

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

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Concluding Remarks

Our contemporary era is underpinned by the process of globalization. This process has had an unprecedented impact on human life, leading to unforeseeable consequences that have allowed this era to be characterized as capricious. The level of uncertainty has increased the quest for certitude. Thus, globalization as a multidimensional process has had, despite the lack of a universally accepted definition, not only positive dimensions but also negative and disruptive sides as far as society is concerned. In this regard, it is worthwhile mentioning that despite the lack of a universal consensus concerning a definition of the globalization paradigm, for the purpose of this study we have tried to conceive this process, on the basis of the features that we have discussed in this research, as a precipitating set of continuous processes involving miscellaneous flows that encompass an ever-increasing number of global spaces in a compressed timescale, which result in deterritorialization and lead to an aggrandized integration, as well as an intensified and deepened interconnectedness albeit with the inevitable antagonisms. The accelerated interconnectedness among worldviews has been designated using the terms 'multicivilizationalism' and 'multiculturalism' – two notions that, as we have elaborated, are used interchangeably in this research.

However, for a considerable period of time, the globalization process has been approached from numerous angles such as the economic and technological dimensions, but hardly from the cultural angle, which has been marginally, if at all, touched upon. Hereby, the flow of people in terms of global migration has gained attention as only one of the many flows within this process, whereas their modes of life – in terms of 'culture' in the broadest sense of the word – have largely been neglected. In this context, globalism, as one of the three waves of globalization, has been defined this process solely in terms of 'modernization', which tends to homogenize cultures, i.e. as a global consumer culture. Consequently, this has been perceived as a new form of Western capitalist expansionism and imperialism. This narrow understanding of globalization only in terms of modernization is thus partial and relative, for it neglects features of human life such as 'politics' and 'culture' that do not always homogenize but even collide and foster antagonism. In this regard, the contingencies and challenges that are brought about by a plurality of cultures have resulted in the second wave of globalization called transformationalism. This wave has paid more attention to the features of human society within the globalization process by stressing that the flow of cultural products has taken place but not without its consequences for these products have been differently conceived by people around the world. Thus, the intensification of interactions

among civilizations, which is fostered by globalization, does not necessarily entail homogenization, but rather evolution, transformation and hybridization. However, one shortcoming of this wave is that the possibility of tensions between cultures is not taken into account, which is actually the main aftereffect we are currently facing. It is, then, the third wave of globalization, i.e. skepticism, that takes this neglected dimension into account by focusing on the differentiating, polarizing, fragmentizing and colliding effects of globalization for which the West is oftentimes accused for imposing such a modernity project, viz. Western values. Thus, globalization in the broadest sense of the term is not only positive and innovative for human society, for it does not only homogenize and hybridize cultures but, as one can notice from the current conflicts at the different strata, it also has rather disruptive, disintegrative, and marginalizing consequences for our contemporary world that are held to be reconfigured along cultural lines. Thence, the pluralism being fostered, if not brought about, by the globalization process, and yet downplayed in this discourse, has had notably negative consequences for the fundamental rights and freedoms in general and the fundamental right to freedom of expression in particular.

And so, in order to determine whether the invocation or negligence of the notion of culture in the broadest sense of the term underpins the currently accelerated antagonism, an attempt has been made to elucidate the scope and nature of this antagonism, which is often designated by the notions of 'Orientalism' and 'Occidentalism'. In this discussion, the seminal study of Edward Said is employed, which we have approached from its essentially political dimension. In this, Said describes the notion of Orientalism as a discursive mechanism that underpins the demeanor of the West towards 'the rest' which is, in essence, a dichotomy between 'East' and 'West'. He contends that the roots of this can be traced back to the colonial and imperial times, which have, nonetheless, found their way into the modern versions. In other words, in his view, it is not so much the character of Orientalism but its source which has changed, whereby a mere shift in attitude from academic to instrumental has taken place. The core aspect of the notion of Orientalism is the interrelationship between 'knowledge' and 'power' that, simultaneously, underpins the aforementioned dichotomy and the contemporary clashes, for it has been the 'otherness' of the Orient against which the identity and, subsequently, the dominance of the Occident is formed. This is why he rejects this and considers Orientalism to be a Western cultural enterprise, i.e. a tradition that has a reality and presence in and for the West through the configuration and institutionalization of power to ensure its durability. Thence, the survey of the notion of Orientalism has revealed that the underlying fundament of this reciprocal antagonism is the concept of culture in the broadest sense of the term.

In this regard, and against the background of the foregoing discussion on this mutual antagonism, an attempt has been made to expound the underpinning concept of this reciprocal animosity, that is, the concept of culture in the broadest sense of the word. In so doing, the description of this concept by Said indicates that it encompasses not only practices that have relative autonomy from the economic, social, and political realms, but that it is also a source of identity, whereby various political and ideological causes reciprocally interact. This is evident from the notion of Orientalism, which Said attempts to elucidate by means of the 'novel', as the pivotal cultural institution, in order to clarify that while the interest of imperialism has been political, it has been the culture that created that interest. Said antagonizes this by conceiving it as ethnocentric, antihuman, hegemonic, and anthropocentric. It is worthwhile noting that other commentators apply this same line of reasoning to Occidentalism. In a word, as our study has shown, the concept of culture in the broadest sense of the term inherently underpins the current reciprocal antagonisms and clashes. More specifically, this has become a pressing issue in the globalization process, whereby freedom, peace, and security are imperiled by mutual animosities that are based on the concept of culture and are, simultaneously, aggravated and exacerbated by the acceleration of this same process, for which Said blames and antagonizes the Western world. However, he applies the concept of culture, as the underlying notion of the current clashes, only to the West and denies the ineluctability of it when it comes down to 'others'. This paradox makes his opposition to the 'Clash of Civilizations' of Samuel Huntington, which he calls the clash of ignorance, spurious for Said's own thesis is inevitably grounded on this civilizational interaction.

However, like Said but in a different guise, Huntington is also skeptical about the so-called Western universalization mission, that is, bringing Western civilization to 'others', which is often defined in terms of modernization. For while previously 'others' seemed to be in need of culture in order to become civilized, currently they seem to be in need of modernization to become civilized. Therefore, modernization, in terms of a missional tendency to *modernize* 'others', is conceived to be the same core feature of modern Orientalism, just as civilization had been the underpinning trait of classic Orientalism. Thus, as regards the connection between the two notions of modernization and civilization, it has been argued that the former concept is equated with the latter, which is, subsequently, conceived as the inextricable crux of Western civilization that contemporarily underpins the colliding reality. This tends to be further fostered by the decline in the globalist claims and, at the same time, the increase in the relative power of other civilizations, which has made them resistant to Western pressure regarding human rights and democracy at the international, regional, and national level. In

this, the West itself is considered to be the culprit of the current antagonism. Even while antagonism is not only caused by the West itself, it is undeniable that it *is* fostered by it as we can discern from globalism's neglect and misinterpretation of the concept of civilization. The prime example of such a globalist theory is the one provided by Francis Fukuyama, that heralds the triumph of liberal democracy as the final stage of mankind's ideological evolution in which the realm of politics is considered to be autonomous from that of culture. This is rejected by Said who argues that this globalist thesis is a radical falsification of culture that strips it of its affiliations, pries it away from the terrain it contests, and denies it real influence.

Thus, the concept that currently underscores antagonism is undeniably the notion of culture, i.e. civilization and the plurality thereof. For making the inextricability of this concept from contemporary world affairs tangible, Fukuyama's thesis is further expounded in this research. In so doing, Jowitt's contention is adopted, according to which liberal capitalist democracy will always generate opposing challengers, since the dissolution of existing boundaries and identities can generate a corresponding potential for genuinely new ways of life that are antagonistic, if not militant, in nature. In this context, some have attempted to differentiate religion from the current clashes. Still, it would be an analytical error to downplay or neglect the role of religion within the current civilizational tensions, especially when it is accommodated by the states. Such an error blurs the perilous reality of the contemporary antagonism and can have unprecedented and unforeseeable consequences for the dignity and integrity of the human person. Despite the alluring theorizations, it is undeniable that the contemporary clashes emerge precisely when traditional cultural identities are made obscure, and a disjuncture between one's inner self and external social practice takes place. However, in the globalization process, little attention is paid, if any, to religion as the core social capital for understanding human interactions, whereas a consideration of this would reveal that the concepts of religion and culture are two indispensable components for the formation of civilization which underpins the current antagonism. Accordingly, for a better understanding, the two main dimensions of this disruption are elucidated: the historical and psychological. As regards the former, it has been argued that the contemporary clash is believed to have commenced in the aftermath of decolonization whereby, in abandoning traditional beliefs, newly independent countries recognized the inherent relativism that underpins all societies, systems of belief, and cultural practices. Consequently, this has ineluctably affected the psychological angle, whereby civilization is invoked to palliate the effects of modernity that have undermined the traditional systems and created a vacuum in the

human psyche. Based on this, it has been inferred that the current global clashes can only be grasped when the concept of civilization is neither neglected nor overlooked.

The indispensable and critical role of civilization for comprehending the contemporary global clashes has also become evident through our discussion of the mechanism that underlies Fukuyama's globalist thesis. More concretely, Fukuyama fails to explain why liberal democracy has no appeal within the Islamic world, so was Jowitt who could not explicate why the dissolution of existing boundaries and identities generates new ways of life that are antagonistic and hostile in nature. As discussed in this study, the most fundamental mechanism is the Platonic notion of thymos, existing out of isothymia and megalothymia. Thymos is defined as the side of man that deliberately seeks out struggle and sacrifice, which goes beyond his materialistic and physical needs. Fukuyama considers this concept to be inextricable for the existence of the body politic, even if it must not only be cultivated but also tamed. He believes that this balance can be struck in the 'universal and homogenous state', that is, liberal democracy which is grounded on economics and recognition. In other words, the universality of democracy is upheld, because one is convinced that this is the only mode of governance that is completely satisfactory to man. Megalothymia is considered to be the downside of thymos which, however, has not disappeared with this mode of governance, not even with the satisfaction of human desire through materialism and rational recognition. This suggests that the quest for ideals will continue, particularly when we take note of the resurgence of traditional megalothymian horizons, i.e. civilizations. Hence, it is questionable whether liberal democracy is vigorous enough to compete with the traditional value systems, since the unleashing of megalothymia by means of satisfying desire through material abundance and mere rational recognition has actually resulted in a greater reappearance and resurgence of megalothymian horizons. This is thus the shortcoming of this theory for, as Huntington contends, people are not likely to find in political principles the deep emotional content and meaning which is provided by traditional systems. We have designated such traditional systems with the notion of civilization, by means of which man is able to bridge the spiritual gap between the aforementioned objective material and subjective aesthetic harmony.

Fukuyama is aware of this deficit, but does not consider the contemporary challenges and clashes serious enough to pose a threat to his theory. Yet, he admits that *megalothymia* must continue to have a place in a vibrant liberal democracy, and also defends this latter against civilizations with an excess of *megalothymia*. To accommodate this, he states that a liberal democracy that could fight a short and decisive war every generation would be far healthier

and more satisfied than having a continuous state of peace. Also Huntington, like many other commentators, attempts to incorporate the *megalothymian* factor into his theory in order to defend the uniqueness of Western civilization. This shows that neglect and underestimation of the concept of *megalothymia* and, by that, ignoring the concept of civilization may be detrimental as witnessed in the relativization of universalistic theories in recent years. Yet, both the aforementioned deficit and neglect have fueled antagonism, which has endangered international peace and security in general and the fundamental human rights and freedoms in particular. The perilous forbearance of the concept of civilization has thus fostered, if not brought about, the severe antagonism we discussed in our elaboration of Said's theory, that goes so far as to condone illegitimate resistance and blame the West for everything. Henceforth, this discussion has rendered beyond doubt the existence of civilizational antagonism that particularly endangers fundamental human rights and freedoms.

Among all these rights and freedoms, it has been alleged that the one most imperiled by antagonism, which emanates from pluralism, is the fundamental right to freedom of expression. Therefore, before examining the de jure impact of pluralism on the fundamental right to freedom of expression at the international, European and national level, it is importunate to grasp why precisely this particular right is imperiled by the contemporary civilizational clashes. In order to grasp this, in the second part of this research, the endeavor was to elaborate on the significance of this fundamental right within the pluralistic public realm, as well as the impact of this pluralism on this right. In so doing, the theory of Hannah Arendt is taken as our point of departure, the elucidation of which has thus made apparent why precisely the fundamental right to freedom of expression is central to the pluralist realm. For pluralism is not only an undeniable reality but even the prerequisite for such fundamental rights and freedoms⁸⁷³, a denial of which would, however, result in alienation and worldlessness, with deprivation of rights and freedoms as its consequence, since freedom "[...] is actually the reason that men live together in political organization at all. Without it, political life as such would be meaningless. The raison d'être of politics is freedom, and its field of experience is action"874 in general, and speech, as the authentic political action, in particular. In other words, speech, as the authentic political action, cannot take place in isolation, but is inevitably dependent on plurality and vice versa. As Arendt asserts, speech is the actualization of that same human condition of plurality, that is, appearance as a distinct and unique being among equals. Hence, the loss of human rights amounts to the deprivation

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⁸⁷³ Hannah Arendt, *The Human Condition* (2nd edn UCP, Chicago 1958) 175

⁸⁷⁴ Hannah Arendt, *Between Past and Future* (Penguin Books, New York 2006) 145

of a place in the world that makes opinions significant and actions effective, for it is only in this realm that one can, by means of this authentic political action, appear and, thus, be free. This makes the inextricability and necessity of the freedom to this fundamental right evident and shows why, among all the fundamental rights and freedoms, it is precisely this right which is at stake in contemporary pluralistic societies.

Hence, pluralism does not only foster freedom of speech as suggested by the theory of Arendt, but due to the antagonism that emanates from it, it also confines speech (in the broadest sense of the term) and the freedom to it. This indicates that the exercise of this fundamental right, like all the other rights, is subject to limitations as our discussion has made evident. It is also this confining effect of pluralism that makes it exigent to grasp the theoretical limitation of speech and the freedom to it before we can scrutinize the de jure impact of this pluralism on the fundamental right to freedom of expression. For a theoretical assay of the possible limitation of this fundamental freedom, the philosophy of John Stuart Mill provided a cue. According to Mill's harm principle, speech ought to be constrained when it would entail mischievous acts that can inflict harm on others. However, he adds to this the notion of offense, and argues that although it is hard to determine the bounds of this notion, the freedom of expression in the public realm has to meet the civilized conditions of interaction, which he calls 'the morality of public discussion', the violation of which should result in the limitation of speech in the same way as action that harms others in society. This can become problematic when it is conceived against the background of utilitarianism, whereby the interest of the majority is taken as the standard, as we have also discussed in light of the reliance of this right on the body politic. Especially when we bear in mind that, besides the befuddlement of the distinction between speech and action, in contemporary multicivilizational societies, the threshold of morality of public discussion is reversed from the interests of the 'majority' to those of the 'minority' whereby, contiguous to governmental curtailments, this latter group also poses limitation on the fundamental right to freedom of expression which is, due to globalization, unprecedented.

Nevertheless, little thought is bestowed upon the *de jure* delineations, if any, that are imposed on this fundamental right with the acceleration of multicivilizationalism, which is also designated by the term 'multiculturalism'. Thence, after having examined why, among all the fundamental rights and freedoms, precisely the fundamental right to freedom of expression is most imperiled by pluralism, and what the permissible limitations are that can be imposed on this right, it is high time to make due allowance for the *de jure* delineation, which tends to be imposed on the fundamental right to freedom of expression by the dichotomous

antagonism that is fostered, if not brought about, by the pluralism that characterizes this age of globalization. Especially when we bear in mind that, thus far, the main attention has gone to the extrajudicial constraints, i.e. *de facto* limitations, with the consequence that little thought is bestowed upon the *de jure* delineations that are imposed on this fundamental right by the acceleration of pluralism. Accordingly, with the preceding discussion in mind, in the remainder of this research, the attempt is made to explore the *de jure* limitation which is thus deemed to be fostered by the accelerated pluralism at the global, regional, and national level. To put it differently, in the following parts of our inquiry, we will try to elaborate on the central question as to what extent, if any, pluralism has had a *de jure* effect on the fundamental right to freedom of expression at the international, European, and national level. In so doing, at each level, the scope and substance of the law in force is thoroughly expounded, whereupon, the delineating effect of the acceleration of pluralism is scrutinized.

At the international level, our survey has led to the conclusion that while expressions may be offensive, which could well be robust and critical in examining religious doctrines and practice, even in a harsh manner, they may, nonetheless, not amount to the advocacy of hatred that would constitute incitement to discrimination, hostility or violence. What is more, this fundamental right, besides the limitations imposed by the law, is also confined by its clash with other fundamental rights, the most important of which has been the fundamental right to freedom of religion and belief. Classically, this latter is aimed at protecting the human person and not religion and belief as such. Still, since 1999, the concept of 'defamation of religion' has grown in status within the UN framework, by means of which an attempt has been made to enact laws for extending the scope of protection beyond the bearer of this right in order to protect also the objects and symbols of veneration. This extension can be said to come down to the broadening of the ambit of the external dimension of religion, for not only the expression of conviction is covered, but also the means through which conviction is manifested. To put it simply, we have been witnessing a shift in protection from persons to ideologies in the broadest sense of the term, encompassing also the means and objects of veneration. The menace posed by this in a globalized era, wherein world affairs are characterized by civilizational clashes, is that such laws are vulnerable to arbitrary usage and can also lead to further limitations on the freedom of expression. Yet in recent years, we have seen a reversal of this development, whereby, once again, the emphasis is put on the fundamental right to freedom of expression in its classical sense. In this way, also the aim to protect religion as such has gone back to the original intention of the law, whereby only the human person has to be protected. However, the dividing line between the freedom of expression and hate speech is thin and perilous, which must be attentively guarded against abuses, especially in contemporary world affairs. Yet, it remains to be seen how the aforementioned reversal tendency can be maintained within a constantly changing landscape of world affairs with newly emerging powers and the accompanying alteration in international setups. What is more, as noted in the course of our research, the civilizational clashes do not only occur at the international arena but also, and perhaps even more so, at the European and national level.

As regards the European level, the scope of this research has been narrowed to the Council of Europe, and, more specifically, to the Human Rights Court that functions within the framework of this organization. This is because our research has been concerned with the mere legal effects, that is, de jure limitations of the civilizational clashes on the fundamental right to freedom of expression. And it is only this organization that is characterized by a court that functions on the basis of fundamental human rights and freedoms, whereas, as has been thoroughly discussed, other organizations are either not (yet) established on the basis of these rights and freedoms or they do touch upon them only sporadically and marginally. Furthermore, our inquiry has revealed that the fundamental right to freedom of expression has not remained unaffected by the civilizational tensions. This has been made evident through a survey of the case-law of the Human Rights Court and the legal developments therein. In the first place, freedom of expression has been broadly defined in scope, which can go so far as to offend, shock and disturb, all of which have to be tolerated in the name of tolerance and broadmindedness in a pluralistic democratic society unless violence is advocated. However, we can observe a tangible shift when it comes down to the morals, rights or reputation of others who have made their presence felt in Western pluralistic societies, as we can find in the vast jurisprudence of the European Human Rights Court. This means that the scope of protection has been widened so as to also cover insulting, offending and provocative expressions. In other words, our discussion has shown that the acceleration of pluralism tends to have a detrimental effect on the balance that, for the sake of pressing social needs, has to be struck among elements that are considered necessary in a democratic society. It is also in this context that the notion of 'hate speech' has been brought within the ambit of prohibited speech. Thus, whereas previously offending, shocking and disturbing utterances had to be tolerated, currently we have been witnessing a shift in view, whereby the Court argues in favor of tolerance and respect within a pluralistic democratic society, for the sake of which it considers it necessary to sanction or even prevent all forms of expression that spread, incite, promote or justify hatred based on intolerance, including religious intolerance. In a word, although previously pluralism and tolerance, as prerequisites of democracy, demanded a certain openness to expressions that could be offending, shocking and disturbing, with the introduction of the notion of hate speech, however, the demand of (religious) tolerance within the democratic pluralistic society now requires the curtailment of such offending, shocking and disturbing utterances. In addition, as has been argued in this survey, a narrow margin of appreciation has generally been made available to the states, but when it comes down to the sphere of morals or religion, this margin tends to be wider in scope.

Such effects of the plurality of civilizations within Western societies on the fundamental right to freedom of expression have been recognized by the Court, for it has argued that in democratic societies in which several religions coexist within one and the same population, it might be necessary to place restrictions on this fundamental freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected. In so doing, the emphasis is put on the 'duties and responsibilities', an example of which is – in the context of religious opinions and beliefs - the obligation to avoid expressions that are gratuitously offensive and profane as regards issues of veneration (that is, improper attacks on and provocative portrayals of objects of religious veneration), for such utterances imply a malicious violation of the spirit of tolerance. And yet, it has been argued that, since the I.A. v Turkey case, an inversion in the Court's attitude can be observed when it adopts a more protective demeanor towards freedom of expression. However, a change in attitude is noticeable only when the dissenting opinions are taken into consideration, but it is premature to draw decisive conclusions from mere opinions. Furthermore, the variable demeanor of the Court towards non-religious and religious speeches has also become evident in this research. For while the Court limits non-religious expressions by lowering the threshold, it, nonetheless, allows religious utterances that are by definition incompatible with human rights and democracy. Thus, a difference in protection regarding religious and non-religious utterances can also be discerned.

The last stratum wherein the interactions between cultures is most direct and has led to perilous tensions and collisions is the national level, where for the most part multiculturalism underpins the reality of most national societies. In this study, we have also attempted to examine the *de jure* impact of pluralism of civilizations on the fundamental right to freedom of expression at this level. In so doing, after dealing with the applicable law at the national level, the jurisprudence of the national judiciary is inquired into, with the criminal law approach as our point of departure, since, as we have argued, this is the main instrument that, due to its coercive nature, has sweeping impact on the fundamental rights and freedoms in

general and on the fundamental right to freedom of expression in particular. On this note, the Dutch judiciary has argued that only attacks against a group of persons – and thus not their views and conduct such as religious doctrines and practices – is punishable for the reason that in a democratic society there has to be room for debate. In this context, it is determined that expressions as such can be offensive in nature, which can, however, be softened if not eradicated by the context wherein they are uttered. But how to define such a context, is, according to some commentators, problematic in that religious expressions seem to gain more protection than non-religious ones, since subjective religious convictions underpin the context of religious utterances, whereas the same cannot be said of non-religious expressions. This development seems to be similar to the evolvement at the European level, whereby the threshold of freedom of expression tends to be lowered for religious expressions when compared to non-religious ones. Nonetheless, the observation has been made that this same subjectivity formula is applied not only to the person who expresses himself in a religious context, but also to the one who expresses himself on the basis of political convictions that have subjective relevance for him. Furthermore, according to the laws in force, and based on judgments rendered that are also in line with the European jurisprudence, defamation has to concern a 'group of persons' and not the doctrines and objects of veneration. However, at first sight the national judiciary seems to have accepted 'indirect defamation', which entails the lowering of the threshold that might, given the multicivilizational developments, result in the protection of symbols and doctrines of veneration as well. This, nonetheless, is a hypothetical assumption which time alone can clarify. On the other hand, the Dutch judiciary as well as the legislative branch, with the abolition of the blasphemy law, have shrunk back from such a development for the time being. Thence, based on the aforementioned discussion, it has been concluded that, at the national level, multiculturalism has, at least de jure, had no confining effect on the right to freedom of expression which has, thus far, been safeguarded by the Dutch judiciary. However, this in no way suggests that, as discussed in the course of this research, the right to freedom of expression is not de facto imperiled. Thus, it remains to be seen what the precise impact of multicivilizationalism (which we have also denoted as multiculturalism) on the fundamental right to freedom of expression will be. Only time will tell.