

# Freedom of Speech

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Cultural, Legal and Philosophical Challenges

Edited by

ANINE KIERULF & HELGE RØNNING

NORDICOM

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## Preface

*Freedom of Speech Abridged? Cultural, Legal and Philosophical Challenges* is a book about the value and right of free speech in an increasingly globalized world. The eleven essays presented are written by authors working in the Nordic countries, who over the years have been engaged in debates over freedom of expression issues from various angles of approach. As shown by the list of contents, the contributions are grouped as three main categories: philosophical, legal and global/cultural.

The book covers these dimensions with a focus on the traditional idea of the individual's freedom of expression. Ideas and speech, however, need tools of dissemination to reach wider audiences, and the means of communication are steadily evolving nationally and globally. Consequently, the media perspective is a key element in most of the presentations.

In order to enable reflections about free speech, one needs an understanding of and a language for what free speech is (and is not), and of what makes free speech worthy of protection. Ulf Petäjä examines these fundamentals in *What is the Value of Freedom of Speech?* and they are also addressed in *Freedom of Expression and Freedom of Discourse. Examining a Justificatory Strategy*, where Cathrine Holst and Anders Molander explore viable philosophical grounds for protecting free speech.

Some of the texts, such as Oluf Jørgensen's *The Right to Privacy and Public Figures. On the Limits to Freedom of Expression*, Walid Al-Saqaf's *Internet – A Challenge to Arab Regimes' Control of Information*, Thomas Bull's *Freedom of Expression in Sweden. The Rule of Formalism* and Anine Kierulf's *International Challenges to National Law. Media Free Speech in Norway* deal with specific contexts or free speech dilemmas, whether it be the particulars of balancing free speech against other rights; in this case privacy, or free speech challenges arising in certain jurisdictions or areas. Although obviously analyzing aspects particular to the rights-balancing, region or country in question, these case-studies illustrate free speech facets of quite a general nature that may also inspire reflection in other contexts.

Case-studies can be helpful starting points for understanding how differing cultural backgrounds influence how we think and talk about free speech. In a world of increasing globalization, where new means of communication bring regions, religions and cultures steadily closer together, such insights are in increasing demand. Both *Pressure on Press Freedom. The Current Religious War on Freedom of Expression* by Frederik Stjernfelt and Risto Kunelius' *Lessons of Being Drawn In. On Global Free Speech, Communication Theory and the Mohammed Cartoons*, highlight challenges to free speech presented where the expanding range of an ever more potent media meet new cultural and religious public spheres. In *Anti-Terror Surveillance and Freedom of Expression*, Joakim Hammerlin illustrates how democracies, in order to protect their liberal foundations as the world grows smaller, resort to illiberal means. Arne Ruth contextualizes artistic free speech culturally in *Twenty Years On. The Lessons of the Fatwa against The Satanic Verses*. Together with Helge Rønning's opening essay *The Contemporary Challenge to the Concept of Universal Human Rights and Freedom of Expression*, Ruth's contribution emphasizes the importance of a caveat approach to cultural relativist views on questions of free speech.

The idea for this book originated with Dr., Professor Ulla Carlsson, Director of Nordicom, who suggested a presentation of free speech as seen from the Nordic countries. Her idea went well with our understanding of free speech as a fundamental value under fire, and provided a welcome opportunity for us in trying to make a contribution to defending this value in a time where free speech principles are threatened from many sides. As free speech is no unlimited right, and carries with it duties and responsibilities; all discussions of free speech imply considerations of where limits are to be drawn. We hope that this book can contribute to the appreciation and debate both on the implications of free speech principles and the role of free speech as a fundamental and universal human right.

The book is published in connection with the Global Forum on Freedom of Expression, 1st – 6th June 2009, at the House of Literature in Oslo, Norway. We are thankful for the funding provided by the Fritt Ord Foundation, and for the continuous support of Nordicom in our work towards this book.

Oslo, March 2009

*Anine Kierulf & Helge Rønning*

# The Contemporary Challenge to the Concept of Universal Human Rights and Freedom of Expression<sup>1</sup>

Helge Rønning

Two decades ago there was a feeling that the struggle for freedom of expression was gaining ground around the world. The Soviet empire was clearly crumbling; there was a new worldwide awareness of how important the struggle for human rights – including freedom of speech – was in a global perspective. Pro-democracy movements that challenged authoritarian regimes were growing. In spite of these developments and the subsequent strides for securing human rights, however, a setback occurred in the 1990s and the concepts of human rights and freedom of expression were universally challenged from several quarters.

The human rights and freedom of expression movements now find themselves in a crisis.<sup>2</sup> They seem to have lost confidence in their own theoretical foundations and methods. These rights are now under attack from a number of often very diverse positions. Human rights are regarded as an expression of Western cultural imperialism and as implying a lack of respect for the cultural identities and thus the perceived humanity of others. They are also undermined by security arguments that are voiced in the name of defending democracy, but that in reality threaten democracy's very basis by limiting individual rights, introducing wholesale surveillance and censorship.

It all started with the fatwa pronounced against Salman Rushdie on February 14, 1999. This event signalled the transformation of the whole debate on tolerance and free speech around the world. It was of course intimately linked to the rise of radical Islam and to how issues linked to multiculturalism were contributing to a new questioning of the concept of universal human rights.<sup>3</sup>

The other event that serves to symbolize the rolling back of gains in civic rights and freedom of expression and information is of course 9/11 and the subsequent war on terror. With reference to the threat from international terrorism, legislation and measures that severely restrict personal liberty and the right to communicate freely have been introduced all over the world. This is also linked to increasing demands to control free information on the Internet and in other electronic communication channels. Thus, the practice of censorship that many thought was being successfully challenged and opposed at the turn of the millennium is now gaining support from governments as well as

social organizations. There is an intimate link between the Rushdie affair, the attack on the Twin Towers and the new challenges to freedom of expression in the form of the rise of radical Islam. But this is not a sufficient explanation for how the whole issue of freedom of expression as a universal human right now is under attack from two sides – two sides that are strange bedfellows, but that nevertheless voice criticism of freedom of expression both locally and globally. Cultural relativists and technocratic securocrats have joined forces in their struggle against free speech and thus also against the universality of human rights. There is a constant struggle against illegitimate control over and censorship on the Internet.

### Communication Technologies and Censorship

Internationally, the Internet community and freedom of expression defenders fight to hold on to freedom of speech on the Net and to extend its use as a democratic and free medium. They come up against attempts at censorship and control by the state, political groups, corporate interests and other kinds of organizations. The Internet contains all kinds of content. The objectives of attempts at censorship are to control not only the contents, but also the possibilities the Net has as a free and democratic arena for communication.

On the one hand, since its beginnings in the early 1990s the Net has been hailed as an inherently democratic means of communication. This is largely due to the fact that the Internet provides a participatory interface and a two-way flow of information between many different users simultaneously. It creates virtual spaces where communities without borders from around the world can enter into communication with each other. This makes the Net particularly suited to global as well as new local social movements. It is a special type of medium with capacities for networking and participation that may enable it to serve as an ideal tool for democratic and free communication.

On the other hand, however, it has also become clear that the Internet is a very advanced tool for surveillance. This takes form not only in relation to the increasing number of legal provisions and technical systems of surveillance and interceptions of communications – including Internet – that are now being introduced. Even more obvious is that the number of countries applying restrictions on the Net seems to be increasing, and this is not limited to countries that one might usually associate with restricting freedom of expression. Particularly in relation to anti-terrorist laws, morality issues and religious questions filtering of the Net is increasing steadily.<sup>4</sup>

One of the greatest problems regarding control of access to the Net is that this is often in the hands of private corporations that are not subject to the standards of review common in government mandates. "It is arguable that in the first decade of the 21st century, corporations will rival governments in threatening Internet freedoms."<sup>5</sup> When the consequence of this is that Internet censorship takes place at institutions such as schools, libraries, Internet cafés,

as well as on individual computers placed in institutions, it is almost impossible to challenge the practice through courts of law, because the control rests with private companies rather than public bodies. The main problem with all these techniques, however, from the perspective of a principled freedom of expression debate, is that they involve direct censorship. That is, they take place before the material has been accessed, which goes against the basic principles of freedom of expression in all democratic countries.

The danger to the principle of freedom of expression is greatest when the corporations that produce content filtering technology work alongside undemocratic regimes to set-up nationwide control schemes. This means that there is no legal means to supervise and find out in what way the Net is being censored. Governments of developing nations often rely on other countries and multinational companies to supply them with the necessary technologies of surveillance and control. China cooperates with several African countries, and big multinationals such as Microsoft, Yahoo and Google have cooperated with the Chinese and other authoritarian Asian states in their censorship efforts. The international transfer of surveillance technology is growing into a profitable sideline of ICT activities, in addition to being a sine-qua-non for non-democratic regimes to being able to impose the current levels of control over Internet activity.

### Is Human Rights a Western Concept?

One of the most damaging assertions about the idea of human rights is that it is inherently the possession of what is usually called the West. Seen from such a perspective, human rights is a Western construct, created at a particular moment in time to suit certain interests, and it is now being projected onto the world stage as an ethical mask behind which old imperial and colonial power continues to assert itself. A case in point is the reaction of President Bashir in Sudan, who immediately after the arrest warrant issued against him by the International Criminal Court (ICC) in March 2009 for war crimes in Darfur characterized it as a Western attempt to destabilize and re-conquer his country. The President thus represented an attitude according to which concrete realizations of human rights in law and practice are regarded merely as ways of imposing a certain kind of humanity on a world that has no natural affinity with the shape that it is being required to take. Arguments of this kind have two bases. One is pragmatic and implies that maintaining principle standards actually may serve to undermine practical ways of solving broader human rights issues. Thus South Africa, which is a country that otherwise stands for human rights principles, for instance expressed "regret" over the issuing of the warrant and maintained that it would have a negative impact on peace talks on Darfur. And China was concerned over and critical of the way in which the International Criminal Court had handled the issue. Secondly, the critique of the international human rights agenda has a principle side to it, and that implies references to concepts such as Asian values and Islamic religious principles.

Arguments such as those referred to above can unfortunately be underpinned by referring to situations in which a human rights agenda is being utilized as a pretext for military intervention. This has taken place in a number of instances during the past two decades – Kosovo, Iraq. And it is this type of situation that the government in Khartoum used as a pretext for expelling Western humanitarian aid organizations following the arrest warrant. Consequently, it is possible to maintain that applying human rights as an argument for different forms of intervention – ultimately in a military form – may contribute to the undermining of the principle itself. The situation in Sudan thus serves as a good example of how good intentions may lead to quite the opposite of the strengthening of human rights, but instead to more suffering and actually strengthening of an authoritarian regime. Such dilemmas play into the hands of those who criticize the universality of human rights and not least interventions in the name of these rights – be it in the form of military interventions or linking aid to political conditionalities. These critics find fertile ground for sowing their viewpoints in societies and nations outside a relatively narrow club of Western states.<sup>6</sup>

This is of course particularly problematic when there seems to be a tendency for interventions and actions to focus on one part of the world in particular. African critics have pointed out that all current ICC cases involve African countries: Sudan, the Democratic Republic of Congo, Uganda and the Central African Republic. But even worse is that large nations, including the U.S., Russia, China and India, have refused to subject themselves to the court's authority. When China, for instance, pursues a policy of non-intervention in the internal affairs of authoritarian African states (Sudan, Zimbabwe, Angola) with whom it co-operates, China may do so by referring to the principle of changing cultural values in different parts of the world, but also by maintaining that not intervening means respecting the sovereignty of independent states. That this is also to the benefit of Chinese economic policies is another matter.

Dictatorial governments that do not respect human rights within their own countries often criticize others for not upholding such rights in their practical politics. And it is true that powerful and rich nations often apply a double standard when it comes to respecting human rights internationally if this does not serve their political and economic interests. Furthermore, within these countries basic individual rights and freedoms are abridged by references to the war on terror and similar arguments. The charges from different quarters that human rights are only being held as universal when it serves the interests of the rich and the powerful must be taken seriously.

### Selective Cultural Values

Such sentiments are being expressed more and more in debates over human rights in general and freedom of expression in particular. In order to illustrate this let me refer to the debate in relation to the so-called “Durban II”-conference

on racism organized by the UN Human Rights Council in Geneva in 20-24 April 2009. The draft declaration for the conference contained references that played directly into arguments against universal rights, particularly in the area of freedom of expression and the right to criticize religion, by asking for UN member states to adapt legislation against all forms of blasphemy and to particularly react against what was dubbed Islamophobia and Christianophobia. The document thus confused opposition to and criticism of religious beliefs with hatred of the believer, and put it on a par with racism. Positioning freedom of speech against freedom of religion is dangerous for democracy. Free expression is a precondition for religious freedom. Limiting free speech in the name of any religion is equivalent to attacking religious tolerance and respect. Traditionally blasphemy laws were not passed to protect religious feelings, but to protect the authority of the Church. Thus, throughout history, religious dissidents have been prosecuted for blasphemy.

Documents such as those prepared for Durban II represent one form of challenge to the universal recognition of human rights by simplifying the diversity between and within different cultures and turning these cultures into something that consists of binary oppositions and generalizations. It does not imply a fundamental respect for the range of human cultures. Instead of taking into account the oversimplification inherent in such concepts as Asian values, European ideals, African cultures, etc., these concepts are now being used to argue against human rights as such and freedom of expression in particular.

The other challenge to a practical and analytical approach to the universality of human rights comes from an opposite position, namely from those who support the concept of universal rights, but separate them from any concrete political analysis and turn them into a form of secular religion. Michael Ignatieff has created the term human rights 'idolatry' for this tendency to regard human rights as a "secular religion".<sup>7</sup> This conception of human rights has led to moral self-righteousness and rhetorical over-reaching. This can take the form, for example, of referring to freedom of expression as being 'holy'. A human rights movement that dispenses with grand metaphysical claims like those of being "holy" is more likely to display an open-minded and self-questioning spirit. Rather than approaching other cultures from a position of moral superiority, freedom of expression advocates ought to engage other cultures in dialogue, without losing sight of the principle of universal human rights as a basis for deliberation. Paradoxically, turning human rights and freedom of expression into religious principles that are given once and for all plays into the hands of those cultural relativists who do not recognize human rights as being both universal and historically situated. Because freedom of expression protects people's ability to speak out against abuses of human rights principles, it is an effective defence against the suffering caused by abuse and oppression.

The Indian Nobel Laureate in economics Amartya Sen has argued very perceptively about how cultural diversity may be used as a case for free expression, rather than as an argument against it.

The fact is that in any culture, people seem to like to argue with one another, and frequently do exactly that – given the chance. The presence of dissidents makes it problematic to take an unambiguous view of the “true nature” of local values. In fact, dissidents tend to exist in every society – often quite plentifully – and they are frequently willing to take very great risks regarding their own security. Indeed, had the dissidents not been so tenaciously present, authoritarian polities would not have had to undertake such repressive measures in practice, to supplement their intolerant beliefs. The presence of dissidents tempts the authoritarian ruling groups to take a repressive view of local culture and, at the same time, that presence itself undermines the intellectual basis of such univocal interpretation of local beliefs as homogenous thought.<sup>8</sup>

### The Radicality of Human Rights

The two developments that I have outlined above – the tendencies towards surveillance and inhibition of utterances in the new communication and information systems, on the one hand, and the reference to cultural specificities as a pretext for abridging freedom of expression and universal human rights, on the other – are apparently far removed from each other. But they share a basic distrust of free communication as a prerequisite for human development, and thus they both undermine a rational examination of positions that maintain that human rights are universal.

In order to defend the principle of universality, it is necessary to make the case for a political conception of human rights. The argument for human rights should be made on pragmatic and historical grounds. This does not imply that Western values should be imposed wholesale upon the rest of the world. However, it does mean that individuals in all cultures must be empowered to make certain fundamental choices for themselves. In such circumstances, human rights advocates are not imposing a foreign culture, but rather allowing oppressed people to help shape their own destiny and culture. Individuals and groups around the world have used the principle of human rights as a tool to advance their own indigenous agendas.

What this form of argument implies is not that human rights and freedom of expression are necessarily universal owing to the fact that thoughts and arguments in others parts of the world and at other times have similarities with the way in which the principles of human rights were formulated in Europe in the eighteenth century. Arguments for historically situating the formulation of human rights principles do not lead away from the radicality of the concept of *universal* human rights. Quite the opposite, recognizing such rights must be done in a manner that is at once abstract and concretely operational. This means that human rights are rights based on the simple foundation that they deal with the human condition and with how this is organized. Thus, human rights are linked to a political dimension of protesting against unacceptable con-

ditions. Human rights are not universal once and for all. They are in a process of universalization.<sup>9</sup> Human rights are not something that has been achieved, something that has become a religious or holy principle. They are a radical driving force behind demands for the right to a decent life and freedom.

In this context, I would like to quote the Sudanese philosopher and legal theorist of Islamic law Abdullahi Ahmed An-Na'im, who, among others, has written an answer to the question "What do we mean by universal?"<sup>10</sup> An-Naim maintains that despite their apparent peculiarities and diversities, human beings and societies share certain fundamental interests, concerns, qualities, traits and values that can be identified and articulated as the framework for a "common" culture of universal human rights.

The criteria I would adopt for identifying universal human rights is that they are rights to which human beings are entitled by virtue of being human. In other words, universal standards of human rights are, by definition, appreciated by a wide variety of cultural traditions because they pertain to the inherent dignity and well-being of every human being, regardless of race, gender, language, or religion. It follows that the practical test by which these rights should be identified is whether the right in question is claimed by the particular cultural tradition for its own members. Applying the principle of reciprocity among all human beings rather than just among the members of a particular group, I would argue that universal human rights are those which a cultural tradition would claim for its own members and must therefore concede to members of other traditions if it is to expect reciprocal treatment from those others.

In content and substance, I submit that universal human rights are based on two primary forces that motivate all human behaviour, the will to live and the will to be free. Through the will to live, human beings have always striven to secure their food, shelter, health, and all other means for the preservation of a good life. At another level, the will to be free exceeds the will to live in that it is the driving force behind the pursuit of spiritual, moral, and artistic wellbeing and excellence.

We are thus faced with the question of how to defend and extend human rights in a situation where there exists a contradiction that is very difficult to resolve. On the one hand, the most oppressed populations in the world are to be found in societies where the possibility of pursuing "[...] food, shelter, health, and all other means for the preservation of a good life" really does not exist, and where the respect for and dignity of the individual are illusions.

## Two Types of Rights

Arguing like An-na'im does for a common humanity is an ethical argument, not a natural rights argument, but it only takes us part of the way. It does not solve the problem of how to implement human rights. In our thinking about

rights, it is necessary to distinguish between two categories of rights. One category comprises the rights that we have by virtue of being human. These are codified in various declarations of human rights, but such declarations are legally binding only to the extent that they are ratified and incorporated into signatory states' constitutions and statutes. The second category comprises the rights that we have by virtue of being citizens of a state. In this connection, we must note that in our present era of globalization and mass migrations, there are millions of people who do not benefit from rights in this category, because they find themselves in a form of stateless limbo. The evolution and codification of rights have taken place over a relatively long historical period and have been achieved at different times in different societies. One condition for the principled application of these rights is that they embrace a special defence of the rights of minorities. Furthermore, rights are not bestowed once and for all, but rather must be created and secured through work and struggle.

It is possible to divide rights into four main types: civil, political, social, and cultural. *Civil rights* include people's rights to be treated equally, to hold property, to have due process of law, to enjoy freedom of speech and religion, and to have their privacy protected. Citizens have these rights by virtue of being autonomous individuals. In Western societies, such rights were developed mainly in the 1700s and were codified in the United States Constitution and by the French Revolution. *Political rights* concern the right to vote, to run for public office, and to organize politically and socially. These rights are a result of the work of political movements in the 19th century. *Social rights* include such benefits to wellbeing as the right to health, education, and a social safety net. These rights were fought for and won mainly by organized labour movements and were entrenched by the welfare states in the second half of the 20th century. They are still a matter of contention for neo-liberal ideology. *Cultural rights* include the right to participate in and enjoy a wide range of cultural expressions. These rights have become especially relevant in the new multicultural societies that are now developing.<sup>11</sup>

The debate over both the universalization of human rights and the role of civic rights must consequently take place within a theory of what constitutes democratic principles.<sup>12</sup> The aim of a democracy must be to take decisions in accordance with structures, compositions, and practices of equal concern and with respect for all citizens. Jürgen Habermas<sup>13</sup> has suggested that self-rule can only be brought about in the first place if personal liberties (equal subjective liberties or freedom of action) and political liberties (the right to equal participation in the democratic opinion and will-formation process) are protected. Fundamental rights are in need of protection in order to preserve every citizen's equal status. Thus, radical freedom of speech does not subvert democracy, but boosts it. Ronald Dworkin<sup>14</sup> has argued that constitutional provisions that protect rights must be interpreted as enhancing democracy rather than undermining it.

In my opinion, such principles must be fundamental to all democratic systems. It is, however, necessary to analyse the concrete social and political con-

ditions of each particular society before deciding which types of organizations, which mechanisms of political association, and especially, how fundamental rights are to be secured. These may vary according to particular circumstances. Therefore, true democracy cannot mean an 'a priori preference' for any particular type of democracy, but may mean something different in each case. The only known non-variables are principles of self-rule, a system of (unsaturated) rights. Institutionalizing a democratic system implies guaranteeing what the apparent existence of different democracies has been promising for so long: equal rights for all citizens.

### Rights Embedded in History

In a very perceptive article, George Ulrich maintains that universal human rights can only be "[...] firmly embedded in history."<sup>15</sup> This means that they are not rooted in general metaphysics or in cultural essentials, but that they were formulated as part of a socio-historical process that took place in a certain period and that is often referred to as modernization. Ulrich builds his arguments on John Rawls and Jürgen Habermas<sup>16</sup>, and writes that Habermas

[...] focuses on a notion of popular sovereignty, i.e. democratic will-formation, as integral to modern society and seeks to demonstrate that the respect for human rights marks a precondition of this rather than an externally imposed limitation. His central claim is that 'human rights institutionalize the communicative conditions for a reasonable political will-formation' (Habermas 1998: 160). Given this, he can immediately derive the familiar political rights, but also the basic civil rights (which he recognizes have an intrinsic value that exceeds their utility for democratic will-formation) can be justified in the same manner in so far as they constitute and protect the legal subject who could in the first place function as citizen of a democratic society (ibid).<sup>17</sup>

And furthermore:

To the charge that human rights figure as an alien notion in many cultural contexts, the response is that the same was once true in occidental society as well, but it will not remain the case for long in non-Western societies with the advance of globalization. Moreover, the inadequacy of the expectation of cultural concurrence has been dealt with in the section on global ethics. To the charge that human rights have a corrupting influence on local cultures – destroying diversity, undermining the social fabric, etc. – the response is: no, it is the process of intense modernization that places immense strain on traditional values and social structures; the construct of human rights is itself a response to this situation which may, conceivably, in some respects serve to protect diversity by curbing the most pernicious effects of economic and technological globalization. Virtually the same answer is given to the charge that human

rights are excessively individualistic in their orientation and that from an African or Asian point of view the interests of the individual always come second to the interests of the collective: no, this too is a matter of confusing cause and effect, individuation is an unavoidable feature of social modernization that is occurring with irresistible force everywhere in the world today; this situation necessitates a rights-based approach to social issues, although not necessarily at expense of communal solidarity and respect for social duties.<sup>18</sup>

Thus, freedom of expression is a principle that may be said to be historically situated, and it was formulated in a specific social context. But this does not imply that it cannot be given a universal implication, which is also historically situated. The development of freedom of expression as a human right has primarily grown out of a Western political and philosophical tradition. But as I have tried to argue above, this does not make these principles invalid elsewhere, but they must be seen as being valid in other cultures based on the experiences of the struggle for human rights and democratic principles everywhere. As Ronald Dworkin has maintained:

Free speech is a basis for legitimate government. Laws and policies are not legitimate unless they have been adopted through a democratic process, and a process is not democratic if government has prevented anyone from expressing his convictions about what those laws and policies should be.<sup>19</sup>

Freedom of expression is thus not only a distinct element of Western tradition that may be limited or restricted according to a wish to show respect for other cultures that reject this fundamental human right. It is central to all democratic discussions and it is a social and historical phenomenon, not a natural phenomenon.

The right to freedom of expression is based on the principle that statements and depictions that are controversial must come out in the open. Freedom of speech is not a right that exists in order to create peace and consensus in society. This means that we also must tolerate utterances that many will find deeply offensive and wounding. This is particularly the case for what many may call blasphemy. Throughout history, critique of religion even in forms that may seem tasteless has been at the centre of the promotion of freedom of expression and the struggle for a tolerant and democratic society. Freedom of expression is essential to exposing violations of the human rights of the powerless and oppressed.

## Notes

1. The issues discussed here refer to problems presented in this volume, without making particular reference to any of these. But the present article is an attempt to sum up the philosophical, legal, cultural, and media dimensions of a contemporary debate over the challenges to the principle of freedom of expression.

2. See: Ignatieff, Michael (2001) *Human Rights as Politics and Idolatry* (Princeton University Press).
3. For an analysis of the history and implications of the fatwa against Rushdie, see: Malik, Kenan (2009) *From Fatwa to Jihad: The Rushdie Affair and Its Legacy*. London (Atlantic Books)
4. For an overview see among others: <http://www.efa.org.au/Issues/Censor/cens3.html> (accessed 05.10.08)
5. See: [www.privacyinternational.org/article.shtml?cmd\[347\]=x-347-82896&als\[theme\]=Freedom%20of%20Expression](http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-82896&als[theme]=Freedom%20of%20Expression) (accessed 05.10.10)
6. See among others: Gearty, Conor (2008) *Are Human Rights Universal?* London (Cameron).
7. Ignatieff op. cit.
8. Sen, Amartya (1999) *Development as Freedom*. Oxford. (Oxford University Press) p. 247.
9. Arguments partly taken from Julien, Françoise (2008) "Rebelske rettigheter" *Le Monde diplomatique*. no. utg. februar 2008.
10. Abdullahi An-na'im (1994) "What do we mean by universal?" *Index on Censorship*. September/October 1994.
11. This way of thinking about rights was introduced by the British sociologist T.H. Marshall in the 1950s and 60s. See Marshall, *Class, Citizenship, and Social Development* (New York: Doubleday, 1964).
12. Schneider, Cornelia (2000) "The Constitutional Protection of Rights in Dworkin's and Habermas' Theories of Democracy", *UCL Jurisprudence Review*
13. Habermas, Jürgen (1996) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge. (Polity)
14. Dworkin, Ronald (1996, *Freedom's Law*, Cambridge, Mass. (Harvard University Press)
15. Ulrich, George (2001) "Universal Human Rights: An Unfinished Project" in Hastrup, Kirsten (ed) (2001) *Human Rights on Common Grounds. The quest for Universality*" The Hague, London/New York (Kluwer Law International) p. 214.
16. Particularly: Habermas, Jürgen (1998) "Remarks on Legitimation Through Human Rights", *Philosophy and Social Criticism* 24, 2/3: 157-171.
17. loc. cit. p. 218.
18. loc. cit. 219-220.
19. Dworkin, Ronald (2006) "The Right to Ridicule", *The New York Review of Books* Vol. 53. No. 5. March 23. 2006.



# Philosophy



# What is the Value of Freedom of Speech?

Ulf Petäjä

Two of our basic freedoms, the freedom of speech and freedom of the press, are phenomena of rather recent origin in human history. The first law to protect the freedom of the press was introduced in Sweden. That was in 1766, less than 350 years ago. The right to freedom of speech is still controversial. In many countries of the world today the expression of unauthorized views is a crime. Even in democracies with longstanding protection of freedom of speech, it is questioned. After the events of September 11, 2001, both England and the USA have introduced constraints in the form of laws that forbid statements that can be interpreted to support terrorism. In the USA since 2001 people can be punished for expressing 'unpatriotic' sentiments.

In Sweden, protection of freedom of speech has been on the books much longer than in many other countries. When issues relating to freedom of speech are raised in a country like Sweden, it is almost always a question of its limits: Are some views unworthy of protection? In countries where people have *no* freedom of speech the situation is quite different. There, minorities and members of the political opposition have to struggle, even fight, for the right to express their views.

One big difference is that in countries where the freedom is secure, there is hardly any discussion of why it is good, whereas that is precisely the focus of discussion wherever it is absent. In my opinion, it is important for us who enjoy the freedom to continue to ask ourselves and each other why we should value the freedom. Even though we no longer risk going to jail for expressing the 'wrong' ideas.

## Freedom of Speech – A 'Natural Right'?

In what way is freedom of speech good? Ask that question, and you may get the answer: "Everybody knows that! It's good because you can say what you want without getting arrested for it." But why is it good to be able to say what you want without risk of punishment? A number of conceivable answers present

themselves. For example, it may be that freedom of speech is good because people who can express their ideas freely feel better than if they have to hold their tongues. Or, it may be that people develop their intellectual abilities when they are able to discuss things freely with one another. Or, freedom of speech may be good because it promotes the development and vigor of democratic institutions.

In my view, the question ‘why’ is highly relevant and merits some serious thought. And I would like to give a few reasons why I consider it important: For one thing, it is potentially dangerous if the citizens of a democracy cannot come up with any good reason why freedom of speech is worth having. Writing on the subject, historian J B Bury makes the following observation:

At present, in the most civilised countries, freedom of speech is taken as a matter of course and seems a perfectly simple thing. We are so accustomed to it that we look on it *as a natural right* (Bury 2001: 2, emphasis added).

If freedom of speech becomes taken for granted, or considered part of the ‘Natural order’, there is a risk that the freedom will, as legal scholar Katarina Alexius puts it, cease to be “firmly anchored in the will of the people” (Alexius 1997: 354). This, in turn, may mean that arguments put forth by anti-democratic elements cannot be effectively refuted by democratically minded citizens if they no longer actively appreciate the value of the freedom they enjoy. Freedom of speech is a right and a freedom that has had to be won and that is founded on certain core values. It is by no means part of the ‘Natural order’.

Another reason ‘why’ is that the limits we put on freedom of speech should reasonably bear some relation to *why* we value it. Let us, for example, assume that freedom of speech in Sweden is founded on the value, Truth. That is to say, freedom of speech is valued because it promotes the diversity of Truths that circulate in society at any given time. It would therefore be contrary to the *idea* of freedom of speech to suppress ideas that might broaden our knowledge and understanding of the world around us.

A variation on this second reason is the proposition that it cannot be meaningful to discuss putting limits on freedom of speech unless we know why freedom of speech is good. That would be to start the wrong way ‘round. Legal philosopher Wojciech Sadurski (1999) puts the argument roughly like this: How can one reasonably decide whether or not a given statement should be allowed unless one is aware of the values on which our commitment to freedom of speech is founded?

So far, I have only presented some of the reasons why it is important to ask, ‘Why freedom of speech?’ but have said nothing about the various ideas that might answer the question. Let us proceed to consider them now.

## An Analysis of the Arguments

In my dissertation, *Why Freedom of Speech?* (Petäjä 2006) I analyze five central arguments in terms of three different dimensions. These ‘dimensions’ are analytical tools that allow us to examine the foundations and structure of arguments that have been put forward as justifications of freedom of speech. The first dimension is what I call ‘normative lines of argumentation’ that relates to the ways freedom of speech is justified. I identify two kinds of normative argumentation. The first assigns value to freedom of speech on the basis of its effects or consequences. I choose to call such arguments ‘consequentialistic’. For example, freedom of speech may be assigned value because it promotes a greater measure of tolerance in society, i.e., an effect of the freedom. The other kind of normative argumentation is non-consequentialistic. Here, the right to freedom of speech is based not on its consequences; rather the opposite: “The individual has the right to express his or her views precisely because it is a right that cannot be counterbalanced by the ‘common good’ [such as the benefit to society of greater tolerance]....” (Andersson 2004: 23). For example, it is possible to argue that individuals have a right to be treated as autonomous entities by agents of the state or community, and if all individuals are not granted freedom of speech to the same degree, it would constitute a violation of the individuals’ right to autonomy.

The second dimension – a social philosophical emphasis – focuses not on *how* an argument justifies freedom of speech, but instead on *what* freedom of speech is said to promote or benefit. Kent Greenawalt sees a significant difference between arguments that conceive of freedom of speech as of value to the individual, and those that say it promotes the common good (Greenawalt 1989: 14; cf. Bull 1997: 327ff). We can distinguish the two lines of argumentation by asking the question, “Whose interest does freedom of speech primarily serve: (i) the individual’s interest or (ii) the common interest (Schauer 1982: 47)? In short, a focus on the individual versus a focus on society or the community.

Finally, the third dimension, or what I call the ‘subject emphasis’. This dimension focuses on the respective parties in any communicative interaction, asking, “Who benefits from freedom of speech – the sender or the receiver?” (cf. Greenawalt 1989: 14). If the answer is the receiver, it means that the argument expresses the individual’s right to receive or partake of information; if the answer is the sender, the argument expresses the individual’s right to spread information via speech, writing/print, etc.

Now we have come to a point where we can sum up this somewhat theoretical discussion of three dimensions of the arguments used to justify freedom of speech (Matrix 1).

**Matrix 1.** The matrix shows the possible permutations of dimensions and foci: (i) Normative line of argumentation (Consequentialism/Non-consequentialism); (ii) Social philosophical emphasis (Common good/Individual); and (iii) Subject emphasis (Sender/Receiver)

|                                 |                        | Social philosophical emphasis |          |                |          |
|---------------------------------|------------------------|-------------------------------|----------|----------------|----------|
|                                 |                        | the Common good               |          | the Individual |          |
|                                 |                        | Subject emphasis              |          |                |          |
| Normative line of argumentation | Consequentialistic     | Sender                        | Receiver | Sender         | Receiver |
|                                 |                        | 1a                            | 1b       | 2a             | 2b       |
|                                 | Non-consequentialistic | 3a                            | 3b       | 4a             | 4b       |

The matrix should be understood, as follows: Arguments in the category ‘1a’ are characterized by a consequentialist line of argumentation, have an orientation toward the common good, and emphasize benefits to the sender.

Arguments in category ‘1b’ are like those in ‘1a’, except with respect to the Subject emphasis dimension, where the argument focuses on the benefit to the receiver.

Let us now review the arguments in the light of the three dimensions.

## The Arguments

If we wish to know why freedom of speech is valued, we should examine some of the arguments put forward *on its behalf*. Here I have chosen five central arguments.

### *John Stuart Mill: Freedom of Speech and Truth*

Perhaps the most well-known thinker on this subject is the British 19th-century Liberal, John Stuart Mill (1859). Mill’s reasoning about the salutary effects of freedom of speech for the discovery of truth has been the starting point for all subsequent justifications of freedom of speech. In his classic work, *On Liberty*, Mill presents a rationale in support of freedom of speech that runs something like this: No one is infallible; we all are in error every now and then. For that reason it is wrong to silence opinions, which may contain at least a grain of truth, perhaps more. To take the liberty of silencing views because they are ‘wrong’ is to presume to infallibility. Who, other than the infallible, can be certain of what is right or wrong? But no one is infallible.

Mill’s argument for freedom of speech is founded on the conviction that it facilitates the quest for truth. If everyone is free to speak his mind, it will result in the enhancement of human intellectual powers, which in turn promotes the development of society – that is, benefits the common good. Thus, Mill’s

argumentation is patently consequentialistic, as success in the quest for truth is an important consequence of freedom of speech. His argumentation is also clearly receiver-oriented and focused on the common good. Those who listen to the expression of opinion are the prime beneficiaries of freedom of speech, not those who express themselves. Even though individuals gain from freedom of speech, it is the development of society that primarily interests Mill. Ronald Dworkin summarizes Mill's argumentation in these words: "... particular individuals are allowed to speak in order that the community they address may benefit in the long run" (Dworkin 1985: 386). As Dworkin reads Mill, individuals' right to express themselves freely is instrumental in enhancing the common good.

*Alexander Meiklejohn:*

*On the Relation of Freedom of Speech to Self-government*

Another argument that should be considered in this context is that put forward by the American Constitutional scholar, Alexander Meiklejohn (1948). Meiklejohn takes his point of departure in the idea of the sovereignty and right to self-determination that citizens in a true democracy enjoy. In a democracy worth its name, he argues, the citizens rule, and those in government, – however powerful, whether elected or in the bureaucracy – are but their servants. Not the other way around. Freedom of speech is essential in a democracy. If citizens are to be able to rule, they must be able to communicate freely, not least with those charged to enact the public will. They must also be free to criticize the judgements made and decisions taken by those in government. Furthermore, citizens can exercise their responsibilities in a democracy only if they have full access to information and ideas that are of importance to them (not solely as individuals, it should be stressed, but as rulers of the polity).

Thus, the value of freedom of speech, to Meiklejohn's way of thinking, lies in that it enables citizens in a democracy to govern more effectively and wisely. That is to say, this 'democracy argument', too, follows a consequentialist line of reasoning.

Turning to the other two dimensions, we find that Meiklejohn emphasizes the common interest and the receivers of information. That is, the chief beneficiary of freedom of speech is society, the polity. He recognizes that individuals have a need to express their views, which freedom of speech should protect, but, above all, freedom of speech (as specified in the First Amendment to the American Constitution) shall protect

... the common needs of the body politic. [The First Amendment] cares for the public need. And since the wider interest includes all the narrower ones insofar as they can be reconciled, it is prior to them all (Meiklejohn 1948: 63).

Furthermore, if the purpose of freedom of speech is to inform the citizens about issues of concern to the polity and public life, it casts the citizen as receiver

of the communications. As Lee Bollinger observes with regard to Meiklejohn's argumentation: "the point of ultimate interest is not in the words of the speakers, but in the minds of the hearers" (Bollinger 1986: 47). Thus, we may say that the focus rests decidedly on the receiver.

### *Lee Bollinger: Freedom of Speech Promotes Tolerance*

A third principal argument for freedom of speech is offered by the American legal scholar and educator, Lee C. Bollinger (1986). Bollinger's starting point is the observation that human beings seem to have a reflex-like tendency to dislike views that contradict their own. That is, there seems to be a natural impulse to wish to censor or suppress opposing views. As a consequence, there is reason to surmise that given the power to do so, a person – an autocratic dictator, for example – will forbid the views he or she dislikes. We need not look far to find present-day examples. For Bollinger, the important thing about freedom of speech is that it can help us to combat this innate impulse and to learn to tolerate deviating or contradictory opinions.

Given freedom of speech, a good number of ideas will be circulated, even those that some, or even many, may consider 'dangerous', 'deviant' or 'wrong'. Bollinger reasons that if we regularly run up against ideas and opinions that differ from our own, in time we will learn to accept their existence, even if we disagree with them. On occasion we may even come around to accepting ideas we once considered 'wrong'. The value of freedom of speech, in Bollinger's view, rests on a conviction that it promotes tolerance in society at large. Thus, Bollinger's is a *consequentialistic* rationale; it is the beneficial effect of the freedom – greater tolerance – *that makes it valuable*.

How, then, may Bollinger's tolerance argument be classified on the other two dimensions? Even though it is at the individual level that the posited transformation takes place, the emphasis of Bollinger's argumentation rests on its cumulative effect, the increase in *a society's* capacity for tolerance. The emphasis is on the receiver, as it is by *partaking* of ideas that are foreign to our way of thinking that we are socialized – we learn – to accept the existence of a diversity of perspectives and ideas.

### *Thomas Scanlon: 'Autonomy Argument I'*

Finally, I should like to mention two arguments put forward by the philosopher Thomas Scanlon. Both arguments have to do with the autonomy of the individual, but although launched in the same decade – in 1972 and 1979, respectively – they differ in some central aspects.

The earlier of the two, referred to here as 'Autonomy I', takes its starting point in the idea that the state should treat individuals as autonomous individuals. That is to say, the state must have very compelling reasons to forbid or punish individuals' views, the information they choose to partake of, or what they say. The state cannot legitimately punish an individual on the grounds that his

or her statements cause (or risk causing) other people to adopt false beliefs. Nor may the state limit expression on the grounds that it may have harmful indirect effects – if, for example, the exposition of an idea should inspire (*not* incite) a listener or listeners to do something unlawful.

What reasons does Scanlon give for maintaining and protecting freedom of speech? In his view, the right of the individual to be treated as an autonomous, rational creature, implies that the power of the state to regulate or limit the actions and expressions of individuals must be limited. For the state to say, “You can’t express that opinion”, would be a violation of the individual’s autonomy. The state must have extremely compelling reasons for such a prohibition to be acceptable.

I would say that this line of argumentation is non-consequentialistic. It does not justify freedom of speech on the basis of its consequences; instead, the value of freedom of speech is conceived of as an integral part of the concept of individual autonomy.

The argument is also interesting in that it appears to emphasize receivers’ right to partake of information rather than senders’ right to express information. Scanlon writes: “There are clearly cases in which individuals have a right to the information necessary to make informed choices and can claim this right against government” (Scanlon 1972: 223). Just as John Rawls (1971) seeks to demonstrate that individuals have a right to a modicum of social and economic welfare, Scanlon argues that they have a right to information in order to be able to function as rational, autonomous individuals. I draw two conclusions about his line of reasoning: that its focus rests essentially on the individual, and its emphasis on the receiver.

### *Scanlon’s ‘Autonomy Argument II’*

Scanlon’s second argument (Scanlon 1979) in support of freedom of speech approaches the notion of the individual’s right to autonomy from a different angle. Instead of starting from the premise that individuals must be treated as autonomous entities (which implies a presumption that they actually *are* autonomous), Scanlon trains his focus here on the *prerequisites* to individuals’ autonomy. He writes: “What we should want in general is to have our beliefs and desires produced by processes that are reliable” (Scanlon 1979: 526). That is, were we free to choose, we would naturally prefer that our ideas and desires were the result of “processes that are reliable”, rather than processes that give rise to false conceptions and to desires that are not good for us. This may be abstract and perhaps difficult to grasp, but it is actually founded on a simple idea.

Thus, Scanlon values freedom of speech because it gives rise to communication processes that contain a multitude of ideas, perspectives and values. Diversity and heterogeneity of the flow of ideas stimulate our ability to think and act autonomously and rationally. That is, freedom of speech promotes reliable communication processes, which are prerequisite to our ability to function as

autonomous individuals. Clearly, unlike its predecessor, Scanlon's 'Autonomy Argument II' is consequentialistic.

Less clear, however, is how we should classify Scanlon's focus: Is it oriented toward the individual or toward society? Essentially the latter, I think. Scanlon argues that it is not only our private interest that a reliable communication process serves, but rather, and perhaps more so, a common interest – that it enables us to change society by political means. There is a common, social interest, Scanlon argues, in our being able to influence the society in which we live. We do so on the basis of our personal views and preferences (cf. Scanlon 1979: 544f). Thus, Scanlon reasons, it is problematic for the polity as a whole if the political process by which we chart our collective futures, set our agenda, and so forth is the result of an unreliable communication process. Consequently, freedom of speech not only serves our individual interest of being free to decide our preferences autonomously, it is also essential to the common interest, to the processes by which we determine the future of our society and social institutions.

Thus, Scanlon's 'Argument II' both has a 'common interest' focus and a receiver emphasis, inasmuch as Scanlon emphasizes a "audience interest" (Scanlon 1979: 528f), that is, our role as receivers of the ideas that a reliable communication process conveys.

## To Sum Up the Arguments

Let us now examine the arguments in terms of the three dimensions. (Matrix 2)

**Matrix 2.** The Arguments Categorized in Terms of the Three Dimensions

|                                 |                        | Social philosophical emphasis |                                                |                |            |
|---------------------------------|------------------------|-------------------------------|------------------------------------------------|----------------|------------|
|                                 |                        | the Common good               |                                                | the Individual |            |
|                                 |                        | Subject emphasis              |                                                |                |            |
| Normative line of argumentation | Consequentialistic     | Sender                        | Receiver                                       | Sender         | Receiver   |
|                                 |                        |                               | Truth<br>Democracy<br>Tolerance<br>Autonomy II |                |            |
|                                 | Non-consequentialistic |                               |                                                |                | Autonomy I |

As we have seen, all the arguments give reasons why freedom of speech is to be valued. Furthermore, they give different reasons. The arguments for freedom of speech are founded in the four values: truth, democratic self-determination, tolerance, and autonomy (in two variants).

As I interpret them, four of the arguments may be said to be consequentialistic, and one non-consequentialistic. That is, four of the five arguments base the value they accord freedom of speech on effects or consequences of the

freedom, e.g., that freedom of speech promotes tolerance or truth. Also, four of the five arguments emphasize the importance of freedom of speech to society, rather than to the individual. Finally, the analysis reveals that *all* the arguments focus on the receiver of communications (e.g., listener, reader) rather than the sender (e.g., speaker, writer).

Assuming that this interpretation of our four writers is correct, it has several implications. First of all, none of the arguments (except Autonomy I) recognize an intrinsic value in freedom of speech per se; four look to the consequences of the freedom, that freedom of speech promotes one or another utility or common good, whereas the lone non-consequentialistic argument ('Autonomy I') looks on freedom of speech as a component of the autonomy of the individual. Second, the value of freedom of speech is not a question of its value to the individual, but its value to the common good. Finally, freedom of speech is approached from the perspective of the receiver; its value is discussed with reference to benefits to receivers of ideas and information rather than to senders. This conclusion is interesting as it would appear to reveal a discrepancy between conceptions of freedom of speech in the fields of Philosophy and Jurisprudence, respectively. In juridical contexts, freedom of speech is generally discussed as the right of senders to make their views known, whereas the opposite would appear to apply among philosophers, who justify freedom of speech on the basis of its benefits to receivers of information.

A final reflection on the findings of the analysis is that they are in a sense counter-intuitive. We generally think of freedom of speech as one of the *Liberal* rights and freedoms, as bound up with Enlightenment concepts like individualism and the rights of individuals (Schauer 1982: 60). But the results of our analysis would seem to point in another direction. Even though all the arguments considered here are definitely of Liberal extraction, the justifications put forward for freedom of speech or not especially Liberal. *Only one* of the five arguments proposes that freedom of speech should be valued for its own sake, as one of the 'inalienable' rights of human beings; but *no one* bases his appreciation of freedom of speech *primarily* on the individual's right to express him- or herself; and only one expresses its value in terms of the benefit to the individual interest.

## Freedom of Information and Diversity of Information

In conclusion, to my way of thinking, there is a common denominator, a common value that unites all these arguments in support of freedom of speech, namely, a reliable communication process – which I would define as a process that exposes members of society to information and ideas that they might not have chosen to partake of (Petäjä 2006: 128ff; Sunstein 2002: 8).

This idea is inspired by legal scholar Cass Sunstein, who discusses a distinction between 'consumer sovereignty' and 'political sovereignty' (Sunstein 2002: 44ff). In the case of consumer sovereignty freedom of speech/freedom of information is valued as a guarantor of the individual's freedom of choice in

his/her role of consumer. In this instance, the individual's current preferences steer his/her choice of information. To take a couple of examples: People who are interested in Marxism search for information about Marxism and discuss it with like-minded people. Militant feminists look for information on subjects like the emancipation of women and issues of gender equality and discuss these subjects with like-minded people.

The trend in communication and information markets tends toward this kind of sovereignty, Sunstein observes and refers to websites like *Individual.com* and *Crayon.com*, both of which enable users to personalize the flow of information that reaches them via the site – or, expressed otherwise, to filter out everything they dislike or find boring. Sunstein sees several possible consequences of this increasing ability to filter information, none of which is particularly desirable: increasing fragmentation of society, more radical polarization of groups (e.g., 'pro-choice' versus 'pro-life' advocates in the USA), and the conformity and self-conviction – a 'sect mentality', some might say – that all too homogeneous groups foster. None of these developments is good in a democratic society, Sunstein observes.

A positive alternative to consumer sovereignty, he proposes, is *political* sovereignty. And what does he mean by that? Political sovereignty makes no presumption that the individual's preferences are fixed, once and for all. Rather the contrary. Preferences are the products of socialization, and thus it is entirely possible to both create them and change them. As Sunstein writes:

Freedom consists not simply in preference satisfaction, but also in the chance to have preferences and beliefs formed under decent conditions (Sunstein 2002: 50).

Providing opportunities for individuals to partake of expressions of a diversity of ideas – more, and more diverse information than merely satisfies a given individual's current interests and preferences – gives people more opportunity to develop new interests and preferences. According to the notion of political sovereignty, it is wrong to assume that citizens' interests are best served if they have full access to the information they desire. Instead of a situation in which citizens constantly have their views reinforced, there is a value in having one's preferences challenged by being confronted with new perspectives and ideas. The great value of political sovereignty is that it enhances both individuals' ability to be citizens in a democracy and their capacity for reflection about collective and social goals.

Thus, the value of freedom of speech lies in its creation of a communication environment that is rich in perspectives and ideas, that presents us with unexpected and objectionable ideas and information that we have not asked for. That means that even 'deviant' and 'dangerous' views should be included; otherwise, the communication process can hardly be considered 'reliable'.

Thus, we should look on freedom of speech as the motor in a process that in turn promotes diversity of information. We find an empirical example of the

opposite in Lysekil, Sweden, where members of the local council proposed to ban evening tabloids from the town's public library because they are "full of docusoaps and violence" (*Expressen* 9 Oct 2005).

The problem with censorship like this is that by banning some sources of information on the grounds that it offers 'bad' information, the councilmen would also eliminate the possibility to partake of other information from the same sources. Yes, I might have read the stories about the latest docusoap and scandal involving one or another 'star', but I might also have read an interesting op-ed piece that gave me cause for thought.

Information diversity is an important vaccine against conformity and intolerance in democratic societies. A democratic society is healthier when its citizens are not locked in an '*echo chamber*', where their own views are constantly reinforced and there are no opportunities for new impulses and unfamiliar perspectives. The diversity of information that is promoted by a reliable communication process is the reason we should value freedom of speech.

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# Freedom of Expression and Freedom of Discourse

## *Examining a Justificatory Strategy*

Cathrine Holst & Anders Molander

Article 19 of the Universal Declaration on Human Rights states that “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Article 19 of the International Convention on Civil and Political Rights and Article 10 of the European Convention on Human Rights are approximately the same. Regarded as a human right, freedom of expression is a moral claim on any political order. To be legitimate, a political order has to guarantee this right.

In constitutional democracies, freedom of expression is transformed into positive law and has the status of a constitutional right. Generally, a right is a relation between the holder (a), the addressees (b), and the object (R) of the right. If we speak of a constitutional right, (b) is a polity and (a) every citizen. That (a) has a right to (R) means, conversely, that (b) is obliged to guarantee (R) to (a). Any constitutional right gives rise to questions about how (c) is to be understood: What is the right a right to, i.e. what does it entitle citizens to do (or not to do) and what does it oblige the polity to do (or not to do)? These questions concerning rights as legal positions and relations can be distinguished from questions concerning the justification of rights, on the one hand, and the application and implementation of entrenched rights, on the other (Alexy 1991: 164-168). The reasons for rights answer the question “what entitles (a) to (R)” or “in virtue of what does (a) have the right to (R)”. Of course, questions on the three levels are interrelated. How we answer questions of justification has implications for how we answer questions of legal positions and relations as well as questions of application and implementation, and vice versa.

In the present article, we will focus on the justificatory level, more specifically on the view developed by the Norwegian Governmental Commission on Freedom of Expression (1996-1999). On the basis of its justificatory considerations, the Commission proposed a new Article 100 in the Norwegian Constitution.<sup>1</sup> The Commission’s amendment reflected its considerations quite literally. The Commission presented three reasons for why freedom of expression should be protected. All three were incorporated in the proposed amendment: “No

person may be held liable in law for having imparted or received information, ideas or messages unless such liability can be justified in relation to the grounds for freedom of expression, which are the seeking of truth, the promotion of democracy and the individual's freedom to form opinions."<sup>2</sup> Today, this passage is part of Article 100 of the Norwegian Constitution.

The Commission's view strongly relies on the Norwegian philosopher Gunnar Skirbekk's attempt to clarify the normative foundation of freedom of expression as a constitutional right.<sup>3</sup> Skirbekk was himself a member of the Commission. Moreover, the Commission itself very explicitly states in its report – in the chapter on justification ("Why freedom of expression?") – that it follows Skirbekk's explication of the three reasons for freedom of expression (19, n. 7).<sup>4</sup> The three reasons are referred to as the principle of truth, the principle of democracy and the principle of autonomy. Together, the Commission says, these principles give a robust and potentially universal justification of the freedom of expression (25).<sup>5</sup>

We start out by presenting the Commission's argument for freedom of expression and Skirbekk's philosophical elaboration of it. In the following paragraphs, we clarify and discuss the argument more thoroughly, and argue that the Commission and its philosopher have chosen a questionable justificatory strategy.

## I. The Argument

a) The Commission presents a *precondition* argument for freedom of expression. Freedom of expression is considered as a precondition for truth-seeking, for personal autonomy, and for democracy. In order to seek truth, fallible human beings need a common use of reason (19). Freedom of expression is "necessary" for "counter-arguments to be heard", which again is necessary for truth-seeking, because "if we are not familiar with the counter-arguments, we cannot know whether we are right" – because we are fallible beings, and could very well be wrong (19). This argument – an argument from truth – is, the Commission says, "probably the most robust argument for freedom of expression" (20). An argument from autonomy could be linked to this: If individuals are to develop into "mature" persons, they need "intercourse, discourse and discussion"; it is "by testing one's views against those of others that they can be made 'morally refined'" (21).<sup>6</sup> Once more, freedom of expression enters as a precondition, this time for what the Commission refers to as personal autonomy or *Bildung*.<sup>7</sup> This dialogical understanding of human "maturity" makes it "possible to place greater emphasis on the content of statements", while "individualistic rights thinking discriminates poorly between the various types of statements" (22). According to the Commission, it is "broadly speaking the political statements" that must enjoy "special protection" (22), as these statements concern questions of a "social, ethical and cultural nature that we as citizens are expected to take a stand on, and where the use of collective reasoning in a public sphere is requisite" (22). The argument from autonomy is thus closely related to the argument from democracy. Openness and criticism are "the two most important

constituents of democracy" (22). According to the Commission, democracy's deliberative aspect – "debate between mature adults" – is "at least as important" as decision-making procedures such as voting. Public deliberation is "intended to result in improved insight" (23). Hence, the argument from democracy is again related to the argument from truth.

The Commission's justification, focusing, in short, on the deliberative qualities of truth, autonomy and democracy, is sketchy and in need of elaboration. To be sure, "precondition" probably means "necessary precondition", as when the Commission speaks of freedom of expression as "constitutive" of democracy. However, even with this qualification, the structure of the argument is far from clear. The Commission is clearly trying to find a politically viable ground and therefore avoids "deep" justificatory or philosophical questions. This is, of course, an attractive option for a governmental commission seeking broad support. At the same time, the Commission moves far into the philosophical domain with its justificatory claims, for example by taking a stand on what is a proper concept of "the individual" and human "autonomy"/"maturity". Moreover, and crucial from a juridical point of view, the Commission writes its justification into the proposed new article, and again this justification is today written into the Norwegian Constitution. Hence, what freedom of expression means, legally speaking, is in the end dependent on the more exact meaning of the Commission's three reasons for freedom of expression: one can "be held liable in law" for one's expressions if – and only if – such liability can be justified with reference to "the seeking of truth, the promotion of democracy and the individual's freedom to form opinions". From this perspective, the Commission's report does not tell us enough about how to understand its precondition arguments. We thus turn to Gunnar Skirbekk's writings for a more detailed account.

(b) Skirbekk argues for a justificatory strategy in terms of "necessary preconditions". Generally, he says that freedom of expression can be justified as "a necessary precondition for free and open deliberations in the public sphere on public matters among enlightened persons" (1998: 90). Like the Commission, Skirbekk refers to three elements (but not in the same order): a so-called "qualified concept of the person", a concept of public argumentation, and a concept of deliberative democracy (1998: 90).

Skirbekk presents the three elements separately, even if he, like the Commission, assumes that they are interconnected. His concept of the person is neither "an idealized concept of autonomous persons (as in Kant)" nor "an idealized concept of a pre-political individual (as in Locke)" (1998: 90, 91). What he has in mind is rather a less "controversial", "minimal concept of individual autonomy", a "modest concept of persons that are at the same time rational" – or reasonable<sup>8</sup> – and "fallible" (1998: 91, 97). They are rational (or reasonable) in the sense that they are "able to take part in public deliberations", they are "discursively competent" and thus "mature"; they are fallible in the sense that they are situated persons who see things from a partial perspective, and "need

to be exposed to counter-arguments and alternative perspectives" (1998: 91). He limits himself, moreover, to "discursively competent persons" in "modern societies". Such persons, Skirbekk presumes, "participate in argumentative discourse not exclusively to validate claims", but also "to *improve* [themselves] as [...] *person[s]*". An element of *Bildung* is thus involved (1998: 91, 106, 123). Furthermore, he is concerned with persons only "in those contexts where they seriously discuss public issues in the public sphere", and not in their roles as "private persons" (1998: 91). It is for persons in their public role that freedom of expression is "an unavoidable precondition", and if this freedom is denied them, they will be "disrespected as persons" (1998: 92).

The justification of freedom of expression with reference to truth-seeking (i.e. the second element of Skirbekk's justification, introduced as John Stuart Mill's argument), is based on the idea that "reasonable" views require "knowledge of counter-arguments" (1998: 92). For truth-seeking persons who are, or recognize themselves and others as rational and fallible persons,<sup>9</sup> "free and open deliberation" is the only way to proceed (1998: 92, 112). Hence, freedom of expression is not only "a value among other values", but "an unavoidable precondition" for "beings of our kind", beings who inhabit modern societies, and who are "interested in distinguishing between more or less valid or invalid views about complex issues of public concern" (1998: 92).

The Millian justification of freedom of expression is a "strong" one (1998: 92), because "it is self-referentially inconsistent to claim: 'I know that position X is true [...], but I refuse to be confronted with alternative positions and relevant counter-arguments, because then it may turn out that position X is refuted [...]' (1998: 92, 104, 111). Not recognizing that one is rationally "obliged" to subject oneself to the force of "*the better argument*" is thus a kind of deep, "logical" mistake (1998: 112). Because freedom of expression is an unavoidable precondition for fulfilling this obligation, to disrespect it is equally self-referentially inconsistent. It follows from this line of reasoning, however, that one not only simply has a "passive" right to freedom of expression; one also has an equal "active" obligation to follow the better argument: Freedom of expression is "actively realized in disciplined interaction with others" (1998: 115).

In addition to this justification in terms of what is self-referentially consistent, there is particular reason for modern people to accept Mill's view, Skirbekk argues. "Fallible truth seeking" and argumentative discourse belong to the fundamental characteristics of "modern, science-based societies", they are practices that such societies "depend on" (1998: 92, 115).<sup>10</sup>

The third element of Skirbekk's justification of freedom of expression, the concept of deliberative democracy, refers to "a modern representative democracy based on [...] majority vote that in addition is based on the free and enlightened discussion of public issues in the public sphere" (1998: 93). And freedom of expression is an unavoidable precondition for this kind of democracy, just as it is a precondition for truth-seeking and personal maturity. This is why a democratic majority cannot vote against the free speech principle without acting "self-destructively" (1998: 93).

Skirbekk distinguishes his justification of freedom of expression from three other justifications. In contrast to “individualist views”, he does not consider freedom of expression as a pre-political right: “the normative basis of freedom of expression” does not “lie within the individual” as “a metaphysical and unchangeable fact” (1998: 96).

Skirbekk also considers his view as differing from “the value-based view” (1998: 96). One version of this view stresses that freedom of expression is “a *value* because it is *good for the individual*” (1998: 96). It is then argued that “the *self-realization* of the autonomous individual” requires freedom of expression, not only of “argumentative expressions about public issues in the public sphere”, but of all kinds of expressions, “verbal and non-verbal” (1998: 96). Another version instead stresses that freedom of expression facilitates a “*good society*”, for example when freedom of expression facilitates “creativity, as in art, that again is *good for others*” (1998: 96). The problem with value-based views is, according to Skirbekk, that they do not recognize the fact of value pluralism: “cultural values” differ between traditional and modern (typically “Western”) societies, as well as within modern societies (1998: 96, 97). This makes the value-based justification of freedom of expression inevitably controversial.

Finally, Skirbekk contrasts his justification to “the functionalist view” that freedom of expression is “useful, for society or for parts of society” (1998: 97). The question then becomes “whether and in what sense such a functionalist (or instrumentalist) claim is *empirically* true, i.e. well-founded” (1998: 97). Empirical connections of this kind may be hard to establish, Skirbekk notes. Perhaps what we value, whatever that is, can be better served by social arrangements that do “*not* clearly protect freedom of expression” (1998: 98). To raise such questions, however, is not to generally dismiss the functionalist view, but to bring awareness to the fact that empirical arguments are always fallible (1998: 98).

Skirbekk claims that “*all* intellectual resources” contained in the individualist, value-based and functionalist views are taken care of in his approach (1998: 104). What his approach offers is thus something in addition, namely a “deeper *justification* of freedom of expression (in the end we can talk about it in terms of a philosophical *Letztbegründung*” [ultimate justification]) (1998: 104).

Furthermore, his approach has implications for how strongly different categories of expressions are protected. The categories that are given the strongest protection according to his justification are “argumentative” or “discursive expressions about public issues in the public sphere”, in particular legal and “political-administrative” expressions and deliberations in “civil society” (1998: 94, 95, 99). Weaker protection is reserved for expressions in “the private sphere”, expressions about “private issues”, “strategic expressions” that are aimed at “manipulating or indoctrinating other persons”, commercial expressions, such as advertising and pornography, as well as aesthetical and emotional expressions with limited or without cognitive content (1998: 95, 100, 110, 116-119). These implications are intended: In any case, one will need to differentiate between the protection of different kinds of expressions; this is the case even if one takes “an extremely wide concept of freedom of expression” as one’s point of departure (1998: 101).

Skirbekk's more "focused" concept differentiates at the outset: "Public, political and legal deliberation" is needed to decide the strength and extension of the protection of other kinds of expressions, such as advertising or pornography, and of expressions made in other places, such as in the private sphere. The first is a "precondition" for decisions about the latter, whether such decisions are on the restrictive or the permissive side (1998: 101). In this sense, public, political and legal argumentation is logically prior to other modes of expression and constitutes the core domain of freedom of expression.

## II. "... An Unavoidable Precondition"

Skirbekk argues that freedom of expression is an unavoidable precondition – for truth-seeking, for democracy, for being a mature person. The argument has the logical form 'q only if p': to say that p is an unavoidable precondition for truth-seeking (q1), democracy (q2) and personal maturity (q3) is to say that the latter are not possible without freedom of expression (p). As far as we can see, the notion of unavoidable precondition is given different meanings throughout Skirbekk's discussions. The nature of his argument for freedom of expression changes accordingly.

Let us start with the "deep" variant of Skirbekk's argument, his outline of a *Letztbegründung*, an ultimate justification, for protecting freedom of expression (1998: 104). This variant of the argument relies on the analysis of the presuppositions for argumentation made by Karl-Otto Apel and Jürgen Habermas.<sup>11</sup> These presuppositions are unavoidable, according to Apel and Habermas, in the sense that in denying them one involves oneself in performative self-contradiction. Skirbekk regards freedom of expression as one such presupposition. Truth-seekers, democrats and mature persons contradict themselves on a performative level (i.e. involve themselves in "self-referential inconsistency") if they oppose freedom of expression: they deny a precondition for doing what truth-seekers, democrats and mature persons do. And what do truth-seekers, democrats and mature persons do? Apart from whatever else they do, they *argue*. To seek truth, to participate in democratic practices and to be a mature person is to participate in argumentation (q4), and freedom of expression is therefore "contained in the constitutive norms of argumentation", it is a "discursive *a priori*" (1998: 114).

One *does* in fact involve oneself in a performative self-contradiction if one participates in sincere argumentation while at the same time denying other actual or potential participants in argumentation discursive freedom; this is not what we would dispute. According to Habermas, participants in argumentation cannot avoid making presuppositions that can be formulated in the form of "rules of discourse" such as:

- (3.1)<sup>12</sup> Every subject with the competence to speak and act is allowed to take part in discourse. (3.2) a) Everyone is allowed to question any assertion

whatever; b) Everyone is allowed to introduce any assertion whatever into the discourse; c) Everyone is allowed to express his attitudes, desires, and needs. (3.3) No speaker may be prevented, by internal or external coercion, from exercising his rights laid down in (3.1) and (3.2). (1990: 88-89)

In short, these “rules” articulate the idea of discursive freedom. However, how is the relationship between discursive freedom and freedom of expression to be understood? Is a defence of freedom of *discourse* sufficient to defend freedom of *expression*? We address these questions in Part IV. Another question is how the relationship between the identification of necessary argumentative preconditions and a justification of constitutional rights should be conceived of. How do we get *from* something being a precondition *to* it being the object (R) of a right? We deal with this question in Part V. First, however, the relationship between q1, q2 and q3, on the one hand, and q4, on the other, needs to be clarified. Skirbekk assumes an internal or conceptual relationship between q1 and q4. This seems plausible: Few would deny that truth-seekers argue, apart from what else they do. A definition of truth-seeking as involving arguing does not seem to be very controversial.<sup>13</sup>

The conceptual relationship between q2 and q4 is both less obvious and less obviously relevant to establishing a relationship between p and q2. In his overview of different theories of how to justify freedom of expression, Larry Alexander distinguishes between the general democratic theory and the public discourse theory of freedom of expression:

The general theory account of freedom of expression is easy to state and grasp. Democratic government requires that the citizenry has access to the information that bears on the performance of the government, both past and future. And that informational requirement in turn requires that expression conveying such information not be suppressed. (2005: 136)

The argument of the public discourse theory is different:

According to this theory, the democratic will is legitimate only if it reflects public opinion. And the latter is a legitimate basis for the democratic will only if it is formed under conditions of freedom. (2005: 139)

The argument from democracy thus relies on an assumed relationship of some kind between q2, on the one hand, and non-suppression of information (q5) or a particular notion of legitimacy (q6), on the other. Stating his argument from democracy, Skirbekk mentions, however, neither q5 nor q6 (or something that equals q5 or q6). On the contrary, he assumes a conceptual relationship between q2 and q4 – democracy is defined as deliberative democracy. Given this definition, Skirbekk can argue that q2 only if p, because q4 only if p. The exact role of argumentation in democratic rule is not, however, made clear. Why define democracy as deliberative? Is it because q4 is required to assess

adequately the information that bears on the performance of the government (i.e., to secure the relationship between q5 and q2)? Is it because the formation of a legitimate public opinion presupposes public deliberation in addition to freedom of expression, i.e. due to a relationship between q4 and q6? Are there other reasons? Ultimately then, Skirbekk's argument from democracy does not seem to add anything to his argument from truth – or validity;<sup>14</sup> in both cases the idea is that q4 only if p.

Regarding his argument from personal maturity, the case is different. Here p is not primarily outlined as a necessary precondition in accordance with the ultimate justification variant of his argument,<sup>15</sup> but rather, if we understand Skirbekk correctly, as something such mature persons *need* and therefore are or ought to be interested in. Needs express 'in order to' relations: x needs y in order to z. Skirbekk does not explain this relation in any detail, but one interpretation of his argument could be as follows: Rational persons who recognize that they are fallible need p in order to reach well-founded beliefs, since such beliefs can only be reached through participation in public deliberation where one is exposed to "counter-arguments and alternative perspectives" (1998: 91). This would imply that people who recognize themselves and others as fallible persons seeking well-founded beliefs, i.e. as having the needs of such persons, could also be said to have an interest in freedom of expression: p would generally be good for them.<sup>16</sup>

If this interpretation is correct, we seem to be dealing with a "goal-based" argument (Dworkin 1981), or a mix of what Skirbekk refers to as a value-based and a functionalist (or instrumental) argument for freedom of expression. The argument is value-based, because freedom of expression is considered as something people need in order to be mature persons, i.e. to realize a higher order interest and not only more or less contingent individual preferences. Mature persons in modern societies do not only participate in argumentation to validate claims (assuming they have an interest in validity<sup>17</sup>), according to Skirbekk, they also value argumentation because it improves them as persons (Skirbekk 1998: 123). Skirbekk himself holds value-based arguments for freedom of expression to be problematic given the fact of pluralism. Clearly, he considers his own notion of maturity as less disputable than alternative values, which it has been suggested that freedom of expression is instrumental to (Skirbekk 1998: 96-97). However, he does not elaborate upon why; to us, this is hardly self-evident.

Furthermore, a positive causal relationship between freedom of expression and truth-seeking cannot be taken for granted. For one thing, "history provides too many examples of falsity triumphant over truth", even in cases where discussions were allowed to go on freely (Schauer 1982: 25-30). In addition, expressions are in fact not simply "freely" expressed in institutions where obtaining truth is imperative; they are rather regulated and circumscribed (Alexander 2005: 128-130). When we are very concerned with finding out what is true (or right), discourses are bounded and participation restricted. This is the case in legal adjudications, but also in science: "[...] professional journals refuse to publish

claims that the editors believe are not properly substantiated, and faculties and laboratories refuse to employ those who hold what in the opinion of those faculties and laboratories are outlandish views" (Alexander 2005: 128). Hence, in contrast to what Skirbekk assumes, the procedures of "modern science" do not in any straightforward way exemplify that "we", modern persons with confidence in these procedures, generally accept the instrumental relationship between freedom of expression and obtaining more well-founded beliefs (1998: 92, 115). And even in institutionally unbound discourse, as delineated by Habermas in his discourse theory of validity, participants' freedom of expression is constrained by rules of logic and reasoning. The discourse rules require, for example, consistency and oblige the participants to provide relevant reasons.<sup>18</sup> Discursive freedom is thus equal to freedom of expression within rules of communicative rationality, which put restrictions on what can be said.

Finally, that freedom of expression is regarded as something we need or have an interest in might mean that it is to be thought of as equivalent to a collective good. Skirbekk only occasionally refers to freedom of expression as an individual right (even if that is what it is, legally speaking; see Part V). What he intends to justify is generally referred to as "the legal protection of freedom of expression". Only a couple of times throughout his discussions does he talk of it explicitly as a legal *right* to freedom of expression. One way to make sense of this systematic and somewhat peculiar avoidance of the notion of right, is that p is regarded as a collective good worth protecting as an infrastructure for making truth-seeking possible. This means privileging "audience interests" at the expense of "participant interests", i.e. the interest in having "a good environment for the formation of one's beliefs and desires" above the "interest in being able to call something to the attention of a wide audience" (Scanlon 2003:186-191).

### III. The Concept of a Person

We will now return to Skirbekk's claim about his concept of a person as a modest one. Persons, according to his concept, are discursively competent and fallible. To be discursively competent is what it means to be rational or reasonable. Fallibility is introduced on some occasions as a condition of human cognition: The "persons" Skirbekk has in mind "are fallible" (1998: 91, 92). On other occasions, fallibility is treated as a sign of rationality: A rational person is a discursively competent person who "recognizes" his own and other people's fallibility (1998: 112).

In the end, the modesty of this concept depends on the meaning of the term "discursively competent persons" (1998: 91). Generally, it means that such persons are "*able* to take part in public deliberations". But how is this to be understood? Does it just mean that they have communicative competence? Or does "public deliberation" signify more or less institutionalized forms of discourse? If the first were what Skirbekk had in mind, he could reasonably

have referred to his concept of a person as modest, as it would simply denote a competence that is coincidental with the human sociocultural life form as such. Argumentation or discourse is, however, what Habermas calls a reflexive and demanding form of communicative action, characterized by a series of idealizing presuppositions. Hence, a concept of the person making the ability to take part in argumentation the core of personhood is in fact a highly idealized concept, comparable to the highly idealized, but “monological” concept of a person in decision theory.

If Skirbekk thinks of a distinctive “public” use of communicative competence (i.e., if persons in fact are to be considered only “in those contexts where they seriously, discuss public issues in the public sphere”), his concept of a person is tied to a certain (normative) concept of the citizen. This is, however, only a partial concept of a person. When Skirbekk pushes his argument further in this direction, stressing that “we are not talking about all persons at all times, but limiting ourselves to adult, well-socialized persons in modern societies in certain modern contexts” (1998: 91), his “modest” concept of a person ends up as a highly contextualized concept, and truly deprives great groups of persons freedom for their expressions. It remains to be shown that this concept of a person is not only a plausible reconstruction of a more or less shared self-understanding among “modern” persons within a certain period of time, but also represents a self-understanding that is more adequate than other conceptions of the self from a normative point of view. Moreover, this contextualization of the concept of a person is in variance with Skirbekk’s universalistic claim, as it strictly speaking implies that freedom of expression is not a universal human right, but something that is reserved for or of vital interest only to a certain group of “modern” human beings.

We may understand Skirbekk as trying to work out a “political” concept of persons freely communicating arguments. In the end, however, Skirbekk does not really focus on what it means to be *free* in a communicative sense. Communicative freedom is, as Klaus Günther has put it, the freedom to take a position toward an utterance (a validity claim) with yes or no, and primarily the possibility to say *no*. This possibility is “constitutive for the possibility of alternatives” and to take an affirmative position means “taking a negative position towards counter-reasons” (Günther 1996: 1040). Focusing on this basic aspect of communicative action brings us to a more “modest” concept of a person. It also points to freedom of expression as a negative freedom, which Skirbekk tends to overlook in his attempt to show all the good things freedom of expression is a precondition of.

#### IV. Freedom of Discourse or Freedom of Expression?

To highlight freedom of expression as a negative right is also to highlight the distinction between freedom of discourse and freedom of expression, or more specifically, the fact that the latter cannot be reduced to the first; as a

constitutional right freedom of expression does not only protect discursive utterances. We return to this in Part V. Here we want to stress a similar point from a different angle. Skirbekk claims that freedom of expression primarily ought to protect “argumentative” or “discursive expressions about public issues in the public sphere”, whereas the protection of other expressions should be considered a secondary question to be settled in the argumentation/discourse that freedom of expression primarily protects (1998: 94, 95, 101). He thus gives the vindication of validity claims stronger protection than the communication in which such claims are raised. Basically, by freedom of expression Skirbekk seems to mean discursive freedom and not communicative freedom as such. This position not only disregards freedom of expression as a negative right, it is also unsustainable in the sense that the vindication of a validity claim will not take place at all if the claim is not communicated in the first place. Protecting vindication presupposes a similar protection of communication; to say that the former should be more strongly protected than the latter, is to say that a claim should be both strongly protected (as vindication) and less strongly protected (as communication) at the same time.

Moreover, one cannot know at the outset which expressions might contribute to discourse. Whether for example an artistic expression or for that matter a pornographic expression,<sup>19</sup> or an expression of a seemingly “private” nature, is of relevance to public discourse cannot be decided elsewhere than in public discourse. This does not mean that we dismiss the question of what importance should be assigned to different categories of expression. What we oppose is the idea that expressions occurring in certain institutional contexts (for example, expressions concerning “political-administrative” questions) are privileged above expressions occurring in other institutional contexts (for example, “aesthetic” expressions), certain topics (conventionally thought to be of “public” relevance) above others (conventionally thought to be simply of “private” relevance) already on the level of *Letztbegründung*. The question of priority cannot be decided upon *a priori*.

## V. From Precondition to Right

All arguments for rights in terms of necessary preconditions involve a problem of inference: how do we get from the statement of some kind of necessary precondition to a moral (human) and legal (constitutional) right? We will focus on Skirbekk’s transcendental/formal pragmatic argument.<sup>20</sup> Even if this argument is successful, it only justifies freedom of expression as a discourse-internal norm, not as a general norm of action or as a legal norm. In order to derive a right from discourse-internal norms, a series of additional steps is necessary. Firstly, an interest in truth, and thereby in discourse as a procedure for answering questions about truth, must be presupposed. Secondly, to justify a general freedom of expression, not only related to truth questions, one has to show that discourse is a procedure for seeking answers to other types of questions

too, for example concerning what is right or wrong, good or bad, beautiful and ugly, and so on. That is, everyone seriously interested in these questions should also be interested in discourse.

From here, there are different ways to proceed.<sup>21</sup> One could argue that recognition of the autonomy of the other is presupposed in sincere participation in discourse, and ought to be translated into a legally guaranteed right to freedom of expression as part of a set of basic rights that guarantees personal autonomy. This would be a discourse-theoretical variant of Kant's argument about "*das angeborene Menschenrecht*".<sup>22</sup> Another way is to argue on the basis of a discourse-theoretical interpretation of normative validity, such as Habermas' discourse principle, that a legal order could only claim to be legitimate if it is freely accepted by its addressees, and that this presupposes the institutionalization of basic rights, including the right to freedom of expression. Freedom of expression as a legal right is then the outcome of the application of the discourse principle (which presupposes freedom of expression as a discourse rule) to the legal form.<sup>23</sup> To be sure, a principle of autonomy is built into the discourse principle, but this argument would anyway differ from the argument from autonomy in that it argues from a (consensual) concept of validity, and considers the right to freedom of expression as a right that is necessary for a legitimate legal order and legitimate law making (and not as a right following directly from a principle of autonomy). This argument from validity could again be developed into an argument from democracy on the premise that only democratic procedures can approximate this discursive concept of legitimacy, i.e. that these procedures justify an expectation that outcomes are legitimate. If this is the case, anyone interested in the legitimacy of a political order ought to be interested in democracy which presupposes freedom of expression.

The basic meaning of a (legal) right to freedom of expression is negative: If one has this right one is *prima facie* free – in the sense of not being hindered by prohibitions – to express oneself publicly. Whether or not protecting freedom of expression also implies positive obligations, i.e. obligations not only to abstain from interference but also to affirmative and supporting protection of freedom of expression, is another question. As a negative right it is part of a general right to freedom, as it is formulated in for example Kant's principle of right or Rawls' first principle of justice.<sup>24</sup> This general right to freedom follows from the idea that any restrictions to freedom should be such that they can be freely accepted by free or autonomous persons. In other words, they have to be justified as restrictions that are in the interest of the freedom of everyone.<sup>25</sup> However, a negative right means that one is not obligated to justify what one is free to do. Freedom of expression is obviously a precondition for rational discourse, but as a legal right – contrary to what Skirbekk argues – it neither permits discursive utterances only, nor obliges us to justify our utterances or take part in rational discourse (Wellmer 1993: 39). A negative right is an exit option, and even a right to act "selfish, deranged, eccentric, irresponsible, provocative, obsessive, self-destructive, monomaniacal etc." (ibid.). One's nega-

tive right to freedom is conditioned only by the same right to freedom for all others. It seems that Skirbekk simply jumps over this basic aspect of freedom of expression as a legal right.

Moreover, rational discourse (or a metaprinciple of rational discourse), even if presupposing discursive freedom, does not in itself generate an idea of individual *rights*, but in combination with such an idea it may be argued that rational discourse implies an equal distribution of such rights and certain restrictions to arguments for restrictions to personal freedom (impartiality). In his justification of a system of constitutional rights, Habermas presupposes not only the discourse principle but also, as we have mentioned, the legal form (individual rights permitting individuals to do what is not legally forbidden). What follows from the discourse principle (in combination with the legal form) is everyone's right to the most extensive equal liberties that are mutually compatible (Habermas 1996: 123). Skirbekk presupposes a principle of rationality (and thereby of human autonomy), but not, seemingly, a principle of individual rights to freedom. This also contributes to explaining why he falsely juxtaposes respect for persons with respect for arguments; falsely, because individual rights protect persons without regard to their arguments, while the rules of discourse protect arguments without regard to persons.<sup>26</sup>

## Notes

1. NOU 1999:27. "Ytringsfrihed bør finne sted". Forslag til ny Grunnlov § 100.
2. Ibid, p. 3.
3. "Same friedom for alle ytringar? – om ytringsfridommens normative grunnlag" (1996) ("Similar Freedom for All Expressions? – on the Normative Basis of Freedom of Expression"). We will also refer to "Din tanke er fri ...' – om å grunngi det rettslige vern av ytringsfridom" (1997) ("Think Freely ...' – on Justifying the Legal Protection of Freedom of Expression"). Both articles are printed in Skirbekk (1998). The translations of quotes from Skirbekk's articles are ours. The translations of the quotes from the Commission's report follow the English excerpt ("*There shall be freedom of expression*". *Proposed new Article 100 of the Norwegian Constitution. EXCERPTS*. <http://unesco.no/images/pdf/ytringsfrihet.pdf>).
4. We refer to pages in the Commission's report (NOU 1999: 27).
5. For some reason, the ordering is however different in the proposed amendment and in the justificatory chapter: the principle of autonomy is number three in the first case, number two in the second. We refrain from speculating about why this is so.
6. The Norwegian text uses "anstendigjgjøres" ("be made 'decent'").
7. The Commission contrasts their understanding of autonomy as *Bildung* with what they take to be a flat understanding of autonomy as negative liberty. The latter reflects an American "individualistic" tradition, the former a European tradition, rooted in an Aristotelian conception of politics as a "cultivation of the virtue and moral character of the citizens" (2.2.2). How a universally valid justification of freedom of expression could be based on a particular, supposedly European concept of a person – and why other concepts, such as supposedly American concepts, are flawed – the Commission does not explain.
8. Skirbekk uses the Norwegian term "fornuftig", which can be translated both ways.
9. Skirbekk sometimes says that the persons he has in mind are rational and fallible persons. Other times he talks about them as persons who see themselves as rational and recognize their fallibility (see Part III).

10. Skirbekk defends a “gradualistic fallibilism” or a “negatively oriented meliorism”: The aim of inquiry and argumentation is not to reach final truths, but to eliminate “less well-founded” views (1998: 112, 113).
11. In Skirbekk’s two articles on freedom of expression only Habermas is explicitly referred to, however.
12. Habermas refers to Alexy’s list of rules of discourse. The numbers refer to the ordering of this list. The complete list is in Alexy 1983: 233-272 and *Anhang*.
13. Instead of truth-seeking, one may talk about seeking “the strongest reasons”, the “best” beliefs, etc. (Cohen 1993: 228). However, this does not alter the assumed conceptual relationship between what one is seeking – truth or a more moderate substitute – and a notion of arguing.
14. When Skirbekk talks about truth, he not only has in mind a standard of empirical validity, but standards of validity generally, for example when assessing moral norms (as more or less right) and political principles (as more or less legitimate) (1998: 116-119).
15. Considered as an ultimate justification of freedom of expression, the argument from personal maturity could have relied on a definition of a mature person as someone seeking valid answers in argumentation. In other words, p could have been regarded as an unavoidable performative precondition for q3 if q3 was defined in terms of q4 (because p is an unavoidable performative precondition for q4).
16. According to “the interest theory of rights”, “the essential feature of rules which confer rights is that they have as a specific aim the protection or advancement of individual interests or goods” (MacCormick 1977: 192).
17. See V.
18. Cfr. the rules that proceed the rules guaranteeing discursive freedom cited above (Habermas 1990).
19. For an interesting argument against the idea that pornography is apolitical, see Scanlon (1979).
20. A similar problem occurs if the unavoidable precondition is understood for example as a need, and we are to go from need to right. Here we will, however, concentrate on the ultimate justification variant of Skirbekk’s argument.
21. See Alexy’s (1995) elaboration in “Diskurstheorie und Menschenrechte”.
22. See Kant (1797/1977: 346) and for an interpretation Niesen (2005).
23. See Habermas (1996).
24. Kant: “Eine jede Handlung ist recht, die oder nach deren Maxime die Freiheit der Willkür eines jeden mit jedermanns Freiheit nach einem allgemeinen Gestz zusammen bestehen kann” (1977: 337). Rawls: “Each person has an equal right to a fully adequate scheme of basic liberties which is compatible with a similar scheme of liberties for all” (Rawls 1993: 291).
25. See Scanlon (1972) on legitimate restrictions to freedom of expression.
26. Cfr. Wellmer (1986: 108).

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Law



# International Challenges to National Law

## *Media Free Speech in Norway*

Anine Kierulf

Globalization of markets, communication and mass media is rapidly increasing, at a rate not quite matched by legal systems. National case law and legal theory are still primarily based in nation-states. However, supranational law is gaining in both scope and impact; it puts obligations on nation-states to deregulate and provide market access, and also to respect fundamental human rights. And as supranational law and facts are developing rapidly, national jurisprudence is at one and the same time keen and hesitant to follow.

This article focuses on the Norwegian national reception of globalization of facts and internationalization of law, and on the relationship between the legal systems: between national law and supranational law, and international and European trade and human rights law. Its angle of approach is that of freedom of thought and expression as liberal rights that enabling each citizen, among other things, to grow as human beings, to partake in discourse and search for truth or meaning to the extent they choose, and to contribute to debates in, and critique of, an open society. Although primarily safeguarded legally as individual rights, these freedoms are also a prerequisite for a functioning general public.

The media function both as an extension of this individual opportunity of expression, as a channel through which such expressions can be spread more broadly, and as a provider of information and ideas that constitute the basis of new individual thoughts and expressions and that form society.<sup>1</sup> As such, free media extend the right of free speech in a way on which a viable democracy fundamentally depends.

The present article outlines a few of the current challenges facing the media's freedom of speech. Today, these stem from increasing globalization of the factual elements that influence medial expression, and from internationalization of the legal instruments that influence free speech. Examples are taken from a Norwegian legal context, but they are undoubtedly representative for problems of both fact and law arising also in other jurisdictions. The aim of this article is to highlight some issues for further thought and consideration; the solutions to a number of the various challenges remain to be found.

## Norway's Free Speech Framework – and a “New” Role for the Nation-state

Traditionally, protection of free speech in Norway has been defined solely by national sources of law. In an increasingly internationalized legal society, the national approach to rights is no longer viable. Supranational regulation of human rights and trade is the source of law that influences and occasionally trumps national legislation and case law. Conflicts between international and national laws, and between different sets of international law, open up for new and complex questions about rights and their limits. This certainly applies to basic civil liberties such as the freedom of expression.<sup>2</sup>

In Norway, freedom of mass media is protected through various means, most fundamentally Article 10 of the European Convention of Human Rights (“ECHR”), the case law of the European Court of Human Rights (“ECtHR”), and the Norwegian constitution Article 100 (“NC 100”).

Norway was possibly the first nation outside the US to employ a system of judicial review, and the constitutional protection of free speech has been in place since the enactment of the constitution in 1814. Hence, one could imagine that NC 100 would have provided a solid and systematic foundation for judicial review of free speech infringements, but this has not been the case.

Two parallel, and to some extent interrelating, currents in Norwegian legal development at the turn of the millennium have provided a much more thorough basis for free speech as a basic right applicable to the public and the press alike: One is the enactment of The Human Rights Act (1999) followed by Norwegian courts’ gradual adoption of the ECtHR principles that have given ECHR rules precedence over conflicting Norwegian regulations. The other is the process of revising Article 100 of the Norwegian Constitution,<sup>3</sup> which commenced in 1996 and was concluded through a constitutional amendment in 2004. Together these reforms have increased significantly the focus on free speech considerations in political and judicial deliberations, not least by providing a basis for closer integration of the ECtHR’s dynamic free speech case law into national law.

The structure of ECHR appliance is that nation-states be the primary vessels for ensuring observance of the convention. Outside this function, one may question what other role national democracies can play in a field that is guided to such an extent by supranational liberal rules and market de-regulations.

It may be in keeping with the principles of classical liberal thought that the state regulate the market, and indeed also provide subsidies and other forms of support in order to rectify imbalances created by market forces.<sup>4</sup> One angle for rethinking the role of the nation-state is the new NC 100, para. 6, which states “It is the responsibility of the authorities of the State to create conditions that facilitate open and enlightened public discourse.” Rather than limiting free speech protection to the traditional negative right of protection against state interference, this paragraph focuses on the positive state responsibility to enable free speech. In its explanations to the proposed new paragraph, the Freedom of Expression Commission wrote:

The sixth paragraph of the proposed amendment (...) clearly states the responsibility of the state for ensuring that individuals and groups are actually given opportunities to express their opinions. Maintenance and development of the public sphere is invoked as a major public responsibility, consistent with the view long held by the Norwegian government. (...) We might also mention the particular responsibilities of public broadcasting and the rules preventing monopolized ownership of the mass media.

The paragraph arguably reflects state initiatives already in existence in Norway, but through the new amendment what was formerly a public policy has been elevated to a constitutional level. A constitutionalized infrastructure requirement opens up for questions of the relationship between different rule sets and levels. These are made even more complex due to the particularly vague nature of the constitutional provision in question; it follows from the preparatory materials that the provision is unlikely to be directly legally actionable for private parties, but rather has the character of legal guideline for courts and other law appliers.<sup>5</sup>

As a guideline, however, it provides an important perspective on one side of the role of nation-states in a supranational rights environment: The liberal right of free speech can not be sustained solely through a system that secures state non-interference. The nation-state is needed to ensure the infrastructure necessary to enable free speech – both for individuals and in the mass media.

## Modern Free Speech Challenges – Scope

Following the immediate difficulties in assessing the limits of expression in a given situation, globalization and internationalization add to the task by posing questions of how different supranational structures relate to each other and to national law. The complexity and heterogeneous nature of these questions necessitates a wider understanding of the various regimes under which they arise. In order to understand and possibly foresee norms directly influencing media expression, the basis for these changing facts and regulations must be seen in light of the structural systems of which they are part.

Important basic premises for a state based on rule of law are the foreseeability, consistency and relative accessibility of legal rules.<sup>6</sup> In modern states, and more so in internationalized legal societies, these premises are compromised due, among other things, to the complexity and number of regulations, and their necessarily dynamic character. Foreseeability and accessibility are arguably even more important in questions of free speech than in many other legal fields. Uncertainty about the consequences of a given expression in itself is a threat to the existence of that expression. Consequently, research into where and how limits for the media's freedom of expression are drawn is a constant requirement.

Even though the legal framework is relatively manageable, international influxes, liberal and anti-liberal alike, affect media free speech in various ways,

as do free market super-structures. Freedom of speech in general, and for the media in particular, is a field in which supranational tendencies influence both law and fact in a way that continuously poses difficult and sometimes new questions, such as where the limits of free expressions are to be drawn when colliding with other basic liberal rights, how the plurality and diversity of a free press is to be safeguarded in an increasingly market-orientated society, what the role and rights of the media are when threats of terror compromise due process and the rule of law, how an expression is to be construed when readers or recipients are from a globalized rather than national or culturally homogenous society.<sup>7</sup>

These and other questions are further complicated by expansion and modernization of the media's means of communication. It is still unclear what constitutes a "newspaper" on the Internet and who has the editorial responsibility in Internet discussion fora. Also uncertain is the assessment of whether users of "new" media, such as the Internet, cell phones and other platforms, are to be taken into account when deciding the market share of a given media corporation, and in what jurisdiction and under what laws expressions on the Internet are to be adjudicated.

In addition to assessing the dogmatic use of free speech principles, their underpinnings, justification and potential reach should also be reflected on. Two approaches to these challenges can serve as illustrations: Can the market still provide the civic outcomes necessary for maintaining the entire democratic function of the press due to increasingly aware and demanding consumers, as media mogul Rupert Murdoch argues?<sup>8</sup> Or, alternatively, are an active nation-state and a governed infrastructure attentive to novel challenges to freedom of expression necessary to uphold the twin function that the quality press has fulfilled up until now – that is, "satisfying the demand for information and education while securing adequate profits", as Jürgen Habermas puts it<sup>9</sup> – and as argued by the Norwegian Freedom of Expression Commission?

Media free speech challenges can be systematized in a number of ways. For the present purposes, I have chosen to give examples along three lines: that of liberal rights, of liberalistic regulations and of factual elements of a developing globalization that affect legal considerations.

## Challenges Exemplified – Three Lines of Fire

### *ECtHR and Other Liberal Rights*

An obvious starting point for identifying legal free speech challenges is new developments in ECtHR case law in Strasbourg and Norway, and Norwegian case law on the new NC 100.<sup>10</sup> Since 2000, case law from the ECtHR has explicated new balances between freedom of expression and conflicting human rights such as the right of privacy, the reputation of others, freedom of religion and freedom from discrimination.<sup>11</sup> Even though some of these developments have been addressed in legal theory,<sup>12</sup> many are still in need of closer analyses.

Until 2000, the ECHR was primarily considered a force for *increased* protection of free speech compared to that afforded by internal Norwegian regulations. ECtHR case law has indeed been the most important development in, and clarification of, Norwegian free press protection,<sup>13</sup> and the libel law effects of its elaboration have been called a paradigm shift in Norwegian free speech law.<sup>14</sup>

Whereas the supra-national human rights structure until 2000 was seen as a guarantor for media free speech protection, the picture has since then become more nuanced: ECtHR case law particularly after 2000 has modified previous case law and theory that holds free speech as a particularly fundamental, and thus specially positioned, basic right.<sup>15</sup> Free speech is one basic right to be weighed against others, and these other rights may well “trump” free speech also in a human rights context.

Consequently, in addition to securing media elbowroom, the “human rights line” of internationalized law also poses new challenges to media free speech. The signals from the ECtHR, and what implications these will have for the continued balancing of the rights and adjudication in Norwegian courts, are less clear today than, say, seven years ago.<sup>16</sup> One significant example of this is the expansion of elements explicitly protected under the right to privacy in ECHR Art. 8. As shown through recent case law<sup>17</sup> and as explored in legal theory,<sup>18</sup> the protection of privacy comprises several aspects not formerly addressed by the ECtHR, and aspects most relevant to the media.

One seminal case in this respect is that of *Radio France v. France*,<sup>19</sup> where a former deputy was wrongfully accused in the press and on radio of having deported a thousand Jews during the war. Here, the Strasbourg Court made clear that *personal reputation* is part of private life as protected under ECHR Art. 8. Formerly, this value was normally safeguarded “only” by virtue of its status as a legitimate element to consider for exceptions to the main rule of free speech in ECHR 10 (2); whereas now personal reputation is seen as a right independently protected by ECHR Art. 8. It has been discussed (but convincingly contested) whether this case, together with the later decision in 2004, in which Germany was found in breach of ECHR Art. 8 for not sufficiently protecting Princess Caroline’s private life against massive paparazzi press coverage,<sup>20</sup> marked a shift in the approach to the balancing of private and public values in press cases.<sup>21</sup>

What is clear is that what constitutes viable principles for the balancing of freedom of expression and privacy rights both in ECtHR and Norwegian case law, and in the general public discourse, is highly debated. In Norway, the balance was treated by the Supreme Court in 2007, in the first case in some twenty years.<sup>22</sup> Although a recent Supreme Court decision that found unlawful the use of a person’s photograph in a different context than it was taken provides a thorough illustration of how ECtHR case law influences Norwegian law in this field,<sup>23</sup> recent decisions from lower courts expose a significant difference in approach, and arguably a considerable lack of principled consistency.<sup>24</sup>

Another example of the national-international tension is ECtHR’s striking down of Norway’s total ban on political TV advertising.<sup>25</sup> The ban was justified by the legitimate aim of precluding financially powerful actors from dominating

the political debate. As it also effectively prevented others from being heard – in the case at hand a small and financially weak party that was never given editorial television coverage – it was struck down as an overbroad and illegitimate interference with Article 10. Rather than enacting a regulatory regime that prevents wealthy actors from dominating by e.g. capping amounts to be used, the Norwegian government instead upheld the total ban, claiming that the public broadcaster NRK in any event had an obligation to cover all political parties of a certain size editorially.<sup>26</sup> This, obviously, represents an illegitimate intervention into NRK's editorial freedom to the extent that it interferes with NRK's editorial line, and still leaves political actors below the "certain size" without TV-coverage. As NRK has stated that its editorial line will not be influenced, the governmental announcement simply represents a non-action, upholding the status quo just found illegitimate by the ECtHR. Until the government actually does something to act in accordance with the ECtHR decision, this is perhaps the clearest illustration of Norwegian national disobedience under the ECHR thus far.

ECtHR development of rights conflicting with freedom of expression raises questions both of how recent Strasbourg case law is to be construed, and of how ECtHR principles are to be applied in Norwegian law. The ECHR does enjoy, through the Human Rights Act of 1999, a semi-constitutional role,<sup>27</sup> and trumps even later national legislation, overriding a *lex posterior* rule.<sup>28</sup> This begs the question of whether Norwegian courts should, as often expressed by the Supreme Court, employ the "Strasbourg method" directly, or limit themselves to "core" adjudication.<sup>29</sup> It is far from clear how the different approaches will affect the practicability of human rights instruments in media-related cases, and what the implications of the new NC 100 will be in this situation.

### *Free Trade Instruments*

Perhaps the most important source of internationalized law in Norway is EU law, which is binding upon Norway through the European Economic Agreement ("EEA"). The EU remains primarily a market union, and liberalistic ideas of anti-trust and free market competition constitute an important basis for much of the EU legislation that concerns its member and associated member states. Some of the regulations in the EU/EEA are also found in other international instruments such as the Agreement on Subsidies and Countervailing Measures and General Agreement on Trade and Services ("GATS").

From a traditional Norwegian perspective, free market rights are no obvious challenge to a liberal right such as free speech. The more complex and pervading they are, however, the more opportunities for conflicting principles and norms: In Norway, since 1969 a system of press subsidies has been in function, with the aim of enabling a pluralistic and diverse situation in the daily newspaper market. Such a civil service function of the press is seen as a vital pillar of a functioning liberal democracy.<sup>30</sup> As advertising revenue, beside sales revenue, is the most important source of income for newspapers, and as advertisers act so that the largest newspaper in an area obtains an disproportional share of

the ads, number two newspapers receive subsidies under the system. Certain local and rural newspapers are also subsidized, as are papers that represent special group interests and ideological or cultural positions and opinions. In addition to such direct aid to newspapers, they are also VAT exempt, contrary to e.g. magazines. This indirect subsidy is by far the most important economic aid to the newspaper sector.<sup>31</sup>

State subsidies interfere with a free market, and may distort competition. Such aid is thus, as a general rule, prohibited in the EU/EEA. This has led the European Commission to challenge the Swedish system of press subsidies and request an end to aid given to two Swedish newspapers.<sup>32</sup> The Swedish subsidizing scheme has enough similarities with the Norwegian system that it risks being deemed as illegal state aid. Although, to my knowledge, no challenges have been made against the direct newspaper subsidies, several complaints from Norway and other countries with comparable systems are already under way contesting the indirect subsidies.<sup>33</sup>

Free speech issues may also arise from trade regulations pertaining to free movement of goods and services as set out in the EEA and GATS. As was shown through the first-instance decision in the case of *Pedicel (Vinforum)*<sup>34</sup> (reversed upon appeal, admitted to the Supreme Court),<sup>35</sup> Norwegian regulations against alcohol advertisement were seen as a disproportionate restriction on imports in the EEA agreement Art. 11, and free movement of services in Art. 36. One element of the finding a deficient proportionality was the way Norway banned all forms of commercial alcohol advertisement, but not editorial articles. Rather than setting out rules for editorial mentioning of alcohol (which often are more graphical and tempting than commercial ads, and also reach vulnerable audiences such as teenagers), and thus following its own alleged consistent line against alcohol ads, the first instance-court found that the Norwegian state had dodged regulations on editorial articles using a non-explanatory reference to freedom of expression.

Article 3 of the EEA, read in conjunction with Protocol 35, makes clear that the EEA takes precedence over national legislation in situations of conflict. And the EEA provisions are interpreted dynamically, pursuant to developing case law in the EFTA and EU courts. Consequently, should the Norwegian system be found incongruent with the EEA limits on state aid and movement of services, it would generally no longer be viable. For a Norwegian court, however, this may be different in light of NC 100, 6 – a provision opening up for a new set of questions: How are conflicts of rules solved when the relevant Norwegian regulation is at the constitutional level? What is the consequence if a constitutional rule is enacted subsequent to valid EU regulation? How is a constitutionalized rule not meant to be directly actionable by private parties to be construed?

### *A Globalized World of Fact and Law*

Tensions between measures to ensure national security and liberal freedoms have increased in scale following globalization. One obvious illustration of

this is the effects of the new Swedish law on general strategic monitoring and potential interception of all electronic communication passing Sweden's borders via air and/or wire, the "FRA-lagen",<sup>36</sup> which enables Swedish authorities (Försvarets radioanstalt "FRA") secretly to monitor and store the contents of all electronic communication passing Sweden's borders.

Any communication between persons in Norway and persons communicating from within Swedish territory is subject to control by Swedish authorities, as is communication between persons in Norway and anyone outside Norway – to the extent the communication passes through Sweden. Due to the Norwegian Internet infrastructure, most electronic communication in and out of Norway is indeed routed through Sweden, as is a substantial portion of domestic Norwegian communications.<sup>37</sup>

The FRA does not only enable Swedish authorities to monitor Norwegian citizens. Even though Norwegian regulations offer to its citizens a relatively comprehensive protection against state surveillance and monitoring, Norwegian authorities may gain access to surveillance data collected by other countries, such as Sweden, through the well-known international intelligence "trade" that takes place between state authorities. Indeed, Sweden's Minister of Foreign Affairs, Carl Bildt, has expressed that if Sweden wanted to participate in league with the "big players" in the international intelligence trade, it would have to be able to offer the kind of intelligence information allowed under the new legislation.<sup>38</sup>

Norwegian journalists communicate extensively through electronic means with sources in Norway and in other jurisdictions. The possible surveillance of such communication obviously represents a significant possible "chilling effect" on the expressions uttered and sought by journalists and sources, particularly as concerns information pertaining to government-critical ideas. Thus, not only are the mass media subject to unjust interferences damaging to the fulfillment of their role as public watchdog, but the public is also deprived of information it should rightfully be able to receive. And while Swedish citizens enjoy some, albeit slim, safeguards under the FRA, all non-Swedish citizens are left lawless.<sup>39</sup>

Another case illustrating the national security/liberal freedoms tension is the *Berlingske-sagen* from Denmark. In 2006, the editor and two journalists of the newspaper *Berlingske Tidende* were prosecuted for publishing classified intelligence material obtained from a source in the *Berlingske-sagen*.<sup>40</sup> The material in question exposed that Danish intelligence had been in significant doubt about whether Iraq had weapons of mass destruction at its disposal, and about the legitimacy of an invasion. At the time of the trial, the source had been sentenced to four years in prison for confidentiality breach, and the accused in the *Berlingske-sagen* were charged with having illegitimately disseminated information potentially harmful to national security. They ended up being acquitted, as the published material was of such profound public interest that to convict them would be seen as illegitimate interference with their freedom of speech, and the public's right to information. This balancing of norms was seconded by the prosecutor, who resolved not to appeal the acquittal.<sup>41</sup>

The case exemplifies how courts and prosecutors do consider freedom of speech aspects in construing restricting laws. In Norway, the new Penal Code (adopted in 2005, not yet in force) Art. 123 and 124 state that dissemination of classified material is punishable in the absence of just or worthy cause (“aktverdig grunn”). Both *Berlingske-sagen* and the uncertainties related to the evaluation of what constitutes “just cause” cast light on potential conflicts between a free press and a national security under increasing pressure.

Such conflicts are even harder to assess when they concern new media: What *actual* freedom do Norwegian Internet editors have to convey controversial expressions in a world of terror threats? This depends, i.a., on the potential legal repercussions for those who technically or by other means enable the dissemination of such expressions.

The confusion about the legal responsibility for those technically assisting an Internet editor is well exemplified by an incident in which an organization, Human Rights Service (HRS), in February 2008 published the cartoon from *Jyllands-Posten* depicting the prophet Mohammed on its home pages. The Internet “host” (“I-host”) of HRS, fearing negative sanctions and hacking of the HRS and other Internet pages, removed both the cartoon and other expressions connected to it from the HRS pages. In the controversy that followed, a professor of law and a computer scientist held that an I-host was fully authorized to censor editorial pages,<sup>42</sup> while the secretary general of the Association of Norwegian Editors argued that no such right could be based on Art. 18 of the Electronic Commerce Act (“ECA”), which regulated the situation.

A likely way to construe ECA Art. 18 is as a limitation on potential legal liability, which otherwise rests upon technical assistance in dissemination of speech. A reduction in potential liability, not an increase, is congruent with the bearing ideas in the preparatory works of the ECA, and also with the protection of free expression as set out both in ECHR Art. 10 and NC Art. 100. Construction allowing – or making unclear the limits for – direct interference with expressions on the part of a technical assistant may well represent a breach of the obligation to protect speech under NC 100 and ECHR Art. 10. This would, in turn, constitute a breach of Norway’s obligation under the convention, and create potential economic liability under its Article 41 – and possibly also give raise to adjudication providing a more precise meaning of NC 100, 5.

However, until the question of legal responsibility is given a more authoritative answer, fear of potential liability on the part of technical assistants is sure to have a “chilling effect” on the assistants in question, and thus stymie what expressions are in fact imparted to society.

Another increasingly practical problem in the globalized field of Internet media is that of “forum shopping” for lawsuits based on allegedly illegal expressions. As Internet “papers” transgress borders and may be read in a number of jurisdictions, expressions perfectly legal in some countries may represent infringements of rights in others. They may also be seen as directed not only to the public in the country of origin, but also to other countries where the material is relatively accessible to the general public. This is particularly rel-

evant when a mass medium translates (as many do) some or all of its published material into English.

An example of potential troubles could have been demonstrated if the Norwegian government had upheld its proposal of December 2008 to resuscitate the sleeping provision against blasphemy in the Norwegian Penal Code.<sup>43</sup> Provided a person in another jurisdiction had some connection to Norway, what that person held to be blasphemous expressions published in a Norwegian Internet paper could probably have been brought before courts in jurisdictions far less open to religious critique than Norway, with the Norwegian provision as the legal basis.

This legal situation generates complex questions of forum and applicable law. Due to the lack of international regulation of such forum and choice-of-law conflicts,<sup>44</sup> a plaintiff is likely to seek out the forum in which the law is most favorable to his or her case.

At least four examples of such forum shopping (or, when pertaining to slander/defamation, libel tourism; “*injurieturisme*”<sup>45</sup>) have taken place. All of these have been initiated by foreign plaintiffs who threaten to sue Norwegian newspapers in the UK, where the means for protecting personal privacy and honor are considered to be more effective than in the rest of Europe. These cases have all been solved through negotiations or procedural creativity,<sup>46</sup> but there is today no clear legal solution to the forum-shopping problem, and Norwegian legal theory has not provided any systematic analysis of it.<sup>47</sup>

## Final Notes

Aside from studies of specific law conflicts in the ECHR or EU, little has been written on the consequences of globalization for media free speech in Norway.

From a legal perspective, some ideas applicable to Norway can certainly be found in studies of international theory on the subject,<sup>48</sup> but on the whole this developing area of law and fact is yet to be systematically analyzed. An exploration of the relationship between human rights law and EU law necessitates examinations of case law under the two systems, studies of how this case law is related to the hitherto rather sparse literature in this field,<sup>49</sup> as well as the forces working towards a European Constitution.<sup>50</sup>

As if lacking in complexity, hard-found solutions to regulatory problems are probably still more easily within reach than are predictions of those factual elements of globalization development that give rise to new free speech challenges. And perhaps the most pressing challenge is the tension between national jurisprudence and international practice and emerging international traditions of legal and conceptual thinking.

In sum, a series of questions about the reach, content and limits of media free speech, indeed of its infrastructure, are in need of answers – in Norway and elsewhere.

## Notes

1. Media can also be said to simplify and make accessible information, and as such be a provider of self confidence necessary to make further societal choices and decisions, see i.e N. Luhmann, *Die Realität der Massenmedien* (2004).
2. The present article raises questions about freedom of thought, speech and expressions, and "press freedom" – how these rights pertain to all media, in Norway. In Norwegian law, all these are aspects of the same basic right, covered in one legal term: "ytringsfrihet". For the present purposes, I will use several of the English terms for the Norwegian expression "ytringsfrihet".
3. The main work was conducted by the Freedom of Expression Commission, appointed in 1996 with a mandate to undertake a thorough investigation into and discussion of the role of freedom of expression in Norwegian society, and internationally, and come up with a proposal for the formulation of a new Article 100 of the Constitution. See: "*Ytringsfrihed bør finde Sted*". Forslag til ny Grunnlov § 100, NOU 1999: 27. [http://www.dep.no/jd/norsk/dok/andre\\_dok/nou/012005-020029/](http://www.dep.no/jd/norsk/dok/andre_dok/nou/012005-020029/). Excerpted English version: "*There shall be freedom of Expression*." The Norwegian Ministry of Justice & The Norwegian National Commission for UNESCO. Oslo 2005. <http://www.unesco.no/sentralesaker/kommunikasjon/114-ytringsfrihets-rapporten->
4. See: John B. Thompson *The Media and Modernity* (1995) pp. 240-241.
5. St.meld. nr. 26 (2003-2004), section 7.6.2.
6. See i.e. L. Fuller, *The Morality of Law* (1964).
7. The construction of any kind of expression has little to do with legal norms, but a great deal to do with the context into which the expression is introduced; the more complex the context, the more uncertain the meaning. See Vidar Strømme and Anine Kierulf, "Tolkning og injurier", *Lov og Rett* 2004 pp. 474.
8. Speech held in London, March 13, 2006.
9. *Süddeutsche Zeitung*, May 16, 2007.
10. Free speech protection in Norway is broadly and thoroughly presented in *Ytringsfrihet* (2002) by Kyrre Eggen. This book is an obvious starting point for all discussion of legal freedom of expression in a Norwegian context, particularly that concerning the range of ECHR Art. 10, and to some extent also the new NC 100.
11. Even though Kyrre Eggen worked closely with the Freedom of Speech commission towards a new NC 100, the provision did not come into force before 2005. The preparatory works presented after 2002, such as St.meld. nr. 26 (2003-2004), are consequently not analyzed in Eggen's book. Certain sides of the new NC 100 have been commented on, but several aspects of interest to the media are not addressed.
12. As an example, the conflicts arising between articles 10 and 8 seen from a Norwegian context have been treated i.a. by Bjørnar Borvik in "EKM art 8 og vernet mot ærekrenkingar", *Tidsskrift for Rettsvitenskap*, 2/2003 pp. 246-307 and *The Norwegian Approach to Protection of Personality Rights: With a special emphasis on the protection of honour and reputation* (2004), and Ragna Aarli, "Vern av privatlivets fred", *Tidsskrift for Rettsvitenskap* 2005 pp. 525-573.
13. The seminal cases being *Bergens Tidende v. Norway*, 02.05.2000, *Nilsen og Johnsen v. Norge*, 25.11.1999, *Bladet Tromsø v. Norway*, 20.05.1999.
14. C. Schiøtz og V. Strømme, "Paradigmeskifte i injurieretten", *Lov og Rett* 2002 p. 401.
15. *Sunday Times v. UK* A/30 1979, NOU 1999: 27, p. 26.
16. For a popular comment to some main tendencies in ECHR practice, see Kyrre Eggen in *Advokatbladet* 03/08 pp. 48-50.
17. I.e. corporate "privacy" limiting searches of business premises in *Stés Colas Est and Others v. France*, 16.04.2002.
18. See note 12, *supra*.
19. *Radio France v. France* 30.03.04.
20. *von Hannover v. Germany*; 24.06.04.
21. P. Danielsen, *Lov og Rett* 2005 p. 129-130, contested by J. Wessel-Aas in "Pressefrihet kontra personvern – nye signaler fra Strasbourg?", *Lov og Rett* 2005 p. 370.
22. HR 2007.05.07.

23. HR 2008.03.06.
24. Examples of significantly different approaches to be found i.e. in two cases from Borgarting Court of Appeal, "Platasaken" LB 20.9.07 and "Bryllupsfotosaken", LB 13.2.08.
25. TV Vest As & Rogaland Pensjonistparti v. Norway, 11.12.08.
26. "Still total ban on political advertising" press release from the Ministry of Culture and Church Affairs, 11.03.09 – see <http://www.regjeringen.no/nb/dep/kkd/pressester/pressemeldinger/2009/fortsatt-forbud-mot-politisk-tv-reklame-.html?id=548607> It can be noted that the government disagreed with the ECtHR decision to such an extent that they were both considering bringing the decision before the ECtHR Grand Chamber, and also reversing the Human Rights Act of 1999. It ended up doing nothing, here also.
27. C. Smith: "Fra konvensjon til lov, Mennesker og rettigheter" 1999 p. 266, at 272, opposed by E. Smith: "Semi-konstitusjonell karakter?", *Lov og Rett* 2001 s. 385-386.
28. J.E.A. Skoghøy: "Norske domstolers lovkontroll i forhold til inkorporerte menneskerettskonvensjoner", *Lov og rett* 2002 p. 337 at 340.
29. F. Elgesem, "Tolking av EMK – Menneskerettsdomstolens metode", *Lov og Rett* 2003 p. 203 cf. I.L. Backer: "Lovgivere og domstoler ved begynnelsen av det 21. århundre", *Jussens Venner* 2000 p. 248, at 264
30. "Forskrift om produksjonstilskudd til dagsaviser" FOR-1996-11-07-1015, and NOU 2000: 15 ("Pressepolitikk ved et tusenårsskifte"), section 6.1.3.
31. NOU 2000: 15 ("Pressepolitikk ved et tusenårsskifte") section 7.8.9.
32. *Svenska Dagbladet* and *Skånska Dagbladet*.
33. One example is "Magasin og ukepresseforeningen" who brought the Norwegian VAT scheme before the EFTA court in December 2006. It should be noted that the case was brought because magazines are not exempt from VAT, and they demanded to be treated the same way as newspapers. The case was not brought to do away with the VAT exemption as such.
34. Decision from Oslo City Court 16.10.2006, p. 27.
35. Decision from Borgarting Court of Appeals 03.11.2008, admitted in March 2009 to the Supreme Court.
36. "FRA-lagen"; the informal term used to describe a series of statutory changes as well as a new statute ("Lag om signalspaning i försvarsunderrättelseverksamhet" enacted as of 01.01.2009) that together enable Swedish authorities (Försvarets radioanstalt "FRA") to secretly monitor and store the contents of all electronic communication passing Sweden's borders.
37. Special report from the Norwegian Postal and Telecom Agency of November 2008.
38. Interview with Mr. Bildt by the Swedish public broadcaster, Sveriges Television (SVT) on September 13<sup>th</sup> 2008. See the relevant excerpt on SVT's web-tv archive-service: <http://svt.se/svt/play/video.jsp?a=1246030>.
39. For a further elaboration of the possible threats to Norwegian citizens posed by the FRA-legislation, see the Third party intervention (11.02.2009) by the Norwegian branch of the International Commission for Jurists (ICJ) stated in support of complaint to the ECtHR as prepared by Centrum för Rättvisa against Sweden (14.07.08).
40. Decision from København City Court, December 4, 2006.
41. Press release of non-appeal as issued by the Attorney General of Denmark on December 14, 2006.
42. Jon Bing is referenced in several places as having not only advised that the host was entitled to take such action, but indeed was under an obligation to do so following Art. 18 of the Electronic Trade Act (2005), see i.e. [http://www.dn.no/forsiden/etterBors/article1319578.ece?jgo=c1\\_re&WT.svl=article\\_title](http://www.dn.no/forsiden/etterBors/article1319578.ece?jgo=c1_re&WT.svl=article_title) (accessed March 18 2008).
43. Proposal introduced in Ot.prp. nr 22 2008-2009 section 13.2.4, but abandoned via media statements from the Minister of Transport and Communication in February 2009 following massive public condemnation.
44. Within the EU, the so-called Rome II treaty seeks to standardize choice of law in matters of non-contractual obligations such as torts and delicts, but makes an exception for matters arising from cases of privacy and defamation. A study of how to include rules about the latter was to be presented 31.12.2008, but is still pending.

45. For an exposition of the Norwegian term, *see* i.e. <http://www.journalisten.no/story/50330> (accessed March 19 2008).
46. *I.e.* filing a claim with a Norwegian Conciliation Court seeking action for declaration of non-defamation (“*negativt fastsettelsessøksmål*”), and thus barring a second case in another jurisdiction under the *lis pendens* principle in the Lugano Convention Art. 22 cf. 21.
47. J. Bing, “Regulering av ytringer på Internettet”, *Lov og rett* 2004/01-02 briefly raises the question, but it is not further developed in his recent book *Ansvar for ytringer på nett* (2007).
48. G.W. Anderson, *Constitutional rights after globalization* (2005), A. Nicol, G. Millar, A. Sharland, *Media law and human rights* (2001) and E.E. Paraschos, *Media law and regulation in the European Union: national, transnational and U.S. perspectives* (1998).
49. Some theory is to be found i.e. in Joseph Weiler, “Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space” in *The Constitution of Europe* (1997).
50. *See* i.e. E.O. Eriksen, J.E. Fossum, A. Menéndez, *Developing a constitution for Europe* (2004) and S. Peers, A. Ward, *The European Union Charter of Fundamental Rights* (2004).



# The Right to Privacy and Public Figures

## *On the Limits to Freedom of Expression*

Oluf Jørgensen

Conflicts often arise between the right to privacy and the media's exercise of their freedom of expression. The tabloid press and weekly magazines entertain their readers with an endless stream of gossip about various stars' and star-wannabees' marriages, infidelities and divorces. Some of these stories feature paparazzi-style photographs. From time to time, hard-news journalism, too, focuses on public figures' private life, investigating, for example, suspected cronyism and other dealings in the interface between private and public interests.

Both the Right to Privacy and Freedom of Expression are guaranteed by the European Convention on Human Rights. Article 8 of the Convention guarantees everyone "the right to respect for his private and family life, his home and his correspondence". Article 10 provides for freedom of expression with an emphasis on the essential functions the press fulfils in a democratic society.

The present article revolves tightly around these two articles and their application by the European Court of Human Rights (ECHR). Rather few cases involving the media are brought before the Court under Article 8; most of the cases arise out of claims that a judgment or penalty imposed by a court violates the provisions of Article 10, i.e., the medium's freedom of expression.

Having determined that the case qualifies for consideration, the ECHR examines whether the reporting in question has lived up to commonly accepted standards of good journalism and whether the person whose privacy has been found to have been violated has been able to protect him- or herself. This exercise is part of the Court's determination as to whether the public interest may weigh heavier than the individual's right to protection. In cases where the right to protection concerns the individual's private life, the judgment of the Court may cast light on the bounds between Freedom of Expression and the Right to Privacy.

The boundaries between the public and private spheres are the products of cultural traditions and traditions of democracy. They differ from country to country, and they differ over time. According to the interpretation of democracy reflected in the praxis of the ECHR, an individual's right to privacy cannot stand in the way of publicizing conditions that are of significance to the community.

Actually, the boundary between the private and public spheres has clearly shifted over the past few decades.

It is, for example, generally accepted these days that commercial enterprises not only bear a responsibility for the workplace and staff and their finances, but for the health of the environment, for product safety and so forth, as well. To take a couple of examples: In the case of *Fressoz and Roire v. France* the ECHR found (21.1.1999) that the publication of leaked information from tax authorities about a business leader's salary elicited a public debate that was of general interest. In the case of *Bergens Tidende v. Norway* the ECHR found that the operations performed by a plastic surgeon on women's breasts had importance that extended beyond the privileged relationship between doctor and patient. Publication of the story was of importance to both past and future patients, and the ECHR heavily stressed the public interest aspect (2.5.2000).

### Of Direct Relevance to Performance of Public Role

The media's freedom of expression in relation to social conditions also applies to individuals who have public roles. 'Public figures' are all those who play a role in public life, whether in politics, the civil service, business, religion, the courts, the Arts, sport or other domains.

The ECHR accords great importance to the media's right to publish information and comment on conditions of interest to society at large. Media have the right to scrutinize the objectives, qualities, probity, conduct and consequences of individuals' performance of their public roles, regardless of whether they are performing in a global arena or in City Hall, in private organizations or in public institutions, in public space or behind closed doors. The public interest is what counts, and subtle or secret use of power is as important as manifest use.

The performance of a public role may be discussed even if it takes place in private circumstances. A minister's dealings with a lobbyist belong to the public domain even if they take place in the minister's home. A letter to a mayor on a matter in the community belongs to the public domain even if sent to the mayor's home address.

It is clearly legitimate to discuss actors' consumption of alcohol if the drinking takes place while they are performing their public roles. Otherwise, drinking habits belong to the private sphere, and are protected. A grey zone arises when a person's off-hours drinking habits are such that they may influence his or her performance of a public role. Freedom of expression extends to those cases where alcohol affects performance, for example, when a minister consumes a half-bottle of whisky just before an important political negotiation.

The public interest also justifies publication in cases where public figures mix their public and private roles. The service to democratic accountability lends legitimacy to reporting about friendships and familial ties if the goal is to reveal acts of nepotism or favoritism, as when a mayor uses his influence to help a good friend into a new home.

## Of Some Relevance to Public Roles

The balancing of conflicting rights and interests is more difficult in situations that do not directly relate to public roles, but nonetheless may have some relevance to them. Publicity relating to a mayor's private life may, for example, cast light on his or her suitability for the office.

Several decisions of the ECHR have indicated that the media's freedom of expression is broader in relation to politicians than it is with regard to other public figures because politicians have voluntarily put themselves in the spotlight when they run for, and are elected to office. Other public roles may be voluntary, too, but the difference is that politicians have a broader public role than, say, actors or civil servants. Still, there are limits; the media may not make public whatever they please out of a politician's private life to help voters to decide whether not he or she is worthy of their trust. The politician's public role is generally broader because the politician represents an entire political program and is called upon to express views on many and diverse subjects. As a consequence, when media publish instances of hypocrisy on the part of a politician, it has greater relevance to the general public.

Media must be free to publicize less sensitive circumstances in a person's private life when they arise in a context of relevance to a public interest. It may be legitimate to bring up events out of a person's past, if the aim is to give voters a basis on which to judge his or her suitability for public office, but not if the aim is simply to pry into the past. For the same reason, it may be justified to point out differences between what a politician practices and what he preaches. If, for example, a politician promotes a political agenda that urges total abstinence, his taking a single glass may have social relevance.

In the case of *Schwabe v. Austria*, a politician had to accept that his involvement in a traffic accident with fatal consequences many years earlier was brought to light in the context of a current debate on hypocrisy in politics. A mayor was found guilty of drunken driving, and the leader of the Opposition called for his resignation. A politician from the mayor's party accused the leader of hypocrisy, as he obviously did not apply the same standard to members of his own party. Twenty years earlier, the current vice-chairman of the party had, namely, been involved in a fatal accident when driving under the influence (albeit within the legal limit). The Austrian court had found mention of this old case to be in violation of the vice-chairman's right to privacy. The ECHR, however, found the Austrian court in violation of Art. 10, when it castigated mention of the accident. The ECHR emphasized that the purpose of mentioning the accident was to demonstrate the opposition leader's hypocrisy, and, secondly, it might give the electorate a better basis on which to judge the vice-chairman's suitability for high political office (28.8.1992).

The media have a right to focus on hypocrisy when, for example, a politician publicly favors a commitment to multiculturalism, but privately moves his child from a school where many of the pupils come from other ethnic back-

grounds. Or, when a person publicly urges strict enforcement of speed limits, but habitually speeds when driving his own car.

Photos may be published according to essentially the same principles as texts. Two cases illustrate the media's right to publish images of public figures. *News Verlag v. Austria* involved a person who was charged with having planted a bomb (11.1.2000). *Krone Verlag v. Austria* involved a politician who questionably, but legally, continued to draw his teacher's salary while serving in the European Parliament (26.2.2002). In both cases the ECHR found that publication of the pictures served public interests and that the pictures did not reveal any details of the individuals' private life.

The right to respect for one's private and family life figures most prominently in cases concerning sensitive details such as sexual relations, illness, social problems and suicide. In principle, sensitive information cannot be published without the consent of the individual in question. The case of *Plon (Société) v. France* that concerned President François Mitterand's cancer constitutes a 'borderline case'. Mitterand was diagnosed as suffering from incurable cancer shortly after assuming office, but the information was made public only toward the end of his term as President. He died shortly after leaving office. One of his doctors revealed some of the details of his illness and its treatment, and shortly after Mitterand's death the publisher, Plon was quick to put the book, *Le Grand secret*, co-authored by the doctor and a journalist, on the market. The French court found the doctor guilty of violating the confidentiality of the doctor-parent relationship, and publication of the book was enjoined.

The case brought before the ECHR concerned the justice of banning the book; the doctor's transgression was not contested. The ECHR found that respect for the family's grief outweighed the public interest in the period immediately following the President's death. Therefore, suspension of the publication was in order. However, public interest in knowing about the President's struggle with terminal cancer was such that continued prohibition nine months after his death was a disproportionate intervention and thus a violation of Art. 10 (18.8.2004).

Respect for the individual's private life applies to private consultation and correspondence, as well. In the case of *Leempoel v. Belgium* the Court upheld a Belgian court's finding that notes from private consultations and correspondence should not be published, even though they concerned an event of great public interest. As a sequel to a major scandal involving gross abuse of minors, the government appointed a commission to investigate whether the police and the investigating judge had handled the investigation properly. The investigating judge was ordered to hand her preliminary notes over to the commission, which she did. The notes were leaked to a weekly magazine, which published excerpts from them. The Belgian court blocked the distribution of the magazine. The ECHR found the ban justified, and stressed that personal notes that included privileged information from lawyer-client consultations and other private correspondence are key elements in the protection of individuals' privacy (9.11.2006).

Freedom of expression regarding relationships having to do with public interests may have pushed back the frontier vis-à-vis respect for individuals' privacy, but there is still a core that must be protected from unwanted exposition in mass media. It is also important to avoid violating the rights of third parties, like next of kin.

### To Cast Light on Issues of Public Interest

Information about less sensitive elements in an individual's private life may, the Court has ruled, also be published if the aim is to demonstrate conditions of social significance.

The case of *Tønsbergs Blad v. Norway* was a newspaper's publication of the fact that a business leader and an entertainer were among the names on an official list of persons who, in the preliminary judgment of the Municipality, did not fulfill the permanent residence requirements attached to a certain property. Three weeks later the Municipality announced that it had been in error, that there were no residence requirements attached to the property. This fact was duly reported by the newspaper the following day. The businessman nonetheless filed suit against the paper, which was found guilty of libel by the Supreme Court of Norway. The case was then appealed to the ECHR, which overturned the Supreme Court ruling on the grounds that it was in violation of Art. 10. The ECHR pointed to the fact that the two had been officially listed as under suspicion of wrongdoing, noting that "a possible failure of a public figure to observe laws and regulations aimed at protecting serious public interests, even in the private sphere, may in certain circumstances constitute a matter of legitimate public interest". Unlike the Supreme Court of Norway, the ECHR did not require that mention of the two people must bear some relation to the performance of their public role, or that the plaintiff had taken part in a public debate on the issue at hand (1.3.2007).

Media mention of public affairs can acquire an extra dimension when illustrated by the details of an individual's situation. The finding in the Tønsberg case would appear to mean that media may freely publish numerous other details of the individuals' private lives of a less sensitive nature, such as personal income and wealth, receipt of subsidies to one's business, the price of one's home, and other transactions.

### Of no General Interest to the Community

Freedom of expression is not an absolute right. The core value when it comes to the media's freedom to publish under Art. 10 is that publication in some way informs the public discussion of matters of common interest. The guaranty of freedom of expression does not carry much weight in cases where the aim of publication has been to satisfy idle curiosity about public figures' private life.

When, for example, a highly placed business executive is suspected of fraud, there is reason to examine his books, his personal transactions and his relations with business associates, but the fact that he has a mistress is not a matter of common interest in the sense of the law.

Media have no right to invade public figures' intimate sphere, claiming that their readers have the right to know everything there is to know about them. The ECHR equates 'public interest' with 'interest to the community'. Information about sensitive aspects of people's private life are the principal object of Art. 8; publication of intimate or sensitive information is not legitimized by the mere fact that there is a market for it.

The limits of freedom of expression are the result of weighing interest to the community against individuals' right to privacy. For example: It is hard to see how a soccer star's sex life is relevant to his public role; by contrast, a broken leg is clearly so. At the same time, sex belongs to the most intimate sphere of one's private life, whereas a broken leg is fairly obvious.

The European Convention on Human Rights and the decisions of the ECHR are of decisive importance in cases where the two values, interest to the community and the right to privacy, conflict. In other cases, the national courts and authorities may limit freedom of expression as they see fit. Take, for example, publication of less sensitive details of people's private life for the sake of entertainment: e.g., the news of a divorce, without delving into the nature of the couple's problems, or reporting and pictures from a celebrity wedding. The news slant in such reporting may qualify for protection under Art. 10 if, say, the pictures taken of wedding guests may be deemed to have relevance in that they cast light on the circles (political, cultural, etc.) in which the couple and their families move.

## Consent

The right to privacy does not imply that one's private life is totally 'off limits'. One of the central principles, however, is that all publicity from the private sphere – what is reported, and how it is reported – has the consent of the individual(s) concerned.

Sensitive details relating to a person's illness, for example, may have interest to the community as an illustration of a more general problem. Protection of privacy does not rule out publication, but means that the persons involved shall have given their consent. Provided consent is given, elements from the private lives of both unknown and well-known individuals can be the subject of serious journalism.

Consent has to be given freely, without coercion, and the person shall be aware of what he or she has agreed to. These criteria are not fulfilled in cases where individuals are asked to comment while still in shock after an accident or the death of a loved one. Nor are they fulfilled if an individual is lured into taking part in a television program under false pretences. Consent generally

extends to a specified part of a person's private life, and a medium may not probe further than has been agreed.

Not everyone is in a position to express consent. Whether or not children are capable has to be decided on a case-to-case basis. If the nature of the subject involves a risk to the integrity of the child, a parent's consent may be needed until the child has come of age.

Publication involving individuals who are not mentally competent to grant consent may only figure in reporting that has a significant informative and social value and has been consented to by the individual's guardian or next of kin. In cases where the aim of reporting is to reveal poor conditions or malfeasance on the part of an institution, it might be a violation of Art. 10 to require the consent of the staff or management of the institution.

### Publicity-seeking

When a public figure opens a window on a sector of his or her private life for the purpose of personal promotion or publicity in relation to a public role, the media may publish details of that part the individual's private sphere. The same holds, even if details that come to light are less flattering than those the figure has presented. The rule of thumb is that if the media are invited to the wedding, they are invited to the divorce. That applies across the board: to movie stars, television personalities, politicians and so forth.

Individuals who become public figures by virtue of their participation in so-called 'reality shows' must be aware that whatever detail of their lives that has bearing on their performance or the show is now in the public eye and open to press coverage. It is important that all who take part shows like these are fully aware of this beforehand. Once the show is no longer in the limelight, the participants should have their right to privacy restored – should they so wish.

Self-promotion or publicity-seeking does not make the individual 'fair game' for invasions of privacy or publication of unsavory details that have no relevance to the sectors they have opened to public scrutiny. In the case of *Tammer v. Estonia* the ECHR upheld the finding of a Tallinn Court and, ultimately, the Supreme Court of Estonia against a journalist who, in a print-medium interview with the author of a biography, had made offensive references to the woman, a prominent politician, whose life was recounted in the book. According to the ECHR decision, the journalist asked the author: "Don't you feel you have made a hero out of the wrong person? A person breaking up another's marriage (*"abielulõhkuja"*), an unfit and careless mother deserting her child (*"rongaema"*). It does not seem to be the best example for young girls."

The ECHR, like the national courts, emphasized the offensive wording of the question. That the politician in question and the events referred to were well-known and that much of her private life was already part of the 'public record' made no difference. (6.2.2001)

## Freely Accessible

Some current trends suggest that people feel less of a need for privacy, that the need to protect privacy may be on the way out. Many, especially young people, talk on the phone with parents and friends in public with apparently no thought to the fact that complete strangers can be listening to even intimate details of their lives. Many publish information about their private lives on websites, and people queue to audition for reality shows on television. But we should not draw all too far-reaching conclusions on the basis of these trends. All these phenomena are voluntary, a matter of free choice. Most of those who make use of these channels do so selectively; some come to regret having put their lives on display.

The use of new communication technologies for recording, searching, storing and distributing images, sound and text make it necessary to heighten our awareness of the bounds of individuals' privacy. And that includes the media. As a rule, media may publish information that is already in the public domain, but publication in new contexts can in effect renew a violation of the person's integrity. Young people tend to consider websites private meeting places; they may consider publication outside that context an invasion of privacy. Many images and texts are posted on websites without the consent of the persons involved – and sometimes with malicious intent.

Some aspects of people's private life cannot be kept secret, not if they take place in public or are a matter of record. Thus, public figures have to accept that media may make their addresses, their ownership of property, their traffic violations, their choice of schools for their children, and so forth common knowledge. The same is true of any other information that is subject to freedom of information statutes.

Media generally have a right to comment on the way people dress, their coiffures and other aspects of their personal style or appearance, as observed in public places. And as a rule the media may also report about and photograph public figures' activities when observed from publicly accessible vantage points, even if the aim is merely to entertain.

In the case of *von Hannover v. Germany*, however, the ECHR established that Art. 8 sets limits for paparazzi-type 'stalking' and reporting about public figures' private activities in public places. Princess Caroline von Hannover (a.k.a. 'Princess Caroline of Monaco') sought an injunction forbidding the further publication of photographs from her private life that had been published in the magazines, *Bunte*, *Freizeit Revue* and *Neue Post*. Photographers that followed her every move, reporting the details of her shopping, her outdoor recreation, visits to restaurants, holidays, etc., violated her right to privacy under the German Constitution, she claimed. With one exception, the lower courts found against the plaintiff, stating that she, "a public figure par excellence", must tolerate publicity outside her home. The exception concerned photos of her in a situation where she clearly had reason to believe she was "in a secluded place out of the public eye". On appeal, the German Federal Constitutional

Court upheld this ban and found, additionally, that photos of the plaintiff together with her children may have violated another Constitutional provision regarding the protection of the family. Therefore, the case should be remitted to the lower court for reconsideration. (As a result of this finding the publisher withdrew the photos from publication.)

The plaintiff took the remainder of her case further to the ECHR, which reversed the argumentation of the German courts. The criteria of “public figure ‘par excellence’” and “a secluded place” referred to by the German courts were too vague to offer adequate protection of the plaintiff’s right to privacy.

In its decision the ECHR stated:

The decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It is clear in the instant case that they made no such contribution since the applicant exercises no official function and the photos and articles related exclusively to details of her private life. Furthermore, the Court considers that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public. Even if such a public interest exists, as does a commercial interest of the magazines in publishing these photos and these articles, in the instant case those interests must, in the Court’s view, yield to the applicant’s right to the effective protection of her private life.

Thus, the ECHR concluded that the German courts “did not strike a fair balance between the competing interests” of freedom of expression and the right to privacy, as provided for by Art. 8 of the Convention. (Judgment 24/06/2004)

The *von Hannover v. Germany* decision offers protection from paparazzi harassment. It does not, however, prevent the media from publishing texts and photographs about figures’ activity in freely accessible spaces, provided the reporter uses non-intrusive methods and the objects of surveillance have reason to believe that they are ‘in the public eye’. Since the Hannover judgment, the Supreme Court of Norway ruled (2.9.2008) that the gossip magazine, *Se og Hør* was within its rights when it published two telephoto images from a wedding that was held in the open air on a small island.

Publishing pictures of individuals in situations of extreme distress, such as a traffic accident, can constitute a grave assault on their personal integrity. Publicity surrounding the trials of everyday life must keep their distance from personal passions. Acts of terror or warfare have a compelling public interest, and it can prove difficult to document the tragic consequences without showing pictures of faces and other recognizable features of the victims. In coverage of situations like these it is important for the media to take pains to avoid further injury to the victims if other documentary images are available.

## Summary

The right to privacy and freedom of expression are two vital democratic values that often have to be weighed against each other. The greater the significance to society, the greater the importance of freedom of expression for the media. The closer to the private or intimate spheres material goes, the more important it is for media to respect privacy.

The purpose or object of reporting is the starting point in striking a balance. The core rationale for media's freedom of expression is the benefit of publication to public discussion of social issues. Freedom of expression cannot be cited to excuse lies or publication for the sheer purpose of satisfying readers' curiosity about figures' private life. The context and form of reporting can add to or reduce the injury and thus must also be taken into account when balancing the two values. The media's right to publish images should as a rule be judged according to the same criteria as publication of texts. Taking photos and publishing images may, however, be more intrusive than texts when, for example, they depict private or intimate situations.

The subjective feelings of the person described or photographed are not a basis for judgment; some people are more sensitive than others. Therefore, they cannot be decisive for freedom of expression. The balance between the values must be based on the objectively assessed severity of the intrusion versus the social significance of publication.

In cases where the right to privacy weighs heaviest, the right to protection exists, whether or not the information in question is true. When publication is found justified due to its value to society, the reporting must fulfill the customary criteria of accuracy, opportunity for the subject to reply or rebut the information, and so forth. Otherwise, the reporting may be libelous.

## Protection of Private Life Has to be Balanced against the Freedom of Expression

Freedom of expression is crucial to public insight and general discussion of issues of common interest. Consequently, individuals must tolerate the focus of critical light on their public roles. Protection of the right to privacy does not guarantee the individual the right to decide what aspects of his or her public role shall be made public. What protection of privacy does guarantee is the individual's right to decide whether details of his or her private life shall be made public.

Respect for the right to privacy and respect for freedom of expression often conflict, but the two are also mutually dependent. Protection of the right to privacy has a social value in that people need personal space in which to develop the personal integrity needed to become active citizens who make use of their freedom of expression. Freedom of expression makes it possible for people to defend themselves against injustices, whether in their public or private lives.

Both values are damaged if individuals who participate in public debate can be called into question or ridiculed by revelations of details of their private lives. If being a public figure were assumed to entail unlimited publicity, many people – including some of the best – might think twice before assuming public roles in politics, elite sport, the arts, etc.

Freedom of expression is vital to securing the accountability of elected officials and other public figures, and protection of privacy makes it possible to recruit able individuals to positions of public responsibility and other roles. Striking the right balance between the two is of fundamental importance to democracy.



# Freedom of Expression in Sweden

## *The Rule of Formalism*

Thomas Bull

Where the boundaries of freedom of expression should be drawn is one of the eternal issues in constitutional and human rights law. Can a democratic society tolerate speech that propagates undemocratic values, and if so, how much of that can it take? Where are the limits to what can be said, or otherwise made public, of other persons' private lives? And, perhaps the underlying issue for all these questions, who shall determine the limits of free speech: politicians, the press or the judiciary? These questions will haunt us forever, because the answers are different depending on who you ask and where and when you ask them.

In the present essay, I will try to show that Swedish constitutional law has some unique features that may be of more than anecdotal interest to scholars, legislators and practitioners in other jurisdictions. Especially set in the context of regional and global changes in how law is interpreted and applied, knowledge of other systems and their rationale and effects is of growing importance.

The main thrust of the essay concerns how the system of protection of freedom of expression in Sweden works in practice. The main finding, I can reveal, is that the Swedish legal system ensures that legislators and judges have almost no influence over the limits of freedom of expression. This alone is worth some attention, and I will discuss the implications of that kind of "un-legal" protection toward the end of the essay. However, I will not limit myself to discussing only this rather functional issue, but will also pinpoint some of the substantive areas of law in which Swedish protection of freedom of expression differs from that of many other countries. To do this I will use tensions arising in the area of protection of private integrity versus the role of freedom of expression. In particular, the European Convention on Human Rights (ECHR) and its Article 8 on the right to private life are used to exemplify the tricky situation that can arise when national constitutional law and the ECHR do not correspond.

In order to discuss these findings and subjects, the Swedish constitutional system of protection of freedom of expression must be presented. Before we proceed, then, we need that background information. But before proceeding with that, I will give a brief overview of how freedom of expression is handled

in the jurisprudence of the European Court of Human Rights, as this approach is common to many jurisdictions in Europe. I will not go into any depth here, but rather sketch out the big picture of how the European Court of Human Rights uses the provisions of the convention. What I particularly want to highlight is that the Court uses a number of concepts to resolve issues of free speech as protected by Article 10 of the convention. The content of the speech, the context and the method of dissemination as well as the intended audience are factors that are interwoven in an over-arching test of proportionality. That is not an unusual way of mapping the limits of free speech. But it is not the Swedish way.

This has to do with the constitutional regulation in Sweden, which in itself is quite unusual. Sweden has no less than four documents with constitutional status.<sup>1</sup> The Instrument of Government contains a more general provision on freedom of expression, not so unlike Article 10 of the ECHR. Two of the other constitutional laws are wholly dedicated to regulation areas of freedom of expression: The Freedom of the Press Act and The Freedom of Expression Act. They contain a comprehensive regulation of freedom of expression when certain technologies are used as a method of disseminating an expression. The Acts cover a large area of possible expressive conduct, and the issue of freedom of expression and its limits is therefore largely equivalent to the question of how the Acts function. In itself, this raises some questions that I will touch upon briefly below. In Sweden, constitutional regulation takes precedence over ordinary law and other legal instruments, and the courts and public authorities have the power of judicial review in cases of conflict between constitutional law and other law.<sup>2</sup>

Finally, I should mention that the ECHR is incorporated into Swedish law in two ways. First, the Parliament has passed an Act making the convention a Swedish law. Second, a provision has been added to the Instrument of Government (Chapter 2, Paragraph 23) forbidding the passing of laws that are contrary to the convention. This provision, in its turn, can form the basis for judicial review; thus, the courts can find a law unconstitutional on the grounds that it is in breach of the convention. The convention does not have formal constitutional status as such, but through the provision mentioned something very close to that has been accomplished.<sup>3</sup> The Swedish courts are today quite used to the convention – there are about 400 cases from our Supreme Courts in which convention issues are being dealt with – and to interpreting Swedish law in conformity with the convention.

## Europe: A Substantive Approach

A quick glance at the protection under the ECHR Article 10, and the case law connected to that article, illustrates how most national and international systems protect freedom of expression: a rather vague legal rule, clarified and refined by case law from the courts. In our case, the case law comes from the European

Court of Human Rights (ECtHR), but on a general level similar constructions and trends can be seen in major national systems as well.<sup>4</sup>

The main thrust of the case law in these kinds of systems is that the protection of expression is intimately connected with its substance and its perceived value to society as a whole. This means that certain categories of expression receive varying degrees of protection: Political speech is at the core of the protected area, as it is of great public interest, while obscene and defamatory expressions are at the outer edge. Arguably, not only the content of the expression is of importance, as factors like the nature of the infringement or limitation, the media used and the intended audience are also relevant. Nevertheless, the legal analysis of the ECtHR is largely centered on the substance of the expression, which structures much of how other factors interplay and to what degree they are decisive.

A significant illustration of this is the way the ECtHR reasons in the *Hanover* case.<sup>5</sup> Princess Caroline of Hanover was the target of the prolonged activities of paparazzi photographers and complained to the Strasbourg court that her private life (Article 8) had been violated by this constant surveillance. The case revolved around the weighing of Article 8 against Article 10, as reports on famous people and their lives easily can be seen as part of freedom of expression. The Court found that the reports on Princess Caroline have little to do with the core functions of freedom of expression, understood as functions connected to the democratic system and culture and science. Instead it was more or less gossip, not very valuable to society as a whole.<sup>6</sup> Thus, Article 10 could not outweigh the interests protected by Article 8, and the relatively “worthless” content of the speech in question was a deciding factor in this. In the more recent case *Vereinigung Bildender Künstler*<sup>7</sup>, on the other hand, the Court’s majority took a more cautious approach to the issue of the value of the expression in question. The case was also about Article 8 and 10 and concerned a huge painting with an obscene motif, among other things portraying certain persons in sexual and degrading positions. The Court saw some potential political and cultural value in the obscene painting and thus found Austria in breach of the convention.<sup>8</sup> The content of the expression, or at least the possibility that there was some content of value, was the deciding factor here.

Apart from that, it can be noted that the ECtHR has adopted a balanced approach to issues of freedom of expression, mainly using the principle of proportionality on the concrete case as its tool for identifying breaches of the Convention. As an example, hate speech would be protected if it were part of a “serious” discussion of societal issues, but not if it were the product of right-wing intolerance.<sup>9</sup> In this context, it must also be stressed that the Court takes heed of the impact of modern information technology, such as television. Thus the need for restrictions may be greater in a medium that is very efficient in reaching a wide audience, and the Court has accepted national restrictions on expression in such circumstances that otherwise would perhaps not have been accepted.<sup>10</sup> On the other hand, the Court has also found that the very potential of expressions using mass media can strengthen certain claims on

breaches against Article 10, particularly if they concern parties with few other means to reach a comparable audience.<sup>11</sup>

## Sweden: A Technological Approach

### *Background*

To understand the Swedish way of protecting freedom of expression, we need to travel back in time, to trace its almost legendary status in Swedish law and politics. In the 18<sup>th</sup> century, the main means of expression were printed material and its dissemination. The Swedish way of protecting expression was therefore, from the outset, connected to *the form* of expression rather than its content. It is the use of a certain technique that is the starting point of our system of protection, and the protection is based on a certain carrier of information (like a printed paper). In 1766, the first Freedom of the Press Act was enacted; probably the first systematic legal instrument anywhere intended to protect freedom of expression and information. It prohibited prior restraint, regulated the criminal responsibility of expression and made public documents widely available to the public. This tradition has – with certain exceptions during the period 1772-1809 – been continued until today. The Freedom of the Press Act in force now is from 1949.

The Freedom of Expression Act is from 1991 and is more or less an adaptation of the Freedom of the Press Act to television, radio, CD and DVD media, computer technology and so on. Below I will discuss the regulation using the Freedom of the Press Act as the starting point and only mention the other Act if it contains specific rules of interest. It should also be mentioned that the perhaps newest and most far-reaching medium of today, the Internet, is not treated as a technique of its own in the Acts, but rather as a forum for several techniques, such as film, sound and text. As such, much material on the Internet fall under the Acts, but there are exceptions, and the Acts' way of connecting protection to the carrier of information has led to many practical problems in the context of the Internet.<sup>12</sup>

The Freedom of the Press Act sets up a specific framework for legal issues arising from a publication that was printed or made by some other similar techniques. The basic rule is that everything printed is protected by the Act. Under certain circumstances, publications not made in print may also be included under the Freedom of the Press Act's umbrella of rules. The easiest way is to ensure that a publication that is not printed will fall under the Act is to include the name and address of the person responsible for the publication and where it was produced. Thus, the choice of whether or not such a publication will fall under the constitutional system of the Act is mainly up to those who wish to spread the material. If they include their identity in the material, it will fall under the Act. Now, this does not mean that everything *protected* by the Act is free to be printed and spread, not in any way. "Protected" is not the same as "allowed" in the Freedom of the Press Act. What this means is that the Act's

special rules on criminal responsibility and civil liability take precedent over any ordinary criminal, administrative or civil law, and its special procedures are used for judicial decisions. This brings us to the content of the Act: What are the parts of this unique system of protection?

### *The Parts of the Machine*

The first rule we need to know has already been mentioned, the rule of exclusivity. If a legal claim is to be brought against anyone on the grounds that something was inappropriate was printed, it has to be done through the Freedom of the Press Act or not at all.<sup>13</sup> Statutory law is not applicable in such cases. This means that the Act itself contains rules on criminal responsibility and civil liability and that these can only be changed by the procedure of constitutional revision.<sup>14</sup> The other main features of this system of protection of freedom of expression consist of a special system of criminal responsibility, protection for sources and informants, prohibition of prior restraint, a special judicial procedure for cases under the Act, special rules on evidence and intent and very strict statutes of limitation. All of these interact so as to form a system that makes it very difficult indeed to take legal measures against any publication that falls under the protection of the Act.

Let us take a closer look at some of the particularities of this system.<sup>15</sup> The second important feature is the rule of “single-person responsibility”. The Act stipulates that for any crime under the Act only a single person may be held legally responsible, and the Act regulates this through a “chain of responsibility” found in Chapter 8. This sets out who will be considered primarily responsible in the event of a crime, and in case this person cannot be held responsible, who will otherwise be held responsible. Schematically, the system works step by step, so that for publications with an editor the person responsible will be the editor, or the owner, or the printer or the disseminator. It is only permissible to take a step “down” the chain if no one at the top can be found. In practice, this typically leaves all involved in an edited publication (as a newspaper) free from responsibility, as the chief editor will be known.<sup>16</sup> Other people involved, such as journalists, authors (in edited publications), owners, printers or distributors, are then free from any legal responsibility in connection with the publication. This formal limitation of legal responsibility – remember that the Act takes precedent over any ordinary concepts of joint responsibility in criminal or civil law – is intended to make the practical use of freedom of expression as foreseeable and risk-free as possible.<sup>17</sup>

Any legal procedure against someone based on material protected by the Freedom of the Press Act is restricted or made difficult by a number of procedural rules in the Act. This is the third aspect I want to elaborate on. First of all, there is only a single prosecutor in the whole country, the Chancellor of Justice (*Justitiekanslern*, JK), who can initiate all procedures.<sup>18</sup> This means that all decisions to prosecute (or not) are filtered through the same individual’s legal analysis, and this person is at the same time expected to take the greatest pos-

sible care not to unduly infringe upon freedom of expression. The effect of this is that most potential cases are never even brought to court, as the JK will find that the interest of freedom of expression outweighs other considerations.<sup>19</sup>

Furthermore, crimes under the Freedom of the Press Act and the Freedom of Expression Act have very strict statutes of limitation. Crimes under the Freedom of the Press Act are most often not possible to prosecute after six months from the publication, and otherwise prosecution must take place within a year. The same applies to radio and TV transmissions, videos and DVDs are normally “safe” after a year, and other carriers of information such as CDs, etc., at most after two years from the time they were made publicly available. The rationale for this is that those who wrote the text on constitutional protection viewed crimes of expression as very context sensitive. Something said or done at one time might be evaluated totally differently at another time. To prosecute someone for expressions made long ago, in political or societal circumstances no longer present, might lead to an unnecessarily repressive situation and a fear of future legal consequences that inhibit a free debate. Crimes of expression are thus “fresh” crimes or not crimes at all.

The proceedings themselves are very special: A trial on the basis of the Freedom of the Press Act is the only kind of trial under Swedish law that includes a jury. The court in such a case consists of both a jury and “ordinary” judges. If the jury finds the accused not guilty, that verdict stands and the judges play no role. On the other hand, if the jury finds the accused guilty, then the judges must also make that judgment in order to convict the accused. So the accused has two chances of going free in one trial. If someone is found not guilty, it is useless to appeal, as the Act forbids a higher court to change a lower court’s judgment in that case.<sup>20</sup> Most cases thus only come to the first instance and go no further. This means that the Supreme Court and other high courts play a very minor role in shaping the law in this area. The limits of expression are thus almost “safe from” judges, and that is no coincidence, as judges in Sweden are viewed as more conservative than the rest of society. The reasoning behind this construction is that letting judges decide on what can or cannot be said is not a good idea, from the perspective of ensuring a free debate. If a case does come to court, the Act makes it explicit that the court should take special considerations of freedom of expression when deciding the case and in every case bear in mind that purpose is more important than content, and that a free debate is the foundation of a free society and that, when in doubt, the verdict should always be to the benefit of the accused.<sup>21</sup> As this binds both the JK and the jury, it becomes something like a double “filter” that makes it very difficult for the prosecuting authorities to have their way in court.

Lastly I would like to point to a fourth factor, namely the protection of informants. Every system of freedom of expression has a way of protecting sources, as their right to remain anonymous is recognized as imperative to the function of free speech. In my opinion, Swedish constitutional law has taken this concept a step further than most. Not only is there a right to remain anonymous as a source, there is an explicit prohibition in the Act against asking questions on

the topic of sources in any legal proceedings, and this prohibition is applicable in all proceedings, barring those that concern grave issues of national security.<sup>22</sup> Furthermore, in the context of public authorities, it is prohibited to investigate which of the public employees might have leaked information to the press or an author. This goes so far as to prohibit the state or county from investigating how the secret or confidential information found its way into the public sphere. In essence, there is a right to expose governmental secrets as long as this is done in order to publish or otherwise make public these secrets.<sup>23</sup> There is no test of “public interest” or anything similar involved here. Rather, the system works on the presumption that editors, journalists and other receivers of such information will make the decision on whether or not to publish and that such decisions will be made under the rules of criminal responsibility in the Acts. The whole of this regulation is thus connected to the idea of a “single person” being responsible. If informants, etc., were not protected, the system of holding only one person responsible would only be an illusion.<sup>24</sup>

### Having Your Cake *and* Eating It too!

The practical impact of the way in which freedom of expression is protected in Sweden is that few cases ever go to court and fewer still result in convictions. The limits of what can be said in papers, leaflets, radio shows and on CDs are not decided in courtrooms, but in the public debate. Politicians and publishers are the key actors in this debate, not lawyers. On a more abstract level, this might be characterized as a system that lets us have our cake and eat it too. Nothing less than a paradox!

As long as material made public falls under the Freedom of the Press or Expressions Acts, a number of factors make it very difficult indeed to take legal measures against it. Both substantive and procedural rules in the Acts preclude action that would ordinarily have been possible. In practice, freedom of expression is thus very well protected. At the same time, the criminal law – both in statutory law and in the Acts – contains rather far-reaching restrictions on freedom of expression. Two practically important areas of law can illustrate this: Defamation law does not contain a defense of truth as in many other jurisdictions, and racist speech is criminalized to the extent that ridicule and contempt are prohibited.<sup>25</sup> We can thus see that Sweden has a regulation in law that in substance is not as friendly to freedom of expression as for example in the US, but that the formal structure of the constitutional regulation in practice leads to a result that is very much the same as in the US. One could say that the total effect of the central position of the JK, the trial by jury, the short statutes of limitation, the principle of single-person responsibility and the instruction to be restrictive in applying the criminal rules of the Acts is that the substantive content of the criminal statutes are countered.

Pragmatically, one could also say that the Swedish system of protecting freedom of expression allows politicians to legislate against speech that is

upsetting, unsettling and intimidating, while at the same time making sure that little of that legislation will have any real silencing effect, as few cases concerning what is said in text, broadcasting, CD or DVD media will ever see the inside of a courtroom.<sup>26</sup> The politicians are given an opportunity to act opportunistically – silencing what they (or the public) cannot bear to hear – while the function of freedom of expression is basically untouched. The single fact that all cases must go through the JK ensures that prosecutions on the basis of an utterance that falls under the Acts will never be rare. This is due to the fact that JK is very restrictive indeed in pressing charges<sup>27</sup> and heads a small agency not practically capable of handling a lot of cases. Together with other ingredients of a jury trial, no appeal of acquittals, etc., the practical impotence of any restriction on freedom of expression is almost assured.

Is this a masterstroke of political and legal prudence – making it possible to bow down to public opinion without actually abandoning the ideals of free speech – or is it an unwarranted manipulation of the political process – making the public and the elected think they can change the balancing of interests in this fundamental area of law, when they actually cannot? To this question there is no clear answer, but it is clear that in Sweden the discourse on free speech and its limits is not generally played out in the legal arena, that the courts in Sweden cannot (until recently, perhaps) be considered to be part of a greater project of spreading tolerance in society<sup>28</sup>, and that public attitudes toward racism or political extremism are not attitudes of tolerance.<sup>29</sup> The latter is also reflected in the substantive legislation. The conflict between the general opinion and the constitutional framework of the Freedom of the Press Act is not easily observable, because the Act does not really stop anything, it just dissipates it. This means that it is a way of “sweeping things under the carpet” instead of bringing them out into the open. Perhaps we can get a glimpse here of that elusive concept of (political/legal) “culture”, and that is all there is to it. In a rather conformist society like Sweden, we prefer not to speak of our tolerance of the “other” in the open.

The system of protection of freedom of expression described above might seem exotic, but all the same, in an international perspective, it puts Sweden at the top in terms of legal protection of freedom of expression. Then all is well, one might think. But naturally that is not the case. There are several problems with Sweden’s formalistic approach. A legislative committee on constitutional revision of the Freedom of the Press Act and the Freedom of Expression Act is currently investigating some of them. At the core of the problem is the idea of tying protection to the use of certain techniques, as the technological rate of change is much higher than the legal rate of change. That is, however, an issue that I will not delve more deeply into here. Instead I will point to two different problems that our peculiar system of protection leaves us with – problems that it is now becoming more and more urgent to find a solution to. These problems are the handling of expressions that fall outside the Acts discussed above and the very weak protection of private life that has its origins in the rules of the Acts.

## Blind Spots in the Swedish System: Symbolic Expression

The first of these problems is the fact that pure and simple speech – words spoken to an audience at a meeting or on a street corner – is not protected under the Acts discussed above. The absence of technological means of mass production of the expressions leaves these kinds of messages under the more general protection of the Instrument of Government, Chapter 2. The Chapter contains a very general statement that freedom of expression must not be infringed upon unless important societal interests so demand and that the principle of proportionality must be observed when such legislation is passed. As a constitutional barrier against infringements of freedom of expression, the regulation in Chapter 2 has a rather unsuccessful track record.<sup>30</sup> Here criminal, civil and administrative law can take full effect and limit the free word in a number of ways.

This is also clear in the context of what US constitutional lawyers would call “speech-plus” situations, as these seldom involve any of the techniques required to fall under the protection of the Acts. A “speech-plus” situation is one involving both an expression and some kind of ongoing conduct, the typical case being a demonstration, which involves walking down streets, standing on squares, etc., while at the same time expressing opinions. This kind of speech is often somewhat different from “pure” speech, as it affects society in a physical and concrete way. The need for restrictions can be greater than for speech, which does not have the same impact. Symbolic speech and issues of “time, place and manner” are often not viewed as related to freedom of expression at all.<sup>31</sup> One might suspect that the dominant position of the Acts – their almost “holy” position in Swedish political and legal thinking – has blinded us to other aspects of the free word.

Let me give you an example of these blind spots. In Sweden, *enraging conduct* is a crime, sorted under the heading of “crimes against public order” in the Criminal Code (Ch 16 Para. 16). It prohibits conduct that typically enrages the public, and there is an obvious risk that it could be used in contexts where the “conduct” was in essence “speech”. The preparatory work to the law acknowledges this risk and directs courts not to apply the regulation as a limitation on freedom of expression. At the same time, the leading commentator on criminal law expresses the view that the message of certain conduct may be considered criminal if that message is made public by the conduct.<sup>32</sup> The inconsequence of the guiding texts is apparent and has made the case law all but foreseeable. Two examples might be sufficient to illustrate this. Burning or desecrating flags in clearly expressive situations has been punished under Swedish law without as much as a reference to the protection of freedom of expression.<sup>33</sup> Likewise, expressing dislike of an athlete in the context of a game by referring to his skin color was found to be a crime, without any reference to freedom of expression.<sup>34</sup> The crime of enraging conduct seems to be “under the radar” of many Swedish lawyers’ (and judges’) sensitivity to freedom of expression issues.<sup>35</sup>

It may seem as though the Swedish system of protection of freedom of expression gives so much weight to some forms of expression that others are easily overlooked. In a world where not all have the means – financially or otherwise – to express themselves through the mass media, this may be a serious problem. The difference in treatment of expression covered by the special constitutional protection of the mass media and other forms of expression becomes increasingly difficult to explain rationally, particularly as people's media habits change.<sup>36</sup>

### Privacy – a European Challenge

The second problem concerns privacy. Swedish constitutional and criminal procedural law has more or less the same rules as any other democratic state when it comes to wiretapping, secret surveillance, etc. However, the Swedish system does not contain any clear protection of private life in general or personal integrity in particular.<sup>37</sup> I think that this tradition of not emphasizing privacy has something to do with the constitutional principles of openness and access to public documents. In a system where you can easily gain access to information on your neighbors' income and school grades from the public records, and where that right is explicitly connected to the possibility to publish such information, it does not make much sense to protect people from those kinds of intrusions. Other parts of the protection of private life have been overlooked or simply deemed not important enough to legislate on.

Furthermore, situations in which photographers – professionals or private persons – harass persons and in which those pictures and films are made public are often covered by the protection of the Acts, as the activity is connected with the making of newspapers, films, etc. The photographers become sources in the eyes of the Acts. Accordingly, the principle of exclusiveness makes it impossible to regulate such behavior through ordinary legislation, and the legislature has been hesitant in restricting the constitutional protection of gathering information. As long as such behavior does not constitute criminal harassment and the resulting publications are not defamatory, nothing much can be done against invasions of privacy in Swedish law. Even in cases when the activity does not fall under the Acts, criminal and civil law has not had any meaningful sanctions against such invasions of privacy.

The problem with the legal protection of privacy in Sweden has a clear connection to the demands of the ECHR and its Article 8. There, the contracting states guarantee that the private life of individuals should be protected in the national legal order. As I have pointed out, Sweden does not have a very far-reaching protective regime in this area, and is in real danger of breaching the convention. The Hanover case<sup>38</sup> (see above) makes it clear that constant surveillance and publicity around a famous person can constitute a breach of Article 8, especially if that person has no political or otherwise "public" position. The contracting states have to provide such protection. In Sweden, this means

that the Freedom of the Press Act and the Freedom of Expression Act have to be revised or that Sweden has to find other means of limiting the possibilities of intrusions of privacy in the media. Until then, the compatibility of Swedish law with the convention remains an unresolved dilemma.

The effect of this has been that the courts have had to resort to rather strained interpretation of (criminal) law in order to give *some* protection to people's privacy, a development that began even before the impact of Article 8 became clear. The Supreme Court found, for example, that a man secretly filming his (then) girlfriend in an intimate situation and showing that film to some friends constituted defamation.<sup>39</sup> In order to find this, the court had to find that even if the film itself did not contain anything defamatory – in that it showed a couple in a normal and expected situation – the act of showing it could give the impression that the woman wanted others to see it. Such an impression could itself be defamatory, as others would view the persons involved as exhibitionists or otherwise “peculiar”. Thus, the court was able to find a defamatory substance in the case by taking a roundabout way through the impression made by showing the film, but it is quite clear that the case was less about the reputation of the woman and more about her privacy having been violated. The court found a way to use the rules of defamation to protect privacy, but the reasoning is not wholly convincing from a strict criminal law point of view. This tension has also led to a proposition for a new crime, unlawful photography, which is currently under consideration in the Justice Department.<sup>40</sup> The proposal is based on the idea that this criminalization does not have to involve any changes in the Acts.

The new criminalization might bring the Swedish legal system more in line with European standards. On the other hand, it is worth noting that the proposition works on the premise that criminalization does not need to involve the Acts.<sup>41</sup> As the Acts protect any provider of information for a publication in the protected media, it is submitted that, in the area of protecting persons in “Hanover-like” situations, the introduction of unlawful photography does little to remedy the problems with the convention. As the new crime will not be included in the Acts, the principle of exclusiveness will entail that publications cannot be legally sanctioned and that the sources of such publications will be protected. In a way, it will be the same as ever in this area of Swedish law, change without change.

## Conclusion

Summing up, the Swedish system of protection of freedom of expression has some real challenges before it. First of all, the influence of technological change has put our formal system of protection under pressure, because, as we have seen, not all technological ways of disseminating expressions are covered by the Acts. The manipulative but genial core of the Swedish system – the fact that it lets politicians think they have the power to regulate freedom of ex-

pression, while in fact keeping such matters out of the hands of both policy and law – is thus also threatened.<sup>42</sup> Is it possible to build a formal system that is not based on technology? Is a formal system still something that is sought after and needed? One might do well to remember that the roots of the formal approach are pre-democratic and that it might have made good sense in those days to keep the limits of freedom of expression out of the hands of parliament and government. But is this still true today? This is one of the lasting questions mentioned in the introduction that remains to be answered.

We have also seen how European law – and the European Convention in particular – affects the limits of freedom of expression in Swedish law today. We are no wholly in command of those limits, and our courts have been given the difficult task of merging our traditions with the influence of the ECtHR. The growing importance of protecting privacy has been used here to illustrate this influence. Trying to reconcile the “strange” Swedish formal tradition with the more mainstream substantive approach of European law is not an easy task. The Swedish courts are walking a thin line here, as the public, the press and the politicians are unused to judicial interference in this area. Necessary interpretive moves by courts to reconcile tensions within the legal system(s) can easily be seen as “activism” and may be deemed illegitimate. The debate on freedom of expression, its content and limits, thus serves as a focal point for larger societal conflicts and tensions – as always.

## Notes

1. They are the Instrument of Government (1974), The Freedom of the Press Act (1949), The Freedom of Expression Act (1991) and the Act of Succession (1810).
2. Regulated in 11 Ch. 14 § of the Instrument of Government.
3. This also means that the convention does not stand above the Freedom of the Press Act and the Freedom of Expression Act and any conflict between these documents would still be resolved by giving the constitutional Acts precedence.
4. See Barendt, *Freedom of Speech* (2005) and Bull, *Reglering av yttrandefrihet – en kartläggning och jämförelse* (SOU 2006: 96 del 2) [Regulating Free Speech – a survey and comparative analysis] in which several systems of protecting freedom of expression in European countries are studied.
5. Judgment 2004-06-24.
6. See §§ 63-65 of the judgment.
7. Judgment 2007-01-25.
8. See § 33 of the judgment and compare with the dissenting opinion of Judge Loucaide, who found the painting of no value whatsoever, but rather just disgusting.
9. See the case *Jersild v. Denmark*, 19 EHRR 1 (1995).
10. Above-mentioned *Jersild* contains a discussion on that theme, as does the case *Murphy* (judgment 2003-07-10) § 74.
11. See *TV Vest As v. Norway* (judgment 2008-12-11) and case law referred to therein, in which the Court has found that a national ban on political commercials in TV/radio cannot be upheld against a challenge based on Article 10.
12. The Supreme Court cases NJA 2004 p. 574 and NJA 2007 p. 309 are examples of this.
13. A useful example is the Swedish Supreme Court case NJA 1999 p. 275, in which a threat was published on the front page of a well-known tabloid. As the Act did not criminalize unlawful

- threats (but ordinary criminal law did), the persons responsible could not be convicted. The Act was later changed to include unlawful threats by publication.
14. Something that is comparatively easy in Swedish law, as it takes two ordinary decisions by the Parliament with an election held in between. It is thus mainly a constraint against very hasty changes of the constitutional framework. In practice constitutional revisions are never made unless a supermajority of at least 75% of the members of Parliament accept it, but this is a political convention and not a constitutional requirement.
  15. I will almost exclusively discuss the regulation in the Freedom of the Press Act, but it should be noted that the Freedom of Expression Act of 1991 is almost identical in its structure and content and gives the same kind of protection to media like film, video, DVD, etc. I will furthermore not deal with the issues of prior restraint (which is uncomplicated) and the particular way in which criminal responsibility is regulated in the Act (which is of importance, but would bring us to a level of detail not suitable for this kind of discussion).
  16. There is a system of registration and documentation that supports these rules to ensure that information on the editor, owner and printer is included in any published material. In practice, this means that if there is no editor, an owner can foresee that he or she will be "the next in line" if any legal consequences were to follow a publication. Similarly, a printer who prints material without information on the editor or owner can also draw the same calculation.
  17. There is in fact a double purpose to this very formal way of deciding criminal responsibility. The other purpose is efficiency, as the police and prosecutor will always "get their man" and this will not be the fruit of any complicated criminal investigation, but rather a simple application of the formal rules of the Act.
  18. There is one exception, in the case of defamation, the defamed person has the primary right to start proceedings and the JK does so only in rare cases (not even once every decade).
  19. A most striking example of that is the decision of the JK not to prosecute the selling of certain recordings in a mosque in Stockholm, even though some very offensive language was used in those recording, including praising those who kill persons of other religions (dnr 6335-05-33, decided 2006-01-02). In this evaluation, the JK was guided by the Act's special "instruction" (Freedom of Press Act 1 Ch 4 §) to always be restrictive when applying the Act. The influence of ECHR is not great in this area; it rests more on a Swedish constitutional tradition.
  20. Freedom of Press Act 12 Ch 2 §.
  21. This is the so-called "instruction" of the Freedom of the Press Act, see above note 19.
  22. Cases that never (sic.) happen in Sweden.
  23. There are, of course, some exceptions to this, mainly concerning information on defense and foreign policy issues and on individual health (most schools and hospitals are public institutions in Sweden and hold sensitive information on pupils and patients).
  24. Prosecuting not only the editor of, lets say, a newspaper, but also the sources of information published therein (for breach of secrecy) would place more than one person under criminal responsibility and thus be against the principle of single-person responsibility.
  25. See the Criminal Code Ch 5 Para. 1 (defamation) and Ch 16 Para. 8 (incitement to hate on the basis of color of skin, religion and sexual orientation). In the preparatory works to the latter, the criminalization of hate speech, it is mentioned that all discussion of groups of peoples that goes beyond a sensible and factual (*saklig och vederbärfig*) discussion falls under the law. It does not take much "hate" to be hate speech in Sweden, one might say. I will return to this below in discussing the development in Swedish case law in relation to the ECHR.
  26. The important factor here is, that even though such legislation in the context of the Acts would have to be done by changing the Acts by adding further crimes to them and that such changes are very easy to accomplish in Sweden (being the country in the world with the highest rate of constitutional revisions, see Rasch, Rigidity in Constitutional Amendment Procedures, in Smith, E. (ed.) *The Constitution as an Instrument of Change*, 2003, p. 121), the fundamental concepts of the Acts (exclusivity, single-person responsibility, etc.) are never changed. Adding substantive criminal rules have little practical effect, apart from symbolic value.
  27. Something that is mandated by the Acts, see above note 19.

28. For example, Bollinger, *The Tolerant Society*, (1986) argues that the courts have a role in “teaching” tolerance, and Gottlieb/Schultz, *The Empirical Basis of First Amendment Principles*, 19 *Journal of Law & Politics*, 145 (2003) on whether this is true or not.
29. This is clear from the substantive legislation on limits on freedom of speech, as well as from the public debate, where most voices heard argue for more restrictions on intolerant speech.
30. This is due in part to the fact that judicial review in Sweden is conducted against a standard of “manifest mistake” (Ch. 11 Para.14) – a standard that in practice works out rather like the “rational basis” test of US Constitutional law – all in all a very lenient attitude toward the choices of the legislature.
31. This is more or less expressly stated in the Instrument of Government Ch 2 § 13 Sec 3. The reason for this can be discussed. It is partly a question of arguing that rules on where and when you may say something do not infringe on the right to free speech in itself. You just can not do here and now. In my opinion, it is also partly a question of avoiding difficult issues of categorization.
32. See Berggren et al., *Brottsbalken med kommentarer* [The Criminal Code with comments] Ch 16 § 16.
33. See the Court of Appeal cases RH 84: 37 and RH 97: 24 and compare *Texas v. Johnson*, 491 U.S. 397 (1989) and *Spence v. Washington*, 418 U.S. 405 (1974).
34. Judgement by Svea Court of Appeal 2006-07-04, case B 8117-05. The court does note that expressions of opinions are common during games, but that does not change its evaluation of the specific comment, which was something like “take that nigger off the course”. In the context of a youth game where the accused was one of the parents, the court found the remark well beyond what could be accepted. No specific reference was made to the constitutional protection of freedom of expression or the protection offered by the European Convention, which might have had an effect on the interpretation of the criminal statute (see below).
35. Not all, though. The Swedish Parliamentary ombudsman (JO) has recently criticized the police for stopping expressions of opinions on the grounds of enraging conduct, see JO report to the Parliament 2006/07 p. 140 and JO decision 2008-04-10, file 2128-2006 (available on [www.jo.se](http://www.jo.se)).
36. For example, blogs seem to be taking over from editorial pages as leading instruments of building public opinion.
37. There is some legislation dealing with particular parts of the private life, for example the control over one’s own picture and personal data in computerized contexts, but there is no general provision on protection of private life or personal integrity, see the recent public inquiry SOU 2008: 3 (*Skyddet för den personliga integriteten*) for a survey of the situation and propositions to add such rules to the Swedish system.
38. Above, note 3.
39. NJA 1992 p.594.
40. See the legislative report SOU 2008: 3. In the report, several other court cases are analyzed, pp. 213-215.
41. SOU 2008: 3 p. 315. This was necessary, as the government explicitly instructed the committee not to touch upon the Acts in their solutions.
42. This is true even with regard to the fact that the Swedish constitution is easy to change, as changes in the core principles of the Acts are not made, and it is those principles that provide the true protection in the Swedish system, not the substantive provisions on crimes.

# Globalization and Cultural Perspectives



# Anti-Terror Surveillance and Freedom of Expression

Joakim Hammerlin

The first edition of the *International Encyclopedia of the Social Sciences* (1933) contained two articles on terrorism. The authors concluded that, in the future, the subject of terrorism would only be of interest to historians and antiquarians, as modern technology would have made our world largely invulnerable to attacks by individuals and small groups<sup>1</sup>.

Our gut reaction to this claim is that they were dead wrong. On September 11<sup>th</sup> 2001, the US was struck by the most devastating terrorist attack in history. Almost 3,000 people were killed. The deadliest act of terrorism the world had seen prior to this date had caused “only” 430 deaths, when a cinema was set on fire in Abadan, Iran in August 1978<sup>2</sup>. In fact, during the entirety of the 20<sup>th</sup> century, only 14 terrorist attacks resulted in more than 100 casualties<sup>3</sup>.

But there is more to this prediction, for it may not be as far off-track as initially it seemed to be. In fact, it serves as a highly relevant warning for our times, for what if “the future” the authors referred to is not now, but 20, 50 or 100 years from now? What if the “modern technology” they thought would make us invulnerable to attacks by individuals and small groups has still not been fully developed or fully implemented? What if they pictured a society where the possibility for any individual or group to indulge in violent confrontation with the state apparatus had been effectively neutralized because the state was in total control over its citizens?

The present article has one aim: To show how the dust cloud of the Twin Towers has provoked a political climate change in the Western world, wherein basic rights and liberties are being overshadowed by the development of a new security and surveillance apparatus.

## “Knowledge is Power”

Two weeks after the 9/11 attacks, US Supreme Court Justice Sandra Day O'Connor stated that “[w]e are likely to experience more restrictions on our personal freedom than has ever been the case in our history”<sup>4</sup>. In the aftermath

of 9/11, the civil liberties of the American people have lost ground to new far-reaching counterterrorism measures. Some of these are better known than others, such as the USA PATRIOT Act (*Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act*). Others have received less public interest. For instance, in July 2002, the US Justice Department launched a new counterterrorism program, TIPS (*Terrorism Information and Prevention System*). The aim of the program was to recruit “a million letter carriers, meter readers, cable technicians, and other workers with access to private homes as informants to report to the Justice Department any activities they think suspicious”<sup>5</sup>. In the long run, the program aimed at recruiting one informant for every 24 Americans, far greater than the Stasi ratio of informant to citizen<sup>6</sup>. The TIPS program was never initiated, much thanks to the resistance of the American civil rights movements. Still, the fact that the US Justice Department wanted to implement an informing system of this kind says a great deal about what impact the 9/11 attacks had on US society.

The same year, the Pentagon disclosed its plans for a new surveillance program, TIA. Originally, the abbreviation referred to the *US Total Information Awareness Program*. Later, the name was changed to a more palatable version: the *US Terrorism Information Awareness Program*. They got John Poindexter, the former national security adviser for President Reagan who had been convicted of lying in Congress about the Iran-Contra affair, to lead the development of the program. Its initial logo showed a pyramid with an alert eye at the top, along with the motto “Knowledge is power”. Even though this logo was eventually removed from the TIA website, it would seem well suited to the aim of the program: to collect an average of 40 pages of information on every inhabitant of the world. This included:

- how much money you have, who you get it from, where you withdraw your money, how much you withdraw, and what you spend your money on (credit card);
- what books you lend at the library, what films you watch and newspapers you subscribe to;
- what medicines you use;
- where you travel;
- what car you own/rent;
- where you live and have lived;
- your education;
- your criminal record;
- your insurance portfolio;
- your social security records;
- your marital status, who you live with and have lived with;
- who you send e-mails to and receive e-mails from;
- what Internet sites you visit;

- what surveillance cameras with facial recognition systems you pass, at what time and with whom.

The information was to be collected through the Internet, in addition to scanning a wide range of databases both in the US and abroad. Eventually, all the data would be put into a supercomputer that would scan the findings and pick out potential terrorists<sup>7</sup>.

The TIA program was planned to be operational in 2007, but after harsh criticism from the civic community, Congress blocked further financing of the project in 2003. Still, this was not the end of TIA. Many of the principles in the system have been recycled in other surveillance systems created by DARPA, the research agency of the US Department of Defense. One of them is ADVISE (Analysis, Dissemination, Visualization, Insight and Semantic Enhancement), a system that maps Internet users around the world by storing and analyzing their Internet communication, including their e-mail correspondence and what sites they visit. Another is Tangram, a computerized profiling system created to search through large quantities of information to calculate a “risk-score” for each person in a population<sup>8</sup>.

## Wiretapping Europe

The US is not alone in implementing new surveillance policies to combat terrorism. In February 2006, the EU adopted a new data retention directive as a response to the terrorist attacks in London and Madrid, which requires that member states direct communication providers to file information on their costumers’ e-mail, telephone and SMS communication, and to create logs on when costumers have been connected to the Internet. Although the content of the communication is not retained, the communication providers are obliged to file whom you communicate with, and the time and location of the communication (when using a mobile phone). The data are to be stored for 6 to 24 months (chosen by each member state), and should be used to fight “serious crimes”. What “serious crimes” implies is defined by each member state. They are also required to decide what public bodies will have access to the information<sup>9</sup>.

If you get a list of all the communication a person has had via e-mail and the telephone during the past couple of years, it is obvious that you can make a fairly accurate description of his or her social network. In addition, because communication providers are to register the whereabouts of their subscribers when they are using their mobile phone, the directive makes it possible to map an individual’s movements.

To date, what sites you visit and what you publish on or download from the Internet is not being filed. Nor is the content of your e-mails. Still, it may just be a question of time before this kind of information is stored as well. Technically, it is not difficult. All computers connected to the Internet have a unique code, an IP-address, and your communication provider stores logs of what you have done on the Internet until you have paid for their services. It is

obvious that this kind of information could be useful to combat terrorism: One can find out a great deal about who you are and what interests and political sympathies you have by mapping what you do on the Internet and by reading your e-mail communication.

There are already troubling signs of governments wanting to expand their filing policies. Denmark, which was the first member state to implement the data retention directive in September 2007, is in the progress of taking the next step by filing hotel guests' telephone and Internet use. Among the data that is to be stored are the names and addresses of the guests using the Internet, what sites they visit, with whom they exchange e-mail, and the identity of the PC they use. In addition, the hotel has to have a positively vetted contact, available at all hours, which can assist the police in telephone conversation surveillance<sup>10</sup>.

Sweden went even further. On June 18<sup>th</sup> 2008, the Swedish Parliament passed the so-called FRA Act, enabling the Swedish National Defence Radio Establishment, *Försvarets Radionanstalt* (FRA), to monitor cross-border cable traffic as from January 1<sup>st</sup> 2009. This includes Internet, e-mail, chat, mobile telephony and SMS communication. The information collected will be stored for 18 months. Google's global privacy counsel, Peter Fleischer, equated the Act with surveillance policies in the US, China and Saudi-Arabia. The passing of the Act triggered massive political debates and protests in Sweden, and in September the Swedish Government was forced to change parts of it. But even in its revised form, the FRA Act remains a dangerous blow to freedom of expression<sup>11</sup>.

In an interview with *Der Spiegel* in 2007, German Federal Minister of the Interior, Wolfgang Schäuble, suggested that German police should be permitted to conduct secret online searches on computers. He also opened the door to pre-emptive jailing and pre-emptive assassination of terrorist suspects<sup>12</sup>.

All these examples are parts of the same pattern: The new security and surveillance measures that have been imposed on us to fight terrorism cover more and more of our social interactions. In December 2007, the human rights group *Privacy International* released its world map over the leading surveillance societies in the world. The UK and the US were placed in the same category as China and Russia<sup>13</sup>.

## The Watch List

But what does all this talk about surveillance have to do with freedom of expression? After all, counterterrorism policies and surveillance measures have been imposed to track down terrorists, not to restrict ordinary citizens from expressing their views, right?

On March 1<sup>st</sup> 2007, Professor Walter F. Murphy went to the check-in counter to get his boarding pass at Newark Airport, New York. Surprisingly, he was denied access to embark. When he asked the airline employee why, he was

told that he was on “the watch list”. Being professor emeritus of Princeton University and one of the leading scholars on the US constitution, as well as a former decorated US marine, Murphy had difficulties understanding why he was on such a list. “Have you been in any peace marches?”, the airline employee asked: “We ban a lot of people from flying because of that”. But Murphy had not been in any peace marches. What he had done, however, was to give a lecture at Princeton on President Bush’s constitutional violations – a lecture that had been televised on the Internet. “That’ll do it”, the airline employee said<sup>14</sup>.

The list over persons who are denied boarding access or have to go through extensive security checks at US airports has grown rapidly during the past few years. Before 9/11 it contained 16 names<sup>15</sup>. In June 2004, 158,000 people had been registered. In May 2005, the list contained 288,000 names. In June 2006: 516,000. In May 2007: 755,000<sup>16</sup>. How many other ‘Murphys’ are there among those put on the list? Critics claim that a significant number of activists, academics, journalists and political leaders who have spoken against the White House in public have experienced harsh treatment at US airports, either by facing extensive security checks or by being denied access to their planes<sup>17</sup>.

Political surveillance is nothing new in the US. In the McCarthy era in 1950s and 1960s, it was the communist threat that provided justification for implementing extensive surveillance measures. And as the Church Commission unfolded in 1976, the FBI also developed a far-reaching surveillance program called COINTELPRO, which as directed against the green movement, anti-war movement and other radical and anti-establishment groups that emerged in the late 1960s and 1970s. Among the groups that were put under surveillance were human rights and civil rights movements, women’s rights movements and opponents of the Vietnam War. The findings of the Church Commission Report created a political earthquake in Washington. In consequence, the powers of the FBI were heavily restricted. But under the Bush administration’s “war on terror”, many of these restrictions have vaporized<sup>18</sup>.

In 2005, the *American Civil Liberties Union* (ACLU) revealed that the FBI had a wide range of organizations under surveillance as potential terrorist groups. Most of them were not radical Islamic groups, but environmentalist and animal rights organizations, such as *Greenpeace* and *PETA* (*People for Ethical Treatments of Animals*). Among the other organizations that had been put under surveillance were the *American-Arab Anti-Discrimination Committee*, the biggest lobby group for Americans with an Arab heritage, and (of course) the *ACLU* itself<sup>19</sup>. Although some had committed violent actions in the past, such as the *Animal Liberation Front*, most of them seemed far from being potential terrorists. It has also been revealed that the police in Denver, Colorado, had collected information on local activists since the 1950s. Among the persons labeled “criminal extremists” were people with connections to the Christian pacifist group *American Friends Service Committee*, a Nobel Peace Prize winner, and a nun engaged in social work to benefit Native Americans<sup>20</sup>.

## Antiwar Marches and Other Domestic Threats

In 2007, the US Congress initiated the processing of a new Act to assess home-grown terrorism threats and causes, and to improve the USA PATRIOT Act's definition of "violent radicalization", "homegrown terrorism" and "ideologically based violence". The Act was passed in the House of Representatives by 404 to 6 votes in October 2007, but is still in committee in the Senate, pending handling. If the Senate passes the Act in its present form, the bridge between counterterrorism policies and political surveillance will be even more solidified. The most dangerous part in the Act is the wide interpretation of the mentioned concepts. For example, "homegrown terrorism" is defined as "the use, planned use, or threatened use, of force or violence by a group or individual born, raised or based and operating primarily within the United States or any possession of the United States to intimidate or coerce the United States government, the civilian population of the United States, or any segment thereof, in furtherance of political or social objectives"<sup>21</sup>. This definition could easily cover a protest march that degenerates into violent confrontations with the police, such as the riots against the WTO summit in Seattle in 1999, which many consider to be the birth of the anti-globalization movement that emerged in the first decade of the millennium. Far fetched? We already know that anti-war marches have been labeled possible "domestic threats" in the Pentagon's TALON database (Threat and Local Observation Notice)<sup>22</sup>.

The tendency to interpret terrorism widely can also be seen elsewhere. In the UK, the Terrorism Act of 2006 criminalizes the glorification of a terrorism act in public – even when it is done generally or is connected to acts that have taken place in the past. The law also enables British authorities to prosecute any person who publicly supports an organization that performs acts defined as terrorism. The connection between the supporting statement and the terrorist activity need not be direct. For a conviction, it is sufficient to show that it is plausible that the statement has contributed to creating "a climate for terrorism". Accordingly, to institute criminal proceedings against someone for terrorist offences, it is not required that he or she has had the intention of committing a terrorist attack. It is sufficient if someone declares that the person in question has made statements that make it reasonable to expect that he or she has the intention of committing a terrorist attack<sup>23</sup>.

Should it be illegal to support groups that perform or have performed acts of terrorism? Would this also include supporting the South African Liberation Movement, *ANC*, which later became the governing party of post-apartheid South Africa? During the 1970s and early 1980s, the *ANC* performed sabotage on industrial installations, oil refineries and communications, political assassination and attacks on the administrative organs, police stations and military targets through its military wing, *Umkhonto We Sizwe (MK)*. They also carried out explosions in city centers and public areas, and attacks on white farmers and black people who assisted the apartheid government<sup>24</sup>.

The UK is not the only European country that has made it illegal to defend terrorism. Antiterrorism legislation in Spain and France follow the same path. This also applies to the EU Convention on the Prevention of Terrorism from 2007<sup>25</sup>. The political fraction of *ETA*, *Batasuna*, has been declared illegal by the Spanish Supreme Court based on a law that prohibits any political party that does not condemn terrorism officially. The Basque newspaper *Egunkaria* has been banned for the same reasons<sup>26</sup>. This tendency can also be traced outside the Western world: Colombia, Indonesia, China, Uzbekistan, Pakistan, Turkey, Egypt, Jordan and Congo have all used the label “terrorist sympathizers” to hunt down protestors<sup>27</sup>. In addition, terrorism is often widely defined, thus making it possible to crush any opposition. A telling example is India’s Prevention of Terrorism Act of 2002, where any act carried out “with intent to threaten the unity, integrity, security or sovereignty of India” is defined as terrorism<sup>28</sup>.

Another alarming tendency is that the political discourse has become more restrained. Since 2005, it has been illegal to perform political protests within a radius of one kilometer of the British Parliament, without obtaining permission from the police six days in advance. The rules are interpreted strictly. A woman who had a picnic close to the parliament, eating a cake with the letters “PEACE” written on it, was arrested. Another woman suffered the same treatment when she read aloud the names of the British soldiers who had been killed in Iraq<sup>29</sup>.

## Universities Under Siege

Academic freedom has also lost ground as the Western world began its war on terror. In October 2006, The Guardian reported that the British Government had plans to instruct lecturers and university staff across Britain “to spy on “Asian-looking” and Muslim students they suspect of involvement in Islamic extremism and supporting terrorist violence”<sup>30</sup>.

A story from the University of Nottingham in 2008 gives an account of how dangerous this kind of informing can be: Rizwaan Sabir, a 22-year-old post-graduate student at the Department of Politics and International Relations, was doing research for his PhD dissertation on US policies toward al-Qaida in Iraq. He downloaded an open-source and edited version of the *al-Qaida Training Manual* from the US Justice Department’s website, a document of 1,500 pages. Sabir did not have enough money to print it out, so he sent the document to a friend at the University administration, Hicham Yezza, and asked him to print it for him. Yezza downloaded the document, but forgot all about it. It stayed on his computer for several months. Later, some of Yezza’s colleagues discovered the manual on his computer and called the police. On May 14<sup>th</sup> both Yezza and Sabir were detained and held in custody. Their homes and computers were searched for evidence of terrorist activity. But the police could not find anything. After six days they were released without charges.

But for Yezza, his newly won liberty would be short-lived. Minutes after his release, he was arrested again. The police claimed that there were problems with his immigration papers. British Immigration authorities remanded a court hearing in July to determine whether or not he was to be deported. But the UK Home Office thought otherwise, and decided to expedite his deportation to June 1<sup>st</sup>, consequently denying Yezza the right of a hearing. At this point, Yezza, Algerian in origin and now aged 30, had lived in Nottingham for 13 years. At the University of Nottingham, where he worked at the time of his arrest, he had studied for both his undergraduate and postgraduate degrees. He was well integrated in British society and a prominent figure on the university scene. Among other things, he had served as a member of the University Senate for two terms and been editor of two prominent journals. Despite this, the Home Office decided to fast-track his deportation, which led to a massive campaign of protests, including the biggest demonstration in the history of the University of Nottingham. In consequence, the Home Office renounced its decision to expedite the deportation. Still, Yezza was refused temporary release. He was placed in different Immigration Removal Centres for three weeks. On June 16<sup>th</sup>, a legal team working for Yezza's release succeeded in getting him released on bail despite strong opposition from the Home Office. Yezza's legal case on deportation is still ongoing.

By the way, *The al-Qaida Training Manual*, which triggered the terror alarm, can be purchased from Amazon.com for 15 USD<sup>31</sup>.

Another alarming tendency is the willingness to impose restrictions on the press. In 2006, Danish authorities brought the editor and two journalists from the Danish Newspaper *Berlingske Tidende* to court for having published "confidential assessments on Iraq" from the Danish Secret Intelligence Agency, *Forsvarets Efterretningstjeneste*. In the Netherlands, journalists have had to go to court to stop the wiretapping of their telephones. It is also known that German Secret Intelligence has spied on newsrooms to disclose their sources. In Switzerland, two journalists were charged for having published a fax from the Egyptian government on secret CIA prisons in Europe, a violation for which they could face five years in prison. The British Government has threatened to bring multiple newspapers to court for having published a transcript of a conversation between Blair and Bush about the bombing of the Arabic TV-station *Al-Jazeera* during the Iraq war<sup>32</sup>.

## Maintaining the Pillars of Democracy

In the aftermath of 9/11, we have accepted harsh countermeasures and paid a high price in lost rights and liberties in order to prevent future attacks. Some of the core values of liberal Western democracy have been put in jeopardy, e.g. by restricting the press, restricting academic freedom, putting ordinary citizens under surveillance, and limiting the political discourse by imposing restrictions on freedom of expression. This is an alarming tendency. Living in a democracy

implies more than putting a voting slip into a ballot box. Democracy is also about preserving the basic rights and liberties of the people. For what exactly is freedom of expression? I understand it this way: To be able to speak freely and without fear of persecution. The last part is crucial. If people fear persecution for their opinions, most will restrain themselves when expressing their views. I say most people, because there are some examples of heroic people who have had the courage to express their views and to fight for these views, no matter how severe the consequences. It is thanks to these people that we have obtained the liberties and rights that constitute the pillars of a democratic society. But these pillars will not stand if we do not maintain them. History has shown that hard-won liberties and rights can be torn away. It has also shown that this can happen rapidly. Therefore, we need to treat their importance in an absolutist manner, meaning that these rights and liberties should not be diluted, no matter the circumstances.

## Notes

*All Internet links were last accessed 25.02.2009*

1. Rapoport & Alexander 1982: xi
2. Tan 2006: 115
3. Hoffman 2004, in Martin (ed.): 2
4. Rapoport 2006, in Tan (ed.): 18
5. Wolf 2007: 82
6. Wolf 2007: 82
7. Leone & Anrig 2003: 130; Bye & Sjøe 2008: 157-9; Strøm 2003: 29-33; 'Totalovervåkning', *Le Monde diplomatique* (Norwegian edition), August 2003.
8. Bye & Sjøe 2008: 150-1, 160-3.
9. [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l\\_105/l\\_10520060413en00540063.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_105/l_10520060413en00540063.pdf)
10. <http://www.edri.org/edrigram/number6.2/privacy-denmark-2007> ; <http://www.nettavisen.no/it/article1435549.ece>
11. [http://www.economist.com/agenda/displaystory.cfm?story\\_id=11778941&CFID=15111685&CFTOKEN=60024102](http://www.economist.com/agenda/displaystory.cfm?story_id=11778941&CFID=15111685&CFTOKEN=60024102) ; <http://www.iht.com/articles/2008/06/19/technology/sweden.php>
12. <https://www.spiegel.de/international/germany/0,1518,493364,00.html> ; <https://www.spiegel.de/international/germany/0,1518,493364-2,00.html>
13. [http://www.privacyinternational.org/article.shtml?cmd\[347\]=x-347-559597](http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-559597)
14. <http://www.guardian.co.uk/world/2007/apr/24/usa.comment>
15. Wolf 2007: 96.
16. [http://www.usatoday.com/news/nation/2007-10-23-Watchlist\\_N.htm](http://www.usatoday.com/news/nation/2007-10-23-Watchlist_N.htm)
17. Wolf 2007: 95; Olshansky 2007: 263.
18. Cole & Dempsey 2006: 6-8; Olshansky 2007: 260-261.
19. <http://www.aclu.org/safefree/spying/23124prs20051220.html>
20. Lyon 2003: 50
21. <http://www.govtrack.us/congress/billtext.xpd?bill=s110-1959>
22. Olshansky 2007: 259; <http://www.aclu.org/safefree/spyfiles/28024prs20070117.html>
23. 'The tongue twisters', *The Economist*, 11.10.2007; 'Når intensjonen blir en forbrytelse', *Le Monde diplomatique* (Norwegian edition), January 2007.
24. Thackrah 2004: 246-248.
25. 'Mellom ytringsfrihet og blasfemi', *Le Monde diplomatique* (Norwegian edition), April 2007.
26. 'Krig mot terrorisme' på avveier, *Le Monde diplomatique* (Norwegian edition), May 2003.

27. 'Antiterrorisme og demokrati', *Le Monde diplomatique* (Norwegian edition), March 2004.
28. Goodin 2006: 5.
29. 'The tongue twisters', *The Economist*, 11.10.2007.
30. <http://www.guardian.co.uk/uk/2006/oct/16/highereducation.topstories3>
31. <http://www.guardian.co.uk/education/2008/may/31/highereducation.uk>; <http://www.wsws.org/articles/2008/may2008/yezz-m30.shtml>; <http://www.guardian.co.uk/commentisfree/2008/aug/18/terrorism.civilliberties>; <http://freehicham.co.uk/about-2/>
32. <http://www.guardian.co.uk/politics/2005/nov/23/uk.topstories3>

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## Twenty Years On

### *The Lessons of the Fatwa against The Satanic Verses*

Arne Ruth

That's where they came flying in over England. They saw those chalk cliffs and then fell out of the sky.

Salman Rushdie points down toward Dover and recalls with a chuckle how Gibreel Farishta and Saladin Chammcha, the two main characters in *The Satanic Verses*, dropped onto British soil after their plane exploded in a terrorist attack.

It is mid-August 1993, and Salman Rushdie and I are headed out over the English Channel in a single-engine aircraft. The fabled White Cliffs of Dover are right beneath us. Through the haze of approaching sundown we can already see the opposite shore. We reach our goal, a small landing strip just south of Cologne, in less than two hours. Two police helicopters hover a meter over the ground, awaiting our arrival. They follow us at an altitude of no more than 200 meters as the German secret service ushers us in a motorcade to our ultimate destination, the home of journalist and writer Günter Wallraff on the Rhine.

Wallraff, master of disguises and heckler of the establishment, has entered into a temporary alliance with the state police of Nordrhein-Westfalen. Secret service agents stroll along the riverfront, posing as tourists. And Rushdie meets with Aziz Nesin, the leading political satirist in Turkey, a secular 'fighter' who, since the 1950s, has been hailed as a folk hero, even in neighbouring Iran. They are meeting in hopes of finding common ground after a bitter public feud, and they manage to do so. Nesin has published excerpts from *The Satanic Verses* in a Leftist Turkish newspaper without obtaining Rushdie's permission.

The outer framework of the meeting is as unlikely as that of a spy-thriller. The German pilot was not to be told the identity of his passenger until after landing. These are the day-to-day circumstances of Salman Rushdie's life more than three years after the Ayatollah's *fatwa*. He boards the plane, wearing a winter cap, the bill pressed down over his face and flaps drawn down over his ears, to prevent anyone from recognizing him. The reason for all this subterfuge? Lufthansa and British Airways, the two largest airlines in Europe, have both refused to carry him to Cologne "for safety reasons".

Rushdie broke his absence from the public scene after the *fatwa* on December 11, 1991. That is, after 1 032 days. The occasion was a speech before students of Journalism at Columbia University in New York on the 200th anniversary of the 'Bill of Rights', the first ten amendments to the U.S. Constitution, adapted from an essay he had written in hiding, '1000 Days In a Balloon'.<sup>1</sup> In it he described his situation, how he lived underground, how he was forced constantly to move from one place to another. All the while, he floated, as in a bubble, high above reality – vulnerable and constantly under scrutiny.

Rushdie, the human being, had vanished from sight. What remained was a symbolic figure by the same name, hero to some, devil to others, actor in a global drama.

For this particular audience, he extended the metaphor of his life one more step in the direction of playful absurdity: the balloon that had kept him shut away had actually been a soap bubble. Now he was stepping forward anew as a visible figure, able and willing to fight. His speech at Columbia was a declaration to the world that he had given up on the idea of seeking reconciliation with his enemies. In a game of negotiating with Saudi-financed Muslim representatives from Great Britain and religious leaders in Egypt he had pronounced the credo of Islam in public. Now, he no longer saw any point in trying to appease his enemies. He would no longer make concessions.

Rushdie was able to endure the ensuing battles thanks to his sense of the absurd. When he visited Stockholm to accept the Tucholsky Prize awarded by Swedish PEN in November 1992, he was wearing a pin with a portrait of Kafka on it. Kafka, he told me, was the greatest humorist of all time. "Laughter", he said, "deserves to be taken seriously".

The battle over the freedom of Rushdie and of literature wore on for six more years. On September 25, 1998, I saw a smiling Salman Rushdie raise his fist before more than one-hundred journalists and photographers at the offices of ARTICLE 19, an organization dedicated to freedom of expression, on Islington High Street in London. The only guards visible were two uniformed policemen at the entrance. That gesture of unbent spirit effectively defused the *fatwa*. Rushdie now re-emerged as a full fledged public figure.

On the eve of his appearance in London, Iran's foreign minister, Kamal Kharazmi and his British colleague, Robin Cook, had held a joint press conference at the headquarters of the United Nations in New York. In an official declaration accompanied by a statement by the British Cabinet, Kharazmi assured the world that the Government of Iran "has no intention, nor is it going to take any action whatsoever, to threaten the life of the author of *The Satanic Verses* or anybody associated with his work, nor will it encourage or assist anybody to do so". And he added: "The Government dissociates itself from any reward which has been offered in this regard and does not support it."<sup>2</sup>

Three weeks later representatives of various national Rushdie Committees assembled in Oslo. An international committee had been formed in London a week after the *fatwa*; a network of national committees was subsequently

formed, the first of which in Oslo in 1992. With Salman Rushdie's full approval we now voted to disband the committees. Our fundamental purpose had been achieved.

The decision and public announcement were the result of a new understanding of the conflict we had been embroiled in since the mid-1990s. It called for a change of strategy. From having opposed the *fatwa* as a religious edict, we now focused on its political consequences. Advisers with Muslim background had convinced us that we might be able to persuade the Iranian leaders not to execute the *fatwa*, but they would never agree to disown Ayatollah Khomeini's personal judgment.

Western leaders and intellectuals had fallen into a trap, they said, when they accepted Khomeini's disguise of his struggle for power in sacral terms. The Iranian leaders could claim that they defended eternal Islamic values, whereas they in fact were using the issue to extend their worldly power and influence, albeit by unconventional means. Unless this was fully understood, our tactics would not prove effective.

*The Satanic Verses* in its original language was on sale in Iran before the *fatwa*. It was even reviewed in the Iranian press. But in the aftermath of riots in protest of the book in Pakistan and a ban on the book in India, the Iranian leaders realized that they might have something to gain by condemning it. Khomeini had been forced to accept a humiliating ceasefire after eight years of war against Iraq. Now he saw an opportunity to stage a doctrinally defined symbolic battle as a means to strengthen the status of his government in the Islamic world and to win points against the country's archrival, Sunni Muslim Saudi Arabia.

The analysis of the conflict in terms of power produced results. Khomeini's successors appear to have weighed the pros and cons of the *fatwa* and found that the 'cons' outweighed whatever might be gained by it. The declaration made at UN headquarters in 1998 meant that Iran agreed to abide by the established codes of international conduct. In this particular case, its leaders no longer claimed that their faith gave them the right to threaten the life of a citizen of a foreign country.

The breakthrough must be credited in large part to the active involvement of the British Foreign Minister, Robin Cook, even though, in his statements, he made verbal concessions to the Islamist sentiments of the power holders in Iran. The Blair Cabinet had recently taken office, and Cook was known for his dedication to universal human rights and the rule of law among nations.

The Norwegian government had been uniquely steadfast in its defense of such principles in the Rushdie case. Only days after the *fatwa*, the then-Minister of Defense Johan Jørgen Holst promised to raise the issue within Unesco. The Norwegian ambassador to Teheran was brought home for consultations. Thereafter, Norway pursued the *issue* vigorously in the UN General Assembly, the UN Commission for Human Rights, and the Nordic Council. And, when Salman Rushdie visited Oslo in 1992, two members of the Cabinet, Åse Kleveland and Gudmund Hernes, chose to break the unspoken tabu among European

governments and appeared in public with Rushdie. The first chief of state to take that step was Ireland's President, Mary Robinson, a half-year later.

The early involvement of the Norwegian government in this issue had its roots in home front events. Even months before the *fatwa*, some of the Pakistani community in Norway had been stirred by the virulent reaction to *The Satanic Verses* in their homeland. Protest manifestations in Pakistan had ended in a turmoil which cost several lives. Tension erupted again after the *fatwa* when extracts from *The Satanic Verses* were published in a local weekly which was immediately banned by the government. In India, twelve Muslim protesters were shot dead by the police a few days earlier following anti-Rushdie demonstrations in Bombay.

Two weeks after the *fatwa*, local Pakistani organizations arranged a demonstration in protest of the book in Oslo. Immediately thereafter, William Nygaard, publisher of the Norwegian edition, received death threats. When, two months after the *fatwa* and six weeks earlier than planned, the book was distributed in Norway, Nygaard's home and the offices of his publishing firm, Aschehoug, in Oslo were put under police protection. Two bookshops were burned, and a third received a bomb threat. At about the same time several bookshops in London were fire-bombed. On March 3, 1990, Aschehoug published a pocket edition of *The Satanic Verses*, the first in the world. The American edition came a year later; British readers would have to wait two more years.

In October 1993 William Nygaard was shot and seriously injured outside his home in Oslo.<sup>3</sup> The Italian translator had been stabbed in July 1991; his Japanese colleague was murdered only days later. These events testify to the global dimension of Khomeini's death sentence. For the first time ever, a *fatwa* made no distinction between persons of Muslim origin and others. The death threat applied to anyone who had anything to do with publishing *The Satanic Verses*, provided they "had knowledge of its contents".<sup>4</sup>

### Where Do We Stand Today?

Roughly a decade after the Iranian declaration at the UN, we may say that the Rushdie campaign won out over the *fatwa*. The danger is not over, but compared to the first nine years under threat Salman has regained much of his personal freedom. He has written seven novels and several other books, and the organized campaign against *The Satanic Verses* has ceased.

In political terms, however, Khomeini's strategy of politics by symbols has gained ground. British writer Kenan Malik, author of a recent book on the conflict, has argued that Rushdie's enemies have won the battle on freedom of expression<sup>5</sup>.

In historical terms, those immediate reactions to the *fatwa* that counselled appeasement seem to have gained wider acceptance. The author and essayist John Berger, himself a modernist of high renown, repudiated *The Satanic Verses* at the outset of the conflict. (His standpoint was subsequently shared

by writers like Germaine Greer and John Le Carré.)<sup>6</sup> Berger argued that since Muslims in Europe are constantly subjected to cultural and racial discrimination, they have a right to react when the fundamentals of their faith are assaulted. For Berger, the burden of colonial guilt weighs, and *should* weigh, heavier in the balance than abstractions like artistic freedom.

The argument goes to the core of the conflict. Up until the Rushdie case, in concrete terms, free speech had been defined in national terms. But Rushdie could be regarded as a citizen of the world in confrontation with a particular and newly defined version of political Islam. His book was burned in India, Pakistan, Britain and Canada even before the *fatwa*. Even though most of us living in democracies didn't realise it at the time, freedom of speech and freedom of the arts were already affected at a global level.

In November 1991, the Archbishop of Canterbury castigated Salman Rushdie's "outrageous slur" of the Prophet, and argued that true tolerance may only be achieved "when people hold their religion as so important that to part from it is to die, and at the same time realize that another person's values are just as important and real".<sup>7</sup>

His view was seconded by both the Pope and the Chief Rabbi of Israel. The logic of his argument is this: when it comes to religion, the limits of freedom of expression have to conform to the norms of the least tolerant believer. This, in effect, would exclude religion from all criticism.

Three years ago the British Parliament nearly passed a law on 'blasphemous libel' that would have codified the Archbishop's position on freedom of expression. Previously, as a response to the acts of terror on September 11, 2001, the Parliament had passed a law prohibiting the publication of texts that could be construed to promote or incite acts of terror.

The new Bill proposing a Racial and Religious Hatred Act would have criminalized abusive or insulting remarks about a religious faith or its adherents, even if the remarks were fact-based and expressed without intent to inflict insult or injury. Such an offense would carry a sentence of up to seven years in prison. The proposal met resistance in both Houses, but failed ultimately when Labour backbenchers revolted against the party leadership.

After important changes forced through by the House of Lords, a new version of the law was effected in October 2007. The new act makes no reference to slippery adjectives like 'abusive' and 'insulting' and requires proof of intent to threaten or foment hatred of a religion or its adherents. Still, it clearly implies an abridgement of intellectual freedom. And events have proven that it also limits the right to cross borders within the European Union.

In mid-February 2009, Geert Wilders, the Dutch MP who gained notoriety for having compared *The Koran* to Hitler's *Mein Kampf* and for a short film, in which he expresses similar thoughts, was denied entry into Great Britain. He had been invited by the House of Lords to speak and to screen his film, but upon debarkment at Heathrow he was presented with a letter from the Home Secretary informing him that he was *persona non grata* because of the statements he had made about Muslims. Were he to be allowed entry, the

Minister wrote, it might “threaten community harmony and therefore public safety”.<sup>8</sup>

I harbor no sympathies for a provocateur like Wilders, but I cannot accept that a democratic government can block an exchange of views across national frontiers in deference to religion-based feeling. A court case in Greece has illustrated the dangers of cross border incrimination of freedom of speech issues related to religion in the EU. In 2005, the Austrian-born artist Gerhard Haderer, residing in Germany, received a six month conditional prison sentence in absentia in Greece for the Greek edition of his book with drawings satirising religion, “The Life of Jesus”. He was acquitted by a higher court in late 2007. Had this not happened, he could have been liable for imprisonment in Greece according to the European Union judicial regulations.

The list of wrongful interventions that have been committed under the new British law is already long. In 2007, the British Channel Four telecast a news documentary, *Undercover Mosque*, which documented hate-inciting rhetoric on the part of imams and other speakers that targeted women, Jews, homosexuals and so called adulterers. Rather than reacting to the inflammatory citations against citizens, the police, applying the law’s definition of hate, attempted to bring charges against the producers of the film for fomenting hatred of the Muslim functionaries shown in the film. Having failed to obtain a warrant, a complaint against the film was filed with Ofcom, the public authority charged to oversee broadcasting. It took nine months before the producers were cleared of all charges.<sup>9</sup>

A British court banned a production of Aristophanes’ *Lysistrata*, in which the stage setting depicted Paradise according to Muslim beliefs. But not all the bans have had to do with Islam. In 2004, the drama, *Bezhti* [Shame], which describes oppression of Women among Sikhs, was stricken from the repertoire of a Birmingham Theatre after threats.<sup>10</sup>

Similar instances of self-censorship practised by institutions have occurred in other countries, as well: Deutsche Oper in Berlin stopped a production of Mozart’s *Idomenéo* because the set included severed heads of Jesus, Buddha, Poseidon and Mohamed. In 2007, the American publishing firm Random House stopped the publication of a novel, ‘The Jewel of Medina’, by Sherry Jones, an American journalist. The main character in the novel is Aisha, youngest wife of Mohamed. Random House was well into the production process when Islamic scholars objected to its content, saying it treated the wife of the Prophet as a sex object. One of them, Denise Spellberg at the University of Texas in Austin called it “a declaration of war” and “national security issue”.

After Random House’ retreat from the field, Martin Rynja, a British publisher, took over the contract. Rynja’s home was arsoned in September 2008. The publication of the novel in Britain has been postponed. It has, until now, been published in the U.S (by Beaufort Books), Germany, Denmark, Serbia, Italy and Sweden, with no repercussion so far.<sup>11</sup>

## Choice of Creed as an Individual Right

For decades, social anthropologists have proclaimed 'human cultures', irrespective of their content, to be intrinsically equal in value, as entities to be studied and understood holistically. This view, together with a prevalent philosophical relativism, lays the foundation for multiculturalism as an ideology. It sets limits for political, intellectual and aesthetic discussion and justifies encroachments on freedom of expression with arguments about cultural diversity and anti-imperialism. Christianity, the predominant religion in the West, is still fair game for critical inquiry, but a questioning attitude toward viewpoints that present themselves as representing non-Western creeds such as Islam is branded as racist.

Cultural relativism elevates the idea of unconditional solidarity with 'The Other' to the position of a dogma. Ayan Hirsi Ali, a former Muslim and outspoken feminist who has lived in Holland, has been dismissed by Islamists as an 'Enlightenment fundamentalist'. When she and other dissidents assert fundamental democratic principles like gender equality and the freedom to choose one's religious beliefs or sexual preferences without reprisals (both capital offenses in several Islamic countries), the bulk of support in Holland has come from the political Right rather than the Left.

Hirsi Ali has chosen to leave Holland. She lives under threat to her life and has police protection. The Islamists' main accusation is that Ayan Hirsi Ali wrote the screenplay for the film on religion-based oppression of women that provoked a Muslim to murder the film's producer, Theo van Gogh. Compared to the international solidarity that Rushdie has elicited, Hirsi Ali has so far been met with cool indifference.

Rather than guarding equality between cultures, the notion that one should not be free to criticize aspects of Islam on the same terms as one may criticize other religious tenets implies discrimination. We have to be able to make a distinction between the intellectual content of a religion, its dogma and articles of faith, and upholding a believers' civil rights and human dignity.

Fundamentalists strive to enforce a biological definition of religious affiliation. Ethnicity and nationality are used as arguments against choice of creed as an individual right. The confusion of a religion with its adherents lends legitimacy to sanctions against those who choose to leave the flock to which they were born.

The cultural relativistic attitude interacts with a political process on an international plane. The Organization of the Islamic Conference (OIC), consisting of 57 Islamic countries in which Saudi Arabia wields considerable influence, has lobbied several UN organs quite successfully. In April 2007, the newly constituted UN Human Rights Council passed a resolution combatting "defamation of religion". The recommendation was subsequently confirmed and sharpened in a resolution from the UN Third Committee (on social, humanitarian and cultural issues) in late 2008. It was adopted by the Human Rights Council on March 26, 2009 with a vote of 23 states in favour and 11 against, with 13 ab-

stentions. More than 200 NGO's, several of them with a religious background, have signed a joint statement in protest. The UN action on the OIC initiative risks cementing the misconception that religious critique is a phenomenon inherently alien to the Muslim faith.<sup>12</sup>

In a conflict over caricatures of Mohamed published in the Danish newspaper, *Jyllands-Posten*, in 2005, a small group of self-proclaimed Muslim representatives in Denmark played into the hands of the Egyptian government, which was under severe pressure from religious groups. The controversy thereby assumed international proportions. The newspaper's motives for printing the cartoons got lost in the turmoil: the caricatures were commissioned after the author of a children's book on Islam had been unable to find an illustrator who was willing to depict the Prophet.

In the book entitled *Adskillelsens politik* [The Politics of Segregation], which is a polemic against both cultural relativism and the brand of right-wing populism that exploits anti-Islamic prejudice, authors Jens-Naftin Eriksen and Frederik Stjernfelt bring up an ironic fact, namely, that *Jyllands-Posten's* opposite pole in the Danish caricature conflict, *Politiken*, had months before the controversy erupted published even more provocative satirical drawings of Mohamed without arousing any controversy whatsoever<sup>13</sup>. The issue, eventually, lost some of its sting. When *Jyllands-Posten* – as a gesture of solidarity with the artist of the drawing depicting Mohammed with a bomb-shaped turban, who lives under threat – printed the caricatures again in 2008, sixteen Danish newspapers published them simultaneously.

To my mind, citizen actions of this kind are what is needed to change the present tide of accommodation. Freedom of speech established at the national level was the result of democracy action, either by founding an independent state as in eighteenth-century USA, or by changing the concept of state from oligarchy to democracy, as in twentieth-century Europe. John Stuart Mill's classic text *On Liberty* was a call for action among his compatriots to change the established British system of rights. Rather than appealing to state power, Mill argued for a "strong barrier of moral conviction" to safeguard freedom of thought and expression.

This concept is not intrinsically absent from the Muslim world. The notion that critical artistic renderings of Islam are, and have been throughout Islamic history, unacceptable, is false. From its start, the Rushdie affair aroused broad discussion in the Islamic world of where the line should be drawn on issues relating to religion. Attacks on *The Satanic Verses* dominated the debate, but several renowned intellectuals defended its publication. In his book, *Dhaniyat-al-tabrim* [The tabu mentality] published in 1992, Rushdie's chief advocate in the Muslim world, the Syrian philosopher Sadiq J. al-Azm, critically analyzed the arguments raised to date against Rushdie's work in the Arab world. He also noted that rather few of Rushdie's critics had taken the trouble to read *The Satanic Verses*.<sup>14</sup>

A core argument among Western critics of Rushdie has been that, for moral reasons, he should either have dealt more delicately with the themes he raised,

or avoided them altogether. Living in a globalised setting, where people of all faiths are living next door to each other, the argument goes, we have to be aware of religious sensibilities as a feature of neighbourly consideration.

Religions make rival claims on crucial existential issues. Life, honesty, truth and their opposites are values at the core of human existence regardless of background and belief. Dignified human existence means that we have to agree on the right to disagree and be free to express our disagreement regardless of belief.

From my personal perspective, I will oppose any system of thought, religious or mundane, which negates full and equal rights in relation to gender, race or sexual orientation. As Rushdie put it recently, how can we have satire worth the name, that does not offend. Satire and mockery which will be felt as an insult by people who support such values are an intrinsic part of any struggle to change attitudes. Needless to say, my opponents should also be equally free to use insult and irony in their opposition to my values. The disturbance of complacency and the shaking of faith are an intrinsic part of democracy. Symbols and metaphors, the products of millenia of religious thinking, are the public property of mankind, and every individual has the right to use them as she or he likes. The great tales of religion are too important to be left closeted by priestly feelings.

Sadiq J. al-Azm has remained a steadfast advocate of such values throughout the decade of the *fatwa* and since. He took part in the final meeting of the Rushdie Committees in Oslo in 1998.<sup>15</sup> His view, which he first set out in a book-length essay, 'The Importance of Being Earnest about Salman Rushdie', is that *The Satanic Verses* will one day be recognized for having broken new ground for secular, modernistic literature in the Muslim world. There, he also reminds us that, as late as 1933 in the USA and 1936 in Great Britain, James Joyce's *Ulysses* was banned as blasphemous, obscene and subversive. In the modern world, the speculative juggling of ideas through the use of fantasy, irony and poetry in words and pictures is a crucial aspect of human dignity.<sup>16</sup>

I am convinced that Al-Azm's estimation of a breakthrough of such values in the Islamic world is correct, in the long term. But universal emancipation is a long haul. In the decade since Al-Azm made his prediction, censorship and self-censorship of the arts in relation to Islam (and other religions, for that matter) has grown stronger. Who these days would dare publish, or maybe even write, a novel in the spirit of *The Satanic Verses*?

Nonetheless, on one point there is immediate progress to be made. The Ayatollah's *fatwa* has managed to truncate the spectrum of perspectives from which *The Satanic Verses* has been considered. The first literary work that, unfettered by deference to religious canon, mixes Eastern and Western mythology is strangely absent from aesthetic discussions. To date, recognition of the revolutionary force in Rushdie's novel has been inhibited by the *fatwa* and the events in its wake. It is high time we began to read *The Satanic Verses* as a work of art, freed from the political barlast imposed upon it by the strange alliance of religious potentates and cultural relativists.

## Notes

1. *New York Times*, Dec. 12, 1991.
2. Carmel Bedford (ed.) 'Fiction, Fact and the Fatwa. The Rushdie Defence Campaign', Article 19, London, 2000, p. 298.
3. *Ibid*, p. 135.
4. *Ibid*, p. 1.
5. *The Sunday Times*, February 1, 2009. Kenan Malik's book *The Rushdie Affair and its Legacy* has been published by Atlantic on April 2.
6. For the latest commentary by John le Carré on his position vs Rushdie, see *The Sunday Times*, September 14, 2008.
7. Carmel Bedford (ed.) 'Fiction, Fact and the Fatwa. The Rushdie Defence Campaign', Article 19, London, 2000, p. 76.
8. *The Guardian*, Feb. 17, 2009.
9. *The Times*, Nov. 20, 2007.
10. Jens-Martin Eriksen & Frederik Stjernfelt: *Adskillelsens politik. Multikulturalisme ideologi og virkelighed*. Lindhardt og Ringhof, Copenhagen 2008, p.396.
11. *The Sunday Times*, September 28 and October 5, 2008.
12. UN Watch, Joint NGO Statement on Danger of U.N. Defamation of Religions Campaign. Jens-Martin Eriksen & Frederik Stjernfelt: *Adskillelsens politik. Multikulturalisme ideologi og virkelighed*. Lindhardt og Ringhof, Copenhagen 2008, p.262, 423, 427.
13. *Ibid*, p. 256.
14. Hanna Ziadeh. *Den sataniske treenighed: Religion sex og politik*, in Lars Erslev Andersen & Jakob Skovgaard-Petersen (ed.) *Satanisk, gudommeligt og såre menneskeligt. Rushdiesagen ti år efter Khomeinis dødsdom*. Gyldendal, Copenhagen 1999.
15. Carmel Bedford, (ed.) 'Fiction, Fact and the Fatwa. The Rushdie Defence Campaign', Article 19, London, 2000, p. 302.
16. Sadiq J. al-Azm: *The Importance of being Earnest about Salman Rushdie*. Hamburg, Die Welt des Islams, Band XXXI 1, 1991. E.J. Brill, P.O. Box 9000, 2300 Leiden, The Netherlands. Published in Swedish as: *Upplysning är inte upplösning. Rabelais, Joyce, Rushdie och den stridsglada modernismen*. Svenska Rushdiekommittén, Stockholm 1995.

# Internet – A Challenge to Arab Regimes’ Control of Information

## *Yemen as a Case Study*

Walid Al-Saqaf

Arab governments’ war on the Internet is merely part of their war on freedom of expression. Here we do not stand impartial. We advocate freedom of expression and thus we are strong defenders of the internet, *Gamal Eid* (ANHRI, 2006)

In a recent report entitled *CPJ’s 2008 prison census: Online and in jail*, the New York-based ‘Committee to Protect Journalists’ said that for the first time, “*more Internet journalists are jailed worldwide today than journalists working in any other medium*” (CPJ, 2008). This, the CPJ believes, is a direct reflection of the Internet’s influence in providing a space for online journalism and commentary.

However, this finding was not the first sign that the Internet is being perceived by governments as a threat to their control of information. The CPJ’s revelation came on the heels of another finding by the Open Net Initiative<sup>1</sup> (ONI). Based on its research on website filtering practiced by many states across the globe, ONI found that the increase in Internet censorship worldwide has reached an alarming rate (EDRI, 2008).

When it comes to which regions in the world are suffering from Internet censorship the most, the Middle East and North Africa (MENA) stand out and rank as one of the most repressive web environments in the world (ONI, 2008). Reporters without Borders seem to agree with this bleak assessment, as it placed four Arab countries<sup>2</sup> among the ‘13 enemies of the Internet’ (RSF, 2006).

Putting these findings together, it becomes clear that we need to study the phenomenon of Internet censorship to understand why some governments are reacting quite aggressively against this new medium and how this is being played out in the Arab world.

This essay attempts to cover some aspects of this phenomenon by giving a general overview of the situation in the Arab region as well as by presenting a case study of Yemen, an Arab state that routinely practices Internet censorship.

Although Yemen may have its own unique status, I believe that most other Arab regimes share similar approaches and attitudes toward the new com-

munication medium, making the case of Yemen relevant and to some degree representative<sup>3</sup> of the region.

The present essay also reflects some of the findings of research I carried out on Yemeni news websites. That research was concluded with a final dissertation submitted in early 2008 toward my Master's Degree in Global Journalism at Örebro University in Sweden<sup>4</sup>.

## Background on Media Freedom in the Arab World

In terms of freedom of expression, Arab regimes are among the most repressive in the world (Miller, 2001). A quick glance at Freedom House's annual Global Survey of Media Independence report for 2007 reveals that the region ranking at the bottom in terms of freedom of expression is MENA<sup>5</sup>, where 96% of the population live in countries that are labeled as 'not free', while only one percent live in 'free' countries. However, that 'free' country is Israel, which is not an Arab country. In other words, based on the report none of the Arab countries were considered 'free', while only two countries, namely Kuwait and Lebanon, were labeled as 'partially free' (Freedom House, 2007).

Generally, media in the region remain constrained by extremely restrictive legal environments, in which laws concerning libel and defamation, the insult of monarchs and public figures, and emergency legislation continue to hamper the ability of journalists to write freely. (Karlekar, 2005)

Similar reports by other international advocacy groups tracking freedom of expression have shown the dismal performance of Arab countries when it comes to respecting freedom of expression and other democratic practices<sup>6</sup>.

In general, Arab regimes have been systematically curtailing freedom of expression in print and broadcast media for decades. Press and publishing laws have articles carrying severe penalties ranging from fines to imprisonment and even closure of newspapers. Furthermore, state-run electronic and other media have been used to shape a collective ethno-national identity based on the postcolonial geographical boundaries of each Arab nation-state (Rinnawi, 2002: 3), which has, in turn, limited the level of critical reporting and commentary.

With regard to broadcast media, out of the 22 Arab countries, only six allow private companies to establish some form of broadcasting (station) such as FM radios or satellite TV channels. So far, those countries are Tunisia, Egypt, Lebanon, Bahrain, Kuwait and Oman (AAG, 2007). Most of them, however, are known to have extremely restrictive media laws, meaning that although there could be private media, their margin of freedom is extremely limited. I believe that such legal restrictions have largely rendered the private media ineffective in enhancing the level of freedom of expression, because they remain under the direct watch of regimes that could easily close them down. One notable

example is (the case of) Murr TV in Lebanon, which was closed for violating Article 68 of the Lebanese election law (Ahmed, 2002).

Allowing private media to operate in such restrictive environments may in fact have more negative than positive impact, as they may be used to boost the image of the regime as tolerant, while simultaneously allowing the government to control the content of those media directly through laws or indirectly through economic means: stopping advertising, discouraging advertisers, etc. A good example is Tunisia, where governmental control of public and private media is quite blatant and may be even more obvious during election campaigns (El Fegieri, 2006).

### Internet as is Breathing Space

For decades, Arab citizens used to rely on print and broadcast media as their main source of information. But with the introduction of the Internet in the 1990s, the governments' tight grip on information started to loosen because the Internet allowed the public to express critical opinions that were often not allowed to appear in newspapers, television, and radio and even via international Arab satellite channels, which often allowed the broadcasting of criticism of Arab regimes (Rinnawi, 2002: 1).

Although use of the Internet was initially limited due to associated high costs and the need for computer literacy, as the years went by, prices went down and computers with Internet connections became more accessible, allowing many more citizens to enjoy this new medium.

Looking back to the time when Arab governments initially boasted about their decisions to allow public access to the Internet, I think those governments may have underestimated the challenge they could face when attempting to control and regulate it. Perhaps they did not have an adequate understanding of how the Internet functions and could be used, or abused for that matter.

Nonetheless, the emergence of the Internet was inevitable even for the most repressive regimes in the region. A good example of an Arab country that tried to resist calls to allow the public free access to the Internet is Syria. Until 1996 and during the late years of Hafez Al-Assad's rule, tens of thousands of Syrians had to access the Internet by dialing internationally to Turkey, Jordan or Lebanon. Not too long thereafter, the Syrian government surrendered to the strong trends and allowed the Internet – although with heavy restrictions – to be accessed through a government-owned Internet Service Provider (ISP) (Askhita, 2000). Nonetheless, Syria remains one of the 'enemies of the Internet' based on Reporters without Borders' assessment. (RSF, 2006)

The introduction of the Internet and other means of Information Communication Technologies, for that matter, resulted in unprecedented opportunities for Arab citizens to access and share information and opinions. Most importantly, the Internet had something that the conventional mass media systems did not: truly interactive communication (Newhagen and Rafaeli, 1996).

Inherent to the Internet is that it promotes the exchange of information and facilitates cross-boundary communication regardless of geographical location. Opposition politicians and opinion makers could use the Internet to generate political pressure, owing to its essentially democratic nature, which fosters populist participation (Seib, 2007). And given that governments cannot fully control what is published online, the Internet became a useful tool for citizens to express their opinions and voice their concerns openly, without the need to channel their message through the conventional and restricted mass media.

The availability and accessibility of information, as well as the ability to create and disseminate information anonymously, has led to a sense of freedom among many Arab Internet users. (Noman and Zarwan, 2008)

Apart from its many business and informational advantages over the mass media, the Internet was particularly useful for Arab citizens because it was a refuge, an escape from the rigid and restrictive boundaries limiting what they would find in the mainstream media. It was hence an arena where Arabs could participate freely in discussions of interest to them, whether they were local, national or international (El Gody, 2007: 230).

This may help explain the remarkable growth rate of the past decade in usage of the Internet in the Arab world. The number of users in the Middle East grew by over 1,175% in the past eight years alone (Internet World Stats, 2008). The overall average Internet penetration ratio for countries in the Middle East stands at 21.3% as of June 2008. However, there are wide gaps in Internet penetration levels among the different Arab countries. The United Arab Emirates enjoys the highest penetration ratio of 49.8%, while Yemen, which is the poorest country in the Arabian Peninsula, has a penetration ratio of merely 1.4% (*ibid.*).

## Censorship and Circumvention Technologies

The fact that the Internet is not controlled or monitored by any specific authority or state made it difficult for Arab regimes to control the flow and dissemination of information. The sense that governments are no longer able to control what people read and what websites publish may have been behind the desperate efforts of some Arab states to regulate the Internet by setting up new laws<sup>7</sup>.

In another attempt to compensate for their inability to fully control the flow of information on the Internet, some governments filed lawsuits, prosecuted and imprisoned bloggers such as Abdul Kareem Nabeel Suleiman, an Egyptian blogger who is currently serving a four-year jail sentence issued against him for content he posted on his blog<sup>8</sup> (Kamal and Palmer, 2007). Other types of intimidation, harassments and threats were also reported in countries such as Tunisia, Bahrain, United Arab Emirates, Yemen and Saudi Arabia<sup>9</sup>.

Another prominent and consistent approach found in Arab countries, however, is website censorship. Governments are able to restrict which websites

can be accessed and which are blocked because Internet access is granted by governmentally owned or monitored Internet Service Providers (ISPs). To obtain an Internet connection, Arab citizens usually apply for subscription at a company that is either directly owned by the state or licensed and under the jurisdiction of the state<sup>10</sup>. Applicants are required to sign documents pledging not to carry out activities that contradict the social, cultural, political, religious, or economic values of the state (ONI, 2008).

Although most ISPs often dynamically block what is deemed to be culturally offensive content such as pornography, the most devastating impact on freedom of expression occurs when websites are systematically targeted for their critical political content. In fact, the MENA region has been labeled as having “*extensive social filtering regimes and a growing penchant for targeting political speech.*” (Deibert et al., 2008: 153)

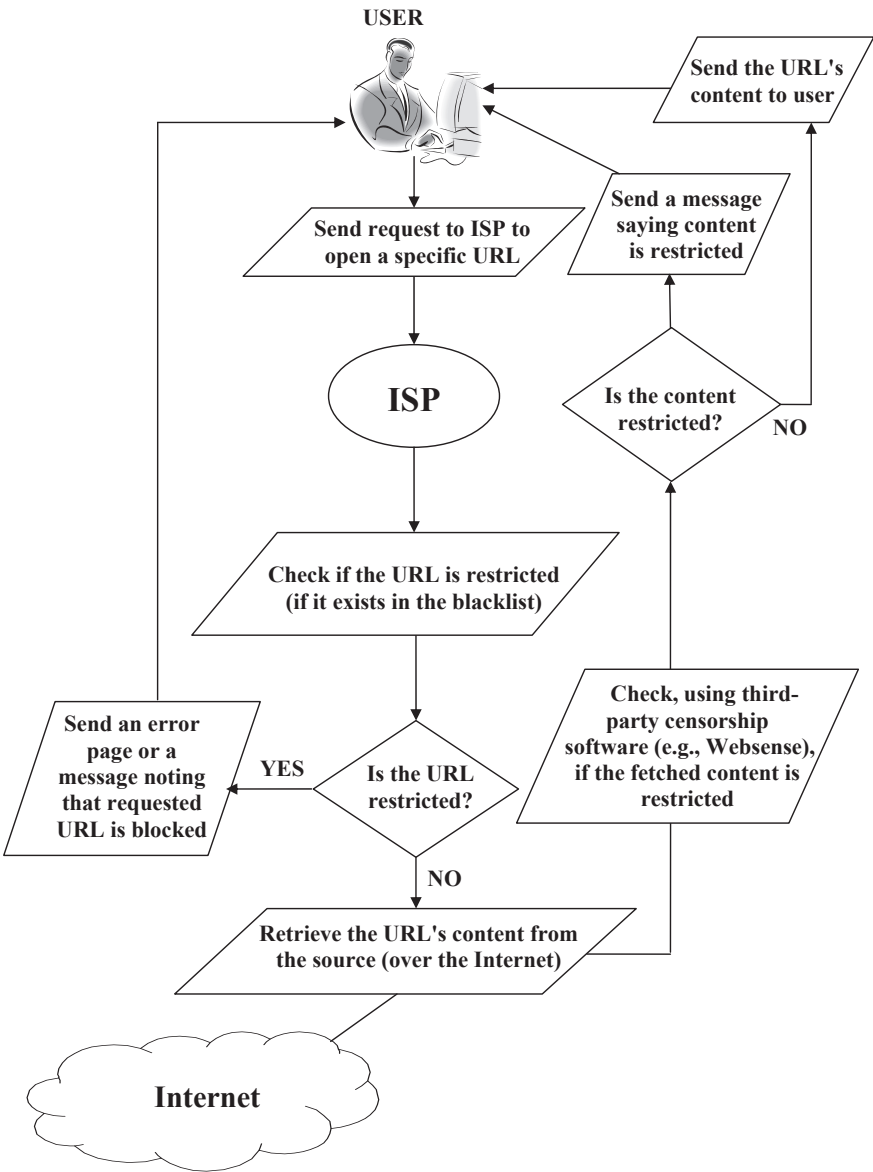
The level of censorship varies from one country to another. Saudi Arabia censors more than 400,000 websites including religious, political and pornographic sites (RSF, 2008). Meanwhile, other countries such as Bahrain focus more on political and religious websites, while practicing only token filtering of pornographic content (Johnathan, Zittrain; John, Palfrey, 2008: 46). However, not all Arab countries practice censorship. Egypt, for example, does not block websites, but is still considered by Reporters without Borders as one of the ‘enemies of the Internet’ due to the frequent prosecutions and intimidations targeting online journalists and bloggers<sup>11</sup> (RSF, 2006).

Technically, one method of blocking a website involves checking whether the website is part of a blacklist stored in the ISP’s database, and if it is confirmed to be one of those websites, instead of fetching the website from its source, the ISP sends either a message noting that the website is banned or a false error message. One scenario demonstrating how a URL<sup>12</sup> could be processed is reflected in the flowchart in Figure 1. The diagram does not reflect an actual process taking place in a specific country or region, as access to such sensitive information – including blocked websites – is not in the public domain. However, it does illustrate how the ISP is effectively in control of what users receive and able to keep a log of all requests.

There are two different methods of checking a URL. One method is called URL checking, through which the URL is compared to the blacklist and is not retrieved if it is on the list. Similarly, there is also keyword checking, which is used to check whether a URL contains specific forbidden words, and finally, the IP<sup>13</sup> address blocking method.

However, even if the URL is not blacklisted or found to contain no forbidden words, this is no guarantee that the requested URL will be delivered to the user, as there is a second level filtering mechanism. This level is usually managed by third-party software such as the Websense<sup>14</sup> censorship program, which is mostly used to filter content not suitable for minors. On the national level, governments in conservative Arab countries could use such software to filter out adult content. In 2001, Saudi Arabia approached several software developers to seek a company that could help filter inappropriate content for its

**Figure 1.** One Scenario Reflecting on How an ISP Could Practice Censorship of a URL



half million Internet users, and apparently there was fierce competition among American companies to win the deal (Lee, 2001).

As a reaction to growing censorship around the world, circumvention solutions started to emerge in the spirit of maintaining accessibility to banned content as well as promoting anonymity and privacy. Among the pioneering

efforts promoting circumvention tools was Citizen Lab, which is an interdisciplinary research and development lab based in the University of Toronto's Munk Centre for International Studies<sup>15</sup>.

Citizen Lab produced or helped produce a number of initiatives that allow users to circumvent the ban to a large extent. Among the most popular programs developed is Psiphon<sup>16</sup>, which is a web-based proxy that allows users to retrieve contents from banned websites through a third party. Among the other prominent tools is Tor<sup>17</sup>, which is a system that allows users to communicate and connect to the Internet anonymously.

There are several other efforts by individuals or institutions to circumvent online censorship. However, many Arab ISPs have been active in censoring websites that provide circumvention solutions, including web-based proxies and the websites of Psiphon and Tor.

### Yemen as a Case Study

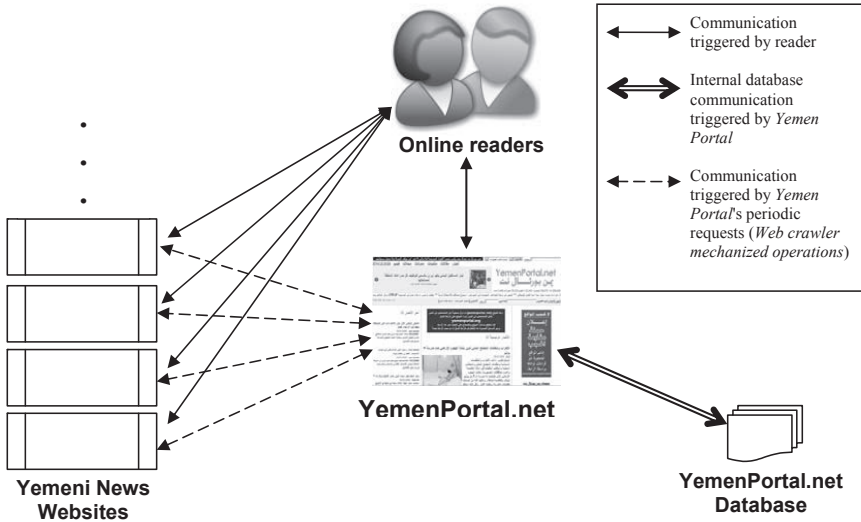
Given that the print media in Yemen are highly restricted by stringent and repressive laws, and given that the broadcast media remain under tight government monopoly and control, it was expected that the Internet might have become a breathing space for those who wish to learn about alternative views and news that would otherwise be forbidden by the Yemeni laws or to express opinions directly without censorship.

In a study I carried out in early 2008, I analyzed tens of thousands of Yemeni news articles posted on dozens of Yemeni websites. The study utilized a research tool that provided a vast amount of statistics on which articles were viewed most and to what politically affiliated websites they belonged. By analyzing about 50,000 articles gathered during the period June 2007 to February 2008, the study was the first of its kind to exclusively focus on Internet trends in an Arab country (Al-Saqaf, 2008: xi).

The research tool used for the study is Yemen Portal, an aggregator that dynamically collects data from about 50 news websites, which were categorized into three groups based on their political affiliation: governmental, oppositional, and independent. As shown on Figure 2, Yemen Portal fetches content from Yemeni news websites on a regular basis and reflects this content on its web pages.

It may be worth noting that even if readers were not able to access the original sources directly due to censorship or any other reason, they would be able to view and search the fetched content of those websites through Yemen Portal's own interface. Hence, Yemen Portal served as a news aggregator as well as a search engine for news on Yemen.

Just as is the case with other news aggregators, such as News Google<sup>18</sup>, no human interference was involved when Yemen Portal extracted news articles from Yemeni websites. Articles were retrieved from all indexed websites on an hourly basis and each article was stored in a secure database with an entry that contained the following data: source, title, author, date published, time retrieved,

**Figure 2.** How Yemen Portal Operates as a Search/Web Crawling Engine

associated picture's URL address, story text, comments submitted by readers, and number of article accessed. Accesses to each article were calculated based on the number of times a reader clicks on the title of that specific story<sup>19</sup>.

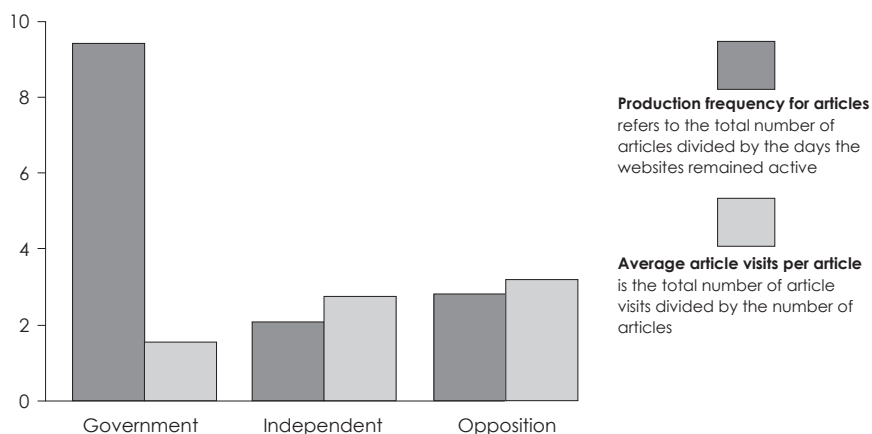
### Online Readers Want Critical Content

The first major result the study revealed was that, on average, oppositional content, i.e., articles from opposition websites, received the highest number of article accesses. On the other hand, governmental online content received the lowest readership levels on average, while independent websites were right in the middle. This came about despite the fact that governmental websites published many more articles per website than did the independent and opposition websites combined. Figure 3 illustrates these findings.

This result certainly indicates that readers of Yemen Portal were looking for content critical of the government. One possible explanation is that the Internet is the only medium that contained content that is too critical to be published in a newspaper or to be broadcast. In conclusion, I noted that many Yemenis do not seem to spend money on and subscribe to the Internet or pay fees at Internet cafes only to search for the same information that is available on the broadcast media for free.

During my study, I carried out interviews with several representatives of oppositional, independent and governmental websites. During the interviews, there was an overall agreement that readers want oppositional content. Nabeel Al-Sufi, the founder and editor-in-chief of NewsYemen.net, the first independ-

**Figure 3.** Production Frequency and Average Article Visits for Websites Based on Political Affiliation



ent news website, explicitly noted that “*the reader in Yemen is an oppositional reader or a reader with an oppositional mood*” (Al-Saqaf, 2008: 96). This very characteristic gives non-governmental websites an edge and limits governmental websites’ ability to compete strongly for online readers.

Furthermore, the interactive nature of the Internet opened more doors for accessing and sharing opinions that often are prevented from reaching the public via any other media. The fact that most independent websites allowed reader comments to be published on their websites boosted the interactivity level and created a bond with groups of readers. Meanwhile, governmental websites remain mostly closed to readers’ comments. Interviewees representing governmental websites admitted their inability to compete with independent and opposition sources.

### Government Reacts, Censors Websites

In perhaps one of the major political decisions taken by the Yemeni authorities concerning the Internet, the government-run ISP began launching successive censorship campaigns in early 2008.

Among the victims of those campaigns was Yemen Portal itself, which had started to gain national popularity as the only news aggregator and search engine of its kind in Yemen. On January 19, 2008, Yemen Portal’s domain was blocked from access within Yemen through the national Internet Service Provider (Yemen Net), which is a purely governmental company operated and controlled by the ministry of telecommunication.

The Yemeni government’s act in censoring the Internet, despite the fact that the country has a mere 1.4% Internet penetration level (Internet World Stats, 2008), indicates that the Internet’s potential threats to the governmental control

of information flows may have been taken more seriously by the regime, which may predict a surge of this new medium in terms of its power and spread.

The ban also included several news websites that were reporting many stories covering government scandals, news on the wars taking place in the north<sup>20</sup> and the increasingly uneasy situation in the south of the country<sup>21</sup>.

Technically speaking, the act of banning access to a specific website deprives any Internet user inside Yemen from accessing that website in the normal way, which involves opening a website by entering its URL. When attempting to open a banned website, the user often comes to a page indicating an error; this may be done intentionally to make the user believe that the website did not open because of a website-related error and not because of an ISP-imposed ban.

To confront this ban, Yemen Portal – with the help of a number of Yemeni news websites – launched an anti-censorship campaign of which the first stage was to establish a page on Yemen Portal dedicated to the content of all banned websites. Access to that page was possible through a number of mirror websites. The intention was to neutralize the effect the ban may have had<sup>22</sup>. The second stage was to establish a web-based proxy, which is a tool designed to allow users accessing Yemen Portal to open banned websites. The third stage was in the development of ‘Access Yemen Portal’, which is a special plug-in made for Mozilla Firefox users, allowing them to bypass the ban without worrying about which mirror website they should go to.

Although the anti-censorship campaign helped in reducing the negative impact of website censorship and in promoting the cause of freedom of expression online in Yemen, it does not constitute the ultimate solution to the problem, which can only be remedied by ending censorship altogether.

## The Road Ahead

As discussed in this essay, inherent to the Internet is the promise of opportunities through expanded access to information and freedom of expression. Along with this promise comes a risk associated with governmental retaliation using different means, including censorship. Efforts to overcome censorship have had varying success, and Yemen’s case demonstrates efforts to overcome this challenge through the use of technological tools.

However, the road ahead remains full of obstacles and difficulties, particularly with the increasing resilience of Arab governments who may attempt to invest in censorship technologies and hire software companies to apply more sophisticated means of censorship. Whether they will succeed remains a major question, but for now, the outlook is promising for more freedom of expression and information accessibility on the Net. Part of my optimism stems from the fact that the circumvention tool I created for YemenPortal.net remains effective nine months after it was created. Today, hundreds of users are able to access blocked content using this tool. Furthermore, there are many circumvention tools available today that allow users to access filtered websites for free or for

a modest fee. In my opinion, this largely eliminates the impact censorship has in blocking information from the public. Governments, however, may try to employ new strategies and methods in their attempts to minimize the effectiveness of those circumvention tools. How successful such efforts to censor information may be remains an open question.

Finally, I would like to stress the importance of promoting circumvention technologies and encouraging collaboration between researchers and innovators to enhance freedom of expression online, especially as Internet usage, particularly in developing countries, is still growing and will largely shape the way information is received and exchanged for the next generations.

## Notes

1. The Open Net Initiative is a collaborative partnership between the Berkman Center for Internet and Society at Harvard Law School, and Cambridge University, Oxford University and the University of Toronto. It primarily investigates and analyzes Internet censorship around the world.
2. Those countries were: Egypt, Saudi Arabia, Syria, and Tunisia. The other enemies of the Internet are Belarus, Burma, China, Cuba, Iran, North Korea, Turkmenistan, Uzbekistan and Vietnam.
3. From field visits I made to Oman, Bahrain, Qatar and the United Arab Emirates, I have sensed that similarities do prevail over differences when comparing the status of the motives and techniques used to filter websites. Some in-depth research on the different Arab countries had already been done by ONI.
4. My Master's thesis can be accessed online at <http://magj.se>
5. According to Freedom House, included in the Middle East and North Africa are all Arab countries except Sudan. However, the MENA region also includes two non-Arab countries, namely Iran and Israel. Nonetheless, I believe that the MENA representation comes quite close to that for the Arab world.
6. Reports issued by Reporters without Borders, Article 19 and Committee to Protect Journalists, among others, have constantly noted the weak performance of Arab countries in terms of freedom of expression.
7. Bahrain is an example of an Arab state that has a cyber law regulating the Internet and requiring the registration and licensing of websites run from within the country.
8. The blog of Kareem has not been updated since August 2008. It can be accessed at: <http://karam903.blogspot.com/>
9. A record of the main incidents and legal cases targeting online journalists and bloggers can be found on Reporter's without Border's website: <http://rsf.org>
10. Some Arab countries allowed private Internet service providers to emerge (such as Jordan and Egypt), while most others continue to monopolize the service.
11. Although censorship is not currently practiced in Egypt, a Council of State administrative court ruled in 2007 that the authorities could block, suspend or close down any website that could be seen as a threat to "national security". There is a possibility that this could open the way for systematic online censorship.
12. URL stands for Uniform Resource Locator, which is a standard address for any file existing on the World Wide Web. All pictures retrieved were shrunk to thumbnail size and stored locally on YemenPortal.net's server in the folder <http://yemenportal.net/images>.
13. IP stands for Internet Protocol. Each domain is translated into an IP, which consists of four numbers each ranging from 0 to 255 (e.g., 132.0.94.244).
14. Websense © is one of the most popular software companies specialized in web security and parental content control.

15. Citizen Lab: [http:// www.citizenlab.org](http://www.citizenlab.org)
16. Psiphon: <http://psiphon.ca>
17. Tor: <http://www.torproject.org>
18. News Google is arguably the world's most popular online news aggregator. It can be accessed at: <http://news.google.com>
19. Duplicate clicks by the same reader are only counted once in any given time.
20. The Yemeni government tried to suppress any coverage of the war between the military and rebel Shiite forces in the northern governorate of Saadah.
21. Southern former military leaders carried out rallies promoting the secession of the former South Yemen from the Republic of Yemen.
22. The URL for the campaign is <http://yemenportal.net/blocked/yemen>.

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## Pressure on Press Freedom

### *The Current Religious War on Freedom of Expression*

Frederik Stjernfelt

Press freedom and freedom of expression have entered world headlines to an extent unpredictable only ten years ago. The reason, of course, is the increasing tension between old standards of enlightenment, on the one hand, and aggressive religion, on the other. Or is it? Many countries and even single political parties in the West seem split on this issue: Is it really the case that religion is challenging freedom of expression to an extent not seen since the bourgeois revolutions of the mid-19<sup>th</sup> century – or is it instead the case that freedom of expression has overstepped its limits and responsibilities, thereby defaming and insulting religious sensibilities in a novel, unnecessary, and even cruel way?

In the Anglo-Saxon world, the overall tendency is to opt for the latter answer; in continental Europe, the tendency is rather to settle for the former. Measured on the left-right axis, there is probably a weak tendency for the left to opt with the Anglo-Saxons, while the right goes with the continentals – but there are many countervoices on both sides that blur this all too simple picture. In Scandinavia, the issue has gained notoriety through the “Mohammed Crisis” or “Cartoon Crisis” that originated in Denmark, drew Norway into its wake, and left it to Sweden to follow up with its own similar crisis surrounding artist Lars Vilks’ drawings of Mohammed as a roundabout dog.

The discussion in Denmark has been fierce. The leading center-left daily *Politiken* has taken a very definitive stance on the issue, representing much of the Danish left wing in attacking the publication of the drawings by the center-right *Jyllands-Posten* (which, ironically, is part of the same large Danish press conglomerate as *Politiken* itself). *Politiken*’s main argument has been nicknamed “Press Freedom BUT”. The argument runs as follows: After an initial, ritual affirmation of press freedom, you quickly go on to assert that such freedom must always be accompanied by responsibility and respect, granting you do not say anything that could insult minorities and religions – the implication being that Danish Muslims form a vulnerable minority that can make demands for special protections.

The bottom line of this argument is that the whole affair has little to do with press freedom, which is not being attacked as such. Its principles are be-

ing upheld – instead the argument claims that the important issue is keeping a proper “tone” in the public debate and current Danish politics, something that the center-right-wing Danish majority government, with its reliance on the right-wing nationalist “Danish People’s Party”, is thought not to respect. Ironically, this explanation seems just as narrow-minded in its exclusive national focus as do the arguments used by the nationalist party mentioned above. By construing the affair as primarily an internal Danish event – with a Danish root cause and subsequent international effects that are only secondary results of a basically Danish malady – the Danish daily (*Politiken*) completely shuts its eyes to the international, cosmopolitan aspects of the crisis. This is evident not only based on the fact that radical Danish imams from the Danish section of the Muslim Brotherhood “Islamisk Trossamfund” (Islamic Society of Faith) were instrumental in igniting the crisis by skillfully using their international contact network in the Middle East – but even more so based on the fact that the Danish event is far from unique. Ever since the Rushdie affair in the late 1980s, the Islamist pressure on press freedom has been mounting – along with a growing, broader religious pressure also involving groups claiming to protect Christianity, Hinduism, Sikhism, Judaism, etc. Hardly a week passes without an art exhibition being shut down, a death threat being received by an outspoken Muslim apostate, a feature film being boycotted, a publishing house being set on fire – or any other religious act aimed at curtailing free speech.

Two serious examples may be mentioned to substantiate this claim. The Organization of the Islamic Conference (OIC) was founded in the 1960s to coordinate the policies of its now 57 Muslim member countries. Since the late 1990s, a considerable radicalization has taken place in this organization, evident from the increasingly far-reaching claims found in the records of its biannual meetings. Around 1999, the OIC decided to coordinate Muslim voting in international organizations to collaborate in fending off NGO criticism of human rights violations and to work against so-called “defamation of religions”, the aim being to set up an international legal system for prohibiting such defamation. It goes without saying that legally restricting such “defamation” is impossible without curtailing freedom of the press. The result has been that, during the past decade, with each year the UN Human Rights Commission (and its successor the Human Rights Council) has supported a resolution more radical than the year before, always attacking free speech. This has been possible owing to the OIC’s coordinated policy and the support from non-allied countries – of course in opposition to Western votes in the Council. In 2007, the UNHRC demanded of all UN member countries that they adopt legislation explicitly banning “defamation of religions” – the main example mentioned always being so-called “islamophobia”.

The constant pressure in such international bodies has without doubt strongly contributed to the spread of the concept “islamophobia” in an attempt to criminalize criticism of Islam and of religion in general. In 2008, the UNHRC furthermore decided to assign the special UN rapporteur the task of examining each member country’s legislation to secure the implementation of

this truncation of freedom of speech. Given the historical fact that freedom of speech had to struggle against organized religion to gain recognition (in Holland, France, England, etc.), until it was finally given legal status in Western democracies during the 19<sup>th</sup> century, this new religious delimitation of free speech is no simple thing to admit. Naturally, the Western countries voting against this pressure in the UNHRC have not succumbed to the resolutions of the Council (at least not so far). But this implies, in any case, that the UNHRC is on its way to becoming completely delegitimized in the eyes of the Western countries (the only countries that have, by and large, adopted human rights). Thus, the effect in the West is to gradually make the Human Rights Council completely irrelevant; in other parts of the world, the effect is to make the Council, ironically enough, into an instrument that works against the implementation of human rights.

Pressure from the OIC is not only taking place in the UN, but also in other international organizations such as the EU. Furthermore, this implies support for similar political processes against free speech internally in Muslim countries – backed up by the OIC's 1990 "Cairo Declaration of Human Rights", in which free speech is explicitly allowed only to the extent that it does not offend sharia law. During the Cartoon Crisis case, one major goal of the Middle East tour of the Danish radical imams was the OIC meeting in Mecca in December 2005, just before the onset of the crisis – where the Cartoon Issue pushed all other items off of the program. The OIC's exact role in the further development of the crisis has not yet been described in detail – but it is thought-provoking to note that present at the meeting were the foreign ministers of all the countries, which only one month later did not intervene when embassies were attacked and incinerated and which tolerated if not encouraged boycotts of Danish goods.

Another example of the religious pressure against free speech took place at exactly the same time – winter 2005-6 – when there was a political attempt to severely curtail British press freedom and freedom of expression. The movement had its roots in the period just after 9-11 in 2001, when British Muslims asked the government for protection against what they perceived to be a wave of skepticism against Muslims. The Blair government drafted a law, supported by The Muslim Council of Britain along with the Anglican Church, the so-called "Religious and Racial Hatred Act" – an expansion of the earlier "Racial Hatred Act", itself part of the general "Public Order Act". The proposal was radical. Insults and defamations were criminalized, even if they were not intentional, and the frame of punishment was as extensive as seven years of imprisonment and/or a fine with no upper limit. The implication, of course, was that even a remark with no defamatory intention might be experienced otherwise by a listener and result in a long prison sentence and/or large fines for the person who made the remark. The House of Lords protested and opted for a weaker version of the law, narrowing in on direct threats, accompanied by an explicit statement protecting free speech. Moreover, a campaign against the law was led by comedian Rowan Atkinson ("Mr. Bean"), who understandably felt that his livelihood was threatened by the proposal.

The House of Commons, however, proceeded with the hard version of the legislation, and at the end of January 2006, just as the Cartoon Crisis was accelerating in the Middle East, the law was put up to the vote, with Labour having a 40-odd comfortable majority in the House. In the concluding debates, the Deputy Minister of the interior, Paul Goggins, predicted it would now be a matter of days before the printing of the now world-famous Danish drawings would be criminalized in Great Britain, and the MCB leader Sir Iqbal Sacranie, who had supported the development of the law, made it clear that with the law, the use of expressions like “Islamic terrorism” would be liable to punishment. Luckily, the “whip” in Labour’s Parliament group had not done his work properly. Twenty-one Labour back-benchers had secretly agreed to vote against the proposal, and the law was not passed by a single vote in the House of Commons. Tony Blair had been so convinced the law would pass that he had left early; had he stayed in Parliament, the votes would have been equal and his vote as PM would have been decisive. The above shows how close this radical delimitation of freedom of speech was to being introduced in one of the cradles of free expression. The failure of this law to pass shocked both Muslim and Christian clergy in Britain, and both the Muslim Council of Britain and the Anglican Church have since then pressed to have the case opened again. Most notably, the Archbishop of Canterbury Rowan Williams has, as of 2008, again demanded severe restrictions on British freedom of speech regarding religions.

Given such blatant international cases of religious pressure against free speech, it is a wonder anyone can seriously believe that the Danish Mohammed Crisis is a unique case with roots in the special cultural or political conditions prevailing in Denmark only. Rather, the Danish crisis is merely one of the more conspicuous cases among hundreds of similar smaller and larger annual cases of religious attacks against free speech. Furthermore, it is sad to note that other religions seem to be quickly picking up on the Islamist avant-garde, thus nurturing a cross-religious culture of acting offended, training a position as victims of utterances that only a few decades ago would have appeared to everybody to be safely protected by freedom of expression.

The Danish affair has conjured up a series of more detailed arguments in the Danish and international public arena, demanding limitations on freedom of speech through legal or more implicit means. Let us scrutinize some of these arguments:

### *1. Free Speech is for Attacking the Powerful Only*

On the political left, one prevailing argument has been that freedom of speech is justified because it allows attacks on powerful factions of society – but that it may not be used to criticize weak groups or minorities or, a fortiori, to publish cartoons that ridicule their beliefs. This, of course, is not part of the legal expression of freedom of speech in the Danish Constitution, which does not restrict freedom of speech to certain purposes only – so it would seem to be an interpretation of the “spirit” of this right. There are several problems with

this interpretation of free speech. One is that it ceases to be an individual right pertaining to every citizen under the constitution – instead it becomes a right ascribed to certain groups more than others, to “the powerless” rather than the “powerful”. Moreover, the argument rests on the sentimental idea that it is easy to identify who is “powerful” and who is not. As if the “powerful” always wore high hats, smoked cigars, drove expensive cars and met in fine offices downtown – in short, as if they fit the old communist caricature of a capitalist. But in a pluralist democracy, deciding who is “in power” or who misuses the power he has been entrusted with is neither easy nor straightforward. Rather, it is one of the *aims* of public debate to identify who has and misuses power in each single case – thus, it cannot immediately be determined that certain groups may be attacked and others not.

Another false premise of this idea seems to be the contention that weak or minority groups can never misuse power. This prejudice effectively protects certain groups against criticism, so that it is in bad taste to investigate, for instance, whether certain immigrant groups obstruct the human rights of some of their own members. This is also a problem because, in a pluralist democracy, most groups or organizations constitute some kind of minority. Typically, no political party holds the absolute majority, so all parties are minorities – should they then be exempt from criticism for that reason? Should only attacks on the government be permitted, because in democracies governments by definition represent the majority of the population? Hopefully, it is clear that such curtailment of free speech would severely reduce the ability of public debate to discover misuse of power in many corners of society. Rather, free speech is there to grant an open debate and to ensure each and every citizen’s ability to speak out – to ensure that all individuals and groups in society have the ability to focus on their particular interest, including attacking those “in power” whose identity as such can only be established in the course of open debate.

## 2. *Free Speech is for Insiders Only*

Another issue concerns the argument that some parties have more right to free speech than others. In Denmark, some voices claimed that what was wrong with *Jyllands-Posten*’s drawings was not the cartoons themselves, but the fact that a center-right newspaper published them – if it had been a left-wing journal, the drawings would have been acceptable. In one of the first Internet debates to spread into other media (on the German website *signandsight*), Pascal Bruckner, Timothy Garton Ash, and Ian Buruma discussed criticism of Islam, and a similar argument was presented. Bruckner held that such criticism is necessary and protected by free speech; the latter two argued that only certain figures had the right (in a more vague sense) to attack Islam. Specifically, Buruma criticized Ayaan Hirsi Ali for attacking Islam – because she was not a Muslim, she had no right to do so, and she had, a fortiori, no right to quote Voltaire, because he fought the powerful Catholic church of his time – while Hirsi Ali, according to Buruma, was only attacking a weak minority in Europe (a version of the first argument discussed above). And Buruma claimed that only Muslims

had the right to attack Islam. Here, it did not count that Hirsi Ali had been a Muslim all of her African childhood, that she joined the Muslim Brotherhood for a long radical period of her adolescence, and that she only discovered other possibilities reading British 19 C novels in Nairobi, which caused her to flee both Islam, Africa, and the marriage her family was forcing upon her. As she left Islam, she lost her rights to criticize it, according to Buruma. He prefers Islam criticism to be undertaken by moderate Muslims, while all other voices should keep silent on this issue. But where would the process of Enlightenment be if this criterion were to be generally accepted? Only Jesuits can attack the Spanish Inquisition? Only noblemen can criticize feudalism? Only Nazis can attack Nazism? This argument ends up in a paradox: Only he who is in agreement with a movement has the right to criticize it ...

3. *Free Speech is not Threatened if the State does not Consider Restricting Free Speech Laws*

The argument that the Cartoon Crisis did not have anything to do with free speech at all – but rather concerned the “tone” of the debate – was often based on the idea that no influential voices demanded revision of the free speech clause of the constitution. This argument is empirically incorrect, for the simple reason that there were indeed Danish voices claiming that free speech should be legally constrained (imams, a theology professor, etc.) as well as many international voices, including the OIC, Turkey’s president Erdogan, demanding changes in free speech legislation in the EU, and many more. But even if it were in fact the case that nobody demanded legal revisions – would the argument then be correct? Not at all.

Free speech, like other human rights, is a restriction, which the state puts on its own ability to exercise power over its citizens. The idea here is that the state is a very powerful actor and thus must be constrained so as to protect individual citizens against arbitrary misuse of power by the state. But even if it is mighty, the state is not almighty. Before the state can make laws and put restrictions upon itself, it must first gain sovereignty over its territory by means of violent control: army, police, etc. But this sovereignty can be contested from without as well as from within – this is what state security is about. And what the Cartoon Crisis reveals is that the Danish state encountered strong, alternative sources of sovereignty on its own territory. Foreign powers announced rewards for the killing of some Danish citizens, draughtsmen and editors – and citizens and inhabitants of Denmark, in connection with international networks, have been involved in planning the killing of some of the draughtsmen. When penning the Danish constitution, the founding fathers hardly considered the possibility that Danish sovereignty and free speech could be contested in this way.

Yet there is an earlier example: During the Nazi period of 1933-45, the Danish Minister of Foreign Affairs urged the Danish press not to publish anti-German cartoons – after pressure from a foreign sovereign power, namely Nazi Germany. This was, of course, the result of an alternative source of sovereignty on Danish soil, namely that of Nazi Germany – implicitly from 1933 to 1940,

explicitly from 1940 to 1945. Thus, even if no sane Danish politician would campaign for legal change of the free speech clause of the constitution, freedom of speech may indeed be endangered if alternative sources of sovereignty have the strength to act on Danish territory to threaten Danish citizens into not using their freedom of expression. And for this very reason, one of the central tenets of the Cartoon Crisis was, in fact, the pressure against free speech.

#### 4. *Free Speech Must be Restrained by Tolerance and Respect*

Doesn't this statement sound good? Wouldn't a larger measure of tolerance and respect ease tensions? Such sweet-sounding claims are, in fact, ripe with terminological and philosophical problems. Tolerance concerns ways of coping with what you dislike – without prohibiting it. Thus, tolerance requires that the person or group that may feel insulted by an utterance or claim in society tolerantly restrain itself so as not to attack or prohibit such utterances. This does not in any way imply that the person or group should accept the claim, nor does it imply any respect for the contents of the claim. One may go on hating the claim as well as attacking it in speech and writing, using all legal means. And of course, exactly the same behavior, reversed, is expected from the opposing person or group. But there is a widespread tendency toward sloppy thinking, loosely identifying this basic Enlightenment notion of tolerance with the notion of respect. But respect is completely different from tolerance. Respecting a group or a person involves passing a positive judgment on the group/person as being respectful – in some way dignified by status, achievement, claims, behavior, or something else. No such thing is involved in tolerance. Tolerance is the act of *refraining* from acting – from prohibiting or physically attacking someone with whom you disagree. This is why democracies may demand toleration of their citizens. Tolerance only entails *not* doing something. Respect, on the other hand, involves knowledge about the group and person in question, and it involves a positive judgment. This is why it is impossible to *demand* respect for a specific ideology of all persons and groups – if you do not, in fact, respect that ideology, you cannot be pressurized to do so. This would require a kind of thought police. Freedom of conscience entails that everyone is free to form his own opinion about all issues, including critical views of other groups and ideologies. Demanding respect would only entail simulated respect, theater recognition, a feigned, clumsy expression of a judgment you do not really subscribe to. So what is called for here is tolerance – not respect.

Respect is called for only in relation to the *rights* of these other groups – their political and human rights. But you may respect these rights without respecting anything about the group's behavior or ideology. So tolerance and respect differ considerably. Tolerance is required of those who listen to a potentially insulting utterance – while respect of others' opinions is required of those about to utter something, the requirement being that they should keep quiet or modify their criticism. Thus tolerance is conducive to free speech, while forced respect is quite the opposite.

These two concepts, furthermore, are often confused with politeness, with “respectfulness”. This is a special, stylized form of behavior, probably originating in the great cities of antiquity, Rome, Alexandria, Babylon, etc., where many different people met and interacted – and where a language had to be developed that facilitated dealing with people with whom you do not share values, religion, or culture. This language is politeness: “How are you?”, “Good day”, “Excuse me”, “Thank you”, which takes the shape of superficially caring for the other person, while everybody knows that, on a deeper level, you do not care. Saying “How are you?” does not oblige you to take a sincere interest in your interlocutor’s health – it is a sign saying you are willing to deal politely with him despite any difference you may have in values or ideology. This politeness may also be called “respectfulness”, but it has as little to do with real respect as “Good day” has to do with caring for the addressee’s well-being on this particular day. Such politeness is extremely important for the trust, smoothness, and plasticity of a society and provides a basis for the liberties of urban living. But even if politeness is indeed a very important social good, it is secondary to basic, individual rights, such as that of free speech. When discussion of important political issues is at stake, politeness comes second, and critical problems must not be hidden away for the sake of politeness. The same applies, a fortiori, to free speech. When free speech is threatened, politeness most decidedly comes second. In the case of the Danish draughtsmen, specifically, it is wildly misleading and morally corrupt to insist that they should have expressed themselves more politely, in another “tone”, when their right to free speech is being met by death threats.

The arguments scrutinized here all stem from center-left reactions to the pressure against free speech. Why is it that the left wing, with its roots in the basic standards of Enlightenment, seems so willing to invent arguments in order to curtail freedom of speech? My contention is that this has to do with culturalism. Culturalism is the idea that culture determines every individual through and through, that cultures form organic wholes, which are homogeneous on the inside and completely heterogeneous on the outside, in their relation to other cultures. This entails that once socialized in a culture, the individual is inextricably bound to it, cannot enter another culture, and may only find a satisfying life within the confines of his culture.

Culturalism began as an anthropological theory – very strong, for instance, in inter-war American Anthropology. It spread to the Western middle classes after WW2, and after the decline of Marxism as a basic ideology of the Western left, Marxism was increasingly replaced with culturalism. This development is strange, for in many respects culturalism forms the antithesis of Marxism’s claim about society’s basis in economic structures, culture only being part of the superstructure. Culturalism, on the contrary, wants to claim that religion and culture form the basis of a society, and that economy rather belongs to the surface. The spreading of culturalism on the left has more the character of *versunkenes Kulturgut* than that of an explicit ideology. Nobody comes out and claims to be a culturalist, instead culturalism appears in arguments – like those

dissected above – claiming that cultures, rather than individuals, should be given special rights, such as the right not to be insulted, defamed, or confronted with arguments. In the more radical versions of “multiculturalism”, culturalism sticks out its ugly head. Just like racism tried to tie the individual to his race, to the color of his skin, culturalism tries to tie him to his culture.

Here, it is important to note that left-wing culturalism is only one half of the story. The other half is right-wing culturalism – nationalism. Both of them, of course, share the same roots in the history of ideas, in the right wing of German romanticism, most notably Herder’s ideas of the *Volksgeist*, the people’s spirit, as something over and above individuals as well as political institutions. This is why the religious pressure on free speech during recent years comes from many sides. The basic pressure, to be sure, comes from religions. But in democracies, this pressure is supported by culturalism from both political wings – multiculturalists claim that cultural groups and religions have a right not to be insulted, and nationalists claim that national culture has such rights and maintain that human rights are a vain, suppressive substitute for religion. In Denmark, such views may be found on the right wing in connection with the “Danish People’s Party”. Consequently, to defend itself against the religious pressure against free speech, the political culture of the democracies must purge itself of culturalism and insist that basic individual human rights must never be eroded by the collective, cultural rights claimed by various groups or, most often, by their most conservative spokesmen.

Thus, it is important to realize that the problem of multiculturalism is not the “multi” part – the existence of many different persons, ideas, points of view. The problem lies in the “culturalism” part – the insistence that such persons form closed groups, which should be accorded the right to be protected against free speech. They should not.

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This essay summarizes some of the points found in the book *Adskillelsens politik. Multikulturalisme – ideologi og virkelighed* [The Politics of Segregation. Multiculturalism – Ideology and Reality], which I co-wrote with novelist Jens-Martin Eriksen (Copenhagen 2008: Lindhardt og Ringhof). A Norwegian version of the book is being prepared (Forlaget Press).



# Lessons of Being Drawn In

## *On Global Free Speech, Communication Theory and the Mohammed Cartoons*

Risto Kunelius

The history of journalism teaches us that the limits of free speech have always made news and caused controversies. After the Cold War years, there is nothing new about “freedom of expression” becoming a rhetorical weapon in international disputes. And 20 years after Salman Rushdie’s *fatwa*, the mutual cultural outrage ignited by the publication of 12 caricatures of the Prophet Mohammed by the Danish newspaper *Jyllands-Posten* seems like a continuation of a sadly persistent theme of global communication. Yet in some sense, when the initial publication in September 2005 slowly grew into a complex diplomatic conflict and led to threats, boycotts, demonstrations and deaths, it was difficult to avoid thinking that something relatively new was also happening.

Indeed, one can argue that some fundamental contextual factors have changed. Particularly in the post-9/11 world, international tensions have increasingly been framed in terms of identities and culture. Religion has made a spectacular comeback into the discourses of power and political mobilization, and varieties of fundamentalism have risen as politically viable forms of criticizing modernity. At the same time, economic and political developments have begun to reposition the “nation” as the basic ingredient of international politics. But most importantly for my purposes here, the media (their institutional relationships, their production culture, their audience, their technologies and infrastructures) have become repositioned.

Thus, the global “news event” surrounding *Jyllands-Posten*’s Mohammed cartoons serves to illuminate in several ways the new conditions in which free speech theory is translated from a seemingly universal and a-historical abstract sets of ideas into actual rhetoric and action. The controversy (was) quickly turned into a *transnational* conflict, and thus it (re)positioned the news media in relation to the state and national identity. It also became *transcultural*, raising contentious questions across what is arguably the most contagious imagined ideological line of the contemporary world order: The “West” and “Islam”. The controversy also underlined the *role of the media itself* as a distinct actor, and thus led to rare moments of self-justification and *rationalization* in a transnational context. As a sign of the times, then, such a dramatic global news

event focusing on free speech<sup>1</sup> is a lucrative moment for media research. In the shadow of all its irreversible and tragic consequences, it offers an opportunity for communication researchers to elaborate and evaluate their inherited wisdom. In this essay, I briefly take up five themes that the case today opens up<sup>2</sup>. My list of keywords runs, fittingly enough, through a series of “-ations” and “-isms”: *domestication*, *carnevalism*, *professionalism*, *rationalization* and *fundamentalism*.

## On Domestication

As James Carey (2007) put it, “journalism works by the light of local knowledge”. And we know that if there is a primary local lighthouse, it is the “nation”. Through use of routine news sources, familiar political actors, and habitual political pundits, journalism creates its well-crafted sense of the domesticated political tensions that constitute the nation. The cartoon case clearly highlighted this old hegemony of the national – but it also hinted at ways in which journalism’s labour of domestication is becoming more complex.

On the one hand, there were signs of transnational solidarities. During the controversy, it became clear that an abstract but coherent “theory” of free speech had a strong potential for uniting media professionals and others across national – and even cultural – borders. Many journalists and media outlets declared that they did not think that what *Jyllands-Posten* did was wise (nor that the published caricatures were of particularly high quality). However, they still answered the call to defend the *feasibility* of the act of publishing the caricatures. Free speech had to remain “undivided”, as many journalistic commentators declared. Such logic also transcended old political cleavages (left and right) and exposed how the category of “freedom” creates new alliances in local political fields. Fully aware of the right-wing tendency of *Jyllands-Posten*, for instance, the leftist *Liberation* in France joined the ranks of those that re-published the drawings at the height of the controversy in 2006. This took place despite the fact that it had at first declined to re-publish when right-wing populist *France Soir* made the first French publication of the caricatures (Berthault et al., 2007).

On the other hand, there was still ample evidence that the mechanisms of national domestication are alive and running. Although the “event” became news worldwide, it seemed to turn into a major news event only when local, domestic news actors were drawn in. This may have happened because the debate provided an opportunity to rehearse familiar debates about multiculturalism and religion (e.g. in France [Berthault et al., 2007]), or because local incidents drew politicians into the spotlight (e.g., in Sweden [Wallentin & Ekecrantz, 2007]). When local news actors (often strategically, no doubt) remained relatively circumspect, the coverage was far less intensive. This was the case, for instance, in Argentina and the US (Craft & Waisbord, 2008), where the cartoon issue (despite the strong legacy of First Amendment discourse in the US) remained largely a piece of “foreign” news.

A deeper, cultural level of domestication was also evident in the way that national histories and identities became articulated in the reactions. In the UK, for instance, the press initially drew from a collective past of colonial experience, suggesting that the long British history of empire had taught the Brits to be more sensitive and sensible (than the Danes) (Phillips & Lee, 2007; Phillips, 2008)<sup>3</sup>. In Russia, the official reaction of political actors seemed to underline the long experience of multi-ethnic empires and the fact that “Europeans” or people in the “West” are clearly more ignorant and arrogant (Bakoulin, 2007). In Israel, the Hebrew language press expressed both a sense of slight superiority to Europeans (suggesting that “they” perhaps are now beginning to understand the Israeli predicament better), but it also expressed a sense of solidarity with those whose religion had been blasphemed (Nossek, 2007). In Finland, the controversy was read through the lenses of the history of “Finlandization”, suggesting that the Finns sensitivity towards Muslims was a continuation of the old legacy of “self-censorship” practiced in relation to the Soviet Union during the Cold War years (Kunelius et al., 2007).

Despite such strong tendencies of domestication, the evidence suggests that, in the current conditions, it is not easy for dominant national news actors to control the domestication of transnational conflicts when less dominant groups – for instance diasporic communities or quasi-xenophobic organizations – wish to intensify them. Also, many of the discourses through which the domestication of the affair took place are in fact potentially rather transnational. Interestingly, they evoke experiences of “empire” and experiences of being submitted to the rule of “others”. In such an environment, a news event that touches people worldwide, abstract ideologies can help to create new and unpredictable kind of alliances. Free speech is clearly one such ideology.

Finally, domestication hints at an important lesson. Even if a news event is framed as “free speech” – a frame with tremendous abstract and universal appeal, at least in the West – the abstract questions and ideology need a local “carrier item”: local actors, familiar personalities, old disagreements, historical references, etc. Thus, free speech is never *just* about global, universal principles, but is grounded in localities.

### On Carnevalism (and Tolerance)

In actual localities, free speech disputes accentuate existing constellations of representation and power. One household name in the debates on the “politics of representation” is Mikhail Bakhtin and his notion of *carnevalism* (Bakhtin 1981, 1984). He celebrated the tasteless, grotesque and unruly practices of the late Medieval carnivals and the language of the marketplace, which often made ruthless fun of dominant institutions and beliefs, producing spaces of inversion where nothing was sacred. In such passing moments, the “life-force” of the people broke through the routines of order. For Bakhtin, the “accents” of the people were particularly important in trying to understand the novel, a

literary form that could – at its best – embody the dialogic momentum of the carnivalistic encounter of the official and unofficial voices of society.

Journalism has one of its roots firmly entrenched in the cultural spaces of the marketplace, and some have claimed that the whole history of the news is inextricably linked to the history of fiction and the novel (cf. Davis 1983). True enough, even in its contemporary commodified form, the popular press clearly carries some aspects of the carnival. One can also read political reporters' subtle irony towards politicians as an expression of a polyphonic ideal, not to mention recent genres such as comedy news shows. A case in point is the genre of caricatures, a traditional material "space" inside the more "official" newspaper discourse where different rules apply.

One can try to hijack Bakhtin in defence of the publication of the cartoons in two ways: first by arguing that what might seem like a tasteless joke can sometimes be a way of exposing hypocritical common sense, and second, by claiming that there is a certain connection between a sense of intimacy and the making of ruthless jokes<sup>4</sup>. Indeed, *Jyllands-Posten's* cultural editor Fleming Rose has used both these points. Initially he defended the publication as an attempt to expose the "self-censorship" and "political correctness" of Danes. Later on, he has also argued that the pictures were an attempt show the Danish Muslims that they are *accepted* as Danes. By breaking their taboos, the paper suggested that it treated Muslims the same as Danes. According to this logic, the message then was that "you are one of us", and thus the potential insult was meant – curiously enough – to integrate Danish Muslims into society.

But following Bakhtin, we can also raise further points. For what is characteristic of the carnival is its emphasis on the "here and now", the way in which it is rooted in the local culture and its habits and beliefs. Thus, although as a cultural *form* we can perhaps claim that the carnival is somewhat universal, as an actual practise it is local, defined by the tension between the common sense of the "people" and the hegemonic beliefs that control them. This is important, as it suggests that the *moral force* of the tastelessness of the carnival grows from the experience of the effects of the very power that the carnival mocks and from the fact that the habits and beliefs mocked are "our" habits. In this sense, the "original" carnival can indeed be seen as being both a culturally integrating and a democratizing phenomenon at one and the same time. Following this trail, an attempt to use mockery to promote tolerance should target *our* sacred beliefs or *our* stereotypes and clichés about the "others".

Following the idea of mocking one's "own" habits leads to the political heart of the case and free speech theory. *Jyllands-Posten's* argument has indeed been that European Muslims have acquired a silent stronghold among "politically correct" Europeans, and that the aim of the cartoon project was to expose this "self-censorship of political correctness", to carnivalize – in the best tradition of caricatures – "our" habits of political correctness. But even if this were to (logically) make sense from the point of view of your average secular Dane in 2005, the message of the cartoons was also (in the words of Fleming Rose) directed to the Muslims of Denmark. For them, the idea of mocking political

correctness obviously did not work. And to take the argument one step further, a common, standard reaction of a Westerner to the pictures – “I’m not offended by these pictures” – answers the question of whether the pictures were a “carnivalistic” moment even among “our” own group.

All this goes to show how complicated the communication environment of media and journalism has become. Even though it still works to a great extent with “the light of local knowledge”, the dynamics of the cultural Westphalian system (my land, my customs) have been broken. Diasporic communities, instant and personalized media flows and transnational political networks complicate the traditional “localities”, where journalists at one time believed they were able to judge the power relations clearly enough to be able to recognize the legitimate moral power of mockery. In the current circumstances, such carnivalistic measures open up – for better and worse – far more complex and unpredictable political spaces.

It is not easy to find a reasonable path through this ground. In a more legally oriented discourse, similar questions have been tackled by Lee Bollinger (1986). He has developed the idea that, in our contemporary world, free speech has taken on a new social function. It no longer merely works as a way of securing a path towards the truth, but also – and more importantly – as a way of crafting a particular kind of ethical character. Free speech, he argues, exposes us to alien ideas, to odd customs and strange beliefs. By doing so, however, it teaches us to tolerate others and helps us to face our own prejudices. This thinking contains some of the same figures of thought as Bakhtin’s ideas about the carnival (Peters, 2005: 160-164). In the logical landscape of free speech theory, the argument does indeed travel some distance as a defence of a wide range of expressive freedom. But in the end, also Bollinger considers the potential pitfalls of a blind commitment to a self-celebratory ideology of free speech. There is always the possibility, he argues, that “the actual operation of free speech might have the ironic result of stimulating excessive intolerance elsewhere in the society” (Bollinger, 1986: 244).

With free speech we must always beware lest we end up seeking to shore up our defences on the side that needs it the least, while the natural barriers in the opposite direction, though they now appear to us the more secure, are in the larger scale of human event the more fragile and vulnerable (ibid.: 246).

Fittingly enough, this quotation could be brought to bear on either side of the cartoons argument, depending on how one sees the world. But in an important way, Bollinger’s vision brings the Bakhtinian idea of polyphonic communication *and* the modern project of a cultivated, civilized subject together (instead of pitting them against each other). “We must become comfortable with the idea that free speech is concerned with the development of a mind that is itself comfortable with uncertainty and complexity” (Ibid: 246-267).

## On Professionalism (and Mediatization)

Publishing the cartoons was an act of distinction by the editors of *Jyllands-Posten*. As such, it fits well with widely discussed narratives about the increasing centrality of media institutions. Thus, adding to our understanding of the role of professional journalism in the era of *mediatization*, the case also helps underline at least three ways in which journalism has become an increasingly *distinct* social and institutional agent.

First, (at least in many countries in Europe) one could witness the professional necessity for journalists to produce a “performative” distinction from politicians<sup>5</sup>. In several countries, journalists at first took a rather moderate and pragmatist view of the cartoon conflict, distancing themselves from *Jyllands-Posten*’s radical and provocative action. But when leading politicians in many countries (UK, France, Finland – to give some examples) maintained and developed some of the same arguments – emphasizing good taste, mutual respect or multicultural sensitivity – part of the journalistic corps felt an urgent need to sharpen their position towards a free speech theory in which all transgressions and provocations can be defended in the name of freedom. My favourite quote on this attitude comes from an editorial in *The Economist*:

“I disagree with what you say and even if you are threatened with death I will not defend very strongly your right to say it”. That, with apologies to Voltaire, seems to have been the initial pathetic response of some western governments to the republication by many European newspapers of several cartoons of Muhammad first published in a Danish newspaper in September. (*The Economist*, Editorial, 11.2. 2006)

A second kind of imperative for media *distinctiveness* in the Mohammed case takes us directly back to Denmark. *Jyllands-Posten*’s “daring” act could have taken place somewhere else, but it is noteworthy that it took place in the “re-politicized” media field of Denmark (Hjarvard, 2006). The provocation fitted very well with the political “brand” that the paper had been cultivating for years, particularly in relation to immigration and Muslims. The practice of politically profiled, more opinionated newspapering can be seen as structurally emerging from the increasing competition for readership on the Danish market, where free delivery papers have begun to change the business of “news” and have pushed the traditional newspapers to focus more on “views” (Schultz 2007). Tellingly for this structural landscape, *Jyllands-Posten* and *Politiken* – which stood on rather opposite sides of the initial debate in Denmark (Hervik & Berg, 2007) – are owned by the same company. This would suggest that the political opinion profile of the newspaper is being seen (or is coming back) as a mechanism for the (commercial) production of readership loyalty. Professionalism in journalism, then, is becoming less anchored in actual geographical communities and more aligned with particular (political) identities. One is tempted to think here that as the earlier geographically and ethnically

bounded limits of consensus have crumbled, fragmentation and “branding” of various sectors of the public sphere are taking its place. This does not mean a simple return to the political era of journalism, for it is still vital for journalism not be identified with political parties. But such increasingly fragmented and “designed” readership relations (institutionally imagined audiences) can also produce encouragement of more “bold” acts of distinction (presumably within the “common sense” of the loyal readership), paradoxically in a time when the real, geographic communities are becoming increasingly diverse. In this sense, *Jyllands-Posten*’s misjudgement (if we grant it the benefit of the doubt) serves as a sign of the times.

In a third sense, media’s distinct professional agency opens up through a paradox. For in addition to and parallel with the performatively distinctive role of the institutionalized media (such as journalism), mediatization often refers to the *saturation* effect of contemporary media technology. From this perspective, there is at first sight something anachronistic about the way in which the conflict forced newspapers around the world to “decide” whether or not to publish – or whether to publish news photographs of other papers who had published (a perfect example of the classic “strategic ritual of objectivity” [Tuchman 1978], only in visual terms). For while such considerations were going on in media houses, most of us would google the cartoons, have a look at them and then consider whether they should be published – as if their wide availability on the Internet had not already made them “public”.

What does it matter if a newspaper or a television station publishes something “daring” if the materials are virtually lying out on every street corner, coffee shop table, mobile phone screen, etc? In a way it doesn’t. But paradoxically, it can also make the institutionalized media players and their decision even more *distinct*. Their acts of publishing are not so much about displaying something that we do not know or see. They are distinct speech acts, choices to declare something *in a particular situation*. As such, they cannot be defended – as easily as in the age of gatekeeper mass media – as neutral acts of mediation, but will be contested on normative grounds.

### On Rationalization

“Publishing” evokes debates about the “public sphere”, and thus opens up the tension between the *ritual* and the *rational* in the workings of media institutions. We are well aware that journalism partly emerges from and carries with it functions of social cohesion, yet we keep up our faith in the media’s contribution to collective self-reflection and criticism. In media research, studies on *media events* often tackle the ritualistic aspect of media performance, whereas concerns of rationalization are usually located in debates concerning the *public sphere*.

The ritualized features of the cartoon case can be easily captured by focusing on the visual materials flowing in the diverse channels of the transnational

media networks. Particularly the news photos underlined dramatic and often fairly stereotypical choices: Muslims were presented in demonstrations, with fists flailing in the air, with flags burning and emotions on the rise. Such – often very similar – pictures created a useful focus of attention for *both* principle sides of the conflict, i.e. for those offended by the cartoons as well as for those threatened by the reaction they had caused. Technically, one can argue that people from opposing sides of the conflict were thus invited to take part in the same transcultural ritualistic spectacle, where their roles were confirmed (devoted Muslims to seeing the widespread protests as a sign of a community in legitimate outrage, Westerners to seeing the emotional crowds as the archetype of the mob run amuck, beyond any reason) (cf. Becker 2008). The pictures travelled quickly and far, but the contextualizing discourses often did not (Hahn, 2008).

This raises urgent questions about a more refined understanding of *modes* of communication in global settings. We can clearly catch a glimpse of the dynamics of a global *spectacle*, in which – in Guy Debord's (1967) words – “the real world changes into simple images, simple images become real beings and effective motivations of hypnotic behaviour” (Debord, quoted in Kellner 2003, 2). For a classic antidote to such un-reflective modes of communication, one can turn for instance to Jürgen Habermas, and his way of distinguishing between linguistic and non-linguistic action.

An observer can only understand a non-linguistic action when he knows the intention that is supposed to be satisfied through it. Speech acts, on the other hand, identify themselves. Because in carrying out an illocutionary act a speaker simultaneously says what he is *doing*, a hearer who understands the meaning of what is said, can without further ado, identify the performed act as some specific action. (Habermas 1992, 64)

This tension between “pictures” and “whole sentences” was often concretely displayed in many Western newspapers’ editorial and op-ed pages, where a “rational” argumentative and often quite moderate editorial (typically reminding the readers that fundamentalism is not the whole true image of Islam) could be decorated with stereotypic, Orientalist pictures (burning flags, smoking Embassies, veiled women)<sup>6</sup>. This calls upon us to reflect more clearly on how the publication of (propositionally differentiated) speech acts and the publication of other modes of communication (pictures, slogans, catch words) are possibly related to different logics. This tension between “the spectacle of the other” and “explanation of the world” is the key location of our *rationalization* of the event.

Any standard reference teaches you that *rationalization* has two interrelated meanings. It refers to the “act of making something intelligible” as well as to the attempt to provide justifications for behaviour by making it *appear rational* or *socially acceptable*, often by “(subconsciously) ignoring, concealing, or glossing over its real motive; an act of making such a justification” (Oxford English Dictionary, 2008).

At first sight, coverage of the cartoons conflict offers ample evidence of rationalization used as justification. Arguments about the act of publication more often than not depended on the positions from which people spoke and wrote. But the case also suggests that rationalizing cannot be reduced to merely strategic rhetorical action. A weak but interesting signal of this is the frequent use of *double standard* criticism. It was common practice on various sides of the conflict to blame the other side for applying double standards. In the West, commentators and journalists blamed Middle Eastern regimes for not allowing the kind of space for other religions that these regimes demanded for Muslims in Europe (Kunelius & Eide, 2007). In Pakistan and elsewhere in the Muslim countries, Europeans were accused of condemning people who deny the Holocaust but not people who demonize Muslims, or for not publishing blasphemous cartoons about Jews (Eide, 2007). In Israel, the argument of double standards was aimed at Muslim leaders in Arab countries who did not condemn anti-Semitic caricatures in their local media (Nossek, 2007).

While at first glance such evidence suggests a sense of denial of one's own double standards, one can also suggest that by demanding such consistency of principles, these disagreeing actors actually presuppose a common set of *criteria of validity*. Certainly, this does not prove the existence of any rigorous "public sphere". But it is an objective enough aspect of coverage that suggests the possibility of a shared basis for a language that might momentarily reach across the cultural barriers and cause a moment of reflection on the other side. It is crucial in the sense that the very act of strategic rationalizing as justification (and articulated denial) makes the double standards of the 'other' – and consequently also one's own – visible. If there is an element of communicativeness, then it exists because of and within the strategic impulse. From this point of view, communicativeness is not a form of wishful thinking, but just as materially based as the powers that shape the strategic rationalizing.

Studying the Danish debate on the cartoons, Lindekilde (2008) shows that the virtues of deliberation were certainly not neatly achieved (positions did not change, argumentations were strategic). A comparison between Muslim actors' claims in newspaper material (talk for the general public) and their own organizational material (talk for one's own community) also underlined strategic rhetorical changes based on the target audience. But, rather than looking at these various discourses as a sign of foul play, Lindekilde suggests that Danish Muslims actually "translated their religiously based despair and grievances to a language of rights, duties and public virtue when entering the larger public sphere". Thus both Muslims and non-Muslims in the debate "spoke different dialects" of the same language, drawing on "principles of the secular public sphere" (ibid., 24, 23).

The infrastructure of a "global public sphere" – if one exists – is made of a complex web of media and message flows (both through the traditional media channels like newspapers or television and through the new interpersonal networks of emails and SMS-messaging). It consists of a loosely (or badly) interconnected web of enclaves for making sense of the world. What the cartoon

case shows is that journalism can indeed play a crucial role in momentarily activating some kind of a global sphere of rationalization. Journalism's taste for the ritual enables it to build global media events, but its located skills of rationalization (in both senses of the word) are the only actual basis on which we can communicate (i.e., mutually see through each other's rationalizations) between such enclaves. While this will never bring about a unitary, overarching space we tend to call a "public sphere", it can potentially produce encounters and moments that deserve to be called "public".

### On Fundamentalism (and Communication Theory)

Media research today is dominated by a "post-linguistic turn" consensus on the constructed, culturally relative nature of human reality. This is the intellectual landscape in which "free speech", too, was challenged and defined. The debate called into question some of the assumed "core" values of Western particularism, thus articulating the question of "fundamentalism" on various sides of the conflict.

From the point of view of communication theory, fundamentalism means at least two things. First, it can refer to an extreme belief in the idea that true communication (in the sense of possible intersubjective understanding and sharing of meanings) can only take place *within* the boundaries of discourse that are ultimately set by something other than communication itself. Cultures cultivate identities and identities frame deliberations: We must share something outside communication before we can share things with communication. Second, fundamentalism is based on a belief in the singular (fundamental) meaning of texts (which in turn define who we are). In this sense it is, as Terry Eagleton (2004: 200-207) aptly puts it, a form of *necrophilia*, a celebration of sacred texts with an orthodox, unchanging interpretation: no diversity of meaning, dialogue or accents – just dead letters.

Taken to the extreme, these two dimensions define fundamentalism in relation to communication. As fundamentalists, we can deliberate only as long as we do not question our fundamentals, the cultural anchors of our identity discourses. If someone does question them, he/she has stepped outside of the community and our cultural sphere. Ultimately, communication cannot bridge cultures, there is no dialogic, inter-cultural conversation, merely conversions and forced compromises (again, framed by forces other than communication: power, coercion, money).

In these terms, the cartoon controversy brought into light at least two basic forms of fundamentalism. The first one became visible to the extent that some Muslims' reactions were based on the idea that Quran's denial for depicting Mohammed is a sacred one. The tendency to see the breaking of this taboo as an attempt to break the whole community of Islam reflects the basic fundamentalist impulse. European modernization has a history of provoking such reaction both at home and abroad, and fundamentalism as an active political

force arises precisely from such encounters (cf. Buruma & Margalis, 2004). But such dynamics of fundamentalism do not only operate inside religions and between them, but also inside the “movement” of modernity itself. Thus, another kind of “fundamentalism” became apparent in the debate: the idea that “free speech” is a sacred Western tenet. We set the idea of “free speech” out of bounds, because our secular religion is based to such a great degree on a belief in (the myth of) free speech. The cartoon debates show how (in many Western countries) a politics of identity was mobilized around such rhetoric. It was not uncommon for attempts to criticize publication of the cartoons, or re-publications of the cartoons, to be depicted – in the media – as various degrees of betrayal of one’s own values. My quote from *The Economist* above offers only a hint of such tendencies. Nevertheless, it characteristically evokes a “sacred” text by (ironically) referring to a famous Voltaire quote. Fittingly enough for the complexity of the terrain, the “original” Voltaire quote is not an authentic one (cf. Peters, 2005: 156-157). But the reference to it underlines the situation we found ourselves in. Modernity provokes fundamentalist reactions both on its “borders” and at its “core”. In the culturally “relativized” Western imaginary of values (a key achievement of modernity, if any), a certain tendency towards “fundamentalism” emerges: If indeed the world is relative and only made of constructions, then we have to defend our own with vigour. Therefore, free speech has to remain “undivided”.

All this brings us to the key question of free speech in global encounters. How well can liberal free speech theory function as an antidote to itself? How well is it protected from turning into perhaps a different kind but still another form of fundamentalism, thus becoming part of the ideological ammunition of cultural conflicts? Faced with such questions, the small but not unimportant task of communication theory is to sustain and develop our ability to rationalize about free speech, to keep elaborating its internal distinctions and tensions and to keep situating it in historical contexts. Perhaps then, next time, when we are *drawn into* debates on free speech in global contexts, we will be a bit better prepared for it and be more able to take the dialogue a step further before things escalate into something other than communication. We should expect such encounters and look forward to them. They provide moments when communication research can contribute to its immanent normative goal – *resisting fundamentalism and defending communication*.

## Notes

1. I do not wish to suggest that the event was somehow “purely” or “originally” about free speech. As Peter Hervik (2007, 2008) argues, this can be seen as a consequence of conscious political spin.
2. This whole essay draws extensively on reports, papers, book chapters, seminars and discussions from a wider international research project (cf. Kunelius, Eide et al., 2007, Eide, Kunelius & Phillips, 2008), where the media reactions to the cartoon conflict were studied in 16 countries (Denmark, Sweden, Norway, Finland, the UK, France, Germany, the US, Canada, Egypt, Israel, China, Russia, Argentina, Pakistan and Indonesia).

3. Although this was the initial reaction, a logic of distinction in relation to the political elite set in pretty fast (Phillips & Lee 2007; Phillips 2008).
4. There is, of course. Intimate friends can declare their special bond by making bad jokes about each other. But this does not mean that bad jokes are a great way of making new friends and building trust.
5. I tentatively call this distinction “performative”, heuristically following the terminology popularized by Judith Butler, among others. It fits the relationship between journalism and politicians particularly well, because it allows us to speculate without an “essential” difference. Journalists and politicians (and to an extent, also experts) are all in the business of *representation*. Their differences are thus not functionally essential, but have to be performatively reproduced. This division of labour or institutional differentiation is, of course, not at all part of the ‘original’ landscape in which free speech theory was developed in Europe.
6. Perhaps the easiest way to capture this dynamic is to think between the modes of communicating with “pictures” and communicating with “full, propositional sentences”. Modes of communication are, of course, much more complicatedly constructed and cannot be reduced to such media-specific distinctions. Slogans, clichés and strategically articulated pieces of “ready-made” language (e.g., “clash of civilizations”) can, of course, become just as objectified (propositionally un-differentiated) a means of communication.

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*Freedom of Speech Abridged? Cultural, Legal and Philosophical Challenges* contains eleven essays that recognize free speech as a fundamental value under fire in a time of globalization. The contributors are professionals in various fields working in the Nordic countries, who have been engaged over the years in debates on free speech issues from different angles.

Ever more far-reaching media are spreading expressions to new publics. In a world steadily growing smaller, where different cultures and religions formerly less exposed to each other are being brought together, basic ideas about speech need to be expressed and rethought. Free speech cannot be unlimited, and all discussions of this right or value imply considerations of where limits are to be drawn. Using quite diverse approaches, the essays in this book all reflect upon the importance and implications of free speech in new contexts.

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