J.S MILL'S VIEW ON FREEDOM OF EXPRESSION AND THE APPROACH OF THE EUROPEAN COURT OF HUMAN RIGHTS

*Shahid A. Ronga**

ABSTRACT

This essay intends to analyse the issue of freedom of speech and expression as argued by one of the most influential British philosopher, political economist of 19th centaury JOHN STUART MILL in one of his famous book "On Liberty". The essay is divided into five parts. The Part I will introduce subject of discussion and is envisioned setting up the premise for discussion in this essay. The Part II aims to thoroughly examine Mill's view on the right to "freedom of expression"[1]. The Part III will focus on the various findings as well as the approach adopted by the European Court of Human rights on various categories and means of speech and expression. The Part IV will compare and contrast the relation between the Mill's views and findings of the European court of Human rights on this issue. And finally, the Part V deals with the conclusion of this essay.

I. INTRODUCTION

Freedom of expression is said to be the cornerstone of liberalism and democracy. Its value has long been entrenched by John Milton and J.S. Mill since the days of the Enlightenment. Yet, right to freedom of expression is not an absolute right.[2] This right is so warranted among all of the human rights that it not only finds its place in almost all the major world Constitutions but is also present in almost all the major international and regional human right Treaties and Conventions.[3] Today there are few States in the world which do not profess freedom of speech in their Constitution.[4]

Unlike other free speech/expression theories most notably, the theory of free speech as an 'Aspect of Self-fulfilment', 'Free speech as a tool of Citizen's participation in Democracy', 'Free speech: Suspicion of government theory' etc. this paper will mostly concentrate on JOHN STUART MILL'S perspective on freedom of expression and opinion as presented by him in his seminal book "ON LIBERTY" and then tries to compare it, mainly with the findings of European Court of Human Rights (the Court).

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* B.A and LL.B (The University of Kashmir), LL.M (Cardiff University, United Kingdom). The author is presently a faculty member of the Department of Law, The University of Kashmir.

[1] **Note**: In this article, I am using the terms, freedom of expression of opinion, freedom of speech and expression freedom of expression, freedom of speech, in an interchangeable manner and should be understood accordingly unless otherwise require by the context.

[2] Puja Kapai and Anne SY Cheung. 2008. *Hanging in a Balance: Freedom of Expression and Religion* ExpressO Available at: http://works.bepress.com/puja_kapai/1. p 12.

[3] In US constitution this right was incorporated by First Amendment in 1789, Canadian Constitution Sec 2(b), UNDHR Art 19, International Covenant on Civil and Political Rights (ICCPR) Art 19, American Convention on Human rights Art 13, European Convention on Human rights Art 10 and Art 9 of African Charter on Human and Peoples' Rights.

[4] Smith Rhona, *Textbook on International Human Rights*, OUP, 2010; p 292.

The Central idea in the Mill's perspective is the *Discovery of truth*, individual emancipation and consequential social progress and ultimate human development[5]. According to William Cartwright, Mill's defence of free discussion in terms of truth invites further questions on a number of points.[6] He (Mill) has in mind discussion on a wide variety of issues, both theoretical and practical, such as scientific, religious, political and moral matters. But there is philosophical controversy about the applicability of the notion of truth to some of these issues.[7] The challenge to free speech is whether words or conduct resulting in insult, intimidation and harassment of religious groups, teachings of a particular religion or individuals should be banned or should they be protected as inherently valuable and indispensable to public debate in a democratic society.[8] It has largely been in the context of legislation in some European countries which restrict propagation of revisionist ideas, Holocaust denial or denial of crimes against humanity which were found to have occurred[9] that the protection of the reputation of others has been heralded as a suitable ground for limiting the right of freedom of expression.[10] In U.S. constitutional jurisprudence, in contrast, freedom of speech seems to trump all other values, providing protection to speech that is stupid and hateful and full of falsehood no matter how hurtful or potentially dangerous. Given the ugly reality of "Holocaust denial" literature, its apparent lack of social value, the hurt that it does, and the danger it poses - one is forced to ask whether the extreme libertarian approach to freedom of speech embodied in U.S. Constitutional jurisprudence is justifiable. How is civilization served by protecting this kind of speech?[11]

II. MILL'S VIEW ON THE RIGHT TO "FREEDOM OF EXPRESSION AND OPINION"

Mill's argument in favour of the support of freedom opinion and discussion in *On Liberty* has been considered as one of the most original literary piece of work and continues to be debated in the academic circles and elsewhere till date. He makes a very strong case for freedom of expression. He sets out his arguments for freedom of speech in chapter II of this book. They are linked by a common concern with the *Truth*. The general idea is that truth is a casualty of the suppression of free discussion. In this chapter, he raises and answers an important question as to whether people, either through their government or on their own, should be allowed to coerce or limit anyone else's expression of opinion and comes to the conclusion that such actions would be illegitimate. He famously asserted that:

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[5] *See*, John Stuart Mill: On Liberty. You can access this book online also at: http://ebooks.adelaide.edu.au/m/mill/john_stuart/m645o/chapter2.html. Also *See*, Feldman David: Civil Liberties and Human Rights in England and Wales, 2nd Edn. OUP, 2002, p 76.

[6] Will Cartwright: Mill on Freedom of Discussion, Richmond Journal of Philosophy 5 (Autumn 2003), p 4.

[7] *Ibid*, p3.

[8] Puja Kapai and Anne SY Cheung. 2008. *Hanging in a Balance: Freedom of Expression and Religion* ExpressO, p13.

[9] I.e. the criminal provisions of the Gayssot Act of France which made it an offence to contest the existence of the crimes against humanity tried at Nuremberg in 1945 and 1946. See Robert Faurisson v.France, Communication No. 550/1993 (views of 8 November 1996), UN Doc. A/52/40 vol.2 (1999), p.84, which concerned this issue. Cited by: Puja Kapai and Anne SY Cheung. 2008. *ibid*

[10] J Cooper and A M Williams, *Hate Speech, Holocaust Denial and International Human Rights Law*, EHRLR (1996) p 593. Cited by Puja Kapai and Anne SY Cheung. 2008. *Ibid*

[11] Peter R. Teachout, *Making "Holocaust Denial" a crime: Reflections on European Anti-Negationist laws from the Perspective of U.S Constitutional experience*, Vermont Law Review 30 [2005-2006], p 659.

'*If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind*' [12]

He is, however, not the only one to have made such strong argument in favour of freedom of speech and expression. Even before him *Voltaire*, the famous French philosopher known for his advocacy of civil liberties, is credited for saying *"I do not agree with what you have to say, but I'll defend to the death your right to say it".* Even the English scholar *John Milton* had articulated, in the similar tone, in favour of freedom of speech and expression in his seminal book Areopagitica [13] two centuries earlier to Mill. 'Though freedom of discussion was widely accepted even in Mill's own day, he thinks that the arguments for it are not widely appreciated, something that is no doubt still true, and he holds, as he makes clear in the chapter II, that *one should not have beliefs without knowing the reasons for them*.'[14]

As a utilitarian Mill rejects the idea of natural rights, and emphasises that society as a whole, not just the silenced individual, loses by the repression of free discussion.[15] Silencing these opinions, Mill says, is wrong because it robs *"the human race, posterity as well as the existing generation*." In particular, it robs those who disagree with these silenced opinions. Consequently, the social majority, which is the source of the 'oppressive public opinion' that Mill fears, also loses by repression.[16]

Mill then comes to the reasons why humanity is hurt by silencing opinions. To demonstrate this he sets out the three possible scenarios:

His first argument is that the *suppressed opinion may be true*. So, in the first scenario one is to imagine that a majority who share a particular view would like to silence the minority who disagree. Mill argues that since human beings are not infallible, they have *no authority* to decide an issue for all people, and to keep others from coming up with their own judgments.[17]

Mill's second scenario is the similar to the first. However, this time the *majority view is true and the minority view false*. As per the Will Cartwright's analysis of Mill[18,] here the concern for truth might seem to support silencing the minority since its view is false. Suppressing falsehoods presumably supports truth. However, Mill ingeniously denies this. He argues that if the majority silences its opponents, it will never have to defend its belief and over time will forget the arguments for it. But, according to Mill, to have a belief without knowing the reasons for it is no way to hold a belief. Mill adds that the majority will in due course even lose a sense

[12] *See*, John Stuart Mill: On Liberty, p1.

[13] J. Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing(1644) in Prose writings* (Everyman, 1958).

[14] Will Cartwright: *Mill on Freedom of Discussion Richmond Journal of Philosophy* 5 (Autumn 2003), p1.

[15] *Ibid.*

[16] *Ibid.*

[17] Mill in a way maintains that in these circumstances it will be highly prejudicial to silence the minority and might turn disastrous for the majority itself because there would be no means of releasing it from its belief in a falsehood. On the contrary, if the minority is allowed to express its doubts about the majority view, then there is the likelihood that the majority might be brought to see the falsity of its view.

[18] Will Cartwright: *Mill on Freedom of Discussion Richmond Journal of Philosophy* 5 (Autumn 2003), p2.

of the real meaning and substance of its belief. The belief will be held as a *dead dogma* rather than as a living truth.[19]

Mill then conceives the third scenario in which *both majority and minority, having a portion of the truth but not the whole of it*. Again, as per Will Cartwright's analysis, Mill regards this as the most common of the three scenarios, and his argument here is very simple. To enlarge its grasp of the truth the majority must allow the minority to express its partially truthful view.

Mill then tries to create *exception* to his free speech theory. He makes us to understand it by means of an example of a corn dealer.[20] The principle embodied in it is that one should be free to say what one likes unless one's saying it causes '*Harm*'.[21]

A fair amount of criticism can be made to the Mill's arguments (though not all the criticism is highlighted in this paper).

In the first place, it assumes that in all circumstances (short of imminent emergency) the publication of possible true statement is the *highest public good*. But there are many situations where legal system prefers to protect other values, and that choice seems defensible.[22] Mill's argument that the utility of an opinion cannot be divorced from its truth is unpersuasive.[23] It is not inconsistent to defend a ban on the publication of proposition on the ground that their propagation would seriously damage society, while conceding that they might be true. The interest of truth is, to some extent, protected if the wisdom of the ban can be freely debated.[24]

Second criticism to the Mill's theory is over the second scenario that it would be wrong to prohibit even false speech for the reasons already mentioned. This may be correct, but a government worries that inflammatory speech may provoke disorder, is surely entitled to elevate *immediate public order considerations* over the long term intellectual development of the its citizenry.[25] It is the prevention of this harm which justifies the curtailment of free speech by the law of libel and slander.[26]

Thirdly, it is bitterly contested that the greatest difficulty with Mill's argument is its implicit assumption that freedom of discussion necessarily leads to the discovery of truth or more

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[19] B. Williams, *Truth and Truthfulness* (Princeton, NJ: Princeton UP, 2002).
Mill continues and says beliefs held like this are extremely vulnerable to serious opposition when it is eventually encountered. They are more likely to collapse because their supporters do not know how to defend them or even what they really mean. Then he proceeds to give the example of Christianity and the decline of its ethical content in the modern times because of these very reasons.

[20] *See*, *John Stuart Mill*: On Liberty.

[21] For Mill, the only principle that could regulate free expression is the harm principle - when expression causes a direct and clear violation of rights. This limitation on free speech commands very wide support, but only because the limitation as stated is so general. Once we get beyond this general formula into the more particular questions raised by it, agreement becomes much harder to reach.

[22] Barendt E, *Freedom of Speech,* 2nd edn., (OUP, 2005), p 8. For example, in many countries hate speech is banned, advertising of tobacco products and dangerous drugs may be prohibited for the reasons of maintaining racial harmony and for maintaining better health standards respectively.

[23] *Ibid.*

[24] C.L. TEN, *Mill on Liberty* (Oxford: UP, 1980), pp. 131-2.

[25] Barendt E, *Freedom of Speech,* 2nd edn., (OUP, 2005), p 9.

[26] Will Cartwright*: Mill on Freedom of Discussion Richmond Journal of Philosophy* 5 (Autumn 2003), p 4.

correctly to better individual or social decisions. It is not clear that unregulated speech always leads to reception of truth.[27]

James Fitzjames Stephen dismissed Mill's 'infallibility claim'[28] on the grounds that an opinion may be suppressed, not because it is false, but 'because it is true, or because it is doubtful whether it is true or false, and because it is not considered desirable that it is discussed'. As Fitzjames Stephen added, 'In these cases there is obviously no assumption of infallibility in suppressing it'.[29]

Mill's position on the limits of free speech is at once simple and complex. It is simple in so far as the avoidance of harm is the only limit he allows, but complex in so far as the application of this limit requires controversial judgements on a range of issues[30] which will be made clearer in the Part IV of this article.

III. APPROACH ADOPTED BY THE EUROPEAN COURT OF HUMAN RIGHTS TOWARDS FREEDOM OF SPEECH AND EXPRESSION

There is an explicit provision in the shape of Article 10 in the European Convention of Human rights (the Convention) which deals with freedom of expression.[31] The marked importance attached to this right and the demand for its special protection are readily explicable by its close linkage to the democracy's political process and its role as an indispensible vehicle for minorities, political opponents, and civil society to nurture and foster the debates.[32] Such a constitutional underpinning of freedom of expression lends succour to the consistent assertion of the Strasbourg organs (the Court and the erstwhile Commission) that interference with this right can be justified only by '*imperative necessities*' and that exceptions to the right must be interpreted narrowly.[33] The Court has explained its approach to the interpretation of Article 10 in a famous case ***Handyside v UK***[34] as follows:

"The Court's supervisory function obliges it to pay the utmost attention to the principles characterising a 'democratic society'. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of population. Such are the demands of that pluralism, tolerance and broadmindedness without

[27] Barendt E, *Freedom of Speech*, 2nd edn., (OUP, 2005) p 9. Indeed, some historical experience suggests the contrary. For example, the Nazis, with all of their nefarious design to destabilise world peace, came to power in Germany in 1933, although there had been relatively free political discourse under the Weimar Republic during the 1920's

[28] As Alan Haworth, in his article *On Mill, infallibility, and freedom of expression* Res Publica 2007, would like to call it. p1.

[29] James Fitzjames Stephen [1873] *Liberty, Equality, Fraternity , in Liberty, Equality, Fraternity, and Three Brief Essays* (Chicago & London: University of Chicago Press, 1991), p. 77.

[30] Will Cartwright*: Mill on Freedom of Discussion Richmond Journal of Philosophy* 5 (Autumn 2003), p 5.

[31] *See* Article 10 Sandy Ghandi*, International Human Rights Documents* (6th edn, 2008).

[32] Harris, Boyle & Warbrick, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009) p 443.

[33] Vereinigung Demokratischer Soldaten Osterreichs and Gubi v Austria A 302 (1994); 20 EHRR 56 para 37. *See* also Informationsverein Lentia v Austria A276 (1993); 17 EHRR 93 para 35.

[34] A 24 (1976); 1 EHRR 737 para 49 PC.

which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued."

This approach of the Court has led to the host of interpretative devices in the case law. The Court initially examines whether there is an interference with freedom of expression under the first paragraph of Article 10, and if so, whether such interference can be justified under the second paragraph on the basis of the following three standards:[35]

i) Whether an impugned measure is 'prescribed by law';

ii) Whether it pursues a 'legitimate aim';

iii) Whether it is 'necessary in a democratic society';

Unlike many political theories that limit itself only in support of the freedom of speech in the sense of protecting the speaker alone, Article 10 goes a little further to entitle "everyone the right to freedom of expression which includes freedom to hold opinion, to receive and information and ideas without interference by public authority and regardless of the frontiers".[36] Moreover, the scope of protection under Article 10 is to be broadly interpreted so as to encompass not only the substance of information and ideas, but also a diverse variety of forms and means in which they are manifested, transmitted and received.[37] Also, the Court has consistently recognised that states must ensure that private individuals can effectively exercise their right of communication among themselves.[38] In determining whether positive obligation to act exists in a particular situation, regard must be had to the fair balance that has to be struck between the general interest of the community and the interest of the individual.[39]

Under freedom of expression as manifested in the Article 10, the Court has recognised different categories of expression.[40] Each of these categories is taken briefly:

a) Political Expression:

The Court has said that political debate and free elections form the bedrock of any democratic system.[41] Healthy democracy requires a government to be exposed to close scrutiny not only by the legislature and judicial authorities, but by the general public and mass media also.[42]It has been said by the Court that by virtue of its dominant power, government, both national and local,[43] tolerate the greatest extent of criticisms against it. It

[35] Harris, Boyle & Warbrick, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009), p444.

[36] *See* Article 10 (1) of European Convention of Human Rights.

[37] Nilsen and Johnsen v. Norway 1999-VIII; 30 EHRR 878 para 43 G; and Sokolowski v. Poland hudoc (2005) para 44.

[38] Clapham, *Human Rights in the Private sphere*, 1993, p 231.

[39] Ozgur Gundem v. Turkey 2000-III; 31 EHRR 1082 para 43.

[40] For example, Political expression, Civil expression, Artistic expression, Commercial expression, the press and journalistic expression etc.

[41] Lingens v Austria (1986) 8 EHRR 407 para 41-2.

[42] *See* for example, Sener v Turkey hudoc (2004) para 40; Lambado v Malta hudoc (2007) para 54.

[43] Lambado v. Malta hudoc (2007) para 54.

must also be vigilant to avoid any *chilling effect* that any restrictive measures it adopts may have upon political expression.[44] Political expression exercised by elected representatives has been given a 'privileged' status because of its contribution to public debates on matters of general public interest.[45] The nature of speech is crucial for assessing the Court's standard of review. It is firmly established that restrictions on political discussions call for stringent review.[46] The Court has fleshed out an array of interpretative tools, including the doctrines of chilling effect and the less restrictive alternative to enhance effectiveness in guaranteeing freedom of political expression.[47]

In ***United Communist Party of Turkey v Turkey***[48,] the Court held that:

> *"One of the principal characteristics of democracy is the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression. From the point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned."*

The greatest tolerance shown to the ideal of political freedom of expression was perhaps best summarised in case of ***Stankov and the United Macedonian Organisation Ilinden v Bulgaria***,[49] where the Court held:

> *"The essence of democracy is its capacity to resolve problems through open debate. Sweeping measures of a preventive nature to suppress freedom of assembly and expression other than in case of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities, and however illegitimate the demands made may be - do a disservice to democracy and often even endanger it."*

b) The Press and Journalistic freedom:

The press has been accorded the broadest scope of protection in the case law, which encompasses preparatory acts for publication, such as research and inquiries carried out by journalists,[50] as well as the confidentiality of journalistic source. About prior restraint, which is perhaps one of the most controversial areas in case of journalistic freedom of expression, it has been held that prior restraints on the press are not in themselves

[44] Castells v Spain A 236 (1992); 14 EHRR 445 para 46.

[45] Lambado v Malta, *ibid.*

[46] Castells v Spain A 236 (1992); 14 EHRR 445 para 42. Also see Ceylon v Turkey 1999-IV; 30 EHRR 73 para 34 GC

[47] Harris, Boyle & Warbrick, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009), p455-56.

[48] [1998] 26 EHRR 121.

[49] Hudoc No. 59491/00.

[50] Sunday Times v UK (No 2) A 217 (1991); 14 EHRR 229 para 51 PC and Dammann v Switzerland hudoc (2006) para 52.

incompatible with Article 10,[51] but at the same times, must not be taken to provide subterfuge for repressive measures against anti-government media. In the case of the ***Sunday Times v. United Kingdom,***[52] The Commission concluded that there had been a breach of Article 10 and referred the case to the Court. Upholding the claim of the applicant, Court held:

> *"The interference with the applicants' freedom of expression was not justified under Article 10(2) which permits such restrictions 'as are prescribed by law and are necessary in a democratic society… for maintaining the authority and impartiality of the judiciary,' the Court deciding that, though prescribed by law and for the purpose of maintaining the authority of the judiciary, the restriction was not justified by a 'pressing social need' and could not therefore be regarded as 'necessary' within the meaning of Article 10(2)."*

So, in the area of prior restraint normally not only the proportionality test[53] but even the two '*standards prescribed by law'* and '*legitimate aim*' may be stringently applied.[54] The Court in ***Lingens v Austria***[55] said, it is incumbent on the press to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas - the public also has a right to receive them. Court further went on to say that the existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof - as regarding the value judgments this requirement is impossible of fulfillment and it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10. The Court cannot accept the opinion to the effect that the task of the press was to impart information, the interpretation of which had to be left primarily to the reader.[56]

Another important area regarding journalistic freedom of expression stems from the area dealing with confidentiality of journalistic sources. The Court in ***Goodwin case***[57] opined that the confidentiality of journalistic source is crucial for press freedom. With such protection, the role of the press as a public watchdog in providing accurate and reliable information to the public and shaping a well informed public opinion may be jeopardized. It is readily understood that any encroachments on the confidentiality of journalistic source

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[51] *See* for example, Krone Verlag GmbH and CoKG and MEDIAPRINT Zeeitungs-und Zeitschriftenverlag GmbH & CoKG v Austria No 42429/98 hudoc (2003) DA.

[52] Sunday Times v. United Kingdom (No. 1) (1979) 2 EHRR 245, the facts involved where concerning Distillers marketing a drug, 'Thalidomide'. This drug had been taken by a number of pregnant women who later gave birth to deformed children. The Sunday Times (newspaper) proceeded to write a series of articles with the intention of assisting the families in obtaining a favourable settlement for their actions. Among these articles, one of them was to deal with the history of the testing, manufacture and marketing of the drug. However, the Attorney-General obtained an injunction against the publication of this article on the grounds that it would constitute a contempt of court. The Sunday Times filed an application with the European Commission for Human Rights claiming that the injunction infringed their right to freedom of expression guaranteed by Article 10 of the ECHR.

[53] See for example, Gaweda v Poland 2002-II; 39 EHRR 90, para 35.

[54] Sunday Times, *ibid.*

[55] Lingens v Austria (1986) 8 EHRR 407 para 41-2.

[56] *Ibid*

[57] Goodwin v UK 1996-II; 22 EHRR 123 GC.

require 'the most careful scrutiny'.[58] However, to come under this protection it has to be demonstrated that 'it is justified by an overriding requirement of public interest.[59]However, the Court in ***Cumpana and Mazare v Romania***[60] has also maintained that the imposition of a prison sentence for a press offence will be compatible with journalist's freedom of expression….only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as in the case of hate speech or incitement to violence.

c) *Artistic Freedom of Expression:*

The Courts judgement in ***Handyside case***[61] is of particular significance for Artistic freedom of expression as well. The Court in this case has underlined a bold principle that Art 10 extends to expressions which 'offend, shock or disturb the state or any sector of population'. The upshot of the constitutional significance of artistic expression to some extent can be summarised from the following words used by the Court in ***Alinak v Turkey***[62]

"……Article 10 includes freedom of artistic expression – notably within freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds…..Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for democratic society. Hence there is an obligation on the State not to encroach unduly on the author's freedom of expression..."

As compared with the political expression, the decision making policy of the Court is to accord a less privileged position to artistic expression.[63] Nonetheless, what ought to be avoided is deployment of the notion 'duties and responsibilities' to mask oppressive measures, whose deterrent impact may stifle artistic imagination and creativity.[64]

d) *Commercial Expression:*

The principal aim of the commercial expression is to enhance the economic interest of individuals and enterprises. In EU law context, commercial expression is defined as 'the dissemination of information, the expression of ideas or the dissemination of images in the course of the promotion of the economic activity and the corresponding right to receive such information.[65] A survey of the case law suggests that commercial expression remains relatively less safeguarded than political or artistic expression. Without necessarily delving

[58] *Ibid,* para 40.
[59] Nordisk Film & TV A/S v Denmark No 40485/02 hudoc (2005) DA.
[60] 2004-XI; 41 EHRR 400 para 96.
[61] Handyside v UK A 24 (1976); 1 EHRR 737 para PC.
[62] Hudoc (2005) para 42
[63] Harris, Boyle & Warbrick, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009), p 458.
[64] *Ibid.*
[65] Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GesmbH, para 75.

into the host of cases involving commercial expression, in general, the attitude of the Court can be gauged from the following words in ***Markt Intern Verlag GmbH v Germany***:[66]

> *"Limitations on commercial advertising may be justified for the purpose of preventing unfair competition, and untruthful or misleading advertising."*

IV. COMPARISON AND CONTRAST BETWEEN THE MILL'S VIEWS AND FINDINGS OF THE EUROPEAN COURT OF HUMAN RIGHTS

There seems to be a healthy relation between the Mill's conception of freedom of expression and the findings of European Court of Human rights. There is a lot of similarity between the two, as both are supportive of individual liberty and consequential social emancipation and human progress. However, sharp and distinct approach of the Court is also discernible. In order to find the relation between the two, one thing has to be kept in the mind that the Court's findings in this regard (even otherwise also) is primarily guided by the spirit of the Convention itself, and has been interpreted within that given framework.

J.S. Mill was an absolute champion of freedom of expression and opinion of an individual. As has been already deliberated in the first Part II of this essay that he would not allow to stifle the individual views just because it is wrong and offensive rather he would like him to speak his mind out. His famous quote as noted previously[67] seems to have found resonance in ***Handyside v UK***,[68] where the Court said that:

"Freedom of expression constitutes one of the essential foundations of a democratic society and it….applies not 'only to information or ideas that favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'"

For Mill, the only principle that could regulate free expression was 'harm principle' – when the expression would cause direct and immediate physical harm to others. Now, this approach seems to have been best advocated by US Supreme Court in the case of ***Schenck v United States***,[69] where the Court through JUSTICE OLIVER WENDWELL HOLMES maintained that:

"..it would only be lawful to limit free speech where it creates 'clear and present danger'."

Also, at other time in ***Abrams v US*** [70] the U.S Supreme Court again through him held that:

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[66] A 164 (1989); 12 EHRR 161 PC para 35, where the court said …."even the publication of items which are true and describe real events may under certain circumstances be prohibited: the obligation to respect privacy of others and the duty to respect the confidentiality of certain commercial information are examples. In addition, a correct statement can be and often is qualified by additional remarks, by value judgement, by suppositions and even insinuations".

[67] That "If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.

[68] A 24 (1976); 1 EHRR 737 para 49 PC.

[69] 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470, 1919 U.S.

[70] 549 U.S. 1145; 127 S. Ct. 1012;166 L. Ed. 2d 763; 2007 U.S.

"….. the ultimate good desired is better reached by free trade in ideas – that the best test of truth is power of the thought to get itself accepted in the competition of the market'."

However, such an enduring defence to the freedom of expression has not been followed in the Europe. This libertarian approach adopted by the U.S. Supreme Court to protection of speech-based, as it appears to be, on deference to the operation of an unconstrained marketplace of ideas – is likely to strike many European observers as yet another manifestation of a "cowboy capitalism" mentality that has come to characterize the U.S. response to experience generally.[71] It is an approach to protecting freedom of speech that, in the European view, is sadly insensitive to the importance of protecting other competing social interests.[72]As a matter of fact, it is the Article 10 (2), which itself, to large extent, puts some restriction on absolute and unbridled freedom of expression of the individual. It lists nine legitimate purposes for which restrictions on the freedom of expression can be justified.[73]

In ***Adams and Benn v UK***,[74] the concern of National security was invoked. An expulsion order that prevented the leader of Sinn Fein[75] from entering Great Britain to attend a political meeting was justified in view of a sensitive peace process in Northern Ireland, and of the real and continuous threat of renewed violence. However, in ***Cetin v Turkey***[76]on the basis of similar concern of National Security, the ban imposed by a Governor on distributing a daily newspaper in an emergency region was considered to have gone too far, even seen against the fierce background of terrorism. The absence of sufficient safeguards against abuse, such as judicial review of administrative bans, was a key to the finding that a fair balance was upset.

In the area of freedom of expression, the Strasbourg organs have been confronted with diverse moral values encompassing sexual propriety, obscenity, abortion and the significance of religion. In the ***Handyside case***,[77] the Court recognised the seizure, forfeiture and subsequent destruction of an allegedly obscene book (Little Red Schoolbook) as pursuant to the protection of morals and rights of adolescent children. Similarly, in ***Muller and others v Switzerland***[78] the Court found no violation of Article 10 with respect to the confiscation of paintings.[79] Generally speaking a wide margin of appreciation to national is given by the Court in these cases.[80]

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[71] Peter R. Teachout, *Making "Holocaust Denial" a crime: Reflections on European Anti-Negationist laws from the Perspective of U.S Constitutional experience*, Vermont Law Review 30 [2005-2006], p 658.

[72] *Ibid.*

[73] Which says, the exercise of the freedoms [mentioned in clause (1)] ….. may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for the preventing the disclosure of the information received in confidence or for maintaining the authority and impartiality of the judiciary.

[74] Adams v UK Nos 28979/95 and 30343/46 hudoc (1997) DA.

[75] Sinn Fein is currently the second-largest party in the Northern Ireland Assembly. However, has always been considered to support terrorist IRA.

[76] Hudoc 2003-III paras 59 -62 and 66.

[77] Handyside v UK A 24 (1976); 1 EHRR 737 para PC.

[78] A 133 (1998); 13 EHRR 212 para 36.

[79] The audience was not warned of the content of the exhibition, and the paintings depicting homosexuality and bestiality in crude forms were 'spontaneous'. The exhibition was free of charge, and without any age limit and hence accessible even to small children.

[80] For example, see, Perrin v UK No 5446/03 hudoc (2005) DA and also see Handyside case above.

Again, when dispute is between the freedom of expression and protection of freedom of religion of others[81] the Court has taken a very cautious approach. For example, in ***Otto-Preminger-Institut v Austria***,[82] the Court after appreciating the importance of Freedom of expression said:

"....However, as is borne out by the wording itself of Article 10 para. 2 (art. 10-2), whoever exercises the rights and freedoms enshrined in the first paragraph of that Article (art. 10-1) undertakes "duties and responsibilities". Amongst them - in the context of religious opinions and beliefs - may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs."

Similarly, a limited freedom of expression has been recognised by the Court when it comes to the protection of Reputation and Honour of private individuals. For example, the Court has considered publishing intimate private aspects of individuals or their family as a serious affront to their right to good reputation, honour and privacy.[83] Moreover, the most fundamental exception carved by the Convention and the Court to the freedom of expression is to maintaining the authority and impartiality of the Judiciary. Under Article 6 (1), the Convention categorically allows courts to hold criminal proceedings in camera, excluding journalists or public in general. Such exclusion is aimed at protecting the privacy rights of juvenile offenders, preventing disorder or crime, maintaining the authority and impartiality of judiciary, or protecting the rights of others.[84]

V. CONCLUSION

Throughout the annals of history there has always been a confrontation between the people who are in favour of absolute freedom of speech and expression and those who opposed this idea. During the era in which Mill wrote "On Liberty", the tenants of freedom and democracy where not as deeply entrenched as they are at present. We have progressed a lot since then mainly in terms of our political structural assimilation ushered by unprecedented technological revolution and market economy. Now, we talk about international and regional communities/arrangements in their various manifestations like United Nations, European Union etc. We live in multi-cultural, multi-ethnic and multi-religious societies. We have come very close to each other especially now, when the internet and communication technology has significantly reduced most of the barriers in our speech and expression. The phenomenon of social media likes Facebook and Tweeter etc. has shrunk the world into a single large community. Our progress, though welcoming, as it has bestowed us with much aspired freedom of expression as well as the movement, has at the same time burdened us with much more responsibilities and concerns for the multitude of sensibilities of others in this *global*

[81] Another right which is also protected by Article 9 of the Convention.

[82] A 295 -A (1994); 19 EHRR para 49

[83] Von Hannover v Germany 2004-VI; 43 EHRR 1 para 59

[84] Harris, Boyle & Warbrick, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009), p 487.

village. In this context, the balanced approach adopted by European Court of Human rights is worth appreciation. The Court through its various judgements has acknowledged that concepts like "Harm principle", "Market place of ideas" etc. as adopted in United States, might not be sufficient in the context of Europe. Here the 'Offense principle' still makes a lot of sense mainly because Europe has its own constitutional traditions, and the balance struck in European constitutionalism between freedom of speech and statements that offend the sensibilities of others has traditionally been different from that struck in U.S. jurisprudence and these differences deserve to be respected.[85] Although, some people might conceive the various decision of the Court as against the advocacy of Mill's absolute freedom of expression, however, it is questionable whether he himself would have appreciated the kind of abuse to freedom of expression as we have witnessed for example in *Muller* and *Perrin* cases discussed above, considering his main aim was social emancipation and intellectual human progress rather than racial[86] or religious confrontations.[87] In cases of hate speech and particularly pornography it is difficult always to identify direct and immediate physical harm.[88] After reflection on the array of cases, it can be concluded that Mill's position is too minimal and that "Offence principle" should be admitted as a constraint on free expression, at least, in some cases. This argument can further be substantiated by quoting a recent interview with Thorbjørn Jagland, Secretary General of the Council of Europe, ahead of the conference "*Tackling hate speech: Living together online*" (Budapest, 27-28 November 2012), while answering the question how to reconcile differences between *hate speeches* and freedom of speech and

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[85] Peter R. Teachout, *Making "Holocaust Denial" a crime: Reflections on European Anti-Negationist laws from the Perspective of U.S Constitutional experience*, Vermont Law Review 30 [2005-2006], p 692.

[86] For example: it is illegal in Germany and elsewhere to deny the occurrence of the Holocaust, the systematic attempt by the Nazis to eliminate the Jews and others.8 Whereas the three previous cases involve insulting attacks on a person's basic beliefs or racial character, this one has to do with simply denying the occurrence of an event. Despite the difference the natural justification for this restriction is that denial of the Holocaust, by Germans in particular, is deeply offensive to the survivors of the event and their descendants. There are perhaps other considerations involved in this case. The identity of modern Germany is inextricably connected with the moral catastrophe from which it emerged. It defines itself against that calamity. For Germans to deny the Holocaust is to deny the central event in that calamity and, in a way, is to subvert the moral identity of the new Germany. Whether these further considerations are adequate reason for interfering with free expression is another question

[87] *See,* for example, in 1988 the writer Salman Rushdie published a novel called The Satanic Verses in which some of the characters think, say and dream things about Islam which caused immense offence to Muslims. The repercussions were extraordinary and global. There were demonstrations in Britain and across the world; the book was burned in public; demands were made for the banning of the novel; bookshops selling it were firebombed; some of those associated with the publication of the novel, and its translation into other languages, were assassinated; and finally, and famously, the Iranian religious authorities placed Rushdie under a fatwa which required devout Muslims to try to kill him. This unprecedented literary furore divided non-Muslim opinion in this country. Some thought it of overriding importance to reassert the freedom of the artist to express himself. Others were impressed by the degree of hurt in the Muslim community and thought that even artists must accept some constraints on their freedom of expression. Also See On September 30, 2005, the Danish newspaper, Jyllands-Posten, published a series of cartoons of Muhammad, one of which portrayed the prophet as a stereotypical terrorist wearing a lit bomb in the shape of a turban. Martin Asser, What the Muhammad Cartoons Portray, BBC NEWS, Feb. 9, 2006, http://digbig.com/4qkcd. When these cartoons were subsequently republished in leading European newspapers, they provoked widespread protests by Muslims throughout the world. The objection in part was that they tended to reinforce in the public mind a caricatured image of all Muslims as terrorists. More fundamentally, the blasphemous depiction was considered a profound sacrilege.

See also, the recent U.S. ambassador to Libya Chris Stevens, and three American members of his staff were killed in an attack on the U.S. consulate in the eastern city of Benghazi by protesters angry over a film that ridiculed Islam's Prophet Muhammad. Check http://www.guardian.co.uk/world/middle-east-live/2012/sep/12/libya-egypt-attacks-muhammad-film-live (accessed on 12/06/2016)

See also, the recent attack on French satirical weekly magazine Charlie Hebdo, Bremner, Charles, Islamists kill 12 in attack on French satirical magazine Charlie Hebdo. The Times (7 January 2015). Check http://www.thetimes.co.uk/tto/news/world/europe/article4316408.ece (accessed on 12/06/2016)

[88] *See* Itzin, C Pornography and Civil Liberties: Freedom, Harm and Human Rights in Pornography, Women, Violence and Civil liberties, 553-585. Also See, Sunstein, Cass (1988) Pornography, Sex Discrimination and Free speech in Gostlin, Civil Liberties in Conflict (1988) pp 152-169 .

expression, he answer that "freedom of speech is basic right of an individual which they can exercise even to the extent of disturbing the public opinion but of course it has to be balanced towards other's rights also. There has to be balance between rights and obligations. We have to pay more and more attention to this as our societies are becoming more diverse with respect to religion, culture and individual priorities. Therefore, it is important for us to convey that yes, we have the basic rights but we also need to have basic obligations in order to pay respect to others opinions, religion and cultures."[89] Perhaps, this essay can best be concluded with the words of Judge Francoise Tulkens,[90] where she argued that "in a democratic society, I believe that it is necessary to seek to harmonise the principles of secularism, equality and liberty, not to weigh one against the other."

[89] The Interview can be accessed at http://www.youtube.com/watch?v=lMbHSlUsWL0(accessed on 12/06/2016).

[90] In her dissenting opinion in LEYLA ŞAHİN v. TURKEY, Hudoc, Application no. 44774/98, 10 November 2005 http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"dmdocnumber":["789023"],"itemid":["001-70956"]}