

FREEDOM OF EXPRESSION AND ITS RESTRICTION IN ISLAMIC AND WESTERN PHILOSOPHY: AN ANALYSIS OF DIRECT AND INDIRECT HARM

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Abstract

From last two decades, we have seen a rise in tension between Muslim and Western countries in terms of conflict between freedom of expression and religious tolerance. The compatibility of the right to freedom of expression in *Shari'ah* or Islamic law with International Human Rights Law has always been challenged. This article intends to unpack the differences between protected expressions from prohibited expression in Islamic law. It further explores how the perspective of Islamic law differs from Western liberal philosophers. This article concludes that both Islamic law and Western liberal philosophy value free expression. However, both differ in an important way. Under Islamic law, freedom of expression is not absolute and, reasonable moral and legal restrictions may be imposed for religious tolerance. On the other hand, Western liberal philosophy focuses on absolute protection of freedom of expression and allows restrictions only in exceptional situations on the ground of "physical harm". Finally, this article argues that the right to freedom of expression must be protected to the extent that one's ideas and feelings with one's own choice are not endangering the peace and tranquillity of the whole community. This article suggests that United Nations need to consider not only physical harm, but moral and spiritual harm caused by free expression while restricting freedom of expression. Such right to freedom of expression must maintain the richness of diversity and should not be harmful for the rights of others.

Keywords: Freedom of expression, Islamic law, Religious belief, Morality, Western liberal philosophy

1. Introduction

The right to freedom of expression in recent years has gained more attention due to the rapid growth of Information Communication Technologies (ICTs) and counter-terrorism laws and policies. However, the importance of the right to freedom of expression for the proper functioning of a democratic society cannot be well understood without knowing its origin and how this vital freedom was born or linked with international and Pakistani domestic law. Pakistan is an Islamic democratic state, and the *Constitution of Pakistan* states that all laws applicable in the country must be consistent with Islamic law,¹ and all laws, domestic or international, shall be enacted only if not repugnant to Islamic injunctions.²

This article discusses the relationship of the rule of law with the freedom of expression from Islamic legal perspectives, and how the Western liberal philosophers differ from this perspective. It concentrates on challenges and perspectives on Islamic law and the freedom of expression in practice. For this purpose, it provides a comparative analysis of the historical, theoretical, and philosophical basis for the protection of freedom of expression under the Islamic law and Western liberal philosophy. It identifies that freedom of expression encompasses different terms that are interchangeable with or synonymous to freedom of expression. It notes that freedom of expression is protected in Islamic law and Western liberal philosophy; however, Islamic and Western perspectives on protected expression differ importantly based on morality.

This article argues that Islamic law protects right to express one's ideas and feelings with one's own choice as long as it is in peace and tranquillity, maintains the richness of diversity and is not harmful for the rights of others. Western philosophers, on the other hand, go beyond that and even allow untruths, and shocking and offensive expression. However, the 'imminent harm' is given much importance in both perspectives and is considered an essential requirement for legal restrictions on the freedom of expression. Based on the harm principle, this article argues that the restrictions on expression based on terrorism are legitimate in both Islamic and Western perspectives.

2. Freedom of Expression as a Divine Right in Islamic Law

The right to freedom of expression is not new and has deep ancient roots.³ Existing literature indicates that it was not limited to one region or religion; instead, this right was granted to all human beings by birth. Many philosophers claimed that freedom of expression was not only crucial to the political ideas of Aristotle,⁴ but was also given high value in early Islamic history,⁵ especially in the *madāris* (Islamic schools) of the ninth century where everyone's expression was welcomed and protected.⁶ However, the roots of freedom of expression in Islamic history can be traced back from the advent of Islam, 1441 years ago, as this right in Islam is not given under any struggle or historical incident, but is granted by Allah Almighty (God) to humans by birth.

The primary source that confirms right to freedom of expression is a divine right given by Allah Almighty is *The Holy Qur'ān* itself. Allah Almighty endorsed in *The Holy Qur'ān* that “*there shall be no compulsion in Faith. The correct way has become distinct from the erroneous*”.⁷ *The Holy Qur'ān* suggest that Allah Almighty gives people the choice in choosing the right or the false path and also clearly mention that the right path is to believe in Allah Almighty and rejecting Satan.⁸ In another verse Allah Almighty orders the Prophet *Ḥaḍrat Muhammad Rasūlullah Khātam un Nabiyyīn Ṣallallahu ‘alaihi wa ‘alā Ālihi wa Aṣḥābihi wa Ṣallam* that “*The truth is from your Lord. Now, whoever so wills may believe and whoever so wills may deny.*”⁹ All these verses clearly show that there is no compulsion in Islam and everyone has a freedom of speech, believe and religion. This can be endorsed from *Qur'ān* that “*had your Lord willed, all those on earth would have believed altogether. Would you, then, compel people, so that they become believers?*”.¹⁰ Islam has given people a right to choose with their free will, and not by compulsion as mentioned in this chapter of *The Holy Qur'ān*.

*In the name of God, the merciful, the compassionate, say. O disbelievers, I do not worship that which you worship, nor do you worship the One whom I worship. And neither I am going to worship that which you have worshipped, nor will you worship the One whom I worship. For you is your faith, and for me, my faith.*¹¹

The other source that confirms the right to freedom of expression is the saying and action of the Prophet *Ḥaḍrat Muhammad Rasūlullah Khātām un Nabīyyīn Ṣallallahu ‘alaihi wa ‘alā ‘Ālihi wa Aṣḥābihi wa Ṣallam*. An event is described in hadith literature (narrated by ‘Ā’isha (Raḍi Allah ‘anhā) where; a group of Jews came to Allah Almighty's Messenger (Ṣal Allah-u-‘alaihe wa sallam) and said, "As-sāmu 'Alaika " (Death be on you), and I [‘Ā’isha] understood it and said to them, "Alaikum As-samu wa-l-la‘nah (Death and curse be on you)." Allah Almighty's Apostle (Ṣal Allah-u-‘alaihe wa sallam) said, "Be calm! O ‘Aisha, for Allah Almighty loves that one should be kind and lenient in all matters." I said. "O Allah Almighty's Messenger (Ṣal Allah-u-‘alaihe wa sallam)! Haven't you heard what they have said?" Allah Almighty's Messenger (Ṣal Allah-u-‘alaihe wa sallam) said, "I have (already) said (to them), 'Alaikum (upon you)’"¹². This hadith highlights two aspects, one Prophet Muhammad (Ṣal Allah-u-‘alaihe wa sallam) had not restricted their [Jews] expression and second, he advocated for tolerance and gentleness. Islam teaches us tolerance and religious harmony¹³ as it is a religion of peace and catalyses universal harmony.¹⁴ On another occasion, Prophet *Ḥaḍrat Muhammad Rasūlullah Khātām un Nabīyyīn Ṣallallahu ‘alaihi wa ‘alā ‘Ālihi wa Aṣḥābihi wa Ṣallam* emphasized that “the wise statement is the lost property of the believer, so wherever he finds it, then he is more worthy of it”¹⁵. It is argued by Muslim scholars that this hadith enables a believer to accept the truth and declare the same wherever he discovers it.¹⁶ Islamic scholars have debated this on many occasions that freedom of expression is granted to human beings by Allah Almighty without any struggle, but it is not absolute.¹⁷ However, there is disagreement on the limitations of the freedom of expression which are discussed below.

2.1. Islamic Restrictions on the Right to Freedom of Expression

The Islamic scholars also explained in their writings¹⁸ that freedom of expression is not absolute in Islam and it may be restricted where the rights of others are attached such as when speech is offensive, untruthful and hurtful.¹⁹ Islam restricts not only illegal expression but also immoral expression. Legal restrictions such as blasphemy, sedition, libel, and insult require enforcement by government authorities. Beside these punishable offences, there are some other restrictions that the *Shari‘ah* allows based on morality. Under Islamic law, moral violations of freedom of expression also includes “a variety of reprehensible utterances such as

telling lies, backbiting, ridiculing others and calling them by offensive names”.²⁰

There is a wealth of instructions on all these topics in *The Holy Qur’ān* and *Sunnah* as well as in the writings of Islamic scholars, mostly in Arabic language. However, all these violations have not been translated into practical rules of Islamic law.²¹ The governments may, when required, convert these moral teachings of Islam into legal ordinances if they deem this to be in the interests of the community and for the protection against evil. However, codification is not compulsory when not needed in society. On the other hand, legal restrictions are important to safeguard the interest of the community and to avoid harm and encroachment on others’ rights or dignity. According to Kamali, under Islamic law, legal restriction must not jeopardise the five essential values i.e. life, faith, intellect, lineage, and property. Under Islamic law, violations of the freedom of expression occur either in the form of particular offences such as slanderous accusation, blasphemy, sedition, insult, cursing, attribution of lies or calumny and the labelling of others as disbelievers or they may take form of a contempt for, or a denial of, the accepted norms and principles of Islam, which may fall under the general headings of infidelity or disbelief and heresy.²²

There are a number of Quranic verses that offer guidelines on the restrictions that may be imposed on freedom of speech. For instance, *The Holy Qur’ān* clearly says, “... and what is there after truth but error?”.²³ In another verse, *The Holy Qur’ān* says,

“Allah Almighty does not like the evil words to be said openly except from anyone wronged.....if you do a good act openly or do it in secret, or forgive an evil deed, then, Allah Almighty is All Forgiving, All Powerful.”²⁴

This verse restricts unseemly or evil expression and Muslim scholars interpreted that an expression is evil or unseemly “when it is obscene, immoral or hurtful” and argued that such expression restricts and interferes with the discovery of truth and thus violates human dignity.²⁵ The Arabic term *Al jahr* is used for public utterance which literally means broadcasting or publicising evil or something hurtful. This explicitly provides that the text is broad enough to comprehend all modern methods and facilities which are used for publicity.²⁶ However, the only exception that *The Holy Qur’ān* has granted aims at encouraging the quest for justice, which is given priority over the prevention of evil speech and in

this way, utterance of evil speech is allowed only in limited necessary circumstances.

Islam prohibits *qadhf* – slanderous accusation - and prescribes a mandatory punishment of eighty lashes that is known as *ḥadd* punishment.²⁷ Similarly, *The Holy Qur'ān* in many verses prohibits *iftira* - maliciously accusing another person of criminal acts, or inventing something false about an individual.²⁸ Islam also prohibits words or expression or gesture which attacks the dignity of the person to whom it is addressed, and which humiliates the later in the eyes of his or her compatriots.²⁹ It is referred to an insult, and Arabic term *sabb* or *shatm* is used to explain such prohibited expression.³⁰ This is mentioned in many Quranic verses such as “Do not revile those whom they invoke other than Allah Almighty, lest they should revile Allah Almighty in transgression without having knowledge”.³¹ Commentators on *The Holy Qur'ān* have concluded that this verse which specifies the prohibition of *sabb* is actually concerned with insult to non-Muslims but this does not mean insulting a Muslim is not an offence rather the focus is on the rights of minorities in Muslim states. *The Holy Qur'ān* instructs Muslims that “invitation to the faith must be through persuasion and sound reasoning and must at no time be allowed to involve insult and abuse”.³² Islam prohibits all forms of transgression against others in Chapter II of *The Holy Qur'ān*³³ and insult is clearly a form of transgression. Islamic law also prohibits cursing. Arabic term *la 'n* used in the Qur'ānic text³⁴ means “expression of disapproval or displeasure and an invocation of malediction upon the object of the curse”.³⁵

Islamic law “forbids the attribution of disbelief, blasphemy, or heresy to a Muslim”.³⁶ The practice is the opposite, nowadays, in Muslim states. For instance, in Pakistan, some clerics are issuing *fatwās* for disbelief, blasphemy or heresy based on just one statement or a Facebook post. Such practice contradicts with the Islamic teachings as Islam clearly prohibits declaring a Muslim a disbeliever or an apostate or blasphemous based on probability. *The Holy Qur'ān* clearly says, “do not say to the one who offers you the *Salām* (salutation), you are not a believer.”³⁷ One thing is evident from this verse that if just the utterance of the phrase *al salam* provides enough “evidence to establish a presumption in favour of a person being a believer, then it is obvious that *The Holy Qur'ān* does not permit inquisitions of any kind to establish the Islamic status or faith of individuals”.³⁸ According to Shariah, if the utterance in question consists ninety-nine per cent of disbelief (*kufr*) but one per cent of belief

(*īmān*), it would still not amount to *kufr* (disbelief). This is a sensitive issue as the Prophet (*Ṣal Allah-u- 'alaihe wa sallam*) said:

*“He who accuses a man of disbelief or calls him an enemy of Allah, neither of which he is, then the accusation rebounds on him”.*³⁹

The commentators of *The Holy Qur'ān* and the Hadith conclude that “no one may accuse another of blasphemy, apostasy, disbelief and transgression without manifest evidence and if one does so partake of the accusation himself”. They further argued that a person - who suspects disbelief, heresy, blasphemy or apostasy is being committed - may do at maximum, is to give him good advice in the true spirit of the Quranic principle of *ḥisbah*. He, who witnesses such incidence, would have “fulfilled his duty if he provided the necessary evidence to establish the truth, and then left the matter in the hands of the authorities” and “no one may be subjected to adversity and harm based on the mere suspicion or allegation of disbelief, blasphemy or apostasy without the necessary proof and adjudication of competent authorities”.⁴⁰

The Holy Qur'ān has also prohibited *fitnah* – sedition. In *The Holy Qur'ān*, the term *fitnah* appears at no less than sixty places. It has various meanings including “temptation, trial, misguidance, enticement, fascination, commotion, sedition, affliction, torture and strife”.⁴¹ In *The Holy Qur'ān*, it is referred mostly in the sense of temptation or enticement and trial.⁴² This clarifies that freedom of expression does not allow subjugating the faithful to corrupt influences which violate the principles of Islam. The verses explaining *fitnah* allow prohibiting offensive speech and conduct that challenges to the lawful authority of government, and the calamity that afflicts the community in the form of rampant corruption.⁴³ Sedition may include offences related to incitement to terrorism. However, Islamic law requires a high standard for the application of the law. Charges based on slander, insult or sedition are made only when a deviation from the correct norms exceeds the limits of propriety and justified tolerance. Punitive measures may be the last resort and only taken when compelling warranted to prevent sacrilege and serious threats to peace and order in society. Islamic law has greatly emphasized in *The Holy Qur'ān* and *Sunnah* on moral persuasion, good advice, appeal to the good, conscience of individuals, repentance and forgiveness.⁴⁴ Thus, in this way Islam advocates essential aspects of the social fraternity.⁴⁵

The *Universal Islamic Declaration of Human Rights (UIDHR) 1981* has reaffirmed this in art 12(a) and (e) which stipulates that:

*(a) Every person has the right to express his thoughts and beliefs so long as he remains within the limits prescribed by the Law. No one, however, is entitled to disseminate falsehood or to circulate reports which may outrage public decency, or to indulge in slander, innuendo or to cast defamatory aspersions on other persons..... e) No one shall hold in contempt or ridicule the religious beliefs of others or incite public hostility against them; respect for the religious feelings of others is obligatory on all Muslims.*⁴⁶

It further provides in art 12(d) that

*“There shall be no bar on the dissemination of information provided it does not endanger the security of the society or the state and is confined within the limits imposed by the Law.”*⁴⁷

Based on the primary sources of Islamic law – *The Holy Qur’ān* and *Sunnah* - and the UIDHR, this article maintains that the right to freedom of expression is “not absolute” and may be restricted when an expression is not true, defames others, hurts general public, insults and ridicules the religious beliefs and religious feelings of others. Inciting public hostility against others is prohibited and may be criminalised under Islamic law. In this view, Islamic law allows restrictions that cause harm based on law or morality. This clearly provides that if any expression falls within the definition of the abovementioned prohibited acts and has a clear intention to cause harm to others, it will fall within the ambit of prohibited expression. This shows that Islamic law provides guidelines to preserve the human dignity and to safeguard individual rights by prohibiting “public utterance of hateful speech, slanderous accusation, libel, insult cursing, and attribution of disbelief to a Muslim, sedition and blasphemy”.⁴⁸ It also discourages “telling lies, backbiting, ridiculing others and calling them by offensive names”.⁴⁹

3. Freedom of Expression in Western Liberal Philosophy

3.1 Historical Struggle for Freedom of Expression

The history of Western freedom of speech and expression can be traced back to 399 BC where Socrates' expression received recognition. In 399 BC, Socrates spoke in front of the jury during his trial for his freedom of expression and stressed that 'If you offered to let me off this time on the condition, I am not any longer to speak my mind... I should say to you, Men of Athens, I shall obey the Gods rather than you'.⁵⁰ This history is subjectively selected and incomprehensive, as many scholars have agreed that freedom of speech that inheres freedom of expression is a natural right. This right, however, evolved over time.

Magna Carta (1215) is another milestone in the history of freedom of expression where liberty was granted by King John, unwillingly, to empower barons their right to free speech and expression.⁵¹ Milton's *Areopagitica* is another work where arguments against restrictions on freedom of the press were made through a pamphlet.⁵² He argued that 'he who destroys a good book, kills reason itself'.⁵³ His arguments were cited by many to defend absolute freedom of expression. In 1792, Paine supported freedom of speech and expression and argued that 'In a free state, tongues too should be free'.⁵⁴ He further opined that 'the unrestrained communication of thoughts and opinions as one of the most precious rights of man'.⁵⁵ As a result of this historical struggle, two significant milestones were achieved: first, through the French Revolution, where freedom of expression was recognised as a right in the *Declaration of the Rights of Man* in 1789; and second, through the first amendment in the U.S. *Bill of Rights* which protected freedom of religion, speech, press and the right to assembly.⁵⁶

The modern concept of freedom of expression is a result of great struggle and dialogue within Western civilisation.⁵⁷ Many earlier philosophers — like John Stuart Mill (Mill), Alexander Meiklejohn (Meiklejohn) and Thomas Scanlon (Scanlon) — have discussed the importance of protecting free speech and freedom of thought and expression in their theories. These are examined below.

Mill and Meiklejohn are considered the pioneers of the modern concept of free speech. Mill, in his work *On Liberty*, argues for toleration and individuality.⁵⁸ He explained that 'the appropriate region of human liberty...comprises, first, the inward domain of consciousness, demanding liberty of conscience in the most comprehensive sense, liberty of thought and feeling, absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological'.⁵⁹ Mill distinguished freedom of thought from freedom of expression and stated

that freedom of thought is self-regarding, although freedom of expression clearly has consequences for other people. In this case, freedom of expression is restricted by society when it harms others.⁶⁰

3.2. Justifications for the protection of Freedom of Expression Under Western Liberal Philosophy

The protection of freedom of expression is advocated by many classical liberal philosophers for several centuries and, as a result, it has added, very late as compared to Islamic law, to many major political documents designed to protect the right.⁶¹ As international law is more closely related to Western liberal values, it is important to see what basis early liberal philosophers have provided for the protection of freedom of expression. Mill, Meiklejohn and Scanlon have discussed why freedom of expression should be protected. According to these liberal philosophers, there are many clear justifications for protecting freedom of expression but three general justifications advancing the meaning of expression are referred to in most of the literature. These include discovery/search for truth, for individual liberty, and for the operation of democracy. These three justifications are discussed below to justify the argument for the protection of freedom of speech/expression.

3.2.1. Discovery/Search for Truth

The first justification for freedom of expression is that it helps to discover the truth. This is classically associated with Mill who supports the other two justifications as well. In *On Liberty*, Mill expanded free speech 'as a tool for the discovery of truth' as an ultimate goal of society.⁶² He believed that for the search of the truth, free speech is essential, as knowledge processes through a forum of open debate that helps ideas to flow freely and allows others to challenge and scrutinise those ideas.⁶³ Contrary to this, censorship hinders the discovery of truth and 'undermines the conditions necessary for us to gain a better understanding of the truth'.⁶⁴

Mill made his claims of discovery of truth based on censorship and stressed that it is imposed to suppress false or immoral opinion. He claimed that 'censored opinion might be true; even if literally false, a censored opinion might contain part of the truth; even if wholly false, a censored opinion would prevent true opinions from becoming dogma; and as a dogma, an unchallenged opinion will lose its meaning'.⁶⁵ He

classified the significance of free expression for analysing society's most prominent 'opinions in relation to the liberty of thought and discussion'.⁶⁶ Freedom of expression seems instrumentally valuable in his first two claims, as it is not only valuable in itself but as a true belief as well. True belief could only be promoted when we believe in everything, and that includes false belief too.⁶⁷

3.2.2. Liberty of an Individual

The second justification for free speech rests on the self-fulfilment and individuality. This could be depicted as '... the matrix, the indispensable condition of nearly every other form of freedom'.⁶⁸ This is a freedom that has been supported for centuries by passionate statements such as Milton's: 'I do not believe a word that you say, but I will defend with my life your right to say it'.⁶⁹ Also, modern scholars such as Eric Barendt, consider it a 'vital aspect of an individual's liberty to grow and achieve fulfillment'.⁷⁰ Barendt further argues that free speech, as fulfilment of individual liberty, is a valid justification for constitutional protection.⁷¹

Mill, in his work *On Liberty*, provides a classic defence of freedom of expression and other liberties against governmental interferences.⁷² He has given a general theory of individual freedom/liberty⁷³ where he argues that 'the free development of individuality is one of the leading essentials of well-being and that the evil is, that individual spontaneity if hardly recognised by the common modes of thinking, as having any intrinsic worth...'.⁷⁴ He further argues that a restriction could only be imposed on someone's individual liberty if it satisfies the harm principle.⁷⁵

Scanlon, who presented 'Millian Principle', believed that 'the powers of a state are limited to those citizens that could recognise while still regarding themselves as equal, autonomous, rational agents'.⁷⁶ Scanlon is of the view that individuals should have been given a chance to select from ideas placed before them by others, and that the government may not restrict speech or expression unless it causes 'physical harm'.⁷⁷ Berendt⁷⁸ is of the view that Scanlon's theory is similar to Mill's in that it allows for the marketplace of ideas; however, it differs as Mill allows the state to restrict such freedom when it causes harm to others.⁷⁹ According to the views of Scanlon, people may be given a chance to have all kinds of expression until such expression causes 'physical harm'.⁸⁰

3.2.3. For Operation of Democracy

The last justification that freedom of expression as an indispensable condition for the operation of democracy has a great relationship with the free flow of information. The citizens use the gained information in exercising their democratic powers and that allows them to maintain accountability of their elected leaders.⁸¹ This view has been greatly endorsed by the American judiciary⁸² and several philosophers⁸³, most notably Meiklejohn. He is considered the foremost philosopher of free expression after Mill,⁸⁴ as his theory of free expression has a 'distinctly communitarian cast'.⁸⁵ Under his theory of free expression, he opined self-government based on the First Amendment⁸⁶ and recognised and celebrated the undeniable connection between a functioning democracy and freedom of expression.⁸⁷ He is of the view that free speech or expression is essential for democracy as it allows citizens to use their powers against the democratic government to maintain accountability over elected officials.⁸⁸

Meiklejohn's theory is optimistic and pragmatic as it suggests that meaningful self-government is possible and also acknowledges that achieving and maintaining a participatory democracy will not be an easy task.⁸⁹ He further provides a cogent rationale for protecting speech unrelated to politics or self-governance.⁹⁰ Speech, such as artistic and scientific speech or expression, allows people to make wise political decisions and, therefore, must be protected.⁹¹ This means that Meiklejohn's theory of free speech or expression mainly accommodates a communitarian social ethic as he protects not only individual interests in self-expression but also the community's interest in overseeing the government.⁹² According to him, freedom of speech or expression is also essential for self-government to survive, as 'the voters must acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express'.⁹³ In this way, he advocates a broader scope for freedom of speech⁹⁴ where he opined that when all opinions are heard, the result will be beneficial for civil society⁹⁵ but he stressed that, along with the freedom to express, citizens' deliberation matters to protect political speech.⁹⁶

For Meiklejohn, speech is important as it allows for democratic self-government; however, Scanlon, another famous philosopher of free speech or expression, opined that it promotes autonomy.⁹⁷ He recognised speech as 'the right to receive information'.⁹⁸ Meiklejohn also believed

that the right to access relevant information could assist democratic citizens to make informed decisions.⁹⁹ Frederick Schauer adopted a similar approach to Meiklejohn where he believed that ‘free speech makes the relevant information available to the electorate for use in the decisions making processes.’¹⁰⁰ Schauer’s notion of access to information shares some of the qualities of Mill’s truth-seeking model where he believed that access to information is essential for seeking truth and every type of information, true or false, should pass.¹⁰¹

Scanlon differs from Meiklejohn on distinguishing freedom of expression from other freedoms as he does not resort to the American *Constitution*. His effort to make speech distinct from other freedoms separates him from Mill as well. His theory relies only on consequentialist arguments, while Mill’s theory aims at individual freedom.

3.3. Restrictions on Freedom of Expression in Western Liberal Philosophy

As explained above, protection of freedom of expression is not only essential for the discovery of truth but also important for the liberty of the individual and for the operation of a democratic society. According to earlier philosophers, freedom of expression is not absolute and may be restricted in certain circumstances. Restrictions on freedom of expression raised few questions why certain types of expressions are unprotected or can be restricted by law? Why are all kinds of expressions not protected? Why do governments need to interfere with freedom of expression?

The restrictions on freedom of expression are applied ‘because their minimal value towards advancing these free speech goals is outweighed by the significant harm they cause’.¹⁰² Therefore, to determine whether the expression is protected or unprotected, the courts need to weigh how much the type of speech or expression contributes to free expression values against the harm the expression causes. If the type of expression contributes great harm as compared to the underlying purposes or values than such expression cannot be protected under free speech principles. However, the sticking point comes in trying to define what constitutes as harmful.

3.3.1 Direct Harm and Earlier Liberal Philosophers

According to Mill, the harm principle holds ‘that the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others’.¹⁰³ Though the harm principle holds a central place in liberal philosophers’ theories of criminal law and liberal political theory. Like Mill, modern American liberal philosophers, such as Joe Feinberg, also argue that ‘harm and offences to others exhaust the relevant reasons for state coercion by means of the criminal law’.¹⁰⁴ The harm principle allows governments to interfere with and limit liberties as necessary to prevent harm. Does the freedom of expression present an exception to the harm principle? The answer is in affirmative if we see the protections of freedom of expression provided under the First Amendment and the views of American scholars.¹⁰⁵

For Mill, the protections of freedom of expression are a means to protect thought, whereas the opinions lose protection if they cross over from thought into action. This may be because of ‘societal harm’ which includes a perception of government’s obligation to protect persons from the harm caused by others and for the sake of common good.¹⁰⁶ Now if the government wants to prohibit expression that may praise or glorify terrorism than such restrictions would have to be subjected to strict scrutiny.

Mill presented principles of individual liberty and argued that restrictions might provide a wide range of defences of individual liberty against government interference.¹⁰⁷ He suggested the ‘principle of harm’ that states need to apply before restricting freedom of expression.¹⁰⁸ However, what exactly counted as the ‘principle of harm’ in Mill’s view is complicated and needs clarification. For him, ‘in order to satisfy the harm principle, an action must actually violate or threaten imminent violation of those important interests of others in which they have a right’.¹⁰⁹ According to Mill’s concept of harm, it must be (1) direct, (2) imminent, and (3) tangible. For him, inciting violence is harmful, and one should not be allowed under the right to freedom of expression as it physically hurts and injures.¹¹⁰

He clearly justifies the ‘principle of harm’ for imposing a restriction on freedom of expression and opined that such restrictions are not problematic in laws dealing with killing, rape and assault etc.¹¹¹ In criminal cases, if someone punches a victim and that action causes pain or injury, it brings direct harm. The harm caused in criminal cases is evident and easy to prove. However, in incitement to and glorification of

terrorism, it is hard to establish an evidentiary link between speech and subsequent harm caused by that speech¹¹² because of the following factors. Firstly, the concept of harm depends on social and cultural definitions. Secondly, you cannot define incitement to terrorism without first defining or explaining terrorism precisely and we know that there is no agreed definition of terrorism. Thirdly, we cannot justify classifying something as harm unless we carry out an empirical study of the actual consequences.

According to Mill, restrictions may be social, legal or criminal. His free speech arguments are more likely to 'minimize governmental and social control over individuals'.¹¹³ This means that the right to freedom of expression cannot be restricted if there is not sufficient evidence that freedom of expression could have resulted in a harmful action.¹¹⁴ However, the expression that glorifies terrorism may be handled other than criminal law such as the U.S. has taken steps, other than criminalisation, to restrict expression that radicalises or extremist or radical expression.

Contrary to this, Scanlon opined that sometimes harm cannot justify restrictions on freedom of expression. He opined that '(a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; (b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing'.¹¹⁵

Scanlon is of the view that permissible justifications for legal restrictions on freedom of expression are only allowed when:

- (1) Free expression causes direct physical harm;
- (2) An expression creates 'harmful or unpleasant states of mind';
- (3) Expression provides bases for others to have an 'adverse opinion, or defamation, or interference with the right to a fair trial';
- (4) Expression causes panic;
- (5) Expression involves in conspiracy to commit a crime; and
- (6) Expression 'provides means rather than reasons'.¹¹⁶

This shows that Scanlon relied on the direct harm that could cause injury, panic and be the reason for other crimes. He also provided a situation where an expression may be restricted without justifying harm.

It is important to note that the harm principle argued by the earlier philosophers was incorporated into the American judicial system. The U.S. Supreme Court has considered this linkage to differentiate between protected and unprotected speech in two important cases; first in the

*Brandenburg v. Ohio*¹¹⁷ and other in the *NAACP v. CLAIBORNE Hardware United States*.¹¹⁸ In both cases, the Supreme Court considered the threshold test for incitement as action must be direct and must have or likely to cause clear and present danger.

Justice Holmes, by highlighting the importance of this principle, recommended that, for restrictions to be imposed, there must be a 'present and clear danger'.¹¹⁹ This test was based on the harm principle that evolved with time. In the American judicial system, it was to see under what circumstances restrictions can be imposed on freedom of expression under the First Amendment.¹²⁰ To apply this test, the courts were required to see 'whether the words used are used in such circumstances and in such a way as to create clear and present danger' and it brings substantive evil that courts cannot prevent.¹²¹ Moreover, scholars argued that the danger needs to be imminent and immediate before the courts could deny protection as an exercise in free speech.¹²² The test of 'clear and present danger' also evolved and has been interpreted heavily by the U.S. courts. This evolution process provided the basis for the test of necessity that is used now in international law to restrict freedom of speech/expression. The U.S. Supreme Court has followed Mill's concept of harm that requires it to be direct and tangible. There is no place for indirect harms in Mill's calculus and neither in U.S. judicial approach that is based on the first amendment.

3.3.2. Indirect Harm and Contemporary Western Philosophers

As noted above in Mill's harm principle, it must be (1) direct, (2) imminent, and (3) tangible. One consequence of this principle is that indirect harms are excluded. However, can we categorically exclude indirect harms from their relevance to public policy decisions? There is a rich literature discussing the consequences of indirect harm on individuals and society in cases of child pornography¹²³ and hate speech.¹²⁴ Contemporary Western philosophers have discussed how freedom of expression in a liberal society can maintain a common idea of justice, while accepting that people have different conceptions of the 'good life'. These philosophers argue that 'we can agree on a core morality while continuing to disagree about what makes life worth living'.¹²⁵

The examination of the earlier philosophers' views clearly depicts that freedom of expression is not absolute and may be restricted when it causes harm to others' rights. However, when an expression may

constitute harm to others differ in domestic legal systems. According to legal scholars, the potential harm to others may be categorised into two types. First, direct harm where the expression directly causes harm as the words, written or verbal, used predicts clear and present danger for the happening of criminal event(s).¹²⁶ Second, indirect harm where the speaker has provided support to a cause but have not encouraged others or have created no direct connection with anything dangerous.¹²⁷ It is essential to have a precise legislation that explains well when speech crosses the line into something that is unprotected such as incitement to terrorism. Thus, the linkage requirement of 'clear and present danger' is missing in the indirect harm.

Jeremy Waldron in his recent book, *The Harms of The Hate Speech*, distinguished direct harm from indirect harm and harm from offence.¹²⁸ He seems to be following the tradition of Mill while arguing about the scope and limits of free expression where he argues for criminalising indirect harm as well. Waldron presented a responsibility¹²⁹ analysis of free speech. He noted that a balancing approach mainly emphasises the importance of free speech principle, but he also acknowledges that 'in these cases it is outweighed by other considerations having to do with the harm that such speech might cause'.¹³⁰ Some scholars, such as John Kaplan who pursues the over-criminalisation thesis, argue that indirect harms may also be considered while framing legislation.¹³¹ He categorises harm into four types that really make two pairs. First modelling/categorical imperative¹³² and second public ward/non-support.¹³³ However, Waldron argued for the criminalisation of hate speech that causes indirect harm to the dignity of the minorities through the harm of denigration, defamation, and exclusion.¹³⁴

Jeremy Waldron emphasizes that two values in this regard play important role in the case of subversion or obscenity. First, 'there is the value or the importance of the incitement as speech' and second 'is the value of the state interests which the law of subversion protects and the value of community or individual interest which the law of obscenity protects'.¹³⁵ He believes that when 'interests of the latter kind outweigh interests of the former kind, then laws regulating speech are permissible'.¹³⁶ He highlighted the importance of free speech by stating that 'in these cases the harm to state or community or interests has to be particularly grave; the harm that would normally suffice to justify legislation when free speech was not stake will not be enough'.¹³⁷

Waldron also suggested an alternative - where 'the character of a speech act as a (grave) act of subversion or an (egregious) publication of child pornography or an (unjustified) act of defamation deprives it of any

protection by the free-speech principle'.¹³⁸ He stated that it is not a question of balance at all rather it is simply that certain free speech claims never really get off the ground, so far as the regulation of these speech acts is concerned.¹³⁹ He emphasized that 'pornography or subversion or threats or incitement or false shouts of 'Fire!' are not really speech at all'.¹⁴⁰ As these statements are obviously false and speech acts of this kind may not get any benefit from the free speech principle.

From these two approaches, Waldron believes that 'it is more sensible to argue for hate speech regulation in terms of the first approach. We recognize, in general, that the considerations which argue in favour of the broad importance of free speech do extend to speech attempting to stir up racial or religious hatred; but we say that nevertheless such speech must be regulated, and in extreme cases prohibited, because of the harm that it does. And we acknowledge that the harm in prospect must be grave — more serious than the harm that would justify regulation where such speech was not an issue — on account of the value of free speech that has to be outweighed on the other side'.¹⁴¹ Waldron's key move, in his book, is to define hate speech as a 'form of group defamation and to compare the libel of members of vulnerable minority groups with other forms of libel that are (or have been) heavily regulated in many legal systems'.¹⁴² Waldron argues that with sufficient safeguards, the loss is vanishingly small and well worth the concomitant gains.

He argues that 'prohibitions on hate speech should only extend to issues that are 'settled', such as race, rather than issues that are currently 'controversial', which should further allay concerns that hate speech regulation will foreclose freedom or democratic debate'.¹⁴³ He used double standards where he considered publication of cartoons in a Danish newspaper in 2005 portraying Prophet (*Ṣal Allāh-u- 'alaihe wa sallam*) as a bomb-throwing terrorist (God forbid) as just mere offence.¹⁴⁴ Similarly, his defence of the ban over Muslim women appearing in public with headscarves or veil¹⁴⁵ and its comparison with the white hoods and hats of Ku Klux Klan (KKK) and justifying the ban on headscarves for the well-ordered society itself is biased and concerned with the balancing of individual rights. For him, the Danish cartoons and Salman Rushdie affair is mere offensive whereas calling Muslims as terrorists or placing billboards tarring all Muslims as terrorists causes indirect harm on the dignity and social life of Muslims and should be criminalised.

Waldron could have used KKK's cross burning in front of his African American neighbour to justify ban on *The Holy Qur'ān* burning as the burning of *The Holy Qur'ān*, or Cartoon of the Prophet (*Ṣal Allāh-u-*

'*alaihe wa sallam*) specifically target Muslims in a similar fashion as the KKK's target African American neighbour. Historical incidents are evident that whenever someone will burn *The Holy Qur'ān* or insult Prophet (*Sal Allah-u-'alaihe wa sallam*) a high likelihood of violence would erupt in response to his/her actions. After knowing that a high likelihood of violence would erupt, such actions should not be justified by Waldron under the umbrella of freedom of expression while giving example of KKK member's white hood and hat ban. As KKK member was guilty of wrongdoing under the same umbrella. For him, relying on the John Rawls analysis, well ordered society is in which "everyone accepts, and knows that everyone else accepts the same principles of justice."¹⁴⁶ However, Islamic conception of justice differs from liberal point of view on law, morality and rights as Islamic conception of justice cannot distinguish law, morality, and rights from one another. He rejected the arguments for criminalising blasphemous or hate literature on a religion based on offensiveness or collective rights. He argues that 'offence is a deeply subjective reaction' especially with any discussion of religion and does not need any legal attention.

Waldron's arguments against the Danish cartoons and Salman Rushdie affair is that the goal of the law is not to protect people from offence, but to protect them from published assaults on their dignity, which ought to be understood as harms to society as a whole as well as individual targets of the hateful speech acts.¹⁴⁷ He further stressed that 'offensiveness by itself is not a good reason for legal regulation'.¹⁴⁸ He is concerned with 'defamation of individual members via group characteristics, not defamation of the group as such'.¹⁴⁹ It is important to note that *Canadian Supreme Court, in Ross v. Canada*, 2000, expelled the teacher who in his spare time had published controversial material perceived to be anti-Semitic and inflammatory towards the Jewish community. Considering this case, why similar protection cannot be extended to all religions including Islam. He argues that there are fine lines to be drawn and the law should generally stay on the liberal side of them.

Many scholars have challenged Waldron's defence of hate speech based on a number of grounds including 'the conventional civil libertarian conviction that democratic governments should rarely be allowed to silence speech acts based on their viewpoint'.¹⁵⁰ It is often argued that hate speech leads to hate crimes, but Waldron's arguments of hate speech do not require the demonstration of causative linkages between speech and violence.¹⁵¹

However, he himself was not transparent while discussing the controversies such as the Danish cartoons and Salman Rushdie's publication *The Satanic Verses*. He, on the one hand strongly supported the Salman Rushdie's right to publish and on the other hand, argued for the criminalisation of hate speech and suggested to ban billboards tarring all Muslims as terrorists. The criteria he suggested to assess harm is not transparent. His view that it is a right of people to make blasphemous cartoons to mock *Ḥaḍrat Muhammad Rasūlullah Khātām un Nabīyyīn Ṣallallahu 'alaihi wa 'alā 'Ālihi wa Aṣḥābihi wa Ṣallam* is clearly biased. It is evident from history, Charlie Hebdo attack, Jylland Posten's cartoon in 2005, defamatory movie, Innocence of Muslims in 2012 and Salman Rushdie affair, that insulting Islam and Prophets is more than insulting Muslims, or an individual person and it fuels or incites violence as a reaction to such actions. Muslims generally care more about the dignity of Islam and Prophet *Ḥaḍrat Muhammad Rasūlullah Khātām un Nabīyyīn Ṣallallahu 'alaihi wa 'alā 'Ālihi wa Aṣḥābihi wa Ṣallam* than their own dignity. The historical incidents show that insults to the Prophet *Ḥaḍrat Muhammad Rasūlullah Khātām un Nabīyyīn Ṣallallahu 'alaihi wa 'alā 'Ālihi wa Aṣḥābihi wa Ṣallam* and Islam have a profound impact on Muslims. There are potential theological justifications of violence towards apostates and blasphemers that are beyond the scope of this study. As Waldron stated in his book, a father who sees hate speech billboards does not know what to say to his children why Muslims are called terrorists. In order to avoid these hate speech billboards and inconvenient questions from his child, he cuts down his unnecessary outdoor social life.

Muslims can compromise their personal dignity, but they cannot compromise dignity of Prophet *Ḥaḍrat Muhammad Rasūlullah Khātām un Nabīyyīn Ṣallallahu 'alaihi wa 'alā 'Ālihi wa Aṣḥābihi wa Ṣallam*. History shows whenever there was an attack on dignity of Islam and Prophet *Ḥaḍrat Muhammad Rasūlullah Khātām un Nabīyyīn Ṣallallahu 'alaihi wa 'alā 'Ālihi wa Aṣḥābihi wa Ṣallam*, Muslims reacted and in most cases their reaction turned into violent protests. Waldron, by ignoring the root causes of the issue, has given more importance to indirect harm (billboards tarring all Muslims as terrorists) and suggested a ban of such speech. He completely ignored the direct harm caused by the free expression of the Danish cartoonist and Salman Rushdie and other forms of mockery against Islam that led to imminent, present and more likely harm of violence in various parts of the world as a result of such blasphemous expression. While discussing the clash between the

principles of blasphemy and freedom of speech, Waldron ignores a set of prior judgements about what kind of injury or offence the cartoons caused and how such an injury or offence need to be addressed in a liberal democratic society.

For Waldron, a well-ordered society needs to protect only its people, especially minorities such as Muslims, against intellectualised assault (non-physical and verbal or symbolic) for the sake of their social life and dignity. Contrary to this, Muhammad Fathi Al-Dirini states that “a society emphasizing an individual’s personal rights without considering the impact of that individual’s rights on society as a whole will succumb to selectivity and factionalism”.¹⁵² He further argued, comparing major Western human rights treaties with Islamic human rights instruments and explaining, that in the West, human rights only benefit the inhabitants of those countries that are parties to international conventions, whereas Islamic law extends the benefits to all humankind.¹⁵³ We cannot solve the problem by just considering one side of the problem. We need to consider the ground realities to identify the actual cause of the problem. We cannot shape a well-ordered society without considering the actual problems arising from actions that attack dignity of Islam and Prophet *Ḥadrat Muhammad Rasūlullah Khātam un Nabīyyīn Ṣallallahu ‘alaihi wa ‘alā Ālihi wa Aṣḥābihi wa Ṣallam*. For Waldron, a well-ordered society is a free society where all ‘illiberal religions’ or ‘intolerant’ religions need to die out. He did not make any effort to differentiate the religion from the forceful and intolerant political ideology. He further argued that in a well-ordered society appearance or how individuals present themselves matters. He tried to justify the ban on Muslim women’s headscarves based on the division between the public realm and the private realm and criticized that Muslim women’s *burqa* and headscarves are sorts of private realm carted around in public like an Edwardian bathing machine.

Erich Kolig’s book *Freedom of Speech and Islam* best presents the Western understanding of freedom of expression and Islam with particular reference to the Islamic concepts of blasphemy, heresy, and apostasy.¹⁵⁴ He rightly poses the following questions: ‘is the right to offend more important than the right not to be offended; and can and should a truly free society, and globalised world, protect its people against intellectualised (i.e. non-physical, verbal or symbolic) assault’?¹⁵⁵

For Waldron, defamation of religion is mere offensive, and it does not need any legal attention. While making his claims for equality and well-ordered society, he ignored the moral limits of speech and the fact that modern democratic nations need to accommodate Muslim populations in a way that is *equal* to Jews, Christians and atheists to avoid

potential public disorder. Burning someone's religious book; depicting their Prophet and religion as terrorist based on actions of one group without establishing any link between their actions and actual Islamic teachings; banning Muslim women from what they can wear or where they can go; suspecting Muslims with suspicion and intrigue; making blasphemous cartoons; and mocking of religion Islam seems mere offensive to him. The long history of such actions against Muslims actually depicts that religious hate speech has caused much harm to Muslims by fuelling religious hatred and by hitting Muslims' emotions which ultimately resulted in violence. Waldron ignores that if incitement to terrorism (which urges or encourages others to commit a crime, even before the crime happens) may be criminalised then why targeted religious hatred or similar actions that eventually fuel religious hatred, public disorder, inequality and violence in society cannot be banned or criminalised?

Contrary to Waldron, Feinberg's theory of harm to others seems more realistic as he examines the moral limits of free speech by giving Mill's principle some shared meaning. According to McGlynn, "Joel Feinberg's influential reinterpretation of Mill's work, which has itself become the commonly accepted conceptualization of the 'harm principle'".¹⁵⁶ The theory of harm is presented in four volumes and volume three particularly sets on moral limits of criminal law.¹⁵⁷ These four volumes present the most thorough and influential treatment of the harm principle. Feinberg's overriding concern has been the 'tenability of liberalism as an account of the moral limits of the criminal law'.¹⁵⁸ He criticised the theory of harm presented by liberal philosophers. He argued that liberal philosophy, such as Mill's philosophy, is not close to the traditional liberalism¹⁵⁹ and he presented how harm itself is linked to morality.¹⁶⁰ He admits that 'sanctioning those who cause harm expresses public reprobation, and in this sense, the criminal law always expresses a sort of moral judgment'.¹⁶¹ He presented a new definition and analysis of the harm principle that differs from the one discussed above in the theory of Mill and Waldron, and argued that the harm principle is not limited and applies to a variety of acts. He then presented an overview of these acts how the principle could apply to these acts.¹⁶²

In his second volume, Feinberg argued that laws should be enacted to prevent others from being shocked or revolted by a particular act. However, he separated harm from the offence and argued that morality, in some instances, must be connected to the legal status of a particular kind of behaviour. The offences in this category are more profound

because: '(a) the offended feelings cannot be wholly escaped by withdrawing one's attention: the offended state of mind is to some degree independent of what is directly perceived, (b) there is an element of direct personal danger and threat, and (c) they are affronts to something the offended parties hold dear and even sacred'.¹⁶³ Based on these criteria, it can be argued that expression based on morality can be criminalised when it meets specific criteria. In his third volume, Feinberg presented what behaviours may be criminalised without violating the moral autonomy of an individual citizen and argues that the state can intervene in 'self-destructive behaviour'.¹⁶⁴

In the strict sense, legal moralism denotes 'prohibiting conduct on the ground that it is 'inherently immoral', even though it constitutes neither harm nor offence to the actor or others'.¹⁶⁵ On the contrary, for liberals, enforcement of morality should not be a concern for criminal law unless immorality results in harm or grievance. Liberals do not support the prohibition of harmless immoralities because they do not see immorality as wrong in itself, unless it causes harm to others.

According to Feinberg, in the broad sense, legal moralism means the 'prohibitions on the grounds that actions constitute or cause evils of other kinds than harm or offence: these grounds include preserving a traditional way of life (moral conservatism) and elevating human character (legal perfectionism)'.¹⁶⁶ Moral conservatism aims to prevent radical social change in the ways of life of a societal group. Supporters of this form of legal moralism consider drastic social change as an evil in itself, whether or not it is caused by inherently immoral conduct and whether or not it results in a harmful effect. The morally conservative persons maintain that 'deviant conduct changes their society in essential ways and makes them an alien in his own community'.¹⁶⁷ This form of legal moralism signifies a type of majoritarianism which sees cultural changes 'as unfair because they are said to violate the interests of the majority that does not consent to the changes'.¹⁶⁸ Legal perfectionism — which denotes the use of the criminal law to improve citizens' character, civility and public virtues — is another illiberal restriction because liberals do not support the use of the criminal law to restrict imperfect ways of life.¹⁶⁹

Noorloos, in her thesis, argues that offence, based on morality, may 'not necessarily [cause] wrong to a particular person, but is considered a wrong in itself'.¹⁷⁰ Moreover, Noorloos believes that the harm principle is narrower as compared to principles based on morality and argues that there is a difference between 'enforcing moral judgments through criminal law and deciding that certain behaviour deserves moral clarification'.¹⁷¹ Sadurski also argues that 'indeed, everything about a

person that the criminal law should be concerned with is included in his morals. However, not everything in a person's morals should be the concern of the law, only his disposition to violate the rights of other parties'.¹⁷² He also believes that 'criteria for harm is a much greater objective than criteria for morals and argues that it is possible to make a rather neutral concept of harm by linking it to peoples' equal moral agency'.¹⁷³ These contemporary philosophers also distinguish harm from offence and argue that harm can be specified by looking at the probability that harm will result and what would be the magnitude of the resulting harm. This is intricately linked with the criteria for criminalising expression based on national security. The offence can be specified by looking at the seriousness of the offence and the reasonableness of the offending party's conduct.

Feinberg argues that 'the law should not take offence as seriously as harm: when less invasive means than criminal law are available, these should be considered first'.¹⁷⁴ According to him, the seriousness of the offence can be measured by considering: (i) extent standards that include intensity and durability; (ii) the reasonable avoidability standard; and (iii) the *volenti* standard (means one has taken the risk willingly being offended).¹⁷⁵ This criteria protects expressions that are not aimed to fuel religious hatred and violence. The views of contemporary philosophers discussed above differ from Western liberal philosophers and from Waldron to some extent as they allow restrictions based on morality. This study argues that the incidents of hate speech against Muslims and other minorities may be reduced where the expression that incites violence or religious hatred is restricted. Also, such restrictions are consistent with contemporary Western thought when these are narrowly defining the scope of offences based on morality.

Contemporary philosophers, such as Larmore, argue that, in order to protect the equal liberty of its citizens, liberalism has to set moral limits on the powers of government and the state has to accept the fact that 'reasonable people disagree about what constitutes a good life'.¹⁷⁶ Noorloos states that 'we can include under it [conception of good] not only an individual's tastes and life-style but also his religious faith and ethical ideals ... and any attempt to say what is important and unimportant in a human life counts as a conception of the good life; it does not matter particularly what the source of that view may be'.¹⁷⁷ The conception of a good life includes religion and other moral beliefs and preferences. Talisse argues that 'there are a number of equally reasonable yet mutually incompatible philosophical, moral, and religious doctrines, each

of which promotes its own distinctive vision of value, truth, obligation, human nature, and the good life'.¹⁷⁸ Ahdar and Leigh also accept this plurality between the conceptions of the good and argue that it is 'a permanent feature of modern societies'.¹⁷⁹

The requirement of 'physical harm' provides that expression may not be restricted based on morality. This approach contrasts with Islamic law that allows restriction based on law and morality where it harms others. The liberal philosophers differ on the 'harm principle', as some, such as Scanlon, believe that freedom of expression must only be restricted when it causes 'physical harm'. However, Mill sees that limiting freedom more than necessary 'to prevent harm to others' would in fact harm the actor by limiting her autonomy. However, the absence of freedom to pursue one's purposes may constitute far greater harm than restrictions on one's liberties. This article argues that earlier philosophers have provided a guideline for states where they can restrict freedom of expression and the theories presented many years ago by these philosophers are still relevant today. Thus, states need to consider the principle of harm provided by these philosophers when criminalising 'incitement to terrorism', and the judiciary needs to consider the principle of 'clear and present danger' while interpreting protections of freedom of expression.

4. The Difference between Islamic law and Western Liberal Philosophy on Restricting Freedom of Expression

The above analysis implies that both Islamic law and Western liberal philosophy value free expression. However, both differ in an important way. Under Islamic law, freedom of expression is not absolute and reasonable moral and legal restrictions may be imposed to manage tyrannical behaviour.¹⁸⁰ On the other hand, Western liberal philosophy focuses on absolute protection of freedom of expression and allows restrictions only in exceptional situations on the ground of 'physical harm'. Academic scholars, such as Jacob, argue that 'people could not be legislated into morality'.¹⁸¹ Also, the above analysis denotes that Mill's argument for the defence of speech is not limited to a defence of expression that assisted the pursuit of truth, but extends to the expression of extreme and untruthful opinions for the benefits it gave a true opinion.¹⁸² His argument that 'falsehood can have value'¹⁸³ becomes the base for the protection of 'untruthful' or 'false' expression or ideas in international law. According to General Comment No. 34 of the Human Rights Committee, art 19 of the International Covenant on Civil and Political Rights (ICCPR) does not restrict expression of opinion or ideas

solely on the basis that those are ‘false’ or ‘untrue’ or are deeply ‘offensive’.¹⁸⁴ Similarly, the U.S. Supreme Court ‘emphatically favoured indulgence of false expression so that the vitality of freedom of expression would not be diminished’.¹⁸⁵

This clearly contradicts with the Quranic verse¹⁸⁶ that emphasizes truth, forbids spreading false news and false reporting, and orders to spread the truth for the sake of information.¹⁸⁷ According to Islamic law, untruthful opinions are not beneficial as they damage the cause of truth and defame societies hence should be avoided.¹⁸⁸ Islam, therefore, allows restrictions for the protection of the rights of others and morality, while liberal philosophers allow restrictions for the prevention of harm to others and do not consider morality as a valid reason for the restrictions. However, it is important to note that Western liberal philosophers’ approach contradicts with their own philosophy, as the ‘principle of harm also enforces a certain morality — the morality of preventing harm and respecting autonomy’.¹⁸⁹

5. Conclusion

This article argues that the theoretical, legal, and philosophical bases of freedom of expression under Islamic law and Western liberal philosophy are the same, but both slightly differ on legitimate grounds for restriction. *The Constitution of the Islamic Republic of Pakistan 1973* allows restrictions on the grounds provided in Islamic law while international law considers grounds provided by the Western liberal philosophers. This practice indicates that Islamic law and Western liberal philosophers have provided the basis for the codification of legal framework for the protection of freedom of expression under international law and Pakistan’s domestic law.

It is noted that Western liberal philosophers’ concept of freedom of expression is, somehow, similar to what is provided in Islamic law. The right to freedom of expression was recognised as a divine right in Islam 1441 years ago. The scope and justification for the protection of freedom of expression provided in Islamic law are similar in many ways to the contemporary right to freedom of expression provided under Western philosophy and international law. Islamic law differs only in terms of restrictions based on morality. According to liberal philosophers’ views, an expression could be prohibited only if it is harmful to a particular set of individuals or society as a whole, otherwise the prohibition is problematic. However, many scholars have focused on physical harm

caused by such speech and have ignored moral and spiritual harm. In most cases of circulation of Prophet's (*Ṣal Allāh-u-‘alaihe wa sallam*) caricature, the Western governments argue that it does not cause any physical harm and thus should be allowed under freedom of expression. However, the contemporary philosophers of West argue that offensive expression could be prohibited when it causes particular moral harm to others, as prohibiting an impersonal offence contains a wrong in itself and provides a base for legal moralism and thus provides a ground for criminalisation.

This shows that restrictions based on morality are illiberal, not illegal, and Islamic law restrictions based on law and moral harm are not contradictory with contemporary Western philosophy. This research argues that UN human right bodies especially UN Special Rapporteur on the Freedom of Expression need to consider restrictions based on law and morality and should vow for the right to freedom of expression that allows one's ideas and feelings with one's own choice but does not endanger the peace and tranquillity of the whole community. UN Special Rapporteur needs to adopt more independent and Universalist approach on the issue of freedom of expression in future so the new developments could also represent Muslim states.

This article concludes that in Islamic law, restrictions may be imposed based on public decency; namely, the prevention of slander and defamation, contempt of religion or religious belief or feeling, and inciting public hostility. This means expression that harms religious belief or feeling is prohibited and Islamic law recommends states take legal actions to protect religion for the maintenance of public order. For this reason, majority of Muslim States have criminalised all those expressions which are deemed offensive towards Islam, Islamic Prophets (*‘Alaihim As-Salām*) or belief system. In Islam, the protection of religion is one of the five objectives of Islamic law. However, there have always been international controversies that greatly harm Muslim–Western States relations. These incidents include but are not limited to Salman Rushdie affair in the aftermath of the publication of the novel *Satanic Verses*; movie trailer of *Innocence of Muslims*; the *Jyllands Posten* Prophet's caricature in Denmark and its republication events in rest of world time and again. The reaction to such events is considered as driven by emotions and not by physical harm. Though all these reactions turned to violence and destruction at later stage and have caused physical harm as well. The difference in the philosophies of freedom of expression has created controversy between Islamic and Western thought; namely, restriction on freedom of expression based on the blasphemy of the

Prophet *Ḥaḍrat Muhammad Rasūlullah Khātām un Nabīyyīn Ṣallallahu ‘alaihi wa ‘alā Ālihi wa Aṣḥābihi wa Ṣallam* has created conflict and is a barrier to peaceful relations and meaningful dialogue between Western liberal states and the Muslim states. This raises an important question: Can the Western liberal states and the Muslim states deal with this conflict and move to peaceful relations?

6. Declarations

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Notes and References

¹ *The Constitution of the Islamic Republic of Pakistan 1973*, Art. 227.

² *Ibid.*

³ Michael O’Flaherty, “Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee’s General Comment No. 34,” *Human Rights Law Review* 12, no 4 (2012), 628.

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⁶ *Ibid*; Hugh Goddard, *A History of Christian-Muslim Relations* (Edinburgh: Edinburgh University Press, 2000) 100.

⁷ *The Meanings of the Noble Qur’ān*, 2:256, Translated by Mufti Muhammad Taqi Usmani (Karachi, Maktaba Ma’ariful Quran, 2010).

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Anwar Jundi, *Qadāyā al-'Asr wa al-Mushkilāt al-Fikrī fī Zaw al-Islam* (Beirut: Dār al-Fikr, 1984), 177; Sayed Abu al-a'lā Mawdūdī, *Khilāfat-o-Malūkiyyat* [Caliphate and Kingdom] (Idāra Tarjumān al-Qur'ān, 1999) 261.

¹⁹ Bhat, "Freedom of Expressing from an Islamic Perspective," 69.

²⁰ Kamali, *Freedom of Expression in Islam*, 117.

²¹ *Ibid*.

²² *Ibid*.

²³ Usmani, *The Meanings of the Noble Qur'ān*, 10:32.

²⁴ *Ibid*, 4:148-149.

²⁵ *Ibid*; Kamali, *Freedom of Expression in Islam*, 167-168.

²⁶ *Ibid*.

²⁷ Kamali, *Freedom of Expression in Islam*, 171.

²⁸ *Ibid*, 175; Usmani, *The Noble Qur'ān*, 4:48; 6:21, 93, 7:37, 10:17.

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