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Freedom of expression in a pluralistic world order. Vrijheid van meningsuiting in een pluralistische wereld orde

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Citation

Awesta, A. G. (2014, November 27). *Freedom of expression in a pluralistic world order. Vrijheid van meningsuiting in een pluralistische wereld orde*. Retrieved from <https://hdl.handle.net/1887/29836>

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Note: To cite this publication please use the final published version (if applicable).

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Title: Freedom of expression in a pluralistic world order

Issue Date: 2014-11-27

I. Introduction to this Research

We live in a world that is now characterized by an intense plurality of worldviews. The growth in such a level of pluralism is being fostered by a process of globalization that continues unabated. In other words, we live in an era that is increasingly characterized by globalization, a process that has shrunk time and space and, as a consequence, intensified human interactions with their unavoidable tensions and clashes. This globalized era is, thus, a tumultuous epoch filled with uncertainties wherein the general will seems to have allowed ‘security’ to prevail over ‘fundamental rights and freedoms’.¹ The quest for security is a result of contingencies and menaces that need to be confronted. This inconvenience whereby human rights and freedoms need to be confined and suspended in the name of security is often called ‘the state of exception’², albeit not in the classical sense of the word. The shrinking of space and time, which is among the most fundamental characteristics of globalization, has turned the world into a global village in which the interaction between diverse worldviews has vastly increased. This tense reciprocity among different if not competing worldviews is designated by the notion of ‘multicivilizationalism’ at the international level and ‘multiculturalism’ at the regional and national level – two notions that, as will be clarified later, are used interchangeably in this study. However, this reciprocity among worldviews, the so-called cultural dimension of globalization, has not garnered the attention it deserves, while the furtherance of interactions, as referred to already, has had outrageous consequences. In this sense, reference can be made to the impact on the fundamental right to freedom of expression, because “in a globalized world speech can be universally heard, as [for instance] the Mohammed cartoons that appeared 2005 in a local Danish newspaper illustrate. Without the growing multiculturalism of European societies, these cartoons would not have garnered much attention. Without modern information technology, they would not have been universally noticed within days. In a globalized world [which is, thus, characterized by multicivilizationalism] speech can provoke universal reactions”.³ This is only one example among many assaults on this fundamental freedom that will be discussed in this study. Thus, the form of pluralism fostered by the process of globalization, and yet downplayed in the discourse on it, tends to have an impact on the fundamental right to freedom of expression. Accordingly, the aim of this study is to provide an understanding of the menace that this

¹ Report and Recommendations of the President’s Review Group on Intelligence and Communications Technologies, ‘*Liberty and Security in a Changing World*’ (12 December 2013)

² Giorgio Agamben, *State of Exception* (UCP, Chicago 2005)

³ Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (OUP, Oxford 2009) 17

pluralism of worldviews and the clashes between them pose to the fundamental right to freedom of expression at the different strata of society.

II. The Research Question

The central question of this research is whether the reciprocal clashes among different worldviews in terms of civilizations and/or cultures have legally confined the fundamental right to freedom of expression. This question will thus guide this inquiry into whether multicivilizational (i.e. multicultural) clashes have posed *de jure* limitations on the fundamental right to freedom of expression, and if so, to what extent. This overriding research question consists of two main parts.

First, to determine whether the human dimension of the process of globalization, which fostered pluralism, underpins the clash between worldviews, and if so, we need to grasp both the nature and scope of such contemporary antagonism.

Second, after having determined that there is indeed a pluralistic clash, we need to examine the ensuing question of whether this antagonism possibly imperils the fundamental right to freedom of expression. In this sense, the survey in this second part will theoretically clarify why precisely the fundamental right to freedom of expression is prone to be legally confined by pluralistic tensions. Subsequently, this *de jure* limitation of pluralism, which tends to be imposed on this particular right, will be examined at different strata – international, European, and national level.

III. Methodology

Law and society are two interwoven concepts that reciprocally influence each other. Contemporarily, this reciprocity is made obvious from the impact of pluralistic society on the concept of law – about which we have narrowed the scope of this inquiry to the fundamental right to freedom of expression. This survey comprises two main parts that are based on these two concepts. As to each part, different methods have been adopted which will be explained momentarily.

The first part concerns the plurality of society which tends to have a limiting effect on the fundamental right to freedom of expression. As Samuel P. Huntington asserts, in this age of globalization, this pluralism and its perilous discontent have taken place along cultural lines.⁴

⁴ Samuel P Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon & Schuster, London 2002) 19, 36. According to Huntington, “[...] the fundamental source of conflict in the new world will not be primarily ideological or primarily economic. The great divisions among humankind and the dominating

Therefore, the process of globalization is used for understanding the scope and effect of pluralism at the different levels – international, European, and national. In so doing, the three waves of globalization – globalism, transformationalism, and skepticism – are taken as our point of departure. Based on these waves, we have tried to grasp the reciprocal antagonism that tends to limit the fundamental right to freedom of expression. Accordingly, following this understanding, we have employed a comparative approach towards such antagonistic perspectives – whose roots can be retraced to the aforementioned waves – which are, at the same time, each other’s dichotomies. Thus, our method concerns an interpretivist position and, in epistemological terms, a partially modern realist approach, since the antagonistic theories that we have comparatively elaborated in this study are discursive and provisional in nature.⁵ Henceforth, understanding the effect of pluralism brought about by the reality of an increasingly globalized world is dependent on the interpretative theories that oftentimes reciprocally antagonize one another.

In the second part of this study, our inquiry will reach beyond the normativity of the first part to assess the *de jure* effect of pluralism on the fundamental right to freedom of expression. More concretely, in the second part, we will strive to philosophically conceptualize the fundamental right to freedom of expression and its possible limitations within a pluralistic society. Subsequently, we will examine the limiting impact that pluralism tends to have on this fundamental right. In assessing this impact, the legal order is divided alongside the aforesaid layers of a pluralistic society into three different strata – international, European, and national legal orders. The methods and approaches adopted for this assessment are manifold in nature, depending on the layer and sources that we use. As to the sources in each layer, it has to be noted that there are three different categories that we have used in this study. First, we have the primary sources which are the positive law tools – both hard and soft law – that are to be found in, among others, conventions, declarations, resolutions, and codes. To this category belong also the judicial judgments. The second category of sources concerns the preparatory works (*travaux préparatoires*) containing parliamentary acts and papers. The tertiary sources are the legal reports and literatures. In order to grasp the content and scope of the fundamental right to freedom of expression, a descriptive approach is adopted. Through this approach, we should be able to grasp the leitmotifs and significance of this right by

source of conflict will be cultural. [...] the principal conflicts of global politics will occur between nations and groups of different civilizations. [...] Conflict between civilizations will be the last phase in the evolution of conflicts in the modern world”. Samuel P Huntington, ‘The Clash of Civilizations?’ (1993) 72 (3) *Foreign Aff* 22, 22

⁵ David Marsh and Gerry Stoker (eds), *Theory and Methods in Political Science* (2nd edn Palgrave Macmillan, Hampshire 2002)

expounding its underlying concepts and rationales. Furthermore, for analyzing these sources on the basis of their (legal) nature, the following methods are used. First, the grammatical interpretation, in other words, the black-letter method is used for studying the legal provisions at their face value. Second, the historical interpretation is employed for grasping the leitmotifs behind their codification as well as the stipulation of their reach. Furthermore, the fundamental right to freedom of expression is analytically studied with the aim of determining the extent to which this right is constrained by a plurality of worldviews.

IV. Clarification of Terminology

A plurality of worldviews has underpinned the modern epoch. This is why Samuel P. Huntington states that, in this era, politics is configured along views that are designated by the notions of ‘culture’ and ‘civilization’, which we have called ‘the human dimension’ of the process of globalization. It has thus become, in a way, the age of identity politics. These notions are interchangeably used and their multiplicity is designated by the following concepts: ‘multiculturalism’ and ‘multicivilizationalism’. However, the use of these concepts in this study requires further clarification. The prefix ‘multi-’ indicates plurality, i.e. multiplicity of the notions that follow this prefix. Regarding the notions of ‘culture’ and ‘civilization’, the following observations are timely.

As Adda B. Bozeman observed in 1975 (whose description is adopted by Samuel P. Huntington), “The words ‘culture’ and ‘civilization’ carry different meanings for different scholars. [...] [Yet, as he deploys it] both stand for that which is most fundamental and enduring about the ways of a group persisting in time. That is to say, they cover those values, norms, institutions, and modes of thinking to which successive generations in a given society have attached primary importance”.⁶ Thus, as Huntington puts it, “Civilization and culture both refer to the overall way of life of a people, and a civilization is a culture writ large”.⁷ Elsewhere we see that he provides the same description by defining culture “[...] in purely subjective terms as the values, attitudes, beliefs, orientations, and underlying assumptions prevalent among people in a society”.⁸ And he describes the notion of civilization as the highest cultural grouping of people and the broadest level of cultural identity people have, short of that which distinguishes humans from other species. It is defined by common

⁶ Adda B Bozeman, ‘Civilizations Under Stress: Reflections on Cultural Borrowing and Survival’ [1975] VQR 51

⁷ Samuel P Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon & Schuster, London 2002) 41

⁸ Lawrence E Harrison and Samuel P Huntington (eds), *Culture Matters: How Values Shape Human Progress* (Basic Books, New York 2000) xv

objective elements such as language, history, religion, customs, institutions, and by the subjective self-identification of a people. “[...] Civilizations are the biggest ‘we’ within which we feel culturally at home as distinguished from all the other ‘thems’ out there”.⁹ Hence, civilization is understood as the broadest cultural entity. What is more, it goes without saying that, in this context, religion is conceived as one of the crucial formative factors of civilization.¹⁰ In other words, “Religion remains an important source of cultural rules, even in apparently secular societies; at the same time, religious rules are subject to a spontaneous evolution as they interact with a society’s given historical environment”.¹¹ Therefore, usage of the notions of culture and civilization differ merely in their scope of application, but remain, for the rest, synonymous regarding their content which is also the line of thought that is followed in this research. This means that these two notions and their multiplicity are interchangeably employed in this survey.

Furthermore, it has to be noted that these two notions have no universally accepted definitions and, as referred to above, carry different meanings for different scholars and disciplines. This is why in this research, no attempt has been made to define the notions of ‘culture’ and ‘civilization’. Hence, we have merely deployed the aforesaid descriptions of these notions which have also been used as a paradigm by Huntington for studying ‘the intercivilizational clash of culture and religion’.¹² What is more, the concepts of ‘multicivilizationalism’ and ‘multiculturalism’ are taken at face value in this study for describing the multiplicity of worldviews among which clashes tend to occur within globalized societies. However, in reality the latter concept has been used as a political notion in the broadest sense of the word by policy makers and scholars in this field. Our research is not concerned with the political usage of the notion of multiculturalism, due to which a discussion of multiculturalist theories does not fall within the scope of the present study. Nevertheless, for the sake of argument, it is important to provide a mere categorical understanding of this notion in view of its political deployment. The reason why a general survey suffices, is because the old multiculturalism paradigm has not been successful in

⁹ Samuel P Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon & Schuster, London 2002) 43

¹⁰ Ibid 47

¹¹ Lawrence E Harrison and Samuel P Huntington (eds), *Culture Matters: How Values Shape Human Progress* (Basic Books, New York 2000) 111

¹² Samuel P Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon & Schuster, London 2002) 54

integrating non-Western migrants into a rather liberal culture.¹³ It explains why the failure of this paradigm has been loudly voiced by policy makers.¹⁴ Therefore, it is neither the functionality nor the desirability of this notion that is disquieting, but the perilous reality concerning the fundamental right to freedom of expression that is yet to be seriously investigated. It is thus also the aim of this study to come to terms with the perilous reality of this concept. In other words, a thorough elucidation of the concept of multiculturalism has no added value to our inquiry. This is because we do not aim to conduct a normative evaluation of this concept, but rather to comprehend its effect on the fundamental right to freedom of expression. Therefore, for our stated purpose in this study, it suffices to provide an outline of the contexts in which this concept has been used.

In so doing, three interrelated referents of ‘multiculturalism’ can be discerned. Firstly, we have the demographic-descriptive usage of multiculturalism that refers to the existence of *ethnically* or *racially* diverse segments in the population of a society or state.¹⁵ Secondly, multiculturalism is used as an ideological-normative approach to “[...] generate the greatest level of debate since it constitutes a slogan and model for political action based on sociological theorizing and ethical-philosophical consideration about the place of those with culturally distinct identities in contemporary society”.¹⁶ The third referent is the programmatic-political usage of ‘multiculturalism’. This approach recognizes the existence of ethnic diversity and ensures the rights of individuals to keep their culture through specific types of programs and policy initiatives designed to accommodate such diversity. This is managed through assimilation, integration, inclusion, and social cohesion with the aim of creating a stable and harmonious social order, peace and security (passive social relationships).¹⁷ Also, access to, participation in, and adherence to constitutional principles and commonly shared values prevailing in society are fostered with the aim of reducing social pressures based on disadvantage and inequality.¹⁸ In other words, this approach aims to foster social justice, intercultural dialogue, as well as tolerance and respect for the diversity of

¹³ Francis Fukuyama, ‘A question of identity’ *The Australian* (Sydney 3 February 2007) <<http://www.theaustralian.com.au/news/a-question-of-identity/story-e6frg6n6-111112933880>> accessed 3 January 2013

¹⁴ Laura Kuenssberg, ‘State multiculturalism has failed, says David Cameron’ *BBC* (London 5 February 2011) <<http://www.bbc.co.uk/news/uk-politics-12371994>> accessed 7 January 2013. Kate Connolly, ‘Angela Merkel declares death of German multiculturalism’ *Guardian* (London 17 October 2010)

¹⁵ Christine Inglis, ‘Multiculturalism: New Policy Responses to Diversity’, UNESCO Management of Social Transformation, *Policy Paper* (1997) No.4, 16-17

¹⁶ *Ibid*

¹⁷ Office of the Deputy Prime Minister, ‘State of the English Cities’ (2006) Vol.1, 109

¹⁸ Christine Inglis, ‘Multiculturalism: New Policy Responses to Diversity’, UNESCO Management of Social Transformation, *Policy Paper* (1997) No.4

cultures. This is done through, for instance, “cooperation and harmonious interaction among people and groups with plural, varied and dynamic cultural identities as well as their willingness to live together”¹⁹ (active social relationships). Yet, deploying the notion of ‘multiculturalism’ has encompassed all the aforementioned interwoven approaches. This means that multiculturalism has been used for enacting – directly or indirectly – various multicultural policies and legal instruments in order to structure and accommodate a multicultural society. The purpose of doing this has been manifold. Firstly, the aim has been the enhancement of respect for cultural diversity, because cultural rights are considered to be “an integral part of human rights”.²⁰ Subsequently, the defense of cultural diversity is conceived to be a commitment to human rights and fundamental freedoms, which is said to be an ethnical imperative inseparable from respect for human dignity.²¹ It means that every individual²² should have the right to participate in the cultural life and practices of his or her choice.²³ The proponents of multiculturalism perceive this notion as enrichment to society as a whole. They consider “[...] cultural diversity as a source of exchange, innovation and creativity, [which] is [in their point of view] as necessary for humankind as biodiversity for nature. In this sense, as the common heritage of humanity, they claim that it should be recognized and affirmed for the benefit of present and future generations”.²⁴ Although cultural rights are said to be an integral part of human rights, it is acknowledged that “[...] cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, as enshrined in the Universal Declaration of Human Rights”²⁵ (as well as other “[...] universally recognized legal instruments, such as the two International Conventions of 1966 relating, respectively, to civil and political rights and to economic, social and cultural rights”²⁶) are guaranteed. This means that “[...] no one may invoke cultural diversity to infringe upon or to limit the scope of human rights and fundamental freedoms”²⁷ in general, and the right to freedom of expression²⁸ in particular. Henceforth, a diversity of

¹⁹ The Preamble and Article 2 of the 2001 UNESCO Universal Declaration on Cultural Diversity

²⁰ Article 5 of the 2001 UNESCO Universal Declaration on Cultural Diversity

²¹ Article 4 (Ibid)

²² As Jurgen Habermas rightly argues, the right to practice and to participate in a cultural life is an ‘individual right’; Amy Gutmann (ed), *Multiculturalism* (PUP, Princeton 1994) x

²³ The Preamble of the 2001 UNESCO Universal Declaration on Cultural Diversity

²⁴ Article 1 of the 2001 UNESCO Universal Declaration on Cultural Diversity

²⁵ Article 2 (1) of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Article 4 of the 2001 UNESCO Universal Declaration on Cultural Diversity

²⁶ The Preamble of the 2001 UNESCO Universal Declaration on Cultural Diversity

²⁷ Article 2 (1) of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

²⁸ Article 19 of Universal Declaration of Human Rights. Article 19 of International Convention on Civil and Political Rights. Article 10 of European Convention on Human Rights

worldviews is interchangeably linked with the notions of ‘culture’ and ‘civilization’. This pluralism, which is designated by the exchangeable concepts of ‘multiculturalism’ and ‘multicivilizationalism’, is used as a mere paradigm shred of any political connotation.

V. The Structure of this Research

In order to arrive at a viable response to the central question of this study, the research will be structured as follows. In *Part I*, an attempt will be made to provide an understanding of the content and scope of the contemporary tensions within the context of a globalized age. The purpose of such attempt is to determine whether an actual clash between opposing worldviews has taken place which underpins current world affairs and by extension confines the fundamental right to freedom of expression. First, we need to understand the process of globalization at face value. In so doing, the three waves that comprise this process – globalism, transformationalism, and skepticism – are surveyed in so far as they concern the human dimension wherein the current pluralistic antagonism is being vested. By taking this dimension into consideration, we will be able to comprehend the inherent rationale of the contemporary collisions and their disruptive, disintegrative, and marginalizing effects.

After having considered whether the human dimension of the process of globalization has had reciprocal antagonism as its consequence, we will try to conceptualize this discontent. The purpose of conceptualizing this mutual antagonism, which is often designated by the notions of ‘Orientalism’ and ‘Occidentalism’, is to make evident its indisputable inherency which has led to perilous consequences. This is done by elaborating the essence of this antagonism which is drawn along civilizational lines, and hence defined in terms of ‘Orientalism’ and ‘Occidentalism’. Such elaboration will render the inherent nature and underlying concept of this antagonism tenable. Based on this, we will then proceed with a substantiation of the underpinning concept of the aforementioned reciprocal antagonism in order to comprehend thoroughly the dichotomy between ‘Orientalism’ and ‘Occidentalism’.

The theoretical conceptualization of the essential contours and inherent features of this dichotomous antagonism makes it possible to understand the actual materialization of such animosity within the current process of globalization. Against this background, an attempt will be made to expound the continuation and vivacity of this antagonism. In so doing, we will try to explain how and through which concepts this continuation has taken place in the antagonizing of the West in this globalized era.

The discussion of the furtherance and continuation of such dichotomous antagonism in our globalized era will reveal that antagonism towards the West is not one-sided but rather reciprocal in nature. A reciprocity which is even fostered by globalism with its narrow comprehension of the human dimension. To make this advancement tangible, the pivotal globalist theory of Francis Fukuyama, ‘the-end-of-history’ thesis, is taken as our point of departure. A discussion of this thesis will make its theoretical shortcoming evident, which is embedded in its negligence and misapprehension of the concept of civilization in the broadest sense of the word. Therefore, we will try to clarify that the notion of civilization – which concerns the human dimension within the process of globalization – is such a pivotal concept that cannot be ignored in terms of current world affairs. This notion cannot be ignored because it is, in fact, Oriental civilization that collides with its Occidental counterpart which is defined in terms of modernity - for which the West is held liable. With regard to this latter, the following two dimensions will be discussed: the historical and psychological. An elaboration of these two angles will make clear that the resurgence of civilization is unavoidably intertwined with modernity, because civilization is exactly invoked to palliate the effects of modernity. Thus, the inevitability of the concept of civilization – the palliating revival of which is fostered by its very negligence by globalism – will be made evident through a comprehensive look at the globalist thesis of Fukuyama.

Accordingly, a discussion of the underlying mechanism of this globalist thesis will reveal its shortcoming(s). This will make clear why we need to go beyond this thesis if we are to grasp the reciprocity and continuation of the current antagonism which is underpinned by the neglected concept of civilization. Thus, both the importance of this concept and the danger of neglecting it should become obvious through a closer look at the antagonism towards the West. And yet, it remains crucial to understand that this perilous antagonism does not stop at a mere criticism of the West. This is because this criticism goes so far as to become apologetic about illegitimate discontent that, as we shall see in the second part, aims to undermine the fundamental right to freedom of expression.

Part II of this research is thus concerned with the danger posed to the fundamental right to freedom of expression which tends to be confined by the so-called reciprocal antagonism that characterizes our globalized world. In so doing, we will endeavor to apprehend why precisely this particular right is imperiled by civilizational clashes that are being fostered by an ever growing antagonism within pluralistic societies. This will be made evident through a discussion of the theory of Hannah Arendt which we have taken as our point of departure. In this discussion, it will be argued that pluralism is not only an undeniable fact, but is even the

prerequisite for safeguarding fundamental rights and freedoms. And the denial of it would result in alienation and worldlessness and, thus, in the deprivation of rights and freedoms. This is because speech, as an authentic political action, cannot take place in isolation, but is ineluctably dependent on plurality and *vice versa*. As Arendt asserts, speech is the actualization of the human condition of plurality, that is, appearance as a distinct and unique being among equals. Thus, the loss of human rights amounts to being deprived of a place in the world that renders opinions significant and actions effective. Hence, the significance of the fundamental right to freedom of expression becomes obvious when the state of absolute rightlessness is taken into consideration, which is a state of being deprived of the right to action, i.e. the right to form an opinion. This is why this fundamental freedom is, more than ever before, at stake in current pluralistic societies. Yet, it has to be noted that although pluralism is the prerequisite for having rights and freedoms, simultaneously it tends to confine them for the sake of that same plurality.

How this limitation that stems from pluralistic reciprocity can be approached is what will be discussed through the philosophy of John Stuart Mill which we have taken as our point of departure. This discussion will reveal that, according to Mill and his harm principle, speech ought to be constrained when, as a consequence, it has mischievous acts that can harm others. However, he modifies this by arguing that despite the difficulty of determining the bounds of offense, the freedom of expression in the public realm still has to meet the civilized conditions of interaction. He calls this ‘the morality of public discussion’, the violation of which should result in the limitation of speech in the same way as harmful action. This modification can become problematic when it is conceived against the background of Mill’s utilitarianism whereby the interest of the majority is taken as the standard. However, this is not the menace of this multicivilizational epoch. It is rather another development whereby, for the sake of peaceful coexistence²⁹, the threshold of the morality of public discussion is reversed from the interests of the ‘majority’ to those of the ‘minority’. It is also this reversal which can pose far-reaching limitations on the fundamental right to freedom of expression that are not only extrajudicial but also judicial in nature.

With the preceding discussion in mind, we will try to respond to the question: to what extent has the increase in antagonistic pluralism had a *de jure* impact on the fundamental right to freedom of expression? Thus, after having considered whether a civilizational antagonism has occurred at the international, European, and national level, we will then examine the

²⁹ Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (OUP, Oxford 2009) 119

question: to what extent these civilizational clashes have *de jure* limited the fundamental right to freedom of expression? At each level, the scope and substance of the law in force is first explained and, subsequently, their limitations are discussed. Simultaneously, the impact of accelerating pluralism is expounded as it will underpin our response to the aforementioned question. With regard to the international level, our research is confined to the documents issued by the prominent organs of the United Nations which are concerned with this fundamental right. With respect to the European level, the scope of this research is confined to the European Court of Human Rights, since it is *this* Court that deals with the fundamental right to freedom of expression in a *legal* sense. The last stratum in which the interaction between civilizations is most vivid and has led to tensions and clashes is the national level. It is at this level that multiculturalism has made its mark in the reality of Western societies, the prime example of which is the Netherlands which we have studied in this research. In determining this, an attempt has been made to scrutinize the *de jure* impact of a plurality of civilizations on the fundamental right to freedom of expression. In so doing, the relevant national laws are first explained. Hereupon, the national jurisprudence is studied by taking the criminal law approach as our point of departure. This approach requires particular attention, because ‘criminal law’ is *the* instrument that – due to its coercive nature – has a sweeping impact on the fundamental rights and freedoms in general and on the fundamental right to freedom of expression in particular. Finally, we will conclude with a general assessment of our findings, which should provide us with an answer to the central question of whether multicivilizationalism/multiculturalism has imposed a *de jure* limit on the fundamental right to freedom of expression.

