

A Historical Analysis of the Development of
Free Speech Justifications

Twana A. Hassan*

Abstract

Humans are born free in the moral sense. This widely recognized principle of natural freedom implies that exercising freedom should not require moral justification; but rather; its restriction must be based on valid justifications. Nevertheless, the burden of justification appears to have been reversed in the context of free speech. A rich jurisprudence has been developed for justifying free speech. Why and how did such reversion happen? This paper is a historical analysis for answering that question through three arguments. (1) It argues that the primitive forms of mythologies, superstitions and religions can be considered the oldest sources of limitation on expressive activities. (2) It finds that the first restrictive laws of freedom of speech were religious in nature, and the first justificatory arguments for freedom of speech were reactions to such religious restrictions. (3) It concludes that justifications of freedom of expression have evolved in parallel with the manifestation of power in both religious and political institutions. These three critical arguments can be a strong base for asking whether exercising or restricting freedom of speech requires moral justifications.

Keywords: Free Speech, Justifications of Free Speech, History of Free Speech, Development of Freedom of Expression, Limit of Free Speech

* PhD Candidate, TC Beirne School of Law, the University of Queensland; Research Scholar, the Center of Public, International and Comparative Law. (twana.hassan@uq.net.au). I am very grateful to Professor Suri Ratnapala for his invaluable and thoughtful comments on the earlier draft of this paper.

I. INTRODUCTION

Humans are born free in the moral sense.¹ The recognition of this natural freedom is found in many religions, ancient writings and philosophical works. It is also widely recognized and accepted as an aspirational provision of international treaties. The first article of the Universal Declaration of human Rights reflects the universal recognition of natural freedom. It reads 'All human beings are born free and equal in dignity and rights.' More importantly, it has been adopted in many legal systems. In many countries, persons are legally treated as free citizens from birth. For example, it is observed that 'the presumption of freedom' has become an embedded principle of the Common Law.² The core notion of the principle is that humans are free to do, say, have, and to be whatever they want if there is no law explicitly prohibiting it. In other words, the general rule of human action is that everything is allowed unless it is restricted by a legal rule. An application of that principle is that human freedom does not require justification, but its restriction needs to be justified.

If this is a principal rule regarding freedom, how have philosophers, scholars and thinkers shifted the burden of justification from laws restricting freedom to the exercise of freedom itself, how have they shifted justification from lawmakers to freedom holders? More specifically, how did the exercise of the FoE become burdened with the need for justification? Did not the scholars realize that those who exercise FoE do not need to justify anything, but rather, those who restrict FoE must justify the restriction?

¹ It can be argued that if this is a statement of fact it is not correct because some people are born in a form of slavery or in cultural and legal conditions that are hard to describe as states of freedom. This potential challenge is a valid legal argument. Nevertheless, my argument for natural freedom is based on moral foundation, namely what ought to be, not on legal reality of the world as it is.

² See Douglas N. Husak, 'The Presumption of Freedom' (1983) 17(3) *Noûs* 345 A major dimension of the presumption of freedom is the principle of legality whose core notion is that the fate, scope, limit and protection of freedoms and fundamental rights must not be solely and unconditionally left to the judicial interpretations and ambiguous legislative words. For further explanations on this principle, see Dan Meagher, 'The common law principle of legality in the age of rights' (2011) 35(2) *Melbourne University Law Review* 449

Surprisingly, without a serious consideration of these fundamental questions, scholars have produced a rich jurisprudence of FoE justifications. Many theories, doctrines and approaches have been initiated and developed to morally or legally justify the exercise of FoE.³ How have these justifications of FoE been developed? This is the central question for most of the arguments and perspectives presented throughout this paper. Its main purpose is to provide a historical analysis of the development of FoE justifications. The analysis is obviously a major undertaking. It requires a comprehensive examination of the origin of many values, interests, norms, rights, and other considerations that play a central role in both justifications and limitations of FoE. The concept of power seems to provide a theoretical framework for examining those values and considerations altogether. Therefore, what follows is an examination of the impact of the emergence of various forms of power on the development of FoE justifications.

II. POWER AND EXPRESSIVE ACTIVITIES IN PRIMITIVE COMMUNITIES

My starting assumption is that to understand the historical foundation of justificatory theories of FoE, one may need to investigate the origin of power and its nature because throughout human history power has been a major, if not the only, reason behind whatever that has happened to all forms of freedom, including FoE. In this paper, power is used in the sense of directing, influencing, restricting or controlling the free will of others. The emergence of various forms or institutions of power has played a significant role in conceptualizing all forms of freedom including FoE. Apparently the emergence of power has ultimately forced the defenders of freedom to initiate and develop justificatory arguments for FoE against different forms and various manifestations of power.

³ See Larry Alexander, *Freedom of speech* (Ashgate, 2000)

(2015) J. Juris. 489

There is no evidence suggesting that there were customary restrictive rules on expressive activities, or there was an idea of FoE justification in ancient times, especially before the emergence of institutionalized religions and political power. No one had to justify expressive activities due to the absence of power in early human communities. This statement can be supported by both 17th and 18th centuries' political theories of the state of nature and evolutionary anthropology.

For most of theories based on the state of nature life and freedom are twins born together on earth. Humans started living on earth freely.⁴ They were born with whatever potentials and capacities required for being a free agent. Being free and remaining so was a characteristic of humans in early forms of life. In his *Second Treatise of Government*, John Locke powerfully describes the state of nature, before the emergence of political institutions, as the state of 'perfect freedom,' and 'equality.' He writes 'To understand political power right, and derive it from its original, we must consider, what state all men are naturally in, and that is, a state of perfect freedom to order their actions.'⁵

Anthropological evidence concerning the earliest human communities also does not suggest that humans' expressive activities were dependent on providing justification to any form of power. The history of freedom can be reasonably extended as far as we can trace the beginning of human life on earth. Whenever and wherever there was a human being, there was freedom in a sense. To deny that, one must first deny the existence of humanity and the existence of free will as an integral part of humans. The earliest known humans and indeed their hominid ancestors lived in rudimentary societies or family groups or tribes. These groups were bound together by customary rules. The freedom of

⁴ How can it be proved? This is a difficult question. It is as challenging as asking how it can be disproved.

⁵ John Locke, *The second treatise of government: (An essay concerning the true original, extent and end of civil government), A letter concerning toleration* (Blackwell, 1966)

group members to do as they please was limited by these rules. There is no evidence suggesting that these customary rules included restrictions on expressive activities.⁶

It may be true that our primitive ancestors did not conceptualize freedom as it is perceived now; nevertheless, they exercised freedom in its maximum extent. They may not have any conscious definition of freedom, nor may they hold any conception of it, but they were exercising all forms of it. This might have been the case for most of other concepts and notions.⁷ Certainly, our primitive ancestors used gestures, symbolic expressions and all sorts of verbal communications freely, but they did not have a conception of free expression or communication. Thus, my intuition is that in the primitive human communities there was freedom without any conception of freedom, and there was absolute FoE without any reflection on justifying it.

Why was there no conception of freedom and no reflection on justifying free expression and communication in the state of nature? My simple answer is that there was no need for conceptualizing freedom, nor was there any need for reflection on justifying it because there was no direct, tangible power on and above freedom.⁸ Humans lived freely in the absence of power and in the absence of social institutions and political organizations. Those who lived in isolation or with others, whether as a family or as any other natural or mutual bond, did not know any limitation of their expressive activities. Thus, they did not need to conceptualize the limit of their expressive activities and did not need to reflect on justifying the possible boundaries of their expressive activities. They draw on the wall of the caves whenever they wanted, however they could, and on

⁶ For a brief account on ways of life and social structure among early humans, see section 9 of Bo Gräslund, *Early humans and their world* (Routledge, 2005)

⁷ It is argued that the imagination of people in ancient times was completely covered by mythical views about themselves, nature, life, and their surroundings. This mythical state and the absence of any notion of progress and conceptualization arguably continued until the period of the emergence of philosophical inquiry in ancient Greek. See M. C. Lemon, *Philosophy of history: a guide for students* (Routledge, 2003)

⁸ A more complicated answer to that question may consider the capacity of conceptualization by humans then. But I guess this reason is more technical than fundamental.

whatever things they imagined without knowing any limitation and without reflecting on the rightness or wrongness of the drawings.

It may not be proved that wherever and whenever there was no human society, religious institution, or political power, all imaginable expressive activities were permitted without any sort of justification within family members or other collective entities.⁹ Nevertheless, it can be claimed that in rudimentary forms of human societies held together only by traditional rules of behaviour, there were no social institutions of power, no political organization, no restrictive rules for regulating expressive activities, and no existence of the interests restrictive to expressive activities. Accordingly, it is hard to imagine that expressive activities were limited, and that there was any conception of FoE or any reflection on justifying communicative activities in these primitive communities.

III. RELIGION AS THE FIRST AND OLDEST SOURCE OF RESTRICTING THE FREEDOM OF EXPRESSION

Primitive forms of mythologies,¹⁰ superstitions,¹¹ and religions can be considered the oldest source of limitation on expressive activities.¹² I reached this arguable conclusion after reviewing and reflecting on a number of works written about the origins and

⁹ State of nature

¹⁰ In *'What is Mythology'* John Fisks elaborates the original meaning, description and definition of mythology. He writes 'The study of mythology, therefore, when properly conducted, must throw light on some of the early thoughts of mankind, giving us glimpses of the way in which people reasoned about things before there was any such knowledge of nature as we are accustomed to call scientific.' See John Fiske, 'What is Mythology?' (1881) 48 *Atlantic Monthly* 85

¹¹ Its original meaning was 'fear of demons.' See Ernst Riess, 'On Ancient Superstition' (1895) 26 *Transactions of the American Philological Association (1869-1896)* 40

¹² All religions without exception have had sacred rules and holy instructions about expressive activities, about what, how, when and where their followers must say or not to say. I doubt that there has been any religion without rules or instructions on humans' expressive choices. Some rules are positive requiring what must be expressed in forms of prayers or the like. Other rules might be negative requiring what must not be expressed.

history of superstition, mythology, and religion of primitive peoples.¹³ In addition to survival thoughts, superstitious and religious thoughts appear to be among the few ideas that crossed the mind of the ancient people. I'm not a historian, but this should not disqualify me from making historical arguments based on intuitive reflections on recorded historical events and materials.

Superstitious ceremonials and religious rituals were common among primitive people and ancient families. They may have been practiced individually or collectively. They certainly involved different forms of expressive activities. The notion of power, natural or supernatural, appears to be behind those ceremonies and rituals. Whoever practiced a form of superstitious ceremony, religious ritual, or prayer may have done it to communicate with a form of power: real or mythical, visible or invisible, natural or supernatural. It may be difficult to identify the exact purpose of ancient men and families in performing a specific religious ritual or prayer; nevertheless, it is not difficult to locate some notion of communicating with a power in their mind whenever they performed the ritual.

When a father in the ancient times gathered the whole family to sit quietly around the fire during sunset and ended the ceremony with a collective recitation of a few verbal expressions, he lead the ceremony in the position of power and performed it to communicate with another more powerful being whatever it would have been in his imagination. Thus, when the notion of metaphysical power was born in the mind of people and when the forms of power were practiced among people, expressive activities started to become restricted. Then, people may have had to accept the power of father or grandfather, even when he is dead, as a source of life or as a god that can make laws

¹³ See Samuel Noah Kramer, *Mythologies of the ancient world* (Doubleday, 1961); H. C, 'ANCIENT ATHEISM AND SUPERSTITION' (1862) 1(1) *Journal of sacred literature and Biblical record*, Apr.1855-Jan.1867 24; Katharine Savage, *The history of world religions* (Bodley Head, 1966); David S. Noss, *A history of the world's religions* (Prentice Hall, 1999)

for life, and that must be obeyed and even worshiped by specific regular ceremonials.¹⁴ This is how the religious rules of freedom may have started to control human life and freedom.

Who can convincingly prove that I make illusionary historical statements if I claim that five thousand years ago a son was killed by his father because he did not perform his regular expressive ritual around his grandfather's grave, a wife was abandoned because she made the god angry by expressing or not expressing something, or a brother was beaten because he spat over his grandfather's grave out of anger. Thus, because there were the gods, sacred symbols of power, and rituals and prayers for the gods, it does not seem illogical to imagine that there were punishments for not conducting prayers or not performing the expressive activities required by the conventional duties to the gods or the symbols of their power.

In short, religion in its different forms may arguably be the first source of institutional power.¹⁵ The seed of that power started to grow from primitive families, developed further with human settlements, became stronger after the emergence of communities and sects, and reached its peak when it became the foundation of social organizations and political institutions in society. Once different forms of religious institutions established, expressive activities, similar to all other forms of freedom, were restricted in a sense. For example, when a religious power within a family, a sect, a community or a settlement required performing a specific regular religious ritual or prayers, it can be imagined that no one was free not to do that. In that sense, people started to become less free once religion became an institutionalized power over freedom. Until then,

¹⁴ For further details about the role of myths and religions in families, organising power within families, leading ceremonies and worships, and in introducing and enforcing various rules and laws in ancient times, see Numa Denis Fustel de Coulanges, *The ancient city: a study on the religion, laws, and institutions of Greece and Rome* (Doubleday, 1956)

¹⁵ I tend to agree with the underlying argument of those who claim that 'religion, in early times, shapes the laws,' and that 'from religion came all laws and rules.' See *ibid*

humans were in the maximum possible state of freedom, and more importantly they did not have to justify their free activities to anyone, to any institution, or to any power. The justification of expressive activities presumably started to appear with the emergence of religious restrictions on expressive activities.

IV. THE EMERGENCE OF JUSTIFICATIONS AS REACTION TO RELIGIOUS RESTRICTIONS

The first restrictive laws of FoE were possibly religious in nature, and the first justificatory arguments for FoE were reactions to these restrictions. This may arguably be correct for most of the laws of freedom and other laws governing people's conducts. One strong argument among legal historians is that the source, nature and foundation of first laws were religious.¹⁶ Michael Stolleis claims that what has been called 'the eye of the law or the eye of the justice' in 'almost all civilizations throughout time' initially has a metaphysical origin. Laws started with 'in the name of God.' Then, it has been gradually secularized.¹⁷ A brief review of the historical records, relevant laws and practices existed in the ancient civilizations of Mesopotamia, Egypt, Athens and Rome illustrates that assumption.

In a study of religion and politics in ancient Egypt, Etim E. Okon concluded 'religion was indispensable in ancient Egypt. Religion and politics in ancient Egyptian society were inseparable. Ancient Egyptians were incurably religious. Social and political life was a religious phenomenon.'¹⁸ In that collective life, no doubt that all written laws, if existed which is unlikely, customary laws and practices were also religious in nature.

¹⁶ It is important to avoid generalization about the religious nature of historical background and foundations of the laws of freedom because it may be problematic. Some laws of freedom such as laws against physical violence, theft and breaking promises probably pre-dated institutionalized religion.

¹⁷ See Michael Stolleis, *The eye of the law: two essays on legal history* (Birbeck Law, 2009)

¹⁸ See Etim Okon, 'Religion and politics in ancient Egypt' (2012) 3(3) *American Journal of Social and Management Sciences* 93

Accordingly, it can be concluded that restrictive laws, rules, or customs were mainly religious in nature. It is doubtful that people in ancient Egypt were free to challenge the highest political and sacred religious status of the Kings, Pharaoh. The story of Moses in the Quran narrates what happens to Moses after he challenged the religious status of Pharaoh and expressed his religious belief.¹⁹

Similarly, city-states in Mesopotamia were considered as 'the private property of the divine family.' They were governed by the temple lords who were 'both sacred-spiritual and secular leaders.'²⁰ Thus, it is convincingly argued 'temple was the center of power.'²¹ It is unlikely that people were free to express what would have been considered unreligious.²²

Regarding ancient Athens, it is well recorded that there were legal restrictions on expressive conducts on various accounts.²³ There were various versions of libel law. As Max Radin indicates, some expressions were considered 'unsayable.' From his review of the ancient Athenian laws, he finds that according to the laws existed then 'one might not say that a man had thrown away his shield in battle, that he had slain anyone, or that he had beaten his father or his mother.'²⁴ Despite the existence of some laws regulating

¹⁹ See P Gheiasvand and Nia AB Taheri, 'Repetition of the Story of Moses & Pharaoh in the Holy Quran ' (2010) *LITERARY CULTURE QUARTERLY*

²⁰ See Robert Chadwick, *First civilizations: ancient Mesopotamia and ancient Egypt* (Equinox Pub, 2005)

²¹ Ibid

²² This is only my intuitive perspective. The article 127 of the Hammurabi Code says 'If a man point the finger at a priestess or the wife of another and cannot justify it, they shall drag that man before the judges and they shall brand his forehead.' King of Babylonia Hammurabi and Robert Francis Harper, *The code of Hammurabi, King of Babylon, about 2250 B.C: autographed text, transliteration, translation, glossary, index of subjects, lists of proper names, signs, numerals, corrections, and erasures with map, frontispiece and photograph of text* (University of Chicago Press ; New York, 1904) Even though it does not directly support my perspective, it does not also refute it. It was mainly a code to regulate the conducts between individuals in their daily life. Most of the laws and rules that we call constitution and regulate relationship between power and freedom were unwritten in ancient time. This is where the religious rules of FoE can be found.

²³ For a detailed study on the practice of FoE and the root of its limits in ancient Athens, see Arlene W. Saxonhouse, *Free speech and democracy in ancient Athens* (Cambridge University Press, 2006)

²⁴ See Max Radin, 'Freedom of Speech in Ancient Athens' (1927) 48(3) *The American Journal of Philology* 215 (2015) *J. Juris.* 496

expressive conducts between individuals, the real and serious restriction on FoE was the restriction existed to regulate expressive activities of individuals in relation to the religious authority whether it was mystical or political. If the penalty of expressing unsayable expressions or libellous expressions against other individuals was a fine of five hundred drachmae, the punishment of expressing impiety was death. Thus, the most serious restriction on FoE in ancient Athens was religious in nature.²⁵ To understand that more clearly, one needs no more than reading Plato's Apology of Socrates and Euthyphro dialogue.²⁶

In the Apology, Plato eloquently narrates the trial of Socrates in 399 BC. By reflecting on the Apology, one can easily sense a strong presence of religion and the gods in the Athenian law, culture, thinking, as well as in the Athenian restriction on expressive activities based on religion considerations. This is behind the charge brought against Socrates. 'Socrates is guilty of corrupting the young and of not believing in the gods in whom the city believes, but in other new spiritual things.'²⁷ From the dialogues, one can conclude that while the major restriction on FoE during that time was a religious restriction, the major justification of FoE was based on seeking for knowledge and searching for the truth. Socrates' trial and execution illustrate that.

In his trial, he stands firmly against existing restrictive religious rules on freedom of seeking knowledge, searching for truth, engaging in philosophical arguments, and communicating with others for learning, educating, and spreading the virtues. He firmly tells the Athenians that 'If I say that it is impossible for me to keep quiet because that

²⁵ There are other non-religious analyses for understanding exercise of FoE and its limits. Athenian democracy, as a political consideration, and Athenian philosophical dialogues- as an intellectual considerations- have also been considered as the base for understanding the nature of FoE in ancient Greek. See Enrico Berti, 'Ancient Greek Dialectic as Expression of Freedom of Thought and Speech' (1978) 39(3) *Journal of the History of Ideas* 347

²⁶ Plato (Edit: John M. Cooper & D.S. Hutchinson), *Plato complete works* (Hackett, 1997)

²⁷ Ibid

means disobeying the god, you will not believe me and will think I'm being ironical. On the other hand, if I say that it is the greatest good for a man to discuss virtue every day and those other things about which you hear me conversing and testing myself and others, for the unexamined life is not worth living for men, you will believe me even less.²⁸

Despite executing Socrates mainly because of exercising FoE, one may still argue that it is not reasonable to charge the entire Athenian democracy at that time for being against FoE. It may be argued that ancient Athenian democracy was among the best political systems in the world for respecting FoE of all its citizens, and that humanity has inherited the concept of FoE from that golden age of Athenian democracy.²⁹ It was a form of direct democracy based on the political expression. The Athenians were conducting whatever artistic, athletic, cultural, religious and cultural expressive activities they desired in the Agora.³⁰ Accordingly, it can be concluded that FoE was the principal pillar of Athenian democracy.³¹ If that was how they made the Agora a central place for expressive activities, how can we describe the ancient Greek city-state of Athens as an example for introducing religious restrictions on FoE to the humanity?³²

In response, I must start by reiterating the structure of my whole argument about the historical background of the justifications of FoE. My assumption is that initially humans were in a maximum condition of FoE. Before the emergence of religious or superstitious

²⁸ Ibid

²⁹ Richard Allsop, for example, claims that the concept of FoE can be traced back to the ancient Greeks. 'One of the first steps on the Greek path towards allowing FoE was the first involvement of ordinary people in intellectual life.' Richard Allsop, 'The difficult history of free speech' (2012) 56(Generic) *Quadrant Magazine* 55

³⁰ S. C. Todd, *Athens and Sparta* (Bristol Classical Press, 1996)

³¹ See Saxonhouse, above n ; Radin, above n

³² One possible answer can be found in what a writer observes which is ' FoE was linked to democratic deliberation, not individual rights in Athens.' Saxonhouse, above n Accordingly, in Ancient Athens FoE was part of- and based on- collective interests and public interests. Similarly, it was limited and restricted based on the foundation of democratic interests that protect the city as a collective entity. Certainly respecting the Gods was among the highest interests because the Gods were considered as the source of power and the protector of the city.

beliefs within primitive families, freedom of expressive activities may have been limitless; there was no limit, nor was there any need for justification for that matter. After the emergence of religious beliefs among primitive families and after the emergence of human settlements, communities, sects, and later social organizations and political institutions in the ancient times, FoE started to lose its limitless status because of the restrictive religious rules that gradually took place and found strength among the families and within the communities.

Therefore, religion can be considered as the first source of imposing restriction on expressive activities because it was the base of power in the families, and it was the foundation of authority in the various communities existed at that time. This can be observed in the ancient Greek city-states, especially Athens. Despite the remarkable democratic deliberation practiced in the Agora, there were a few legally restrictive rules on expressive activities; not offending the Olympian Gods, such as Zeus and Apollo, was among the strictest rules on FoE. Offending or 'questioning the divine was not part of Parrhe'sia.¹³³ It is an Athenian phrase or word which means FoE or 'frank speech.'¹³⁴ Impious expressive activities were considered as offences against the gods and the city, and as such, those who were charged with impiety, such as Socrates, would face the harshest punishment and execution.

The offence of impiety was both religious and political in nature because at that time mythology, superstition and religion were integral and inseparable parts of the cultural life, political structure, and legal system of Athens. Likewise, the justification developed to defend FoE against the charge of impiety and against the religious-political authority of Athens was both religious and political in nature. By reading the Apology and Crito, one can easily conclude that the first well-developed argument for the justification of

³³ Ibid

³⁴ Ibid

FoE was formulated by Socrates. The justificatory argument or theory was a defence of FoE against religious restrictions; it was founded on seeking knowledge and searching for truth, and it was substantively grounded on the idea of justice.³⁵

Similarly, in the Roman Empire there were religious restrictions on FoE. The restrictions were both religious and political in nature. Blasphemy is a clear example. It was one of the most common, widely practiced, and harshly punishable restrictions on FoE. Based on blasphemy, a big portion of humans' FoE has been outlawed for centuries. Because it included the use or abuse of language, or behavioral acts, that scorn the existence, nature, or power of sacred being,³⁶ it excluded almost all non-conventional expressions or publications which were not directly approved by religious institutions of power from FoE. It criminalized expressing or publishing anything which were considered disrespectful to the God, his messages, his laws of life, his symbols, his sacred representatives and his earthly institutions of power, such as temples, churches, assembly houses, etc.³⁷ The nature of what were considered blasphemous crimes indicates that those crimes designed to restrict FoE based on religious considerations.

V. THE CO-EVOLVEMENT OF INSTITUTIONAL POWER AND THE JUSTIFICATIONS OF THE FREEDOM OF EXPRESSION

Justifications of FoE have evolved in parallel with the manifestation of power in both religious and political institutions. The justifications were born immediately after political powers emerged; their nature changed with the changes occurred in the nature of political power. When the Greek philosopher and one of the founders of Cynicism

³⁵ See Plato, *Plato: Complete Works* (Hackett Publishing Co, Inc, 1997)

³⁶ David Nash, 'Analyzing the History of Religious Crime. Models of "Passive" and "Active" Blasphemy since the Medieval Period' (2007) 41(1) *Journal of Social History* [H.W.Wilson - SSA] 5

³⁷ For a detailed analysis of the history of blasphemy, see Leonard W. Levy, *Treason against God: a history of the offense of blasphemy* (Schocken Books, 1981)

Diogenes of Sinope told Alexander the Great to 'stop blocking his sunlight,'³⁸ he implied what political power has done to freedom. Before the emergence of political powers, freedom of expressive activities appeared to have been significantly, if not absolutely, unfettered and uncontrolled. With the gradual emergence of political powers, with the establishment of political systems, kings, leaders, law-making institutions, and empires, the circle of individual freedoms has been gradually shrunk.³⁹ Freedom started to suffer once different forms of political powers emerged and started to control and subordinate humans' free will.

The historical origin of political power is a complex and controversial issue. What, when, and where was the first appearance or manifestation of power, how it came to exist, why humans submitted themselves to the will of others and agreed to chain their freedom to others, how did the first ever kings, princes, lords, and leaders come to exist, and based on what they justified their coercive power are among the controversial questions about the historical origin of power. What is not controversial, however, is the adverse effect of political institutions of power, in all its forms, on human freedom. The effects have been very harsh. Humanity was introduced to power after being born free; nonetheless, humans were, and still are, compelled to bow the knee and plea for their natural entitlement of freedom in front of different institutions and symbols of power. Socrates had to plead for his freedom to speak in front of the Athenian institution of mixed religious-political power, Diogenes had to cynically remind Alexander the Great to stop blocking the sunlight of life and freedom, and both Christians and afterwards non-

³⁸ John Christian Laursen, 'Cynicism as an Ideology Behind Freedom of Expression in Denmark-Norway' in Elizabeth Powers (ed), *Freedom of Speech: The History of an Idea* (Bucknell University Press, 2011)

³⁹ For some aspects of FoE after the emergence and establishment of political institutions in classical antiquity, see Ineke Sluiter and Ralph Mark Rosen, *Free speech in classical antiquity: [Penn-Leiden Colloquium on Ancient Values, June 2002 at the University of Pennsylvania]* (Brill, 2004)

believers had to justify and fight for their expressive activities in front of the ancient Roman laws and the judges.⁴⁰

Many centuries later, a combination of religious and political power was the reason behind the 'first consistent articulation' of the arguments of FoE in England, Holland, France and other parts of Europe.⁴¹ It may not be inaccurate to claim that both Renaissance and Enlightenment were comprehensive intellectual movements against the religious-political institutions of power for the sake of protecting all forms of human freedom including FoE. The major roots of the modern theories and justifications of FoE can be found in the arguments put forward by the intellectual leaders of both Renaissance and Enlightenment.⁴² Their arguments were mainly based on the value of freedom, limit of the power and religious tolerance.⁴³ John Milton wrote *Areopagitica* to defend FoE against the forms of censorship and licensing practiced by the institutions of power.⁴⁴ Similarly, John Stuart Mill defended FoE by claiming for the marketplace of ideas so that everyone can exchange ideas freely about all imaginable topics of life, including truth, god and power.⁴⁵

⁴⁰ For some examples see F. H. Cramer, 'Bookburning and Censorship in Ancient Rome' (1945) 6(1) *Journal of the History of Ideas* 157

⁴¹ Elizabeth Powers claims 'it was in England and Holland that the arguments for FoE received their first consistent articulation.' See Elizabeth Powers, *Freedom of speech: the history of an idea* (Bucknell University Press, 2011)

⁴² FoE practices were also common political and social practices in sixteenth-century Spanish America. See Lewis Hanke, 'Free Speech in Sixteenth-Century Spanish America' (1946) 26(2) *The Hispanic American Historical Review* 135

⁴³ In the 16th century, which is arguably marked as the first historical stage of developing FoE theories, FoE was initially considered and treated as an aspect of religious tolerance. See Joris Van Eijnatten, 'In Praise of Moderate Enlightenment: A taxonomy of Early Modern Arguments in favour of Freedom of Expression' in Elizabeth Powers (ed), *Freedom of speech: the history of an idea* (Bucknell University Press, 2011) This may prove that FoE was initially defended by begging religious powers and institutions for being tolerant with those express their different opinions regarding religion and other issues.

⁴⁴ See John Milton and John Wesley Hales, *Areopagitica* (Clarendon Press, 1886) For a guide to better understand Milton's *Areopagitica*, see Willmoore Kendall, 'How to Read Milton's *Areopagitica*' (1960) 22(1) *Journal of Politics* 439

⁴⁵ See chapter II of John Stuart Mill, *On liberty* (Prometheus Books, 1986) For some arguments on Mill's account of FoE, see K. C. O'Rourke, *John Stuart Mill and freedom of expression: the genesis of a theory* (Routledge, 2001); T. D. Campbell, 'John Stuart Mill and Freedom of Speech' (1971) 4(3) *Pensiero politico* 443; John

In making pleas for freedom and providing justifications for FoE, those philosophers never assumed that human freedom needs justification. Their arguments were about the limits of power, not about the moral justification of FoE.⁴⁶ Both Renaissance and Enlightenment can be considered as the cultural and intellectual movements of direct criticism against power, more than movements for providing justification for life and freedom. FoEs in general and freedom of the press, communication or publication, in particular, was among the most significant issues defended by intellectuals during Enlightenment mainly because they wanted to stand firmly against institutions of power.⁴⁷ Based on that same rationale, some writers argue 'Enlightenment was an age of criticism; it meant the fearless application of reason to society's institutions, practices, and beliefs.'⁴⁸

Generally, what compelled great thinkers in history to provide justifications for freedom was not that they doubted the moral foundation of freedom or that they did not believe in freedom as an end in itself. Rather, they attempted to defend freedom based on the same artificial rationales used by institutions of power to restrict freedom.⁴⁹ This is what Socrates, Milton, Mill and others have tried to accomplish by developing justificatory theories of FoE.

Michael Roberts, 'John Stuart Mill, free speech and the public sphere: a Bakhtinian critique' (2004) 52 *The Sociological review* 67; R. George Wright, 'A Rationale from J. S. Mill for the Free Speech Clause' (1985) 1985 *The Supreme Court Review* 149; Paul A. Passavant, 'A Moral Geography of Liberty: John Stuart Mill and American Free Speech Discourse' (1996) 5(4) *Social & Legal Studies* 301; Alan Haworth, 'On Mill, Infallibility, and Freedom of Expression' (2007) 13(1) *Res Publica* 77

⁴⁶ See Mill, above n ; Milton and Hales, above n

⁴⁷ See Leonard W. Levy, *Emergence of a free press* (Oxford University Press, 1985) (This book partly presents the struggle of FoE and press with institutions of power. It indirectly tells the story behind the development of justifications and laws of FoE and the press).

⁴⁸ See Lemon, above n

⁴⁹ For a brief historical background of the development of FoE arguments, see Allsop, above n

For example, Mill wrote *On Liberty* to stand firmly against religious intolerance which was an integrated part of the political and social tyranny existed during his time.⁵⁰ In a thorough examination of Mill's account of FoE, it has been concluded that Mill had two major tasks. First, in articulating his theory of free expression, Mill's aim was to eradicate the various forms of religious intolerance practiced during his time. Second, Mill wanted to lay a strong foundation for freedom as the most effective means of attaining well-being and achieving maximum happiness.⁵¹

VI. CONCLUSION

After centuries of theoretical clash between power and freedom, it has now become necessary to reflect on the nature and source of this historical clash so that we can easily locate the theoretical problems we have inherited. After such reflection, one would not have difficulty to argue that different institutions of power must be fettered by considerations of human life and freedom, that no god has vested any divine authority in anyone or any institution to control humans' life and freedom, that freedom is the source of legitimacy of authorities, that the legitimacy of authority needs to be convincingly justified, that freedom- in all forms- requires no moral justification, but rather, power and authorities- in all forms- must be convincingly justified.

My final comment here is that despite the current trend of justificatory theories of free speech, and despite the attractiveness of some of the theories of justifications, we must be cautious in adopting those theories and in embracing their features. We must not continue taking the justificatory roads engineered by the defending pioneers of freedom. They designed justifications for free speech based on seeking knowledge, searching for

⁵⁰ For some explanatory, analytical, and guiding works about *On Liberty*, see C. L. Ten, *Mill's On liberty: a critical guide* (Cambridge University Press, 2008); Gerald Dworkin, *Mill's On liberty: critical essays* (Rowman & Littlefield Publishers, 1997); Peter Radcliff, *Limits of liberty: studies of Mill's On liberty* (Wadsworth, 1966)

⁵¹ Uner Daglier, *John Stuart Mill's two-pronged argument for freedom of expression* (Dissertation/Thesis Thesis, ProQuest, UMI Dissertations Publishing, 2005)

truth, finding truth and defeating falsehood in the marketplace of ideas because these arguments were by many standards one of the only two available effective options they have in order to fight for freedom against almighty political powers.

When an almighty power dominates all aspects of life and controls all forms of freedom, there are only two ways to fight for life and freedom. The first one is an offensive way, and the second is defensive. While the former way refers to attacking the nature, foundation and forms of the power through questioning its legitimacy, and criticizing its foundation, the latter way is to defend life and freedom through providing moral justifications of life and freedom. Historically, the justifications of freedom of expressions were developed as part of the defensive approach taken by the thinkers to defend freedom.⁵² Despite the long history of that approach, and despite its relative effects on defending freedom against power throughout history, we must no longer consider that approach.

If we want to take freedom of expression seriously, a theoretical defensive approach is not the most effective option. Old justificatory theories of freedom of expression and even the recent theories, built on the elements of the old ones, have all missed a very crucial point about freedom. Power over freedom requires justification, not vice versa. To take freedom of expression seriously, the focal question regarding freedom of expression should be different from the historical justificatory questions. My understanding is that if we continue asking 'why does freedom of speech deserve legal protection?' nothing significant can be achieved practically and theoretically. Instead, a more fundamental question must dominate jurisprudential discussions about free speech which is 'why is freedom of speech restricted?'

⁵² In the 16th century, which is arguably marked as the first historical stage of developing free speech theories, freedom of speech was initially considered and treated as an aspect of religious tolerance. See Eijnatten, above n This may prove that free speech was initially defended through begging religious powers and institution for being tolerance with those who speak their mind and express their opinions.

Some may argue that this latter question is an important question for freedom in general, but the other question, namely why does freedom of speech deserve legal protection?, is a more significant question of freedom of speech because with reflecting on that question the special value of free speech, not freedom in general, can be examined. In other words, some may argue that justifications of freedom of speech have been historically initiated and recently reiterated and developed further not based on the belief that there is a need for moral justification of freedom in general, but based on the assumption that there is a special value in free speech which requires special moral theorization and special legal protection. Is that so? The answer is positive for those who argue that there is freedom of speech principle to some extent independent from the general principle of freedom. However, I doubt the existence of such problematic and baseless principle.