“There shall be freedom of expression”

Proposed new Article 100 of the Norwegian Constitution

Report of commission appointed by Royal Decree on 26 August 1996

EXCERPTS

JUSTIS- OG POLITIDEPARTEMENTET
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Report of a commission appointed by Royal Decree on 26 August 1996
Submitted to the Ministry of Justice and the Police on 22 September 1999

EXCERPTS

Introduction by the Chairman of the Commission of Freedom of Expression, Professor Francis Sejersted

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Preface

A new article in the Norwegian Constitution concerning the freedom of expression was adopted in autumn 2004. The inclusion of this new article was a tangible result of the impact of the government-appointed Commission of Freedom of Expression (1996-1999) and its recommendations to the Norwegian Storting. The Commission was chaired by Professor Francis Sejersted.

The publication at hand contains the major parts of the report of the Commission of Freedom of Expression (NOU 1999: 27) and all parts which are considered most interesting to international readers. The parts of the report which are not included are replaced with ****** .

It is a pleasure to provide the excerpt of the report at a time when Norway is host to the IFLA World Library and Information Congress. The publication is also part of the Norwegian preparation to the World Summit on the Information Society to take place in Tunisia in November this year.

The excerpt is preceded by a foreword by the Minister of Justice, Odd Einar Dørum, and an introduction by Professor Francis Sejersted.

The Norwegian National Commission for UNESCO
August 2005

Foreword by the Minister of Justice, June 2005

Norway has one of the oldest living Constitutions in the world, dating back to 1814. At the time of its adoption, this Constitution was looked upon as a radical improvement, echoing the new ideas of the day. The Constitution included a set of basic civil and political rights, among them the right to freedom of expression. The Article on freedom of expression has served its purpose, but in the late 20th Century, it became evident, owing to the development of society and the general focus on the protection of freedom of expression, that a major revision of the free speech clause of the Constitution was desirable. A government-appointed Commission on Freedom of Expression laid the foundations for this revision. The Commission was given the task of making “a thorough consideration of the status of freedom of speech in our society”. It proposed revision of the constitutional protection of free speech, on the basis of an analysis of the conditions that affect freedom of speech in practice and a careful consideration of the underlying reasons for the constitutional protection of freedom of speech. The Commission broadly represented the various interests of Norwegian society.

The Commission was active for three years, and the fruits of its labour are presented here. I am glad to say that my Government and the Norwegian Parliament gave unanimous support to the basic principles of the Commission’s proposal as well as most of the details. The Commission’s work will have a lasting impact on the conditions of free speech in the Norwegian society. Among other things, the work has spurred a set of reforms in the ordinary legislation in order to secure the protection of free speech. An important example is the field of employee speech, both in the public and private sector.

A valuable feature of the new free speech clause of the Constitution is its very broad concept of free speech, also including a right of access to government documents. In today’s society, a right of access to information is crucial in order to facilitate classic free speech rights. The free speech clause even states a duty for the authorities to create conditions enabling an open and enlightened public debate, for example through active support in various ways of the educational system, libraries etc.

I believe that the discussion of principles that underlie the revision of the Norwegian Constitution’s free speech clause is useful in an international context as well. The Commission’s report highlights difficult conflicts between competing interests. Even though the constitutional protection of freedom of speech is not exactly the same in all corners of the world, there is undeniably quite an extensive core of free speech that should be protected, without which there is no free society. The Commission argues convincingly for this.

Finally, I would like to draw your attention to the introduction to the Commission’s report, written by its chairman, Professor Francis Sejersted. His introduction highlights some of the most important features of the revised free speech clause of the Norwegian Constitution.

Oslo, June 2005

Odd Einar Dørum

A new article of the Norwegian Constitution concerning freedom of expression

An introduction to a translation into English of an excerpt of the report of the Commission on Freedom of Expression (NOU 1999: 27)

In autumn 2004, the Norwegian Storting adopted a new article of the Constitution concerning freedom of expression. As is reasonable regarding amendments to the Constitution, this was the result of a long process. In 1996, the Government appointed a commission to investigate the question. The commission, which consisted of 16 members, submitted its report with a proposal for a new article in autumn 1999. The report was extensive with a broad fundamental consideration of the grounds for and history of freedom of expression. In addition to proposing a new article 100 of the Constitution, it considered the implementation of principles of the new article in general legislation in the different areas. An extensive excerpt of the report with particular emphasis on the discussions of matters of principle follows this introduction.

In autumn 2000, after an extensive round of consultations, the Government submitted a report to the Storting providing a number of alternative proposals for a new article. In accordance with the rules for amendments to the Constitution, a new article may not be adopted by the Storting until the following electoral period. In March 2004 (there was an election in 2001), the Government submitted a new, far more extensive report to the Storting including a proposal for a new article. The Government’s proposal deviated on a number of points from that of the Commission. Following an extensive public debate, the Storting adopted the article in its final form. The wording of this final version was closer to the Commission’s proposal than it was to that of the Government. We will return to the main points of the debate and to the differences between the Commission’s proposal and that of the Government.

In 1814, in the wake of the Napoleonic Wars, Norway was established as an independent state (in a union with Sweden), and was granted its own Constitution, which was at the time the most democratic constitution in Europe. In principle, it is the same Constitution that applies today, but with a number of not entirely insignificant amendments. However, until 2004, the article concerning freedom of expression (article 100) had remained unchanged for 190 years. The old article was worded as follows:

“There shall be liberty of the Press. No person may be punished for any writing, whatever its contents, which he has caused to be printed or published, unless he wilfully and manifestly has either himself shown or incited others to disobedience to the laws, contempt of religion, morality or the constitutional powers, or resistance to their orders, or has made false and defamatory accusations against anyone. Everyone shall be free to speak his mind frankly on the administration of the State and on any other subject whatsoever.”

In 1996, when the Government took the initiative to revise the article on freedom of expression, this was not because of any crisis or any pressing need to save freedom of expression. In international terms, Norway has been a stable democracy with a considerable degree of openness and freedom of expression. However, in such

countries too, problems can arise as regards how to define the limits of freedom of expression. There were two main reasons for revising the article. Firstly, the old article was technically poor, and had been criticized from the very beginning. It was increasingly unsuitable as a guideline for legislation and legal practice. Secondly, a need had arisen to harmonize Norwegian legislation and legal practice with that of article 10 of the European Convention on Human Rights (ECHR) and of the case law on this basis of the European Court of Human Rights (ECtHR). In a number of cases, the Norwegian Supreme Court had been overruled by the ECtHR, which in these cases stood for a more liberal interpretation. Moreover, in a country where freedom of expression has been taken for granted, a need may arise to recall the intention of freedom of expression.

The excerpts of the report of the Commission on Freedom of Expression begin with a presentation of the Commission’s proposed article 100 of the Constitution and a brief presentation of the content of each chapter. This is then followed by selected excerpts from each of the various chapters.

There may be reason to note that emphasis is placed on a utilitarian basis for freedom of expression in the tradition from John Stuart Mill. This is not entirely consistent with the basis characteristic of the Constitution of the USA, for example. The basis adopted by the Commission is in three parts. It pays regard to the seeking of truth, the promotion of democracy and the individual’s freedom to form opinions. By referring to this basis in the article itself, the Commission considers that it has provided practical guidelines for the legislator and courts as regards defining the limits of freedom of expression. Restrictions must not impede the three processes to be safeguarded by the freedom of expression in such a way that they cannot be justified in relation to these processes (seeking of truth, promotion of democracy, free formation of opinion). In the view of the Commission, this is a better solution than the old article’s reference to “disobedience to the laws” or the list of legitimate protection considerations in article 10 of the European Convention on Human Rights, both of which can be interpreted in the direction of providing very wide-ranging possibilities for restrictions.

The sentence on the freedom to speak frankly on the administration of the State is taken from the old article. It is established practice to interpret this as a special protection for political utterances. Furthermore, freedom of information, as part of the modern freedom of expression, has been included in the definition. The principle of public access, which gives citizens, on request, the right of access to the case documents of the public administration, is peculiar to Scandinavia. This principle has now been given constitutional protection. The final sentence is often referred to as “the infrastructure requirement”. It imposes on the state an overall responsibility for the institutional system that is a precondition for the ability of freedom of expression to function according to intentions (generally educative school, free universities, a diversity of publishers and media, etc.). It is not usual to include a point of this kind in such contexts. The state is often viewed as a threat to freedom of expression, yet here it is invoked as the guarantor of freedom of expression. However, in modern society, the state must be able to assume many, possibly conflicting, responsibilities. The point was subjected to a certain criticism by the public, but was approved by all decision-making bodies.

The chapter on the history of freedom of expression has been left out of the translated

excerpts. The main point of this chapter is to indicate how *the protection of authority,* which was the most important restriction on freedom of expression a century or more ago, has gradually been overcome. Today, it is precisely the opportunity to criticize the authorities that is the foremost criterion of freedom of expression in an open society. On the other hand, *personal protection* has become the most important argument for restrictions.

The Commission’s recommendations adopted a certain liberalizing direction. On the basis of the grounds referred to, emphasis was placed on freedom of expression (and freedom of information) and a well functioning public discourse as a precondition for being able to reveal abuse of power and promote decency and tolerance and for the free formation of opinion. In accordance with the stronger considerations of freedom of information, emphasis was also placed on citizens’ right to be informed concerning, among other things, the attitudes that are actually prevalent in society.

After the adoption of a new article 100 of the Constitution, it is assumed that a general statutory revision will be set in motion. A revision of defamation legislation has long been underway. The Commission has proposed here that it shall not be possible to be held liable for untruths if one has been “in non-negligent good faith”. This involves a certain weakening of personal protection in favour of freedom of expression. There has been some public criticism on this point, but this weakening has in principle been approved by all official bodies. It may otherwise be worth noting that, as regards racist statements, the Commission proposed that the current section of the Act should be upheld and that the established practice of observing a certain restraint as regards application should continue. It was furthermore proposed that the old prohibition of blasphemous utterances should be abolished, while liberalizing pornography provisions somewhat. The Commission’s report on these points has been included in the translated selection in its entirety.

After the Commission on Freedom of Expression had submitted its report and before the Government had submitted its report to the Storting, a case was brought before the Supreme Court which aroused public debate and played a significant role in further developments. During a neo-Nazi demonstration in Askim outside Oslo on 19 August 2000, the organizer of the demonstration, Terje Sjølie, held a short speech where he said the following: “Every day, Norwegians are robbed, raped and killed by immigrants. Every day, our people and country are plundered and ruined by the Jews, who suck our country dry of its riches, which they replace with immoral and unNorwegian thoughts” Sjølie was charged pursuant to a section of the Penal Code that states that it is a criminal offence to “threaten, insult, or subject to hatred, persecution or contempt any person or group of persons because of their creed, race, colour or national or ethnic origin.” However, in the Supreme Court’s judgment of 17 December 2002, he was acquitted, inter alia, because the court’s majority found that the statement was of political and ideological character, and that it therefore fell under the provision concerning special protection of political utterances laid down in the old article 100 of the Constitution. This gave rise to a relatively strong reaction from the public demanding more stringent prohibition of racist statements. The judgment was defended, among others, by the chairman of the Commission on Freedom of Expression, who pointed out that Sjølie’s relatively limited demonstration had led to a far greater counterdemonstration in Oslo. In his view, this provided an example of how publication functioned according to intentions in that Sjølies provocative

utterances gave rise to antiracist attitudes. There is no doubt however that the case – and the judgment – strengthened the demand for more stringent prohibition of racist statements.

In 2004 the Ministry of Justice on behalf of the Government submitted a separate proposal for a new article 100 of the Constitution on freedom of expression:

> There shall be freedom of expression.
>
> Restrictions of the freedom to impart or receive information, ideas or messages concerning the administration of the State and any other subject whatsoever may not be imposed unless they 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.
>
> The State authorities may not exercise prior censorship and other prior control of utterances, unless weighty considerations so justify in relation to the grounds for freedom of expression. Prior control of printed matter shall not take place.
>
> Application of these principles to commercial utterances and the restrictions to which they shall be subjected shall be established by statute.
>
> Everyone has a right of access to the documents of the State and of the municipal administration and a right to follow the proceedings of the courts and democratically elected bodies. Restrictions of this right may be laid down in statutes out of consideration for personal protection and for other weighty reasons.
>
> The State authorities shall create conditions that facilitate open and enlightened public discourse.

The Government’s proposal regarding article 100 of the Constitution concurs with that of the Commission in several respects. The differences between the Government’s proposal and that of the Commission must not be overdramatized. Viewed in an international perspective, it is clear that both proposals are liberal, and that the differences between them are marginal. Nevertheless, there are differences. Firstly, the Government’s proposal is vaguer than that of the Commission. That is to say that more is left up to the continuous legislation on the grounds that it is difficult to draw boundaries “once and for all for a long period”. This therefore opens up the prospect of prior control or censorship (except for printed matter) by means of ordinary legislation. It has also left out the special protection of political utterances, and has excepted “commercial utterances” from constitutional protection. In addition to its article being more open-ended than that of the Commission, the Government opens for a more restrictive approach in the guidelines it has suggested for further legislation.

The report begins by criticizing the Commission’s “idealism”, maintaining, among other things, that “it is possible that the negative effects [of freedom of expression] may be greater than assumed by the Commission”. As regards the difficult and much debated prohibition of racist statements, this will be tightened up. With direct reference to the Sjølie case, the Ministry on behalf of the Government proposes “a reduction of liability [...] so that grossly negligent violations may also be punished”. It proposes moreover that the boundary between the public and the private sphere be

moved closer to the private sphere in respect of a reduced requirement regarding what constitutes a public utterance in this connection. In this manner, more utterances can be made subject to the prohibition. Where pornography is concerned, the Government wishes to retain the current legislation. As regards the prohibition of blasphemy, the Government proposes, as opposed to the Commission that this article be retained. Emphasis is placed on the consideration that the symbolic value of the provision and regard for people’s religious feelings “may be given renewed relevance by the growth of new religious groups in the multicultural Norway”.

The submission of the Government’s report to the Storting resulted in rather a broad public debate in summer 2004. The matters that were most intensely debated were the questions of whether the prohibition of racist statements should be tightened and whether the blasphemy clause should be retained. Most of the differences between the Government’s proposal and that of the Commission were discussed, such as the form of the article of the Constitution, the question of whether political utterances should retain their special constitutional protection and whether commercial utterances should be excepted from constitutional protection. A recurrent topic in this debate, as in the previous debates, was the question of confidence in the media. The last debate particularly concerned “victims of the media”. Did the media abuse its privilege by threatening personal privacy? This was thus partly a question of whether personal protection should be strengthened. However, this requirement was not included in the submitted proposals although there was quite extensive criticism of the media, particularly in the Commission’s report.

It was long uncertain what the result of the debate in the Storting would be. In the recommendation of the standing committee of the Storting, the non-socialist government coalition parties supported the Government’s proposal, while the two largest opposition parties, the Labour Party and the Progress Party, opted for the Commission’s proposal. Since a two-thirds majority is required for an amendment of the Constitution, it seemed for a long time that none of the proposals would be able to gather enough votes for a two-thirds majority. However, the public debate resulted in a change of attitude in the standing committee, which then submitted a proposal that won the unanimous support of the Storting. The final form of the article bore a character of compromise. However, it was clearly closest to the Commission’s proposal since the special protection of political utterances was included, commercial utterances were no longer excepted from constitutional protection and prior censorship was prohibited.

It remains to be seen whether the Storting will also follow up the Commission’s proposal as regards general legislation. There is particular uncertainty surrounding the much discussed matters of racist and blasphemous utterances. In other words, does the Storting hold the view that the new article allows for tightening of protection against racist statements and for retention of the prohibition against blasphemous utterances, as the Government believed that its proposal achieved? In spring 2005, the Storting voted in favour of the Government’s recommendation as regards racist statements, so that more such utterances are now subject to the prohibition. Nor has the old protection of authority been entirely removed from the Penal Code. The Commission on Freedom of Expression has proposed that the special protection for public authorities that still exists should be removed. Regard for democracy indicates that

public authorities should not receive more protection than the law affords to other institutions and persons. The remains of the old authoritarian state continue to oppose the principles of a modern open society where the potential for criticizing persons with power is a constituent element.

Article 100 of the Norwegian Constitution as adopted in autumn 2004:

> There shall be freedom of expression.
>
> No person may be held liable in law on any other grounds than breach of a contractual or other obligation under private 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. Such legal liability shall be prescribed by law.
>
> Everyone shall be free to speak his mind frankly on the administration of the State and on any other subject whatsoever. Clearly defined limitations to this right may only be imposed when particularly weighty considerations so justify in relation to the grounds for freedom of expression.
>
> Prior censorship and other preventive measures may not be applied unless so required in order to protect children and young persons from the harmful influence of moving pictures. Censorship of letters may only be imposed in institutions.
>
> Everyone has a right of access to documents of the State and municipal administration and a right to follow the proceedings of the courts and democratically elected bodies. Limitations to this right may be prescribed by law to protect the privacy of the individual or for other weighty reasons.
>
> The State authorities shall create conditions that facilitate open and enlightened public discourse.

Francis Sejersted, 12 April 2005.

Chapter 1

Summary and administrative topics

1.1 Summary

1.1.1 Proposal of the Commission

The proposed amendment to the Norwegian Constitution

The Commission proposes an extensive amendment to Article 100 of the Norwegian Constitution, and proposes that the Article shall read as follows:

> "There shall be freedom of expression.
>
> 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. Such legal liability shall be clearly prescribed by law. No person may be held liable in law for the reason that a statement is untrue if it was uttered in non-negligent good faith.
>
> Everyone shall be free to speak his mind frankly on the administration of the State and on any other subject whatsoever.
>
> Prior censorship and other preventive measures may only be used as far as is necessary to protect children and young persons from the harmful influence of moving pictures. Censorship of letters may only be imposed in institutions and by leave of a court of law.
>
> Everyone has a right of access to the documents of the State and of the municipal administration and a right to follow the proceedings of the courts and democratically elected bodies. The law may only prescribe such clearly defined limitations to this right as particularly weighty considerations show to be necessary.
>
> The State authorities shall create conditions that facilitate open and enlightened public discourse."

"There shall be freedom of expression"

The basic view of the Commission is that Norway shall be an open society in which all individuals shall have the right to express themselves and keep themselves informed. An enlightened, active and critical public is the cornerstone of democracy. This is established in the first paragraph of the draft amendment by the words "There shall be freedom of expression".

Freedom of expression as a practical reality

The provision will provide better protection of freedom of expression than the current Article 100 of the Constitution. By strongly emphasizing the three main reasons for freedom of expression in the provision itself (second paragraph) the Commission aims to achieve a realistic balance between the purposes of restriction of freedom of expression and the damage or disruption that such restriction may inflict on the three processes that freedom of expression is intended to safeguard, i.e. the seeking of truth, the promotion of democracy and the individual’s freedom to form opinions. These three processes, which are dependent upon freedom of expression, are further described in the report. Freedom of expression will thus not be perceived as an abstract principle with the attendant risk of being afforded low priority, but as a practical reality of partly universal importance. Legal restriction of the classical freedom of expression, freedom of information and the right to remain silent that cannot be justified in relation to the three reasons may not be adopted or enforced, cf. second paragraph, first and second sentence.

Restoration of the criterion of liability

The Commission proposes that no-one may be held legally liable for a statement made in non-negligent good faith even if the statement later proves to be false, cf. second paragraph, third sentence. This will give rise to a freer public debate, and entail a partial reaffirmation of the criterion of liability implied by the phase “wilfully and manifestly” in the current article 100.

Freedom to speak frankly

The Commission proposes that the current provision that “Everyone shall be free to speak his mind frankly on the administration of the State and on any other subject whatsoever”, cf. third paragraph, be upheld. The provision, which includes all utterances of general interest, sets limits for both legally sanctioned restriction and private, contractual restriction of freedom of expression.

General prohibition of censorship

The Commission proposes that the current prohibition of prior censorship of printed matter be upheld and extended to include any utterance, regardless of medium. The current film censorship for persons over 18 years of age must therefore be abolished. Rules preventing free establishment of public channels of expression should only be upheld to the extent that they are based on technical conditions, cf. the fourth paragraph of article 100 of the Constitution. The Commission intends the fourth paragraph to be interpreted in such a way as to enforce more strictly the conditions for application of interim injunctions against statements. Similarly, demonstrations may not be prohibited in advance solely on the basis of the content of such demonstrations.

The draft amendment allows for exemptions from the prohibition of prior censorship and other precautionary measures as far as is necessary to protect minors from harmful influence of moving pictures and certain forms of censorship of mail in prisons and

other institutions. Age limits for films, videos, computer games, etc. may therefore be upheld.

The principle of public access

The Commission proposes that citizens’ right of access to information held by the public administration and the courts should be established by the Constitution. Exceptions from the public right of access to documents and the public’s right to attend meetings may only be adopted when made necessary by particularly weighty considerations, cf. the fifth paragraph of the draft amendment.

The responsibility of the state for citizens’ actual opportunities for expressing opinions

The sixth paragraph of the proposed amendment establishes the responsibility of the state for creating conditions enabling an open and enlightened public debate. This thus 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. Other examples are public funding of schools and universities, public support of the arts and of Norwegian and minority language media and public support of organizations. We might also mention the particular responsibilities of public broadcasting and the rules preventing monopolized ownership of the mass media.

1.1.2 Brief outlines of the individual chapters

CHAPTER 2 specifies the five matters of law that are discussed in the report and which are all addressed by our proposal for a new article 100 of the Constitution. These are the classic freedom of expression, freedom of information and the right to remain silent, cf. the second and third paragraph of the draft amendment, right of access to information, cf. the fifth paragraph of the draft amendment and infrastructure requirements, cf. the sixth paragraph of the draft amendment.

The three main grounds for freedom of expression – the principle of truth, the principle of democracy and the principle of autonomy – are each presented and subjected to thorough consideration. The three grounds are closely interconnected and are rooted in the Age of Enlightenment, associated with scientific rationalism, to the concept of individual rights and to a form of society where a distinction is drawn between a public and a private sphere. The core of the three principles provides a *universal* defence of freedom of expression, while other arguments for freedom of expression are more situational.

The principle of truth, postulating, as it does, that truth is reached through a secular, culture-dependent and dialectic process, involves a scientific approach. By “dialectic process” is meant that truth is reached by means of debate, whereby the arguments put forward are corrected when confronted by other arguments, a process requiring freedom of expression. We are all fallible, and our insight is influenced by personal

limitations, irrationality and power structures. By listening to counter-arguments, we reduce the influence of such limitations and are able to improve our insight.

The principle of democracy dictates that major social processes must be open to public view and, prior to elections and major decisions, there must be a free debate. The communicative or deliberative aspects of democracy are just as important as the democratic decision-making procedures. Freedom of expression and, not least, openness are constituent elements of democracy. They must be discussed, but may not themselves be subjected to democratic voting since the limits of democracy are defined by its potential to abolish itself.

The principle of autonomy or the individual’s freedom to form opinions is based on the concept of “the mature human being”. This is neither the collectivist concept of the individual, which states that the individual is subordinate to the community, nor the individualistic view, which states that regard for the individual takes precedence over regard for the community. The conception of “the mature human being” can be said to embody a third standpoint that transcends the other two and assumes that a certain competence (socialization or education) is required in order to function as an autonomous individual in the open society. This competence is attained by the individual through encounters with other people, listening to their arguments and trying out their alternative perspectives. Gradually and step-by-step a reflexive identity is developed, which is the essence of the modern “mature human being”. In view of the institutionalization of our society with its generally educative school and the continuous debate in the public sphere, all adults may be regarded as “mature” in the sense the word is used here.

The second paragraph of the draft proposal for a new article 100 of the Constitution refers directly to these three grounds, which can also be referred to as three processes. Liability cannot be imposed if such imposition cannot be defended in relation to the three processes to be safeguarded by freedom of expression. The understanding of these three grounds is therefore of decisive importance for the constitutional protection of freedom of expression.

The chapter goes on to explain the distinction between verbal and non-verbal utterances and between utterances respectively in the public and private spheres. There is also a review of some important characteristics that can be used to classify utterances, and some categories of utterance are considered in relation to the three grounds. The grounds for freedom of expression are thereby clarified.

It is not possible to lay down a requirement that utterances in the public sphere can be shown to be necessary, positive, proper or true. The burden of proof is the opposite. One is free to express whatever one wishes unless it is proved that legal *restrictions* are necessary. In a “sound society” where the public have a controlling, corrective and morally refining function, there is a limit to what restrictions are “necessary”, cf. 2.3.8.

CHAPTER 3 describes the development of the public sphere from the 17th and 18th centuries up to the end of the Cold War. One of the main purposes of this description is to show that freedom of expression involves far more than mere legal regulations; the conditions for freedom of expression are dependent on a complex institutional system, a system developed through a historical process.

The history of freedom of expression is brief. The development from a society based on an authoritative interpretation of reality and today’s society with freedom of expression as an ideal has been revolutionary.

Article 84 of the Constitution, which provides that the proceedings of the Storting shall be open to the public, is regarded as just as revolutionary as article 100, since this openness presupposed the existence of a public sphere with a corrective opposition. In 1814, Norway was almost at rock bottom, but certain elements of a national public sphere nevertheless existed, such as the University of Oslo (1811) and the Norwegian school with its focus on general, liberal education. The 1820s saw the establishment of the teacher seminaries, the new meeting paces in the towns (art exhibitions, theatres, tivoli) and the new networks of organizations and associations. From the 1830s, there was a rapid growth in the number of newspapers and commentary journalism was beginning to cut its teeth. The most important new public sphere was nevertheless the literary sphere, with Wergeland and later Bjørnson as the foremost representatives of the Norwegian poetocracy.

The second half of the 19th century saw the development of counter-cultures or alternative public spheres, which took a critical view of the social authorities. Of particular importance was an independent popular enlightenment project derived from popular culture, which offered an alternative to the hegemonious popular enlightenment project of the middle class elite. This project played a decisive role in overcoming the protection of authority that clearly restricted freedom of expression in the 19th century.

Towards the end of the 19th century, the modern differentiation process gained momentum. Arts and sciences, for example, became more clearly demarcated fields. This involved a high degree of freedom of expression for artists and scientists, but also led to their becoming more isolated in relation to the public political debate.

The trials against Hans Jæger and Christian Krohg in the 1880s heralded the differentiation of art as a separate field. Newspapers diverged from magazines and periodicals and were more closely associated with the political scene. At the turn of the century the press developed close ties with political parties, and there was therefore no emergence of a genuine “fourth estate”.

The greatest problems associated with freedom of expression during the first half of the 20th century arose in connection with the new media, film, radio and, in the course of time, television. The sceptical response to these media and the determination to regulate them played a marked role in the history of freedom of expression. A marked role was also played by the weak resistance to the state broadcasting monopoly set up in 1933 and by the fact that, after the arrival of television in 1960, the state controlled the most important channels to the public sphere.

World War II put the institutions and the population to the test. The basic structure of the system proved robust. Although the Norwegian Nazi Party and the German occupation forces succeeded to some extent in gaining control of the institutions, they were not successful in effectively influencing public opinion. After World War II, the rights of freedom of which people had been deprived during the war were not as carefully defended as one might have expected. Neither the post-war trials nor the cold war that followed were golden eras for freedom of expression. It seems that the war may have weakened people’s capacity for tolerance.

CHAPTER 4 primarily provides a sociological description of the conditions for freedom of expression in “the public sphere”, which is not a single sphere, but consists of a number of public spheres or fields, such as science, art, the church, the Nynorsk sphere, the labour movement’s organizations, minority spheres, etc. The various fields differ in their conceptions of reality and have their own communicative norms. A decisive question is therefore how these spheres interact with each other and what are the preconditions for doing this in such a way that they will together form a unified public sphere with a minimum of shared language and understanding. Who “translates” between the various fields and what arenas exist for the large shared public sphere?

The Storting and the municipal councils are the very symbols of the institutionalized public arenas. The press, on the other hand, is described both as a separate field and as a common arena or stage. It is not possible for everyone to be equally active in the common debate that takes place on this stage. Most people are only spectators in the auditorium, but have the opportunity of following the debate and either applauding or expressing disapproval.

The institutional systems able to make a positive contribution to the development of general openness and common discourse between the various public spheres are discussed under the heading “The institutions of the public sphere”. This particularly includes science, the universities, general education, the media, politics and art. The problems and institutional challenges to be faced are also discussed here. Main topics addressed include research autonomy, the need for a self-aware and independent teaching profession, the school at the intersection between socialization and development of critical independence, state approval of school textbooks, the party-political independence of the press and the development of a new press ideology, editors of newspapers, periodicals and publishers as guardians of channels to the public, the media’s criteria for selection and structuring, the conflict between tendencies towards a separate ideology of journalism and journalists as “translators” between the various fields, and whether art for the few is empty of provocative potential.

Under the heading “Public discourse” we discuss questions of significance for the quality of this discourse, e.g. the question of whether *the respect* for the public as a control body can be said to have been distorted to a *fear*. The Commission states that there is often more support, sympathy and understanding to be gained from the public than critical condemnation, and the authorities can to a great extent depend on the public to judge the substance of stories published by the media.

The independence of the media is potentially threatened from three sides: the state, the owners and the sources. The state has an ambiguous role, on the one hand, of pursuing its own control interests and, on the other hand, of being the power capable of protecting the public discourse from pressure exerted by owners and sources.

The abilities and opportunities of minorities to take part in “open and enlightened discourse” may be regarded as a “test case” of the conditions for freedom of expression in society. The situation is not easy, among other reasons, because Norway is one of the countries that have been characterized by an ideology of national conformity based on the ethnicity and culture of the majority of citizens. We emphasize that there is no conflict between a well functioning local public sphere for the various minorities and integration in the society as a whole.

As a result of the digital revolution, particularly the Internet, the situation may seem somewhat chaotic, but there is a process under way that will gradually integrate the new potential for communication in the institutionalized world surrounding the net.

The Commission states that, to the extent that public discourse functions satisfactorily, i.e. that it is informative, critical and morally refining, the need for control and legal sanctions will be limited. The greatest challenge involves providing for integrative communication between the various fields or public spheres so that we can make use of shared knowledge to improve our insight. Not only is society dependent on the quality of the communicative community; its very existence is dependent on it. If restrictions are placed on free communication, society will disintegrate.

Throughout the modernization process, progressive forces have fought for freedom of expression. Faith in public disclosure and freedom of expression as instruments of freedom appears nowadays to be somewhat weakened. Spokesmen for underprivileged groups want freedom of expression for their own causes but not necessarily for those of their opponents, and threats against freedom of expression therefore come from both political wings. One reason may be that utterances are not associated with argumentation and persuasion but with declarations and contentions. The Commission finds it necessary to warn against this development.

In CHAPTER 5, the Commission gives an account of its views concerning the functions of a Constitution (5.1) and states the arguments for protection of freedom of expression in the form that can be provided by the Constitution. Neither the protection afforded by formal statutes nor that afforded by international conventions is sufficiently effective when one wishes to restrict the freedom of action of the legislative majority.

The Commission gives some consideration to the existing system for enforcement of constitutional norms. The submitted proposal for a new article 100 of the Constitution “is based on the assumption that Norwegian courts, particularly the Supreme Court as the last instance (cf. article 88 of the Constitution), will maintain the authority of the Constitution regardless of the shifting waves of feeling in society at large” and “that the courts must interpret and apply the constitutional provision proposed by the Commission on the basis of its text and the travaux préparatoires. The fact that a majority of the Storting has stated that a statutory provision is not in contravention of article 100 cannot in itself be ascribed decisive importance”.

The proposal in the second paragraph of the draft amendment that encroachments on freedom of expression “shall be clearly prescribed by law” and, correspondingly, the proposal in the fifth paragraph concerning “clearly defined limitations” are intended to prevent conflicts between article 100 of the Constitution and statutes that intervene in freedom of expression. These conditions will force legislators to consider what encroachments are intended and what their consequences will be, and legislation that encroaches on freedom of expression may only be enforced to the extent that the requirement regarding clear statutory prescription is met.

Furthermore, chapter 5 considers legal principles and rules that directly or indirectly help maintain an open and enlightened public debate, i.e. that *safeguard* freedom of expression. Legal aspects of the infrastructure requirement are here reviewed in general (5.3) and in particular with regard to cultural minorities (5.6).

In 5.4 consideration is given to freedom of information, government information policy and citizens’ right of access to information (the principle of public access). It is concluded, inter alia, that openness is socially constituent, while also being, from an instrumental point of view, a precondition for democratic control. The Commission considers aspects of the Freedom of Information Act and Report No. 32 (1997–98) to the Storting (Report No. 32 (1997–98) to the Storting on the principle of public access in the public administration) and recommends, inter alia that establishment of a separate complaint body be considered, that the Act be made also to apply to the Storting and the bodies of the Storting and that the intentions of the Act be further emphasized in connection with excepting provisions and increased public access. 5.5 discusses the need for new media legislation, and the question of establishment by law of the editorial independence are treated separately. The Commission has not succeeded in reaching a common standpoint on this question.

In CHAPTER 6, a review is made of some selected areas where classic freedom of expression (and partial freedom of information) may conflict with other interests. The chapter is divided into two main parts; firstly, freedom of expression in conflict with individual interests is considered (6.2), then freedom of expression in conflict with public interests (6.3).

The terms *omdømme* (reputation), *personvern* (personal protection), *privatlivets fred* (privacy) and *privatsfæren* (the private sphere) are precisely defined. Three principles are stated regarding the relationship between the private and the public sphere:

The conception of an open society and the possibility of the existence of what is known as “freedom of expression” are dependent on a form of society where a distinction is drawn between the public and the private sphere.

As spheres of freedom, the two spheres are mutually dependent. For persons without access to the public sphere, the private sphere is oppressive. For persons who are unable to withdraw to a private sphere without being pursued by the public eye, as in totalitarian regimes, the public sphere is oppressive.

When “the private sphere” is made public through art and fiction, the private nature of the private sphere is upheld.

The Commission concludes that public disclosure of the private sphere is fundamentally undesirable and is alien to the public sphere and to public discourse. Public disclosure of matters in the private sphere should only take place to a limited extent and in order to serve the general need for openness and control.

While the Commission wishes to safeguard the private sphere, it sees little need for stringent legal protection of citizens’ public reputation. Freedom of expression can therefore be allowed rather more breathing space than is provided by the current defamation law. We propose that it be established by the Constitution that no-one can be held legally liable solely on the ground that a defamatory statement was false, on the condition that the defamer was in non-negligent good faith regarding the truth of the statement. This is referred to as a partial restoration of the criterion of liability in the second sentence of the current article 100 of the Constitution, and is, inter alia, supported by Norwegian law prior to 1842 and the case law of the European Court of Human Rights (ECtHR).

The Commission recommends that Norwegian defamation law, like the case law of the ECtHR and of the UK and Germany, implements a distinction between statements of fact and value judgments, and that it is made clear that justification cannot be demanded for value judgments. It is further emphasized that the main rule must be that true defamatory statements are permitted but that certain exceptions are conceivable when a statement is “improper”. We warn against the introduction of new prohibitions against true defamatory statements, cf. proposals regarding prohibition of identification of suspects, charged persons and indicted persons.

The specific problems associated with the freedom of expression of employees are considered in a separate subchapter. Examples are provided of a number of situations where there may be uncertainty as to whether duty of loyalty or freedom of expression shall have precedence, and the Commission recommends further legal clarification of the term disloyalty, statutory regulation of the phenomenon known as “whistle blowing” and that it is made clear that the duty of secrecy cannot be imposed on public employees in violation of the draft amendment of article 100 of the Constitution, fifth paragraph, second sentence.

The Commission discusses the blasphemy clause (section 142 of the Penal Code), paying particular attention to its previous grounds, and concludes by proposing that the provision be repealed. The legitimacy of limiting the freedom of expression of groups with considerable resources in order to ensure that there is time and space left for statements from weaker groups is discussed under the heading “democratic equality”. This was one of several arguments put forward when, in spring 1999, the Storting adopted prohibition of “political advertising” on television. In the view of the Commission, other less invasive strategies should be tried first, but the Commission is otherwise divided in its view of whether prohibition of political advertising on television will stand up against the proposed new article 100 of the Constitution.

The discussion of the conflict between freedom of expression and public interests begins with a discussion of the conflict between freedom of expression and consideration for national security. The Commission first makes a number of general observations regarding the issue, pointing out that limitations of freedom of expression in the interests of the internal security of the realm can only be defended when faced by actual, not imaginary, threats. The majority of the population both can and must tolerate a great deal from revolutionary groups. It then discusses a number of provisions of chapters 8 and 9 of the Penal Code and of the Act relating to special measures during war, threat of war and similar situations in relation to the Commission’s proposed amendment to the Constitution. In connection with this, certain legal reforms are recommended.

Under the heading “public Security, Peace and Order” there is a discussion of encouragement of criminal acts, spreading of lies, hatred and opposition to public authority as well as hateful statements against and referring to specific population groups (racist statements). The Commission states that hateful statements constitute one of the most difficult and most controversial areas associated with the limits of freedom of expression. It should be remembered that the freedom to express oneself in the public sphere results in airing, purification and moral refining of standpoints through discourse and criticism. In order that public disclosure shall function in this manner, discriminatory ideas must be expressed, since it is only when they are expressed that they can be combated through public criticism. In principle, freedom of

expression is thus conceived as a protection against discrimination. The Commission concludes that section 135a of the Penal Code, in its current form, is not satisfactory, and that the somewhat arbitrary list of different types of characteristic should be amended to comply with the minimum provided by international legislation. In the view of the Commission, Norway, with its reasonably alert public sector, need not have more extensive penal sanctions against discriminatory statements than the internationally approved minimum.

Marketing (advertising), pornography and scenes of gross violence are discussed under the heading “Health and Morals”. It is stated here that the aspects of advertising that go beyond the purely informative seem to bear little relation to the three processes to be safeguarded by freedom of expression, and that limitations can therefore often be defended. However, the Commission is critical of the Marketing Control Act’s prohibition of advertising that “is in conflict with the inherent equality of the sexes”, since the motive is clearly political. In the view of the Commission, the proposed draft amendment to the Norwegian Constitution should result in a somewhat more liberal pornography legislation consistent with the proposed amendments to the Penal Code submitted by the Sexual Crimes Committee (NOU 1997: 23). Five major arguments against pornography are discussed in depth.

By way of conclusion, chapter 6 discusses certain aspects of the conflicts between freedom of expression, on the one hand, and the duty of secrecy and the impartiality of the courts on the other.

CHAPTER 7 discusses censorship and other forms of prior control. It is pointed out that all forms of prior control are in conflict with the liberal principle of freedom with responsibility and that past experience indicates the need to be sceptical of control prior to publication of statements. An account is given of the current prohibition of prior censorship of printed matter in the first sentence of article 100 of the Constitution, and the existing rules for censorship of films and videos. There is also a discussion of the rules for broadcasting licences, interim measures, seizure and confiscation and prior control of demonstrations.

The proposal of the Commission for media-neutral prohibition of censorship and other preventive measures, cf. fourth paragraph, is discussed and explained. It is noted that subsequent accountability probably provides sufficient control in most cases. There should still be a possibility for prior control of moving pictures intended for a public under 18 years of age (age limits).

CHAPTER 8 considers the issues of allocation of accountability and sanction systems. It is shown that the rules governing accountability for an unlawful statement can have major significance for the genuine opportunity for expressing opinions. If the many helpers needed for making a statement public (technical staff, web hosts, etc.) were made accountable as accessories to the original expressor, this would restrict the original expressor’s possibility of making controversial views public. We therefore argue in favour of the most possible sole accountability, while ensuring that the rules are designed in such a way that there is always a person whom the aggrieved party can hold accountable. The Commission recommends that legislative work be initiated with a view to revision of the rules of accountability, extension of the rules for protection of sources and further establishment by law of the privilege of reference.

The Commission reviews several of the proposals set out in NOU 1995: 10 Reform of defamation legislation, and supports the proposal for repeal of the right to institute private prosecution in the area of defamation. Other forms of reaction, such as judgment that a defamatory statement is null and void, compensation, redress and apology are discussed, with certain suggestions concerning the need for reform.

In CHAPTER 9, we present a survey of regulation of freedom of expression in nine other states: Sweden, Denmark, Finland, Iceland, the UK, Germany, France, the USA and South Africa. The basis for the presentation is the constitutional protection afforded by the individual states of classic freedom of expression. In order to give a more adequate description of how the protection functions in practice, which can rarely be judged on the basis of the general wording of a constitutional provision, we consider a number of restrictions of freedom of expression resulting from statutory law and case law. Where most states are concerned, we consider the rules concerning prior control, broadcasting activities, right of access to information, restrictions on ownership and rules of accountability.

In CHAPTER 10, we present the proposed amendment to the Norwegian Constitution and the Commission’s further notes to and interpretation of its proposal. The specific comments on each paragraph and sentence must be read in the context of the report as a whole, and cross-references are provided in the text.

The chapter is concluded with a brief list of the desirable legal reforms that the Commission has identified in the course of its work. This applies both to reforms that seem necessary in order to ensure that statutory law complies with the Constitution and other reforms designed to encourage a freer and more open public debate in Norway.

In CHAPTER 11, the Commission records some notes on assumed economic and administrative consequences of the proposed amendment to the Norwegian Constitution.

CHAPTER 12 contains a brief presentation in English of the Commission’s proposal for a new article 100 of the Constitution as well as some information concerning the Commission and its work.

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1.3 The work of the Commission

The Commission has held 22 meetings, including one three-day meeting, eight two-day meetings and 13 one-day meetings, a total of 32 meeting days. In addition, the Commission was for a period divided into working groups, which held their own meetings.

In July 1997, the Commission sent a letter to approximately 140 organizations and 70 individuals whom we regarded as being of particular interest for the Commission and its work. We invited these organizations and individuals to take part in a dialogue and asked those interested in direct contact with the Commission on Freedom of expression to notify us of their interest. We informed that contact could take place as bilateral meetings with the Commission, through participation in open meetings or by submitting written opinions to the Commission. We received approximately 40 replies to the letter and have held meetings with most of those who expressed interest. In

addition, throughout the continuous process, we have received input from press organizations and other interest organizations.

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Chapter 2

Why freedom of expression?

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2.2 The grounds for freedom of expression

"Freedom of expression" is a modern concept that belongs to the social concepts prevalent from the Age of Enlightenment and onwards. It is associated with scientific rationalism, with the concept of individual rights and with a form of society where a distinction is drawn between a public and a private sphere. It is important to be aware that freedom of expression is a modern concept, and that, in a historical perspective, it is the exception rather than the rule. Freedom of expression has never been, and is not, a matter of course.[1] This emphasizes the need for promotion of greater awareness and for grounds. The fact that freedom of expression can be historically located in the manner outlined above need not mean that it cannot be provided with universal grounds. We will return to this.

The grounds for freedom of expression are normally explained by reference to three principles that correspond to the three characteristic features of the Age of Enlightenment. These are *the principle of truth, the principle of autonomy* ("the individual's freedom to form opinions") and *the principle of democracy*.[2]

2.2.1 The principle of truth or the conception of fallible reason

This principle springs out of the turning point of the scientific approach, postulating, as it does, that truth is reached through a secular, culture-dependent and dialectic process. The latter entails that truth is arrived at by means of debate where assertions put forward can be corrected in confrontation with other opinions. This does not necessarily apply to trivial assertions, such as that two plus two equals four, but applies to assertions dependent on a greater or lesser degree of interpretation. We humans are fallible but, by investigating matters and by listening to each other, we can learn more and view matters differently, so that we acquire more well-founded opinions. Our fallibility requires that we join forces in our reasoning. We observe that "truth" does not here involve a conception of perfect insight regardless of personal

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[1] It is stated in the Swedish report, SOU 1983: 70 Protect Freedom of Expression. Proposals of the Inquiry into Freedom of Expression (page 70) that "freedom of expression is experienced as a value that can be taken for granted, that is not created but whose continued existence is worth securing." What therefore needs to be justified is not freedom of expression in itself "but intervention in it". We beg to differ. Freedom of expression is more vulnerable than the Swedish commission seems to believe. It has proved necessary to remind of the reasons for freedom of expression, not least when making restrictions".

[2] Cf. Eric Barendt: Freedom of Speech, Clarendon Press, Oxford 1996 pages 8-23. His categories are: "Mill's argument from truth", "Free speech as an act of self-fulfilment" and "The argument from citizen participation in a democracy". Here, the three concepts will be presented rather differently on the basis of Gunnar Skirbekk: "'Din tanke er fri' – om å grunngi det rettslege vern om ytringsfridom" ("'Your thoughts are free' – on the grounds for legal protection of freedom of expression"): Vit og Vitskap, Fagbokforlaget 1998".

limitations, irrationality or power structures. What it involves is a conception that, by listening to counter-arguments, we can reduce the influence of such limitations, of irrationality and power games, thereby gaining *better insight.* This means that freedom of expression is a necessary condition for counter-arguments to be heard and, if we are not familiar with the counter-arguments, we cannot know whether we are right.

The Inquisition’s trial of Galileo Galilei in 1633 heralded the turning point for the scientific method. The case concerned the new scientific theories which were felt to threaten the basis of traditional authority.[3] The conflict in the Galileo case was between theological powers and a proponent of free research. It is irrelevant whether Galileo was right or not. What was important was the principle of free research, which entailed free discussion and which therefore presupposed freedom of expression. It might even be contended that, if Galileo was wrong, it was all the more important that his views be made public in order that they might thereby be corrected. The trial of Galileo heralded a process of differentiation that was to give rise to a division between theological and political powers on the one hand and a public sphere for free debate on the other.

During the course of the 18th century, free debate in the public sphere was extended from primarily concerning scientific and philosophical questions to concerning controversial political questions too; all topics of public interest should be open to free and enlightened debate in the public sphere. Precisely in a modern society, where it is expected of us as human beings and citizens that we address complex questions of a political, social, ethical or cultural nature, can it be vigorously stated that it is often important that we attempt to eradicate the less good opinions resulting from fallible collective reasoning, i.e. by means of investigation and discussion in the public sphere, whereby we, to the best of our abilities, attempt to distinguish the less well substantiated opinions from the opinions that are better substantiated.

This may be said to be a relatively cogent conception of modern reasoning and its close association with the principle of freedom of expression. No facts regarding power structures or human irrationality are here denied. However, this conception of our collective fallible reasoning has the particular strength that those who wish to contradict it have difficulty in avoiding being drawn into a discussion of the arguments they wish to reject since they are required to provide counter-arguments, that is to fall back on the collective fallible reasoning. The truth argument as outlined here has proved to be probably the most robust argument for freedom of expression. It is also closely related to the other two arguments.

2.2.2 The principle of autonomy (“The individual’s freedom to form opinions”)

The ideal of “free formation of opinion” which the Commission on Freedom of Expression proposes implemented in Article 100, second paragraph, of the Norwegian

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[3] The trial of Galileo may be regarded as the third of the three major cases concerning freedom of expression in the history of our civilization, all of which concerned threats against established authority. The first was that against Socrates. This concerned philosophical convictions. The second was against Jesus of Nazareth, which concerned religious faith and preaching. The case against Galileo concerned scientific knowledge, cf. Skirbekk, op. cit. page 88-128. One may perhaps find there to be a fourth major case, i.e. that (or those) against James Joyce in the 1920s. This concerned the threat posed by art.

Constitution is closely related to the conception of “the mature human being”. This means that certain preconditions must be present in order for a person to function as an autonomous individual in the open society.

There is a tradition in western countries of maintaining that the individual is born with inviolable prepolitical rights to freedom of action including speech acts. This freedom may only be restricted on the grounds of other individuals’ right to corresponding freedom. This individualism with its theoretical foundation was originally provided by John Locke.

A modern variant can be found in the jurisprudentialist Ronald Dworkin, who has had considerable influence in the USA. According to Dworkin, the individual rights are “political trump cards held by individuals”. What right have any individuals to decide what other individuals may do and say or not do and say? It is nevertheless worth noting that he seeks the basis for his standpoint not in a natural law principle of freedom but in the equality principle: “laws that constrain one man on the sole ground that he is incompetent to decide what is right for himself are profoundly insulting to him,” according to Dworkin.[4] There is a strong antipaternalism in this equality argument.

This individualistic rights thinking has considerable standing in the USA, where it has resulted in very extensive protection of freedom of expression. It was reinforced by the reaction to McCarthyism during the Cold War and to the Vietnam War. In both cases, there was a subsequent feeling that the state had unlawfully restricted the rights of individuals, inter alia, to express themselves freely concerning political matters.

However, this position has recently been subjected to criticism. The point of departure for this criticism lies in another concept of the individual. According to this concept, the autonomy of the individual is associated with a socializing or formative process. Society exists prior to the individual, as in Locke, and not the reverse. This means that society has a responsibility for educating the individual. People are to be subjected to improvement through a mutual formative process or, to quote the American jurisprudentialist Michael Sandel, who argues against Dworkin, the unfortunate “conception that the government should be neutral in the question of ‘the good life’ is characteristic of modern political thinking. The political theory of Antiquity considered that the purpose of politics was to cultivate the virtues or ethical qualities of the citizens”.[5] McCarthyism and the Vietnam War seem not be so immediately relevant as they were. The current cause of concern is an alleged decline in common values in modern society. Against this background, it is necessary in legal contexts for the state to consider the content of the statements.[6] This approach to common values and a general formative process has traditionally had a stronger position in Europe.

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[4] Ronald Dworkin: Taking Rights Seriously, Duckworth 1977, pages ix and 263.

[5] Michael J. Sandel: Democracy’s Discontent. America in Search of a Public Philosophy, The Belknap Press of Harvard University Press 1996, page 7.

[6] Sandel (page 71 pp.) illustrates developments in the USA and the contrast between the two views by comparing the court case concerning Martin Luther King’s rally in 1965 with a case concerning a nazi demonstration 20 years later in Skokie, Illinois. In both cases, attempts were made to prevent demonstrations by instituting legal proceedings. Both succeeded, although on completely different grounds. The Luther King demonstration was permitted “because of the enormous degree of injustice

In the previous paragraph, we saw how the truth argument was based on a conception of personal limitations. It was by means of intercourse, discourse and discussion that personal limitations might be reduced and improved insight attained. Moreover, Sandel would argue that a fallible human being needs other people and their alternative perspectives and arguments in order to be able, step by step, to improve his own opinions of himself and others. In this way, one develops into “a mature human being”. It is by testing one’s views against those of others that they can be “morally refined”.

It may be argued that, particularly in modern society with its varying freedom of action and multiplicity of perspectives, it is important to develop the capacity for self-examination by putting oneself in other people’s shoes and viewing things through their eyes. Such a reflexive identity is by many people viewed as the core of the *modern* “mature human being”.

Freedom can thus be seen to be contingent upon a form of education. Without education, freedom may be perverted. Ludvig Holberg, the Age of Enlightenment’s portal figure in Denmark-Norway, was keenly preoccupied with freedom of expression, and called attention to the connection referred to here: “The greater the level of education possessed by a people, the greater the freedom it provides its poets”.[7] The development aspect is important. Society must be institutionalized so that citizens are gradually released as they achieve maturity or education. There is, and must be, a tension between the paternalistic undertones of the educational ideal and the anarchistic undertones of the freedom ideal.

As mentioned above, there is a tendency to place somewhat varying emphasis on the two grounds for such rights as freedom of expression in the USA and Europe based on different concepts of the individual. We also observe that both types of grounds provide strong arguments for freedom of expression. However, the types of expression show a tendency to vary. Individualistic rights thinking discriminates poorly between the various types of statement, while on the basis of the concept of the individual associated with “the mature human being”, it will be possible to place a greater emphasis on the content of statements. It is broadly speaking the political statements that, according to this principle must enjoy special protection. These are statements concerning the conditions of 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. Thirdly, we observe how the weight accorded to the various arguments varies according to the historical situation. This contextuality is demonstrated particularly well in connection with developments in the USA.

In principle, we can refer to two opposing concepts of the individual. These are the collectivist concept, according to which the individual is subordinate to communal considerations, and the individualistic, according to which regard for the individual takes precedence over regard for the community. The conception of “the mature human being” as here developed as a precondition for freedom of expression, may be

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that was being demonstrated against”, while the nazis succeeded by showing the content of the utterance to be irrelevant. Sandel is critical of the latter decision.

[7] Ludvig Holberg: Memoirs. Letters to an Honourable Gentleman 2, Aschehoug 1984, F. Beyer AS 1988, page 48.

said to embody a third standpoint that transcends the other two.[8] This conception assumes that a certain competence (socialization or education) is required in order to function as an autonomous individual in the open society. In view of the institutionalization of our society with its generally educative school and the continuous debate in the public sphere, all adults may be regarded as “mature” in the sense the word is used here.[9] The fundamental preconditions for free formation of opinion are present.

2.2.3 The principle of democracy

In his seminal book *The open society and its enemies*, Karl Popper maintains by way of introduction that our civilization is still in its infancy. It has not fully recovered from the shock of its birth “the transition from the tribal or ‘closed society’, with its submission to magical forces, to the “open society,” which sets free our critical powers”. The book attempts to show that the shock of this transition is one of the factors that have made possible the rise of reactionary movements, which have tried, and still try, to overthrow civilization and return it to tribalism. To make the message explicit, in our civilization, there will always be forces that, consciously or unconsciously, strive to return us to a closed society by taking control of the “texts” that constitute our understanding of reality. It is therefore essential that we are continually reminded of the premises for democracy. *Openness* and *criticism* are two of the most important constituents of democracy. We will draw attention to three aspects of this openness: *freedom of information*, *public debate* and *public access as a control*.

Freedom of information is laid down in article 10 of the European Convention on Human Rights. It has also been laid down in the Constitution of Germany, according to which everyone has the right to freely inform himself on the basis of generally accessible sources.[10] The precondition for this functioning in accordance with the democratic intention is of course that relevant information is actually accessible. This means that there must be *public access* to the major social processes, power must be given a face. Public access to the proceedings of the Storting is established by the Constitution. Public access has long been a principle of the administration of justice. In order to further secure the principle of public access, it has in the Nordic countries been particularly expressed through establishment of “the Freedom of Information Act”. Here it is laid down that it shall be possible, on request, to examine the case documents of the public administration.

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[8] All of the great thinkers of the liberal tradition, i.e., the tradition within which the modern concept of freedom of expression was developed, have maintained that freedom presupposed certain characteristics or a certain “maturation”, cf. Peter Berkowitz: Virtue and the Making of Modern Liberalism, Princeton U.P., 1999”.

[9] It is perhaps necessary to make clear that we are not referring to conditions for democracy in the sense of general franchise, etc., but of the need to regulate the communication that must be the basis of democracy in the sense referred to. There has recently been an extensive international debate on the relationship between freedom and virtue.

[10] In German: “sich aus allgemein zugänglichen Quellen ungehindert zu unterrichten”

Provisions concerning freedom of information in modern statutes are not solely a consequence of the desire of some forces to return us to the closed tribal society, but are also a consequence of the complexity of modern society, which requires special measures to ensure openness. The problem is clearly expressed in the European Union, where the term “transparency” has become a major political concept. One speaks of increasing “transparency” in order to create greater confidence in the system. The modern antithesis of the open society is the Kafkaesque, hidden, faceless power. Democratic exercise of power must take place openly. We must feel that we know what forces drive social developments, thus defining the frameworks for our lives. Such transparency is a precondition for our ability to maintain a rational relationship to these forces, thereby enjoying the characteristic sense of freedom it should give to live in a democracy.

As regards the emphasis on openness and freedom of information as preconditions for democracy, we repeat what we pointed out in the introduction; the conception of a liberal democracy and the requirement as to openness are intimately associated in a form of society where a distinction is drawn between a public and a private sphere. Openness and transparency apply to the public sphere and what may be regarded as of public interest, cf. Statements in the public sphere versus statements in the private sphere, below.

A democracy is based, among other things, on procedures for election of representatives and on decisions made on the basis of majority votes. However, prior to the voting, there must be a debate between mature adults. This communicative or deliberative aspect of democracy is at least as important as the democratic decision-making procedures such as voting. Such debate is intended to result in improved insight (cf. The principle of truth, above) and better decision-making. As Helge Høibraaten has said, democracy is “a stream of communication that changes people’s intentions, that wears and tears them with new points of view and arguments, that forces its way, often in unexpected directions”. It is a fundamental principle of democratic society that political debate shall take place in public. This is also expressed in article 84 of the Constitution, where it is laid down that “The Storting shall meet in open session”. In 1814, this was a radical principle.

It is worth noting that not even today is this openness a matter of course. Thus, the practice developed by the Labour Party during the first decades after World War II has been criticized for the fact that essential parts of the politically important exchanges of views and decision-making procedures were not open to the public. Expressions such as “some of us have discussed the matter” and “Hønsvaldian parliamentarianism[11] bear witness to this.[12]

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[11] Translator’s note: During a debate of the Storting in 1959 concerning the sale of weapons to Cuba, the Labour Party parliamentary spokesman, Nils Hønsvald, stated that a change or replacement of the Government would take place “in a different manner than a parliamentary open vote of no confidence”. The Labour Party preferred to settle with the Government and the ministers in private. This was perceived as a disregard for the Storting and a lack of willingness to accept the consequences of mistakes.

[12] In connection with the consideration of “Lex Brofoss” in 1947, John Lyng accused the Labour Party of undermining the political democracy by moving “important decisions from the open, free forum, where the opposition has certain rights, to decisions behind closed doors and with the blinds down in the administration’s offices.” Proceedings of the Storting, page 459 pp. Cf. also Jostein Gripsrud in an

One of those who has argued best for freedom of expression and the use of collective reasoning is Immanuel Kant. On the other hand, he warned against democracy, which he referred to as a form of despotism. What he feared was plebiscitary democracy whereby the masses allow themselves to be led, i.e. a democracy with no basis in the mature human being, where freedom may result in malice. This is a reminder of the importance of the institutionalization of the processes of education and decision-making. No-one has expressed the necessity of such an institutional guarantee better than Frederik Stang (Prime Minister of Norway 1873–1880) in his often quoted lines “The general will” “refined and moderated by the forms through which it must work towards its goal” must be “the moving force behind all directions taken by the organs of state”.

Public disclosure as a basis for control of both public and private power is also an aspect of the institutionalization of the public sphere of democracy. It may be argued that it is here, rather than in legal procedures, that the individual citizen’s main protection against abuse of power lies. The control function rests on a general *fear of public disclosure,* or what we might call *the pillory effect.* Many people find the prospect of exposure to public criticism more frightening than formal penalties. This control function is primarily sustained by the media.

We shall return to the media, not only in its function as a control body, but also as an instrument of power. Like all power, the power of the media can be abused. What, above all, should protect those without power may thus turn into a threat. And we are well aware that demands may quickly arise regarding restrictions and control by ombudsmen, e.g. demands that public channels be (partially) closed, etc. This may be regarded as an institutional paradox of our open democracy. It demonstrates the old problem of who shall watch the watchers.

In this connection, it is necessary to emphasize strongly that the media are only intermediaries. The real watcher or agent of control is the mature human being, the enlightened and critical reader of the media’s messages. There are good reasons to show a reasonable degree of confidence in this recipient. The fragile trust in the media reflected in continual demands for different types of control in itself reflects a critical attitude held by these real guardians. The call for control is in itself evidence that the control is already in place.

Freedom of expression and, not least, openness is a constituent element of democracy. It must be discussed, but cannot in itself be subjected to democratic voting. Democracy is delimited by its ability to abolish itself. Freedom of expression, the right to criticize political players and the rights of individuals and minorities are factors that must be secured by constitutional guarantees. That is to say that these are areas where it must be difficult to make changes, and that such changes should only be possible when supported by a qualified majority. In other words, that the change can be blocked by a minority. This too is part of the normal democracy concept of a modern society.[13]

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unpublished MS to the Commission on Freedom of Expression in 1999, where he refers to J. Habermas’ criticism of the modern “refeudalization”, which precisely entails that decisions are returned to the closed rooms, while public disclosure becomes a “manipulative pseudo-publicity”.

[13] “Democracy” has not always been defined in this way. Immanuel Kant, for example, identified democracy as really being a form of despotism, since he referred to it as a plebiscitic tyranny of the

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2.3.2 Statements in the public sphere versus statements in the private sphere

Just as important as the distinction between words and action is the distinction between public and private statements. The first sentence of the old article 100 of the Norwegian Constitution states that “There shall be freedom of the Press”. What this means is that there shall not be *prior censorship* in connection with *public disclosure* of statements. It is thus statements in the public sphere that attention is directed to. At that time, generally speaking, the only one way of making statements public was to put them in print. As a result of technological developments, there are now a number of means of making statements public. However, the major fundamental distinction between statements in the public sphere and private statements continues to apply.

The conception of freedom of expression and the potential for its realization according to intentions requires such a distinction between statements in the public sphere and statements in the private sphere. It is the distinction itself that constitutes the freedom or, alternatively, each of the two spheres, the private and the public, constitutes its own form of freedom from, respectively, external and internal control or restraint. In this way, they are able to constitute each others’ characteristic freedom precisely by being separate while both are accessible to individuals.[14] The converse principle is what is termed “totalitarianism”, which is characterized by the fact that the communal body, the public authority, in principle has control over private life. It is of decisive importance that the distinction referred to is laid down in legislation and legal practice.

The private sphere is the sphere where private persons associate with each other. It is, and should be, a sphere of freedom in the sense that it is extensively *protected against regulation* and intervention by the public authorities. It entails, among other things, a relative freedom to defame without intervention by the public authorities, but also entails a lack of public protection against being defamed.

The private sphere is, and should be, a sphere of freedom also in the sense that it is *protected against access* both by the public authorities and by the public. These two freedoms, against intervention and access, are preconditions for the formative process and the development of identity towards the mature human being. The formative process will not be able to fulfil this maturation purpose unless one is certain that one is not subject to surveillance by the public authorities as, in principle, occurs in closed societies. One can only develop as a human being if one has a space where one can feel free from accountability to external, unknown controllers for what one does and says. Public discourse in a free society originates in such free and unrestrained processes. It springs out of the protected private sphere.

There has been a tendency to scale down protection of privacy, both as regards intervention by the public authorities and access by the public. There may be good reasons for regulating protection in both cases, e.g. as regards child protection and

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majority. This was also the general terminology in 1814. The national assembly at Eidsvoll, which established the Norwegian Constitution in 1814, did not speak of “democracy”, cf. Francis Sejersted: Demokrati og rettsstat (Democracy and Constitutional State), Universitetsforlaget 1984.

[14] The public sphere was not originally accessible to women. Indeed, the fight for access to the public sphere played a central role in women’s emancipation.

protection against domestic violence or as regards certain parts of the private concerns of particularly public persons. The development of public registration, not least as regards the tendency to connect different databases, is considerably more questionable. Here it looks as if we might be sliding naïvely into the “brave new world”. To the extent that these developments reflect a lack of understanding of the fundamental importance of this distinction, there is reason to react. The distinction between the public and the private sphere must be maintained both because of the right to privacy and in order to maintain a basis for free public discourse. Particularly in the context of freedom of expression, it is necessary to maintain the distinction between the private and the public spheres in the way we think about freedom and in the regulation of this.

The private sphere does not offer any particular individual freedom. It is the public sphere that does so. Although public sanctions are lacking in the private sphere, social sanctions may be all the stronger. In the intimacy of the private sphere, people are thrown on the mercy of each other. This is known as “the tyranny of intimacy”. In this regard, the public sphere offers a particular form of freedom in that it is to some extent possible to choose an identity or “be relieved of one’s individual traits”. The characteristic freedom of the public sphere is based on the assumption that certain information from the private sphere is not made public and is not disclosed to the public authorities. It is thus characteristic for the public sphere that it constitutes “the forum in which it becomes meaningful to join with other persons without the compulsion to know them as persons”.[15] This particular freedom offered by the public sector is a prerequisite for a public life, where mature adults communicate with each other about politics, morals, art, etc. What is, and should be, characteristic of public discourse is that it is discourse between independent and mature strangers.

The tendency to erase the distinction between the public and the private sphere involves, on the one hand, public disclosure of private matters and, on the other hand, a privatization of the public sector. The former entails the damage that erasure of this distinction may do to the formative processes in the private sphere, as suggested above. The latter entails the damage that such erasure may do to public communication. Privatization of the public sector is associated with increasing demands to be allowed to peep into the private lives of other people, particularly well-known people. This is harmful, not only because it infringes the right to privacy, but also because it corrupts public discourse so that this cannot function according to intentions, but degenerates into gossip. Attention is averted from public concerns. It should suffice to mention the example of President Clinton. The extramarital affairs of earlier presidents have partly been of a more reprehensible nature, but have been hidden from the public gaze simply because it was respected that such matters bore no relevance to their public activities. The right to privacy must apply just as much to public figures as it does to other persons.

There is reason to emphasize the fundamentally important distinction between “protection of privacy” and “personal protection”. Protection of the private sphere

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[15] Richard Sennett: The Fall of Public Man, Faber & Faber 1993, page 340. This classic work was first published in 1977, and is a critique of the “intimization” of the public sphere, which began as early as the 1700s. It provides a strong argument in favour of the assumption of freedom that underlies the distinction between public and private spheres.

(“privacy”) has grounds beyond personal protection, grounds associated with the community’s or society’s way of functioning. In practical terms, this concerns the regard for public discourse. Personal protection, on the other hand, primarily concerns protection of the person *as a public person* (public reputation), and precisely not specifically as a private person. This distinction is not always observed, as it should be, when discussing these topics.[16] We referred to the unfortunate tendency to make public the private lives of public figures. Personal protection or protection of public reputation or “honour” is a different matter. In this connection, persons with power and position must tolerate more aggressive criticism than ordinary, normally more anonymous, persons must put up with. There may be reasons for stricter procedures than those that apply today as regards “protection of privacy”, whereas a fairly liberal approach should be taken as regards personal protection.

The fundamental arguments in favour of freedom of expression, as reviewed above, assume an institutionalized public sphere relatively independent of the private sphere, a sphere where information is freely accessible and where public discourse can take place. Such a “public sphere” is not, as Jürgen Habermas reminds us, a matter of course, but an institutional system formed by a historical process.[17] We will return to this process. For the present, we only emphasize that, as opposed to the relative lack of such regulations in the private sphere, the particular freedom of the public sphere necessitates certain regulations. “Abuse” of freedom of expression has thus relatively greater consequences if it takes place in the public sphere. In a number of areas, general statutes thus observe the Constitution’s restriction to statements in the public sphere. For example, the so-called “racism clause”, section 135a of the Penal Code, is explicitly restricted to statements made publicly. The distinction between private and public statements should be maintained and made clearer.

The problem regarding public disclosure is firstly that, if statements are to be made public, this requires access to the channels to the public sphere. It goes without saying that it is not possible for everyone to inform or communicate with everyone. The anarchy or cacophony that would then break out would threaten freedom just as much as a totalitarian control. In order that it shall be possible to keep satisfactorily informed and in order that public discourse shall be able to foster collective reasoning, the development of the mature human being and the democratic process, a well structured institutional system is required. This includes a need for channels to the public sphere or “media” in a broad sense.

We might perhaps compare the public sphere to a theatre, or rather many theatres, but within a system where there is seen to be a need for a main stage. A relatively small number have been assigned (or have secured for themselves) roles on these stages. These are the persons who actively maintain public discourse. However, the purpose of the theatre metaphor is to emphasize the fact that this discourse must be held in public. Most of us are spectators down in the auditorium. However, we too have a right to express ourselves. We can applaud or express disapproval or perhaps leave the auditorium. The role that we all (or most of us) have in the public sphere is precisely that we can show support or disapproval by means of actions, demonstrations or,

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[16] It is, somewhat inappropriately, usual to interpret “privacy” as part of personal protection.

[17] Jürgen Habermas: [Strukturwandel der Öffentlichkeit (The structural transformation of the public sphere), 1962].

primarily, by voting at elections, which is also a way of making a statement. Such *statements by the public* constitute a particularly important part of the political discourse. An important question is to what extent development of the public spheres or “theatres” may be ultimately regarded as incumbent on the public authorities as a positive obligation if it is not otherwise realized satisfactorily. This is what the infrastructure requirement involves.

The second problem is that it may be difficult to define the boundary between the public sphere and the private sphere. This boundary is contingent upon historical considerations. There may at the same time be individual views as to where the line should be drawn. There is also a considerable grey area. Generally, this proves to apply not least to communication carried out by means of the new digital media. It is maintained that these media fill the gap that previously existed between the public media and private communication. For this reason, among others, regulation of statements in these media poses particular problems.

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2.3.4 Political statements

It is implicit in the concept of freedom of expression that political statements shall, broadly speaking, enjoy special protection.[18] This follows from the reference in the Norwegian Constitution to the “Freedom to speak frankly on the administration of the State”. The principle of special protection for political statements has also been clearly established by the European Court of Human Rights in Strasbourg. The special protection of political statements reflects fundamental principles of our form of society. It is associated with the conception of the open society and the institutionalization of a public sphere. It is primarily the political process and the political debate that shall take place in this sphere. The above remarks concerning public statements apply not least to political statements.

The concept of the open society and public discourse with special protection of political statements does not involve any revocation of the political power or any equal distribution of this, although it may be possible to attain some degree of this by opening society. However, the main point is to establish the conditions for legitimate exercise of power in the area of freedom of expression.

As in the case of the scientific discussion, political statements are often argumentative. That is to say that the statements are reasoned. It may be maintained that it should be possible to afford argumentative statements special protection since they, in a particular manner, are intended to serve one of the central considerations of freedom of expression, that of truth. However, such a limitation would impose too stringent restrictions on the political debate. Although argumentative statements play a central part here, political debate is also characterized by symbolic demonstrations and agitative statements, appealing to feelings and fantasy as well as to reason. All of this is legitimate and necessary for the political debate. But, just as in the case of the argumentative statement, this type of agitative statement or appeal must seek its

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[18] It is shown in 2.2.1 that politics “broadly speaking” involves all topics of public interest, of a political, social, ethical and cultural nature, that we as human beings and citizens are expected to address. When “politics” in some connections is used in a less extensive sense, this is more out of regard for the discussion of variations in form and context than in content.

legitimacy in an *institutionalized opposition* or by means of a diversity that not only enables, but may also inspire independent and responsible formation of opinion.

An example of special protection of political statements is the major importance attached by the European Court of Human Rights in Strasbourg to the premise that justification cannot be demanded for “value judgements” or for characterizing statements made in a political connection. It thus follows from the special protection that considerable tolerance is shown for negative characterizations of political opponents. One argument in favour of a considerable degree of liberality in relation to tough language is that it can in practice be difficult to differentiate between argument, appeal and characterization. An equally important argument is that, by applying “academic” standards to political language, one actually excludes many people from taking part in the political exchange. Thus the academic standard, including requirements regarding explanation of standpoints, cannot merely be transferred to the public political debate.

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2.3.8 The necessity of not prohibiting “undesirable” statements

There is no doubt that many statements are “undesirable” in the sense that many people would not wish them to be made public, such as untruths, glorification of violence, pornography, defamation, hateful statements, etc. It must also be legitimate to set limits for freedom of expression in order to avoid the worst manifestations. However, there is a question of where the lines should be drawn and whether the most important responsibility of the public authorities is to set limits or, put another way, should we be most concerned about the “undesirable” statements made in the public sphere or should we rather direct our attention towards the information and statements that do *not* make themselves heard in the public sphere, *but which should have been heard there?* There are good reasons for maintaining that it is the latter that should concern us most.

We referred above to a “sound society”, i.e. a society where public access functions reasonably well, where false information can be corrected and opinions be morally refined through open, public discourse. We can refer to the public sphere as an arena for purification and airing. Such a correction in the open public sphere is preferable to prohibition and penalties. Indeed, it is simply a principal argument for having a public sphere with freedom of expression.

There are thus seen to be positive reasons for not attempting to totally cleanse the public sphere of “undesirable” statements. Paradoxically, we should welcome some provocative statements so that we will be forced to make more effort and to generate and raise the temperature of public discourse. In a sense, “undesirable” statements have a necessary function in the sound society. For example, one needs some manipulatory statements in order (among other ways, by examination of texts in the school) to be able to reveal manipulation and thus raise our awareness of and resistance to this type of statement.

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The desirability of “undesirable” statements is not as paradoxical as it may seem at first sight. It simply reflects the fundamental argument in favour of freedom of expression. Firstly, there is the positive argument according to which “undesirable”

statements are desirable in themselves. Truth is reached through a dialectic process where public disclosure of less good opinions is a necessary stage in arriving at better opinions or improved insight. Secondly, there is the negative argument that purging of “undesirable” statements must necessarily result in eradication of desirable statements as well. If penal sanctions are to be introduced against statements, it is therefore not sufficient to refer to the fact that the statements violate more or less generally accepted norms of decency. There must be no requirement of evidence in order that statements in the public sphere shall be necessary or positive or proper or true. The burden of proof is the opposite. One is free to express what one will, unless restrictions are proved necessary. In a “sound society” with a public sphere with controlling, corrective and morally refining functions, there are limits to what restrictions are “necessary”.

2.3.9 The responsibility for infrastructure

The major concern is thus what does *not* make itself heard in the public sphere. What then is the responsibility of the public authorities in relation to this concern? Originally, freedom of expression was viewed primarily (but not exclusively) as a freedom in relation to the power of the state and the public authorities, a guarantee against abuse of power. However, the responsibilities of the public authorities have altered during the course of history. We have acquired positive rights of economic and other kinds that go beyond pure rights of freedom. Thus the public administration today represents not only communal rights and requirements regarding the individual, but also our positive individual rights in relation to the community. Hence, the public authorities have become a many-headed creature with to some extent mutually conflicting responsibilities. In the context of freedom of expression, the obligations of the public authorities have therefore been extended from not standing in the way of free expression to actively providing for public discourse and free flow of information. That is to say that the public authorities today are obliged to make provisions for use of the potential for expressing opinions that was acquired by the public on establishment of the classic freedom of expression.

If we examine the three principal arguments in favour of freedom of expression, the truth argument, the autonomy argument and the democracy argument, we quickly see that, in order to support freedom of expression, an extensive institutional structure is required. The generally educative school is, as stated, the most important public institution in the development of the public sphere and the mature human being. Important roles are also played by the institutional preconditions for science and art, the diversity of the media, etc., i.e. public cultural institutions such as universities, libraries, museums, broadcasting and the like as well as the entire gamut of private institutions regulated and supported by the public authorities, such as media, publishers, theatres, cinemas or other public meeting places. It is the obligations of the public authorities in relation to this entire institutionalization of the public sphere that is referred to as *the infrastructure requirement*. The legal regulations of access to information and communications are an important element of this extensive project, but constitute only part of the institutional framework.

This infrastructure is well developed in Norway as regards both direct and indirect instruments. This means that, in all reasonable relations, we have considerable

opportunity for expressing opinions (including access to information) combined with a largely ethical public sphere. A little untidiness in the form of violations must not be allowed to cloud these fundamental conditions. However, this does not mean that there is no need for continuous vigilance and new initiatives to ensure not only that freedom of expression is protected but also that the opportunity for expressing opinions is used according to intentions. The history of freedom of expression is primarily a history of how this institutional system has developed.

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Chapter 4

The conditions for freedom of expression in the public sphere

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4.2.4 The channel guardians

The development of the press from a high degree of owner control and the break-up of the close relationship to the political parties that had developed from the end of the previous century was closely associated with a process involving the development of new forms of responsibility and a new identity. This process has a clear character of attainment of independence or differentiation. It was with reference to this process that the expression "the fourth estate" was coined.

A central feature of this process has been to render visible and to regulate what we might call the editorial function. Generally speaking, this is the function involved in deciding what shall be made available to the public. Besides being carried out by those who are formally editors, this function, may also be carried out by media owners, journalists, publishers' readers, expert committees, taste panels, civil servants, PR consultants, advertising agents or other persons in formal or informal positions, and is thus one of the most important functions in the public sphere. It is the function of guardian of channels to the public.

What then is the difference between *editing* and *censorship*? The first sentence of the old article 100 prohibits *public censorship.* That is to say prior censorship by the authorities. This is what we usually envisage where "censorship" is concerned. This entails that anyone is free to seek access to the general public by, for example, printing and distributing whatever information he or she wishes to impart. Anyone is free to (seek to) establish a channel to the public.

However, it is not so easy to establish such a channel. This is primarily because it costs money to establish a channel with the potential to reach out. If one wishes to reach the public, one is in practice therefore dependent on the existing channels, presided over by channel guardians or editors. We wish to make clear, as we have done elsewhere, that this is an entirely necessary function. Public discourse must be structured in one way or another in order to function according to intentions. But it is of decisive importance how, or on what criteria, this sorting and structuring is done.

The censorship concept has been drawn into this context in this way by the Permanent Commission on Criminal Law, which has stated that "media owner censorship ... is almost as harmful to freedom of expression as public censorship". This may be a correct and important observation, and considerable attention has been paid to the question of how owner influence may be prevented in the media. The question is given broad treatment in NOU 1995: 3 *Media Diversity.* The strategy chosen by the dominant owner of the Schibsted Group, Tinius Nagell-Erichsen is also worthy of mention. He has decided that his shares shall be transferred to a foundation, "The Tinius Foundation", which is intended, firstly, to ensure that the Schibsted Group will continue to function as a media concern and, secondly, that it will be run in accordance with specific guidelines. Among other things, the newspapers Aftenposten

and Verdens Gang shall have “free and independent editorials” These newspapers shall also be operated in accordance with “Christian values, Norwegian culture and democratic principles” and shall “stand for quality and credibility”.

It would be naïve to believe that the “censorship” problem could be solved by editorial freedom alone. In principle, one may just as well talk of “editorial censorship” as “media owner censorship”. The concept “censorship” must imply a situation where there is a media monopoly or dominant media channel directed by a will to govern on the basis of political, economic or other motives. It is easy to envisage that an editor may govern in this manner, just as an owner. The “censorship” concept ought really to be reserved for the classic politically motivated public censorship. It is ultimately the freedom of the many potential expressors that is at stake. Channel guardians may either protect it or threaten it depending on the circumstances.

The problematical nature of the (in itself entirely necessary) editorial function is demonstrated by certain measures in other countries, where the expressor in a given situation is solely accountable for a statement in a mass medium. That is to say that the expressor to some extent is ensured direct communication with recipients via a mass medium without any form of intermediary editorial accountability. This applies to the Danish provision concerning signed, external contributions to newspapers and it applies to the British provision concerning political parties’ allotted broadcasting time on radio and television. It has also been emphasized as an advantage of the Internet that the cost here of establishing a channel to the public is so small that anyone can be his own editor. However, outside the established mass media, one has no guarantee of reaching many recipients. The examples referred to are exceptions of limited extent, primarily demonstrating that the editorial function constitutes a challenge where direct communication is concerned. The question is nonetheless whether and, if so, how editorial freedom can serve the general freedom of expression.

There is thus every reason to ask who the channel guardians are in the publishing companies, periodicals, newspapers, etc. That is to say, what considerations govern the choices that they must make on a continuous basis? What is selected and why? What is left out of the information we receive through the established channels? Does the system serve the interests of truth, autonomy and democracy? How can we guarantee independence, openness, diversity of statements and a dialectic exchange of views?

Guarantees for this diversity lie firstly in the institutionalized norms governing the channel guardians. They must shoulder this responsibility with humility since they regard themselves as the representatives of the open society. Positive normative guidelines of this kind seem to be widespread. But this is not enough. The next principle is institutional diversity of types of guardian and ownership structures. It is only in this type of diversity that the necessary *criticism* can be expected to take effect. An important question concerns the form that this institutional diversity should take. Rules that prevent excessive concentration of ownership in the media would appear to be a reasonable approach. Another reasonable approach would be some form of press subsidy and support to periodicals and book publications. Support of this kind would symbolize the obligations of the press and the publishing companies as “public service” bodies according to “the contract”. Specific issues, such as the question of whether diversity requires a large number of newspapers or whether it can be

safeguarded by the internal diversity of a somewhat smaller number, are not addressed in this connection.

It should however be emphasized that, when considering such questions, the place of the media in a greater, institutionalized public sphere should be taken into consideration. The media does not exist in isolation although one may sometimes be given this impression by the debate. The character assumed by the media reflects to a great extent the more or less legitimate expectations and pressures they are subjected to by the community at large.

Within the press, the concept of the editor, as Nils E. Øy writes, is as old as the press itself. It is however paradoxical that, "while the emergence of the institution of the editor was associated with a struggle for independence from authorities, it is currently the authorities who show the greatest interest in strengthening this institution in order to ensure independence from the owners." A central role in this discussion is played by the *"Rights and Duties of the Editor",* which is a declaration that was drafted in cooperation between the Norwegian Newspaper Publishers' Association and the Association of Norwegian Newspaper Editors and adopted by both organizations in 1953. This declaration affirms the editor's "full and personal accountability for the contents of the newspaper". However, the editor is expected to share the fundamental views and aims of his or her publication. In a court judgment in 1972, the principles laid down in the Rights and Duties of the Editor were cited as a source of law. Since then, this has occurred several times. In 1995, it was proposed that editorial independence be established by statute. The purpose of these initiatives is to protect free speech from commercial interests. There is no doubt that the Rights and Duties of the Editor play an important, positive role. However, the question of whether editorial independence should be established by statute is a separate issue.

A special responsibility rests with the editor with regard to "protection of sources". Throughout the history of freedom of expression, the right of anonymity has been a major priority. On the one hand, this right is maintained to be a precondition for freedom of expression. On the other hand, it is maintained that it is important that someone is made liable for defamations or other improper statements. We recall the period following Struensee's establishment of freedom of the press in 1771 with its chaotic stream of anonymous pamphlets and the reproaches of Peter Edward Holm[19] that Struensee had failed to understand the importance of a liability system. Today, we are more preoccupied with "protection of sources". However, Nils Øy argues in favour of retaining the term "right of anonymity" since this enables the emphasis that what is really involved is the expressor's right to be anonymous and not a special right of the press to refrain from revealing sources. Today, as a consequence of the regulated protection of sources, the editor (journalist, media company) assumes the legal liability for the statements which are published anonymously. This is an important and entirely necessary principle for the realization of freedom of expression. There is reason to investigate whether the legal system functions satisfactorily in this area.

Protection of sources shall only apply exceptionally. The rule, as established by the *Code of Ethics of the Norwegian Press*, is the opposite, i.e. that sources shall be

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[19] Translator's note: In *Danmark-Norges Historie, Vol. IV.* (Copenhagen, 1897-1905).

revealed. However, as suggested in the preface to Øy’s book on the protection of sources, there is a tendency to make the exception the rule that “it is easy to use the protection of sources to cover up poor source work ... so ‘absolute protection of sources’ becomes a form of self-protection.” It goes without saying that uncritical dependence on the grape vine is not far away. The same is pointed out by Raaum: journalists use the protection of sources “so frequently that they can often be suspected of mistaking the exception for the main rule”. On the whole, the protection of sources requires considerable thoroughness and vigilance on the part of the editor. It must only be used when it is clearly essential. The tendency to confuse the rule and exemptions from the rule is very unfortunate, not least for the media themselves. It seems strange that, in a situation where they to some extent must be said to be struggling for their credibility and, as we will show below, are threatened by the professionalism of their sources, they do not make it more of a virtue to reveal their sources. It is a simple strategy that would both protect against aggressive sources and gain the credibility of the public.[20]

The declaration concerning the Rights and Duties of the Editor places the “full and personal accountability for the contents of the newspaper” with the editor. In this way, it regulates matters relating both to the owner/publisher and to the newspaper’s editorial staff. In relation to the latter, the dominant position of the editor seems to have been affected by the development of professional ideology in journalism. In the basic trade union agreement for journalists from 1980 (and later revisions), they have gained acceptance for what is referred to as “journalistic integrity”. This development raises the issue of the already poorly defined allocation of responsibility. For example, it sometimes seems that too much scope is granted to young, aggressive journalists lacking in the caution learned by experience and unaware of the power of the weapon they are wielding. The editorial function is, not least, important in such contexts; that is to say that the editor must have a formal and genuine status enabling him or her to play the role of moderator, particularly with regard to the young journalist referred to.

There is reason to emphasize that the media are both arenas and players. That is to say they both constitute channels to the public for those who have something to impart and are themselves active players communicating with the public. This dual role is of course a delicate one. It requires a reasonably clear distinction between the editorial function and the function of the journalist. The editor is the channel guardian responsible for selecting, initiating and editing what is provided by journalists or other people. Expressing oneself in the media is far from the exclusive privilege of journalists.

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[20] Odd Raaum; Pressen er løs. Fronter i journalistenes faglige frigjøring, Pax 1999, page 174. Raaum refers to a Swedish study, Jan Ekecrantz and Tom Olsson: Det redigerade samhället (Edited Society), Carlssons 1994, which points towards a long-term, increasing tendency to conceal how material came into being. The authors view this tendency in connection with the need of journalists to assert their autonomy in relation to active sources. It is easy to understand that the journalist, for his part, may feel a need for secrecy. As mentioned above, the source becomes a kind of “trade secret”. But it is difficult to see why this should result in greater independence in relation to the source. The effect is often likely to be the reverse. Sigurd Allern: Kildenes makt (The power of the sources), Pax 1996, page 145, is normatively clear on this point: “identification is required unless this conflicts with protection of the source. The public must know who is responsible for the information”.

The twofold function, as both arena and player, also raises the issue of the identity problem. It is hardly likely that there are many people who yearn for the days of the old party-dominated press. However, it had one positive aspect; one knew the ideological platforms of the various bodies involved. They had an identity that made it easy to relate to their selected coverage and to the positions taken in their comment. Many of the media, not least the largest, now have an obscure player identity, which can make them difficult to relate to. The problem is also relevant in connection with the question touched upon above, i.e. whether it is desirable to base diversity on multiple units, or on the diversity within individual units. There is also the question of whether the individual media unit should have a separate identity or whether it is “sufficient” that one is able to identify the individual player or group of players within the unit. The question is how the arenas should be institutionalized in order for it to be possible to identify the players. Such an identification potential is important for the readers’ ability to adopt an independently critical approach to information and comment. The question is not easy to answer. However, it would seem desirable to have a somewhat clearer approach to it than is the case today.

Broadcasting has a separate history that throws the problem into relief in a rather different way. One might believe that, as long as it remained a public monopoly, it would, in compliance with regulations, have retained its function as an *arena* or channel for the many. However, this was not to be relied upon. On the contrary, it defined itself as a *player.* In fact, initially, it made a virtue out of being something quite different than the party-dominated press by not opening the way for political matters or discussions. It was founded on the popular enlightenment tradition. Its identity was, as far as it went, clear enough. But this close association with popular enlightenment raised another issue. The fundamental idea behind popular enlightenment was to create *mature human beings*. As previously noted, this is part of the purpose of the school and the classroom. However, when this project is extended beyond the non-adult population, and the public sphere is regarded as a classroom, the project is perverted into something paternalistic, thus *depriving people of their competence as adult citizens*. There is nothing particularly democratic about the classroom. Thus, the Norwegian Broadcasting Corporation did not originally view itself as an independent player with its own agenda. The history of broadcasting demonstrates that the public authorities do not automatically operate as a guarantor for diversity. Here one could perhaps have applied the “censorship” concept.

As we have seen, room was soon reserved for politics and debate. This was owing to the pressure brought to bear by the political parties, which the public broadcasting corporation found difficult to withstand. The paternalistic features were also gradually broken down. But it was not until the monopoly was dissolved that the prospects of genuine diversity were opened up. As time has gone on, the untied press and the various broadcast media have gradually come closer to each other.

It is of major importance for freedom of expression that the channels to the public sphere are structured so as to ensure satisfactory information, a diversity of statements and exchange of opinions. In this connection, what we have referred to as “the editorial function” plays a central role. Ultimately, it must be incumbent on the communal body, the public authorities, to provide for an institutional basis for public debate. Such arrangements may be made by means of regulations and grant schemes and direct initiatives of various kinds. An important element of such arrangements is

the institutionalization of the channel guardians’ or the editors’ genuine and formal responsibility.

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4.3.4 The multicultural society

It is generally acknowledged today that Norway is, or is in the process of becoming, a multicultural society. This immediately raises the question of the conditions for freedom of expression for “minority groups”. The question is twofold. Firstly, there is the question of the potential for establishing separate public spheres where such groups can develop their own collective identities. Secondly, there is the question of the potential for being shown consideration by, being listened to by, and being able to communicate with, society at large. The premises and potential for minority groups to take part in “open and enlightened discourse” may be said to be a real “test case” of the conditions for freedom of expression in the community. It has been maintained that minority groups have to a great extent been invisible in the public sphere, and that there is a tendency to refer to them negatively when they are referred to at all.

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In a discourse with the philosopher Charles Taylor, Jürgen Habermas reflected over this issue on the basis of his studies in communication, rights, democracy and the nature of the public sphere. In a system of individual rights, he says, we must take into consideration that “differences must be seen in increasingly context-sensitive ways if the system of rights is to be actualized democratically ... the integrity of legal subjects [cannot be ensured] without strict equal treatment, directed by the citizens themselves, of the life contexts that safeguard their identities ... The identity of the individual is interwoven with collective identities and can be stabilized only in a cultural network that cannot be appropriated as private property ...”. However, in order that different cultural forms shall be able to coexist peacefully, a well functioning public sphere is required in a developed civil society with “open communication structures that permit and promote public discussions” resulting in understanding of individual and collective identities. However, this also means that there must be some fundamental rights that cannot be set aside by a right to a specific identity. Something must be common, and this necessary common understanding can only be created by means of open debate with room for cultural criticism, not by regulations that prevent communication.[21]

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The conditions for freedom of expression are ultimately dependent on the existence of a political will to protect this freedom. We must finally ask whether this will is present. Throughout the modernization process, progressive forces have struggled to achieve freedom of expression, with success. What is the situation today? The American social critic Alan Wolfe considers that he is able to observe that in the USA a new situation has arisen where the left and right political wings “are both sceptical of assigning a high priority to free speech”. The right has always been sceptical, so

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[21] Jürgen Habermas: “Struggles for Recognition in the Democratic Constitutional State” in Amy Gutmann (ed.): Multiculturalism. Examining the Politics of Recognition, Princeton University Press, 1994, pages 116, 128, 129.

“what is more surprising is the degree to which the left has come around to the right’s position on free speech”. The reason for this is the form “identity politics”, as he calls it, has taken in the emancipatory movements. As opposed to many white radicals who fought for the rights of underprivileged groups, blacks have, for example, no belief in freedom of expression as an instrument of freedom:

“Free speech, by equating the utterances of racists and victims of racism, is, according to this view, premised upon a false equality. The only reason to welcome free speech is tactical; oppressed groups may need it to get their points across, but groups which oppress them can properly have their utterances regulated ... Like conservatives, advocates of identity politics view speech as a form of declaration, not as a means of persuasion”. [22]

The USA is not Norway, but there are similarities. Firstly, freedom of expression and freedom of information are both deeply rooted in the institutions of both countries. It therefore seems a little strange that Wolfe is so concerned. However, secondly, there is the similarity that Wolfe’s description rouses associations with certain features of Norwegian reality too. There are a number of trends in recent developments that make it necessary to ask what priority one is willing to give to openness and freedom of expression. Where is the political will and how strong is it? The question may, in consistency with Wolfe’s description, be posed in several directions, to the right and to the left, i.e. to all political parties, to the legal system and to public institutions as well as radical emancipatory movements; what priority are they willing to give to freedom of expression? One may perhaps also be tempted to wonder whether we are seeing a weakening of our collective historical memory. Are we in process of forgetting that public access is the best form of control and the best protection for underprivileged groups regardless of who is in power?

There is a third point in the quotation from Wolfe that must be commented on, i.e. that freedom of expression is something that is associated with declarations and assertions more than with persuasion and argumentation. We have seen that the truth argument has been the most robust argument for freedom of expression and it throws the argumentative statement into focus although the argument reaches beyond this, for example, to artistic statements with their appeal to the imagination. However, if it is the case, as Wolfe suggests, that freedom of expression is no longer associated with persuasion and argumentation, we are forced to ask whether the statements that can particularly be defended on the basis of freedom of expression are in the process of being pushed aside. Is there a growing tendency to use opportunities for expressing opinions opportunistically and propagandistically?

The Commission wishes firstly to warn against such an interpretation of the scant empirical material that exists. Secondly, the Commission wishes to warn strongly against allowing conceptions of the type specified to result in a general scepticism or indifference to freedom of expression, entirely regardless of whether or not these conceptions have any factual foundation. We must not forget our historical experience. If there is a decline in public discourse, which is a dubious assertion in itself, this must be met, not with further restrictions of freedom of expression, but with positive measures to create better conditions for an enlightened public debate.

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[22] Alan Wolfe: Marginalized in the middle, The University of Chicago Press 1996, page 235. Wolfe suggests that there are similar tendencies in other groups, such as feminists and homosexuals.

In this connection, there may be reason to bring to mind the general dialectic principle formulated by Hegel approximately as follows: when an ideology is implemented in practice, it will degenerate in its speculative form with the subsequent danger of regression in practice. Freedom of expression has reasonably good conditions in our society. But this is precisely why it is necessary to identify the threats while reminding how indispensable it is for truth, democracy and free formation of opinion.

Chapter 5

Legal protection of freedom of expression

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5.4 Statutory provisions concerning openness

5.4.1 Freedom of information

The terms of reference of the Commission on Freedom of Expression state that the Commission shall consider whether "freedom of information should be protected by the Constitution". Freedom of information concerns the right to receive information that is freely provided by the source. It is usual today to view this freedom as part of freedom of expression. Freedom of information is thus protected by article 10 of the European Convention on Human Rights on freedom of expression, where it is stated that man not only shall have freedom to impart but also to *receive* "information and ideas". Freedom of information is even more clearly expressed in the Constitution of Germany, where it is stated that anyone shall have freedom "sich aus allgemein zugänglichen Quellen ungehindert zu unterrichten" (right to "freely inform himself from generally accessible sources"). The Commission regards freedom of information as a natural part of freedom of expression, and proposes that it be established by the Constitution.

This principle is perhaps not quite so self-evident as it may seem at first sight. The problem in this connection arises primarily when the provider of opinions or ideas is located outside Norwegian jurisdiction. One may then envisage that it might be tempting to alternatively place restrictions on the recipient's right to *receive*. The surrender of radios to the German occupying power during World War II is thus quite clearly a breach of this freedom of information principle. Regulation of the right to set up dish aerials or prohibition of the import of certain books and periodicals might also constitute violation of freedom of information. The Commission wishes also to point out that the so-called "jigsaw puzzle doctrine" may be regarded as problematical in relation to freedom of information. It is relevant in connection with military secrets and relations with foreign states. It involves, by systematically retrieving and collating information from generally accessible sources, discovering further information, concealment of which may be in the interest of the nation.

5.4.2 The duty to disclose information

Freedom of information only provides individuals with a right to seek information, and entails no obligation of anyone to provide information. The state's general obligation to provide for an open and enlightened public discourse is mentioned above in 5.3. There may however be reason to look a little more closely at public information in a narrower sense, i.e. the administration's continuous information to the public, or perhaps we should say the administration's manner of communicating with the public – its *information policy*. In the next round, the question will be how

and to what extent this information policy is laid down in a statutory *duty to disclose information*.

In 4.3.2, we touched on the topic of how the professionalized sources attempted to gain control of the information that was disseminated by the mass media. This prompted Trond Berg Eriksen to call for a “far more proactive information policy” on the part of the public authorities out of regard for the democratic process. This contrasts with the more traditional perspective espoused by Inge Lorange Backer when he writes that the public information policy will mainly be “a means of promoting the objectives of the public authorities, while the Freedom of Information Act is intended to serve democratic considerations that may be contrary to the objectives of the authorities”. There may seem to be grounds for questioning whether the public information policy helps or hinders the democratic process; or what really are the objectives of the public authorities? In another context, we have pointed out that these objectives may vary and may sometimes conflict with each other. Whether or not the public information policy serves the democratic process thus depends on how it is implemented. One should not disregard the fact that the public authorities, as the communal body, can be called upon in a situation where private dissemination of information does not function satisfactorily, and that it should be possible for this to take place by means of direct as well as indirect measures.

In principle, we can establish that reasonably open access to information by the administration is a prerequisite for keeping oneself meaningfully informed on the basis of accessible sources. That is to say that, with no duty to disclose information on the part of the public authorities, freedom of information may degenerate to humbug. Such an active duty to disclose information has been implemented in the Norwegian Constitution only for one specific type of information, i.e. in article 110b, which establishes that citizens are “entitled to be informed of the state of the natural environment and of the effects of any encroachments on nature that are planned or commenced”.[23] Nor is there any general statute relating to an active duty to disclose information to the central government. Such a general obligation is nevertheless laid down in the Local Government Act. However, the fact that such a political obligation exists effectively in the case of the central government as well is clear, and is stated for that matter in a number of individual provisions, such as the provisions of sections 14 and 15 of the Pollution Control Act, section 16 of the Building and Planning Act, section 4 of the Local Government Act, section 1-2 of the Act relating to Municipal Health Services, and, not least, section 11 of the public Administration Act on the duty to provide guidance.

The Commission has not found reason to conduct a critical review of the many provisions concerning the general duty to disclose information to the public. However, we wish to emphasize the importance of this duty. By means of the sixth paragraph of the proposed amendments to Article 100 of the Norwegian Constitution, not only the

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[23] There may be reason to reflect over why exactly this type of information has been accorded such a privileged status. In this connection, reference can be made to the well-known German sociologist, Ulrich Beck, who, in his classic book, Risk Society, considers that public information on the major “modern” risks has a tendency to downplay the element of risk so as to avoid creating “unnecessary” fear. This easily leads to empty incantations which, on the other hand, foster a general unrest. It is thus known that the public authorities withheld information concerning radio activity resulting from the Russian nuclear explosions in the 1960s.

many somewhat arbitrary individual provisions, but the whole of the public authorities’ direct information project has been endowed with a collective constitutional foundation.[24]

It may be worth noting that there has been disagreement on information policy in the EU. In Maastricht it was established that the right of access to information “strengthens the democratic nature of the institutions and the public’s confidence in the administration”. However, there was a considerable distance between the principle and compliance with it. This became clear when a lack of public support for the Union was registered in the wake of the Maastricht negotiations. In this situation, increased transparency was launched as a slogan to regain confidence, and the EU took initiatives to reshape its information policy. This process was a lesson on the intimate connection between transparency and confidence.

In Norway, the principles underlying information policy or the administration’s communication with the public have changed over time. The changes are instructive, and demonstrate the tendency towards a lack of clarity concerning the purpose suggested above. The changes can be followed through various government investigations.

The first committee to investigate government information policy after World War II was appointed in 1960, and submitted its recommendations in 1962. This resulted, among other things, in the establishment of “the Norwegian Central Information Service”. The main principle of this committee’s recommendations was that democracy should be strengthened by the central government actively informing the public. Information policy was to be viewed in connection with such matters as government measures to maintain a differentiated daily press. That is to say that the government’s own information activities were viewed as an integral part of a larger open information society, where the intention was to serve democracy.

On the other hand, the main principle underlying the “Social Information Committee”, which was appointed in 1975 and submitted it recommendations in 1978, was that the information activities of the public authorities should be directed towards the individual needs of members of the public for information concerning their rights and obligations. It also drew an explicit distinction between “social information” and “advertising”, “public relations” and “propaganda”, where it concentrated on the first of these. The next committee, which submitted its recommendations in 1992, changed the perspective once again. It emphasized that it would depart from the previous strategies by taking as its point of departure “the communication perspective” characterized by the “alternating roles of the authorities and the public as information providers, recipients and initiators in the communication process”. What is new here is the principle of the administration’s need for information from the public in its continuous work.

This most recent study does not draw as marked a distinction between “social information” and “public relations” as was drawn by its predecessors. In the meantime, a new profession of PR consultants has grown up, which, at the time when

[24] Private individuals too are in some connections duty bound to disclose information directed towards the public, for example, the duty to release information to public registers that are in principle open to the public.

the committee’s recommendations were submitted, were referred to as “information officers”. An instrumental perspective was established, which was nevertheless more clearly stated in the committee’s terms of reference than in its recommendations. In the terms of reference, information is viewed primarily as part of the administration’s measures for achieving efficiency and credibility. “The credibility of public decisions and thus support for them will be dependent on how the public authorities organize and arrange their internal and external information. A well functioning and efficient public administration must be aware of the connection between administration, service and communication.” The committee follows up the terms of reference while considering the danger of “paternalism” in the “consciousness-raising” element of government information.

These reports are interesting in themselves owing to the various perspectives towards government information activities that they address. They possibly reveal the existence of a (fruitful?) uncertainty as regards the purpose and how it shall be attained. The point must be that there are several different and legitimate purposes associated with the public information policy, purposes which in some cases may conflict with each other. Perhaps, for this reason, one should be careful to avoid overloading the active, direct government information activities; the danger, of course, being that it is easy to confuse motives, so that information intended to be independent and objective (in one sense or another) may easily acquire an element of propaganda. The Commission subscribes to the following statement in the current textbook in administrative law: “Communicating the authorities’ many different messages to those concerned is no easy task. A certain amount has been accomplished in recent years to improve on this (...). However, there is still a long way to go before communications are satisfactory”.

The problem is of an institutional nature. It is conceivable that information from public bodies can be disseminated more systematically in different ways, partly by means of “information officers” and partly by means of persons with a more independent institutional status than information officers, who are easily controlled by the management, as is stated in the report submitted in 1992. We will return to the Freedom of Information Act, which is a measure intended to deal with the doubts mentioned here. One strategy might be to use the authority provided by the public Administration Act to use independent researchers who can assess and inform on the activities of the administration from different perspectives.

The extensive central government information service plays an important role in openness and in giving a face to public power. This is important for democracy. However, it is equally important to emphasize that such a self-organized information service is in no sense sufficient to ensure access to the administration. One must avoid a development in the direction of something resembling a “Ministry of Information”, of the kind we have seen in societies with which we would prefer not to be associated. Therefore, just as important as having an information system, is not overloading the system, but rather dividing it into independent units on the basis of the various objectives, seeking to maintain a discussion concerning the character and purpose of this activity and placing it in a broader context where there is room for informed criticism of the information provided.

5.4.3 Right of access to information

5.4.3.1 The principle of public access

Freedom of information, as included in the modern concept of freedom of expression, safeguards, as we have seen, the freedom of anyone to seek and receive information from accessible sources. Freedom of information is intended to serve the open society but, in order to do so, there must be reasonably extensive access to the important or relevant information sources. *The duty to disclose information* is also intended to serve the open society by obliging the public authorities to actively inform the public. The danger here, as we pointed out in the previous subchapter, is that, when the public authorities provide information concerning their own activities, it can easily be used as a means of promoting their own interests. *The right of access to information* is intended to remedy these weaknesses by imposing on the public authorities an obligation to provide information when so requested. The public authorities shall thus not alone be free to decide what information may be made available to the public.

This *principle of public access to information,* which had long roots in the administration of justice, was first established in the political area as *the right to attend meetings* in article 84 of the Constitution, which establishes that “The Storting shall meet in open session, and its proceedings shall be published in print ...” The principle was that the political process was to take place in public. As we have seen, this was just as radical in 1814 as the provision concerning freedom of the press or prohibition of prior censorship in connection with public disclosure. However, what we often associate with the principle of public access in a narrower sense is the public right of access to documents or the right to examine the documents of the public administration. This has been viewed as a principle with considerable standing in the Nordic countries. Sweden has the longest tradition in this area since the principle of public access in this sense was introduced as early as 1766. The reason was control of the administration. In Norway, it was proposed in 1845, but was not implemented in law until the Freedom of Information Act was enacted on 19 June 1970. This was thus the result of a long process. During the final phase, the principle of public access was focused on in connection with rule of law issues that arose as a result of the extensive use of enabling acts after 1945. This general issue was dealt with by the recommendation of the Committee on public Administration in 1958. This was the basis of several reforms, of which the most important were the Act relating to the Storting’s Ombudsman for public administration of 1962, the public Administration Act of 1967 and the Freedom of Information Act of 1970.

The main reason why it took so long to enact a Freedom of Information Act, was a considerable lack of confidence in the ability or willingness of the press to behave in a responsible manner. This is clearly stated in the recommendations of the Committee on Freedom of Information, which were submitted in 1967. The committee stated its agreement with the principle that public access to the administration’s documents would have a democratizing effect and increase the interest in public concerns. However, the press was unable to communicate this because it was guided far too much by ulterior motives. The committee’s principal recommendation was therefore that there should be no Freedom of Information Act. The committee’s report reveals a lack of confidence in the press and a corresponding confidence in the administration.

The tension surrounding what one has a right of access to or, put another way, the tug of war between the administration and the press, has been a constant feature of the Norwegian public sphere for many years. The Freedom of Information Act provided something to fight over: interpretation of and compliance with the Act. The question has gradually been brought to the fore by the continually increasing complexity of society and by the growth of the public administration.

The Freedom of Information Act was originally proposed with a view to safeguarding individual security under the law. That is to say, it was viewed as an extension of the right of access to documents by parties, permitting that third parties should also be ensured access. The driving force behind the Act lay at the political level. However, when the Act was adopted, it was the regard for democracy or for the political process that was most prominent, although the original security under the law consideration is still part of the grounds. As time went on, there was an increase in the interest of the press for this type of access on request in individual cases. Today, it is generally recognized that the Act exists out of regard for openness and democracy, although this may be “contrary to the objectives of the authorities”. It is currently the press that “makes use of” the Freedom of Information Act. However, there is considerable struggling regarding freedom of access, and there has been strong criticism of the manner in which the law is practised.

The turbulence surrounding the Freedom of Information Act has resulted in various amendments and proposed amendments to the Act. In 1982, the principle of increased public access was introduced. This was further developed by a revision in 1993. The principle takes as its point of departure that the *right* of secrecy is not the same as the *duty* of secrecy. It entails, on the contrary, a duty, in certain circumstances, to consider whether documents (or parts of documents) that can be excepted from public disclosure shall nevertheless be made public. The reason for introducing “increased public access” was that the principle of public access was not being complied with according to intentions since it had become far too usual to withhold documents from public disclosure. It has subsequently been questioned whether the implementation of increased public access in the Act has really resulted in an increase in public access.

Increased public access is a key provision of information access legislation. The positive duty to assess whether a document can be made public should raise the awareness of the administration in the sense that civil servants are obliged to consider public disclosure. It is intended as a simple and flexible means of solving the need to balance considerations inherent in the Freedom of Information Act. On the other hand, it is legally ambiguous, and does not seem to date to have resulted in improved compliance with the intentions of the Act.

In May 1998, the Government submitted Report No. 32 (1997-98) to the Storting *The principle of public access in the public administration*. The newspaper *Dagens Næringsliv* maintained that the Government “gave itself a clean bill of health”. However, in spite of cautious language, the report can also be read in rather a different way. It is really sufficient in this connection to refer to page 106, where the report cites the Parliamentary Ombudsman’s investigation of the Ministry of Justice in 1997, when the Ombudsman found it necessary to criticize refusal to grant access to information in 32 out of 35 rejections investigated. Although it is difficult to judge the magnitude of the problem or whether there is a general trend in the direction of greater secrecy, the investigation referred to is of a sufficient size to establish that this is a

democratic problem that we must take seriously. This is also suggested in the report, which states, among other things, that the Government has been given “the impression that the provision concerning increased public access in section 2, third paragraph, is often not complied with in accordance with the intentions of the provision”. It finds further that there is a need for a general change of attitudes in government agencies.

The Government notified in the report that it would propose amendments to the Freedom of Information Act. Some concrete proposals were also included in the report including a cautious extension of the scope of application, involving repeal of the excepting provision in section 4 of the Act relating to state-owned enterprises. The Standing Committee on Justice submitted its recommendations on 5 November 1998 and the report was debated in the Storting on 23 November 1998. In all essential respects, the Government received the support of the Storting. No proposition concerning amendments to the Act has yet been submitted.

As mentioned above, it is reasonable to read the report as a cautious apology for insufficient compliance with the Act. However, this does not imply that improvements cannot be made to the text of the Act. One approach might be to emulate the Swedish system by replacing the general provision concerning increased public access with a detailed list of the exceptions. Although we would not wish to adopt the same level of measures as the Swedish Act, in the Commission’s view, more precisely worded exemptions from the principle of public access should be possible.

It is the Commission’s view that a stronger emphasis on the openness intended by the Freedom of Information Act should be more prominent in the practice of increased public access. As mentioned above, it has become usual to describe the consideration of increased public access as a duty to consider whether the document “may be made public”. A practice has thus evolved subject to the principle of public access whereby grounds shall be given for public access rather than the opposite, which is the real point of departure for the Act. The Commission reminds that it was primarily for practical reasons that the legislator chose this standard principle as a technical solution for exemptions from the principle of public access, well aware of the fact that this enabled far more documents than necessary to be exempt from public access. It was not intended by the legislator that this possibility should be used unless there were objective grounds to do so, as stressed by the Ministry of Justice in the travaux préparatoires to the last amendment concerning increased public access:

“In the view of the Ministry, the suggested amendment will not however result in a significant increase in the work of the administration provided that the Freedom of Information Act is practised according to intentions. A request for access to a document that does not contain information subject to the duty of secrecy will then always be granted unless the government agency has objective grounds for wishing the document to be exempt from public access. Not unless there are demonstrable grounds for the agency to exempt the document, is it necessary to consider whether the document can be exempted”.

The Commission does not regard itself as responsible for submitting concrete statutory proposals, but considers that it must be appropriate in connection with the forthcoming statutory revision to consider amending the final paragraph of section 2 to wording such as the following: “The government agency shall not invoke the right to exempt documents pursuant to the provisions of sections 5 and 6 or regulations

issued pursuant to these provisions unless there are specific objective grounds for keeping such documents secret. The government agency shall in such case assess whether it may be sufficient to exempt parts of the document”.

Lack of compliance with the spirit, and sometimes the letter, of the Act is partly a control problem. In the cautious wording of its report, the Government states that “there may be reason to consider the potential for improving both the efficiency and the control of the system”.

However, in the follow-up, the proposals concerning this are argued against without putting forward any specific proposals for improvements.

In reality, the Parliamentary Ombudsman is the only controller. However, he has no formal sanctionary power and nor is he authorized as a chief interpreter of the correct doctrine. The potential for control seems tenuous. However, the Parliamentary Ombudsman is not lacking in a certain authority. Besides, the potential he holds for sanctions lies in making use of the public, which he does. The Parliamentary Ombudsman is, for that matter, a good example of institutionalized use of the public as a public control body. The attention devoted by the Parliamentary Ombudsman to compliance to the Act is a positive development. However, the Commission recommends that the control system be strengthened by establishing a separate appeal board to review appeals against rejections.

Another problem area is that of the public administration’s correspondence records, which are the key to accessing the public administration. During the consideration by Storting of Report No. 32 (1997-98) to the Storting on the principle of public access in the public administration, the Standing Committee on Justice emphasized that the duty to keep the correspondence record should be laid down in the Freedom of Information Act itself. The Commission concurs with this, and this duty must apply to all case documents. The legislation adopted by the Government in the form of regulations pursuant to the Archives Act can be interpreted as providing that the individual government agencies shall be free to decide whether or not internal documents are to be entered in the correspondence record. As a result of this, practise of the right of access may vary between the different government agencies; different ministries, directorates or municipalities. The principle of public access has such a central place as a condition for right of access and freedom of expression that the public must hold the same access rights to all parts of the public administration, particularly in view of the fact that such records of all documents in the public administration are a natural part of current information management systems. The Commission is also critical of the fact that the same regulations define major parts of the contents of electronic journals in such a way that these shall not be subject to the right of access pursuant to the Act. The Commission is critical of the fact that there is provision for this in the current Freedom of Information Act, and warns against providing such authority.

However, there are certain signs of moves in the right direction. Among other things, it is maintained that the new professional “information officers”, who, as mentioned in the previous subchapter, are easily controlled by the management, also view it as their responsibility, (or has it been imposed by the management?) to establish procedures for compliance with the Freedom of Information Act. It is perhaps relevant to refer to a tendency towards “professionalization” of the administration’s communications with

the public on the basis of democratic considerations regarding openness. We still have some way to go.

There is every reason to believe that there will continue to be tense relations between the public administration and the press owing to the different purposes they serve. However, perhaps we are moving in the direction of a somewhat greater mutual understanding of the legitimacy both of the administration’s need for viable working conditions and of the public’s right of access and control, a purpose assigned to the press. But full understanding is neither possible nor desirable.

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Chapter 6

The limits of freedom of expression

6.1 Introduction

6.1.1 Criteria and synopsis

In the previous chapter, we considered the legal *protection* of freedom of expression. In the following, we shall review some of the legal *restrictions* that exist below the level of the Constitution while giving further consideration to the question of what restrictions will be acceptable pursuant to our proposed amendment to the Constitution. The existing restrictions are primarily found in the Penal Code.

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6.2.3 Protection of honour and dignity

6.2.3.1 Introduction

In the historical introduction[25] we gave an account of the role originally played by the protection of authority as the greatest obstacle to freedom of expression. With the gradual weakening of the protection of authority, we have observed a certain tendency towards a strengthening of personal protection. Currently, personal protection, particularly protection of honour and dignity, is a major argument for restriction of freedom of expression.

However, the Commission urges against stretching personal protection too far. Under no circumstances can personal protection be absolute. The normative concept of person adopted by the Commission in giving particular emphasis to "the mature human being" as a precondition for extensive freedom of expression entails that all persons may and should be criticized for all censurable behaviour and attitudes. Secondly, too stringent defamation rules will have a dampening effect on what individuals can and dare say, thus disrupting and reducing openness and public discourse. Information or opinions that should be made public may be prevented from making themselves heard (cf. 2.3.8). Thirdly, one should not exaggerate the fear of publicity (cf. 4.3.1). Public access primarily provides protection, and this applies to individuals as well. Normally, unreasonable attacks or allegations will not be accepted, or will be corrected by the critical public.

However, although one assumes that most of the public exchange *de facto* regulates itself, as indeed it should, there are nonetheless good reasons for a certain additional legal regulation. Firstly, the existence of agreed rules may be assumed to be conducive to a civilized debate. Secondly, there are situations where other mechanisms do not function, so that unacceptable attacks on other people's honour and dignity occur. In such a connection, defamation rules, which provide an external framework for exchange, may therefore contribute actively to increased participation in the public debate, thus giving support to the democratic process, cf. our proposal for a new article 100 of the Constitution, second paragraph. Taken as a whole, the

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25 Translator's note: Not included in these translated excerpts of the report.

Commission's proposal will result in a slight reduction in legal protection against defamation.

Nor can one, in the area of defamation law, expect to arrive at a universal norm for the strength of protection afforded to honour. On the contrary, there seems to be a climate for historic changes of attitude in this area. An example of this is that, whereas authorities and leaders in earlier times in the authoritarian state enjoyed a special protection against negative media attention, politicians and other public figures are now expected to tolerate more than the average person.

Honour and dignity are currently protected by the defamation provisions laid down in chapter 23 of the Penal Code on "defamation". These provisions apply to both private and public discourse, and protect both subjective sense of honour (cf. section 246) and a person's good name and reputation (cf. section 247).

Norwegian defamation law is on the whole complex, and current legislation will not be reviewed here more than necessary. The complex aspects are associated both with the rules for what is unlawful defamation and with the procedural rules. To take the latter first, a defamation case can be conducted as a) public criminal proceedings, b) private criminal proceedings or c) civil proceedings. If unlawful defamation is established, the result may be a) a penal reaction in the form of fines or imprisonment, b) a judgment that a defamatory statement is null and void, c) compensation or d) redress.

NOU 1995: 10, Reform of defamation legislation proposes a number of changes in the procedural rules concerning defamation cases including abolition of private criminal proceedings and transfer to civil proceedings of actions concerning declaration of defamatory statements as null and void.

The substantive defamation rules are based, put very simply, on assessment of two factors, the degree of *truth* in the negative statement and the degree of *respectable purpose* underlying the statement. It is further reasonably certain, pursuant to current legislation, that true allegations made with a respectable purpose are allowed, whereas false allegations made without a respectable purpose are unlawful. As regards the other two possible combinations of truth/purpose, no general rules can be given, but discretion must be exercised.

6.2.3.2 Restoration of the criterion of liability

6.2.3.2.1 The issue addressed

In the view of the Commission, there is a major need for revision of the current defamation provisions, both with a view to simplification (we should have rules that most people can understand), with a view to liberalization and with a view to more uniform legal practice. However, most of the desirable reforms do not belong in the Constitution, but in statutory law. However, there is one principle that we feel should be established by the Constitution because this already ensue from the current article 100 of the Constitution, although this has been explained away for over 150 years. It is our view that a partial restoration of the criterion of liability in defamation law is necessary as this is stated in the wording of the current article 100, which states that

no-one may be punished “unless he wilfully and manifestly” has made “false and defamatory” allegations. This requirement has long been explained away in case law.

We will not go as far as the current text of the Constitution, which, in the case of printed matter, only provides for penalties when the defamer knew that the allegation was false, i.e. only in cases of a deliberate lie. Nor will we go as far as American law, which, in some cases, only imposes liability in case of wilful and gross negligence. However, it is our view that non-negligent good faith regarding the truth of the allegation on general media-neutral grounds should not give rise to civil or criminal liability.

Pursuant to current rules, the defamer holds a more or less objective liability for the truth of the statement that is made. In principle, it makes no difference that the declarant was in non-negligent good faith regarding the truth of the statement. Although it is true that section 249 (3) of the Penal Code and restriction to what is unlawful may save the non-negligent expressor. However, these are excepting provisions that, in our view, do not have a wide enough range and are in some respects too discretionary to allow sufficient predictability.

We envisage a future where three questions must be asked in defamation cases as opposed to the current two. Pursuant to current legislation, one asks first whether the statement is defamatory, i.e. whether its content is such that it damages or in other ways has negative consequences for the good name and reputation of the person referred to. Then one asks whether the content of the negative statement is true or not. If the answer to the first question is “yes” and the answer to the second question is “no”, the declarant is usually found guilty. We wish to retain these questions, but we wish to add the following additional question: was the declarant in non-negligent good faith regarding the truth of the allegation at the time it was made? Only if the answer to this question is “no” should it be possible to hold the person liable.

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6.2.3.2.3 The European Convention on Human Rights

Due regard for Norway’s international obligations pursuant to article 10 of the European Convention on Human Rights seems to be a strong formal argument in support of our proposal concerning the criterion of liability. A number of the decisions of the European Court of Human Rights indicate that statements made in non-negligent good faith must be permitted although the expressor is not fully able to prove the correctness of his assertions. However, this does not mean that article 10 of the European Convention on Human Rights always requires acquittal in cases where statements were made in non-negligent good faith.

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6.2.3.3 Introduction of a distinction between facts and value judgments

The case law of the European Court of Human Rights in Strasbourg shows that a clear distinction is made in defamation law there between statements concerning facts and statements that express value judgments. The possibility of classifying statements in this manner follows from the wording of article 10, first paragraph, of the European Convention on Human Rights, which guarantees freedom of expression for “opinions”, “information” and “ideas”, although the distinction between opinions,

information and ideas does not necessarily coincide with the distinction between facts and value judgments.

The significance of the legal distinction between facts and value judgments was established by the *Lingens* judgment of 1986. Here it was found necessary to make a careful distinction between facts and value judgments because “existence of facts can be demonstrated whereas the truth of value judgments is not susceptible of proof”. It was further stated that the requirement to provide proof of value judgments “is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 of the Convention”.

Value judgements must rest on criteria of a more factual nature. The European Court of Human Rights imposes modest requirements on these premises, and there are probably grounds for assuming that case law is not fully developed on this point. The only conditions stated to date are that the value judgments themselves must not be “excessive, in particular in the absence of any factual basis”. This indicates very small requirements regarding the factual premises on which such value judgments must rest. This is reinforced by statements to the effect that journalistic freedom includes a certain degree of exaggeration and provocation (“In addition, journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation...”). Following the Lingens judgment of 1986, the European Court of Human Rights has repeated the statement concerning the special protection of value judgments in cases Oberschlick I (1991), Oberschlick II (1997), Schwabe (1992) and De Haes and Gijsels (1997).

In Norwegian domestic defamation law, there is no corresponding operative distinction. However, pursuant to current legislation, as presented, for example, by Andenæs and Bratholm, a distinction is made between *beskyldninger* (allegations) and *forhånelser* (insults). On page 142, *beskyldninger* are stated to be “assertions of fact. In their capacity as assertions of fact, *beskyldninger* are always true or false. They may therefore be subject to proof of truth”.

Forhånelser, on the other hand, are utterances that only express scorn and contempt. They are not in a legal sense assertions of fact but abusive expressions, such as rabble, slob, rat, idiot, schizophrenic bitch, etc.

However, the Norwegian term *beskyldninger* implies far more than what the European Court of Human Rights refers to as “facts”. It includes both allegations with the character of value judgments and allegations that refer to specific established facts. Subjective value judgments of other persons are therefore in Norwegian law classified as *beskyldninger* while those corresponding to the meaning of “facts” as used in the European Convention on Human Rights are classified as *vurderinger* (assessments). An utterance such as “Fy faen, du er enda mer råtten enn jeg trodde” (Bloody hell! you are even more rotten than I thought) (Norwegian Supreme Court Reports 1966/157) is regarded in Norwegian law as an assertion of fact, which must consequently be supported by proof of its truth in order not to be unlawful.

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Pursuant to our proposal for a new article 100 of the Constitution, second paragraph, it will not be possible to continue the current non-discrimination between facts and value judgments. It is difficult to reconcile prohibition against subjective value judgments with the democracy argument and the individual’s freedom to form his or

her own opinions. On the one hand, it is desirable that each individual is given legal protection against false, negative assertions of fact concerning his or her person, made wilfully and negligently. On the other hand, individuals should not be afforded legal protection against other people holding negative opinions. The assessments other people make of my character and actions on the basis of more or less correct information, I must tolerate without legal protection. In a democracy, citizens must be free to assess various matters differently. Thus, while, for some, a politician is the saviour of his country, for others, he is no better than a traitor. As shown in 3.1, authoritative interpretations of reality do not belong in a modern society.

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In combination with the requirement that no-one may be punished for statements made in non-negligent good faith, which, according to the distinction discussed here, will only have significance for statements of fact, we believe that we have pointed the way to a freer debate, consistent with the signals from the European Court of Human Rights and in harmony with the standpoint that the three processes that freedom of expression is intended to safeguard must be allowed to take place with the least possible disruption.

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6.2.4 Other people’s rights

6.2.4.1 The freedom of expression of employees

The Commission does not view it as appropriate to propose special rules concerning the freedom of expression of employees in the Norwegian Constitution. The basic principle pursuant to our proposal for a new article 100 will therefore be, as today, that employees are subject to the same protection of freedom of expression as any other citizen. Legally sanctioned restrictions of the employee’s classic freedom of expression must satisfy the conditions of article 100 of the Constitution, second paragraph, first sentence, i.e. the restriction must be justifiable “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”. In addition to this, the second sentence requires that the limitation (“the legal liability”) shall be clearly prescribed by law.

In practice, the provision laid down in the third paragraph of our proposal for a new article 100 of the Constitution, will be of greater significance because most restrictions of the freedom of expression of employees will not be legally sanctioned statutory provisions, but rules, instructions, etc. laid down by the employer. Such instructions may not contain provisions that infringe the right to “Speak his mind frankly on the administration of the State and on any other subject whatsoever”.

The employment relationship raises special questions regarding freedom of expression because the employer, within certain limits, is entitled to the employee’s loyalty. In order to observe the duty of loyalty, the employee may be obliged to refrain from making certain statements. The duty of loyalty therefore involves a limitation of the freedom of expression of employees.

The conflict between freedom of expression and the employee’s duty of loyalty is of major practical significance; approximately half of Norway’s population is in one

sense or another employed by other persons. In view of this, it is not satisfactory that the rules restricting the freedom of expression of employees are to such a great extent non-statutory and partly underdeveloped.

One reason for the lack of rule formation may be that the thinking in relation to freedom of expression has been concentrated on the free, independent individual, unfettered by ties of loyalty to any master. Just as democratic participation in 1814 through the right to vote was reserved for men of a certain income and independence, freedom of expression was primarily viewed as a practical reality for independent citizens. Parallels can also be drawn to the democracy of the city-states of Ancient Greece and participation in the ancient Norwegian local and regional assemblies, both of which were reserved for nominally free men.

The ideal of freedom and independence rarely corresponds with reality. For Norway’s approximately 2 million wage-earners, this is particularly clear. When the matter in hand is associated with the employee’s work or workplace, he or she cannot take advantage of this fundamental freedom and independence. This would conflict with the requirement regarding loyalty to the employer. There may furthermore be a horizontal requirement of loyalty to the community of workers to which one belongs. What I say on the public arena may backfire on more people than myself.

A further account of the restrictions that can be accepted pursuant to article 100, second and third paragraph, of the Constitution, would require extensive analysis. It would exceed the Commission’s capacity and the scope of its terms of reference to carry out such work. We confine ourselves to the various factors and principles that should be included in such analyses.

It is hardly possible to make a general distinction between employees in the private and public sectors. In the case of private sector employees, loyalty is primarily associated with not damaging the economic interests of the employer, for example, by revealing internal matters that may have significance for competition or unduly damage the reputation of the company. However, these considerations also apply to public employees. Many public employees work for bodies that exercise public authority and/or are secretariats for political leaders. It may therefore be necessary for the freedom of expression of the employees to tolerate restrictions based on another consideration, that of the legitimacy and function of the democratic system. However, this argument must be weighed against the public employee’s duty of loyalty, not only to his superiors, but also to the democratic system itself, including the regard for a best possibly informed public debate. A public servant cannot go it alone if this creates major difficulties for the government agency that he or she serves.

It is not entirely clear what is meant by loyalty. Some people consider that employers should have general protection against public criticism from employees. In our view, this would be demanding too much. It would be more consistent with the general principles of limitation of freedom of expression to lay down as a minimum requirement that only statements that demonstrably unduly damage the employer as an employer may be regarded as disloyal. The duty of loyalty is associated with the employer’s managerial prerogative, which means that the employer is in a better position than the employee to decide what this duty entails. However, this should also impose on the employer the burden of proof that harmful disloyalty has taken place.

Employment conditions and working environment are currently regarded as a public concern and it may by extension be argued that the general public has a legitimate interest in a certain access to information concerning the individual workplace. Regard for the general democratic debate concerning working environment issues is not necessarily best served when censurable conditions are only made known to public supervisory bodies (e.g. the Norwegian Labour Inspection Authority).

Regard for the public indicates in general considerable freedom of expression for employees. It is particularly important to bear in mind that the quality of the public debate is reduced when those who work on the matters in question are either not allowed or do not wish to take part in the debate. This applies not least to public employees. The situation is complex, and it is hardly possible to operate with clear categories of public employees, and then allow different degrees of freedom of expression to the different categories. However, by way of suggestion, one might differentiate between employees who work in a form of political secretariat and employees with purely specialist responsibilities. The latter group, whether responsible for education, health, communications, defence or another field, should have both a right and a duty to inform on problems, challenges and possible solutions in the field concerned. The actual competence that they possess should not be excluded from the public sphere. In addition to loyalty to the institution, one must thus also observe general loyalty to the society one serves.

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6.2.4.2 Blasphemy

Pursuant to section 142 of the Penal Code, popularly referred to as “the blasphemy clause”, it is a criminal offence “by word or deed publicly to insult or in an offensive or injurious manner show contempt for any creed whose practice is permitted in the realm or for the doctrines or worship of any religious community lawfully existing here”. By “creed” is meant religious truths and everything that is regarded as holy or precious by the religious community concerned. Objective criticism of doctrines and atheistic statements do not as such constitute criminal offences. Criminal proceedings have not been instituted pursuant to this provision since the case against Arnulf Øverland in 1933.[26] The general view currently seems to be that “prosecution pursuant to section 142 is not appropriate”.

Historically speaking, the blasphemy clause is rooted in the old society, where the state religion was a reality in the sense that the religion was one of the pillars on which the state rested, i.e. it contributed to the authority of the state. An attack on the

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26 Legal proceedings were instituted following publication of Øverland’s “Tre foredrag til offentlig forargelse” (Three Publicly Offensive Lectures) in 1932-33, of which one bore the title “Kristendommen – den tiende landeplage” (Christianity – the tenth plague). On 18 April 1989, private criminal proceedings were instituted against H. Aschehoug & Co (W. Nygaard), Bokklubben Nye Bøker and the publisher William Nygaard for violation of, inter alia, section 142 of the Penal Code in connection with the publication of the Norwegian edition of Salman Rushdie’s book The Satanic Verses. The summons was served by 20 different Muslim associations and communities. The case was withdrawn two and one-half years later because the plaintiffs no longer wished to pursue the case. The reason given was that there seemed to be little potential for winning the case. Moreover, it was feared that the full main hearing would result in further negative publicity and negative consequences for Muslims residing in Norway”.

state religion was an attack on the social authorities themselves. The old blasphemy clause of the Penal Code of 1842 is worded:

“Whoever scorns or blasphemes against God’s holy words or sacraments or otherwise derides the official state religion may be punished by fines or imprisonment, but if this occurs by means of printed matter, may be punished by imprisonment or hard labour of the fifth degree”.

In the old authoritarian state, it was a serious offence to threaten the social authorities. However, regard for the new civil freedom is taken into consideration in the following sentence, where more lenient penalties are indicated for blasphemy against the creed of those of a different faith than the official state religion. In the Penal Code of 1902, the reference to “the official state religion” has been removed. On the other hand, protection against blasphemy is restricted there to apply to persons the practice of whose creed is permitted in the realm. At that time, this included only Christians, Unitarians and Jews. It was not until the amendment of 1934 that the blasphemy clause was extended to include punishment of contempt for the doctrines or worship of any religious community. In reality, this was a major extension that changed the character of this section of the Penal Code.

Punishment for blasphemy was thus in principle a limitation of freedom of expression on the basis of public interests. This also explains why section 142 is still located in the Penal Code’s chapter 13 on felonies against the general order and peace. The situation today is fundamentally different. Although we still have a state church, the authority of the state is no longer associated with the religion. This reflects the general differentiation process. Religion has become a separate area.

In connection with the history of the blasphemy clause, there are two factors worth noting. Firstly, in the 19th century, there was a marked freedom to show contempt for Catholics, Jews, Muslims and other “alien” religions or ethical orientations (although all Christians and Jews were formally protected against blasphemy in, respectively, 1845 and 1851). A freedom was thus reflected in the section’s clear limitation article. This means that, if one were to apply the blasphemy clause anywhere near as zealously against contempt for all religions as it was originally applied against contempt for the state religion, this would entail a considerable restriction of freedom of expression in relation to the situation in this area during the 19th century!

The second factor we should note is the striking coincidence between the extension of the section in 1934 and the fact that it was in reality invalidated by never again being applied. By amending the section, it was laid to rest. This coincidence is not entirely fortuitous. It reminds us how tightly purely historical religious freedom is interwoven with religious criticism.

If it were possible to envisage its application today, it would be out of regard for protection of individual religious feelings. According to the practice of the European Court of Human Rights in Strasbourg, a blasphemy clause is not in itself in violation of article 10 of the European Convention on Human Rights. This is shown, for instance, by the judgment in the *Wingrove* case of 1996. What was particularly noteworthy in this case was that protection against blasphemy was regarded as “rights of others”, i.e. as an individual interest.

The background for this is that it can no longer be perceived as a prerequisite for a sound society that all citizens profess the same religion. In our society, religion is

largely a private matter,[27] and the consequence of this must be that an attacks on religion cannot be regarded as an attack on common values that are essential to the social structure, but more as an attack on individual religious feelings and dignity. However, the most important factor in the context at hand is that, in connection with the case referred to, the court stated that strong genuine arguments could be put forward in favour of revocation of blasphemy rules. But, since such rules are still found in many European countries, the court would not conclude that blasphemy provisions in themselves are unnecessary in a democratic society.

Following a comparative review of a number of Western European states, we find that blasphemy or direction of insults at a religious faith is either no longer a criminal offence or has been narrowly interpreted and rarely invoked in recent years. In Sweden, the law relating to blasphemy was repealed in 1949 and, in 1970, the narrower provision concerning insults against religion was repealed. Denmark has a provision concerning blasphemy in the Penal Code, but it was last used in 1938. In France and the USA, there is no prohibition against blasphemy. In the USA, blasphemy laws have been abolished as contrary to the Constitution (1952). In the UK, on the other hand, prohibition of blasphemous statements is a common-law principle. However, characteristically, it is only the Anglican faith that is protected! Germany and Austria have provisions against ridicule of religion. In Canada, it is a condition that the blasphemous utterance results in a “disturbance of peace”.

There is much to indicate that it would have been entirely unproblematical to abolish the blasphemy clause 20 years ago. By itself, the fact that it has been dormant is also a strong argument for removing it. However, it is interesting that there are certain signs that some people wish to revitalize the clause. A certain indication of this may perhaps be found in the somewhat round formulation in the Commission’s terms of reference stating that “the increase in close contact with people from other cultures makes certain needs relevant and may be a seed of conflict where the functions and limitations of freedom of expression are important issues”. As mentioned above, the blasphemy clause was also invoked when some Muslim associations and communities brought an action against the publisher William Nygaard in connection with the publication of Salman Rushdie’s book *The Satanic Verses.* Although the action was withdrawn, it is an indication that there may come a time when the section is revived. For some people, this may of course be an additional reason for removing it. That is to say that we discern underlying conflicts.

The problem has arisen, among other reasons, owing to the development towards a more multicultural society. This has given rise to a renewed focus on elements of the purpose of the original blasphemy clause. That is to say that the “modern” view of religion as a private matter is adopted by more and more people in our society. It is

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27 For a critical examination of the statement “religion is a private matter”, see the quotation of Hans Skjervheim below. See also Göran Gunner: *Att slakta ett får i Guds namn* (Slaughtering a Sheep in God’s Name), SOU 1999: 9, page 69, which states that, “in the so-called world religions, there are factors that are expected to affect more than one individual and shape collective courses of action”. He submits that a religious freedom that only provides freedom for a privatized religion is only half a religious freedom. One might respond to this that compromise is necessary when several ethical orientations and religions are in competition with each other. It has been recognized since the Nantes Edict of 1598, which required citizens to tolerate the existence of several religions. This stopped for a while the bloody wars between Catholics and Huguenots (Protestants)”.

thus not only a matter of preventing violation of individual religious feelings, but also of attacking part of what constitutes the basis of the collective life. Hans Skjervheim has called attention to this dilemma: “whether or not religion is a private matter is not something external to the religion, and precisely with regard to those who take the religion most seriously, this liberal principle is manifested as restraint when it is realized in practice”. The desire for a more active blasphemy clause has not only arisen as a result of the greater prevalence of originally alien religions, but is also an element of what we have generally referred to as the new “identity policy”.

A problem in this connection is that what a liberal critic intends as objective criticism is easily perceived as scorn or blasphemy by the other party. This is almost unavoidable as regards dogma-criticism, or the area between faith and rationality. Although this is recognized as a problem, the Commission would emphasize that this problem can *under no circumstances* be solved by giving the power of definition to the party who feels violated by the blasphemy. From a fundamentalist standpoint almost any criticism may be regarded as blasphemous. On the other hand, the alien religion may appear to the external observer to be so strange and absurd that the criticism is almost unavoidably perceived as insulting. It is not easy to see this in relation to one’s own ethical orientation but is all the easier if one considers extremely alien faiths. Nonetheless, the main point must be that a blasphemy clause that is enforced on the basis of the power of definition of the aggrieved persons may have unsuspected consequences for the restrictions of freedom of expression and clearly violate the “freedom to speak frankly on the administration of the State and on any other subject whatsoever “, i.e. “frank statements” about politics in a broad sense. As we have seen, the whole blasphemy issue is rooted in the close relations between religion and authority in the community or, in a word, politics.

The freedom to criticize is not only an individual right. It is a fundamental precondition for the open society and a precondition for the entire emancipation project that has freedom of expression as its point of departure and precondition. It underlies the three grounds: truth, democracy and the mature human being’s free formation of opinion. History also shows that criticism of religion has been perhaps the most central and important factor of the emancipation since religion has been used as the perhaps foremost legitimation of authority by those who hold power. Historically, blasphemy allegations have been used extensively as a means of oppression.

Viewed from the political or power perspective, there is a difference between the religion or ethical orientation allied with the established social authority and the religion or ethical orientation represented by minorities. Criticism that may be perceived as blasphemy may on the one hand be purely internal and directed at the community’s authorities either at the level of the society at large or within the individual religious communities.[28] On the other hand, it may be more external. If this external criticism issues from well established quarters of the society at large, the criticized group, which is basically vulnerable, may easily feel violated or ostracized. Criticism that is perceived as blasphemy is thus not only criticism directed against the

28 In theory there is nothing to prevent the religious authorities of a minority group from bringing a legal action against an outspoken member of the group on the basis of the blasphemy clause.

political or religious authorities and used to promote emancipation, it may also have an ostracizing effect on minority groups.

The multicultural society is dependent on these groups being met with respect and tolerance. The Commission regards the religious freedom that we have in Norway as a hard-won asset. It was won through a political struggle within a public sphere that enjoys a considerable degree of freedom of expression. Many people have undoubtedly felt that their interests were violated in the process. However, the result of the process has been a reasonably high degree of respect and tolerance towards people with other opinions and beliefs. It is in the open public sphere that we have learned to associate with one another as strangers in this proper manner. We are now on our way into a new situation with a multicultural society and with signs of a new rise in religiosity. In this situation, our capacity for tolerance will be put to the test. What we need in this situation is not a tightening of reactions and sanctions through a revival of the blasphemy clause. There may, on the contrary, be a need for more extensive and enlightened public religious criticism, and this will not be fostered by means of more stringent reactions to alleged blasphemy.

The blasphemy clause is a vestige of a society with a different relation to religion. This society was religious and bore a certain relation to the new “neoreligiosity” (if this can be viewed as a phenomenon characteristic of our times). However, this society was not multicultural, at any rate did not view itself as multicultural, and it was not tolerant in our sense of this term, on the contrary. What we need today, at least as much as before, is a free and open cultural and religious criticism.

The Commission holds the view, on the above basis and on the general basis of freedom of expression with regard for truth, democracy and free formation of opinion, that section 142 of the Penal Code (“the blasphemy clause”) should be repealed.

The Commission would emphasize that this only means that the *special* protection against criticism (scorn) of religious conceptions and values is removed. This does not mean that individual religious feeling is without any form of legal protection against violation. Depending on the situation, the general provisions concerning defamation, sections 246 and 247 of the Penal Code, section 135a concerning hateful statements and section 140 concerning incitement to commit criminal acts will apply.

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6.3.2 National external and internal security

6.3.2.1 Introduction

Pursuant to current legislation, freedom of expression in a number of connections is restricted in the interests of national security. The term is used explicitly in section 90 of the Penal Code while in other places it is implied by the context that the purpose of a restriction of freedom of expression is protection of national security.

The concept “national security” must be kept distinct from “state security”. It is not the state as an executive body or body corporate pursuant to national law that shall primarily be protected, but the nation itself or the realm with its territory and constitution. To a certain extent, protection may also be extended to the Head of State, the Government and, in time of war, the Chiefs of the Norwegian Armed Forces.

The concept can be divided into *external* and *internal* security. That is to say that the threat against security may originate either abroad, typically military threats from foreign states or, at home, typically revolutionary groups that wish to amend the Constitution unlawfully, i.e. in another manner than winning the necessary majority to amend the Norwegian Constitution in a vote of the Storting. This distinction is not necessarily a sharp one – revolutionary groups might for example receive simultaneous support from a hostile neighbouring country.

In earlier times, the terms *treason* and *high treason* were used to designate this distinction. *Treason* occurred when one of the state’s own citizens or a group of citizens encouraged another state to go to war against Norway or when Norwegian citizens assisted the enemy in time of war. *High treason* occurred in connection with attacks on the state’s constitution, on its independence and sometimes on the life and freedom of the Head of State. Both cases concern treason, which presupposes that those who carry out such actions owe allegiance to Norway.

The term “treason” opens the way for a number of reflections concerning the relationship between individuals and the nation. It may seem inappropriate to regard the citizens of a democracy as subjects of the crown and therefore to equate various forms of disobedience with treason. We have therefore attempted to avoid using the term “treason”.

We have described freedom of expression as socially constituent. There are limits to the extent to which restrictions can be taken without undermining the form of society itself. On the other hand, this does not mean that there shall be no limitations, On the contrary, if “the liberal principles are regarded as absolute, all is transformed to absolute illiberality”. The realization of freedom is enabled by limitation of freedom. The problem consists of where to set the limits.

The problem is made particularly relevant when considering national security. For example, to what extent shall one permit statements that undermine the form of society that has freedom of expression as one of its mainstays? When may a democracy employ such undemocratic means of defending itself? It becomes a question of where the democracy’s line of demarcation – line of defence – is to be drawn. How great a security risk is it necessary and/or correct to take out of regard for the open debate on the democratic concerns safeguarded by freedom of expression? Shall statements that may be harmful to national security be prohibited in accordance with a precautionary principle or shall one wait until there is a “clear and present danger”, as would be consistent with American legal doctrine?

These questions have been of major significance in Norway since World War II, as evidenced by the Act relating to special measures during war, threat of war and similar situations, the “Ikkevold” case and the “list” case. After the end of the Cold War, there has been less focus, and tension, associated with these issues. The Lund Commission reviewed aspects of this, and it seems in retrospect that the authorities’ will to take risks during this period was not great and that the assessment of risk was not always particularly accurate.

Both right-wing and left-wing revolutionary groups are still active, but they are practically invisible on the public arena, and northern European foreign policy is characterized by détente. This relative relaxation of tension can be taken advantage of to assess the issues more objectively and thus perhaps also more soberly. At the same

time, recent developments in the Balkans have shown that the international picture can change rapidly. There are arguments in favour of holding a debate now so that good principles can be in place for any difficult days that may lie ahead.

According to article 10 of the European Convention on Human Rights, it is regarded as legitimate for a state to restrict freedom of expression in the interests of national security. The restriction must however be “necessary in a democratic society”.

6.3.2.2 The Commission’s general observations

The Commission recognizes that there may be situations where it must be possible to prohibit statements in the interests of national internal and external security. This primarily applies to statements in the form of factual information but may exceptionally also apply to opinions. Our proposal for a new article 100 of the Constitution, second paragraph, also provides that the Storting may adopt such prohibition or limitations when the conditions of this provision are met. It is assumed that there is general agreement that the basic principle must precisely be that such limitations may be introduced on specified conditions.

It is far more difficult to formulate the precise conditions that must be fulfilled in order that such limitations shall be legitimate and acceptable. The conditions must be formulated in such a way that the right to adopt limitations is not so discretionary and broad that it can be misused politically, i.e. used for a purpose other than protecting national security. Our proposed amendment to the Constitution states that limitations of the classic freedom of expression and freedom of information must be justifiable “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”. It is not immediately obvious on the basis of these conditions where the boundaries may be drawn. A satisfactory answer to this can only be provided after a closer analysis of the individual restriction, the purposes of the restriction and the degree to which the restriction encroaches on and disrupts the three processes safeguarded by freedom of expression.

In addition, there is the protection that lies in the draft amendment to article 100, third paragraph, i.e. the absolute protection of freedom to speak frankly, and in the second paragraph, third sentence, concerning the freedom from liability for false statements made in non-negligent good faith.

It is the Commission’s view that intervention on the grounds of national internal security can only be defended when there is an actual, non-imaginary threat. This leads to two difficult questions: a) What magnitude of risk shall one be required to take? b) Who defines the prevailing risk?

Question a): It is the Commission’s view that the majority of the population both must and can tolerate a great deal from revolutionary groups, separatists and opponents or critics of Norwegian security policy. There is no symmetry between the power and the revolutionaries. A sound society with a legitimate system of government and well functioning public access, cf. particularly 2.3.8, is the best guarantee against harmful effects of such statements. When there is considerable support for the establishment, it is possible to view revolutionary modes of expression with indulgence. In such a situation, the distance between words and deeds will be considerable, and the

responses in the public debate and public opinion will have a calming effect. This is preferable to the state that regards itself as always being in the right.

In earlier times too, there have been representatives of such open-mindedness in the meeting with revolutionaries. In defence of Marcus Thrane, Bernhard Dunker observed that one should “let nature take its course – it will never arrive”, and Minister of Justice Castberg refused to prosecute the organizers of the 1 May in Kirkenes in 1908 for the banner inscribed “Down with the alter, the crown and the plutocracy”.

The opposite strategy, strong protection of authority, may easily prove to increase the problems. When revolutionaries maintain that the system lacks legitimacy, this view may more easily gain support if force is used instead of dialogue. There is always a risk that the medicine only makes the disease worse. If one employs certain means of combating the enemy, the enemy’s activities are legitimized as well. The growth of terrorist activities by the extreme left in West Germany in the 1970s has been explained as a result of the fact that the protest movement was met with force instead of attempts to use openness and dialogue.

There is not necessarily any conflict between freedom of expression and national security. If we protect freedom of expression and openness, this will provide a strong security policy. States with serious fragmentation, with political minorities prevented from expressing their views through the political channels, are far more vulnerable to internal unrest. This applies correspondingly to international conflicts. There are rarely hostilities between open democracies and, in wars between democracies and dictatorships, the democracies are able to mobilize greater resources and self-sacrifice. Freedom of expression and openness therefore provide long-term stability.

It is also important to analyse the kind of opposition one is facing. Is it contradictory or contrary? That is to say, is it, after all, engaged in a dialogue with the authorities or does it devote itself to pure destruction, like the spy? The majority of the population of a democratic state may prohibit active disloyalty, but not enforce active loyalty. Demanding active loyalty may result in a new witch hunt like that of the McCarthy period in the USA during the 1950s.

Question b): There clearly lies an inherent risk in the fact that it is the same majority that is challenged in its decisions and positions that has the competence to assess the degree of prevailing risk. In other connections, such a combination of roles is perceived as somewhat unsettling. Nationally, it is possible to be too short-sighted and to make excessive political allowances. In this connection, it is a clear asset that the necessity of national intervention can be reviewed by an independent international court. In its decisions, the European Court of Human Rights in Strasbourg has demonstrated that it accepts a greater element of risk than was adopted in the state in question.

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6.3.3.3 Lies, hatred and opposition to public authority

The Penal Code contains several provisions that prescribe penalties for qualified forms of opposition to public authority or for spreading lies or hatred against the constitution or the authorities. Some of these provisions should be removed or revised considerably owing to the demise of “the authoritarian state”, cf. 3.6.

The greatest problem is that associated with section 130 of the Penal Code. Here, penalties are prescribed for any person “who against his better judgment publicly attributes to any of the State authorities or any other public authority acts that they have not committed, or who gives a misleading account of the circumstances under which or the way in which they have acted.”

The state authorities and other public authorities have consequently been provided with protection against both mendacious and deceptive assertions and allegations. Bratholm and Matningsdal state that objective criticism is not affected “and regard for freedom of expression, both in principle and in practice, restricts the scope of application of the qualified utterance. Freedom of expression cannot justify pure slander”.

The first paragraph applies to deliberate lies. Pursuant to the second paragraph, gross negligence may also be penalized, given that the incorrect allegation is “with intent to harm the general reputation of the authority concerned”. Because criminal prosecution pursuant to this provision may be, and should be, politically controversial, the third paragraph provides special rules concerning application for a prosecution: “If the felony is committed against the Storting, one of its divisions, committees or officials, a prosecution will only be instituted on the application of the Storting. Otherwise a prosecution will be instituted on the application of the government ministry concerned or pursuant to the King's decision.”

In the view of the Commission, it may today be difficult, in relation to “the seeking of truth, the promotion of democracy and the individual’s freedom to form opinions”, to defend retention of a provision that provides the public authorities with special protection – protection in excess of that afforded by law to other institutions and persons. The democratic process indicates that protection must be the same for everyone.

Section 135 of the Penal Code is constructed in rather a different way. What is protected is the “general peace”, and the provision identifies three factors that might endanger peace, i.e. by “publicly insulting or provoking hatred of the Constitution or any public authority or by publicly stirring up one part of the population against another”. The provision is therefore not provided as a special protection for the constitution and public authorities, but may nevertheless have this function by setting limits for reference to these institutions.

Bratholm and Matningsdal emphasize that “regard for freedom of expression indicates that only relatively gross forms of agitation be affected, but the legislator assumes that social peace is more worthy of protection than the more extreme utterances that threaten it.” “The risk must furthermore apply to disturbance of the peace in a physical sense, not only the risk that people will be mentally insecure or disturbed”.

In our view, the provision does not make it clear enough what magnitude of risk of disturbance of the peace must be present for the insulting and provocative utterances to be subject to penalties. Moreover, as mentioned in the travaux préparatoires in 1915, the provision has had little practical significance, and should be considered for repeal.

Individual public servants are given special protection against utterances in section 326 of the Penal Code. Here, it is made a criminal offence to annoy “him in the performance of his duties by insults or other offensive conduct”. The provision is of

major practical significance. In Poland, a fine pursuant to a corresponding provision has been found by the European Court of Human Rights to be “necessary in a democratic society”, even in a case where the public servants concerned acted without any clear legal basis.

The military system and the military authorities have also been provided with special protection against provocative utterances. The main provision is laid down in section 134, third paragraph, of the Penal Code.

Einar Gerhardsen, Martin Tranmæl, Oscar Torp and others were found guilty of violating this provision during the so-called military strike of 1924. Leading members of the Norwegian Communist Party, who opposed the military strike but were supporters of revolutionary agitation at the army camp, were also sentenced.

According to Bratholm and Matningsdal, it is not regarded as “aversion” that “a member of the audience subscribes to objective criticism. On the other hand, ascribing to the service qualities or objectives that are contrary to reality in order to arouse aversion may be so regarded.” Attempts are equated with acts successfully carried out, cf. “seek to arouse”. Provocation, aversion and hatred therefore need not take place.

The provision seems to apply to *utterances* well before such utterances would necessarily lead to criminal acts. There may therefore be reason to specify the scope of application of the provision in accordance with the fundamental principle concerning the difference between words and actions.

6.3.3.4 Hateful statements (“the racism clause”)

By *hateful statements* is meant strongly negative utterances concerning individuals or groups on the basis of certain types of criterion. Section 135a of the Penal Code (popularly referred to as “the racism clause”) prescribes penalties for publicly making such utterances and lists the criteria; creed, race, colour or national or ethnic origin besides homosexual inclination, way of life or orientation. It thus applies to various types of criterion, some innate, some hereditary and some dependent on own choices or own free will. Criteria *not* mentioned are, for example, gender, age, geographical ties and social status (class).

The section follows section 135, which was an original part of the Penal Code of 1902. Penalties are here prescribed for endangering general peace by publicly stirring up one part of the population against another. What makes this section of the Act interesting is that hateful statements were clearly considered on the basis of social criteria. These are thus subject to penalties, but only when there is a risk of disturbance of public peace and order.

Like section 135, section 135a is placed under chapter 13 of the Penal Code: “Felonies against the general order and peace”. This indicates that, in the case of this section, it is the provocative effect of the utterance that is important. This is also indicated by the fact that it is only the public prosecution authority that can initiate criminal proceedings. It is worth noting that the new South African Constitution of 1996 explicitly establishes that penalties shall be dependent on actions. It prescribes penalties only for “advocacy of hatred that is based on race, ethnicity, gender (sic!) or religion” when this “constitutes incitement to cause harm.”

However, it is important to emphasize that section 135a of the Norwegian Penal Code is not only associated with potential disturbance of peace and order, but that it also constitutes protection against defamatory statements, a special protection of honour for vulnerable minorities. The Norwegian penal provision could for that matter just as well have been placed under the chapter of the Penal Code concerning defamatory statements.[29] A defamatory statement that conforms to the criteria referred to is thus, in itself, subject to penalties. However, a qualified connection between the statement and unlawful acts must constitute an aggravating circumstance.

Hateful statements are one of the most difficult and controversial areas associated with the limits of freedom of expression, and the question has been subjected to repeated and long debates by the Commission. In this connection, it is necessary firstly to call to mind the real reason for freedom of expression in our society. Freedom of expression is associated with the existence of a public sphere. It is assumed that the freedom to express oneself in this sphere leads to airing, purification and moral refining of standpoints through discourse and criticism. In order that the public sphere shall function in this manner, discriminatory ideas must be expressed, since it is only when they are expressed that they can be combated through public criticism. In principle, freedom of expression is thus conceived as protection against such phenomena as discrimination. Nor is there any doubt that, in the greater historical perspective, there has been a lesser degree of discrimination in the open societies with a high degree of freedom of expression than in the closed societies. In most if not all cases, freedom of expression has functioned as a protection against discrimination.

By extension of this real reason for freedom of expression, there is another argument that is worth noting. It is formulated as follows by Sandra Coliver of the freedom of expression organization ARTICLE 19:[30]

“The rise of racism and xenophobia throughout Europe, despite a variety of laws restricting racist speech, calls into question the effectiveness of such laws in the promotion of tolerance and non-discrimination. One worrying phenomenon is the sanitized language now adopted to avoid prosecution by prominent racists in Britain, France, Israel and other countries, which may have the effect of making their messages of hate more acceptable to a broader audience.”

What this implies is that statutory provisions restricting expression in the public sphere may, by withholding racist statements from public criticism, foster a greater prevalence of racist attitudes. It does not necessarily work this way in all connections. However, it must be mentioned in order to emphasize the complexity of the social processes we are dealing with here. In such a situation, one must beware of simple solutions and symbolic demonstrations with no further effect. If it is possible to combat discriminatory attitudes via the public sphere, this is preferable to employing penal sanctions. It is important to maintain the dialogue. If racists are silenced or go

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29 The Danish “racism clause” is placed under the title Defamatory Statements. Such a clause is otherwise usually placed in the same way as the Norwegian clause, as in the case of Sweden, Finland, Germany and the UK.

30 Sandra Coliver ed.: Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination, ARTICLE 19, London 1992, page 374. (In the editors’ summing up)

underground, much of the antiracist argumentation will also die down, and racism awareness will be weakened.

The Commission regards it as of central importance that the public sphere is well developed in the various institutions, since it is the institutional system that is responsible for guaranteeing that freedom of expression really has a corrective and morally refining function. It is moreover a precondition for the Commission’s assessments that we have an institutionally well developed public sphere in Norway. That is to say, that we can normally allow ourselves a relatively large degree of freedom of expression. As regards a number of the areas involved, such as racially discriminatory attitudes or discrimination of homosexuals, there is also reason to maintain that the public sphere functions reasonably well. Relatively great attention is given to such attitudes and utterances, and they normally meet criticism at schools and in the public sphere. This does not mean that there are no racist or discriminatory attitudes in Norway. On the contrary, there is reason to maintain that such attitudes constitute a major problem. However, the question is what countermeasures are adequate. What is to be gained by penal sanctions against utterances, and what may be lost?

It is possible that there is something to be gained. Firstly, we have no guarantee that public correction functions in all areas in accordance with the ideals referred to. Freedom to agitate in favour of discriminatory attitudes always carries a risk of increased prevalence of such attitudes. And this applies even when there is no incitement to carry out unlawful acts or any direct risk of such acts being carried out. If nothing else, there may be good reasons for a statutory provision that can function as a kind of contingency in relation to agitative offensives. This entails that the premises must make it clear that the intention is not to combat arbitrary statements but more systematic discrimination associated with repeated utterances.

It may also be argued that the defamatory aspect or regard for personal protection are arguments for penal sanctions to some extent regardless of whether or not the corrective public sphere functions (and regardless of whether the utterance may or may not provoke actions). In the Supreme Court’s judgment in the Kjuus case on the basis of section 135a of the Penal Code, conviction was based, inter alia, on a qualified *violation*. If, in this connection, we disregard any harmful provocation, there is a need to find a balance between two legitimate considerations, on the one hand consideration for correction, which requires that the discriminatory attitudes are expressed, and, on the other hand, consideration for an ethical public sphere, where anyone can freely move without being in constant fear of defamation.

In this connection, it is worth remembering that the particular freedom of the public sphere is based on associating with people one does not know personally, which involves to some extent being free to “choose identity”. At the same time, we know that some aspects of a person’s identity are less prominent and clear. It may be argued that discrimination on the basis of features one cannot “conceal” in public (colour, language) may result in a particularly brutal form of discrimination. This observation does not involve any assessment of what discrimination is worst in itself. It is solely a question of how vulnerable to discrimination one will in practice be.[31]

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31 This is also stated regardless of the normative question of whether one should appear in public with one’s distinctive features.

The above discussion illustrates different views of the relationship between utterances and, on the one hand, attitudes and, on the other hand, acts. We may perhaps think in terms of a continuum – *attitude – utterance – act.* In the Kjuus judgment, which is the most prominent judgment based on section 135a of the Penal Code, both the majority and the minority discuss the potential for racist attitudes “living covert lives” (the majority) or “growing by stealth” (the minority) if racist statements are excluded from the public debate. The minority attaches importance to the general freedom of expression argument, that an attitude must be expressed in order to be combated. The majority does not exclude such a possibility, but attaches less importance to it (“argumentation alone” cannot stop “the grossest racist statements”).

What is therefore interesting is the different views concerning the other relationship, that between utterance and act. The minority finds that the utterance in question is not an incitement to an unlawful act. That is to say, it makes a distinction between utterance and act or between verbal and physical violence. In 2.3.1 we demonstrated that this is not unproblematical, but that a distinction of this kind has historically been a precondition for the development of the concept of freedom of expression. The majority, on the other hand, may be said to attach less importance to this distinction and more to the grossly offensive nature of the utterance in itself. Relatively great importance is thus attached to the utterance as a (“violent”) act. The Commission was divided as to what importance should be attached to the utterance as an (offensive) act as compared with the classic freedom of expression argument, which “requires” that ideas are expressed.

Section 135a of the Penal Code was adopted on 5 June 1970 because, the same year, Norway ratified the International Convention on the Elimination of all Forms of Racial Discrimination of 21 December 1965 (CERD). As regards racial discrimination, the provision was viewed as necessary to Norway’s fulfilment of its obligations pursuant to the Convention. The obligation to punish racially discriminatory utterances is described in greater detail in article 4 (a) of CERD. On adoption of the Convention, there was awareness that certain of these prohibitions could be regarded as in conflict with freedom of expression, and this was solved by referring to the fact that the prohibitions must be interpreted as being “with due regard” to other human rights, including freedom of expression. Under the terms of CERD, a committee has been appointed with responsibility for monitoring states’ implementation of the Convention. This is not a court, but a committee, which reports, inter alia, to the UN General Assembly. The International Covenant on Civil and Political Rights is also relevant in this connection. The implementation of this convention is monitored by the UN Human Rights Committee. The conflict referred to comes to light in the relationship between articles 19 and 20 of the Convention.[32] This body does not have the status of a court either, but its statements have relevance as a source of law.

The conflict also lies in the relationship between articles 10 and 17 of the European Convention on Human Rights. It may therefore be tabled at the European Human Rights Court in Strasbourg. The practice of this court has major significance in

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32 Kyrre Eggen, Special annex, page 255, maintains, with the support of Nowak that, according to the UN Convention, states are not obliged to prohibit racially or religiously discriminatory utterances that are non-violent or purely offensive or political.

Norway. The problem was touched upon in the *Jersild* case. This case concerned a journalist's repetition of racially discriminatory utterances in an interview. It also concerned what is termed "reporting privilege". The journalist was convicted in Denmark, but acquitted non-unanimously by the European Human Rights Court in Strasbourg. However, the court stated in the grounds of the judgment that the utterances in themselves could not be protected by article 10 of the European Convention on Human Rights: "There can be no doubt that the remarks in respect of which the Greenjackets were convicted (...) were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10."

It is nevertheless worth noting that at least part of the argumentation in favour of acquitting the journalist could in principle also have been used as arguments for acquitting the original expressor, since it was maintained that the public has a right to be informed of ideas that actually exist. The problem lies in the relationship between attitude and utterance. We discern once more the classic freedom of expression argument, i.e. that it is difficult to combat an attitude that is not expressed. If the original expressors had not expressed themselves, the journalist would not have had anything to pass on, and information concerning existing ideas that, according to the grounds of the judgment, the public had a right to receive would thus have been withheld from the public.

On the basis of the above and of the Commission's general discussion of the grounds and conditions for freedom of expression in Norway, the Commission recommends that section 135a of the Penal Code be revised in relation to the Commission's proposed new article 100 of the Constitution. The current section is in any case unsatisfactory. Out of regard for CERD, there must be a section of this kind, but the somewhat arbitrary list of different types of characteristic should be amended. An alternative would be to restrict the list to innate biological or cultural hereditary socio-cultural characteristics.[33] This seems to be in accordance with the minimum requirements of international legislation, and with a generally accepted requirement that such a provision, restrictively interpreted, should not conflict with the regard for freedom of expression. The Commission sees no reason why Norway, with a reasonably alert public, should carry penal sanctions against discriminatory utterances further than the internationally approved minimum.

The Commission's recommendations entail that the term *trosbekjennelse* (creed) be left out. As opposed to the other criteria, this involves, first and foremost, an element of personal choice or free will. The term "trosbekjennelse" (literally, "profession of faith") is moreover inappropriate in that it has associations with Protestantism where precisely the profession of faith plays a central part. In the extended interpretation that is clearly intended here, it is moreover difficult to define. However, the most important consideration is that the section 135a of the Penal Code does not impair the right to free and open religious and cultural criticism. See also the Commission's discussion of the blasphemy clause in 6.2.4.2.

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33 From various quarters, criticism has been raised against the use of the term 'race' since, by using the term when referring to persons or groups indirectly, one may play a part in legitimizing race thinking in general. However, in accordance with the language of the International Convention on the Elimination of all forms of Racial Discrimination (CERD), the term must nevertheless be allowable (CERD uses the term 'racial'). On the other hand, 'racism' should be avoided''''''.

The Commission would also emphasize that the term *ringeakt* (contempt) is inappropriate. The reference to “ringeakt” for a person must at least not be viewed as entailing an absence of criticism of the person or the person’s acts and character. The general normative concept of person adopted by the Commission entails on the contrary that a person is mature and responsible, so that all persons may and should be criticized mutually and openly for all censurable *behaviour* and *attitudes*. In any revision of section 135a this should be clearly stated in the travaux préparatoires to the section. It should also be stated that the section should be interpreted restrictively.

6.3.4 Health and morals

6.3.4.1 Introduction

The health and morals of the population is an established public concern. The acts and attitudes of individuals in these areas may have consequences for the community, and it is therefore reasonable that questions of health and morality to some extent may be subjected to majority decisions. The question in the present context is to what extent *utterances* with consequences for health or morals may be prohibited or subjected to other restrictions.

In a number of areas, restrictions currently exist on grounds of a need to protect health and morals. The prohibitions against advertising of alcoholic beverages, tobacco products and control of pharmaceuticals advertising are obvious examples of intervention on grounds of health. Provisions of the Marketing Control Act may also be viewed in such a light. In addition, the Penal Code contains a number of special provisions, cf. e.g. section 154a wrong or misleading information that may obstruct the implementation of measures against outbreaks of “generally contagious disease” and section 158 on spreading of “false rumours” that “give rise to famine...”.

Under the heading “Intervention on the grounds of morals”, it is natural to consider the rules concerning pornography, scenes of gross violence, advertising with undesirable messages, advertising directed towards undesirable recipients and undesirable amounts of advertising.

Restrictions on the grounds of negative health consequences normally rest on a better empirical basis than restrictions on the grounds of morals. Mental alterations as a result of the consumption of, for example, pornography is more difficult to measure than the effect of tobacco on the body. Health interventions therefore normally have a stronger case than moral interventions. Generally speaking, one may moreover be sceptical of regulation of questions of morality by threatening penalties.

We have selected restrictions in marketing, pornography and scenes of gross violence for further discussion in relation to our proposed amendment to the Constitution.

6.3.4.2 Marketing

In its terms of reference, the Commission was explicitly requested to consider whether the new constitutional provision shall apply to commercial utterances, cf. the fourth sentence, worded as follows:

“It should further be considered whether and, in which case, to what extent constitutional protection shall apply to commercial utterances, typically in the form of advertising...”

The European Court of Human Rights in Strasbourg has by means of its practice established that commercial utterances or advertising, understood as utterances inviting entry into commercial contracts, are subject to the protection of article 10, first paragraph, of the European Convention on Human Rights.

The Commission also finds that commercial utterances, like all other utterances, must be subject to the term *ytring* as used in article 100 of the Constitution. Another solution would be to require that article 100 of the Constitution contained a definition clearly showing that commercial utterances should not be included or should only be included when further conditions were fulfilled. From a purely legislative point of view, this would be inappropriate.[34] It would also be inappropriate on grounds of principle. It is the *content* of the utterance that should decide its access to the public sphere.

There are also more practical grounds indicating that commercial utterances must be subject to article 100. There are a number of borderline cases where there may be uncertainty as to whether or not an utterance is commercial[35] and, by adhering to the principle that all utterances are subject to the provision, such borderline questions of little probable relevance can be avoided. By adopting this approach, none of the arguments in favour of regulation of commercial utterances are rejected. On the other hand, consideration of the arguments is postponed, and such consideration is thus given the same structure as consideration of other proposed or existing restrictions of intervention in freedom of expression. That is to say that the consideration is associated with the general conditions for restriction of intervention in the classic freedom of expression and freedom of information as these are formulated in the second paragraph of our proposal for a new article 100 of the Constitution. The formulation “commercial utterances are subject to article 100 of the Constitution” says therefore nothing about the kind of protection afforded to the individual commercial utterance. This is not known until any intervention is considered in relation to article 100, second paragraph.

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34 As an example of the two alternative solutions available here – to start within or outside the provision – we may refer to the First Amendment in the USA and article 10 of the European Convention on Human Rights in Europe. According to its wording, the American provision allows for no intervention whatever in freedom of expression, and it therefore seems as if the Americans have been forced state that certain “utterances” are not utterances in the sense used in the Constitution. Entirely necessary restrictions of freedom of expression have thus been made possible without violating the constitutional protection to which no exception may be admitted. Pursuant to the European Convention on Human Rights, on the other hand, it seems that everything that may naturally be perceived as an utterance shall be subject to article 10. This can safely be done because article 10, second paragraph, of the European Convention on Human Rights allows restrictions. A postulate that an utterance is subject to freedom of expression protection in article 10 of the European Convention on Human Rights and, in our case, article 100 of the Constitution states therefore in principle only that the provision must be applied when considering whether the intervention is permitted or not. A closer analysis of the considerations underlying the intervention and the general conditions for intervention may show that protection of freedom of expression was purely nominal.

35 In ECHR practice, statements by, for example, market players concerning competitors and to a certain extent economic journalism have been regarded as commercial utterances.

The debate on regulation of commercial utterances contains normative elements. On the one hand, the ideology of maximum free trade and market economy has gained considerable influence during the last decades.[36] On the other hand, there is considerable scepticism of the general commercialization of society and opposition to the spread of market norms through civil society. No-one would deny the need for institutional differentiation in modern society. A single social institution, e.g. the economic, should not be allowed to invade and take over the basic functions of other social institutions, such as politics or civil society. However, there are varying views on the demarcations between the different social institutions.

The Commission will here restrict itself to calling attention to two factors:

In a society based on market economy, the informative aspects of advertising fulfil a necessary function both for vendor and purchaser. For the customers, advertising provides a basis for economic choices, whether or not these are rational in a larger context. For the vendors, it is a matter of potential for increased sales and for presentation of new products and services. Major forms of innovation will be hampered if companies are unable to communicate with the market, preferably in the manner they find most appropriate. Advertising has thus a utility function in a society based on market economy despite the possible negative consequences in individual cases owing to the form, location, object and scope of the advertising.

The aspects of advertising that go beyond the purely informative seem little related to the three processes to be safeguarded by freedom of expression. It cannot therefore be assumed that strongly manipulative utterances with a view to persuading someone to purchase a product may be regarded as a contribution to the democratic exchange, to the dialectic process towards greater truth or as a stage in the individual’s freedom to form opinions. On the contrary, manipulation and appeal to the unconscious seem to conflict with the grounds for freedom of expression, which all aim at greater awareness and clarity. In individual cases, it is necessary to decide the question of what protection ensues from article 100 of the Constitution in relation to the utterance’s contribution to the three grounds: democracy, truth seeking and the individual’s freedom to form opinions, cf. the proposal for a new article 100 of the Constitution, second paragraph, and the account in 2.2 of this report.

This means that restrictions of commercial utterances are easier to justify in relation to the grounds for freedom of expression than restrictions of utterances that do not aim to change people’s behaviour in the marketplace.

As suggested several other places in this report, rules restricting certain utterances in time and place appear less invasive than total prohibition. Precisely in relation to advertising, this seems a sound alternative. Part of the problem associated with advertising is that it attempts to penetrate almost everywhere potential customers gather, regardless of the reason for their gathering there. It would not constitute a violation of freedom of expression to ban commercial utterances from the public spheres that should not be regarded as marketplaces.

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36 Cf. for example the 4th paragraph of the preamble of the EEA Agreement, which states that the parties are “determined to contribute, on the basis of market economy, to world-wide trade liberalization and cooperation,...”.

As regards some of the existing restrictions directed towards commercial utterances, we observe as follows: the prohibition of advertising of alcoholic beverages is laid down in chapter 9 of the Alcoholic Beverages Act (1989/27) with further regulations, while the prohibition of advertising of tobacco products is laid down in section 2 of the Act relating to prevention of the harmful effects of tobacco (1973/14). The Commission has no observations regarding these prohibitions in general, provided that sufficient evidence can be provided that such advertising results in increased consumption of alcohol and tobacco and thus in increased damage from alcohol and tobacco use.

The rules concerning advertising for pharmaceuticals are laid down in chapter VII of the Act relating to medicinal products (1992/132). The Commission has no observations regarding these rules relating to health matters.

However, the prohibition against advertising that is “in conflict with the inherent equality of the sexes” laid down in section 1, second paragraph, of the Marketing Act (1972/47) is more problematical. On the one hand, it is of no major importance for freedom of expression that marketers are not able to make use of sexually discriminating advertising. On the other hand, the purpose behind the prohibition is clearly politically motivated, and this entails that advertisers are prevented from portraying relations between the sexes in other ways than are accepted by the political majority. From the democracy ground for freedom of expression, it follows quite directly that one cannot legitimately prohibit opinions solely because the majority dislike them or because the opinions obstruct the majority’s political strategy aimed at achieving greater equality between the sexes. If the prohibition had applied to all utterances, i.e. a general prohibition of utterances in conflict with the inherent equality of the sexes, it would have been clearly in violation of our proposed amendment to the Constitution. It is not self-evident that this is changed by restricting such a prohibition to apply only to advertising.

The specific prohibition of radio and television advertising directed at children, cf. section 3-1, second paragraph, of the Broadcasting Act, should also be considered in the light of relevant research into children’s consumption orientation on the one hand and the relationship to the three grounds for freedom of expression on the other. Other advertising directed towards children via other media is permitted, and these utterances should be considered in a corresponding manner. We emphasize once more that it is normally easier to justify intervention against commercial utterances than against utterances that lie more centrally in relation to protection of freedom of expression on the basis of the three grounds.

6.3.4.3 Pornography

The main provision concerning pornography is laid down in section 211 of the Penal Code[37]. In order to understand the provision correctly, one should first read the second paragraph. Pornographic depictions are here defined as “sexual depictions that seem offensive or in any other way are likely to have a humanly degrading or corrupting

37 Translator’s note: Section 211 of the Penal Code was repealed in 2000 and replaced by section 204. The definition given in section 204 is similarly worded, but the reference to sadism has been omitted.

effect, including sexual depictions showing children, animals, violence, duress, and sadism”. One may then read the first paragraph in order to ascertain what dealings with pornography are unlawful.

The result of this two-stage process is, firstly, that a number of utterances of erotic, sexual or unseemly nature fall outside the definition. These are utterances that are not so direct or explicit that they can be regarded as “offensive” or “likely to have a humanly degrading or corrupting effect”. We are thus left with two kinds of sexual utterance: (a) lawful utterances that fall outside the definition and (b) utterances that fall within the definition and which are therefore unlawful in a number of connections. According to the terminology of the Act, it is only the latter sexual utterances that are referred to as pornography. However, in everyday language, “pornography” is used by many people as a more extensive term, and what falls, respectively, outside and within the definition given in the Act is often referred to as “soft-core” and “hard-core” pornography. Although the law operates with a narrow pornography concept, anyone is of course free to decide where to draw the line, cf. the discussion of value judgments in 6.2.3.3.

Secondly, it follows from this two-stage process that not all dealings with pornography (hard-core pornography) are prohibited. The prohibition of certain public performances in section 211 (a) of the Penal Code[38] implies that corresponding private performances are permitted. Moreover, the prohibition in (b)[39] of publishing, selling or hiring out pornography implies that it is not prohibited to produce, purchase or possess pornography or to import pornography from other countries for one’s own use. What has been implemented thus does not constitute a total prohibition of pornography. However, in one area, there is total prohibition, i.e. that of child pornography. This follows from (d)[40], which prohibits any handling of such material. However, textual material is not mentioned here. Child pornography solely in the form of text may therefore be purchased and held in one’s possession.

The provisions of section 211 do not apply to films or ideograms that are subjected to prior control and subsequently approved for showing and sale by the Norwegian Board of Film Classification. This is reasonable since one of the tasks of film censorship is precisely to remove pornographic pictures.

For the sake of completeness, we note that sections 212, 376 and 377 of the Penal Code prescribe prohibition of certain utterances with reference to “indecent conduct”, “decency” and “modesty”.[41]

Since 1814, there have been considerable changes in what utterances are perceived as indecent. Until the 1960s, interest was primarily attached to indecency in printed texts, particularly in literary accounts, such as Hans Jæger: “Fra Kristiania-Bohêmen” and Christian Krohg: “Albertine” in the 1880s, and Mykle, Miller and Bjørneboe during

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38 Section 211 (a) has been replaced by section 204 (e).

39 Section 211 (b) has been replaced by section 204 (a). The wording of section 204 (a) is “publishes, sells or in any other way attempts to disseminate pornography”.

40 Section 211 (d) has been replaced by section 204 (d). The wording of section 204 (d) is “produces, imports, possesses, delivers to another person or for payment acquaints himself with moving or non-moving pictures of a sexual nature involving the use of children”.

41 Translator’s note: Sections 212, 376 and 377 of the Penal Code were all repealed in 2000.

the 1950s and 60s. In the 1970s the focus was moved from the indecent text to the indecent film, later also video and Internet, and the term was changed to pornography. During the same period the arguments against such utterances were changed and extended, with considerable success.

This prompted Dworkin[42] to remark appositely:

“..(..).. liberals defending a right to pornography find themselves triply on the defensive: their view is politically weak, deeply offensive to many women, and intellectually doubtful. Why, then, should we defend pornography? Why should we care if people can no longer watch films of people copulating for the camera, or of women being whipped and enjoying it? What would we lose, except a repellent industry?”

We will examine more closely five central arguments against pornography and assess their strength in relation to freedom of expression. We recall that freedom of expression consists not only of freedom to express whatever one likes, but also the freedom to receive whatever utterances one likes. The five arguments are:

Pornography is or may be harmful to the individual viewer.

Pornography is or may be harmful to society in the form of moral decline.

Pornography is harmful to the participants.

Pornography prevents women from expressing themselves.

Pornography is, like racist statements, a collective defamation of an oppressed group and as such obstructs gender equality and equal status.

Argument 1 (pornography is or may be harmful to the individual viewer) is based on an uncertain factual basis, cf. NOU 1997: 23 Sex Crime, page 77 pp. It is assumed that the potential damage varies in relation to the different forms of pornography, that pornography has different effects on children and adults and that the effect on individuals will vary depending on the circumstances of life, mental factors, etc. This is clearly an argument that must be taken seriously, and it is the central argument for age limits and other measures for preventing exposure of minors to pornography. As far as it goes, it is also in our view a valid argument in relation to adult users.

Argument 2 concerns the morally acceptable and desirable in society in general. Two previous public reports (that of the Sexual Crimes Committee in NOU 1997: 23 and of the Permanent Commission on Criminal Law in NOU 1985: 19 Pornography and Punishment) concluded that it is difficult to maintain general sexual morals by means of penalties. Doubts are cast both on the grounds for penalties and on their effect. However, rejection of a prohibition on the grounds of morals is not the same as showing indifference to moral decline. The point is only that morals must be maintained by means of social sanctions and other measures in civil society. The Commission does not want a society where, for example, it is acceptable to read pornography on the bus or underground on one’s way home from work. Nor however is there any reason to believe that this will be the result of a *legal* relaxation. Despite

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42 Ronald Dworkin: Freedom’s Law, The Moral Reading of The American Constitution, Replica Books 1996, page 228’.

more liberal legislation, reading matter on public transport in Denmark and Sweden, varies little from that found in Norway.

Argument 3 (damage to the participants) cannot be rejected either. As regards adults this may however be viewed as somewhat paternalistic. However, it is clearly valid where children are concerned, and is the central argument for total prohibition of child pornography. Some countries have an 18-year age limit for participation in nude photography and pornography. Norway has no specific limit here beyond the general age of consent of 16 years. In Norway too there should be an 18-year limit for participating in front of the camera in the production of pornography.

Argument 4 also has general interest beyond pornographic expressions. It has two variants: firstly, when powerful groups dominate the public sphere with their utterances, there is less room for other people. Other people are not given the opportunity to participate, and are thus forced to remain silent. This argument clearly calls attention to a genuine state of affairs and a genuine problem, the actual opportunity for expressing opinions is influenced by the quantity and quality of the other utterances in the exchange of ideas at the “speakers’ corner”.

The second variant states not only that women fail to make themselves heard because pornography is dominant and takes up room. It also states that the picture of women projected by pornography modifies the public’s view of the female speaker, her character, wishes, needs and standpoints, and may also perhaps even alter her own view of who she is and what she wants.[43] Pornography teaches us that, when a woman says “no”, she really means “yes”. Pornography thereby makes it impossible for women to participate effectively in the process that freedom of expression is supposed to safeguard, i.e. the battle of ideas for public favour.[44]

The problem with this argument, in both variants, is that it does not view freedom of expression only as a negative freedom,[45] i.e. a freedom from interference by the state. It views freedom of expression as a positive freedom in the sense of the right to the opportunity to express opinions. The Commission agrees that there is every reason to promote opinions and expressions issuing from groups that have difficulty in making themselves heard, but it is not tenable within a system of negative freedom of expression to deny someone the right to express himself/herself on the grounds that other people shall be given a chance. To return to the “speakers’ corner” metaphor, the state can make larger soapboxes for people to stand on or provide megaphones for those with weak voices, but it cannot deny other people the right to hold their speeches.[46]

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43 This is expressed extremely directly by Catharine MacKinnon, on eof the leading American lawyers against pornography: “Who listens to a woman with a penis in her mouth?”

44 Here taken from Ronald Dworkin: Freedom’s Law, 1996, page 221

45 Cf. Isaiah Berlin: Two Concepts of Liberty: an Inaugural Lecture delivered before the University of Oxford on 31 October 1958, Clarendon Press, Oxford 1958.

46 Ronald Dworkin: Freedom’s Law, 1996, page 222: “It would indeed be contradictory for a constitution to prohibit official censorship while also protecting the right of private citizens physically to prevent other citizens from publishing or broadcasting specified ideas. That would allow private citizens to violate the negative liberty of other citizens by preventing them from saying what they wish.””

The fifth argument compares freedom with equality, and thus involves familiar material from areas such as the conflict between hateful statements and protection against discrimination. Article 17 of the European Convention on Human Rights also recognizes this conflict in that it states that nothing in the Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth in the Convention.[47]

When pornographers (and racists) are denied freedom of expression on such grounds, it is because their utterances (their contribution to the public sphere) are perceived as pollution. They obstruct and create difficulties for positive forces that endeavour to raise all parts of the population to a better future, characterized by greater equality.

We can ban such people from our homes. We can ban them from the workplace (sexual harassment, racist bullying). They can perhaps be expelled from schools, etc. But, if one takes equality seriously, the equality that lies in the equal right of expression, one cannot totally ban them from society. One can oppose them, but not make laws prohibiting their utterances, provided they are simply utterances and not incitement to commit criminal acts. It will thus violate the most fundamental equality provisions of all, i.e. equal right to take part in the political process and equal right through one’s existence to make an impression on the moral environment.

Freedom of expression as negative freedom entails no right to be heard or to exert influence, only the right to *attempt* to gain publicity. In a society based on such an equality, one cannot prohibit opinions by law, one can only discredit them through abhorrence, contempt and ridicule.

One must thus tolerate the existence of people with distressing, hostile, reactionary and insane *opinions*. If one abandons the equality that lies in the equal right of expression and replaces it with an equality stating that certain people are simply too wicked, destructive and incorrigible to be allowed to take part in society, we open up frightening prospects. Where shall we put these people who are not to be allowed to take part in society?[48]

It is not the responsibility of the Commission to propose amendments to current legislation concerning pornography. On the other hand, it is necessary to suggest what statutory provisions should be considered for revision if our proposed amendment to the Constitution is adopted with the interpretation that we regard as fundamental.

Prohibitions against pornography, whether in the form of total prohibition or in a more limited form of distribution prohibition, must, in the same way as other restrictions of freedom of expression, fulfil the criteria laid down in the first paragraph, second sentence, of our proposal for a new article 100 of the Constitution, That is to say that intervention must be justifiable “in relation to the grounds for freedom of expression, which are the seeking of truth, the promotion of democracy and the individual’s

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47 See Kyrre Eggen, Special annex, page 252.

48 Ronald Dworkin: Freedom’s Law, 1996, page 239: “If we abandon our traditional understanding of equality for a different one that allows a majority to define some people as too corrupt or offensive or radical to join in the informal moral life of the nation, we will have begun a process that ends, as it has in so many other parts of the world, in making equality something to be feared rather than celebrated, a mocking, ‘correct’ euphemism for tyranny.”“‘“

freedom to form opinions”. This entails, inter alia, the need to clarify which of the three processes safeguarded by freedom of expression will be disrupted by the intervention concerned.

If we return to the literary indecency cases from the 1950s and 60s, it seems reasonably clear that these prohibitions intervened disruptively in the ongoing, democratic exchange of views concerning the place of sexuality in the public sphere. It must be possible to assume that the authors concerned, to a greater or lesser extent, wished to liberate themselves and other people from what they perceived as negative taboos. This was, not unnaturally, viewed as a flagrant challenge by those who regarded the established norms as the only ones that could be justified. Prohibition of certain utterances by one party in such a situation intervenes directly and disruptively in the democratic process, i.e. the public debate on what should be regarded as correct. We have since seen that these prohibitions failed to function. A more broadminded view of sexuality has gained ground because the majority of people, for various reasons responded more favourably to the arguments of the new era.

It seems moreover clear that the banning of utterances enforced (attempted enforced) in the 1950s and 60s also concerned the dialectic process towards greater, or better, truth concerning various aspects of sexual matters and the individual’s freedom to form opinions. All three processes were thus disrupted.

It is not equally easy to decide whether and, if so, how the current prohibition of, for example, certain pornographic moving pictures encroaches on one or more of the three processes that freedom of expression is intended to safeguard. This is not the place for a more thorough analysis of this question. At first sight, today’s commercial pornography industry does not seem to contribute much to the democratic exchange of ideas or to the seeking of truth. On closer examination, the possibility that this standpoint is too simplistic *cannot* be excluded. Regardless of this, it seems clear that pornography as an expression concerns the free formation of opinion, and that the current restrictions therefore intervene disruptively in this process. Establishing that the current pornography prohibition encroaches on individuals’ free formation of opinion does not mean that one addresses the matter of whether it is desirable or necessary that such utterances are included in the process of opinion formation. On the contrary, one may be sceptical of the opinions and attitudes deposited in the minds of major consumers of pornographic films. It is nevertheless a fact that many people wish to have access to such forms of expression. One’s own rejection of pornography is thus of little relevance if the conditions for restrictions in the second paragraph of the draft amendment are not present.

On the basis of the formula for weighing up considerations arrived at by the Commission in the proposal for the second paragraph of a new article 100 of the Constitution, it seems that prohibition in the current section 211 of the Penal Code is rather too extensive. It is difficult to see any good arguments for more stringent provisions in this area in Norway than, for example in Sweden and Denmark. The social stability in these neighbouring countries, with a considerable degree of social and economic similarity to Norway, is not threatened by their liberal pornography legislation. To the extent that the question of what it is necessary to prohibit in a democracy is an empirical question, the experience of a number of neighbouring countries shows there to be no conflict between greater tolerance for pornography and a relatively secure democratic society.

At the same time, there is no reason to assume that Norway would be found guilty of violating the protection of freedom of expression laid down in article 10 of the European Convention on Human Rights should the current rules be subjected to review by the European Court of Human Rights in Strasbourg. As in the *Handyside* and *Wingrove* cases, the court would in all probability point out that there are no common European sexual morals, and that states must therefore be allowed considerable room for adjustment (European Court of Human Rights A/24 (1976) Handyside v UK. Prohibition of the ‘Little Red School Book’ was not found to be in violation of article 10 of the European Convention on Human Rights. The book encouraged young persons to take a liberal view of sexuality, and certain passages could be perceived as encouraging sexual debut while under the age of consent (ECtHR Wingrove v UK judgment of 25 November 1998). The Norwegian translation of this book was, incidentally, not prohibited in Norway. It was not found to be in violation of article 10 that a film including sex scenes between Jesus and a saint was refused approval by the British Board of Film Classification.[49] In addition, it would probably be taken into account that the pornography that is prohibited in Norway today is not a core issue of freedom of expression, and that international control on the basis of international common responsibility for the democracy of each individual country is not particularly necessary.

Our proposed amendment to the Constitution will make it necessary to amend Norwegian pornography legislation on the lines outlined in the report of the Sexual Crimes Committee, NOU 1997: 23. The majority here proposes, in brief, a liberalization regarding the pornography that shall be legally available, combined with a ban on exhibiting. This will safeguard two considerations at the same time: pornography will be more easily available for those who want it without increasing the risk of involuntary exposure to it.

The Sexual Crimes Committee defines the boundary between lawful and unlawful pornography in terms of “considerations regarding harmful effects”. It states that “the Bill is based on the adverse effects that must be assumed to follow from the free accessibility of certain types of pornographic material, and not on purely moral considerations”.

The Commission does not exclude the possibility that the requirements regarding the establishment as probable of causal connections between certain forms of pornography and harmful effects on users can be more stringently formulated than they are in NOU 1997: 23, so that forms of pornography that the committee feels shall continue to be prohibited are nevertheless permitted. On the other hand, the proposed ban on exhibiting might have been taken further, i.e. one could to a greater extent than proposed pay regard to people who do not wish to be exposed to sexual depictions in their everyday lives. Rules restricting the time and place for certain offensive

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49 ECHR A/24 (1976) Handyside v UK. Prohibition of the ‘Little Red School Book’ was not regarded as a violation of article 10 of the European Convention on Human Rights. The book encouraged young people to take liberal view of sexuality, and certain passages could be perceived as encouraging sexual debut before the age of consent. Incidentally, a Norwegian translation of the same book was not prohibited in Norway.
ECHR judgment in the case of Wingrove v UK, 25 November 1998. It was not regarded as violation of article 10 that a film including scenes of sex between Jesus and a saint was refused approval by the British Board of Film Censors.

utterances are far less questionable than a total prohibition. The important issue is that such utterances may legally be made and received, not that they may be made everywhere all the time.

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Chapter 7

Prior control

7.1 Prior control or freedom with responsibility?

Prior control of utterances can take many forms. The common feature of all the various arrangements is that the intervention is carried out before the utterances reach the intended recipients.

Prior controls can be divided into two main categories, according to the intention of or the grounds for the control. One type of prior control concerns the content of the individual utterance. It is the individual utterances that are subjected, for example, to film censorship and interim injunctions. The issue for consideration during the control is whether the content of the utterance is harmful and/or offensive to the person referred to or to the recipient.

The other type of prior control is not concerned with individual utterances, but with the result of the collective total of utterances in the public sphere or in a specific medium. It is the total effect that is subject, for example, to the rules concerning broadcasting licences. The issue for consideration during the control is the consequences for cultural, linguistic and democratic diversity if broadcasting is not regulated.

The opposite of prior control is control or assessment after an utterance is made, i.e. subsequent accountability for utterances. The question of *when* an utterance shall be assessed in relation to the boundaries for freedom of expression, before or after delivery/public disclosure, must be kept separate from the question of where the boundaries should be drawn.

The concept of prior control must be defined in relation to certain forms of continuous, simultaneous monitoring of utterances, such as wiretapping or video surveillance. Such controls are not normally carried out in order to put a stop to undesirable/unlawful statements, but to gather information and possibly to store this to enable subsequent documentation of what was said. Such simultaneous monitoring is therefore not subject to prior control, but may be unlawful for other reasons.

In principle, there is no reason why a system with full prior control should have greater tolerance for controversial utterances than a system with subsequent accountability. The decisive factor for what may legally be uttered is not the time of control alone, but the substantive rules for freedom of expression. However, this view is too simplistic. The question of prior control cannot be reduced to the technical issue of whether the control shall be conducted before the utterance is made, while the utterance is being made or after the utterance is made. There are several reasons for this:

Firstly, prior control has in the past particularly been employed and continues to be employed by repressive or intolerant regimes. In Norwegian (and Dano-Norwegian history) this is associated with prior censorship of printed matter from 1537 to 1770 and from 1810 to 1814, and the censorship imposed by the German occupying powers during World War II. It is therefore natural to connect prior control with correspondingly narrow frameworks for substantive freedom of expression. It is

certainly possible to view this experience in a more critical light, since prior control by powers with low or sinking legitimacy is bound to upset people more than censorship implemented by powers with high legitimacy. Control implemented by democratic regimes, when both the regime and the purpose of the control receive considerable support, is therefore not viewed in the same way. Consider, in this connection, Norwegian film censorship from 1913 to the present day.

Secondly, a system with prior control is contrary to the liberal principle of freedom with responsibility. According to this principle, citizens are able to make their own decisions concerning what information and ideas they wish to impart to other people, but are subsequently liable for any statutory violations. It is this that is freedom with responsibility.[50]

Thirdly there is something fundamentally undemocratic about a system involving prior control because the debate concerning what utterances shall be permitted necessarily takes place in a closed sphere between the expressor and the controllers. However, the debate concerning where the boundaries shall be drawn belongs to the democracy, and must therefore take place in full openness. An utterance that is declared unlawful must, paradoxically, be made known so that the citizens themselves shall be able to form an opinion as to whether they agree or disagree with the prohibition. A continuous debate is needed on where the boundaries should be drawn.

The conclusion must therefore be that there is a fundamental difference between prior control and subsequent accountability. The difference cannot be reduced to a technicality. The Commission therefore finds that prior control must be perceived as a particularly undesirable form of sanction against utterances.[51]

We are however open to the possibility that there may be situations where *the expressor* may prefer the discharge from liability ensuing from prior control in order to avoid the risk inherent in freedom with responsibility, i.e. the risk associated with depending on one’s own judgment of where the boundaries lie.[52]

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50 Theoretically justified opposition to prior censorship arose in England, which in 1695 was the first country to repeal censorship. Much of the credit for this is attributed to John Milton who, in his work Areopagitica (1644), pointed out that prior censorship was particularly inexpedient for freedom of expression and democracy.

51 This is normal scepticism that is formulated in a number of places. Thomas I. Emerson: The System of Freedom of Expression (1970), expresses it as follows: “A system of prior restraint is in many ways more inhibiting than a system of punishment; it is likely to bring under government scrutiny a far wider range of utterances; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process; the procedures do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses as the history of all censorship shows”, here quoted from Barron/Dienes: First Amendment Law in a Nutshell, St Paul, Minnesota, 1993, page 49.

52 The price of a system for freedom with responsibility is precisely the risk of any subsequent liability. If it should the assessment of the boundaries of freedom of expression subsequently prove to be incorrect, this might have serious consequences in the form of penalties and/or economic liability. It may not therefore in principle be excluded that a system involving prior approval of utterances, where an utterance approved by the appropriate public authority cannot subsequently give rise to a liability, could result in an opener and freer debate or a greater diversity of utterances. The consequence for a film producer whose film is not approved by the censoring body may be that some metres of film must be cut before showing the film, whereas the result under a system involving freedom with responsibility

7.2 Forms of prior control

The most extensive form of prior control is a general order that all utterances, regardless of medium, shall routinely be placed before a control body for approval before public disclosure. This can be referred to as general prior censorship, and corresponds to the system for printed matter that was usual in Denmark-Norway from 1537 to 1814, with the exception of a few years.

Prior control may also occur more arbitrarily, i.e., in the absence of any general system for review of utterances, it is nevertheless possible to stop specific utterances that are in the offing. Interim injunctions and legal seizure and confiscation are examples of such prior control. The control is then instigated by a person who assumes that he or she will be offended by the utterance if it is made public or is instigated by the prosecuting authority owing to the assumption of unlawful content. This must be regarded as prior control as a logical consequence of the fact that intervention is carried out *before* the utterance reaches the intended recipient.

A certain prior control may also be achieved by monitoring the mediation process itself. One may earmark certain media or certain public spheres for selected persons or institutions. Requirements regarding licences for operating broadcasting services and requirements regarding permission to hold demonstrations are manifestations of such a control. To the extent that such a control is only based on technical factors, it falls outside the issue addressed here.

It is necessary to differentiate clearly between prior control of each utterance, as in a general censorship system, and control of the use of the medium itself, such as broadcasting licences. However, the arrangements have in common that they apply to the circumstances *prior to* the making of the utterance. A corresponding licensing system for publishing newspapers or books, with conditions associated with the content of the newspapers and books, would be a clear violation of the censorship prohibition in the first sentence of article 100 of the Constitution. It is formally possible to refer to the current Norwegian broadcasting regulation as a prohibition of the use of the media radio and television with the exclusion of a few selected licensees. A corresponding prohibition for printed matter has not been legally possible since 1814.

If we maintain that the central feature of the various forms of prior control is an intervention or control before the utterances reach their potential recipients, forms of control of reception may also be regarded as prior control. This can be achieved by prohibiting reception equipment or by requiring licensing of the owners of equipment such as radios (e.g. confiscation by the Nazis during World War II) or dish aerials. Such arrangements be found appropriate when the source of the utterances is outside the jurisdiction of the controlling state.

Control of the content of the utterance itself and control of the mediation process mainly apply to the *classic freedom of expression*. Control of reception of utterances

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may be conviction for violation of, for example, pornography provisions with a consequent fine and prison sentence, cf. e.g. Barendt Freedom of Speech, page 116 that the large British film distributors appreciate the commercial security of prior control. Several countries have voluntary prior control for films precisely in order to reduce the risks to the film industry.

on the other hand involves restrictions of *freedom of information*, and will not be dealt with further here.[53]

The potential for prior control is closely associated with the medium or arena that is used for mediation of the utterances. It is hardly a rash assumption that the need for control is perceived as greater, the greater the number of people that can be reached by the utterance and the more efficient the communications are assumed to be. The technical and factual circumstances are of assistance to the controllers here. Mass communications, whether they are carried out by gathering several thousand people in a town square or by means of technically advanced equipment for transmitting and receiving, are easier to discover than utterances made to a limited number of recipients.

Digitization opens up entirely new forms of automatic control. When all information in principle is converted to rows of ones and zeros, undesirable rows of ones and zeros can be stopped by means of filters. These identify predefined words, expressions or pictures, and break the connection or block transmission when the undesirable words or pictures appear. When installed in private PCs or television sets, such filters can enable parents to protect children from harmful effects. On the other hand, when installed by order of the public authorities at important communication nodes, such filters may be a hidden and effective means of censorship in relation to adult citizens as well.

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7.4 The observations of the Commission

7.4.1 Introduction

The Commission finds the prior control of utterances to be fundamentally undesirable in an open, democratic society, cf. 7.1. This applies to all forms of prior control, whether they take the form of ordinary censorship of the content of utterances, exclusive media rights to selected broadcasters or interim injunctions issued by the courts.

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53 Information requirements may also be subjected to forms of prior control, by the public body that is otherwise obliged to provide information refusing access unless the recipient can prove that it will use the information in a manner that the body finds respectable. It follows from the current Freedom of Information Act that a person who requests access to information cannot be required to provide information concerning the motive for the request for access. A milder variant would involve allowing the body to refuse access in the event of a particular suspicion that the information will be used for a criminal purpose. An amendment of the Freedom of Information Act in this direction was discussed in Report No. 32 (1997-98) to the Storting concerning the principle of public access to information in the public administration, page 83. Public support of media that would not otherwise survive in the market may be regarded as subject to a certain prior state control if the support is made contingent upon specific content in the publications, e.g. the requirement that, in order to qualify for support, immigrant newspapers must mainly write about Norwegian matters. However, it is difficult to criticize this in principle since the state’s motivation for providing financial support is precisely to provide access to information that would not otherwise be made available. It is hardly likely that there is any general legal right to such support, and regard for the recipients’ assumed needs takes precedence here over the regard for the actual potential for expression of the subsidized issuer. However, this shows that prior control may also be an issue in connection with infrastructure requirements.

At the same time the Commission recognizes that there may be circumstances that cause the normal arrangement involving subsequent accountability to fail to provide sufficient protection for conflicting interests.

In connection with ordinary subsequent accountability, the reactions against the person or persons responsible for the unlawful statement have at least three functions. Firstly, the reaction may have a *restitutional* function in relation to injured parties. Secondly, the reaction may have a *specifically deterrent* effect, i.e. the person responsible for the utterance will subsequently refrain from making corresponding utterances. Thirdly, the reactions may have a *generally deterrent* effect, i.e. other citizens will refrain from making such utterances because they do not wish to be subjected to corresponding sanctions.

The basic principle, according to the assumptions presented here, is that prior control cannot be legitimized in situations where subsequent accountability would have the same or a corresponding effect. Prior control must thus be justified by specific circumstances associated with the utterances’ content, form, recipient group or utterance situation.

As pointed out in 7.1, prior control is divided into two main types according to the intention of or the grounds for the control. Control arrangements associated with the content of the individual utterances and arrangements associated with the result of the collective total of utterances must be considered separately. The object and the issue under consideration are very different.

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