements that are all generally known as offensive? Should this person be penalized for one violation or multiple violations? According to the Ḥanafī scholar ibn 'Ābidīn, each insult is punishable as a discretionary punishment (*wa huwa annahu yu'azzaru likulli wāḥidin minhā*). The reason for this is that people's rights (*ḥuqūq al-'ibād*) are not eligible for amalgamation (*tadākhul*), as opposed to the *ḥudūd* punishments that are. In a similar vein, insulting a group amounts to multiple violations.<sup>398</sup> Thus, a person who insults a group of ten people with just one word has committed ten violations, and can be punished accordingly.

### 3.2.4 *Takfīr al-Muslim*: excommunicating or declaring a Muslim an apostate

The concept of *takfīr* or attributing disbelief to a Muslim goes back to the beginning of Islam and is a very sensitive matter. During the era of the fourth Caliph 'Ali, a group of secessionists or *Khawārij* declared that they were loyal to 'Ali or any other ruler as long as the Qur'an and Sunna were followed. Initially, the *Khawārij* were loyal to Caliph 'Ali, but when they noticed 'Ali's willingness to submit to human arbitration, the situation changed drastically. After the

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<sup>395</sup> Muslim, *Ṣaḥīḥ Muslim*, vol 4. *ḥadīth* no. 2587, p. 207.

<sup>396</sup> Bukhārī, *Ṣaḥīḥ Al-Bukhārī*, vol. 8, *ḥadīth* no. 6401, p. 226.

<sup>397</sup> Bukhārī, *Manners in Islam (Al-Adāb al-Mufrad)*, Chapter 66, *ḥadīth* no. 119, p. 135; <https://sunnah.com/adab:119>. According to al-Albānī this *ḥadīth* is authentic, see <https://sunnah.com/adab:119>.

<sup>398</sup> Ibn 'Ābidīn, *Radd al-Muḥtār 'alā al-Durr al-Mukhtār Sharḥ Tanwīr al-Absār*, Vol. 6, p. 129.

murder of third Caliph 'Uthman, Mu'awiya -who was the governor of Syria and cousin of 'Uthman- demanded revenge and punishment for 'Uthman's killers. After months of confrontation of Mu'awiya and 'Ali's armies, an agreement was forced on whether 'Uthman's murder was justified. The outcome of this arbitrage was that 'Uthman's murder was not justified and that the arbitrators did not concur with the continuation of the caliphate of 'Ali. However, the *Khawārij* regarded 'Ali's willingness to arbitrate as a violation of religion and subsequently turned against him.<sup>399</sup> The *Khawārij* deemed all other groups to be unbelievers and thought they had to fight them. Even though the *Khawārij* didn't exist very long -because they lost their power due to their ongoing battles against other rulers and Muslim groups- their ideas are alive and kicking.<sup>400</sup> Groups like al-Qā'idah and the so-called Islamic State (IS) share the same ideology: those Muslims who don't agree with their ideas are considered as non-believers and are therefore to be fought.

*Takfīr* or declaring a Muslim a non-believer is a severe and sensitive issue as the following *aḥādith* make clear:

"If a man says to his brother, O *Kāfir* (disbeliever)!' Then surely one of them is such (i.e., a *Kāfir*)."<sup>401</sup>

"If somebody accuses another of *Fusūq* (by calling him '*Fāsiq*' i.e. a wicked person) or accuses him of *Kufr*, such an accusation will revert to him (i.e. the accuser) if his companion (the accused) is innocent."<sup>402</sup>

Ibn Taymiyyah makes it clear how much he detests *takfīr* and other false accusations: "anyone who sits with me knows this about me, that I'm among the people who most emphatically forbade a person to be attributed to *takfīr*, and transgression (*tafsīq*) and sins [i.e. being a disbeliever, transgressor or a sinner], unless it is known that proof [based upon the *Sharī'a*] has been established against him, and it is evinced whether he is a disbeliever, a transgressor or a sinner. I confirm that Allah has forgiven this ummah for its errors, including mistakes in the narrative and practical issues. The predecessors (*salaf*) continued to dispute many of these issues, but none of them testified that anyone else was labelled with disbelief (*bikufr*), depravity (*bifisq*) or sinfulness (*bima'aṣiyya*)."<sup>403</sup>

Even though as we just saw, the *Khawārij* declared the Caliph Ali as a non-believer, and were regarded as transgressors, Ali on no occasion declared them as disbelievers.<sup>404</sup> 'Ali did fight and defeated the *Khawārij*, but this was due to their rebellion against him and their mischief in the caliphate.<sup>405</sup>

The contemporary Muslim scholar Shaykh Muhammad Salih al-Munajjid states the following about *takfīr*:

<sup>399</sup> Lapidus, *A History of Islamic Societies*, p. 66.

<sup>400</sup> Ajouaou, Mohamed, *Wie is moslim? Geloof en secularisatie onder westerse moslims*, Zoetermeer: Uitgeverij Meinema, 2014, p.147.

<sup>401</sup> Al-Bukhāri, *Ṣaḥīḥ Al-bukhāri*, vol. 8, Chapter 78, *ḥadīth* no 6103, p. 77.

<sup>402</sup> Al-Bukhāri, *Ṣaḥīḥ Al-bukhāri*, vol. 8, Chapter 78, *ḥadīth* no 6045, p. 77.

<sup>403</sup> Ibn Taymiyyah, *Majmū'a al-Fatāwā*, 3/229, p. 147.

<sup>404</sup> Kamali, *Freedom of Expression in Islam*, p. 186.

<sup>405</sup> Riḍā, Muḥammad, *Imam Ali Ibn Abi Taleb, The Fourth Caliph = Imām 'Alī ibn Abī Tālib, rābi 'al-Khulafā' al-Rāshidīn*, Dar Al-Kutub Al-'Ilmiyah, 1<sup>st</sup> edition, 1999, p. 198-203.

“Determining whether someone is a kaafir [disbeliever] or a faasiq [transgressor] is not up to us, rather it is up to Allaah, may He be exalted, and His Messenger (peace and blessings of Allaah be upon him). This is one of the rulings of sharee’ah that is to be referred to the Qur’aan and Sunnah, so we should be very careful and base our judgement on clear proof. No one may be judged to be a kaafir or faasiq except the one whom the Qur’aan and Sunnah indicate is a kaafir or faasiq. The basic principle is that the one who appears outwardly to be a Muslim of good character is regarded as still being a Muslim of good character, until it is proven that this is no longer the case by means of evidence that is acceptable in sharee’ah. It is not permissible to take lightly the matter of judging someone to be a kaafir or faasiq, because that involves two very serious matters:

1 – It implies fabricating lies against Allaah with regard to this ruling, and fabricating lies against the one who is being judged.

2 – Falling into that which one accused one’s brother of, if he is free from that.”<sup>406</sup>

Kamali rightly notes that given the complexity and sensitivity of the subject of *takfīr*, only a judge or a *muftī* (jurisconsult) who is well-versed in Islamic theology is authorized to make a clear determination what makes an unbeliever, and certainly not laymen.<sup>407</sup> Previously, in our discussion on *naṣīḥah*, we saw that it is required for the adviser is to have knowledge regarding the act he is giving advice about. If the adviser doesn’t possess the necessary knowledge or expertise, he should refrain from advising. This is because, even though he may assume he is giving sound advice, he could be giving harmful advice to the one he is advising. Having a profound knowledge of Islamic theology is even more required when it comes to *takfīr*, because the consequences are far more serious. Attributing disbelief to a Muslim automatically boils down to one simple fact: the person in question becomes an apostate.

### 3.2.5 *Fitna*: Seditious speech

In recent years, the Arabic word *fitna* is often used in the media. For example, in 2008, Dutch politician Geert Wilders launched a short anti-Islam movie named *fitna*. The Arab Spring (started in late 2010) is frequently associated with disorder,<sup>408</sup> one of the various meanings of *fitna*. Our interest here is freedom of expression related to the disorder, security, and attacking the legitimacy of a government, also known as seditious speech. Like *takfīr*, Islam has a long history with political *fitna*. For example, two dozen years after the demise of Prophet Muhammad, a five-year period of civil war broke out “for the control of the Muslim community and of its vast conquered territories.”<sup>409</sup> This period of civil strife is known as the first *fitna*.<sup>410</sup> When it comes to the relationship between freedom of expression and security in our time, we see that after 9/11, many liberal democracies implemented counterterrorism

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<sup>406</sup> <https://islamqa.info/en/answers/85102/guidelines-on-takfeer-ruling-someone-to-be-a-kaafir>, accessed 01-04-2021.

<sup>407</sup> Kamali, *Freedom of Expression in Islam*, p. 186.

<sup>408</sup> In this context, the correct and complete term is *fitnah: shaghab*, see al-Khudwari, *Dictionary of Islamic Terms*, p. 395.

<sup>409</sup> Hodgson, Marshall G. S., *The Venture of Islam: Conscience and History in a World Civilization*. Volume 1, Classical Age of Islam, vol. 1, Chicago: University of Chicago Press, 1977, p. 214.

<sup>410</sup> *Ibid.*, p. 215.



laws having a significant impact on freedom of speech.<sup>411</sup> Moreover, the United States, the United Kingdom, and Australia all positioned the relationship between liberty and security as hierarchical. Key agents of all three countries argued that security is needed first to realize liberty. For example, United States Attorney General Alberto Gonzales stated that “without security, there can be no real freedom.”<sup>412</sup>

It is useful to make a clear distinction between seditious speech, lawful criticism of the government, and armed rebellion or uprising against a legitimate ruler (*baghīy*) in Islam. I shall make this distinction by first defining seditious speech.

### 3.2.5.1 Definition of seditious speech in Islam

Generally speaking, seditious speech is a political expression and a hostile attack on the government.<sup>413</sup> In its widest sense, it encompasses, as Eric Barendt puts it “the publication of a speech or writing with intent to bring into hatred or contempt, or excite hostility towards, the Crown, government, Parliament, and administration of justice, or with the aim of inducting reform by unlawful means or of promoting class warfare.”<sup>414</sup> Barendt’s definition is very close to how Kamali describes seditious *fitna* in its political sense as “an abuse of freedom of expression which threatens the legitimacy of lawful government, and which could lead to the collapse of normal order in society.”<sup>415</sup> He adds that “seditious *fitnah* also applies to words and acts which incite dissension among people, with the effect that right and wrong can no longer be distinguished from one another.”<sup>416</sup> Thus, in some cases, seditious speech aims to overthrow the existing government or even start a revolution. This is, in my opinion, also the dividing line between seditious speech and lawful criticism of the government. In the latter, the government merely receives criticism for its policy without demanding the government to step down.

Even though criticism of the government is protected under freedom of expression in liberal democracies, many governments have considered it indispensable to design statutes making sedition a crime. Apparently, according to some lawmakers, the normal law of words does not prevent serious harm in the long run. Under the normal law of words, the counselling, urging, or demanding of people to resort to crime or engage in assassinations, riots, or insurrections are clearly outlawed. However, the reason why some lawmakers deem it to be unlawful to bring the government, the courts, or even the constitution of a country into disrepute by one’s writing or words is not simply that such expressions are offensive, but rather that in the long term, they undermine loyalty and respect in government, and thereby contribute to more serious harm.<sup>417</sup>

From a classical Islamic point of view, Muslims who live in an Islamic state and who might rise in rebellion against its government are called *Khawārij* (dissenters), *murtadūn* (apostates), or

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<sup>411</sup> See for example: Katharine Gelber, *Free Speech after 9/11*. In her monograph prof. Gelber analyses the impact of counter-terrorism laws after 9/11 in the United States, the United Kingdom and Australia.

<sup>412</sup> Gelber, *Free Speech after 9/11*, p. 38.

<sup>413</sup> Barendt, *Freedom of Speech*, p. 162.

<sup>414</sup> *Ibid.*, p. 163.

<sup>415</sup> Kamali, *Freedom of Expression in Islam*, p. 193.

<sup>416</sup> *Ibid.*, p. 194.

<sup>417</sup> Feinberg, Joel, *Freedom and Fulfillment: Philosophical Essays*, Princeton, N.J.: Princeton University Press, 1994, p. 146-7.

*bughā* (rebels).<sup>418</sup> Some Muslim scholars are of the opinion that a *khārijī* is entitled to remain a citizen of the state but is liable to punishment if he opposes the authority. In the previous section, we saw how ‘Ali dealt with the *khārijīs*, a group who claimed it is legitimate to rebel against an unjust ruler. Ali was once addressing his people from the pulpit, he was interrupted by several *khārijīs*, who said, "There is no rule but the rule of God." ‘Ali, may God be pleased with him, responded: "A truth, misinterpreted to support a falsehood. There are three things we owe you: not to keep you from mentioning the name of the Lord in the Lord's mosques, not to initiate a war against you, and not to deprive you of your share of *fay*' [spoils of war] so long as you stick with us."<sup>419</sup> We see here that ‘Ali tolerated the political speech of the *khārijīs*.

*Bahgī* is an armed rebellion against the legitimate ruler. There is no consensus among Muslim jurists regarding the punishment for a rebel. Some Muslim scholars deem death the appropriate punishment to *bughāh* (rebels).<sup>420</sup> M. Cherif Bassiouni makes an important observation here. Often, Muslim jurists wrongly conflate *baghi* with the crime of *ḥirāba* or highway robbery.<sup>421</sup> And from this, it becomes clear that seditious speech, which is our subject-matter, is not equal to *ḥirāba*. Seditious speech is a form of civil disobedience. Other examples of civil disobedience are labour strikes, hunger strikes, boycotts<sup>422</sup>, and tax resistance. Before discussing some forms of seditious speech, it is important to note that there is no consensus among Muslim scholars regarding obedience to the ruler or government. However, in the light of *Sūrat al Nisā'* Muslims are required to "obey Allah and obey the Messenger and those in authority among you" 4:59 [Sahih International Translation]. The general thrust of this verse is not only that political rulers are to be obeyed, but should be regarded as legitimate to forestall *fitna* (internal dissension).<sup>423</sup>

<sup>418</sup> Khadduri, Majid, *The Islamic Law of Nations, Shaybānī's Siyar*, Baltimore: The Johns Hopkins Press, 1966, p. 47-8.

<sup>419</sup> al-Māwardī, *The Ordinances of Government: al-Aḥkām al-Sulṭāniyya wa-l Wilāyāt al-Dīniyya*, p. 64.

<sup>420</sup> Bassiouni, M. Cherif, *The Sharī'a and Islamic Criminal Justice in Time of War and Peace*, New York, NY: Cambridge University Press, 2014, p. 124.

<sup>421</sup> *Ibid.*, p. 134, n49.

<sup>422</sup> For a full discussion on these subjects, see Muhammad Haniff Hassan, *Civil Disobedience in Islam*, Puchong: Selangor D.E. Springer Singapore Palgrave Macmillan, 2018.

<sup>423</sup> Bassiouni, *The Sharī'a and Islamic Criminal Justice in Time of War and Peace*, p. 214. It should be noted as Ellethy rightfully points out, that commentators of the Qur'an differ about who are those people who have some authority and needs to be obeyed. He states: "The narrations vary whether they were those in charge of military missions (*umarā' al-sarāyā*); the people grounded in knowledge (in general) and *fiqh* (*ahl al-'ilm wa al-fiqh/al-dīn*; the companions (*ṣaḥāba*; especially Abu Bakr and Omar); or the governors (*al-a'imma wa al-wūlā*). Al-Tabari prefers the last interpretation, because it is affirmed by the Sunnah concerning the obedience of those in authority "in all that implies obedience [of God] and interest (*maṣlaḥa*) for the Muslims." After citing and evaluating different scholars, Ellethy concludes that: "Thus, it is clear that those in charge are distinguished from the religious scholars and the jurists (*'ulamā'/fuqahā'*); obedience, on the people's side, is conditioned by the justice of the ruler; and the subject of obedience is for the common good of the people, and does not imply any disobedience of God. In this regard, those who are to be entrusted with political authority should have the qualifications allowing them to bear this responsibility. Having the title *faqīh*, *'ālim* or a *muftī* is not adequate if the relevant political expertise is missing. Islam recognizes the importance of specialization. Moreover, this involves two important things as far as the *'ulamā'* are concerned in the context of a modern state. Firstly, according to Al-Awwa, they should not be excluded from political positions if they possess the appropriate qualifications, even in non-religious fields. Secondly, an Islamic scholar, even if he were the greatest of his age, is not eligible to be involved in politics unless he has the required knowledge and expertise." See Ellethy, *Islam, Context, Pluralism and Democracy*, p. 204-6.

### 3.2.5.2 Street protests

One of the most contested subjects regarding seditious speech is street protests. For example, in 2012 Muslim scholars of the National Fatwa Council of Malaysia issued a *fatwa* that partaking in a potentially unruly rally violate Islamic principles. The trigger for this *fatwa* was the recurring anti-corruption and election reform protest marches in Muslim-majority Malaysia, which were shut down with tear gas and water cannons. The council's chairman has ruled that "no one is exempted and cannot support any efforts that can cause harm, anxiety or unrest among Muslims to the point of the community being split" and that "rioting, causing disturbance and damaging public property" are violations of the Islamic code.<sup>424</sup> In his monograph on civil disobedience in Islam, Muhammad Haniff Hassan has given a comprehensive overview of arguments for allowing street protest and arguments forbidding it. Hassan draws upon the opinions of contemporary Islamic scholars, and from the outset, he points out the goal of civil disobedience: to bring about change in the political domain. As such, people demonstrate to effect change in the wrongful policies of the government. They fight against discrimination, human rights abuses, injustices, unconstitutional laws, and other illegal policies of the government. The demonstrators don't come together to break the law merely to express their opinion, but with the desire to effect real change.<sup>425</sup> In other words, peaceful street protests serve a purpose and fall under positive freedom.

### 3.2.5.3 Allowing Street Protests in the Contemporary Context

Contemporary scholars who approve of street protests stipulate that expressing support and solidarity for oppressed people is the object of these demonstrations. Again, this is closely related to positive freedom. Mufti Zubair Bayat is a contemporary Islamic scholar based in South Africa. He states that "expressing solidarity and support for oppressed people in any part of the world is a noble act, more so if the oppressed happen to be Muslims. Allah is Just and He has made oppression *Ḥarām* for Himself, so how would He ever allow it for another? Islam imbues Muslims with a keen sense of love for justice and hatred for injustice. The Muslim therefore instinctively identifies with the suffering of an oppressed people or nation. The Qur'an and Hadith [are] replete with injunctions on this subject."<sup>426</sup> According to him, "for a Muslim to express detestation for injustice and solidarity with the oppressed in the form of protest marches, etc. is allowed."

He also lists the primary objectives of protesting:

- to convey to the oppressed people, one's solidarity with them;
- to draw the attention of the world towards their suffering;
- to embarrass the oppressor and to swing international public opinion against them.<sup>427</sup>

In a world that follows news events closely, the international media give extensive attention to these kinds of events, and thus achieve maximum exposure to the strategic advantage of the oppressed. Mufti Zubair Bayat also refers to Mawlana Ashraf Ali al-Thana'wi (d. 1943) and Mufti Muḥammad Taqī 'Uṣmānī (1943 -), two famous Islamic scholars from the Indian

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<sup>424</sup> <https://www.pri.org/stories/2012-05-07/malaysia-fatwa-against-protests>

<sup>425</sup> Hassan, *Civil Disobedience in Islam*, p. 14.

<sup>426</sup> <https://www.ilmgate.org/islamic-perspective-on-protests-and-demonstrations/>, accessed 01-03-2021.

<sup>427</sup> Ibid.

subcontinent, who view these street protests as permissible. Even though Mufti Zubair Bayat considers street protests permissible, caution should be taken that the participants do not violate the principles of the *Sharī'a*, such as committing violence, vandalism, disrupting the peace, damage to persons or property, coercion of unwilling people to participate by threats of violence, vulgarity, music, dancing, rowdy and uncouth behaviour, or hindering the safe movement of non-participants.<sup>428</sup>

#### 3.2.5.4 Impermissible Viewpoint of Street Protests

Generally speaking, Islamic scholars who deem street protests impermissible use the following theological arguments. Firstly, street protests are regarded as prohibited *khurūj* or rebellion. Hassan defines *khurūj* "as the act of revolt or disobedience against a ruler with the intention of overthrowing him."<sup>429</sup> Even if the aim is not to overthrow the ruler, it is still forbidden because it promotes a public display of disobedience and contempt. Secondly, it is a forbidden form of religious innovation or *bid'a*. It is argued that street protests have no precedent of the Prophet and the *salaf*, i.e., the first three righteous generations of Islam. It is also a *bid'a* because it is a form of public disdain against a ruler that is detested by Islam. Thirdly, street protests represent a forbidden imitation of a non-Muslim way of life. Since they have no precedent in Islam, it must have come from an outside source. It is a fact that protesting is widely promoted and practiced by non-Muslims in the West, which suggests that it is a demonstration of Muslims imitating the West. Fourthly, street protests are often accompanied by prohibited conduct, such as breaching the rights to the safety of life and property, transgression of community, cursing and swearing, free-mixing of genders, chaos, and lawbreaking. Even if these forbidden elements are absent, and no negative consequences are to be expected, street protests are still forbidden because they are ruled as *bid'a*. Following this same argument, street protests are prohibited even if they are in support of oppressed Muslims and against a foreign, non-Muslim ruler.<sup>430</sup>

Allowing street protests is preferable because, in Islam, everything is permissible unless stated otherwise. The view of some Islamic scholars that street protests are *bid'a* is highly questionable. *Bid'a* is a religious innovation and has nothing to do with worldly matters such as street protests. Many things didn't exist at the time of the Prophet but are now widely used: means of transportation (car, train, plane, etc.), the use of electricity, factories, etc. Regarding street protests as impermissible only because of free-mixing of genders can be simply refuted by letting men and women demonstrate separately.

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<sup>428</sup> Ibid.

<sup>429</sup> Hassan, *Civil Disobedience in Islam*, p. 24.

<sup>430</sup> Ibid. p. 82.

## Conclusion

In this chapter, I have demonstrated there is affirmative evidence for freedom of expression in Islam. In fact, certain foundations and institutions of the *Sharī'a*, such as *ḥisba*, *nasīha*, *shūra*, and *ijtihād* can only function with freedom of expression. Like in liberal democracies, there are several justifications for freedom of expression in Islam, such as human dignity, and discovery of the truth. Like all major law systems, there are boundaries to freedom of expression in Islamic law that are directly related to the justifications for free speech. The difference between moral and legal restraints on freedom of expression in Islam is that in the latter, violations of freedom of expression are reprehensible and punishable under Islamic law. From both a moral and legal perspective, it is not permitted in Islam to vilify or defame others under the pretext of freedom of expression. Human dignity is an innate right and to slander the reputation and honor of a person is a violation of Islamic law. The boundaries of freedom of expression and opinion in Islam are not confined to human dignity and distorting the truth, but reach much further. Any expression of thoughts that affects the public order, affects morality, or puts national security at risk are all solid reasons to curtail freedom of expression in Islam. In this respect, Mill's harm principle, which we discussed in chapter 2, is inadequate for setting boundaries of free speech in Islam. These differences will be further discussed in chapter 5.

## Chapter 4

# Muslim Legal Discussions on Blasphemy and Apostasy

This chapter consists of two parts: part I deals with blasphemy in Islam, and part II concerns apostasy in Islam. Before proceeding with the two subjects mentioned above, I find it necessary to make some general remarks. Apostasy and blasphemy in Islam are not only in the news often, but are also closely related to freedom of expression. Blasphemy is a profound offence<sup>431</sup> and is therefore linked to freedom of expression. At first glance, apostasy only relates to freedom of religion, but the fact that the subject of apostasy is now widely being discussed shows it is also related to free speech. Furthermore, the question of whether apostasy is permitted or not according to Islamic law and whether an apostate can directly or indirectly express that he or she is no longer a Muslim makes apostasy an integral part of freedom of expression. Both the subjects of blasphemy and apostasy will first be discussed from the normative view of Islamic Law. Thus, these discussions are primarily internal ones, which are to a certain extent only applicable in certain contemporary Islamic countries. These internal discussions do not relate to Muslims living in the West, however, the debate on blasphemy and apostasy casts its shadow over liberal democracies that include Muslim citizens. The outcome of these discussions about blasphemy and apostasy will illustrate seemingly insurmountable differences between Islam and liberal democracies on these matters. Consequently, Muslims in the West are viewed with suspicion. After examining the position of normative Islam, I will point out opinions of modern and classical Muslim scholars who hold different views of blasphemy and apostasy, which are more compatible with liberal values. Another preliminary remark I want to make is that classical scholars of Islam have treated blasphemy under the subject matter of apostasy. This position is untenable for several reasons I will discuss later in this chapter. Therefore, I have decided to isolate blasphemy from apostasy and deal with them as two separate subjects. Although most classical and modern scholars believe that capital punishment is an appropriate sanction for both blasphemy and apostasy, the latter is perhaps more controversial than blasphemy because it conflicts with a fundamental right: freedom of religion.

### I      **Blasphemy in Islam**

Incidents such as the Salman Rushdie affair (1988), the Danish Cartoon crisis (2006), and the Charlie Hebdo affair (2015) make it clear how sensitive the issue of blasphemy is among Muslims and how thin the dividing line between freedom of expression and *profound* offense can be within liberal democracies. Most European countries are not only liberal democracies, but also cherish secular values that sometimes collide with religious values. Likewise, most European countries are multicultural democracies that naturally comprise different views of what is satire, critique, or blasphemy. For Muslims living in the West, the problem and challenge is even greater: how should a Muslim react to a blatant blasphemous act forbidden in Islam while the country in which he happens to live protects the same offense? In this part, I will discuss the relationship between blasphemy and freedom of expression in Islam through the following question: What is the relation between blasphemy as a punishable crime and

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<sup>431</sup> See chapter two, p. 39.

freedom of expression in Islam? I will answer this question by first focussing on the definition and scope of blasphemy in Islam, followed by presenting arguments for separating apostasy and blasphemy. I will then discuss the opinions of Muslim scholars regarding the punishment for blasphemy and point out the general standpoint of Islam regarding mocking other religions.

### 1.1. Definition and scope of blasphemy in Islam

There does not exist a clear-cut definition of blasphemy in Islam, which is also the case for Christianity and Judaism.<sup>432</sup> Even though scholars may offer different definitions of blasphemy, they generally agree that it is closely associated with Christianity, Judaism, and Islam. This is probably due to the fact these Abrahamic faiths have traditionally lain considerable emphasis on language and words.<sup>433</sup>

The Arabic term for blasphemy is *tajdīf*.<sup>434</sup> However, it seems that this term is hardly used in the books of Islamic jurisprudence. Some modern Muslim countries employ related terms such as *izdirā' al-dīn* (contempt of religion) in Egypte or *za'za't 'aqīdat muslim* (shaking the faith of a Muslim) in Morocco.<sup>435</sup> There are two terms in Arabic that are generally linked to blasphemy in Islam, and these are considered synonyms: *shatm* and *sabb*. Lane gives the meaning of this as insult, slander, abuse, or vilification.<sup>436</sup> *The Encyclopedia of Islam* states that when *shatm* is directed against God, the Prophet Muhammad, other Prophets mentioned in the Qur'an, the companions of the Prophet, historical personalities or objects venerated by the Muslim community or by various groups within this community, that *shatm* is then considered an act of blasphemy and disbelief (*kufr*) which can lead to legal prosecution. Other terms less commonly used to describe specific blasphemous acts and more broadly synonymous with *shatm* are *la'n* (curse), *ṭa'n* (wound someone's reputation, verbal attack), *īdhā'* (damage, hurt), or the verb *nāla* with the preposition *min* (hurt, slander).<sup>437</sup>

Although religiously motivated insulting is a punishable act in Islamic literature, the word *shatm* or other words derived from the root *sh-t-m* does not appear in the first source of Islamic jurisprudence, namely the Qur'an.<sup>438</sup>

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<sup>432</sup> For example, *The Encyclopedia of Judaisme*, does not give a definition of blasphemy at all. It only states on p. 180: "It is considered blasphemy to utter God's personal names, and for followers of orthodox Judaism, pronouncing any of the above names of God outside of prayer or Torah reading is also blasphemy; such Jews instead refer to God as HaShem, meaning "the Name." Interestingly, this prohibition has crept into the practice of writing God's name in English. Many Jews will choose to write "G-d" instead of "God" to avoid blasphemy." Also the *Encyclopedia of Early Christianity* does not provide a definition of Blasphemy.

<sup>433</sup> Peter Cumper, "Protection of Religious Sensibilities in Europe", in Jeroen Temperman and András Koltay (eds.), *Blasphemy and Freedom of Expression* (Cambridge: Cambridge University Press, 2017), p. 141.

<sup>434</sup> Karmi, *Al-Manar: An English-Arabic Dictionary*, p. 61; Al-Khudrawi, *Dictionary of Islamic Terms*, p. 21; Lane, *Arabic-English Lexicon*, Vol. I, p. 391

<sup>435</sup> See for example [تقرير رسمي يدعو إلى إلغاء "زعزعة العقيدة" من القانون الجنائي \(hespress.com\)](https://hespress.com), accessed December 29th, 2020

<sup>436</sup> Lane, *Arabic-English Lexicon*, Vol. I, p. 1284v en Vol. II p. 1503.

<sup>437</sup> The Encyclopedia of Islam, Vol. 12, p. 725.

<sup>438</sup> Ibid.

Therefore, in my opinion, the definition used for blasphemy in *The Encyclopedia of the Qur'ān* "Speech that is derogatory to God,"<sup>439</sup> is too simple. Also, the further remarks made by *The Encyclopedia of the Qur'ān* fail to describe blasphemy in Islam:

"In as much as God and his messages represent the ultimate truth (q.v.), blasphemy is denial of that truth or propagation of a falsehood in its place. Blasphemy by denial (*takdhīb*) is the outright rejection of revealed religious truths, such as the revelations and warnings of God's messengers (Quran 54; see messenger; revelation and inspiration; warning), and the announcements of the day of judgment and the meeting with God (Quran 6:31; 10:45; 23:33; 25:11; 82:9; see last judgment). It can also include the refusal to recognize and acknowledge God's signs (q.v.), particularly the wonders of the natural world which serve as evidence of his omnipotence and unity (Quran 6:21; 17:59; 55; see power and impotence; creation)."<sup>440</sup>

What I think is of great importance in defining blasphemy is the malicious intent, as Kamali points out, "the hallmark of blasphemy is, of course, a contemptuous and hostile attack on the fundamentals of religion, which offends the sensibilities of its adherents."<sup>441</sup> Consequently, I agree with him that blasphemy differs from apostasy, "for the latter can take place without any contemptuous attack or sacrilege being committed"<sup>442</sup> and thus not offend the sensibilities of its followers. Furthermore, the definitions mentioned above of blasphemy don't adequately emphasize the implications of insulting the Prophet Muhammad, while this is precisely where the sensitivity lies. Another point I would like to address is that the various definitions of blasphemy that I just have presented fail to differentiate between what I call offensive blasphemy and non-intended offensive blasphemy in Islam. I hereby follow Joel Feinberg's distinction of "profound offense" and "offensive nuisances merely"<sup>443</sup>, which we already touched upon in chapter two.

Events such as the Salman Rushdie affair, the Danish Cartoon Crisis, and the Charlie Hebdo affair caused major outbursts among Muslims because they were deemed profoundly offensive. In particular, the Prophet Muhammad either being described or depicted in a profoundly offensive manner. These events also had a significant impact on non-Muslims, given the fact the several people were killed as a result. Since the late Ayatollah Khomeiny issued his famous death *fatwa* on 14 February 1989, Salman Rushdie has lived in hiding in England.<sup>444</sup>

This brings me to the second type of blasphemy: non-intended offensive blasphemy. In Islam, the most important article of faith is to believe that there is no deity besides Allah, known as the concept of *tawhīd*. This implies that articles of faith of other religions that contravene the tenets of *tawhīd* can be perceived as blasphemous. For example, the Christian trinitarian doctrine of God being conceived as 'the Father, the Son and the Spirit' and Jesus being the Son of God are blasphemous from an Islamic

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<sup>439</sup> Devin J. Stewart, 'Blasphemy' *Encyclopedia of the Qur'ān*, Vol. I, p. 235.

<sup>440</sup> Ibid.

<sup>441</sup> Kamali, *Freedom of Expression in Islam*, p. 213.

<sup>442</sup> Ibid.

<sup>443</sup> Feinberg, *Offense to Others*, p. 51.

<sup>444</sup> Shepard, William, *The Rushdie Affair: Cultures at Cross Purposes*, in: Kolig, Erich (ed.), *Freedom of Speech and Islam*, Surrey: Ashgate, 20004, p. 125-6.



viewpoint. The Qur'an explicitly states that this doctrine is an insult towards Allah, and brings about the wrath of Allah.<sup>445</sup> However, since Christians avow this trinitarian doctrine as part of their creed and do not intend to offend Muslim sensibilities, it does not constitute blasphemy.<sup>446</sup> Therefore, throughout this chapter, I shall only discuss subjects related to intended offensive blasphemy.

The most common term used in Arabic for blasphemy is *Sabb Allah wa Sabb al-Rasul*. If coarse or offensive language is used towards the Prophet, one speaks of *Sabb al-Rasul*. If one uses abusive language towards Allah, one speaks of *Sabb Allah*. Blasphemy is also committed if one of the prophets or angels is insulted. Anyone who uses such language towards Allah, the Prophet Muhammad, the other prophets, or the angels, is considered a great sinner.<sup>447</sup> According to the vast majority of scholars, if the person in question is a Muslim, he is considered an apostate, but scholars differ on whether the blasphemer should be given the opportunity to repent, which would revoke the death penalty.<sup>448</sup> When a non-Muslim commits the offence of blasphemy, the question of apostasy is not relevant. Muslim scholars also differ on whether it is admissible for the non-Muslim offender to repent, which would absolve him from capital punishment.<sup>449</sup> The evidence for the punishment for blasphemy is based on several events mentioned during the life of the Prophet Muhammad. There is no clear instruction from the Qur'an regarding this matter. The term *sabb* is only used in the Quran to order the Muslims not to taunt the idols of non-Muslims because then the non-Muslims will taunt Allah.<sup>450</sup>

“And do not insult those they invoke other than Allah, lest they insult Allah in enmity without knowledge. Thus, We have made pleasing to every community their deeds. Then to their Lord is their return, and He will inform them about what they used to do.” [Qur'an 6: 108]<sup>451</sup>

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<sup>445</sup> See for example the following verses: *Surely, disbelievers are those who said: 'Allaah is the third of the three (in a Trinity).'* But there is no Ilaah (god) (none who has the right to be worshipped) but One Ilaah (God —Allaah). And if they cease not from what they say, verily, a painful torment will befall on the disbelievers among them” [al-Maa'idah 5:73]

*“And the Jews say: 'Uzair (Ezra) is the son of Allaah, and the Christians say: Messiah is the son of Allaah. That is their saying with their mouths, resembling the saying of those who disbelieved aforetime. Allaah's Curse be on them, how they are deluded away from the truth!*

*They (Jews and Christians) took their rabbis and their monks to be their lords besides Allaah (by obeying them in things which they made lawful or unlawful according to their own desires without being ordered by Allaah), and (they also took as their Lord) Messiah, son of Maryam (Mary), while they (Jews and Christians) were commanded [in the Tawraat (Torah) and the Injeel (Gospel)] to worship none but One Ilaah (God — Allaah) Laa ilaaha illa Huwa (none has the right to be worshipped but He). Praise and glory be to Him (far above is He) from having the partners they associate (with Him)”.* [al-Tawbah 9:31], taken from <https://islamqa.info/en/12713>.

<sup>446</sup> Kamali, *Freedom of Expression in Islam*, p. 217.

<sup>447</sup> Quadir, *Vrijheid van meningsuiting in de islam*, p. 105; Saeed, Abdullah and Saeed, Hassan, *Freedom of Religion, Apostasy and Islam*, Surrey: Ashgate, 2004, p. 37-8.

<sup>448</sup> Kamali, *Freedom of Expression in Islam*, p. 217. For a detailed discussion of various forms of blasphemy, see Ibn Taymiyya, *al-Ṣārim al-Maslūl 'alā Shātim al-Rasūl*, Beirut: Dār al-Kitāb al-'Arabi, 3<sup>rd</sup> edition, 1999, p. 532-559.

<sup>449</sup> Kamali, *Freedom of Expression in Islam*, p. 235-6.

<sup>450</sup> Quadir, *Vrijheid van meningsuiting in de islam*, p. 105; Saeed and Saeed, *Freedom of Religion, Apostasy and Islam*, p. 37-8.

<sup>451</sup> SAHIH INTERNATIONAL TRANSLATION, <https://quran.com/6>

During the time of the Prophet, some companions killed non-Muslims who had defamed the Prophet, Allah, or Islam, and thus apparently committed the crime of blasphemy. Among these murdered persons was the poet Ka'ab bin al-Ashraf (d. 624), who composed poems in which the person of the Prophet was denigrated and that encouraged others to taunt him.<sup>452</sup> In other cases, the name of the Prophet was smeared with fabricated stories or blasphemed by verbal attacks against Islam and the Muslim community as a whole. According to Abdullah Saeed and Hassan Saeed, several reports in the *ḥadīth* literature indicate that the Prophet declared that such people had been killed in vain. Nevertheless, no compensation or punishment was imposed on those who had killed such people, as is the case with war. In war, it is permitted for a Muslim to kill one of the enemies without being subjected to retribution, the payment of blood money, or other forms of punishment. So, according to the above authors, it seems that people who used crude and insulting language against the Prophet, Allah or Islam, had also declared war against Muslims.<sup>453</sup> As I just pointed out, within Islamic law, a distinction is made between insulting the Prophet Muhammad and Allah, however, this does not mean that the resulting offence is different. An overwhelming majority of Muslim scholars believe that insulting and mocking Allah is blasphemy and that a Muslim transgressor will automatically become a disbeliever (*kāfir*) since no one will do such a thing unless he is a disbeliever. This distinction is based on the right of Allah (*ḥaqq Allah*) and the right of man (*ḥaqq al-'abd* or *al-ḥaqq al-Ādamī*). The taunting of Allah is understood in Islamic law as a violation of the right of Allah, while the taunting of the Prophet Muhammad is a violation of the right of man and is considered a heavier offence than the taunting of Allah. The question now is why insulting the Prophet Muhammad is regarded as a greater crime than insulting Allah? In answer to this, most Muslim scholars mention the following reasons:

- 1) If a person makes a blasphemous utterance towards Allah, then the honor of Allah can, in reality, not be tarnished by a nonsensical utterance of a deluded person.
- 2) If a blasphemous statement is made against the Prophet Muhammad, the Prophet is not in the position to avenge this abuse. Therefore, the Muslim community's responsibility is to take revenge in his name and protect the rights of the Prophet by imposing the death penalty on the offender.<sup>454</sup>

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<sup>452</sup> There were more reasons why the assassination of Ka'ab bin al-Ashraf took place. It is said that after the battle of Badr (624) he went to Mecca to provoke the pagan Quraysh to fight the Prophet. Ka'ab also wrote verses mourning the victims of the Quraysh who had been killed at the battle of Badr. Shortly thereafter, he returned to Medina and composed insulting poems about Muslim women. Thereupon, the Prophet ordered to kill Ka'ab. See Rubin, *The Assassination of Ka'ab b. al-Ashraf*, p. 65-6. Thus, these acts can be seen as political acts: high treason and alliance with the enemies.

<sup>453</sup> Saeed and Saeed, *Freedom of Religion, Apostasy and Islam*, p.37-8; Quadir, *Vrijheid van meningsuiting in de islam*, p. 106.

<sup>454</sup> Quadir, *Vrijheid van meningsuiting in de islam*, p. 106-7; Saeed and Saeed, *Freedom of Religion, Apostasy and Islam*, p.37-9; Kamali, *Freedom of Expression in Islam*, p. 231-233.

## 1.2. Arguments to distinguish apostasy and blasphemy

In the introduction of this chapter, I briefly touched upon the issue of isolating blasphemy from apostasy. One finds in the classical manuals of *fiqh* or Islamic jurisprudence that sometimes blasphemy has been subsumed under general apostasy. As a consequence, blasphemy has been treated as a part of apostasy. Since apostasy does not necessarily have to involve any sacrilege or a hostile and contemptuous attack on the fundamentals of religion, blasphemy can be separated from apostasy. After all, someone can renounce Islam without sacrilege. Another reason to distinguish blasphemy from apostasy is the issue of a Muslim versus a non-Muslim committing offended blasphemy. In the case of a Muslim committing offensive blasphemy, the perpetrator renounces Islam and automatically becomes a *kāfir* or nonbeliever. Thus, a Muslim committing offensive blasphemy is committing two offenses in one act: blasphemy and apostasy. This is of course, not true for a non-Muslim committing blasphemy. As we shall see later, some Islamic scholars also view non-Muslims committing blasphemy as liable for punishment. In this case, non-Muslims are held accountable only for committing blasphemy and, of course, not for apostasy.

## 1.3. Punishment for Blasphemy in Islam

Before discussing the opinions of Islamic scholars regarding the punishment for blasphemy in Islam, it is necessary to introduce historical context. After the demise of the Prophet, Islam spread over vast territories to China, North Africa, and the Iberian Peninsula. During this era, Islam was economically, militarily, and politically strong. As a result, non-Muslims living in the territories of Islam acknowledged the hegemony of Muslims and the Islamic religion/rule of law. It was expected of non-Muslims residing as protected minorities (*ahl al-dhimma*) under Islamic rule not to disparage the religion of Islam, nor cast aspersions on its major institutions or figures. Islamic scholars of the time viewed any such defamation as a hostile and intolerable act. Neither the Qur'an nor the Prophet prescribed the existence of any temporal punishment for blasphemy. Nevertheless, Islamic scholars constructed and legitimated punishment for the offence of blasphemy in the post-prophetic period. They based their rules condemning blasphemy on relevant reports in the *ḥadīth* literature and argued that reviling Allah, or the Prophet, or Islam and using abusive language against any of them constitutes blasphemy.<sup>455</sup> Al-Qādī 'Iyāḍ (d. 1149), Ibn Taymiyyah (d. 1328), and Taqī al-Dīn al-Subkī (d. 1355) are perhaps the three most prominent scholars who wrote extensively on the subject of blasphemy in Islam in the post-prophetic period and tried to separate blasphemy from apostasy.

Still, most Islamic scholars deem blasphemy to be an act of apostasy. Since, as will become clear in part II of this chapter, most Islamic scholars view apostasy as an act that merits capital punishment, the punishment for blasphemy is also capital punishment. An example of this is the following *fatwa* on the website

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<sup>455</sup> Saeed and Saeed, *Freedom of Religion, Apostasy and Islam*, p.38-9.

[www.askimam.org](http://www.askimam.org), supervised by the contemporary Muslim scholar Mufti Ebrahim Desai. The *fatwa* was issued in answering the following submitted question:

I heard on a tape that whoever insults the Prophet (peace and blessings of Allaah be upon him) should be executed even if he shows that he has repented. Should he be killed as a *hadd* punishment or because of *kufur* [disbelief]? If his repentance is sincere, will Allaah forgive him or will he go to Hell and his repentance will be of no avail?

This question was then answered as follows:

“In the Name of Allah, the Most Gracious, the Most Merciful.

As-salāmu ‘alaykum wa-rahmatullāhi wa-barakātuh.

If a Muslim insults Rasulullah Sallallahu Alayhi Wasallam, he exits the fold of Islam and becomes a *murtad* (apostate). The ruling of an apostate in an Islamically ruled country is that the apostate’s ruling will be administered by the Qadhi [judge] through a court system. The Qadhi will arrange for the apostate to be counselled and given the opportunity to repent. If the apostate repents and renounces his/her statements, his/her repentance will be accepted. If the apostate does not repent and insists on an unapologetic attitude, the apostate will be executed (in the case of a Muslim male) or imprisoned (in the case of a Muslim female) as a *hadd* for adopting *kufur* (disbelief). It is not permissible for any citizen to take the law into his own hands and execute the apostate.”<sup>456</sup>

This *fatwa* is based on the Ḥanafī school of law. It makes two things clear: insulting the Prophet Muhammad constitutes apostasy for a Muslim, and in an Islamically ruled country, the court will apply the rules of apostasy to the person in question. This *fatwa* also highlights the possibility of *tawba* or repentance (see section 1.5 for the position of the Mālikī, Shāfiī and Ḥanbalī). Thus, if the apostate sincerely repents and renews his *shahādah* or profession of faith, the charges of apostasy will be dropped. However, if the person in question refuses to distance himself from his statements, then according to the Ḥanafī school of thought, there are two scenarios. If the perpetrator is male, he will be executed, and if they are female, this results in imprisonment. As we shall see later in this chapter’s section on apostasy, the aforementioned punishment resembles exactly the Ḥanafī school of thought regarding apostasy. Thus, in this *fatwa*, blasphemy is subsumed as a part of apostasy and not an offence on its own. It is striking that this *fatwa* completely ignores blasphemy committed by a non-Muslim and makes no distinction between blasphemy and apostasy,<sup>457</sup> which I shall discuss later in this chapter.

#### **1.4. The standpoint of Islam regarding mocking other religions**

The Qur’an states very clearly that mocking other religions is not allowed:

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<sup>456</sup> [http://www.askimam.org/public/question\\_detail/35215](http://www.askimam.org/public/question_detail/35215)

<sup>457</sup> See section 1.2 above.

“And do not insult those they invoke other than Allah, lest they insult Allah in enmity without knowledge. Thus, We have made pleasing to every community their deeds. Then to their Lord is their return, and He will inform them about what they used to do.” [Qur’an 6: 108]<sup>458</sup>

Al-Qurṭubī, while commenting on this verse, states that Allah forbade the believers from mocking the idols of the idol worshipers because Allah knew that if the believers mocked them, the disbelievers would be further alienated from Islam and would increase in disbelief.<sup>459</sup> Ibn Kathīr comments on this verse that if Muslims mock and insult the false gods of the idolaters, this will result in the idolaters insulting and taunting Allah.<sup>460</sup> This will, of course, lead to more hatred on both a personal level and a religious one.<sup>461</sup> In addition, countries that harbor people of different faiths will be afflicted with instability if adherents of different religions mock and insult each other, and it will certainly not lead to mutual understanding. Jamaal Zarabozo, a contemporary Islamic scholar from the US, states that: “Muslims also should never engage in false or ridiculing propaganda against others. Even if there is great hatred between the Muslim and others, a Muslim is never allowed to deviate from what is truthful and proper. This is because the ultimate goal of a Muslim is the pleasure of God and God is pleased with truth and justice. The mere ridicule of others resulting only in increased hatred—not to speak of hatred between individuals but, indeed, even a hatred for God’s religion—is not part of the character of a Muslim.”<sup>462</sup> He then refers to verse 108 from chapter 6 of the Qur’an (which we have just discussed) and other verses of the Qur’an.<sup>463</sup>

However, this doesn’t mean that people cannot question or criticize Islam and have discussions with Muslims. The Prophet himself used to debate with non-Muslims. For example, a group of Christians of Najran visited the Prophet in Medina to debate with him on theological issues for several days. Even though the Prophet answered all their questions and invited them to embrace Islam, they refused.<sup>464</sup> Thus, as Zarabozo rightfully points out, no one should be surprised that non-Muslims value the Prophet less than a Muslim does. Zarabozo goes on to state that the Qur’an welcomes debates and discussions with non-Muslims:<sup>465</sup>

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<sup>458</sup> SAHIH INTERNATIONAL TRANSLATION, <https://quran.com/6>

<sup>459</sup> al-Qurṭubī, Abī ‘Abd Allāh Muḥammad b. Aḥmad b. Abī Bakr b. Farḥ al-Anṣārī, *Mukhtaṣar Tafsīr al-Qurṭubī*, Beirut: Dār al-Kutub al-‘Ilmiyah, 2001, vol. 2, p. 154.

<sup>460</sup> Ibn Kathīr, *Tafsīr al-Qur’ān al-‘Aẓīm*, vol. II, p. 287.

<sup>461</sup> Zarabozo, Jamaal, *Reflections on Hatred and the Defamation of the Prophet Muhammad*, available at <http://www.jamaalzarabozo.com/audio/reflectionsonhatred.pdf>, p. 4.

<sup>462</sup> *Ibid.*, p. 4-5.

<sup>463</sup> O you who have believed, be persistently standing firm in justice, witnesses for Allah, even if it be against yourselves or parents and relatives. Whether one is rich or poor, Allah is more worthy of both. So, follow not [personal] inclination, lest you not be just. And if you distort [your testimony] or refuse [to give it], then indeed Allah is ever, with what you do, Acquainted.<sup>463</sup> [Qur’an 4:135]

O you who have believed, be persistently standing firm for Allah, witnesses in justice, and do not let the hatred of a people prevent you from being just. Be just; that is nearer to righteousness. And fear Allah; indeed, Allah is Acquainted with what you do. [Qur’an 5:8]

<sup>464</sup> Al-Mubarakpuri, *The Sealed Nectar*, p. 526-8; Haykal, *The Life of Muḥammad*, p. 195-7; Ibn Kathīr, *The Life of the Prophet Muḥammad*, vol. IV, p. 71-76.

<sup>465</sup> Zarabozo, *Reflections on Hatred and the Defamation of the Prophet Muhammad*, p. 7.

Invite to the way of your Lord with wisdom and good instruction, and argue with them in a way that is best. Indeed, your Lord is most knowing of who has strayed from His way, and He is most knowing of who is [rightly] guided.<sup>466</sup> [Qur'an 16:125]

And We will extract from every nation a witness and say, "Produce your proof," and they will know that the truth belongs to Allah, and lost from them is that which they used to invent.<sup>467</sup> [Qur'an 28:75]

Commenting on the former verse, Ibn Kathīr explains that those who want to debate and argue should do so in the best possible manner. One should do this with gentleness (*līn*), kindness (*rifq*) and good speech (*ḥusn khiṭāb*) as this has been explained elsewhere in the Qur'an.<sup>468</sup>

And do not argue with the People of the Scripture [Jews and Christians] except in a way that is best, except for those who commit injustice among them, and say, "We believe in that which has been revealed to us and revealed to you. And our God and your God is one; and we are Muslims [in submission] to Him."<sup>469</sup> [Qur'an 29:46]

Allah instructed Prophet Muḥammad to speak gently, just as Allah ordered the prophets Mūsā and Hārūn to speak gently to Pharaoh when Allah sent both of them to him:<sup>470</sup>

And speak to him [Pharaoh] with gentle speech that perhaps he may be reminded or fear [Allah].<sup>471</sup>

Thus, the Qur'an gives clear instructions on how Muslims should debate and discuss: using good speech, which must be accompanied by gentleness, kindness, and overall, respect.

### 1.5. The issue of repentance

As I pointed out at the beginning of this chapter, a person who committed the offence of blasphemy against Allah has violated Allah's right and can ask Allah forgiveness by repenting. This is different for someone who has insulted the Prophet since this is a matter of violating the rights of a human person; the personal right and honor of the Prophet have been violated. When a human person's right is violated, the perpetrator of this offence can only be forgiven through forgiveness from the person affected. Since the Prophet no longer lives, forgiveness is simply no longer possible, according to some scholars.<sup>472</sup>

Different opinions have emerged among law schools (*madhāhib al-fiqhiyyah*) as to whether a blasphemmer should be asked to repent and whether his repentance, if it is obtained, is

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<sup>466</sup> SAHIH INTERNATIONAL TRANSLATION, <https://quran.com/16>

<sup>467</sup> SAHIH INTERNATIONAL TRANSLATION, <https://quran.com/75>

<sup>468</sup> Ibn Kathīr, *Tafsīr al-Qur'ān al-'Azīm*, vol. III, p. 232.

<sup>469</sup> SAHIH INTERNATIONAL TRANSLATION, <https://quran.com/29>

<sup>470</sup> Ibn Kathīr, *Tafsīr al-Qur'ān al-'Azīm*, vol. III, p. 232.

<sup>471</sup> SAHIH INTERNATIONAL TRANSLATION, <https://quran.com/20>

<sup>472</sup> Saeed and Saeed, *Freedom of Religion, Apostasy and Islam*, p.37-9.

permissible. The admissibility of repentance in this context is of particular importance since it can lead to the absolute and unconditional acquittal of the accused. One should also be aware that there are sometimes differences of opinion among scholars of the same school of law on this subject. This difference of opinion tends to introduce an element of doubt in establishing the representative position of the individual schools of law.<sup>473</sup>

I will now briefly present the opinions of the four leading Sunni schools of law regarding the admissibility of repentance for those who revile Allah and/the Prophet. The Ḥanafīs are of the opinion that it is advisable to ask the blasphemer to repent (*istitābah*) and to return to Islam, but according to Imām Mālik, this is unnecessary. The Shāfi'īs and the Ḥanbalīs have two different opinions about this; one opinion agrees with that of the Ḥanafīs and the other with that of Imām Mālik.

The scholars who make *istitābah* a requirement before proceeding to sanction believe that the offender should be asked to repent over a period of three days. As mentioned, Imām Mālik ruled out repentance based on the *ḥadīth*: 'The one who changes his religion, kill him', which I shall discuss in part II of this chapter. According to Imām Mālik, this *ḥadīth* is silent about repentance, and some Shāfi'īs and Ḥanbalīs accept this.<sup>474</sup> However, there is also a *ḥadīth* handed down by 'Ā'isha, that says that on the day of the battle of Uhud a woman renounced Islam and the Prophet declared that she should be asked whether she wanted to repent.<sup>475</sup> The majority of scholars are of the opinion that repentance, if asked or proffered by the transgressor of his own accord, is permissible for one who has defamed Allah and/or the Prophet Muhammad. The Ḥanbalīs and the Mālikīs have two different opinions. The prevailing opinion in both law schools is that repentance will not exempt the blasphemer from punishment in this world, but it may benefit him in the hereafter if he is sincere. In this respect, the Ḥanbalīs and the Mālikīs make no distinction between insulting Allah and the Prophet Muhammad. They consider both forms of defamation to be two manifestations of the same offense, which should therefore be dealt with in the same way. This opinion is based on a tradition of the Caliph 'Umar bin al-Khaṭṭāb, who is known for his comparison of defaming Allah and insulting the Prophet. In neither case was it known that he asked the blasphemer to repent. So, it can be said that the main difference between blasphemy and apostasy is that the perpetrator of apostasy is allowed to repent but, according to some scholars, not the perpetrator of a blasphemy. However, the second opinion of the Ḥanbalīs and the Mālikīs is that it is obliged to allow the condemned blasphemer to repent and return to Islam.<sup>476</sup>

The Ḥanafīs and the majority of the Shāfi'īs believe that blasphemy belongs in the same category as apostasy and have established that repentance is admissible in both cases. The blasphemer must be asked for three consecutive days to repent, counting from the first day

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<sup>473</sup> Kamali, *Freedom of Expression in Islam*, p. 233.

<sup>474</sup> Kamali, *Freedom of Expression in Islam*, p. 233; Qādī 'Iyāḍ, ibn Mūsa, *Ash-Shifa: healing through defining the rights of Prophet Muhammad (may Allah's peace and blessings be upon him) = al-Shifā: bi-ta'rīf ḥuqūq al-Muṣṭafā* (Arabic - English text), Translated by Gehan 'Abdel-Raouf Hibah, Revised by Amattala Mujahda, Beirut: Dār al-Kutub al-'Ilmiyah, 2009, p. 711; Ibn Taymiyya, *al-Ṣārim al-Maslūl 'alā Shātīm al-Rasūl*, p. 315-7; Ibn Qudamah, Muwaffaq al-Dīn Abdullah Ibn Aḥmad Ibn Qudama al-Maqdisi, *al-Mughni*, 3<sup>rd</sup> edition., Riyadh: Dar Alam al-Kutub, 1997, vol. XII, p. 298-9; Friedmann, Yohanan, *Tolerance and Coercion in Islam. Interfaith Relations in the Muslim Tradition*, Cambridge: Cambridge University Press, 2003, p. 151.

<sup>475</sup> Kamali, *Freedom of Expression in Islam*, p. 233.

<sup>476</sup> Ibid, p. 233-4. See also Ibn Taymiyya, *al-Ṣārim al-Maslūl 'alā Shātīm al-Rasūl*, p. 315-7, p. 320; Al-Qādī 'Iyāḍ, *Ash-Shifa*, p. 711; Ibn Qudamah, *al-Mughni*, vol. XII, p. 298-9; Friedmann, *Tolerance and Coercion in Islam*, p. 151; Al-Jazā'irī, *Minhāj al-Muslim*, p. 721.

of conviction, and during this time, the convicted person has the right to food and other necessities. Showing repentance in the case of an apostate means that he can return to Islam by pronouncing the profession of faith, the *shahādah*. In the case of the repentance of a *dhimmi* (a non-Muslim who lives in a Muslim country and is entitled to protection and safety), this person has to express regret for what he has done and confirm that he will never do this again. In this case, the head of the state can accept his repentance, and the accused can keep his religion or convert to Islam as a result.<sup>477</sup>

According to another opinion, which seems preferable, the conditions for repentance should be proportionate to the nature and content of the offence and the accused should initially specifically distance himself from what he has done or said. Moreover, according to the Ḥanafīs and Shāfi'īs, the repentance of an apostate and his return to Islam is admissible a maximum of four times. Thus, if an apostate showed repentance for the fifth time and desired to return to Islam, this would no longer be valid. But in each of the previous events, the accused is granted a three-day postponement.<sup>478</sup> This rule is based on the tradition that the Prophet asked one Nabhān who apostatized from Islam for about four or five times to repent.<sup>479</sup>

The most comprehensive treatment of blasphemy in classical jurisprudence can be found in *al-Ṣārim al-Maslūl 'alā Shātīm al-Rasūl*<sup>480</sup> written by the prominent Muslim scholar Ibn Taymiyyah (1263-1328). The title of his book can be translated as *The Sharp Drawn Sword for the One Who Insults the Messenger*. The book discusses *inter alia* the following major themes: evidence from the Qur'an that the one who vilifies the Prophet must be executed,<sup>481</sup> evidence from the *sunna* that the one who vilifies the Prophet must be executed,<sup>482</sup> the issue of repentance<sup>483</sup> and clarifying what is insulting and what the difference is between insulting and merely unbelief.<sup>484</sup> Even though Ibn Taymiyyah gives a detailed overview of opinions regarding repentance of other Islamic scholars, he believes it is mandatory for a judge to implement capital punishment for the one who vilifies Prophet Muhammad.<sup>485</sup> In other words, the title of his work dictates the punishment for the blasphemer: capital punishment by beheading, even if the blasphemer sincerely repents. Another important work regarding blasphemy in Islam is *al-Shifa* written by al-Qāḍī 'Iyāḍ. Part 4 of this work deals with legal judgments regarding insulting the Prophet. Like Ibn Taymiyyah, al-Qāḍī 'Iyāḍ holds the opinion that the one who insults the Prophet is to be killed, and he refers to the following Islamic scholars: Abū Bakr bin Al-Mundhir, Mālik bin Anas, al-Laith, Ahmad, Ishāq, al-Qadi Abul-Fadl, and the Shāfi'i School of Jurisprudence.<sup>486</sup> Al-Qāḍī 'Iyāḍ also states that blasphemy is an act of apostasy, thus the one who reviles the Prophet has become an apostate. He then notes there is disagreement among scholars whether the blasphemer should be given a chance to

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<sup>477</sup> Kamali, *Freedom of Expression in Islam*, p. 233; Ibn Taymiyya, *al-Ṣārim al-Maslūl 'alā Shātīm al-Rasūl*, p. 335.

<sup>478</sup> Kamali, *Freedom of Expression in Islam*, p. 234; Al-Juziri, *al-Fiqh 'ala al-Madhahib al-Arba'ah*, p. 1325.

<sup>479</sup> Al-Qāḍī 'Iyāḍ, *Ash-Shifa*, p. 761; Kamali, *Freedom of Expression in Islam*, p. 234.

<sup>480</sup> This work was written in 1294, see Hoover, Jon, "kitāb al-ṣārim al-maslūl 'alā shātīm al-rasūl", in: *Christian-Muslim Relations 600 - 1500*, General Editor David Thomas. Consulted online on 05 February 2021 <[http://dx.doi.org/10.1163/1877-8054\\_cmri\\_COM\\_25593](http://dx.doi.org/10.1163/1877-8054_cmri_COM_25593)>

<sup>481</sup> *Ibid.*, p. 42-94.

<sup>482</sup> *Ibid.*, p. 95-216.

<sup>483</sup> *Ibid.*, p. 315-491.

<sup>484</sup> *Ibid.*, p. 492-559.

<sup>485</sup> Ibn Taymiyya, *al-Ṣārim al-Maslūl 'alā Shātīm al-Rasūl*, p. 315-7.

<sup>486</sup> Al-Qāḍī 'Iyāḍ, *Ash-Shifa*, p. 710-17.



repent.<sup>487</sup> However, al-Qāḍī 'Iyāḍ, as a Māliki scholar, rules that the one who reviles the Prophet must be executed without giving him a chance to repent as he states: "Whether he repents because he was put to trial and accused, or he repents on his own accord, it's a penal law that can't be atoned for by means of repentance."<sup>488</sup> Yet, if the blasphemer repents sincerely, this will save him in the Hereafter.<sup>489</sup>

### 1.6. The Issue of Repentance of a Muslim and a non-Muslim: A Comparison

In the previous section, we saw that there are differing opinions among Muslim scholars concerning to issue of repentance when a Muslim has committed blasphemy. In this section, I will demonstrate that this is also the case with blasphemy committed by a non-Muslim. There are three possible situations in which a non-Muslim can be involved in blasphemy against Islam, which makes this issue more complicated as compared to a Muslim who commits blasphemy.

1) When a non-Muslim testifies to a point of his own faith that is contrary to the Islamic doctrine, such as when a Christian declares that Jesus is the son of God. However, from an Islamic perspective, this is only a variety of disbelief and not actual blasphemy.<sup>490</sup> In other words, we are not dealing with blasphemy here.

2) When a non-Muslim says something that, although part of his faith, is brought up aggressively. An example of this is the incident that took place after the call of prayer when a Jew addressed the *muazzin* (caller of prayer) with the words "you lied". In this case, there is utter contempt for an article of faith of Islam or the commandments of the Qur'an. When in this case the non-Muslim is a *dhimmi*, he loses his protected status and is subject to punishment.<sup>491</sup> This shows that the protected status of a *dhimmi* is certainly not a license to make blasphemous statements against Islam.<sup>492</sup>

3) When the insult in question is not part of the offender's faith and consists of something that is equally forbidden in his own religion. In this type of blasphemy, no distinction is made between a Muslim and a non-Muslim, since anyone who defames God commits a blasphemous offense, regardless of his or her religious denomination.<sup>493</sup>

In both situations two and three, there is profound blasphemy. Muslim scholars disagree about the acceptance of repentance in the case of a non-Muslim, however, it seems that most allow it. For a non-Muslim, repentance can be permitted if he or she converts to Islam, among other things. Some scholars of Medina believed that the repentance of a *dhimmi* is acceptable in the same way as that of a Muslim and that the non-Muslim does not lose his protected

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<sup>487</sup> Ibid, p. 711.

<sup>488</sup> Ibid., p. 755.

<sup>489</sup> Ibid.

<sup>490</sup> Kamali, *Freedom of Expression in Islam*, p. 235.

<sup>491</sup> Ibid., p. 235.

<sup>492</sup> Quadir, *Vrijheid van meningsuiting in de islam*, p. 113.

<sup>493</sup> Kamali, *Freedom of Expression in Islam*, p. 235.

status. According to one tradition, Imam al-Shāfi'i and Imam Aḥmad bin Ḥanbal are of the opinion that a *dhimmī* is not allowed to repent, but if he converts to Islam on his own initiative, he is not liable to punishment. Another tradition mentions that Imam al-Shāfi'i believes that a *dhimmī's* protected status ends when he commits blasphemy and as a result, becomes an enemy of the Islamic state at war, in which case the head of state has the right to punish him. Imam al-Shāfi'i adds that in this case, the head of an Islamic State has the right to impose what he considers to be an appropriate punishment, as is the case with prisoners of war. The head of the state can have the blasphemer executed, ask for ransom, or expropriate his property.<sup>494</sup>

Imam Abū Ḥanīfa and his followers, on the other hand, remain of the opinion that the covenant with the *dhimmī* will not be broken as a result of blasphemy towards Allah and/or the Prophet Muhammad. Also, the *dhimmī* is not eligible for capital punishment, but he should be handed an appropriate and deterrent punishment (*ta'zīr*) as is the case when he performs bad deeds (*munkarāt*) which are forbidden for him. To strengthen their opinions, the Ḥanafis refer to traditions in which some Jews greeted the Prophet with 'may death be upon you' (*al-sām 'alaikum*), but in none of the cases did the Prophet impose a punishment. The Prophet told his wife 'A'isha and his companions to answer only with 'wa 'alaik' (and on you).<sup>495</sup> It is also known that the Prophet himself forgave individuals who insulted him after they apologized. For example, the Jewish poet Anas b. Zunaym al-Dīlī used to insult and satirize the Prophet.<sup>496</sup> When he learned that his blood was going to be taken, he went to the Prophet and apologized by reading some poetry.<sup>497</sup>

After giving various opinions of Muslim scholars, Ibn Taymiyyah rules that no repentance is to be sought if the blasphemer is non-Muslim and he is to be executed. Thus, he doesn't distinguish between a Muslim and a non-Muslim who insults the Prophet; it is mandatory to impose capital punishment for both of them.<sup>498</sup> In a similar vein, al-Qāḍī 'Iyāḍ also rules that a non-Muslim who reviles the Prophet is to be executed.<sup>499</sup> Based upon the evidence used by the Imam Abū Ḥanīfa, it appears to me that a non-Muslim blasphemer is liable to a deterring punishment (*ta'zīr*) imposed by the authorities of a state.

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<sup>494</sup> Ibid., 235-6; Ibn Taymiyya, *al-Ṣārim al-Maslūl 'alā Shātim al-Rasūl*, p. 38. See also Abū Dāwūd, *Sunan Abū Dāwūd, English Translation with Explanatory Notes by Prof. Ahmad Hasan*, Vol 3, footnote 3799: "It is unanimously agreed that if a Muslim abuses or insults the Prophet (may peace be upon him) he should be killed. There is a difference of opinion about the killing of a non-Muslim. According to al-Shāfi'i, he should be killed. Abū Ḥanīfa is of opinion that he should not be killed. The sin of being a polytheist is far greater than it. Mālik maintains that he should be killed except that he embraces Islam."

<sup>495</sup> Kamali, *Freedom of Expression in Islam*, p. 236; Ibn Taymiyyah, *al-Ṣārim al-Maslūl 'alā Shātim al-Rasūl*, pp. 40, 244.

<sup>496</sup> Kamali, *Freedom of Expression in Islam*, p. 246; Faizer, Rizwi, *The life of Muḥammad: al-Wāqidi's Kitāb al-Maghāzī*, Abingdon: Routledge, 2011, p. 385, 389-90; Ibn Taymiyyah, *al-Ṣārim al-Maslūl 'alā Shātim al-Rasūl*, p. 139.

<sup>497</sup> Faizer, *The life of Muḥammad: al-Wāqidi's Kitāb al-Maghāzī*, p. 385, 389-90; Ibn Taymiyyah, *al-Ṣārim al-Maslūl 'alā Shātim al-Rasūl*, p. 139-140.

<sup>498</sup> Ibn Taymiyyah, *al-Ṣārim al-Maslūl 'alā Shātim al-Rasūl*, p. 380.

<sup>499</sup> Qāḍī 'Iyāḍ, *Ash-Shifa*, p. 792.

## Conclusion

This section has revealed that the four canonical *Sunni* schools of law (Ḥanafīs, Ḥanbalites, Mālikīs, and Shāfi'īs) all rule that blasphemy is an act of apostasy. This entails that when a Muslim commits an act of blasphemy, he automatically becomes an apostate or *murtad*. However, even though blasphemy is considered a part of apostasy, the dispute lies in the issue of repentance, should a Muslim who has committed blasphemy be allowed to repent sincerely? And in the case of a non-Muslim who has committed a blasphemous offense, is it admissible for him to repent? As we have seen, Muslim jurists differ on whether the blasphemer -both Muslim and non-Muslim- should be given the opportunity to repent. This is probably due to the fact that the Prophet himself forgave some persons who had insulted him. It is likely that those persons whom the Prophet forgave didn't pose a threat towards the then-nascent Islamic state in Medina. In contrast, those who were convicted for having committed blasphemy most likely did constitute a threat to the new community of Medina, and as such, their actions were viewed as political offences, including high treason. As I mentioned before in this chapter, Muslim jurists don't distinguish between apostasy and blasphemy and align their opinions and rulings on the offence of blasphemy with that of apostasy. Earlier I argued that there are compelling reasons to distinguish blasphemy from apostasy. Blasphemy is automatically accompanied by sacrilege, while someone can also renounce Islam without profanity. Also, a non-Muslim who commits blasphemy cannot become an apostate; thus, taking action against a non-Muslim blasphemer is to sentence him for the offense of blasphemy alone.

## II Apostasy in Islam

### Introduction

With the rise of human rights including freedom of religion, apostasy in Islam has become a perilous topic, especially for Muslims living in liberal societies. According to the vast majority of classical Muslim scholars, apostasy in Islam is a crime that merits capital punishment. In liberal democracies, freedom of religion as a negative freedom is not merely looked upon as the right to convert to a religion or belief, but it also safeguards someone's right to freely desert from a belief or creed. This can be seen, *inter alia*, in Article 9 of the European Convention on Human Rights:

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

Freedom of religion is personal liberty and is characterised as an individual having the freedom to profess and express the religion of his or her choice.<sup>500</sup> Based on Article 9 of the European Convention on Human Rights, freedom of religion is also the right to freely express that an individual has changed his or her religion, and shows how closely related apostasy in Islam is related to freedom of expression. Thus, from a liberal perspective, apostasy in Islam is, as the vast majority of Muslim scholars conceive it, not compatible with freedom of religion. However, when apostasy in Islam is perceived as the right to step out of the religion of Islam freely, as some Muslim scholars believe, then both the arguments for and against capital punishment for apostasy in Islam should be analysed. This brings me to the main question of this section:

What are the arguments for and against capital punishment for apostasy in Islam?

I shall answer this question by first concentrating on the definition and scope of apostasy, thereby addressing what expressions and actions are tantamount to apostasy in Islam. Then I discuss the early conceptions of apostasy in Islam and the various opinions of the Sunni schools of law regarding apostasy in Islam. In the last part of this section, I shall reflect on how apostasy can be rethought in the modern world.

### 1. Definition and Scope

The Arabic term for apostasy is *ridda* or *irtidād*. Both terms are derived from the word *radda*, which means to turn back.<sup>501</sup> A person who leaves the fold of Islam for either unbelief or

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<sup>500</sup> Kamali, *Freedom of Expression in Islam*, p. 87.

<sup>501</sup> Lane, *Arabic-English Lexicon*, vol. I, p. 1061.

another religion is called *murtadd*.<sup>502</sup> There are numerous actions which amount to apostasy. This may be done by creed, deeds, words, or by deliberating not observing the obligatory practices of Islam.<sup>503</sup> The rejection of the fundamental articles of faith (*imān*) like the existence of Allah, the Qur'an, the angels, the Prophets are tantamount to unbelief and apostasy. To deny or ridicule obligatory duties in Islam like prayer (*ṣalāh*), giving alms to the poor (*zakāt*), fasting (*siyām*) during the month of Ramadan, or the pilgrimage to Mecca also amounts to apostasy. Other acts and expressions that constitute apostasy are: throwing the Qur'an or the books of *aḥādīth* in a filthy place, claiming that one has received a revelation from Allah, arguing the permissibility of something forbidden, in which there is a consensus among Muslim scholars, such as the permissibility of fornication, drinking wine, usury, or eating pork.<sup>504</sup>

As we have seen earlier in this chapter, blasphemy also equates to apostasy, classical Muslim jurists don't differentiate between apostasy and blasphemy and incorporate blasphemy in apostasy.<sup>505</sup> It should be noted that if someone is forced to pronounce words corresponding to apostasy while his heart is full of *imān* (faith), he is not considered an apostate.<sup>506</sup> This is due to the following verse of the Qur'an:

Whoever disbelieves in Allah after his belief... except for one who is forced [to renounce his religion] while his heart is secure in faith. But those who [willingly] open their breasts to disbelief, upon them is wrath from Allah, and for them is a great punishment.<sup>507</sup>

Chronologically, three groups of Muslim scholars have dealt with the issue of apostasy: the classical scholars, the premodern scholars, and the modern scholars. As I will briefly point out in the next section, the majority of classical scholars, including the Sunni leading schools of law, believed that an apostate was eligible for capital punishment. The main reason for taking such a harsh stand is that these scholars viewed apostasy as a political crime. Some premodern scholars objected against capital punishment for apostasy, arguing that apostasy

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<sup>502</sup> Ibid., p. 1065.

<sup>503</sup> Cf. Al-Sāmarā'i, 'Abd al-Razzaq Nu'man, *Ahkām al-Murtadd fī'l-Shari'ah al-Islāmīyyah*, Riyadh: Dār al-'Ulum li al-Tiba'a wa al-Nashr, 1983, p. 61; Al-Ghannūshī, Rāshid, *al-Ḥurrīyāt al-'Āmmah fī al-Dawlah al-Islāmīyah*, Beirut: Markaz Dirāsāt al-Waḥdah al-'Arabīyah, 1993, p. 48.

<sup>504</sup> Sābiq, al-Sayyid, *Fiqh us-Sunnah. Sayyid Sabiq by the doctrinal writings of the Sunna of the Holy Prophet*, 4 vols., rendered to English by F. Amira Zrein Matraji, corrected and revised by Mahmoud Matraji, Beirut: Dār el Fikr, 1996, vol. III, p. 326.

<sup>505</sup> Kamali, *Freedom of Expression in Islam*, p. 215.

<sup>506</sup> Doi, *Shariah: Islamic law*, p. 265-7.

<sup>507</sup> SAHIH INTERNATIONAL TRANSLATION, <https://quran.com/16>. The scholar al-Wāḥidī (d. 1075) mentions in his book *Asbāb al-Nuzūl* (the reasons for the revelations) two reasons why this verse is revealed. According to the great exegete of the Qur'an Ibn Abbās, this verse is revealed because of Ammar Ibn Yasir. The following happened. The idolaters (*mushrikīn*) had imprisoned and tortured him, his father Yasir, his mother Sumayyah, Suhaib, Bilāl, Khabbab, and Salīm. As for Sumayyah, she was tied between two camels, stabbed with a spear and she was told: "you have accepted Islam for the sake of men." So, she was killed like her husband Yasir. They were the first to be killed for the sake of Islam. And as for Ammar, he forcedly said what she wanted to hear from him. When the Messenger of Allah found out that Ammar had gone unbelieving, he said: "No, Ammar is full of faith, from head to toe. Faith is mixed with his flesh and blood." Ammar later came crying to the Messenger of Allah and the Prophet wiped his eyes and said, "If they come to you again, repeat what you said to them before." So, Allah the Exalted revealed this verse. According to another great exegete of the Qur'an Mujāhid, this verse has been revealed concerning some people in Mecca who were religious, and the Muslims of Medina wrote to them: "you must emigrate, and we do not consider you one of us unless you emigrate". They then wanted to leave Mecca but were stopped by the Quraysh who forced them to disbelief. And because of them, this verse was revealed. See al-Wāḥidī, *Asbāb al-Nuzūl*, p. 209.

is not a political crime per se. Finally, some modern Muslim scholars deal with apostasy within the framework of human rights and attempt to reconcile apostasy in Islam with freedom of religion.

## 2. Consequences for Committing Apostasy

In Islamic Law, apostasy has several implications. According to the Māliki, Shāfi'i, and Ḥanbali Sunni schools of thought, the apostate should be executed. This includes both men and women. The Ḥanafī Sunni school of thought and the scholars Sufyān al-Thawrī (d. 778), Ibn Shubrumah al-Kūfī (d. 761) and Ibn 'Ulayya (d. 809) draw a distinction between a male apostate and a female apostate, stating that only the male apostate should be executed, and the female apostate should be imprisoned until she returns to Islam.<sup>508</sup> In section 10.2, I will discuss in more detail the rationale behind this distinction and why this classic view is still highly relevant in our day and age.

According to the Māliki and Hanafi school, the marriage of an apostate becomes void, and the couple should be separated. When both spouses become apostates, they should be separated, according to the Shāfi'i and Ḥanbali school. However, according to the Ḥanafī school, their marriage is still valid.<sup>509</sup> There are different views about the ownership of property of the apostate. Because I will only focus on capital punishment for apostasy, these and other issues related to apostasy are not relevant and will not be discussed.

## 3. Relevance for Western Muslims

Apostasy in Islam is a relevant topic not only for Muslims living in traditional Muslim countries but also for Western Muslims. It is a heated and controversial subject because ex-Muslims living in the West are often reluctant to openly admit that they have left Islam. For example, in the Netherlands, on 11 September 2007 (a symbolic date), the Central Committee for Ex-Muslims got off the ground. However, this committee was disbanded in April 2008 because no one dared to become a member, according to founder Ehsan Jami.<sup>510</sup> In a relatively recent book, *The Apostates: When Muslims Leave Islam* (2015), Simon Cottee, a senior lecturer and researcher in criminology at the University of Kent, describes the stories of 35 ex-Muslims living in Great Britain and Canada. These ex-Muslims go through a difficult life because they feel a social pressure that prevents them from coming out openly and stop living as Muslims. One of the interviewees even committed suicide afterwards. Cottee believes these ex-Muslims deserve better but finds that they receive little support. Cottee is surprised that these ex-Muslims, who live in a secular state, are often portrayed as Islamophobic, while they

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<sup>508</sup> Saeed and Saeed, *Freedom of Religion, Apostasy and Islam*, p. 53; al-Qurṭubī, Abī 'Abd Allāh Muḥammad b. Aḥmad b. Abī Bakr b. Farḥ al-Anṣārī, *al-Jāmi' li-Aḥkām al-Qur'ān*: Beirut: al-Resalah Publishers, 2006, vol. III, p. 428-30.

<sup>509</sup> Saeed and Saeed, *Freedom of Religion, Apostasy and Islam*, p. 53; al-Qurṭubī, *al-Jāmi' li-Aḥkām al-Qur'ān*, vol. III, p. 428-30.

<sup>510</sup> Quadir, Razi H., *Godsdienstvrijheid en afvalligheid in de islam in relatie tot seculier recht*, p. 127, NTKR 2019, afl. 2, pp. 113-137; [www.nu.nl/algemeen/1528962/ehsan-jami-heft-comite-ex-moslms-op-video.html](http://www.nu.nl/algemeen/1528962/ehsan-jami-heft-comite-ex-moslms-op-video.html).)

want to lead an ordinary life and certainly not opt to go through life as 'professional apostates' such as Ayaan Hirshi Ali or Ibn Warraq.<sup>511</sup>

#### 4. The Issue of Repentance

After consulting various works of fiqh, the contemporary scholar Friedmann discerns three views regarding repentance after committing apostasy. Abū Ḥanīfa and some of the Ḥanafī jurists like al-Marghīnānī are of the opinion that it is only desirable to ask an apostate to repent. According to Abū Ḥanīfa, the *ḥadīth* mentions the capital punishment for an apostate “whoever changes his religion, kill him”, but does not declare the obligation to seek his repentance prior to execution.<sup>512</sup>

The second view is that an apostate's repentance will never be accepted, and therefore the apostate should be killed at once. Al-Ḥassan al-Baṣri, Ṭāwūs, al-Ṭahāwī, and Aḥmad bin Hanbal (according to one report) are amongst others who have this view.<sup>513</sup>

Other Muslim jurists such as ‘Atā’ Ibn Abī Rabāḥ (d. 733), Ibrāhīm al-Nakha‘ī, Mālik bin Anas, Sufyān al-Thawrī and according to one report Aḥmad bin Hanbal maintain that it is mandatory to allow the apostate to repent. This idea is, among others, supported by the Qur’an 8:38 and the conquest of Tustar in which ‘Umar bin al-Khaṭṭāb disliked the news that the apostates had been killed. Instead of killing the apostates ‘Umar told that he would have invited them back to Islam and if they refused, he would have imprisoned them.<sup>514</sup>

Most Muslim jurists are of the third opinion and uphold that the apostate should be given the opportunity to repent and should only be executed after refusing to return to Islam. There are, however, different opinions on how much time should be given to repent; this varies from three days – which is the majority view -, to one month, three months, or even a lifetime.<sup>515</sup> The scholars Ibrāhīm al-Nakha‘ī and Sufyān al-Thawrī are of the opinion that the apostate should always be allowed to repent, even if it takes a lifetime, and never be killed. However, according to ibn Qudāma, this opinion contradicts the *sunnah* and the consensus of scholars.<sup>516</sup> Some scholars like al-Zuhri are of the opinion that the apostate should be invited back to Islam a maximum of three times; otherwise, he will be executed.<sup>517</sup>

#### 5. The Qur’an on apostasy

There are numerous verses in the Qur’an deal with the subject of apostasy or *riddah*, but none of them prescribe any worldly punishment. Rather, the punishment for apostasy occurs in the Hereafter as the following verses point out:

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<sup>511</sup> Cottee, Simon, *The Apostates: When Muslims leave Islam*, London: Hurst and Company, 2015; Quadir, *Godsdienstvrijheid en afvalligheid in de islam in relatie tot seculier recht*, p. 127.

<sup>512</sup> Friedman, *Tolerance and Coercion in Islam: Interfaith Relations in the Muslim Tradition*, p. 127.

<sup>513</sup> Ibid.

<sup>514</sup> Ibid., pp. 128-9.

<sup>515</sup> Ibn Qudamah, *al-Mughni*, vol. 12, pp. 264, 266; Al-Juziri, *al-Fiqh ‘ala al-madhahib al-arba’ah*, p. 1318-9 (no. 1); Khadduri, *The Islamic Law of Nations*, p. 195; Saeed and Saeed, *Freedom of Religion, Apostasy and Islam*, p. 54.

<sup>516</sup> Ibn Qudamah, *al-Mughni*, vol. 12, p. 269.

<sup>517</sup> Ibn Qudamah, *al-Mughni*, vol. 12, p. 268; Friedman, *Tolerance and Coercion in Islam: Interfaith Relations in the Muslim Tradition*, p. 128.

They ask you about the sacred month - about fighting therein. Say, "Fighting therein is great [sin], but averting [people] from the way of Allah and disbelief in Him and [preventing access to] al-Masjid al-Haram and the expulsion of its people therefrom are greater [evil] in the sight of Allah. And fitnah is greater than killing." And they will continue to fight you until they turn you back from your religion if they are able. And whoever of you reverts from his religion [to disbelief] and dies while he is a disbeliever - for those, their deeds have become worthless in this world and the Hereafter, and those are the companions of the Fire, they will abide therein eternally.<sup>518</sup> (2:217)

How shall Allah guide a people who disbelieved after their belief and had witnessed that the Messenger is true and clear signs had come to them? And Allah does not guide the wrongdoing people.

Those - their recompense will be that upon them is the curse of Allah and the angels and the people, all together,

Abiding eternally therein. The punishment will not be lightened for them, nor will they be reprieved.

Except for those who repent after that and correct themselves. For indeed, Allah is Forgiving and Merciful.

Indeed, those who reject the message after their belief and then increase in disbelief - never will their [claimed] repentance be accepted, and they are the ones astray.<sup>519</sup> (3:86-90)

O you who have believed, whoever of you should revert from his religion - Allah will bring forth [in place of them] a people He will love and who will love Him [who are] humble toward the believers, powerful against the disbelievers; they strive in the cause of Allah and do not fear the blame of a critic. That is the favor of Allah; He bestows it upon whom He wills. And Allah is all-Encompassing and Knowing. (5:54)

Notwithstanding that the Qur'an views apostasy as a heinous crime, it doesn't mention any earthly punishment for it. Rather, it is up to God to judge the apostate in the Hereafter.<sup>520</sup>

## 6. The Sunnah on apostasy

Although the Qur'an is perspicuous on apostasy, i.e., there is no penalty in this world, the *Sunnah* is unequivocal about this subject. The *Sunnah*, which is the teachings of the Prophet Muhammad, is known through the *aḥadīth* or the narrations of the Prophet, and encompasses his sayings, actions, and tacit approvals.

The vast majority of Muslim scholars rely on the following two verbal *aḥadīth* to contend that the apostate should be executed:

"Whoever changes his religion, kill him"<sup>521</sup> and "The blood of a Muslim, who confesses that there is no God but Allah and that I am His Apostle, cannot be shed except in three cases: (1)

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<sup>518</sup> SAHIH INTERNATIONAL TRANSLATION, <https://quran.com/2>

<sup>519</sup> SAHIH INTERNATIONAL TRANSLATION, <https://quran.com/3>

<sup>520</sup> Other verses that deal with apostasy are: 2:109, 3:72, 3:77, 3:80, 3:82, 3:86, 3:90, 3:100, 3:106, 3:144, 3:149, 3:177, 3:187, 4:81, 4:137, 5:54, 9:66, 9:74, 16: 106-107, 37:57, 47:25-28, 63:3.

<sup>521</sup> Narrated by al-Bukhārī, *ḥadīth* no. 3017 and 6922, Sunan Abū Dawūd, *ḥadīth* no. 4337, *The Translation of The Meaning of Jāmi' al-Tirmidhī*, *ḥadīth* no. 1463.



Life for life, (in cases of intentional murders without right, i.e., in *Qisās* -Law of Equality in punishment); (2) a married person who commits adultery, and (3) the one who reverts from Islam [apostates] and leaves the [Muslim] community.”<sup>522</sup>

The scholar Muḥammad al-Shawkānī (d. 1839), when commenting on the first *ḥadīth*, explicates the difference between the *ẓāhir* (ostensible) meaning of “abandoning faith” in the *ḥadīth* (that *riḍḍa* in whatsoever form of *kufr* entails death punishment) and the intended “full abandoning”, “leaving the community” and “stepping out of Islam”. Thus, according to al-Shawkānī, leaving the Muslim community can only be done by unbelief and cannot merely be achieved by committing rebellion (*baghy*), heterodoxy (*ibtidāʿ*), or other forms of dissent. Although al-Shawkānī admits that it is permissible for each Muslim individual to kill the aggressor (*bāghī*) who is eager to kill him/her or take his property, this aggressor is still considered part of the Muslim community. This *ḥadīth* purports that the only reason for reverting the religion of Islam and the Muslim community is [accepting] unbelief such as been explained with the words of the Prophet in another narration “or becoming an unbeliever after accepting Islam” (*bal al-murādu bil-tark lil-dīn wa-lmufāraqah lil-jamāʿah al-kufr faqaṭ kamā yadallu ʿala dhalik qawluhu fi il-ḥadīthi alākhar*).<sup>523</sup>

## 7. Does apostasy entail the *ḥadd* punishment?

In the Qurʾan, there are prescribed punishments for certain offenses which are called the *ḥadd* (plural *ḥudūd*) punishment. These offenses are highway robbery (*ḥirabah*) (5: 33), theft (*sariqah*) (5: 38-9), adultery, and fornication (*zina*) (24: 2,5), and slanderous accusation (*qadhf*) (24: 4, 5). According to Kamali, since apostasy (*riḍḍah*) and drinking alcohol (*shurb*) are not mentioned in the Qurʾan, they are excluded from the *ḥudūd*. Indeed, *ḥadd* is defined as a prescribed penalty in the text and the Quran is silent on the penalty for apostasy and drinking alcohol. However, as Kamali states, some Muslim scholars include apostasy among the *ḥudūd* as can be seen in the books of Islamic jurisprudence (*fiqh*).<sup>524</sup>

The implementation of *ḥudūd* punishments requires strict evidence and in case of doubt the *ḥudūd* punishments must be prevented as the following *ḥadīth* gives the basic ruling:

*“Avert as far as possible the infliction of prescribed punishments from the Muslims as much as possible, if he has a way out then leave him to his way, for if the Imam (i.e. Judge) makes a mistake in forgiving it, it would be better than making a mistake in punishment.”*<sup>525</sup>

Furthermore, once an offense is proven eligible for the *ḥadd*-punishment, the judge should carry out the punishment, and repentance will be of no avail. However, as we have previously seen, most Muslim scholars believe that the apostate should be given the opportunity to repent. The late scholar Mahmoud Cherif Bassiouni (d. 2017) notes that there is no consensus

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<sup>522</sup> Al-Bukhārī, *Ṣaḥīḥ Al-Bukhārī*, Vol. IX, p. 20, *ḥadīth* no. 6878; Muslim, *Ṣaḥīḥ Muslim*, Vol. 3, p. 208, *ḥadīth* no. 1676.

<sup>523</sup> Al-Shawkānī, Muḥammad Ibn Ali ibn Muḥammad ibn Abdullah, *Nayl al-Awṭār: Sharḥ Muntaqā al-akhbār min aḥādīth Sayyid al-Akhyār*, Beirut: Dar el-Marefah, 2002, Vol. II, p. 1472-3.

<sup>524</sup> Kamali, Mohammad Hashim, *Shariʿah law: an Introduction*, p. 191-3.

<sup>525</sup> Tirmidhi, *The Translation of The Meaning of Jāmiʿ al-Tirmidhī*, Vol. I, p. 607 *ḥadīth* no. 1429.

among Muslim scholars regarding apostasy being a *ḥadd*-crime.<sup>526</sup> He adds that there is ample evidence that apostasy is not a *ḥadd*-crime in itself. What makes apostasy a crime is when it is coupled with warfare or active combat against Islam. In such a case, apostasy becomes equivalent to high treason, which is punishable in almost every legal system. Many legal systems in the world punish high treason with capital punishment.<sup>527</sup>

For the same reason, the modern and famous Saudi Muslim scholar al-‘Uthaymīn (d. 2001) denies that apostasy is a *ḥadd*-crime. He states that the *ḥadd*-punishment can never be dropped, even if the offender repents. This is obviously not the case with apostasy as the apostate should always be given the opportunity to repent. If the apostate repents, it is forbidden to execute him.<sup>528</sup>

This is also demonstrated in the case of ‘Abdallāh ibn Sa‘d ibn Abī Sarḥ (d. 656). He was among the persons who converted to Islam and wrote down the revelations of the Prophet. Later he seceded from Islam and returned to Mecca, where he joined the polytheists.<sup>529</sup> In Mecca, he spread stories about his counterfeit of the revelations he wrote down. When the Prophet conquered Mecca, he ordered the execution of ibn Abī Sarḥ, whereupon ibn Abī Sarḥ went to ‘Uthmān ibn ‘Affān - who was his brother-in-nursing - to seek his protection. ‘Uthmān asked the Prophet to forgive ibn Abī Sarḥ, and after some time, the Prophet granted him forgiveness.<sup>530</sup>

Proponents of the death penalty for apostasy consider this compelling evidence, for it was only due to the intercession of ‘Uthmān that the Prophet spared ibn Abī Sarḥ.<sup>531</sup> However, this argument is weak because if apostasy called for mandatory penalty, the Prophet would not have spared ibn Abī Sarḥ. Several occurrences indicate that the Prophet insisted that mandatory sentences be implemented irrespective of the perpetrator's social status and connections.<sup>532</sup>

‘Ā’isha, one of the wives of the Prophet, narrates the following:

“The Quraish people became very worried about the Makhzumiya lady who had committed theft. They said, "Nobody can speak (in favor of the lady) to Allah's Messenger and nobody dares do that except Usama who is the favorite of Allah's Messenger. " When Usama spoke to Allah's Messenger about that matter, Allah's Messenger said, "Do you intercede (with me) to violate one of the legal punishments of Allah?" Then he got up and addressed the people, saying, "O people! The nations before you went astray because if a noble person committed theft, they used to leave him, but if a weak person among them committed theft, they used to inflict the legal punishment on him. By Allah, if Fatima, the daughter of Muhammad committed theft, Muhammad will cut off her hand!"<sup>533</sup>

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<sup>526</sup> Bassiouni, *The Sharī‘a and Islamic Criminal Justice in Time of War and Peace*, p. 134.

<sup>527</sup> Ibid., p. 136.

<sup>528</sup> al-‘Uthaymīn, Muḥammad ibn Ṣāliḥ, *Sharḥ al-‘Aqīdah al-Safārīnīyah*, al-Riyāḍ: Madār al-Waṭan lil-Nashr, 2005, p. 670.

<sup>529</sup> Ibn Kathīr, *The Life of the Prophet Muḥammad*, Vol. IV, p. 496.

<sup>530</sup> Haykal, *The Life of Muhammad*, p. 496; This incident is also collected by Abū Dāwūd, see *Sunan Abū Dāwūd*, Vol. III, p. 1214, *ḥadīth* no. 4345-6.

<sup>531</sup> Rahman, *Punishment of Apostasy in Islam*, p. 75.

<sup>532</sup> Saeed and Saeed, *Freedom of Religion, Apostasy and Islam*, pp. 62-3. Ellethy notes that Abī Sarḥ eventually was forgiven because he repented; the narration shows that the Prophet had the tendency not to accept his repentance, see Ellethy, Yasser, *Islam, staat, democratie en godsdienstvrijheid: een islamtisch perspectief*, p. 151, NTKR 2019, afl. 2, pp. 139-160.

<sup>533</sup> Al-Bukhārī, *Ṣaḥīḥ Al-Bukhārī*, Vol. VIII, *Kitāb Al-Ḥudūd*, p. 410, *ḥadīth* no.6788; Muslim, *Ṣaḥīḥ Muslim*, Vol. 3, p. 222, *ḥadīth* no. 1688.

This report demonstrates that the Prophet forbade any intercession in administering the mandatory sentences or *ḥudūd*.<sup>534</sup> From this, the jurist deduced the rule that no *ḥadd* or mandatory sentences are pardonable. This rule is characterized by belonging to a separate category of punishments and is therefore distinguished from the *ta'zīr* or discretionary punishment, for the latter can be condoned by the judge.<sup>535</sup>

Al-Shāfi'ī also refers to this report when he states that the Prophet was the keenest among his people regarding the implementation of the *ḥudūd* and that he never forsakes the implementation of *ḥudūd* by intercession.<sup>536</sup>

Therefore, this report serves as a proof of the fact that there is no mandatory sentence or *ḥadd* for apostasy in Islam, for the Prophet wouldn't have permitted 'Uthmān to intercede for ibn Abī Sarḥ.<sup>537</sup> Furthermore, this incident occurred towards the end of the Prophets' life, in which the revelation of the Islamic law was nearly completed, and no major alterations in it were to be expected.

In section 4, we saw that 'Umar bin al-Khaṭṭāb didn't favour implementing capital punishment for apostasy. This is further underpinned by the following incident about 'Umar; "a man came to 'Umar bin al-Khaṭṭāb from Abu Musa al-Ashari. 'Umar asked after various people, and he informed him. Then 'Umar inquired, 'Do you have any recent news?' He said, 'Yes. A man has become an unbeliever after he was Muslim. 'Umar asked, 'What have you done with him?' He said, 'We let him approach and struck off his head. 'Umar said, 'Didn't you imprison him for three days and feed him a loaf of bread every day and call on him to repent that he might turn in repentance and return to the command of Allah?' Then 'Umar replied, 'O Allah! I was not present, and I did not order it and I am not pleased since it has come to me!' "<sup>538</sup> It is obvious, as El-Awa rightly observes, imprisonment is not one of the *ḥadd* punishment. Hence, the inflicted punishment should be conceived as a discretionary punishment or *ta'zīr*.<sup>539</sup>

## 8. Arguments against Capital Punishment for Apostasy

So far, we have dealt with the arguments in favour of capital punishment for apostasy. In the following section, I will discuss some arguments against it by exploring the standpoint of the Qur'an and examine whether the Prophet killed anyone for apostasy.

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<sup>534</sup> El-Awa, Mohamed Selim, *Punishment in Islamic Law*, Plainfield: American Trust Publication, first edition 1981, p. 2; al-Alwani, Taha Jabir, *Apostasy in Islam. A Historical and Scriptural Analysis*, Herndon: International Institute of Islamic Thought, 2011, p. 49.

<sup>535</sup> El-Awa, *Punishment in Islamic Law*, p. 2; al-'Asqalani, Aḥmad ibn 'Alī Ibn Ḥajar, *Fatḥ al-Bārī: Sharḥ Ṣaḥīḥ al-Bukhārī*, 13 vols., Edited by Muḥammad Fu'ād 'Abd al-Bāqī, Riyāḍ: Maktabat Dār al-Salām; Dimashq: Maktabat Dār al-Faiḥā', 1997, Vol. XII, p. 107; see also Ahmad Hasan in *Sunan Abū Dāwūd*, Vol. III, p. 1218, footnote 3811 in which he states: "This shows that intercession regarding prescribed punishment is unlawful. It should be inflicted, whether the criminal is of a low or a high rank."

<sup>536</sup> Al-Shāfi'ī, Abū 'Abdullāh Muhammad ibn Idrīs, *Kitāb al-Umm*, 12 vols. Edited by Rif'at Fawzi 'Abd al-Mutallib, al-Manṣūrah: Dār al Wafā' 2001, vol. 7, p. 415-6.

<sup>537</sup> Al-Alwani, *Apostasy in Islam. A Historical and Scriptural Analysis*, p. 49.

<sup>538</sup> Mālik, *al-Muwatta' of Imām Mālik ibn Anas*, Translated by Aisha Abdurrahman Bewley, p. 304; Ibn Taymiyyah, *al-Ṣārim al-Maslūl 'alā Shātīm al-Rasūl*, p. 337.

<sup>539</sup> El-Awa, *Punishment in Islamic Law*, p. 55.

## 8.1 Qur'an

Earlier, we saw that the Qur'an is silent regarding any worldly punishments for apostasy. It can then be argued that if apostasy is a heinous crime, why is the death penalty for apostasy only mentioned in some solitary narrations and not in the Qur'an? After all, the Qur'an is the first source of the *Sharī'a*, and it would be illogical for a measure as drastic as capital punishment for apostasy to only be mentioned in the Sunna and not in the Qur'an. Furthermore, freedom of religion is a salient feature in the Qur'an, as the following verse of the Qur'an points out:

There shall be no compulsion in [acceptance of] the religion. The right course has become clear from the wrong. So, whoever disbelieves in Taghut and believes in Allah has grasped the most trustworthy handhold with no break in it. And Allah is Hearing and Knowing. (2:256)<sup>540</sup>

In the following verse of the Qur'an, God interdicts the Prophet Muhammad to coerce people into Islam:

And had your Lord willed, those on earth would have believed - all of them entirely. Then, [O Muhammad], would you compel the people in order that they become believers? (10:99)<sup>541</sup>

The quoted verses are just a few of the more than two hundred verses that subscribe to freedom of religion and choice as an axiom of the Qur'an.<sup>542</sup>

## 8.2 Did the Prophet kill anyone for apostasy?

So far, we saw that the *Sunnah* is the primary source for capital punishment for apostasy. Given the authenticity of two verbal *aḥādīth* mentioned in section 6, there seems no argument for eliminating the death penalty for apostasy.<sup>543</sup> However, does this also mean that the Prophet actually ordered anyone to be killed for apostasy? To answer this question, I will discuss two well-known persons who were killed on the authority of the Prophet for reasons that seem at first glance, to be related apostasy.

*'Abdullah ibn Khaṭal (d. 629)*

After becoming Muslim, 'Abdullah ibn Khaṭal had been appointed by the Prophet to collect legal alms (*zakāh*). An *Ansāri* (a resident of Medina that had converted to Islam) joined him,

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<sup>540</sup> SAHIH INTERNATIONAL TRANSLATION, <https://quran.com/2>

<sup>541</sup> SAHIH INTERNATIONAL TRANSLATION, <https://quran.com/10>

<sup>542</sup> See for example al-Alwani, *Apostasy in Islam. A Historical and Scriptural Analysis*, p. 130: "It would be impossible for the Qur'an to affirm human beings' freedom of choice in more than two hundred verses, then punish those who exercise this freedom with such a stern penalty, particularly when they have done nothing to hurt anyone but themselves."

<sup>543</sup> Some modern scholars have tried to point out that the *ḥadīth* "whoever changes his religion, kill him" is not authentic because the chain of narrators (*isnād*) contains 'Ikrimah, who was the slave of Ibn 'Abbās, and who is unreliable. See for example, al-Alwani, *Apostasy in Islam. A Historical and Scriptural Analysis*, p. 78-9. For an overview of classical scholars who either consider 'Ikrimah as trustworthy or not, see Muḥammad ibn Aḥmad Dhahabī, *Mīzān al-Itidāl fī Naqd al-Rijāl*, eds. 'Alī Muḥammad Mu'awwad; 'Ādil Aḥmad 'Abd al-Mawjūd and 'Abd al-Raḥīm ibn al-Ḥusayn 'Irāqī, Beirut: Dār al-Kutub al-'Ilmīyah, 1995, vol. V, p. 116-119.

along with a Muslim slave. After a while they stopped to rest, and Abdullah ordered the slave to slaughter a goat for dinner. Abdullah took a nap, but when he awoke, he found that the slave had done nothing, and he killed the helpless slave in a fit of rage. Another crime which he committed was taking the camels that he collected as *zakāh* and joining the pagans as an apostate. He never repented for these heinous crimes and to make things worse, he incited two girls to sing satirical songs about the Prophet. The Prophet ordered him to be killed during the conquest of Mecca in 628.<sup>544</sup>

#### *Miqyas ibn Subaba*

Another man who was killed on the authority of the Prophet was Miqyas ibn Subaba. Like ‘Abdullah ibn Khaṭal, he was also a Muslim and from the *Ansār*. In Medina his brother Hishām was accidentally killed by an *Ansāri*. Miqyas had accepted blood money for the death which had been arranged by the Prophet. However, his vengeful nature was not satisfied, so he killed the *Ansāri*, and went to Mecca as an apostate. As with ‘Abdullah ibn Khaṭal, the Prophet ordered the execution of Miqyas during the conquest of Mecca.<sup>545</sup>

Thus, on closer inspection, we can see that these two individuals were not just executed for apostasy. Both had committed heinous crimes against individuals, the Prophet, and the state. Furthermore, these offenses can be also considered high treason and political crimes. The sensitivity of apostasy, i.e., its association with high treason, taking up arms, and joining a hostile group shall be discussed in section 9.1.

### **8.3 Controversial opinions: The position of Ibn Taymiyyah and al-Shāfi‘ī’ on apostasy**

Some modern and contemporary scholars hold controversial opinions regarding the position of Ibn Taymiyyah (d. 1328) and al-Shāfi‘ī’ (d. 820) on apostasy and bring forward these opinions as valid arguments against the death penalty for apostasy. We will first start by elucidating Ibn Taymiyyah's position and whether he holds that there is a *ḥadd* punishment for apostasy.

#### **8.3.1 Ibn Taymiyyah**

Some contemporary scholars, like Mohammad Hashim Kamali and Mohamed Selim El-Awa, refer to page 124 of an edition of the famous work of Ibn Taymiyyah called *al-Siyasah al-Sharīyyah fi Islah al-Ra‘i wa’l-Ra‘iyyah* (The *Sharī‘a*-oriented Politics for the Guidance of the Ruler and His Subjects), published in 1952 by Dār al-Kitāb al-‘Arabī in Cairo, where he stated categorically that there is only a *ta‘zīr* punishment for apostasy, which should be severe.<sup>546</sup> To quote El-Awa: “Finally, Ibn Taymiyyah stated categorically that the punishment for

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<sup>544</sup> Siddiqui, Abdul Hameed, *The Life of Muhammad*, Lahore: Islamic Publications, 5<sup>th</sup> edition, 1980, p. 253; ‘Abd al-Malik Ibn Hishām, *Summarizing the Sirah of Ibn Hisham*, Translated by Sulaima al-Sheikh Mihammed; corrected and revised by F. Amira Zrein Matraji, Beirut: Dar al-Fikr, 1998, p. 227.

<sup>545</sup> Siddiqui, *The Life of Muhammad*, p. 253-4; Mubarakpuri, *The Sealed Nectar*, p. 469.

<sup>546</sup> El-Awa, *Punishment in Islamic Law*, p. 55; Kamali, *Freedom of Expression in Islam*, p. 94.

apostasy is a *ta'zīr* punishment; it is or should be severe punishment, but still it is in the category of *ta'zīr*.<sup>547</sup>

Kamali states the same: "The Māliki jurist, al-Bāḥī (d. 494 A.H.), also observed that apostasy is a sin which carries no prescribed penalty (*ḥadd*), and that such a sin may only be punished under the discretionary punishment of *ta'zīr*. The renowned Hanbali jurist, Ibn Taymiyyah, also categorically agrees on this later punishment for apostasy."<sup>548</sup>

Previously, I observed that I could not find this passage of Ibn Taymiyyah in a recent edition of *al-Siyasah al-Shar'iyyah fi Islah al-Ra'i wa'l-Ra'iyyah*.<sup>549</sup> However, since I'm in possession of the referred edition of 1952, I am able to consider the text on page 124 of this edition. And in doing so we see that there is nothing of the alleged assertion that Ibn Taymiyyah categorically mentions "that the punishment for apostasy is a *ta'zīr* punishment." The relevant text on page 124 reads as follows:

The second one: the punishment to perform an obligation and to abandon something prohibited in the future, like allowing the apostate to repent so that he [re-] accepts Islam. Should he repent [then, the punishment is suspended]; otherwise, he should be put to death. And punishing the one who abandons the prayer and almsgiving and [violates] the rights of humans so that he starts performing them. The discretionary punishment (*ta'zīr*) in this kind is more severe than in the first. And in this case, it is permissible to hit this person again and again until he performs the obligatory prayer or the other obligations.

Although the word *ta'zīr* does occur on this page, it has nothing to do with apostasy. Ibn Taymiyyah clearly states that if the apostate doesn't repent, he should be executed. Therefore, both El-Awa and Kamali have mistaken in their conclusion "that the punishment for apostasy is a *ta'zīr* punishment."

Furthermore, in another work of Ibn Taymiyyah, *al-Ṣārim al-Maslūl 'alā Shātīm al-Rasūl*, Ibn Taymiyyah states that it is obligatory to execute an apostate. To quote Ibn Taymiyyah precisely:

"And it also [applies] that there are two types of apostasy: ordinary apostasy (*ridḍa mujarrad*) and vowed apostasy (*ridḍa mughallaḍa*) [to be never a Muslim again], for which execution is prescribed. In both cases, there is evidence that it is required to execute the apostate, but the evidence indicating that the execution may be waived if the person repents does not apply to both types [of apostasy]. Rather, the evidence [that this is allowed] in the first kind [i.e., the ordinary apostasy], as it will be clear to anyone who studies the evidence that there is acceptance of the apostate's repentance. In the second type [of apostasy], the evidence still stands the obligation to execute the apostate, and there is no text or scholarly consensus to indicate that the execution may be suspended. And it is not feasible to make a comparison between the two distinct cases. And [for] the person who implements this method, there is no [evidence] in the Book [Qur'an] or the Sunnah, or according to the scholarly consensus that everyone who apostatizes in word or deed will fall away to be spared the death penalty if he repents after he is captured and brought to justice. Rather the Qur'an and Sunnah and the scholarly consensus differentiate between the different types of apostates, as we will mention later."<sup>550</sup>

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<sup>547</sup> El-Awa, *Punishment in Islamic Law*, p. 55.

<sup>548</sup> Kamali, *Freedom of Expression in Islam*, p. 94.

<sup>549</sup> Quadir, *Vrijheid van meningsuiting in de islam*, p. 74.

<sup>550</sup> Ibn Taymiyyah, *al-Ṣārim al-Maslūl 'alā Shātīm al-Rasūl*, p. 375.

From the above, it becomes clear that not only is Ibn Taymiyyah most likely in favor of capital punishment for apostasy, he also states that there are two types of apostasy.

### 8.3.2 Imam al-Shāfi'i

According to the modern scholar al-Alwani, al-Shāfi'i (d. 820) - founder of the al-Shāfi'i school of thought - the Prophet never killed anyone for apostasy. In his work *Ishkāliyyat al-riddah wa murtadīn min sadr al-Islām ilā al-yawm* [The dilemma of apostasy and apostates from the beginning of Islām until today], which was later translated into English by Nancy Roberts as *Apostasy in Islam. A Historical and Scriptural Analysis*, he cites al-Shāfi'i from his *Kitāb al-Umm* in which he states: "Some people believed, then committed apostasy, then professed belief again. However, the Messenger of God did not put them to death."<sup>551</sup> (*Wa qad āmana ba'd al-nās thumma aẓhara al-īmān falam yaqtulhu rasūlullahi.*)<sup>552</sup> From this, al-Alwani concludes that "it is an established fact that never in his entire life did the Prophet put an apostate to death."<sup>553</sup> However, this conclusion is premature, because al-Alwani does not quote the whole sentence from *Kitāb al-Umm* of al-Shāfi'i. He omits the following last part of the sentence: "*wa qatala min al-murtadīn min lam yuẓhir al-īmān.*" [And he killed those apostates who did not show faith].<sup>554</sup>

Thus, the complete translation of the sentence from *Kitāb al-Umm* of al-Shāfi'i to which al-Alwani refers is, "Some people believed, then committed apostasy, then professed belief again. However, the Messenger of God did not put them to death. And he killed those apostates who did not show belief again."

From al-Shāfi'i's observation, we can conclude that those apostates who professed the Islamic faith again were spared from capital punishment by the Prophet, but those apostates who persisted in their apostasy from Islam were put to death by the Prophet according to al-Shāfi'i.

## 9. The rationale behind capital punishment for apostasy in Islam and some counterarguments

### 9.1 Political apostasy and religious apostasy

The majority of Muslim scholars regard apostasy as a politico-religious crime. In other words, apostasy is considered a public matter and not a private one. The modern scholar Muhammad Hamidullah (d. 2002) states that apostasy is a political-religious rebellion against Islam, and therefore, no distinction is made between a solitary apostate or a group of apostates; all

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<sup>551</sup> Al-Alwani, *Apostasy in Islam. A Historical and Scriptural Analysis*, p. 65.

<sup>552</sup> Al-Alwani, al-Alwani, Taha Jabir, *Ishkāliyyat al-Riddah wa Murtadīn min Sadr al-Islām ilā al-Yawm* [The dilemma of apostasy and apostates from the beginning of Islām until today], Herndon: International Institute of Islamic Thought, 2006, p. 142.

<sup>553</sup> Al-Alwani, *Apostasy in Islam. A Historical and Scriptural Analysis*, p. 65.

<sup>554</sup> Al-Shāfi'i, *Kitāb al-Umm*, Vol. 7, p. 416.

deserve capital punishment.<sup>555</sup> However, some scholars like Jamaal Zarabozo, state that the exact reason for capital punishment for apostasy is not given in the *aḥadīth* discussed in section 6, and one should be careful in explaining what the reason is for the law regarding apostasy.<sup>556</sup>

The modern scholar Al-Alwani addresses the issue of the majority of the Islamic school of thought regarding religious or personal apostasy as political apostasy. He mentions two additional factors to note:

- 1) The Islamic conquest and expansion of the Islamic Empire brought many countries who had their own laws, systems, and customs under the law of the Islamic State, like the Byzantines and the Persians. Their well-established laws and rules began to interact with the Islamic laws.
- 2) During the caliphate of Abū Bakr (632-634) the ‘wars of apostasy’ took place. He waged war on those who refused to pay the *zakāh*. When ‘Umar ibn al-Khattab asked Abū Bakr why they fought while professing “There is no god but Allah”, Abū Bakr replied that these people wanted to disrupt the Muslim nation as an entity, as a way of life. They wanted to leave the divine system and return to the pre-Islamic rules and customs.<sup>557</sup>

Accordingly, as Al-Alwani points out, these wars of apostasy were not waged to coerce those who had left the fold of Islam back to the religion. These wars purported to preserve the Islamic State, the citizens of the Islamic State had their obligations towards it. These obligations were naturally rooted in the religion of Islam and served for the protection of the Islamic State and to forestall the disruption or fragmentation of the Muslim nation. In modern times too, “a citizen is required to respect the legitimate authorities and not to engage in any action that would threaten his or her nation’s sovereignty, unity or territorial integrity”, as state by Al-Alwani.<sup>558</sup> In other words, in the pre-modern Islamic context, apostasy from Islam was tantamount to abandoning an Islamic geopolitical context and joining a hostile group outside the political framework of the Islamic state. Thus, in the premodern Islamic state religion played a crucial role in protecting the socio-political cohesion of society, which explains the sensitivity of apostasy.<sup>559</sup>

Another contemporary scholar, Muhammad Saleh al-Munajjid, who runs a question-and-answer website on Islam, states on his website several reasons for capital punishment of apostasy. First, capital punishment is a deterrent for anyone who wants to become Muslim for hypocritical purposes. Such a person will take the matter of becoming a Muslim seriously. As apostasy is tantamount to forsaking the Muslim community and causing sedition, capital punishment will prevent people from committing apostasy. Secondly, it will prevent the apostate from spreading doubts, lies, and fabrications about Islam. Thirdly, since in modern secular laws the death penalty exists to protect society from disorder and crimes which are likely to cause disintegration, Islam entitled to execute those who commit the crime of

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<sup>555</sup> Hamidullah, Muhammad, *The Muslim Conduct of State*, Kuala Lumpur: Islamic Book Trust, 2012, p. 186.

<sup>556</sup> Zarabozo, Jamaal, *Apostasy and Islam: The Current Hype*, 2006, available at <http://www.jamaalzarabozo.com/audio/thehype.pdf>, p. 1.

<sup>557</sup> *Ibid.*, pp 98-99.

<sup>558</sup> *Ibid.*, p. 100.

<sup>559</sup> Ellethy, *Islam, staat, democratie en godsdienstvrijheid: een islamitisch perspectief*, p. 152-3.



apostasy to protect itself.<sup>560</sup> Finally, the act of apostasy is considered high treason, for which capital punishment also exists in modern secular states.<sup>561</sup>

This line of reasoning coincides with al-Sāmarā'i. He also holds that apostasy is an act of high treason and enmity towards the Muslim community. The apostate gives others the impression that Islam lacks goodness and thus prevents them from accepting it. Thus, the apostate not only commits an offense against himself/herself but also against others, which cannot be tolerated.<sup>562</sup>

Commenting on this text, S.A. Rahman states that this kind of reasoning lacks rational thinking and consequently fails to persuade the modern mind which is deeply influenced by rationalism. Islam favors rational thinking because it is *Dīn al-Fiṭrah* or the religion of innate human nature. It is irrational that a person who accepts Islam and later apostates is in a worse position than a convinced and hardened infidel.<sup>563</sup> Towards the end of this chapter, I shall briefly come back to the subject of rationalism in Islam and how it is intertwined with empiricism in general and specifically with apostasy. In the next section, I will point out why I disagree that apostasy is equivalent to high treason or taking up arms against the Muslim community.

## 9.2 The ḥanafī school of thought and the execution of a female apostate

In section 3, I briefly touched on the fact that Abū Ḥanīfa and his followers, the Hanafī's, make a distinction between a male and a female apostate. According to them, the male apostate is be executed, which is based on the *ḥadīth* "Whoever changes his religion, kill him" and the wars of apostasy during the caliphate of Abū Bakr.<sup>564</sup> On the other hand, a female apostate is only to be imprisoned and not executed. This is based on the assumption that a female is not active in combat nor capable of warfare.<sup>565</sup> Also, a hermaphrodite and an elderly man from whom no progeny is expected are both saved from capital punishment.<sup>566</sup>

Therefore, it can be assumed that according to the Ḥanafīs, apostasy is considered a political crime. This is because the renegade does not only leave the fold of Islam, but it is also expected that he becomes an enemy of the Islamic State and the Muslim community. This explains why the Ḥanafī jurists have treated apostasy under the heading of *siyar* or current international law. *Siyar* treats issues such as jihad, armed conflict, the abode of Islam, and the abode of war. Hence, this constitutes proof that apostasy is considered by the Ḥanafī's as a political crime and high treason.<sup>567</sup>

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<sup>560</sup> <http://islamqa.info/en/12406>, accessed December 19th, 2015.

<sup>561</sup> <https://islamqa.info/en/answers/811/why-death-is-the-punishment-for-apostasy>, accessed December 19th, 2015.

<sup>562</sup> Al-Sāmarā'i, *Ahkām al-Murtadd fi'l-Shari'ah al-Islāmiyyah*, p. 182-3. I have used here the English translation by S.A. Rahman in *Punishment of Apostasy in Islam*, p. 115-6.

<sup>563</sup> S.A. Rahman, *Punishment of Apostasy in Islam*, p. 115-6.

<sup>564</sup> Al-Alwani, *Apostasy in Islam. A Historical and Scriptural Analysis*, p. 100.

<sup>565</sup> Khadduri, *The Islamic Law of Nations, Shaybānī's Siyar*, p. 205; Rahman, S.A., *Punishment of Apostasy in Islam*, p. 122: The Hanafī scholar Sarakhsi states: "And in this there is specification that justification for killing is on the ground of *qital* (fighting) and women do not participate in fighting."

<sup>566</sup> Hamidullah, Muhammad, *The Muslim Conduct of State*, p. 187; Khadduri, *The Islamic Law of Nations, Shaybānī's Siyar*, p. 209.

<sup>567</sup> Al-Alwani, *Apostasy in Islam. A Historical and Scriptural Analysis*, p. 101.

Like Al-Alwani, I have objections to the assumption that an apostate might demonstrate hostility against the Muslim world or would try to wage war against it. What makes apostasy an actual crime is when renouncing Islam goes hand in hand with active combat or even warfare against Islam. In this manner, apostasy becomes equivalent to high treason, which in almost every legal system in the world is conceived as a crime, and which many countries punish with capital punishment.<sup>568</sup> To execute an apostate for the sheer possibility of becoming an active combatant against Islam is against the maxims and principles of Islamic jurisprudence. Therefore, as Bassiouni observes, apostasy in itself is not a *ḥadd* crime.<sup>569</sup>

The following table summarises the view of some classical scholars I have discussed so far regarding capital punishment for apostasy and whether they make a distinction between a male and a female apostate.

<b>Muslim Scholar</b>	<b>In favour of death penalty</b>	<b>Distinction between male and female apostate</b>
'Umar bin al-Khaṭṭāb (d. 644)	No	No
Ibrāhīm al-Nakha'ī (d. 713)	No	No
Sufyān al-Thawrī (d. 778)	No	Yes
Ibn Taymiyyah (d. 1328)	Yes	No
al-Shāfi'ī' (d. 820)	Yes	No
Abū Ḥanīfa (d. 767)	Yes	Yes
Ibn Shubrumah al-Kūfī (d. 761)	Yes	Yes
Ibn 'Ulayya (d. 809)	Yes	Yes

Table 1. *Views of Muslim scholars on apostasy and apostates*

In the previous section, the different reasons for capital punishment for apostasy were discussed. It became clear that according to the proponents of capital punishment, an apostate is a threat to the Islamic State and that the punishment serves as a deterrent for those who desire to step out of the fold of Islam. However, by forestalling people from becoming open apostates, there is another danger waiting in ambush: the phenomenon of hypocrisy, as Al-Alwani rightfully points out. It is not my intention here to give a detailed presentation about hypocrisy. It will suffice here to state that someone who doesn't inwardly believe in Islam but pretends outwardly being a Muslim (just to avoid the death penalty) acts hypocritically. My point is here to ask the following question: who poses a more significant threat to Islam and Muslims, the open apostate or the hypocrite? The phenomenon of hypocrisy was widely spread during the time of the Prophet in Madinah. The Prophet knew who the hypocrites were because they had distinctive characteristics and ways of expressing themselves. Moreover, they would expose themselves as hypocrites on certain occasions as they tended to take certain positions, revealing their dishonesty, their dissimulation, and the phoniness of the religious belief they professed. The hypocrites at the time of the Prophet would spread untruths that stirred up division and unrest. They also engaged in concealment,

<sup>568</sup> Bassiouni, *The Shari'a and Islamic Criminal Justice in Time of War and Peace*, p. 136.

<sup>569</sup> Ibid.

terrorism, deceit, and infiltration, and in some situations, inflicted significant damage on Islam's internal front. Thus, as Al-Alwani rightfully points out, we can readily observe that the hypocrite poses the most significant danger by far to Muslims and Islam, both individually and collectively.<sup>570</sup>

I have to add here that there is no legal punishment for hypocrisy because it is an unexpressed intention. As long as a person claims to be a Muslim and does not act outwardly against Islam, he or she is considered to be a Muslim. This is underpinned by the following long narration in which the Prophet, among other things, stated: "...I have not been ordered (by Allah) to search the hearts of the people or cut open their bellies."<sup>571</sup> 'Abd Allāh ibn Ubayy ibn Salūl (d. 631) was a well-known hypocrite and was even named leader of the hypocrites. He had repeated conflicts with the Prophet. Despite this, the Prophet offered the funeral prayer for ibn Salūl.<sup>572</sup> Thus, because ibn Salūl outwardly appeared to be a Muslim, the Prophet offered the funeral prayer for him. The Islamic funeral prayer can only be performed for someone who died as a Muslim.

### 9.1 Empirical proof against capital punishment for apostasy

Some modern scholars such as AbūSulaymān and Kamali are of the opinion that works of Muslim scholars lack empiricism, as a result rational knowledge has remained underdeveloped.<sup>573</sup> AbūSulaymān gives two main reasons for this: First, there was general contentment with the existing social system established by the Prophet which was bolstered by religious texts. Secondly, the Mu'tazilah movement failed to deal appropriately with the question of *wahī* (revelation) and *'aql* (reason) in an Islamic context. Consequently, they failed to establish a permanent foundation for the evolution of rational philosophy in Islam. This also led to the demise of systematic investigation and empiricism in the field of Islamic social studies. AbūSulaymān goes on to state that al-Ghazzālī's (d. 1111) famous work *Tahāfut al Falāsifah* (Refutation of the Philosophers) is a milestone in the battle against rationalism.<sup>574</sup> This observation can be readily linked with the issue of apostasy. As we have seen previously, one of the arguments for the capital punishment of apostasy is the fear of opening the door to the abandonment of Islam.<sup>575</sup> However, this argument runs directly counter to the empirical findings of Pew Research Center. In her report, *The Future of World Religions: Population Growth Projections, 2010-2050*, Pew Research Center concludes that "Islam will grow faster than any other major religion."<sup>576</sup> Furthermore, many people who renounce or convert to Islam live in countries where they enjoy freedom of religion. For example,

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<sup>570</sup> Al-Alwani, *Apostasy in Islam*, p. 54.

<sup>571</sup> Al-Bukhāri, *Ṣaḥīḥ Al-Bukhāri*, Vol. V, *Kitāb Al-Maghāzī*, p. 388, *ḥadīth* no. 4351.

<sup>572</sup> Ibn Kathīr, *The life of the Prophet Muḥammad*, Vol. IV, p. 45-6.

<sup>573</sup> AbūSulaymān, 'AbdulḤamīd, *Towards an Islamic Theory of International Relations: New Directions for Methodology and Thought*, Herndon: The International Institute of Islamic Thought, Second Revised Edition, 1993, p. 87-8; Kamali, *Principles of Islamic Jurisprudence*, p. 503.

<sup>574</sup> AbūSulaymān, *Towards an Islamic Theory of International Relations: New Directions for Methodology and Thought*, p. 87-8.

<sup>575</sup> See p. 115.

<sup>576</sup> Pew Research Center, *The Future of World Religions: Population Growth Projections, 2010-2050*, p. 5.

according to the same Pew Research Center, in the United States, the proportion of Americans leaving Islam is compensated by those who become Muslims.<sup>577</sup>

## Conclusion

In this chapter, I discussed the consequences of apostasy and primarily focused on the arguments against capital punishment for apostasy. The opinions of Muslim jurists who are against capital punishment for apostasy clearly indicate that there has never been a clear consensus among scholars that the apostate should be executed. As we have seen in this chapter, in the early period of Islam some reputable figures objected to the *hadd* penalty for apostasy. Therefore, there has never been a consensus regarding the punishment for apostasy in Islam. As we have seen, some classical and modern Muslim scholars believe that apostasy constitutes a politico-religious rebellion, and the perpetrator deserves capital punishment. This approach is extremely problematic for Muslims living in liberal democracies, where there is freedom of religion. The evidence for capital punishment, however, is based on solitary reports of the Prophet Muhammad and goes against the principles of the Quran, which upholds the principle of freedom of religion in more than two hundred verses; for example, stating that: “*There is no compulsion in religion*” (Quran, chapter 2, verse 256). Although the Qur'an states that apostasy is a very serious offence, punishment does not follow in this life but in the afterlife. Many Muslim scholars neglect the fact that Islam is a well-established religion nowadays and is no longer threatened by apostasy cases. Islam is the fastest-growing religion worldwide. Therefore, in contemporary contexts, apostasy in Islam should be conceived as a private matter, as is the case in liberal democracies. Furthermore, in Muslim countries, the traditional punishment for apostasy is seldom officially applied.

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<sup>577</sup> <https://www.pewresearch.org/fact-tank/2018/01/26/the-share-of-americans-who-leave-islam-is-offset-by-those-who-become-muslim/>

## Chapter 5

# The Boundaries of Freedom of Expression in Islam and Freedom of Expression in Liberal Democracies

This chapter compares judicial approaches to freedom of expression in Islam and liberal democracies. In chapter 2, I considered the boundaries of freedom of expression in liberal democracies. Chapter 3 addressed the boundaries of freedom of expression in Islam. In this chapter, I shall discuss where boundaries of freedom of expression within Islam stand in relation to the limits of freedom of expression in liberal democracies, by first addressing where the boundaries of freedom of expression in Islam and liberal democracies differ from each other in terms of content. I then inquire to what extent the substantive difference is explainable by a difference in the nature of the community (a community of free and equal citizens and a community where Islamic ethical norms still function as an important legal and moral reference. Finally, I explore the ways in which the boundaries of freedom of expression in Islam and liberal democracies are conceptually different or comparable.

### 5.1. The Difference between Boundaries of Freedom of Expression in Islam and Liberal Democracies in Terms of Content

In this section, I shall discuss some inherent characteristics that explain the differences between the limits of freedom of expression in Islam and liberal democracies. As I already explained at the beginning of chapter 3, I asked the critical and perhaps perennial question of whether it is possible at all to compare Islam with liberal democracies. I pointed out two major concerns for this. (1) Islam is a divinely revealed religion with its own divinely inspired socio-political system. (2) Islam is, *inter alia*, based on a religious community with its own value system. This religious community has an overlapping morality due to deeply shared standards and values. I shall come back to this point in the next section. In this section, I primarily focus on the social-political system in liberal democracies and Islam. I begin by laying out justifications for restrictions on free speech in liberal democracies. However, before doing so, I believe there are two major problems in restricting freedom of expression in a liberal democracy. First, freedom of expression is both a fundamental right and a human right in every liberal democracy. This ultimately means that a liberal democracy can only curtail freedom of expression with compelling reasons.<sup>578</sup> Secondly, in a liberal democracy, fundamental rights and human rights should all be of equal value and must be protected in the same way. In other words, there is no prioritization of rights. And here lies a fundamental problem. If fundamental rights and human rights such as freedom of expression, freedom of religion, right to life, and the prohibition of discrimination are really all of equal value, then what to do when there is a collision of these rights? In no single liberal democracy does the

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<sup>578</sup> This of course also true for other typical liberal values as Robert Audi points out: “Here, as in other realms of conduct, liberty is the default position: Roughly, in regulatory activities, it is restrictions of liberty, especially of thought, expression, and free association, that governments must justify. Permitting “natural” and other liberties does not normally need justification.”, Audi, Robert, “Religion and Politics”, p. 227, in David M. Estlund (ed.), *The Oxford Handbook of Political Philosophy*, Oxford Handbooks, New York: Oxford University Press, 2012.

constitution or law prescribe that one fundamental right should prevail over another if they conflict.<sup>579</sup> The only thing that can be done when fundamental rights collide is to present the case to a court of law.

### 5.1.1. Context

In all the court cases presented in chapter 2, freedom of expression conflicts with one or more other fundamental rights. In every case, the court made a calculated decision whether freedom of expression has affected other fundamental rights. In all cases, the court took into account the *context* in which freedom of expression was used. I, therefore, regard freedom of expression as a context-based human right. For John Stuart Mill the context in which freedom of expression operates is essential for setting its boundaries. Chapter 2 revealed that according to Mill, freedom of speech can only be restricted if it incites violence (known as Mill's harm principle). Mill makes it very clear that the very same expression that is admissible in one situation, can be inadmissible in others:

"An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard. Acts of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavourable sentiments, and, when needful, by the active interference of mankind."<sup>580</sup>

In the example above, it becomes clear that one can accuse corn-dealers of starving the poor through the press because there is no imminent danger (situation A). On the other hand, this very same opinion cannot be expressed -oral or written- to an angry mob gathered in front of a corn merchant's house, because it will most likely lead to severe harm to the corn-dealer (situation B). Even though the message in situations A and B is exactly the same, the context in which the message operates is strikingly different. The *context* in situation A varies considerably from situation B.

This context-based approach can also be seen in contemporary literature on freedom of expression. In most legislation and jurisprudence of liberal democracies, freedom of expression and democracy are regularly linked. This link doesn't imply that all political statements have the same protection or that a ban on political statements is seldom permitted. Except for the US, in all liberal democracies, racism is a criminal offense.<sup>581</sup> As such, racist political developments should be prevented. Additionally, utterances that essentially incite violence, especially against minorities, are not protected by the principle of free speech. However, this doesn't mean that a rigorous political discussion about sensitive issues cannot take place. Given the link between freedom of expression and democracy, there must be the

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<sup>579</sup> Belinfante, A.D., Reede, J.L. de, *Beginnelsen van het Nederlandse staatsrecht*, Edited by L. Dragstra, N.S. Efthymiou, A.W. Hins and R. de Lange, Deventer: Kluwer, 2012, p. 262; Zucca, Lorenzo, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA*, Oxford: Oxford University Press, 2007, p. 3-6.

<sup>580</sup> Mill, *On Liberty*, pp. 107-8.

<sup>581</sup> Nieuwenhuis, *Over de grens van de vrijheid van meningsuiting*, p. 279. See also Barent, *Freedom of Speech*, p. 183, who notes that in the US, hate speech laws are deemed incompatible with the First Amendment.

necessary space to discuss difficult issues, such as immigration policy and the integration of ethnic minorities.<sup>582</sup> Chapter 2 demonstrated that politicians in their public speeches have the right to defend their views, which may disturb, shock, or offend a section of the population.<sup>583</sup> The context may negate the offensive character of a statement if it is perceived as a contribution to the social debate and is not accompanied by racism or incitement to violence.<sup>584</sup> This can be seen in the following Dutch court case. On 2 June 2008, the criminal division of the District Court of Amsterdam handed down a judgment in a case concerning insult on the Internet in which the suspect has deliberately insulted groups of people by posting insulting texts on an Internet forum. These groups were insulted because of their homosexual orientation (homosexuals), their race (negroes), their race and creed (immigrant women and Jews).<sup>585</sup> Examples of the statements of the insulting texts are:

“There is certainly money going to a certain ex-slave organization and from now on more. The ex-piss bowl organization "the COC" in Amsterdam will receive no less than one and a half tonnes of the municipality to avoid bankruptcy. Plenty of money for the crawling animals.”<sup>586</sup>

“Yesterday the dance negro in Kunststof [a Dutch television program] says he is so sorry to have to leave the former Bijlmer [a suburb of Amsterdam]. That was his jungle that is now being uprooted. Songs to sing away his inferiority. All those crawling animals are sitting together. Soon they'll be ex-negroes but no less dirty.”<sup>587</sup>

“The court finds the texts and discussions on the given Internet forum unmistakably homophobic, racist, Islamophobic, and anti-Semitic. The legislator has made such forms of discrimination punishable in article 137c of the Dutch Penal Code. This provision aims to protect self-esteem, honour and/or good name of groups of people when such groups are publicly discredited or their self-esteem is impaired on account of their common characteristics. The court finds the words used to refer to these groups unacceptably affecting their dignity and humanity. The words are undeniably offensive and also unnecessarily hurtful.” However, the court also referred to article 10 ECHR, which protects freedom of expression.<sup>588</sup> The court states that “the ECtHR has developed extensive case law on the various aspects of Article 10 ECHR. In it, the ECtHR has stressed time and again that freedom of expression is one of the most essential foundations of the democratic rule of law and also a precondition for its development as a whole and for the development of individuals within that rule of law. The right to freedom of expression, as guaranteed in paragraph 1 of Article 10 of the ECHR, may be subject, under paragraph 2 of that Article, to restrictions provided by law that are necessary in a democratic society in the interests of - inter alia - the protection of the good reputation or the rights of others. Article 10 of the ECHR protects not only information that is pleasant or harmless, but also information or ideas that "offend, shock or disturb". The first paragraph of Article 10 of the ECHR leaves little room for restrictions on the

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<sup>582</sup> Ibid.

<sup>583</sup> Chapter 2, p. 10, cf. *Handyside v. United Kingdom*, 7 December 1976, § 49, series A No. 24; <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2008:BD2977>

<sup>584</sup> Ibid., p. 280.

<sup>585</sup> <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2008:BD2977>

<sup>586</sup> Ibid.

<sup>587</sup> Ibid.

<sup>588</sup> Ibid.

right to freedom of expression concerning political statements or statements that affect the public interest.”<sup>589</sup>

Ultimately, the court acquitted the defendant because the offending texts were placed on a more or less private internet forum. Furthermore, there was no evidence that the defendant was actively pursuing publicity. The defendant didn't publish his offending texts via radio, television, or forms of media that attract publicity. The court was convinced that he had no intention to seek publicity with his offensive statements but that only a small group of like-minded people would read his messages.

Here we see that the court clearly distinguishes between an offense that is easily avoidable and one which is not, and resembles Feinberg's most compelling reason to penalize an offense: the *standard of reasonable avoidability* as we saw in chapter 2.<sup>590</sup> This also explains why in the case of *Féret v. Belgium*, which was discussed extensively in chapter 2, Daniel Féret was convicted and the accused in this case not: Féret actively sought publicity with his offensive statements, which were not easily avoidable.

Although the context of a particular statement or expression is rightly taken into account, this does not always make it easier to predict whether such a statement or expression constitutes a criminal offense. A judge will have to take several issues into account. First, the meaning of a statement is determined by the context. It makes a difference if a politician goes on a rampage only against Muslims with strong anti-democratic ideas or when the same politician states that there is no room in his country for a lot of Muslims because all Muslims are antidemocratic due to their belief. Second, statements made on the spot can also determine the meaning of a certain statement and the outcome of a case. Thus, distributing leaflets during a neo-Nazi rally give a connotation of the statements on those leaflets. Finally, controversial statements are often judged in the context of a public debate. As a result, a banner with a few words on it may be seen as contributing to the same social context as a comprehensive exposition during a political meeting.<sup>591</sup> It seems that offensive speech is allowed if it is perceived as a contribution to the social debate, unless it is racist or incites violence. The former demonstrates that freedom of expression is not merely a right free from external interference but also a positive freedom. Free speech is valued as a contribution to a democratic rule of law.

### 5.1.2 Ethical theories for setting boundaries on freedom of expression

Ethical theories are another method by which to evaluate the boundaries of freedom of expression. In this thesis I will use the following ethical theories: consequentialism, deontology, and virtue ethics.<sup>592</sup> All three theories are about what is the rightness of an

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<sup>589</sup> Ibid.

<sup>590</sup> Chapter 2, p. 39.

<sup>591</sup> Nieuwenhuis, *Over de grens van de vrijheid van meningsuiting*, p. 286.

<sup>592</sup> I'm aware there are more ethical theories, but the theories I have chosen are, to my mind, most suitable for evaluating the boundaries of freedom of expression. These ethical theories can also be relevant to discussions on whether freedom of expression is a human right. See for example, Alexander, *Is There a Right of Freedom of Expression?*, p. 129-46. My goal here is different than that of Alexander. My goal here is to underline the reasons these theories have in justifying freedom of expression. Alexander's goal in discussing these theories is very different. He wants to demonstrate that none of these theories is able to convince that freedom of expression is a human right. While this is an interesting discussion, it is beyond the scope of this book. For the sake of



action, but both consequentialism and deontology are primarily concerned with the action itself. On the other hand, virtue ethics is all about the person who performs an action.<sup>593</sup> Consequentialism, with utilitarianism as its pre-eminent theory, holds that the rightness of an action is determined solely by the extent to which it produces positive consequences.<sup>594</sup> Deontology, sometimes viewed as the counterpart of consequentialism, is not concerned with a certain goal and as such cannot be valued for its consequences.<sup>595</sup> It posits that the rightness of an action lies in the moral motivation for the action, regardless of its consequence. This includes whether the act complies with the requirements of the duty, whether it respects the rights of the persons concerned, and whether something in the nature of the act, whatever its consequences, makes it intrinsically wrong.<sup>596</sup> Most contemporary liberal theories prioritize rights over good and are therefore deontological.<sup>597</sup> Virtue ethics focus on being a person of virtue and as such is primarily concerned with the practices, behaviors, or habits that promote good character among persons. Obviously, a virtuous person will express good character through action. However, unlike consequentialism and deontology, the rules of action and good conduct are secondary. There is another important difference. While consequentialism and deontology focus on the rightness of an action in a given situation, virtue ethics treat ethics as a matter of a lifetime. It thus appeals to the practical wisdom of someone. A person of virtue will approach a morally difficult situation with his or her personal qualities as courage, wisdom, kindness, and integrity.<sup>598</sup>

#### 5.1.2.1 *Consequentialism and the boundaries of freedom of expression*

Although free speech is often seen as a cause for social upheaval and tarnishing human dignity, liberty of speech can help achieve human dignity and social stability.<sup>599</sup> These consequentialist justifications of freedom of expression fall under its very consequentialist theory. As such, from a utilitarian viewpoint, freedom of expression is conceived as an instrument for the attainment of one of the aforementioned goals that are deemed indispensable for the success of liberal democracy.<sup>600</sup> But what if free expression collides with the aforementioned goals? What if free speech seriously endangers the democratic constitutional state? Can consequentialism offer a solution to justify the curtailment of freedom of expression?

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convenience, I presuppose that freedom of expression is a human right and leave aside why these theories fail to justify freedom of expression as a human right.

<sup>593</sup> Audi, Robert, *Moral Value and Human Diversity*, Oxford: Oxford University Press, 2007, p. 22-3.

<sup>594</sup> Ward, David W., "Philosophical Issues in Censorship and Intellectual Freedom", *Library Trends*, Vol. 39, Nos. 1 & 2, Summer/Fall 1990, pp. 83-91, p. 84.

<sup>595</sup> Alexander, *Is There a Right of Freedom of Expression?*, p. 134.

<sup>596</sup> Ward, *Philosophical Issues in Censorship and Intellectual Freedom*, p. 84.

<sup>597</sup> Kymlicka, Will, *Liberalism, Community, and Culture*, Oxford: Clarendon Press, 1989, p. 21.

<sup>598</sup> Russell, Daniel C. (Editor), *The Cambridge Companion to Virtue Ethics*, Cambridge Companions to Philosophy, Cambridge: Cambridge University Press, 2013, p. 2.

<sup>599</sup> In chapter 2 we saw that discovery of truth, self-fulfillment, human progress, citizen participation in a democracy, and the much-needed control of the government are justifications for free speech because the society as whole will benefit.

<sup>600</sup> Alexander, *Is There a Right of Freedom of Expression?*, p. 129-33.

To answer this question, let us go back to John Stuart Mill. As I have pointed out in chapter 2, for Mill - who was an Utilitarian and therefore concerned with the greater good of society as a whole - discovery of the truth is the ultimate goal of free speech. The positive opportunity to discover useful knowledge and insights depends on the maximum - negative - freedom of seeking the truth. In Mill's optimistic idea, maximum individual freedom and maximum freedom of speech will lead to the best insights. Due to this individual freedom, society as a whole will benefit the most.<sup>601</sup> Restricting freedom of speech does not contribute to the discovery of the truth and society as a whole will not benefit from the acquired insights. Mill offers four arguments in defense of freedom of expression and against censorship. His first argument is that "the opinion which it is attempted to suppress by authority may be true. Those who desire to suppress it, of course, deny its truth; but they are not infallible. They have no authority to decide the question for all mankind and exclude every other person from the means of judging. To refuse a hearing to an opinion, because they are sure that it is false, is to assume that their certainty is the same thing as absolute certainty. All silencing of discussion is an assumption of infallibility. Its condemnation may be allowed to rest on this common argument, not the worse for being common."<sup>602</sup>

Secondly, Mill states that "though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied."<sup>603</sup>

Thirdly, Mill argues that merely taking the truth for granted is not enough, because "however true it may be, if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth."

The fourth and final argument that Mill offers is that a doctrine that is taken for granted needs to be discussed, otherwise "the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience."<sup>604</sup> Thus, if we look at Mill's fourth argument, we see that not only society at large is at stake (human progress), but also the self-fulfillment of individuals.

The arguments that Mill offers in his defense of freedom of expression are overly simplistic and limited, they overlook one paramount issue: what to do when there is a conflict between freedom of expression and other human rights? Also, as Raphael Cohen-Almagor rightfully points out, the political culture at the time of Mill was significantly different from present-day England. Cohen-Almagor notes that there was no equal treatment for the law in 19<sup>th</sup>-Century England; there was one law for the rich, another for the poor. More than 25% of the population was living at or below the poverty line and could not afford to purchase a daily newspaper. The level of illiteracy was alarmingly high: 47% in 1820. Censorship was pervasive, especially on matters of religion. On top of this, "poor men had no right to use their own words to express their own opinions" in a court of law. It is against this background that Mill wrote *On Liberty*. Mill was primarily against governmental suppression of opinions and

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<sup>601</sup> See chapter 2, p. 31.

<sup>602</sup> Mill, *On Liberty*, p. 36.

<sup>603</sup> *Ibid.*, p. 101-102.

<sup>604</sup> *Ibid.*, p. 102.

therefore preached for the widest possible free speech.<sup>605</sup> This doesn't mean that I condemn Mill, his liberal ideas on freedom of speech were ideally suited to the time in which he lived. However, in our time and from the perspective of consequentialism, we need more overriding moral concerns regarding the curtailment of freedom of expression. Previously, we saw that if an act of free speech brings about negative consequences, such as intolerance, discrimination, affronting human dignity, sowing the seeds of discord between ethnic groups, and other effects that are incongruous with constitutional values, then freedom of expression can be restricted.<sup>606</sup> That is, if freedom of expression is opposing other human rights and its consequences are detrimental to the greater good, it is justified to curtail it.

#### 5.1.2.2 Deontology and the boundaries of freedom of expression

In this section, I shall discuss whether deontology theories help set boundaries on freedom of expression. As I already pointed out, deontology theories are not concerned with the consequences of an act, but primarily focuses on the intention behind it. From a liberal standpoint, as Michael Sandel writes, it is first and foremost a theory about justice, focusing on the primacy of justice among political and moral ideals. Its core thesis can be formulated as follows: society, which consists of a multitude of persons, each with his/her own goals, interests, and views on the good, is best regulated "when it is governed by principles that do not themselves presuppose any particular conception of the good; what justifies these regulative principles above all is not that they maximize the social welfare or otherwise promote the good, but rather that they conform to the concept of right, a moral category given prior to the good and independent of it."<sup>607</sup> If we apply this to human rights, then these rights are correct in themselves and take precedence over consequences (or utility). From a deontological viewpoint, freedom of expression is a right and cannot be restricted when bringing about negative consequences. In other words, in cases of conflict, freedom of speech is more important than the maximization of the greater good.<sup>608</sup> That is, freedom of expression, from a purely deontological perspective, "is the right not to have one's speech coercively interfered with; it is not the right to be provided with the resources necessary to produce and distribute speech."<sup>609</sup> Freedom of expression is a "negative" right that protects legitimate human autonomy. When freedom of expression results in insulting a religion, for example, the publication of *The Satanic Verses* (1988), or -in the case of pornography-, may lead to sexual violence against women, then the deontological response is that despite the negative consequences, both *The Satanic Verses* and pornography cannot be banned for two reasons. First, people simply do not have the right not to be insulted or not to be degraded. Only in the case of libel and literal slander in which an individual is specifically targeted can freedom of speech be restricted. Secondly, elevating the undesirability of the insulting nature of a book or the malignant and degrading character of pornography to the status of a right not to be insulted or degraded endangers the power of the rights that aim to protect human

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<sup>605</sup> Cohen-Almagor, Raphale, "J.S. Mill's Boundaries of Freedom of Expression: A Critique", p. 568-71, in *Philosophy* 92, no.4, 2017, pp. 565-96.

<sup>606</sup> See chapter 2, p. 8-13.

<sup>607</sup> Sandel, Michael J., *Liberalism and the Limits of Justice*, Cambridge: Cambridge University Press, Second edition, 1998, p. 1.

<sup>608</sup> Ward, *Philosophical Issues in Censorship and Intellectual Freedom*, p. 85.

<sup>609</sup> *Ibid*, p. 89.

autonomy. All “positive” rights such as “right for education” or “right to a job” are from a deontological viewpoint less plausible than “negative” rights, such as the right to freedom of expression.<sup>610</sup> Again, freedom of expression “is the right of not to have one’s speech interfere with.”<sup>611</sup> Stipulating that other members of society cannot impede a person’s free expression by no means infringes or even threatens to infringe on their rights. However, demanding members of society to take positive action to provide education, health, or a job, etc., may be contrary to their rights. From a deontological perspective, the writer of *The Satanic Verses* and the pornographer are in an extremely strong position. All they want is for their right of expression and consumption of expression to be respected.<sup>612</sup> In a similar vein, a radical deontologist will hold the opinion that the right to free speech cannot be compromised if it clashes with another fundamental right. In short, deontology is not useful in setting the boundaries of freedom of expression.

### 5.1.2.3 *Virtue Ethics and the boundaries of freedom of expression*

Free speech is a moral act and if conducted properly, is thought to be “conducive to the cultivation of certain virtues that are essential to the success of liberal democracy.”<sup>613</sup> That is, liberal democracies are pluralistic and can only exist with a high incidence of tolerance and a thick skin. Freedom of expression is pre-eminently considered to lead to a tolerant attitude towards other people's opinions and becoming resilient to insulting, critical, and offensive utterances.<sup>614</sup> All this fits in well with the current era, as Bas van Stokkom puts it aptly. There should be no taboo, and everything must be said. Censorship is something 'unclean' and freedom of expression must be defined in an absolute sense: unlimited. When, for example, racist ideas are disseminated, these ideas should not be banned, but instead, challenged with arguments against racism. Thus, the remedy is *more* speech. And when it comes to speech, the tone should not be more moderate but rather harsh. That is the opinion of a group calling itself ‘friends of Van Gogh’ that emerged in the aftermath of the murder of Theo van Gogh (2004). They wanted to push the discussion right to the edge and claim a right to offend. Ayaan Hirshi Ali, who belongs to “friends of Van Gogh”, states that if interlocutors are hurt and offended, if their honour has been tainted, only then there is free expression that really matters. This means it is not so much about using good arguments, but words that will offend the other. In defense of the “right to offend”, the “friends of Van Gogh” invoke the Handyside judgment of the European Court of Human Rights,<sup>615</sup> which we discussed earlier.<sup>616</sup> However, the Handyside judgment only states that the scope of freedom of expression also includes offensive ideas. The process of finding the truth relies on critical statements that will shock

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<sup>610</sup> Ibid, p. 88.

<sup>611</sup> Ibid.

<sup>612</sup> Ibid., p.89-90.

<sup>613</sup> Alexander, *Is There a Right of Freedom of Expression?*, p. 133.

<sup>614</sup> Ibid.

<sup>615</sup> Van Stokkom, *Mondigheid tegen elke prijs*, p. 8-11.

<sup>616</sup> Chapter 2, p. 10. The core of this judgement reads as follow: “Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".”

and hurt many. This is to be appreciated because robust speech deserves protection. However, there is absolutely no question of a “right to offend”. It makes no sense to elevate an unnecessary, gratuitous insult that adds nothing to the discussion to a right.<sup>617</sup> This is underpinned by the Dutch literary Ineke Sluiter who states the following: “The offend may not be an end in itself, nor may there be a right to it. To a “right” we elevate something that can be considered “good” in itself’.”<sup>618</sup> The ‘right to insult’ is, therefore, an invitation to indecency and absolves one to deal responsibly with freedom. Decency is also: adapting your statements to the ability of opponents to offer a rebuttal.<sup>619</sup>

In the light of virtue ethics, a good, virtuous person has the wisdom to employ freedom of expression properly. Thus, a virtuous person will not inveigh someone because free speech entitles him to do so. In a debate, a virtuous person expressing good character through action, will make sound arguments to persuade people and avoid disparaging comments. As professor Steven Mintz puts it, character and free speech go hand in hand. He defines character as “the sum of qualities that define a person. These qualities include one’s intellect, thoughts, ideas, motives, intentions, temperament, judgment, behavior, imagination, perception, emotions, loves, and hates.”<sup>620</sup> Character is built on “seven sore ethical values”: truthfulness, trustworthiness, responsibility, fair-mindedness, respect, caring and civility.<sup>621</sup> Based on this character, it is not befitting of a virtuous person to employ free speech as the right to offend. Furthermore, the publication of *The Satanic Verses*, the film *Submission* by Theo van Gogh, the Danish cartoons, and the Charlie Hebdo cartoon provide ample evidence that such offensive speech hasn’t made people more tolerant or thick-skinned. On the contrary, it has led only to more socio-political polarization.

### 5.1.3. Freedom of expression in relation to a thick and thin society

Chapter 3 revealed that there are two kinds of moralities in political philosophy: a thin morality and a thick morality. We learned that Muslim majority countries can be construed as *thick* societies, and liberal democracies can be conceived as *thin* societies. Since *thick* communities have deeply shared values, which have been conditioned by culture, history, and tradition, generally speaking, anomalies and controversies have a more significant impact on its societies as compared to *thin* societies and communities. This also obviously applies to freedom of expression. For example, the Danish Cartoon crisis (2006) not only had a significant impact on numerous Muslim majority countries but also shook the Muslim communities living in the West.<sup>622</sup>

Before I discuss the boundaries of freedom of expression in relation to thick and thin societies, I feel it is necessary to make some general observations regarding thin and thick societies. In doing so, I paraphrase Seth D. Kaplan. All large societies have the responsibility to let unrelated persons coexist peacefully. There are, broadly speaking, two approaches to

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<sup>617</sup> Van Stokkom, *Mondigheid tegen elke prijs*, p. 11-12.

<sup>618</sup> *de Volkskrant* 24 February 2007, cited in Van Stokkom, *Mondigheid tegen elke prijs*, p. 12.

<sup>619</sup> Van Stokkom, *Mondigheid tegen elke prijs*, p. 12.

<sup>620</sup> Mintz, Steven, *Character and Free Speech Go Hand in Hand*, April 3, 2017, available at <https://www.ethicssage.com/2017/04/character-and-free-speech-go-hand-in-hand.html>

<sup>621</sup> *Ibid.*

<sup>622</sup> For how the Danish cartoon crisis has completely escalated, the interested reader may consult the chronology as composed by Jytte Klausen. See Klausen, Jytte, *The Cartoons That Shook the World*, New Haven & London: Yale University Press, 2009, p. 185-199.

undertaking this challenge. The first approach centers on the individual and focuses on maximizing personal freedoms and emphasizes the independence of each member of such a society as long as they do nothing to harm someone else. The second approach centers on the well-being of society as a whole and focuses on maximizing the sturdiness of relationships and institutions. It thereby emphasizes the independence of each member of such a society within the networks and groups they belong to. These approaches presuppose and foster various definitions of the good life. Individualistic societies attach great importance to freedom of choice and fairness and emphasize moral concepts such as liberty, rights, and justice. Sociocentric societies place great value on order, tradition, and hierarchy; they emphasize moral concepts such as duty, reputation, respect, sanctity, patriotism, and purity. Individualistic societies can be characterized as “thin societies”, while socio-centric societies can be featured as “thick societies,” depending on how large a role they assign to social institutions regulating behaviour. Thin societies provide a small role; whereas thick societies provide a significant role.<sup>623</sup>

When it comes to human rights in general (this also applies to freedom of expression as our human right of interest) and enhancing human welfare, we notice that both these social orders have different conceptions. Thin societies favor a human rights framework that provides broad protection for individual choices and gives the state a major role in enforcing rules. Cultural differences, social institutions, and traditions can be overridden if they conflict with human rights objectives. On the other hand, thick societies favor a human rights framework that contains some core rules assuring “certain minimum standards are met, while at the same time providing flexibility for local adaptation.” The state is still important but plays a more limited role in the enforcement of the rules. Traditions and social institutions, regarded as crucial to identity and a sense of dignity, are given a relatively large role. Human rights are seen as just one of many ways of living a better life and improving the functioning of society.<sup>624</sup>

Simply speaking, I consider Muslim majority countries as thick societies and liberal democracies as thin societies. I have to add here that the dividing line between both social orders is not a strict one, and “thin” and “thick” are more ideals than absolutes. For example, cultures are fluid and change over time. Both social orders contain elements from each other, thus, thin societies contain thick elements and vice versa. Thin and thick elements within a single community or society can be in competition or tension with each other. Due to the context, issue, and time, some of these thin or thick elements become more or less important. However, generally speaking, the overall character of a thin or a thick community or society remains unchanged despite a shift in the balance of the two. For example, the election of Donald Trump as president of the United States can be understood not only as rising populism but also as a shift towards conservative nationalism, which is a thick element. But on the whole, the United States is much more thin than thick, given the fact that it is a highly individualistic society.<sup>625</sup>

In my opinion, the ideas of John Stuart Mill represent a highly thin society given his view of the role of the individual. In chapter 2, we saw that, according to Mill maximum individual freedom and maximum freedom of speech will lead to the best insights. Due to this individual

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<sup>623</sup> Kaplan, Seth D., *Human Rights in Thick and Thin Societies: Universality without Uniformity*, Cambridge: Cambridge University Press, 2018, p. 69-70.

<sup>624</sup> Ibid, p. 70.

<sup>625</sup> Ibid, p. 74.

freedom, society as a whole will benefit the most.<sup>626</sup> Therefore, Mill seeks a minimal role for the government when it comes to the application of restrictions on the freedoms of any member of society as Mill writes in *On Liberty*: “the only purpose for which power can be rightly exercised over any member of a civilized community, against his will, is to prevent harm to others.”<sup>627</sup> Here we touch again very briefly on Mill’s harm principle, which we already discussed extensively regarding the boundaries of free speech. Mill makes it very clear that society can only interfere with an individual when he or she is causing harm to others. It’s up to the individual how he lives his life: “the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong.”<sup>628</sup> In other words, in thin societies, there is “ethical independence” as Ronald Dworkin calls it.<sup>629</sup> Ethical independence “...means that government must never restrict freedom just because it assumes that one way for people to live their lives—one idea about what lives are most worth living just in themselves—is intrinsically better than another, not because its consequences are better but because people who live that way are better people. In a state that prizes freedom, it must be left to individual citizens, one by one, to decide such questions for themselves, not up to government to impose one view on everyone. So, government may not forbid drug use just because it deems drug use shameful, for example, it may not forbid logging just because it thinks that people who do not value great forests are despicable; it may not levy highly progressive taxes just because it thinks that materialism is evil.”<sup>630</sup>

Ethical independence has the same basic meaning and importance of freedom as Mill’s. Like Mill, Dworkin argues that governments must have compelling reasons for interfering with individual citizens’ ways of life, such as protecting other people from harm or improving the general welfare. Regarding the latter, the government may levy taxes to aid the poor and finance roads. It may forbid drugs, not because drugs are deemed immoral, but to protect society from the social costs of addiction. It may protect forests because forests produce oxygen.<sup>631</sup> Then what are valid reasons to restrict freedom of expression in thin societies? Besides ethical independence, Dworkin discerns another political freedom: special rights. Contrary to ethical independence, special rights impose much stronger and more general restrictions on the government. This means that the government has to come up with very compelling justifications if it wants to restrict special rights. In the US, which is, as we have just seen a thin society, freedom of expression is a special right. Freedom of expression can only be abridged when there is a clear and present danger. Thus, freedom of speech cannot be restricted if it leads to bad consequences. For example, speakers cannot be censored even if it is likely that what they say will lead to negative consequences for others: because it would be expensive to protect them from an angry mob or because they campaign for deforestation.<sup>632</sup> Even though what Dworkin writes regarding special rights has likely more to do with the US, it represents the boundaries of freedom of expression in a thin society. We

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<sup>626</sup> Chapter 2, p. 30.

<sup>627</sup> Mill, *On Liberty*, p. 23.

<sup>628</sup> *Ibid.*, p. 28.

<sup>629</sup> Dworkin, Ronald, *Religion without God*, Cambridge, Massachusetts, and London: Harvard University Press, 2013, p. 130.

<sup>630</sup> *Ibid.*

<sup>631</sup> *Ibid.*, p. 130-1.

<sup>632</sup> *Ibid.*, p. 131-2.

see here that in a thin society, freedom of expression cannot be restricted because it might have negative consequences for society as a whole. In principle, freedom of expression is an individual right and the one who uses this freedom doesn't have to take into account other people's feelings and morals, to what is deemed sacred. A thin society centers on the individual and focuses on maximizing personal freedoms such as freedom of expression and emphasizes the independence of each member of such a society as long as they do nothing to harm anyone else.<sup>633</sup>

Unsurprisingly, in a thick society, freedom of expression is more curtailed as compared to a thin society. In thick societies, moral systems are developed by traditions and consequently, the focus is more "on relationships rather than rules, duties rather than rights, and virtues rather than freedoms."<sup>634</sup> In some thick societies, such as Muslim majority countries, religious teachings play an eminent role and emphasize moral concepts such as virtuousness, purity, and self-sacrifice. Such moral concepts have no or limited place in a thin society which is founded on an individualistic rights-based moral code.<sup>635</sup> Thick societies are, as Kaplan points out, interdependent societies and highly value social institutions because these are viewed as the key to human flourishing. And they have less difficulty restricting individual freedom, including freedom of speech if this contributes to maintaining social harmony. There are different definitions of social institutions, but the following is useful for our discussion regarding the boundaries of free speech in thick societies: "the ordering by society of the interactions of person in social relationships."<sup>636</sup> Kaplan goes on to state that "social institutions ensure that 'the conduct of persons in their interactions with others is controlled by norms, rules, or patterns.' As a result, they ensure that 'a person knows that he is expected to behave according to these norms and that other persons should do the same.'"<sup>637</sup>

This entails two types of restrictions to freedom of expression in a thick society:

forbidden ways of expression and restrictions based on substantive grounds. In Islam, and this can be seen in some Muslim majority countries, there are restrictions on certain ways of expressing an opinion regardless of the content of those opinions. Expressing obscenities and perversions under the pretext of freedom of speech is prohibited. Thus, publicizing pornographic photographs and literature, and obscene, vulgar speech, obscene poetry or art, are all forbidden because they undermine the framework of the Islamic public order. The same applies to acts that will lead to a dwindling of morals, such as using coarse language, wearing modes of dress that don't cover properly, or showing affection in public.<sup>638</sup>

On substantive grounds, freedom of speech can be restricted if it goes against well-established Islamic principles and morals. The reason for this is obvious: it jeopardizes the established religious-ethical norms considered to be the bedrock of social cohesion and public

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<sup>633</sup> Harm is primarily interpreted here as damage. In Islam there is a legal maxim based on a prophetic narration that states: *lā ḍarar wa-lā ḍirār*, which means: "No injury/harm shall be inflicted or reciprocated," Zakariyah, Luqman, *Legal Maxims in Islamic Criminal Law: Theory and Applications*, Leiden-Boston: Brill, 2015, p. 158. Here Zakariyah points out that "preventing harm is a fundamental principle (*aṣl*) generally agreed upon and widely applied in Islamic jurisprudence, as it has its roots firmly in Qur'ānic injunctions and in the traditions of the Prophet." Ibid., p. 159.

<sup>634</sup> Kaplan, *Human Rights in Thick and Thin Societies: Universality without Uniformity*, p. 73.

<sup>635</sup> Ibid. p. 74.

<sup>636</sup> Ibid, p. 75. Here Kaplan cites the English social anthropologist A. R. Radcliffe-Brown.

<sup>637</sup> Ibid. p. 75.

<sup>638</sup> Basyūnī, *The Freedom of Opinion in Islam*, p. 60-1.



order. In other words, maintaining public order outweighs the freedom of speech of the individual.

#### 5.1.4. *The boundaries of freedom of expression in relation to dignity and toleration*

Both Islam and liberal democracies set boundaries on freedom of expression in relation to human dignity and toleration. In chapter 3, we saw that in Islam, human dignity (*karāmah*) is a natural right of every human being and not exclusively for Muslims.<sup>639</sup> Earlier we saw that without freedom of expression there is no dignity,<sup>640</sup> and this applies to every society, irrespective of whether it is liberal or religious, thin or thick. At the same time, freedom of expression can seriously affect human dignity. However, in liberal democracies, the relationship between freedom of expression and human dignity can be problematic. I shall later discuss where it is appropriate to set boundaries on free speech. Earlier we saw that in liberal democracies, the discovery of truth, self-fulfillment, human progress, citizen participation in a democracy, and the much-needed control of government are justifications of freedom of expression.<sup>641</sup>

Self-fulfillment is often mentioned side by side with dignity in theories that focus on the meaning of fundamental rights for the individual. The starting point of modern natural law doctrine is that certain fundamental rights naturally exist. These fundamental rights stem from human dignity, and every individual is entitled to them. As such, human dignity and equal rights go together.<sup>642</sup> In order to maintain human dignity, I believe, tolerance plays an essential role. This is probably even more true for liberal democracies than Muslim majority countries because liberal democracies are individualistic and multicultural.<sup>643</sup> Following Egbert Dommering, when I talk about tolerance, I don't mean indifference. Nor do I mean allowing deviant behavior as long as it doesn't bother others and doesn't affect the power of the silent majority. What I mean about tolerance is, as Dommering puts it: "When we talk about tolerance in the sense of conflicting religious and political beliefs, often reducible to a specific civilization, we are talking about two interlinked issues: recognition of the autonomy of an individual with his own identity and historical-cultural background on the one hand, and the role of the state concerning conflicting identities on the other."<sup>644</sup> In liberal democracies, citizens view themselves as autonomous and often have different ideas about well-being. Or as Larry Alexander puts it: "Tolerance and a thick skin are in turn vital to life in a modern pluralist democracy, with its competing visions of the Good, its differing standards of civility, and its competitive economy and politics. Without a high incidence of tolerant attitudes and thick skins among their citizens, pluralist societies would be riven with civil strife and could

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<sup>639</sup> Chapter 3, p. 49-50.

<sup>640</sup> Chapter 2, p. 27.

<sup>641</sup> Chapter 2, p. 30.

<sup>642</sup> Nieuwenhuis, *Over de grens van de vrijheid van meningsuiting*, p. 23. See also Mondal, *Islam and Controversy: The Politics of Free speech After Rushdie*, p. 45: "For John Locke, this means rights are 'natural' because they are 'rooted – like bodily organs – in the individual person'".

<sup>643</sup> There is of course also the position of a Muslim community in a secular, liberal democratic state, and vice-versa non-Muslims living in Muslim majority states, who both don't essentially share these Islamic/liberal ethical ideal norms with the broader social context. An example of this is the British Muslim community during the Rushdie Affaire, which I will discuss later on in this chapter.

<sup>644</sup> Dommering, Egbert, *Tolerantie, de Vrijheid van Meningsuiting en de Islam*, p. 7, 2003, available at <https://www.ivir.nl/publicaties/download/tolerantie.pdf> [accessed 16 June 2020].

not maintain their liberal democratic character.”<sup>645</sup> Like human dignity, the relationship between freedom of expression and tolerance is problematic and complicated in liberal democracies. Historically, John Locke, who is considered one of the founding fathers of modern liberalism, advanced the concept of tolerance in his *A Letter Concerning Toleration* (1689). It appears that many modern liberals consider this conceptualization of toleration as a starting point of how freedom of expression is related to it. Those who consider freedom of speech to be absolute, base their approach on non-consequentialist arguments that are grounded on tolerance. But is this the same concept that Locke envisioned? Locke wrote his *A Letter Concerning Toleration* in Rotterdam, Holland, where he lived as a political refugee.<sup>646</sup> He argued that different Protestant convictions had to be tolerated by the state and that it is not the state’s business to enforce religious convictions.<sup>647</sup> In that respect, he pleaded for a separation between church and state. But this separation between church and state is ‘impure’ because a state is a Calvinistic state for Locke.<sup>648</sup> Locke did exclude atheists and Catholics from toleration.<sup>649</sup> According to David Lorenzo, Locke excluded atheists and Catholics from toleration for one main reason: “the refusal to link the consequences of one’s actions to an objective posthumous judgment, a refusal generated by the atheist’s unbelief and by the Catholic’s belief in the pope’s power to suspend or enforce God’s judgment at will.”<sup>650</sup> It seems that Locke considered that there was a degree of consensus among different Protestants factions. Thus, according to Locke, toleration is only possible where there is consensus.<sup>651</sup> This brings us to the first problem: Locke’s conceptualization of tolerance is within a Calvinistic context and not within today’s secular context, which is also multicultural and multireligious. In a secular society, its citizens not only have very different conceptions of what is ‘good’, but there is no consensus regarding the “fundamental nature of what constitutes the common ‘good’ in the first place.”<sup>652</sup>

The second problem is that it seems that Locke’s vision of tolerance is ‘your own business’, not sticking your nose in other people’s business. This is contrary to free speech absolutists who value freedom of expression as the right to criticize others, or -in the case of Hirsi Ali- the right to insult others, and this clearly constitutes interfering in other people’s affairs. Even more so, in the light of freedom of expression, criticizing or even insulting others is not tolerance, but a form of intolerance. Therefore, tolerance and freedom of speech are at odds

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<sup>645</sup> Alexander, *Is There a Right of Freedom of Expression?*, p. 132.

<sup>646</sup> Dommering, *Het verschil van mening*, p. 79.

<sup>647</sup> Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech*, p. 124.

<sup>648</sup> Dommering, *Het verschil van mening*, p. 80-1.

<sup>649</sup> Lorenzo, David J., *Tradition and Prudence in Locke’s Exceptions to Toleration*, p. 248, *American Journal of Political Science*, Vol. 47, No. 2 (Apr. 2003), pp. 248-258,

<sup>650</sup> *Ibid.*, p. 249. Here, on the same page, Lorenzo states that Locke “treated Catholics at greater length, identifying them with several positions disqualifying them from toleration: their loyalty to the pope, their failure to embrace toleration, and their civic unreliable.” See also Taylor, *Sources of the Self: The Making of the Modern Identity*, p. 241: “Seen from this perspective, the legislative, self-proclaiming God is a great benefactor to mankind. I believe that this is how Locke saw him, and that this was the basis of a genuine and deeply felt piety...God alone gives sense and hope to a human condition which is otherwise the source of irremediable despair and potentially endless self-destruction. God has to exist for humans to give some order to their life. That is why Locke was induced to except atheists from his otherwise wide rule of toleration. Such people had spurned the very basis of human civil life.”

<sup>651</sup> Mondal, *Islam and Controversy: The Politics of Free speech After Rushdie*, p. 47.

<sup>652</sup> *Ibid.*, p. 47.

with each other, and it is difficult to maintain that the latter must be grounded in the former.<sup>653</sup>

The third problem is separate from Locke's ideas, but fits well with the second problem. At what point does tolerance turn into intolerance and even into coercion? In my opinion, little is needed for that. Especially when freedom of speech is conceived as the right of the speaker and insufficient consideration is given to the recipient. When a society demands of its citizens to accept every form of freedom of speech, including insulting speech, offensive speech, or hate speech, then the recipient is a mere spectator and is coerced into tolerance. After all, the recipient is *forced to tolerate* such forms of freedom of speech (with or without a thick skin).

As I already pointed out in chapter 2, certain forms of speech and in particular hate speech, target the social sense of assurance of certain citizens, their bigotry aimed at excluding certain people.<sup>654</sup> This social sense of assurance is closely related to dignity as can be seen in the following conception of dignity by Waldron: "The guarantee of dignity is what enables a person to walk down the street without fear of insult or humiliation, to find the shops and exchanges open to him, and to proceed with an implicit assurance of being able to interact with others without being treated as a pariah."<sup>655</sup> When certain types of free speech lead to insult, humiliation, or, even worse, to violence, then dignity should be protected and not freedom of speech. The same can be said from an Islamic perspective. The contemporary Muslim scholar Abdullah Saeed notes the Qur'an's insistence on recognizing the human dignity of a person: "We created human beings in the finest state." (Q. 95:4)<sup>656</sup>

"We have honoured the children of Adam" (Q 17:70)<sup>657</sup>

"I breathed from My Spirit into him." (Q. 38:72)<sup>658</sup>

Thus, Allah has granted a unique dignity to humankind, which can be seen *inter alia* by breathing His Spirit in Adam. Since, according to the Muslim faith, all mankind is "descended from Adam, every human being possesses this Allah-given dignity."<sup>659</sup> In other words, from an Islamic perspective, human dignity is a natural right and absolute. As such, all acts, including freedom of speech, that undermine human dignity, can be restricted.

## 5.2. The Difference of Boundaries of Freedom of Expression in Islam and Liberal Democracies Due to the Nature of the Community

In the previous section of this chapter, we made some general observations regarding thin and thick societies: we consider liberal democracies as thin societies and Muslim majority countries as thick societies. In this section, I examine whether freedom of expression is more protected in a community that is based on liberal principles than within a Muslim community.

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<sup>653</sup> Ibid.

<sup>654</sup> Chapter 2, p. 34-5.

<sup>655</sup> Waldron, *The Harm in Hate Speech*, p. 220.

<sup>656</sup> Saeed, Abdullah, *Human Rights and Islam: An Introduction to Key Debates between Islamic Law and International Human Rights Law*, Cheltenham, UK: Edward Elgar Publishing Limited (Elgar studies in human rights), 2018, p. 10.

<sup>657</sup> Ibid.

<sup>658</sup> Ibid.

<sup>659</sup> Ibid.

I shall point out that this substantive difference is explainable because of the difference in the nature of both communities. On the one hand, we have a liberal community comprising of free and equal citizens. And on the other hand, we have a Muslim community consisting of believers with overlapping Islamic religious practices. As Abdulaziz Sachedina points out, there is an ongoing debate about the common good which originates from ideas about the highest purposes of humans. Broadly speaking, this common good can only be achieved through communal cooperation “or through widely different and even irreconcilable individual interests.”<sup>660</sup> The debate also stems from the intersection between communitarian and individual rights and obligations, where too much emphasis on one over the other can lead to violations of the collective good or of individual human rights.<sup>661</sup>

Simply speaking, liberal democracy is an individualistic society in which its citizens are all considered equal and independent. An Islamic society is a social-oriented society and deems its citizen to be interdependent and emphasizes social harmony.

According to Ahmad Hasan,<sup>662</sup> the opposite of social harmony in Islamic terms is *fitna* or sedition. Historically, it seems that *fitna* refers to the civil wars that occurred after the death of the Prophet. The first civil war started with the political upheaval during the reign of Caliph ‘Uthmān (d. 656), which was known for the rise of heretical sects. This culminated during the time of Caliph ‘Alī (d. 661). Both caliphs were murdered. In the context of the integration of community, the concept of *jamā‘a* appeared for the first time in the year 661 CE when Mu‘āwiyah (d. 680) became caliph. This year is known as *‘ām al-jamā‘a* referring to communal unity. In that very year, the conflict between al-Ḥasan bin ‘Alī (d. 670) and Mu‘āwiyah over whom should be the caliph was ended. The term *‘ām al-jamā‘a* indicates that the *jamā‘ah* or community was detested during the internal wars and required both internal and external solidarity. Soon after the demise of the Prophet, emphasis was placed on the solidarity of the community. Disagreements leading to anarchy and chaos were avoided as much as possible. For example, it is said that ‘Uthmān had detained the chiefs of the Quraysh in Medina lest dissension and perversion should spread among the community. The word *jamā‘a* signified not only community or majority group, but also unity. To cope with both internal and external disunity, the emphasis was placed on the concept of *jamā‘a*. In the course of time, theological differences were minimized as much as possible to let the sunnah's dominant concept prevail. As such, the term *ahl al-sunnah wa jamā‘a* emerged, which comprises the moderate and majority group, and unity. Theology and law cooperated with each other to establish this *modus vivendi*. We can safely say that the concept of *jamā‘a* emerged to react against *fitnah*, emphasizing the unity of the Muslim community.<sup>663</sup>

Previously, we already came across some *aḥadīth* regarding the *jamā‘a*.<sup>664</sup> In the corpus of *aḥadīth*, we find many narrations that emphasize the importance of the *jamā‘a*. I will present here the most relevant *aḥadīth*.

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<sup>660</sup> Sachedina, Abdulaziz, *Islam and the Challenge of Human Rights*, Oxford: Oxford University Press, 2009, p. 168-9.

<sup>661</sup> Ibid., p. 169.

<sup>662</sup> Hasan, *The Doctrine of Ijmā‘ in Islam: A study of the Judicial Principle of Consensus*, p. 6-8

<sup>663</sup> Ibid.

<sup>664</sup> Chapter 3, p. 60.

“Verily my Ummah (community) will never agree on an error. When you see some difference, it is incumbent upon you to adhere to the great majority [of my community].”<sup>665</sup>

Even though there is a difference of opinion regarding the authenticity of this narration,<sup>666</sup> this and many similar traditions<sup>667</sup>, some of which we already discussed,<sup>668</sup> gave rise to the notion of the infallibility of the agreed decisions of the Muslim community and consequently required strict adherence to it. This observation is important regarding opinions and expressions that are deviant from mainstream thought in Islam. Ahmad Hasan points out in his study of the principle of *ijmāʿ* that in medieval Islamic society, the emphasis on the *jamāʿah* for the sake of the community led to the devaluing of the individual and as such was a setback to individual thought. And to make things worse for the individual, besides adherence to the community, great stress was put on the unquestioned obedience to the leader of the community or *amīr*, leaving no freedom for the individual.<sup>669</sup> It seems that Al-Shāfiʿī (d. 820) also deems the community infallible as he states: “So we accept the decision of the public because we have to obey their authority, and we know that wherever there are *sunnas* of the Prophet, the public cannot be ignorant of them, although it is possible that some are, and we know that the public can neither agree on anything contrary to the *sunna* of the Prophet nor on an error.”<sup>670</sup> In explaining the meaning of the Prophet’s order to follow the community, Al-Shāfiʿī states that holding the same opinion as the Muslim community boils down to following the community. However, holding different opinions is equivalent to opposing the Muslim community. Al-Shāfiʿī goes on to state that “in the community as a whole there is no error concerning the meaning of the Qur’an, the *sunna*, and analogy.”<sup>671</sup> According to Wael Hallaq, in Islam, the role of the community is significant, for it supersedes the nation of the modern state. The community and its members are not the ends of all ends -as is the case of the nation-state- but are a means to a greater end. As such, “the community is governed by the same moral rules.”<sup>672</sup> The following tradition of the companion Ibn Masʿūd makes it clear that what the Muslim community deems as good is good before Allah and what is considered as bad, is bad before Allah:

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<sup>665</sup> Ibn Mājah, *Sunan Ibn Mājah*, vol. 5., *ḥadīth* no. 3950, p. 282. In chapter 3, I have already mentioned that Al-Tirmidhī states that the explanation of *jamāʿa* is according to Islamic scholars, the scholars of *fiqh*, knowledge, and *ḥadīth*, see chapter 3, p. 60.

<sup>666</sup> Al-Albānī classifies this tradition as very weak (*ḍaʿīf jiddan*), see al-Albānī, Muḥammad Nāṣir al-Dīn, *Ḍaʿīf Sunan Ibn Mājah*, Riyadh: Maktabah al-Maʿārif, 1997, p. 321.

<sup>667</sup> Al-Ghazālī mentions these traditions in his discussion on *ijmāʿ*. He doesn’t give any classification of these traditions, see Al-Ghazālī, *al-Mustaṣfā min ʿIlm al-Uṣūl*, p. 221-28.

<sup>668</sup> Chapter 3, p. 60.

<sup>669</sup> Hasan, *The Doctrine of Ijmāʿ in Islam: A study of the Judicial Principle of Consensus*, p. 9.

<sup>670</sup> Al-Shāfiʿī, *al-Risālah*, p. 286, English translation by Majid Khadduri. According to Joseph Schacht, the writings of Al-Shāfiʿī show a continuous development of his doctrine of consensus. Initially, he recognized the consensus of scholars, but later he refused it and even denied its existence. However, Al-Shāfiʿī was so deeply ingrained in referring to it, he kept one using it. See Schacht, *Origins of Muhammadan Jurisprudence*, pp. 88-9. Schacht goes on to state that Al-Shāfiʿī tried to reconcile the consensus of scholars with his own concept, which is the consensus of the community at large. He did this by “opposing the generality of scholars with that of the specialists among them. The unanimous opinion of the scholars merges into the consensus of the Muslims at large and serves to eliminate stray opinions by showing them to be below the general scholarly standard.” *Ibid.*, pp. 93-4.

<sup>671</sup> *Ibid.*, p. 287.

<sup>672</sup> Hallaq, Wael B., *The Impossible State: Islam, Politics, and Modernity’s Moral Predicament*, New York: Columbia University Press, 2014, p. 49.

“If something is seen by the Muslims as good, then it is good for Allah, and if it is seen as bad, then it is also so for Allah.”<sup>673</sup>

Generally speaking, it is thus not surprising that all acts of free expression that go against the Islamic creed or morals of Muslim society are outlawed.<sup>674</sup> Likewise, speech inciting violence or intolerance are restricted in Muslim majority countries. This kind of expressions falls under the category of *fitnat al-shahawāt* or sedition concerning desires and sensuality as Ibn al-Qayyim (d. 1350) explains as follows. After citing verse 69 of chapter 9 of the Quran, Ibn al-Qayyim states that Allah indicated in this verse that the occurrences are due to corrupted hearts and religions. It leads to enjoying immorality and going into falsehood (*bāṭil*) because the corruption of religion is done either through believing in falsehood and speaking it or by acting contrary to true knowledge. The first category refers to religious innovation (*bid'ah*) and the second one has to do with immoral actions (*fisq al-'amāl*) which are the result of desires (*shahawāt*). The root of every *fitnah* lies in the fact that personal opinion is given precedence over legal, and desire is preferred over reason (*wa 'aṣal kullu fitnah 'innamā huwa min taqdīm al-rā'y 'alā al-shar'a, wa al-hawā 'alā al-'aql*). To prevent and overcome *fitnah* of doubts (*shubuhāt*) one needs certitude (*yaqīn*), and it requires patience (*ṣabr*) to prevent and overcome *fitnat al-shahawāt*. Therefore, Allah has appointed religious leaders and government (*'imāmat al-dīn*) to deal with these two issues.<sup>675</sup> Indeed, what is considered decent, as opposed to what is regarded as immoral, lascivious, and obscene depends highly on the opinion of the Muslim community. This is one of the reasons why obscenity as a *fitnah* is broad in its meaning and therefore difficult to define. However, regardless of the difficulty of understanding what falls under *fitnah al-shahawāt*, freedom of expression can be restricted in the interest of public morals. This protects particularly vulnerable members of the Muslim community against provocative expressions that focus on their basic desires.<sup>676</sup> Sowing the seeds of discord is another type of *fitnah* that disrupts the unity of the Muslim community as can be seen in the following case. Dr. Zakir Naik is a well-known Indian Muslim preacher who resides in Malaysia. In August 2019, Naik ignited outrage in Malaysia after he suggested in a speech that ethnic Chinese minorities should be expelled from Malaysia. In response to Naik's speech, two ministers said that he needed to be deported from Malaysia as his speeches were "inflammatory in nature".<sup>677</sup> Even though Malaysia is a Muslim majority country (60% of its population is Muslim), it harbors significant religious and ethnic minorities such as Hindus and Chinese. Discussions on race and religion are therefore sensitive issues in Malaysia. Commenting on Naik's speech, Minister Jayakumar stated: "We do not need such individuals to issue seditious statements with the intent to drive the wedge between Muslims and non-Muslims in Malaysia."<sup>678</sup> Minister Jarakumar's statement in some ways reflects what scholars have pointed out regarding the Constitution of Medina. After the Prophet

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<sup>673</sup> Ibn Hanbal, *Musnad al-Imām Aḥmad bin Ḥanbal*, vol. VI, *ḥadīth* no. 3950, p. 84. English translation by Ellethy, see Ellethy, *Islam, Context, Pluralism and Democracy: Classical and Modern Interpretations*, p. 52.

<sup>674</sup> One could of course argue, that since the tradition of a Muslim community is used in Islamic jurisprudence as evidence of *'urf* (custom), some modernists might claim that if a Muslim community would agree on something, this would be seen good by Allah, even if Muslim orthodoxy would define this as *'urf fāsid* (corrupt custom).

<sup>675</sup> Ibn Qayyim al-Jawzīyah, Muḥammad ibn Abī Bakr, *Ighāthat al-Lahfān min Maṣāyid al-Shayṭān*, Makkah al-Mukarramah: Dār 'Ālam al-Fawā'id lil-Nashr wa-al-Tawzī', 2010, p. 902-3.

<sup>676</sup> Kamali, *Freedom of Expression in Islam*, p. 203.

<sup>677</sup> <https://www.aljazeera.com/news/2019/08/outrage-malaysia-zakir-naik-suggests-chinese-expulsion-190814230715236.html>

<sup>678</sup> Ibid.

Muhammad migrated from Mecca to Medina, he formulated around 622 a treaty between the Jews and Muslims.<sup>679</sup> This treaty is sometimes called ‘The First Written Constitution of the World.’<sup>680</sup> The rationale of this treaty was to provide peace, prosperity, security, and also to bring about harmony and a spirit of understanding in the region where the Prophet lived, in particular.<sup>681</sup> Another feature of this covenant was to establish full freedom of faith, the inviolability of human life, property, and the city of Medina, and the forbiddance of crime. The result of this covenant was that Medina became inviolate for its inhabitants, who were now obligated to defend and protect each other. These peoples -both Muslim and non-Muslim- now had an obligation to guarantee the implementation of the covenant, including the establishment of the rights and freedom it called for.<sup>682</sup> Based on this covenant, Muslim scholars have developed concepts of how to conciliate Islamic law with the modern concepts of constitutionalism and the rule of law. They state that the ‘Constitution of Medina’ served the same goals as the rule of law and modern constitutionalism, namely regulating the rights and obligations of the community at large and peaceful coexistence, including its rulers.<sup>683</sup> Generally speaking, due to the nature of the Muslim community, personal freedom, such as freedom of speech, is more limited in Muslim majority countries than in liberal democracies. This can be explained as Ellethy puts it, “the margins of personal freedom and actions are limited by an Islamic code which aims to protect the *moral* integrity of the society as this emerges from the Islamic ethical system.”<sup>684</sup> He then quotes the following *ḥadīth* which touches on this matter of the moral boundaries between individual freedom and the community:<sup>685</sup>

“Everybody in my *ummah* (community) is forgiven/safeguarded except those who publicly (diffuse) sin.”<sup>686</sup>

According to contemporary scholar Muhammad Saalih Al-Munajjid, this *ḥadīth* makes it clear that those people who commit sins and openly speak about their sins will not be forgiven by Allah. The situation is worse when people not only profess sins but spread sins and to flaunt them because it leads other people to imitate this kind of behavior. The *Shari‘a* emphasizes acting upon those who openly speak out about their sins and who try to invite, tempt, and attract others to also commit sins. Islamic scholars have stipulated that it is desirable for the open sinner not to conceal himself, but rather show his condition so that the people can avoid him, and the matter should be raised to the judge to assess what he deserves.<sup>687</sup> For example, al-Nawawī (d. 1277) states that he who speaks out about his debauchery, immorality (*fisq*),

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<sup>679</sup> Esmaili, *The Rule of Law, Freedom of Expression and Islamic Law*, p. 29.

<sup>680</sup> See for example, Hamidullah, Muhammad, *The First Written Constitution in the World: an Important Document of the Time of the Holy Prophet*, available at <https://muqith.files.wordpress.com/2016/01/dr-hamidullah-the-first-written-constitution-of-the-world.pdf>

<sup>681</sup> Al-Mubarakpuri, *The Sealed Nectar*, p. 237.

<sup>682</sup> Haykal, *The Life of Muhammad*, p. 183.

<sup>683</sup> Esmaili, *The Rule of Law, Freedom of Expression and Islamic Law*, p. 29.

<sup>684</sup> Ellethy, *Islam, Context, Pluralism and Democracy: Classical and Modern Interpretations*, p. 235.

<sup>685</sup> Ibid.

<sup>686</sup> Al-Bukhāri, *Ṣaḥīḥ Al-Bukhāri*, Vol. VIII, p. 61-2, *ḥadīth* no. 6069, translated by Ellethy in Ellethy, *Islam, Context, Pluralism and Democracy: Classical and Modern Interpretations*, p. 235.

<sup>687</sup> <https://almunajjid.com/speeches/lessons/562>

or his religious innovation (*bid'ah*) may be named by what he is speaking out about.<sup>688</sup> Thus, if someone is telling others he is using drugs, he may be called a drug abuser.

In my opinion, this is related to the concept of *hisba* -which we have discussed in chapter 3- because from an idealistic perspective, the goal of an Islamic society is to implement goals of the *Sharī'a*, such as justice and fairness, and this requires every member of such an ideal society to command good and forbid evil. In such a society, each person has a social responsibility to ensure that there is moral authority in the community.<sup>689</sup> The contemporary philosopher Nasr argues that while it is required to keep the peace and to foster social harmony if for one reason or another moral authority is lost and Islamic norms are flouted by political powers, "then there is a right to rebellion and the reestablishment of an order based on ethical norms and the Divine Law."<sup>690</sup> Another scholar points out the importance of morality at the collective level as the progress and survival of a society depend upon its morality: "Nations exits as long as their morality exists. When their morals are gone, they are also gone."<sup>691</sup> Thus, all forms of freedom of expression which promote obscenity, lust, and sensuality undermine the interest of the Muslim community and can be limited. In a similar vein, restrictions can be imposed on freedom of expression which promotes sedition, religious innovation (*bid'ah*), and disbelief (*kufr*) since they are all detrimental to the interest of the Muslim community.<sup>692</sup>

Ibn al-Qayyim states that there is no liability involved when misguiding books are either burned or destroyed (*wa kadhalika lā ḍamāna fī tahriqi-lkutubi-lmuḍillati wa itlāfihā*).

He quotes Aḥmad ibn ḥanbal, who states that it is permissible to burn a borrowed book that contains bad things. He adds that it is also not permissible to publish books that contradicts the *sunna* of the Prophet. Rather, it is mandatory to burn and destroy such books, to save the community (*ummah*) from harm.<sup>693</sup> In a similar vein, Ibn al-Qayyim states that all books that advocate falsehood and religious innovation (*bid'ah*), must be destroyed. Destroying such books is more required than destroying instruments of amusement, musical instruments, and vessels of wine because the harm of such books is far greater than the harm of the aforementioned instruments and vessels. Ibn al-Qayyim again emphasizes that there is no liability in destroying such books as there is no liability in breaking the vessels of wine.<sup>694</sup>

The view of Ibn al-Qayyim may appear highly prejudiced and in stark contrast with freedom of thought, as the contemporary Indian scholar Jalāluddīn 'Umarī points out.<sup>695</sup> But if one takes into consideration the interest of the Muslim community united by its religious identity,

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<sup>688</sup> Al-'Asqalānī, Aḥmad ibn 'Alī Ibn Ḥajar, *Fath al-Bārī: Sharḥ Ṣaḥīḥ al-Bukhārī*, Riyāḍ: Maktabat Dār al-Salām; Dimashq: Maktabat Dār al-Faiḥā', 1997, vol. 10, p. 597-8.

<sup>689</sup> Nasr, Seyyed Hossein, *The Heart of Islam: Enduring Values for Humanity*, New York: HarperCollins Publishers, 2002, p. 170. Cf. Michael Cook who writes: ...Hawwā explains that Muslims living in a corrupt Islamic state (*dawla Islāmiyya munḥarifa*) should organise performance of the duty 'with the hand'; this operation should avoid collision with the state, and should take as its target wrongs perpetrated by individuals (musical instruments, pictures of nudes, liquor, or the flaunting of female sexuality), see Cook, Michael, *Commanding Right and Forbidding Wrong in Islamic Thought*, Cambridge: Cambridge University Press, 2006, p. 517.

<sup>690</sup> Nasr, *The Heart of Islam: Enduring Values for Humanity*, p. 170.

<sup>691</sup> Ghazālī, *Muslim Character: An American-English Translation of Muḥammad al- Ghazālī's Khuluq al-Muslim* (Translated by Mufti A.H. Usmani), p. 24. The cited poem is from the Egyptian poet Ahmad Shawqi (d. 1932).

<sup>692</sup> Kamali, *Freedom of Expression in Islam*, p. 203.

<sup>693</sup> Ibn Qayyim al-Jawzīyah, Muḥammad ibn Abī Bakr, *Al-Ṭuruq al-Ḥukmiyya fī'l-Siyāsa al-Sharī'ah*, Cairo: Dār al-Ḥadīth, 2002, p. 235.

<sup>694</sup> *Ibid.*, p. 237.

<sup>695</sup> 'Umarī, Jalāluddīn Anṣar, *Maroof and Munkar* (Enjoining the Good and Forbidding the Evil), Translated from the Urdu by Usman Muhammad Iqbal, New Delhi: Markazi Maktaba Islami Publishers, 2009, pp. 314-5.



then this view is highly prudent according to him. Destroying misguided books aims to protect the Muslim community from ideas and opinions that are anti-*Sharī'a*, promote *bid'ah*, and are alien to Islam, and ensure that the Muslims community remains faithful to its religion and beliefs as much as possible, so that opposition to its principles and doctrines does not rear its head.<sup>696</sup>

Thus, as al-Ghannūshī points out, Islam is a belief and a system of life. This makes every organized activity within the Islamic community aiming to undermine the edifice of Islam an aggression against the public order, because the Islamic belief is the essence of the Muslim community (likewise, the principles of democracy are the foundations of identity of liberal democracy). Hence, the government in a presupposed Islamic state is based on guarding and preserving the Islamic religion. Therefore, it discerns the danger to the state system in every organized collective movement that targets the structure of Islam, especially if it goes hand in hand with violent offences, and addresses this danger with appropriate policies.<sup>697</sup>

The questions that now arise is what are the boundaries of freedom of expression in a liberal community, where citizens are free, equal, and independent, and how does this relate to the boundaries of freedom of speech in a Muslim community? Michael Cook points out aptly the difference between liberalism and Islam regarding liberty and freedom of expression:

“But where the match is with liberal values, the effect can be jarring. The reason is not far to seek. Islam, within certain limits, tells people what to believe and how to live; liberalism, within certain limits, is about leaving them to work this out for themselves. It is this incompatibility that lies behind the unhappy notion of a right to freedom of opinion which protects only good opinions. What makes the disparity so salient in the discussions that concern us is that forbidding wrong [in Islam] is precisely a practice for telling people what to believe and how to live – for imposing family values, not for enabling people to choose their lifestyles. This point has not been lost on modern Muslim writers, who have long been critical of excessive freedom in the West.”<sup>698</sup>

As we saw earlier, liberal societies only restrict freedom of expression when there are compelling reasons for doing so.<sup>699</sup> Some of these compelling reasons are related to the nature of a liberal community. The nature of a liberal community is more complex as compared to a Muslim community, the latter is not only a thick community but also more or less a monistic community. Moreover, as Talal Asad puts it, liberalism itself is a highly complex historical tradition. Locke, Constant, Mill, and Rawls all had different ideas about liberalism, and its history in Europe is not the same as in North America. Liberalism is not only found in classical texts, and of course, it is contrary to other traditions in the West. In the beginning stages, liberal politics was concerned with challenging hegemonic power. Nowadays, liberalism is the partner of global power: rational, cool, and imperturbable.<sup>700</sup> Nevertheless, I shall try to present some similar characteristics among liberal communities. Will Kymlicka discerns two different aspects of a liberal community. First, there is the political community,

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<sup>696</sup> Ibid., pp. 315-6.

<sup>697</sup> Al-Ghannūshī, *al-Ḥurrīyāt al-Āmmah fī al-Dawlah al-Islāmiyah*, p. 50.

<sup>698</sup> Cook, *Commanding Right and Forbidding Wrong in Islamic Thought*, p. 514.

<sup>699</sup> Chapter 2, p. 33.

<sup>700</sup> Asad, Talad, *Free speech, Blasphemy, and Secular Criticism*, p. 19, in *Is Critique Secular? Blasphemy, Injury, and Free Speech*, Talal Asad, Wendy Brown, Judith P. Butler and Saba Mahmood, New York: Fordham University Press, 2013.

in which individuals exercise the rights and fulfill the responsibilities deriving from the framework of liberal justice. People who are part of the same political community are fellow citizens. Secondly, there is the cultural community, in which individuals set and revise their goals and ambitions. People who are part of “the same cultural community share a culture, a language and history which defines their cultural membership.”<sup>701</sup> A liberal community is also pluralistic, which means that the two aforementioned communities do not always intersect: it may harbor two or more groups of people who do not only have different cultures but also speak different languages, and develop different cultural traditions, and this is the situation in the vast majority of countries.<sup>702</sup> Contrary to Islam, there is no clear-cut definition of the good life in liberalism, because it is left to the individual to work it out for himself. In other words, as Ronald Dworkin puts it, “individuals have a personal responsibility to define success in their own lives”, and this “principle supports the traditional liberal rights of free speech and expression, conscience, political activity, and religion that most human rights documents include.”<sup>703</sup> After all, a liberal community consists of citizens who consider themselves as autonomous, equal, and rational agents.<sup>704</sup> Being equal entails that all citizens of a liberal community have equal rights and that there is no prioritization of rights.<sup>705</sup> As we noticed in chapter 2, it occurs that on certain occasions fundamental rights collide. Since there is no prioritization of rights, it is up to the legal authorities of a liberal community to decide which right should be given preference over another right when rights collide. Naturally, for John Rawls, a liberal community is a community that is built on justice, but on the understanding that the welfare of the community cannot override the rights of an individual because all individuals are equal:

“Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason, justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many. Therefore, in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests.”<sup>706</sup>

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<sup>701</sup> Kymlicka, *Liberalism, Community, and Culture*, p. 135.

<sup>702</sup> Ibid.

<sup>703</sup> Dworkin, Ronald, *Justice for Hedgehogs*, Cambridge (Massachusetts): The Belknap Press of Harvard University Press, 2011, p. 336.

<sup>704</sup> Scalon, T.M., *The Difficulty of Tolerance: Essays in Political Philosophy*, New York: Cambridge University Press, 2003, p. 14-5.

<sup>705</sup> Cf. Peter Cumper who writes: “...there is nothing in the ECHR to support the view that Article 10 is hierarchically superior to Article 9, so that the right to freedom of expression should not necessarily prevail over respect for religious sensibilities.” See Cumper, *Blasphemy, Freedom of Expression and the Protection of Religious Sensibilities in Twenty- First- Century Europe*, p. 151.

<sup>706</sup> Rawls, John, *A Theory of Justice*, Rawls, Original ed. Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1971, p. 3-4; see also Nozick, Robert, *Anarchy, State, and Utopia*, Oxford: Blackwell Publishers Ltd, 1974, reprinted 1999, p. 33, who writes: “The moral side constraints upon what we may do, I claim, reflect the fact of our separate existences. They reflect the fact that no moral balancing act can take place among us; there is no moral outweighing of one of our lives by others so as to lead to a greater overall social good. There is no justified sacrifice of some of us for others. This root idea, namely, that there are different individuals with separate lives and so no one may be sacrificed for others, underlies the existence of moral side constraints, but it also, I believe, leads to a libertarian side constraint that prohibits aggression against another.”

This echoes in some way Mill's defense for opinions that are highly deviant and controversial concerning the general view of the community:

"If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."<sup>707</sup>

In a liberal community, contrary to theocratic communities,<sup>708</sup> people are ethically independent and do not subject themselves to religious authority. If they subject themselves to religious authority, such as a mosque or a church, they do so voluntarily.<sup>709</sup> The right to ethical independence stems from the principle of personal responsibility. All rights that people are entitled to, including rights to freedom of expression, are essential to their general right to govern themselves, which also follows from personal responsibility.<sup>710</sup> However, this doesn't mean that there is no conception of the good at all or that a liberal community is simply a community of individuals who have nothing to do with each other. Yes, one can argue that being a member of the political community had little to do with how active and socially integrated such a person is, as Ronald Beiner puts it aptly:

"According to the liberal conception, once one has secured formal entry into the political community, one may be a citizen in good standing and yet do absolutely nothing after having attained to membership: not vote, not participate in jury service, not read newspapers or keep oneself informed politically. Even conformity to the laws does not count toward citizenship, since breaking the laws does not deprive one of citizenship in this formal sense."<sup>711</sup>

However, a liberal community in effect instigates a subterranean, but tacitly shared, view of the good, or a collection of such views. Like every other community, a liberal community "offers a community of experience that identifies its members as inhabitants of the same

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<sup>707</sup> Mill, *On Liberty*, p. 35.

<sup>708</sup> I agree with Lucas A. Swaine that "the wide diversity found across theocratic communities could lead one to suppose that those communities cannot be identified by any set of necessary and sufficient characteristics". However, we can apply a general characterization: "a theocratic community is one in which persons endeavor to live according to the dictates of a religious conception of the good that is strict, non-liberal, and comprehensive in its range of teachings. The strictness of religious teachings normally is promoted by religious leaders, who do not tolerate dissent among community members, and who try to prevent or disallow competing religious views from emerging. Since religious authorities in theocratic communities do not have political authority with which to enforce their views, they attempt to maintain religious order using other means. Theocratic communities also are nonliberal, not inasmuch as they all reject liberal values equally or in the same fashion, but in the sense that they undertake to maintain the tenor of their religious communities by discouraging or forbidding outright many liberal values and practices. The comprehensiveness of theocratic religious conceptions pertains to the range of life-practices to which those conceptions apply. Religious doctrines of theocratic communities are widely or fully comprehensive, in the sense that they extend to cover "all recognized values and virtues within one rather precisely articulated scheme of thought." 5 Theocratic conceptions of the good do not apply merely to some areas of members' lives; rather, these conceptions range across nearly all life-practices, covering personal associations, familial structures, institutional arrangements, practices of ritual and worship, ideals of character, and so on." See Swaine, Lucas A., *How Ought Liberal Democracies to Treat Theocratic Communities?*, p. 304-5, in *Ethics*. 111 (2): 302-343.

<sup>709</sup> Dworkin, *Justice for Hedgehogs*, p. 213.

<sup>710</sup> *Ibid.*, p. 4.

<sup>711</sup> Beiner, Ronald. *What's the Matter with Liberalism?*, Berkeley: University of California Press, 1992, p. 114.

social order.”<sup>712</sup> This social order, no matter how minimal it might be, is to be sustained by legal authorities. Members of a liberal community are legal persons that cede their authorization to use coercive measures to a legal authority that monopolizes the means of legal coercion and uses those means on their behalf as necessary.<sup>713</sup> Sustaining the social order explains why freedom of speech and other rights that undermine and jeopardize the social order of a liberal community can be restricted as already saw in the *Féret v. Belgium* case and as we shall see in the *Í.A. v. Turkey* case in section 5.3.

A liberal society cannot be comprehensively neutral. Rather, it is properly understood as a community organized around maintaining a distinct set of public goals. It is these goals that underlie its unity, direct its policies, structure its institutions, and define its public virtues. In the constitutional context, these goals constitute appropriate knowledge and understanding of compelling state interests that justify public interference in group activities. For example, the protection of human life is a central liberal goal. This goal would allow the liberal state (being a political community) to intervene against religious practices that involve human sacrifice: this excludes Aztecs from freedom of religion.<sup>714</sup> Galston gives two further examples: (1) “The protection and promotion of normal development of basic capacities” is another central liberal goal, that allows “the state to intervene against communities that bind infants’ skulls or malnourish them in ways that impede physical growth and maturation.”<sup>715</sup> (2) The development of what Galston calls “social rationality (the kind of understanding needed to participate in the society, economy, and polity)” is also a central liberal goal that allows “the state to intervene against forms of education that are systematically disabling when judged against this norm.”<sup>716</sup> In the latter, we also see what Dworkin calls surface paternalism. He argues that in liberal states the majority of people think that obligatory education until late adolescence is a permissible form of paternalism because education improves rather than reduces a person’s ability to live his own life.<sup>717</sup> In other words, a liberal community has a *minimum* social order that must be fulfilled and consequently, can restrict individual freedoms, such as freedom of expression, when personal liberties undermine the social order of the community. The aforementioned examples from both classical and modern Muslim scholarship show the reservation of Muslim scholars towards some freedoms of expression taken for granted in liberal democracies. The extent to which modern Muslim communities adhere to these reservations marks the boundaries of freedom of expression and reactions of Muslims on aspects of this freedom as practised in liberal democracies. In the next section, I will further discuss these boundaries based on some case studies.

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<sup>712</sup> Ibid., p. 36.

<sup>713</sup> Habermas, Jürgen, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Translated by William Rehg, Cambridge, Massachusetts: The MIT Press, 1996, p. 124.

<sup>714</sup> Galston, William A., *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice*, Cambridge: Cambridge University Press, 2002, p. 23.

<sup>715</sup> Ibid.

<sup>716</sup> Ibid., p. 24.

<sup>717</sup> Dworkin, *Justice for Hedgehogs*, p. 336.

### 5.3. The Boundaries of Freedom of Expression in Islam and Liberal Democracies: Some Case Studies

To what extent are the boundaries of freedom of expression conceptually different or comparable in liberal democracy and Islam? Although we have encountered significant differences regarding the boundaries of free speech in liberal democracies and Islam, this section will point out that setting these boundaries in both systems sometimes runs parallel. There are expressions that endanger both democracy and Islam. Chapter 2 revealed that in liberal democracy freedom of expression is usually justified for the following reasons: discovery of truth, self-fulfillment, human progress, citizen participation in a democracy, and the much-needed control of the government. We also noticed that certain speech is curtailed if it runs counter to these justifications, especially speech that endangers the democratic constitutional state. Chapter 3 revealed that in Islam, freedom of expression is restricted if it violates the stipulated norms, values, and principles of Islam. As it will become clear in this chapter, compared to liberal democracies, freedom of expression in Islam is more likely to be restricted when it is detrimental to the Muslim community, which demonstrates why Muslim communities can be perceived as thick communities. Liberal democracies are thin communities in the sense that such states are highly individualistic and promote individual rights such as freedom of expression. However, as we saw earlier in this chapter, liberal democracies have minimum cohesion among their citizens. This minimum cohesion is often a shared history and some common cultural and religious values. The following case clarifies that liberal and secular states sometimes take into account cultural and religious sensitivities in setting the boundaries of freedom of expression, which is often upheld by the European Court of Human Rights.

#### The Case of *I.A. v. Turkey*

Turkey became an independent state in 1923.<sup>718</sup> Since then, a rapid series of reforms were instituted aiming to thoroughly transform the remnants of the old Ottoman government and social life by westernizing and secularizing the country. This included strictly limiting and controlling the role of religion and religious institutions. The army saw itself as a guardian to protect the secular nature of the state and consequently undertook several coups (in 1960, 1971, 1980, and 1997).<sup>719</sup> Despite its secular nature, Turkey's penal code holds the public degrading of religion as punishable under article 216, aiming to prevent social unrest.<sup>720</sup>

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<sup>718</sup> Lapidus, *A History of Islamic Societies*, p. 527.

<sup>719</sup> An-Na'im, An-Na'im, Abdullahi Ahmed, *Islam and the Secular State: Negotiating the Future of Shari'a*, Cambridge: Harvard University Press, 2008, p. 182.

<sup>720</sup> Article 216, Provoking the Public to Hatred, Hostility or Degrading, paragraphs 2 and 3 state that: “ (2) A person who publicly degrades a section of the public on grounds of social class, race, religion, sect, gender or regional differences shall be sentenced to a penalty of imprisonment for a term of six months to one year. (3) A person who publicly degrades the religious values of a section of the public shall be sentenced to a penalty of imprisonment for a term of six months to one year, where the act is capable of disturbing public peace”, available at [https://www.legislationline.org/download/id/6453/file/Turkey\\_CC\\_2004\\_am2016\\_en.pdf](https://www.legislationline.org/download/id/6453/file/Turkey_CC_2004_am2016_en.pdf)

Moreover, 98% of Turkey's population is Muslim,<sup>721</sup> making it an interesting country for the way it deals with freedom of expression and religious sensibilities.

İ.A. is the owner and director of Berfin, a publishing house that published a novel by Abdullah Rıza Ergüven in November 1993 entitled "Yasak Tümceler" ("The forbidden phrases"). The book conveyed the author's views on theological and philosophical issues in a novel-like style. Two thousand copies were printed at once. On 18 April 1994, İ.A. was charged with blasphemy against "God, the Religion, the Prophet and the Holy Book" by the Istanbul public prosecutor charged under the third and fourth paragraphs of Article 175 of the Criminal Code for having published the book in question. The public prosecutor's indictment was based on an expert report drawn up by Professor Salih Tuğ, dean of the theology faculty of Marmara University, at the request of the press section of the Istanbul public prosecutor's office.<sup>722</sup> In his report of 25 February 1994 Professor Salih Tuğ observed:

"... the author arbitrarily uses theories about the physical substance of the universe, creation and the existence of natural laws to sway readers' minds towards the conclusions he wishes to be drawn from the book. In particular, in the passages on theology he imprisons readers within the limits of his own views, which are devoid of all academic rigour. ... He criticises the beliefs, ideas, traditions and way of life of Anatolian Turkish society by adopting the independent and nonconformist viewpoint of the leaders, thinkers and scientists of the Renaissance in order to enlighten and advise our people as he sees fit. ... This way of thinking, based on materialism and positivism, leads to atheism in that it renounces faith and divine revelation ... Although these passages may be regarded as a polemic in support of the author's philosophical views, it may be observed that they also contain statements that imply a certain element of humiliation, scorn and discredit vis-à-vis religion, the Prophet and belief in God according to Islam ... In the author's view, religious beliefs and opinions are mere obscurities, and ideas based on nature and reason are described as clear-sighted. The author describes religious faith as a 'desert mirage', a 'primitive idea' and 'desert ecstasy', and religious practices as 'the primitivism of desert life'. ..."<sup>723</sup>

In his report, Professor Tuğ cited numerous passages from the book under review, in particular:

"... just think about it, ... all beliefs and all religions are essentially no more than performances. The actors played their roles without knowing what it was all about. Everyone has been led blindly along that path. The imaginary god, to whom people have become symbolically attached, has never appeared on stage. He has always been made to speak through the curtain. The people have been taken over by pathological imaginary projections. They have been brainwashed by fanciful stories ... this divests the imams of all thought and capacity to think and reduces them to the state of a pile of grass ... [regarding the story of the Prophet Abraham's sacrifice] it is clear that we are being duped here ... is God a sadist? ... so the God of Abraham is just as murderous as the God of Muhammad ..."

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<sup>721</sup> Pew-Templeton Global Religious Futures Project, available at [http://www.globalreligiousfutures.org/countries/turkey#/?affiliations\\_religion\\_id=0&affiliations\\_year=2010&region\\_name=All%20Countries&restrictions\\_year=2016](http://www.globalreligiousfutures.org/countries/turkey#/?affiliations_religion_id=0&affiliations_year=2010&region_name=All%20Countries&restrictions_year=2016)

<sup>722</sup> European Court of Human Rights, *Case of İ.A. v. Turkey*, Application no. 42571/98, para 1-7.

<sup>723</sup> *Ibid.*, para 7.

The expert concluded his report as follows:

“The passages which I have quoted from the book form the *actus reus* of the offence provided for in Article 175 of the Criminal Code. As regards the *mens rea*, my analysis shows that it has been made out, especially since the author entitled his book 'The forbidden phrases'.”<sup>724</sup>

On 28 June 1994, the applicant filed a complaint stating that he questioned the expert's impartiality, and more importantly, contested the expert report, arguing the book in question is a novel and must be analyzed by literary experts. On 2 November 1995, a committee of literary experts submitted their report. The applicant disputed the accuracy of the report to the committee of literary experts, arguing that it was a copy of the first report. On 24 April 1996, the applicant pleaded before the Court of First Instance that the book was neither blasphemous nor offensive within the meaning of Article 175, third paragraph, of the Criminal Code and that it merely reflected the author's philosophical views.

On 28 May 1996, the Court of First Instance rejected the applicant's arguments and sentenced him to two years' imprisonment and a fine. The Court commuted the prison sentence to a fine of 16 United States dollars. The Court based its ruling on the report of the committee of literary experts and quoted the following passage from the impugned book:<sup>725</sup>

“Look at the triangle of fear, inequality and inconsistency in the Koran; it reminds me of an earthworm. God says that all the words are those of his messenger. Some of these words, moreover, were inspired in a surge of exultation, in Aisha's arms. ... God's messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual relations with a dead person or a live animal.”<sup>726</sup>

The applicant appealed to the Court of Cassation, pleading that in the impugned book he merely expressed his opinions, and challenged the views of both expert reports. The Court of Cassation upheld the impugned judgment of the Court of First Instance.

### *The Judgement of the European Court of Human Rights*

The applicant appealed to the European Court of Human Rights. Before reflecting on the judgment of the European Court of Human Rights, I would like to make two introductory remarks. (1) Given the lack of any “uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions”, Contracting States are afforded a “wider margin of appreciation when regulating freedom of expression in connection with matters liable to offend intimate personal convictions within the sphere of morals or religion”.<sup>727</sup> Therefore, it is quite possible that in another contracting state the applicant in question was not punishable for publishing the impugned novel. (2) All human rights are according to the European Convention of Human Rights equal, and in case there are conflicting human rights, European judges take into account the context in which

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<sup>724</sup> Ibid., para 8.

<sup>725</sup> Ibid., para 9-13.

<sup>726</sup> Ibid., para 13.

<sup>727</sup> Ibid., para 25; McGonagle, Tarlach, “An Ode to Contextualisation: ‘i.A. V Turkey.’”, p. 239, *Irish Human Rights Law Review* (2010), pp. 237-258.

these conflicting human rights operate. Thus, when freedom of expression collides with another human right, for example, the right not to be discriminated against, it is feasible that a court values the latter over freedom of expression.<sup>728</sup>

The European Court of Human Rights upheld the judgment of the Court of Cassation of Turkey. The Court argued the importance of freedom of expression in a democratic society. It emphasized that freedom of expression “is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.”<sup>729</sup> The Court also referred to Article 10, paragraph 2, stating that freedom of expression entails duties and responsibilities. In the context of faith, it may be legitimate to include the obligation to avoid expressions that are unnecessarily offensive to others and profane, regarding this the Court refers to the case *Otto-Preminger-Institut v. Austria*,<sup>730</sup> judgment of 20 September 1994. Thus, without explicitly mentioning it, the Court is referring here to the cultural community. Both Turkey and Austria have a long history with religion, Islam, and Christendom respectively.

This case reveals that European judges take into account the cultural context in which freedom of expression operates. European countries are afforded a relatively wide margin of appreciation in setting the boundaries of freedom of expression due to their unique cultural and religious background. For example, among European states, France is the most secular republic, and, in matters of religion, its strong secular law protects individual freedom of expression in such a way that it takes priority over religion. This implies a marginalized role for the public importance of religious organizations, and as long as individual human rights are not affected, religion can be criticized or even caricatured as can be seen in the judicial case concerning Michel Houellebecq. Houellebecq is a famous best-selling author in France who made statements against Islam. In September 2001, he stated in an interview with the French magazine *Lire* that according to him, Islam is the most stupid religion in the world. Several Muslim associations prosecuted Houellebecq for this Islamophobic and offensive statement, but the French Court dismissed the indictment. The Court upheld that a negative opinion on Islam does not automatically boil down as an offense against Muslims. And even if members of a religious denomination are offended by a personal opinion about their religion, it does not constitute a crime. This and other judicial cases demonstrate that in France freedom of expression is conceived as an individual human right and doesn't take into account the different cultural communities it harbors.<sup>731</sup> On the contrary, France represents itself as a nation-state (egalitarian, unitarian, and universalist) in which assimilation is a prerequisite for equality. This nation-state is based on individualism: “those who have made a choice to become French citizens should assimilate, at least in their public behaviour, the

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<sup>728</sup> Ibid., para 25.

<sup>729</sup> Ibid., para 23.

<sup>730</sup> In this case, the European Court concurred with the domestic court of Austria, that seizure and forfeiture of the film *Das Liebeskonzil* (“Council in Heaven”) by the government served a legitimate aim. The film was regarded as blasphemous by the Roman Catholic Church. As Roman Catholic is the majority religion in Austria, the European Court also considered that by confiscating the film, “the authorities acted to ensure the religious peace in that region and to prevent people from feeling the object of the attacks on their religious beliefs in an unwarranted and offensive manner.” See: <https://globalfreedomofexpression.columbia.edu/cases/otto-preminger-institut-v-austria/>

<sup>731</sup> Alicino, *Freedom of Expression, Laïcité and Islam in France: The Tension between Two Different (Universal), Perspectives*, p. 58.



Republic's principles, which at the same time aim at reducing the distinctiveness of communities, and the cultural and religious expression of their participation in public life."<sup>732</sup> Here we see two features of a *thin* society: a high level of individualism and freedom of religion as a peripheral right.<sup>733</sup> The nature of a *thin* society presupposes a sort of minimalism in morality. Being individualistic, *thin* societies promotes being independent as long as no harm is done to others. Freedom, rights, and justice are important moral concepts. These moral concepts explain why conceptually, freedom of expression is generally less restricted than in thick societies. Thin societies emphasize rights primarily on the individual level and the state ought to protect individuals' ability to employ their rights.<sup>734</sup> As Kaplan rightly observes, Mill's vision reflects what a thin society is: "the individual is the basic social unit...society strongly emphasizes fairness and equality, and it gives maximum liberty to everyone to develop their talents and relationships as they see fit. It is based on a social contract designed for the mutual benefit of all individuals. Groups form and disband voluntarily and often quickly. Diversity and self-expression are not only valued but even favored at times, over preference for one's own group."<sup>735</sup> Again, Mill welcomes all opinions because these will lead to the best inside and in the end, the society as a whole will benefit. At the same time, the key feature of a contemporary liberal state is its neutrality towards the opinions of its citizens. In the US, the government cannot regulate the content of speech, although it can regulate the manner, place, and time of speech. For example, protesters can be allocated to a park for a rally, and the government can prohibit a noisy demonstration in the middle of the night. The reason that the government cannot ban unpopular or offensive speech is that it then imposes certain values on others and thus does not respect the ability of every citizen to choose and express his own opinion. The liberal conception, which resembles a thin society, is that free speech can only be restricted when it is likely to cause physical harm (for example, violence). Therefore, according to the American liberal view, hate speech cannot constitute harm in itself. Nor can it be argued that hate speech affects the dignity of a person. The dignity of a person is separate from any social role he or she inhabits but is rather connected to his or her capacity to choose roles for themselves. In other words, the dignity of a person cannot be damaged by an offense directed against a group of community with which he or she comes to identify. From a communitarian conception, the liberal conception of harm is probably too narrow. Some people understand themselves not simply as a social unit or as an individual but define themselves by the religious or ethnic group to which they belong. Consequently, an offense to the group they identify with can cause damage that is as real and as damaging as some physical damage. The Skokie case discussed in chapter 2, is an example of this. The planned neo-Nazi march was meant to arouse fears and memories of horrors of the concentration camps in Nazi Germany in Holocaust survivors. Communitarians, who resemble a thick society, define the right of freedom of speech according to the prevailing values and beliefs of the communities in question. Accordingly, restricting freedom of speech is justified when it breaches the prevailing values of a society.<sup>736</sup> Usually, Muslims, and especially those who are involved in political movements, claim even more explicitly that putting restrictions on freedom of expression, press, sexual practices, etc. is necessary, for otherwise their society and culture

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<sup>732</sup> Ibid, p. 54.

<sup>733</sup> Kaplan, *Human Rights in Thick and Thin Societies*, p. 192.

<sup>734</sup> Ibid., p. 69-71.

<sup>735</sup> Ibid., p. 71.

<sup>736</sup> Sandel, *Liberalism and the Limits of Justice*, p. xiv-v.

would disintegrate, and it would also undermine the self-respect that individuals derive from their religious and cultural membership. Public morality is like a seamless web, it represents the very stability and structure of society. Tolerating deviation in religious and sexual matters will lead to jeopardizing the very structure of society.<sup>737</sup>

### Negative or Positive Freedom? The Rushdie Affair

Although in liberal democracies freedom of expression is commonly regarded as a negative right, I have pointed out earlier<sup>738</sup> the opposite; it should be regarded as a positive freedom. Earlier, we saw that freedom of expression in Islam can also be framed as a positive freedom.<sup>739</sup> This is due to the important role freedom of expression plays in some principles and institutions in Islam and the objectives of freedom of expression in Islam: the promotion of social cohesion, the discovery of truth, and human dignity.

In some controversial cases, such as the Rushdie affair, it is not always clear how to approach such controversies in liberal democracies, especially when the distinction between the liberal and communitarian approaches is not entirely clear. However, in this section, I will point out that the Rushdie Affair should be viewed through the lense of positive freedom. In liberal democracies, most people believe that freedom of expression is a negative freedom, as a liberty against the state.<sup>740</sup> To be more precise, freedom of expression as a negative right protects the speaker and not the public, the audience, and hence, is a right on the individual level, protecting the individual from the interference of the state. But how far can this negative freedom go? Can someone under the pretext of freedom of expression (and regarding it a negative freedom) make expressions that are offensive or blasphemous? The Rushdie affair (1988) fits in to reflect on these questions. Before answering these questions, I would like to highlight that this case is further complicated in relation to the concepts of thin and thick societies. Rushdie's novel was published in England, which is a liberal democracy and can be qualified as a thin society. On the other hand, the British Muslim community, which was deeply offended by Rushdie's novel, can be construed as a thick community living in a thin society.

Briefly, Rushdie wrote a novel called *The Satanic Verses*. This novel provoked widespread protests from Muslims all around the world because it *inter alia* reviles the Prophet Muhammad, his wives, and the Qur'an. Muslim spokesmen in Britain levelled the following criticisms at this novel. First, the novel was altogether incorrect regarding Islam. It only spread lies about Islam and given the fact that the novel portrayed itself as historically accurate, Muslim leaders were willing to withdraw their campaign if the novel added a note rejecting its historical nature. Secondly, Muslim leaders took abjection to the tone Rushdie uses in his novel. Persons that are being held in high esteem among Muslims were treated in an abusive, insulting, and vilifying manner. Their religion was discussed in the most obscene and foul language, lacking all civilized norms. Thirdly, Muslims claimed they were degraded by the

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<sup>737</sup> Kymlicka, *Liberalism, Community, and Culture*, p. 168.

<sup>738</sup> Chapter 2, p. 29-32.

<sup>739</sup> Chapter 3, p. 49-50.

<sup>740</sup> Barendt, *Freedom of Speech*, p. 14; Schauer, Frederick, *Free Speech: A Philosophical Enquiry*, Cambridge: Cambridge University Press, 1982, p. 129.

novel, not only in their own eyes but also in the eyes of others. They were portrayed as barbarians, making them objects of ridicule, following a false religion.<sup>741</sup>

I want the focus on the third point of criticism: does the novel *The Satanic Verses* constitute group libel,<sup>742</sup> or is it an artistic piece of work that is fully protected under the right of freedom of expression? This is a difficult question to answer because, as Eric Barendt points out, this relates to the problematic application of the principle of freedom of expression as the law of libel. The reason for this difficulty is obvious: both the right to reputation and freedom of expression are well-established rights that might conflict. The right to reputation has a much longer history than freedom of expression. For centuries, reputation has been highly valued and protected, and to this day most countries still attach great importance to individual reputation. It reflects the highest value attributed to individual human dignity and is paramount in international human rights law: “both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights recognize the right to legal protection against attacks on individual honour and reputation, as well as against interference with privacy.”<sup>743</sup> How then, did the British court rule when British Muslims sought to ban the novel? The Queen's Bench Division of the High Court followed the lower courts and affirmed a denial of blasphemous libel and seditious libel charges, based on the fact that the common law violation of blasphemous libel only applied to assaults on the Christian religion.<sup>744</sup> Abdal Choudhury, a British Muslim, appealed to the European Court of Human Rights. Choudhury complained that British law fails to protect his religion from scorn as the offense of blasphemy does not cover Islam. He also complains that under Article 9 of the Convention, the United Kingdom has not protected the Islamic religion against abuse or scurrilous attacks, without that protection there will inevitably be limited enjoyment of the right to freedom of religion provided in that article. The European Court ruled that there was no direct interference in his freedom of religion by the British state. In the present case, therefore, the question is whether the freedom of Article 9 of the Convention can extend to guaranteeing a right to bring a specific form of legal action against those who, through authorship or publication, insult the sensitivities of an individual or a group of individuals. The Court found no indication in this case of a link between freedom from encroachment with the freedom of Article 9 and the complaints of Choudhury and therefore declared this application inadmissible.<sup>745</sup>

The verdicts of the High Court of the UK and the European Court indicate free speech as a negative freedom: the state cannot curtail Rushdie's free expression. Neither courts address whether Rushdie as a writer has a responsibility towards the sensibilities of Muslims, nor did they raise the issue of group libel. Apparently, *The Satanic Verses* was conceived as a critique of Islam, but it does not prevent Muslims from practising their religion. Thus, generally speaking, the above-mentioned verdicts are typical of liberal democracies: people are generally free to criticize others' religious beliefs, but what is (generally) not allowed is to deny people's rights to the expression and practice of their beliefs. In the latter case, their dignity as free and equal citizens is directly affected. Therefore, even if people feel offended

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<sup>741</sup> Parekh, *The Rushdie Affair: Research Agenda for Political Philosophy*, p. 307-8.

<sup>742</sup> I'm using here the term libel and not the term slander. Although both terms are forms of defamation, libel is a written defamatory statement, whereas slander is an oral defamatory statement, cf. Schauer, *Free Speech: A Philosophical Enquiry*, p. 168; <https://www.merriam-webster.com/words-at-play/slander-vs-libel>; <https://www.britannica.com/story/whats-the-difference-between-libel-and-slander>.

<sup>743</sup> Barendt, *Freedom of Speech*, p. 198.

<sup>744</sup> Chakravorty, Pinaki “The Rushdie Incident as Law-and-Literature Parable”, p. 2217, *Yale Law Journal*, Vol. 104, No. 8, (1995), pp. 2213-2247.

<sup>745</sup> Available at <http://echr.ketse.com/doc/17439.90-en-19910305/view/>

or insulted because of what they experience as deeply disturbing or unacceptable about how their religion is portrayed or subject to ridicule –as was the case in the Rushdie Affair–, as long as their fundamental individual right to express and practice their faith is respected, there is, within the legal framework of the liberal ‘thin’ society, no room for limitation of one’s freedom of expression.

Also, almost the entire community in Britain thought that the demands of Muslims to ban the novel involved unacceptable impediments to freedom of expression, and Rushdie reflected this opinion when he said:<sup>746</sup>

“How is freedom gained? It is taken: never given. To be free, you must first assume your right to freedom. In writing *The Satanic Verses*, I wrote from the assumption that I was, and am, a free man. What is freedom of expression? Without the freedom to offend, it ceases to exist. Without the freedom to challenge, even to satirise all orthodoxies, including religious orthodoxies, it ceases to exist. Language and the imagination cannot be imprisoned, or art dies, and with it, a little of what makes us human.”<sup>747</sup>

Like Bhikhu Parekh, I believe, that Rushdie’s remarks typically reflect the liberal discourse on freedom of expression: a negative freedom. Freedom of expression is an interpersonal act, an act between the speaker (or writer) and the audience. However, Rushdie reduces free speech to a personal and subjectivist act and subsequently “shifts the focus from a shared public realm to the individual’s right or need to express himself.”<sup>748</sup> His understanding of free speech boils down to the following: he is free to offend or satirize others, and others have an obligation to tolerate his insults. He doesn’t clarify why others should tolerate his offense and why it is an obligation for others not to interfere with his free expression. Rushdie’s approach regarding free speech is entirely from his standpoint: that of a writer. According to him, not only the interests of the writer are morally paramount, but he goes one step further: that what is good for the writer (or speaker) must be good for society as a whole.<sup>749</sup> This line of reasoning echoes to a certain extent John Stuart Mill as we saw earlier in this chapter. Mill too believes that all opinions, including the deviant ones, are welcome because this will lead to the discovery of truth and to the best insights from which the society as a whole will benefit. However, there is one important difference between Rushdie and Mill. Where Rushdie believes that without offending, free speech ceases to exist, thus ensuring offense as a prerequisite for free speech, Mill believes that needless insulting must be avoided as he states:

“In general, opinions contrary to those commonly received can only obtain a hearing by studied moderation of language, and the most cautious avoidance of unnecessary offence, from which they hardly ever deviate even in a slight degree without losing ground: while unmeasured vituperation employed on the side of the prevailing opinion really does deter people from professing contrary opinions, and from listening to those who profess them. For the interest, therefore, of truth and justice, it is far more important to restrain this employment of vituperative language than the other; and, for example, if it were necessary

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<sup>746</sup> Parekh, Bhikhu, “The Rushdie Affair: Research Agenda for Political Philosophy”, in Will Kymlicka (ed.), *The Rights of Minority Cultures*, Oxford: Oxford University Press, 1995, p. 316.

<sup>747</sup> ‘In Good Faith’, *Independent* (11 Feb. 1990), cited in: Parekh, *The Rushdie Affair: Research Agenda for Political Philosophy*, p. 316.

<sup>748</sup> Parekh, *The Rushdie Affair: Research Agenda for Political Philosophy*, p. 316.

<sup>749</sup> *Ibid.*

to choose, there would be much more need to discourage offensive attacks on infidelity than on religion. It is, however, obvious that law and authority have no business with restraining either, while opinion ought, in every instance, to determine its verdict by the circumstances of the individual case; condemning every one, on whichever side of the argument he places himself, in whose mode of advocacy either want of candour, or malignity, bigotry, or intolerance of feeling manifest themselves; but not inferring these vices from the side which a person takes, though it be the contrary side of the question to our own; and giving merited honour to every one, whatever opinion he may hold, who has calmness to see and honesty to state what his opponents and their opinions really are, exaggerating nothing to their discredit, keeping nothing back which tells, or can be supposed to tell, in their favour.”

Whereas Mill points out that needless insulting will not lead to the discovery of truth and justice, Rushdie believes that offense is a necessary condition of free speech. Rushdie’s approach to free speech is an almost absolute one, only the incitement to harm is a legitimate reason to restrict it. Mill approaches free speech as a positive freedom since the discovery of truth and justice are two objectives. However, there is another reason why I believe that Mill approaches free speech as a positive freedom. Mill emphasizes that free speech goes hand in hand with decent language, calling upon the responsibility of the speaker or writer. Again, as Berlin points out, according to the concept of positive freedom, a human is a rational, active, and willing being who bears responsibility for his or her choices. This is in contrast with Rushdie, who basically denies all kinds of responsibilities for writing *The Satanic Verses* and therefore renders free speech a negative freedom. Rushdie is not alone in this; many people believe that there are hardly any boundaries when it comes to artistic freedom. However, there are court cases where artists are convicted for the misuse of freedom of expression. For example, the French comedian Dieudonné M’Bala M’Bala has collected several convictions and paid € 65,000 to fines in his stage career for hate speech, mocking the Holocaust, and glorifying terrorism. Some of Dieudonné’s stage shows have even been banned for a while because of making jokes about the Holocaust. In one joke, he suggested that a certain “Jewish radio presenter reminded him of the gas chambers.”<sup>750</sup>

### *Is Apostasy involved?*

The Rushdie Affaire not only concerns the issue of offense, but also includes apostasy. Since Rushdie disparaged among others the Qur’an, Prophet Muhammad, and his wives, he became an apostate. In chapter four, we saw that apostasy and blasphemy are intertwined because if a Muslim commits an act of blasphemy -as in the case of Rushdie writing a blasphemous novel- he automatically becomes an apostate. The issue of apostasy is sensitive and controversial in the West. Although liberal democracies warrant religious freedom and the right to change or leave a religion, apostasy often causes outrage among Muslim minorities living in the West, as we can see in the case of Lale Gül. In February 2021, the Dutch-Turkish writer Lale Gül published an autobiographical novel and bestseller *Ik ga leven* (I’m going to live), in which she gives a shocking depiction about her childhood in Amsterdam. She discusses in detail among others her deeply conservative family, imams who denounce Dutch

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<sup>750</sup> Alicino, Freedom of Expression, *Laïcité and Islam in France: The Tension between Two Different (Universal) Perspectives*, p. 66.

society, oppression of girls and women, and a Turkish community that does not tolerate individual development, as a result, Gül is considered by some laymen as an apostate.<sup>751</sup> The publication of her novel led to great commotion, both among the Turkish Muslim community and within the Dutch society at large. Moreover, Gül received several threats, such that she had to be temporarily placed in a safe house. She also has no longer contact with her family.<sup>752</sup> Although the Rushdie Affair cannot directly be compared with the case of Lale Gül (Rushdie's novel is conceived as blasphemy, while the book of Gül is an autobiography in which she criticizes the Dutch-Turkish community), both cases have one thing in common. Like in the Rushdie Affair, there is a tension between how thin and thick communities respond to the situation. Gül received both acclaim and active support from members of the liberal society at large – a thin society –, whereas some members of the Dutch-Turkish Muslim community – a thick community – were outraged. I believe that Muslims living in a liberal democracy should respond in a responsible way in such a predicament. For example, Muslims could refute such content by writing books, articles, sending letters to newspapers, etc., offering rebuttals and presenting the right image of Islam, or even going to Court. However, resorting to violence or death threats is not only against the law, but is also counterproductive and self-defeating for Muslims and Islam. Perhaps the main reason why the novels of Rushdie and Gül became bestsellers is not only the mass demonstrations but the violent reactions and death threats that both writers received, which awoke people's interest in reading those novels. At the same time, as the ethical theories of consequentialism and virtue ethics point out, writers such as Rushdie bear responsibility. By writing a novel in which Islam and the Prophet Muhammad are depicted in an unflattering light as ignorant, deceitful, and sexually deviant, Rushdie could have known that his novel would lead to violence resulting in the killing of hundreds of people.<sup>753</sup> The cases *Otto-Preminger-Institut v. Austria* and *İ.A. v. Turkey* have revealed that gratuitously offensive speech can be restricted. This points out that freedom of expression is a positive freedom, which entails duties and responsibilities for the speaker.

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<sup>751</sup> <https://www.parool.nl/nederland/het-islamkritische-boek-van-lale-gul-houdt-de-gemoederen-flink-bezig~b1fe7ed6/?referrer=https%3A%2F%2Fnl.wikipedia.org%2F>, accessed September 12th, 2021.

<sup>752</sup> <https://www.villamedia.nl/artikel/lale-guel-sorry-maar-ik-kijk-echt-neer-op-recensenten/1398851894-b11789d5>, accessed September 12th, 2021.

<sup>753</sup> Cohen-Almagor, Raphael, *Taking Profound Offence Seriously: Freedom of Speech v. Human Dignity*, p. 7, in *Journal of Hate Studies*, 16(1), 1–11.

## Conclusion

This chapter has explored the similarities and differences between the boundaries of freedom of expression in Islam and liberal democracies. Although in liberal democracies freedom of expression is commonly regarded as a negative right, in which citizens are protected from censorship and intervention of the state, chapter 2 revealed that freedom of expression in liberal democracies is regarded as a positive freedom, given the usual justifications for it: discovery of truth, self-fulfillment, human progress, citizen participation in a democracy, and the much-needed control of the government. This is further underpinned in this chapter by two ethical theories: consequentialism and virtue ethics. According to the ethical theory of consequentialism, any act of freedom of speech eliciting negative consequences, such as discrimination, intolerance, affronting human dignity, or sowing the seeds of discord between ethnic groups, and other incongruous effects with constitutional values, can be restricted. This is fully in line with the reviewed court cases in chapter 2, which demonstrated that freedom of expression can be restricted when it undermines the core values of a liberal democracy. Also, the ethical theory of virtue ethics can set ethical boundaries on free speech. A virtuous person has the wisdom to employ free speech properly. If the right to express a sincere critique about an issue is a right, choosing the proper way to express it might be an obligation. From a virtue ethical perspective, inveighing, offending, or making disparaging comments, although legally permitted, will not persuade people, let alone make people more tolerant or thick-skinned. The publication of *The Satanic Verses*, the film *Submission* by Theo van Gogh, the Danish cartoons, and the Charlie Hebdo cartoon have revealed ample empirical evidence that offensive speech leads to more socio-political polarization.

Even though freedom of expression is sometimes considered the most important and precious human right, it is not unlimited and should always be balanced in relation to other human rights. Since there is no hierarchy of human rights and freedom of expression is only one among many, a court can decide that other rights may override free speech in specific circumstances. The European Court cases reviewed in this chapter reveal that freedom of expression on some occasions can be curtailed when it promotes intolerance or is unnecessarily offensive or profane to others. However, European countries themselves differ in setting boundaries of freedom of expression, as can be readily seen in several European Court cases. There is, for example, a strong difference in the verdicts of the European Court of Human rights when it comes to blasphemy. The European Court affords European countries a relatively wide margin of appreciation in setting boundaries on freedom of speech because of their respective religious and cultural backgrounds.

Most Muslim scholars classify human dignity and discovery of truth as the most important values in Islam. In a Muslim community, which claims coherence due to a certain religious identity, freedom of expression is usually restricted when it is considered harmful to the religious identity of the community or its collective goals. At the same time, there is no monolithic interpretation of Islam, Muslim scholars, and Muslim countries, and just like liberal countries, they differ on what kind of speech is (un-)acceptable.

Muslim societies can be qualified as 'thick' societies in which people are interdependent and in which religion plays a more important role in everyday life as compared to liberal societies, which are individualistic and more secular. Therefore, individual liberties, such as freedom of expression will generally be curtailed sooner in Muslim societies than in liberal societies, which is related to the differing ways in which public order is construed. In a thin society such as a liberal democracy, public order revolves mainly around respecting each other's

fundamental rights. In a Muslim (thick) society, public order depends largely on a shared belief with its associated moral concepts such as reputation, respect, sanctity, and purity. The moral and legal restraints on freedom of expression in Islam aim to protect the core values of a Muslim society, whereas the moral and legal restraints on freedom of expression within liberal democratic societies are justified by the protection of core liberal-democratic values. The differences between the boundaries of freedom of expression in liberal democracies and Muslim societies can thus be explained in relation to the basic values which are central to these societies. Both liberal democracies and Muslim societies hold certain basic values, such as dignity and discovery of truth, in high esteem, but the understanding of these values is substantially and conceptually different in both societies. For example, dignity in Islam has a different substantial meaning than in liberalism, as it is related to religion, which directly affects setting the boundaries of freedom of expression. At the same time, it is important to be aware of the formal similarity in the ways the boundaries of freedom of expression are set in these two types of societies. In both Muslim societies and liberal states, freedom of expression is a positive freedom, which entails responsibilities and duties from the actor. In both systems, the role of freedom of expression is to enhance society's well-being as a whole. Thus, any speech that seriously undermines the well-being of a Muslim or liberal society is eligible to be restricted.



## Summary and Conclusions

This chapter will focus on answering the main and sub-questions set out in the introduction and what lessons can be distilled from this study. As I will discuss in more detail in this chapter, there is corroborating evidence of freedom of expression in Islam, which counters the often-heard claim that there is no freedom of expression in Islam. Moreover, although freedom of expression within Islam is much more restricted than within liberal democracies, the boundaries of freedom of expression in Islam and liberal democracies have conceptually more in common than what would initially be expected.

Chapter 2 answers the first sub-question, i.e., "what are the boundaries of freedom of expression in liberal democracies?" Since freedom of expression is an aspect of individual freedom, I explored in chapter 2 what type of liberty freedom of expression falls under. Following Isaiah Berlin's two concepts of liberty, i.e., negative and positive freedom, I conclude that freedom of expression can best be conceived as a positive freedom, serving not only individual but also collective purposes, and not as an end in itself, existing for the sole benefit of the individuals who are able to use it (negative freedom). The main reason for this is that we value freedom not just to be left alone (negative freedom) but mainly to set and achieve goals in social life. In a similar vein, within liberal democracies, freedom of expression is valued for, among other things, the following reasons: discovery of truth, self-fulfilment, human progress, citizen participation in a democracy, right of opposition and control of the government. Acknowledging freedom of expression as a positive freedom entails individual responsibility for how it is used. Positive freedom is how people can achieve their goals and ideals and about the liberty to shape one's life. Since people have different interests, goals, ideas, and ideals, positive freedom is far more complex than negative freedom, and this also resonates in setting the boundaries of freedom of expression. American judges only restrict freedom of expression when there is proof of 'clear and present danger' as a consequence of certain utterances. Whereas the examined court cases in this chapter reveal that European judges are also inclined to curtail the freedom of speech when speech or other forms of expression incite or constitute not only violence, but also different types of discrimination, intolerance, offense, and hate speech, because such speech is deemed to be incongruous with the constitutional values underlying liberal democracy. Although freedom of expression is a fundamental individual right in a liberal democracy, its justifications and restrictions relate to a citizen's responsibility when using that right because a person should consider the social context when using its rights and is not allowed to (mis-) use them to undermine the fundamental values underlying liberal democracy.

To answer the question, "what is the corroborating evidence for freedom of expression in Islam?" I examined in chapter 3 the justifications for freedom of expression in Islam. Following the contemporary Muslim scholar Mohammed Hashim Kamali's pioneer work *Freedom of Expression in Islam*, freedom of expression has two objectives: upholding human dignity and discovering the truth. These two objectives point out that Kamali treats freedom of expression in Islam as positive liberty. Freedom of expression is an integral part of self-development, entailing that restricting the expression of an individual in any form - speech, writing, propagating - will have a negative impact on both his aspiration for personal growth and his dignity. The subject of freedom of expression is often in the news when it relates in one way or another to Islam. Examples are the Danish cartoons and the Paris *Charlie Hebdo* affairs. A typical response that follows is that there is no freedom of expression in Islam. As such, the Islamic and liberal perspectives are diametrically opposed to each other

when it comes to freedom of expression. This view is further bolstered by some Muslims who perceive freedom of expression as an exclusive liberal value and consider it a tool used to vehemently attack Islam and Muslims. Therefore, I discuss the corroborating evidence for freedom of expression in Islam as envisaged by Kamali. This evidence is based on functional mechanisms of the *Sharī'a*, namely *ḥisba* (supervision of moral behaviour, promoting good and forbidding evil), *ijtihād* (independent reasoning), *shūra* (mutual consultation), and *naṣīḥa* (sincere advice). In this chapter, I have demonstrated that these mechanisms and institutions of the *Sharī'a* cannot function without freedom of expression. I have then discussed the boundaries of freedom of expression in Islam to answer the question, "what are the boundaries of freedom of expression in Islam?" Following Kamali, I distinguish the restrictions of freedom of expression from moral and legal perspectives, which aim to protect the core values of a Muslim society. The reason for this distinction is that moral violations of freedom of expression are reprehensible but not punishable in Islam. On the other hand, some violations of freedom of expression in Islam, such as *Qadhf* (slandorous accusation) and *Iftirā'* (libel), are conceived as criminal offenses carrying specific penalties.

To answer the question "how do blasphemy and apostasy in Islam relate to freedom of expression?", I have pointed out that blasphemy is not only related to (profound) offense and thus to freedom of expression but also to apostasy. In chapter 4, I have argued for the separation of blasphemy from apostasy. Classical Muslim scholars have treated blasphemy under the subject matter of apostasy. I have argued that since apostasy does not necessarily involve any sacrilege or a hostile and contemptuous attack on the fundamentals of religion, blasphemy can be separated from apostasy. Furthermore, in the case of a Muslim committing offensive blasphemy, the perpetrator, if he/she meets other criteria, becomes a nonbeliever. In other words, a Muslim committing offensive blasphemy is committing two offenses in one act: blasphemy and apostasy. A non-Muslim committing blasphemy only commits the offense of profanity. Thus, it can be said that blasphemy involves apostasy, but apostasy may not involve blasphemy.

A highly disputed point among Muslim scholars is whether the blasphemer is allowed to repent sincerely. Muslim jurists differ on whether the blasphemer -both Muslim and non-Muslim- should be given the opportunity to repent. One of the reasons for this dispute is that the Prophet himself forgave some persons who had insulted him, while others were convicted. It is likely that those persons whom the Prophet forgave didn't pose a threat of the then-nascent Islamic state in Medina. Those who were convicted most likely did constitute a threat to the new community of Medina. Consequently, their actions were viewed as political offenses, including high treason.

Some Muslim scholars also deem apostasy a political crime, an act of high treason. Therefore, they concur with some reports of the Prophet Muhammad that an apostate merits capital punishment. However, there has never been a conclusive consensus on the death penalty for apostasy in Islam. For example, in the early period of Islam, some reputable figures objected to the death penalty for apostasy. Modern Muslim scholars who object to the death penalty for apostasy argue that it goes against the Quran, which upholds the principle of freedom of religion in more than two hundred verses; for example, stating that: "*There is no compulsion in religion*" (Quran, chapter 2, verse 256). Notwithstanding that apostasy is, according to the Qur'an, a grave offense, punishment does not follow in this life but in the afterlife.

It also seems that the Prophet never ordered the execution of anyone for apostasy alone. Apostates who were executed had committed heinous crimes against the Prophet, individuals, or the state. These offenses can be associated with high treason, taking up arms,

and joining a hostile group. Furthermore, nowadays, Islam is a well-established religion and is no longer threatened by apostasy cases. This is further underpinned by the fact that Islam is the fastest-growing religion worldwide. Therefore, apostasy in Islam should be regarded as a private matter in contemporary contexts, as in liberal democracies. Finally, in Muslim majority countries, the traditional punishment for apostasy is seldom officially applied. The observations of chapter 4 answer the question of "how do blasphemy and apostasy in Islam relate to each other, and what are the standpoints of Muslim scholars on these subjects?"

Chapter 5 has explored the differences and similarities between the boundaries of freedom of expression in liberal democracies and Islam, and answers the last question of this study: "Where do the boundaries of freedom of expression in Islam stand in relation to the limits of freedom of expression in liberal democracies?" In chapter 2, we saw that freedom of expression in liberal democracies is regarded as a positive freedom given the usual justifications for it. Two ethical theories, consequentialism, and virtue ethics, also underscore this and are expedient in setting boundaries of freedom of expression.

According to the ethical theory of consequentialism, any speech affronting human dignity, intolerance, discrimination, or sowing the seeds of discord between ethnic groups, leading to effects incompatible with constitutional values, could be curtailed. This is fully consistent with the lawsuits examined in Chapter 2, which confirms that freedom of speech can be restricted when it undermines the core values of a liberal democracy.

The same is true for virtue ethics. A virtuous person has the wisdom to utilize free speech properly. If expressing sincere criticism on an issue is a right, then choosing to exercise this right entails doing so could be an obligation. From a virtue-ethics perspective, taunts, insults, or derogatory remarks, although legally permissible, will not convince people, let alone make them more tolerant or thick-skinned. On the contrary, the publication of *The Satanic Verses*, the film *Submission* by Theo van Gogh, the Danish cartoons, and the Charlie Hebdo cartoon have provided solid practical evidence that offensive speech leads to increased socio-political polarisation.

The reviewed European Court cases in this chapter reveal that freedom of expression can be curtailed on occasions when it promotes intolerance or is unnecessarily profane or offensive to others. At the same time, there is no fixed dividing line regarding the boundaries of freedom of speech in Europe. Due to differences in their respective religious and cultural backgrounds, European countries are given a relatively wide margin of appreciation in setting boundaries on freedom of speech by the European Court. Blasphemy is an example of a significant margin of appreciation left to the states in the European Court of Human rights verdicts.

Similarly, Muslim majority countries also differ on what kind of speech is unacceptable. One of the main reasons being is that Muslim scholars hold different interpretations of relevant Islamic texts.

Most Muslim scholars classify the discovery of truth and human dignity as the most important values in Islam. Freedom of expression that affects these values is usually restricted. Also, freedom of expression that is considered harmful to the community's religious identity or collective goals is mostly restricted.

In this study, I also compare the boundaries of freedom of expression in the light of the nature of Muslim majority and liberal societies. Muslim societies can be qualified as 'thick' or social-oriented societies that hold religion as a significant consolidator of social cohesion and cultural harmony. Religion plays a more important role in everyday life in Muslim societies as

compared to liberal societies, which are more secular and individualistic. Liberal democracies are 'thin' societies, and their citizens are considered equal and independent. Therefore, individual freedoms, such as freedom of expression, are generally more likely to be restricted in Muslim societies than in liberal societies, which is linked to the different ways in which public order is understood. In a thin society, such as a liberal democracy, public order is mainly about respecting each other's fundamental rights. In a Muslim (thick) society, public order largely depends on a shared faith with the accompanying moral concepts such as respect, reputation, purity, and sanctity. The moral and legal restrictions on freedom of expression in liberal societies are justified by protecting core liberal democratic values, whereas in Muslim societies, legal restraints on the freedom of expression are intended to protect its core cultural-religious traditional values.

Therefore, the differences between the boundaries of freedom of expression in Muslim and liberal societies can be explained in relation to the fundamental values central to these societies. Both Muslim societies and liberal democracies hold certain basic values, such as the discovery of truth and dignity, in high esteem, but understanding these values is conceptually and substantially different in both societies. For example, dignity in Islam has a different substantive meaning than in liberalism, as it is related to religion, which has a direct bearing on defining the limits of freedom of expression.

At the same time, the conceptual differences of the functioning and boundaries of freedom of expression in Islam and liberalism should not be overstated. As previously mentioned, there is a false impression that there is no freedom of expression at all in Islam, and that it would be unlimited in liberal democracies. In liberal states, freedom of expression is sometimes perceived as the most important and precious human right. However, the examined court cases in this study have demonstrated that freedom of expression is not unlimited and should always be balanced with other human rights. There is no hierarchy of human rights, and when freedom of expression collides with other human rights, a court can decide that other rights may override the freedom of free speech in specific circumstances. Furthermore, in both Islam and liberal democracies, freedom of expression is a positive freedom that requires responsible use. In both Muslim and liberal societies, the role of freedom of expression is to contribute, not only to the individual's well-being and self-development, but also to the development and flourishing of society's core values.

When comparing freedom of expression in Islam and liberal democracies, it can be concluded that the ideas about it that are rampant in both Muslim majority countries and liberal states are biased and unfounded. It has been demonstrated in this study that the notion that there is no such thing as freedom of expression in Islam is untrue. Similarly, it disputes the notion that freedom of expression has no boundaries in liberal democracies and that people can say whatever they want. Thus, the differences regarding freedom of expression in Islam and liberal democracies are merely a question of degree and certainly not cut-and-dry. Both Islam and liberal democracies set boundaries for freedom of expression, implying similarities, and possibilities to close the seemingly unbridgeable gulf between them, which can be a basis for peaceful coexistence in both liberal and Muslim majority states. I believe that Western Muslims can play a crucial role in the discourse of freedom of expression, due to their unique position, they have several means to address this issue. They can achieve this by using democratic means, such as the media (e.g., writing an opinion piece in a newspaper), engaging in political activism, or even going to court.

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