

Freedom of Expression

Revisited

Citizenship and Journalism in the Digital Era

Edited by

ULLA CARLSSON

NORDICOM

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with one exception, see page 45
Nordicom 2013

ISBN 978-91-86523-74-9

Published by:
Nordicom
University of Gothenburg
Box 713
SE-405 30 Göteborg
Sweden

Cover by:
Daniel Zachrisson

Printed by: Ale Tryckteam AB, Bohus, Sweden, 2013



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A Brief Introduction

In recent years there has been widespread concern about the ability of the media to maintain and develop their role as a pillar of democracy. A precondition for true democracy is well-informed citizens and the right to freedom of expression and freedom of information, and that can only exist where the press and internet are free and pluralism and independence of media are secure.

Internet and the ongoing digitization have transformed media landscapes and in turn the social functions of media and the structure of both governance and markets as new kinds of transnational companies have emerged. Issues regarding freedom of expression, freedom of information and freedom of the press are more complex than ever.

Examples of new forms of political censorship, monitoring and control, gatekeeping, disinformation, terrorism laws, threats to journalists and other, as well as commercially motivated hindrances to these freedoms are, unfortunately, commonplace. Freedom of expression, privacy and security are closely interrelated.

Traditional media and their various platforms on the Internet and mobile telephony operate today in contexts that are quite different from those that prevailed when most of the fundamental declarations and resolutions regarding media and human rights were adopted on the global arena: *The UN Universal Declaration of Human Rights of 1948*, *The UNESCO Constitution of 1946*, *the Universal Covenant on Civil and Political Rights of 1966*, and *UNESCO's Resolution 29: Condemnation of Violence against Journalists of 1997*.

Despite the passage of time, these documents continue to express the principles of freedom of expression and freedom of the press, with an emphasis on pluralism and independence of the media – both offline and online. The principles of freedom of expression and press freedom must be technology-neutral.

Advances in technology and changes in the political and social context in which the digital technologies operate give rise, however, to a number of dilemmas, and these in turn demand new approaches and strategies to ensure the full and proper application of these fundamental freedoms. A number of challenges have to be taken into account if we are to succeed in resolving complex issues of freedom of expression, not least those involving freedom of the press, in ways that prevent the erosion of these freedoms and, ultimately, the erosion of human rights.

The communication society of today has an enormous potential to add to and advance democracy, human rights and social justice – not least globally.

We gain access to information and knowledge that not so many years ago were beyond our horizons, and we can make our voices heard in numerous possible ways.

There are, however, some powerful constraints. In order to be able to make use of these freedoms, citizens have to have some education and be of good health. Thus, many groups of people living in poverty are unable to use their rights. They often face social inequality, poor schools, gender discrimination, unemployment and inadequate health systems. People caught up in war and violent unrest are especially vulnerable. Millions of people have been driven from their homes and have no civil rights whatsoever.

Many of the researchers who have devoted themselves to problems of development and political legitimacy, and what can be done to eradicate poverty and corruption – two prime “enemies” to these fundamental rights – are agreed as to the need for “clean government” with a concern for human welfare. They focus not only on formal political institutions, but also on informal institutions having to do with trust and traditions of cooperation. These, too, must be taken into consideration.

In many societies some people fear that globalization poses a mortal threat to their society’s and culture’s uniqueness and see media as agents of a globalized cultural sphere. The fearful take measures to defend their identities, and when common cultural platforms can no longer be maintained, stockades are raised around local cultures, religious beliefs and communities. Thus, while horizons broaden, the world also seems to retreat further from us.

Transcendence of boundaries and defense of boundaries are twin aspects of the globalization process. Globalization processes force us not only to focus more on transnational phenomena in general, but also to highlight difference. Thus, globalization calls for regional epistemologies.

The Nordic countries – Denmark, Finland, Iceland, Norway and Sweden – are kindred in many respects, including their media systems. All share long traditions of protecting freedom of expression and freedom of the press in constitutional law; public service broadcasting; state subsidy systems to insure pluralism in the press; early development of ICT; and not least a long tradition of mass literacy.

The Nordic countries also rate high on indexes of democracy, welfare, absence of corruption and other such indicators – characteristics that, taken together, are often referred to as “the Nordic model”. In this era of globalization, however, the Nordic countries are undergoing change on many fronts. Extensive deregulation has changed the relationship between government, the market and the citizens. Furthermore, once homogeneous populations are today truly multicultural. From the point of view of welfare politics and democratic processes, these changes pose numerous challenges.

The Nordic region is among the most technology-intensive and “wired” regions in the world. People in these countries have enormous possibilities to exchange information and to make their voices heard, which bodes well for the future of democracy. But, there is also a risk in the form of widening gaps in our societies in terms of knowledge. Media use in the Nordic countries has become increasingly fragmented, differentiated and individualized. The conditions under which media operate have changed, and so, too, the “public sphere”, so essential to democracy. Critical, independent journalism is now an endangered species.

Nonetheless, all too often public discussions of the media are concerned more with business models than with safeguarding professional journalism – ultimately it is about the press freedom and freedom of expression upon which it rests. And all too often the ‘top-down’ perspective of politics and the industry collides with the ‘bottom-up’ perspective of the network culture.

This situation has far-reaching implications for the research community. There is an urgent need to broaden the context in which freedom of expression, freedom of information and press freedom are conceptualized. A much more holistic approach is called for if progress is to be made. As researchers we need to revive our curiosity and explore the new phenomena in society around us.

In 2009 Nordicom published *Freedom of Speech Abridged? Cultural, Legal and Philosophical Challenges*, an anthology that focused on the traditional concept of individual freedom of expression. A media perspective was a key element in most of the articles. The book was edited by two Norwegian researchers, Anine Kierulf and Helge Rønning, and the essays presented were written by researchers and authors working in the Nordic countries. More than four years later, we see that this book has reached large numbers of readers around the world.

The present volume, *Freedom of Expression Revisited. Citizenship and Journalism in the Digital Era*, may be seen as a follow-up to this earlier title. The articles in it arise out of collaboration among Nordic scholars around among other things an international symposium held in conjunction with the Hana-saari International Freedom of Expression Days in Finland in December 2012.

The theme of this symposium might be summarized as critical perspectives on Nordic experiences and conceptions of freedom of expression and the media, formulated in the question: Do the Nordic countries have anything to contribute to global discussions of freedom of expression, press freedom and the role of journalists in contemporary communication societies?

From Nordicom’s view it is most important to understand the principle of freedom of expression and communication rights from different standpoints in various parts of the world. This is an absolute prerequisite to any robust scientific inquiry into the field on a global scale.

There is a need for a more coherent, comprehensive understanding – a call for greater internationalization of media studies. We need more collaboration – within our field, with other disciplines, with society around us and across national frontiers. We need to learn more from one another, to share knowledge and context. We have to maintain and further develop national and regional collaboration, not least as a means to ensure that internationalization does not take place at the expense of knowledge about, and reflection on, scholars' own societies and cultures.

Fruitful national and regional dialogues are a great boon in international exchanges, and vice versa. It is therefore my hope that this book may contribute knowledge and reflections of value to the discussion of freedom of expression and press freedom.

Finally, I should like to thank all those who have contributed the fruits of their research and their reflections on the complex and often controversial issues relating to freedom of expression, citizenship and the role of journalism in digital cultures.

Göteborg in August 2013

Ulla Carlsson

Views from a Nordic Horizon

Freedom of Expression is Not a Given Right

Helge Rønning

There is an issue that is always at the centre of debates about freedom of expression, namely: what are the limits between acceptable and non-acceptable utterances? And how should pronouncements that are regarded by many or a few as offensive be dealt with? This issue has wide implications both in relation to cultural values as well as to the practice of debate on 'social' (or as I prefer to call them 'interpersonal') media. In such fora, it seems as if anything goes, and there are no limits to the vulgarity that can be brought forward. In the end, this question is linked to how we distinguish between law and ethics. And there is a difference between the two. What is possible from a judicial perspective might be unacceptable from an ethical perspective. Furthermore it is necessary to distinguish between morals and ethics. Morals deal with private, subjective and individual principles, while ethics are about intersubjective values that transcend individual norms. Thus ethics are relevant in how we deal with utterances and actions. This implies that even utterances that from a judicial point of view are and ought to be legal may be ethically questionable and unacceptable.¹ These issues are at the centre of a study of Norwegian attitudes towards freedom of expression that was published on Press Freedom Day May 3rd 2013. The project was initiated by the Norwegian Freedom of Expression Foundation Fritt Ord, which published the results of a survey of Norwegian attitudes towards Freedom of Expression issues.²

How Do Norwegians Feel About Free Speech?

The issues explored in the survey dealt with how a representative selection of the Norwegian population viewed the importance of freedom of expression in general and internationally, and in particular how Norwegians regard this right. They were asked how they themselves had experienced free speech and how they would prioritize freedom of expression compared with other social

and political concerns. Further, the group was invited to react to statements in the media, experiences in daily and working life and attitudes towards religion. They were requested to provide their opinions about political surveillance and the fight against terror. And they were asked to indicate whether they personally had experienced harassment and violence as a result of having expressed their opinions.

The findings of the barometer were revealing in many aspects, and they have implications beyond Norway. Perhaps the most striking result of the poll was not that Norwegians clearly were in favour of freedom of expression as a general principle, but that when it came to defending this right for all groups and opinions, attitudes differed. There were surprisingly many who were in favour of restricting controversial and radical positions. For instance, a majority would reject the right of religious extremists to hold public demonstrations, and *only* 57 per cent thought that those who hold extreme opinions should be allowed to publish books containing such opinions. Furthermore Norwegians felt that those who profess to racism or discriminatory attitudes should be prevented from holding demonstrations. On the other hand, 74 per cent thought that it was important to defend freedom of expression even if utterances were experienced as being offensive.

To further expand on the answers: Norwegians in general (82 per cent) felt that they freely could express themselves, and that there was great tolerance for deviant opinions (69 per cent). The interviewees thought they personally were free to speak out without fear, but on the other hand that minorities and women were discriminated when they spoke out (34 and 31 per cent). Assessing the right to freedom of expression in relation to other social concerns, a majority of Norwegians were of the opinion that law and order are more important than freedom of expression (81 per cent to 58 per cent). This is a lower figure than in Denmark (68 per cent), the Netherlands (62 per cent) and Sweden (61 per cent).

When it came to the issue of tolerance and reactions to offensive utterances, the results were a bit confusing. On the one hand, the majority felt that utterances that were thought to violate religions should be tolerated and that religious minorities must accept offensive criticism. On the other hand, as many as 31 per cent thought offensive utterances about religious groups ought to be punished, and that one should be careful about insulting religious symbols (70 per cent). When it came to punitive reactions against the media, the majority (89 per cent) felt that those who harassed someone on the Internet should be punished. False statements about individuals or groups in the media should also be punished (76 per cent). To disclose details about persons' private lives should be punished (81 per cent). The media should be punished for publishing untrue statements about individuals and groups (85 per cent). Only 28 per cent thought that the media were open to those who hold deviant opinions.

Persons with extreme opinions should be surveyed (73 per cent) and political parties that aim to overthrow democracy should be banned (48 per cent). And one in six had themselves experienced threats or harassment because of opinions and utterances, ethnicity, religion, gender or sexual orientation.

What may be concluded from the barometer is that there is a contradiction and ambiguity in Norwegian attitudes towards general tolerance and freedom of expression. On the one hand, there is a high degree of support for freedom of expression as a principle, but on the other hand, the survey also reveals that many would support restrictions and even what may be characterized as censorship of unpopular and deviant utterances. It seems that many feel that this best can be achieved through legal means and punishment.³ Many Norwegians seem to think that it is better to enact laws against things we do not like than to tolerate them.

This attitude is particularly worrying when it comes to what is being perceived as transgressions on the part of the media, where clear majorities call for retributions against media that overstep their limits. As a commentator in the Norwegian daily *Dagbladet* remarked, this may be seen in the context of the Norwegian reactions to the Muhammad caricatures.⁴ The Norwegian Government then (apparently in line with Norwegian opinion as referred to above) attempted to explain away the right to religious criticism in the form of caricatures. In this respect, the Government at that time was supported by a majority of Norwegian editors who professed the right to print, but who nevertheless felt that it was tasteless to do so, and that this would create unforeseen reactions. The right to offend is obviously not a right that enjoys clear support in Norway.

Offence – Attitudes, Utterances, Acts

This again points in the direction of one of the most contested areas in relation to freedom of expression today. In many circles, it has now become a trope that as soon as a group can claim to be offended, they can call for restrictions against the right to express oneself freely. This does not even have to be associated with so-called ‘hate speech’. Of course such reactions have their roots partly in the emergence of a sphere of offensive and insulting utterances in various Internet fora. Something that definitely calls into question the issue of who is responsible for what is being posted on Internet sites, and for that matter also elsewhere. But it should not lead to a situation in which calls for new forms of censorship and restrictions on the right to express oneself freely are being heeded.

That hate speech differs from hate acts is as essential is the distinction between causing harm and causing offence. It is here the distinction between

attitudes, utterances and acts comes into the argument. One cannot legislate about attitudes. Thought control only exists in authoritarian dystopias. Utterances, however, are expression of attitudes that may be changed when met by counterarguments. Expressions may be obnoxious and hateful, but to ban them when they are not aimed at causing direct harm is to move in the direction of thought control. No one will argue, however, that concrete incitements to harm are protected under freedom of expression. Thus the fatwa against Salman Rushdie and his publishers cannot be protected under free speech arguments? But Rushdie's novel or the Danish cartoons clearly are protected utterances even if they may have offended many Muslims.

It is worrying that there now are so many calls for restrictions on utterances because they are said to cause offence, often of the kind that is labelled 'group defamation'. What some regard as blasphemy is seen as legitimate critique of religion by others. Who in a democratic society is to decide what is what? Instead of maintaining a right to *not* be offended, one should argue for the right to be offended. Offence in itself is part of being taken seriously in a society of equal rights for all groups and individuals. Freedom of expression is about protecting minorities of all kinds, not about giving some group privileges because they feel they have the right to define what they feel insults them. If this is introduced, it may lead in the next round to minorities being singled out not for protection, but for other forms of special treatment that might imply forms of discrimination.

The question is: What constitutes a minority? Is it based on race, religion, and sexual preferences? Or does it also comprise opinions, politics, and ideology? If pressure groups of different kinds have the right to define which expressions are religiously, ideologically and politically acceptable, and which are not, then which roles and opportunities exist for those who think differently and are in a minority? Who has the right to maintain that their conviction constitutes the correct interpretation of reality? It is in non-democratic societies where freedom of speech is restricted that minorities are discriminated. Many Muslim countries are examples of this as regards their treatment of Christian minorities, and the arguments used for discrimination are that Christianity involves practices and attitudes that are offensive to the Muslim majority.

Despite constitutional guarantees of free speech in many of the world's legal systems, even the most democratic of societies have never treated freedom of speech as an absolute. The liberal tradition has generally defended freedom of expression for utterances that do not violate others' fundamental rights or lead to predictable and avoidable harm. As mentioned above, incitements to illegality in the form of, for example, sexual abuse of children, sedition, murder, libel and defamation are obvious restrictions. But expressions that do not come under such limitations should be fiercely defended, because a free interchange of ideas is an essential ingredient of democracy. All discus-

sions about freedom of expression in the end come down to defining where the limits are. They should be broad.

The principles of protecting freedom of expression must be technology neutral. While digital technologies open up for abuse, one cannot abandon the values that are basic to democratic cultures, and demand that new forms of communication be controlled in a manner different from other media. Hate speech and other obnoxious utterances found on the Net should be mapped and countered in open debating fora on the Net and elsewhere. Those who are behind such utterances should be held responsible, with special attention to whether they express incitements to concrete illegal actions.

How to Secure a Free and Pluralistic Public Discourse

Free speech is basically an individual right, however it is at the same time collective, and it is this duality that is the basis for analysing and defending freedom of expression as essential for democracy. The relationship and difference between the individual and collective aspects of this right and how it is practised through the media as 'media or press freedom' create a number of problems. The press exercises its freedom by ideally representing the individual rights of citizens through collective means.⁵ A very important issue concerns how forms of media regulation relate to arguments for free speech. How is it possible to promote free speech in media environments that in practice are restrictive?

How we regulate and define freedom of expression was at the centre of work done by the Norwegian Freedom of Expression Commission.⁶ And it thus addressed some of the concerns and principles raised in the survey of how Norwegian citizens regard the right to freedom of expression. One of the many dilemmas that the commission faced concerned the seeming contradiction between securing the right of the individual to free speech, on the one hand, and making provisions for a pluralistic media system which might involve restrictions for media owners to exercise unlimited control, on the other. This contradiction has been central to many debates over the interrelationship between ownership of media and thus the right of the owners, on the one hand, and the right of the public, on the other.⁷

This was one of the many dilemmas that the Commission came up against when it was tasked with formulating a new freedom of expression article for the Norwegian Constitution. The new sixth clause of Article 100 of the Norwegian Constitution ("NC 100, 6") states: "It is the responsibility of the authorities of the State to create conditions that facilitate open and enlightened public discourse." In its explanations to the proposed new clause, the Commission wrote:

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.⁸

This paragraph opens for new and interesting perspectives on how freedom of expression may be seen in relation to the liberal tradition of defending free speech as a fundamental individual right in relation to state interference, on the one hand, and how to secure basic freedom of the press, on the other. Could this be achieved through active infrastructural engagement by the state in order to secure the conditions for an enabling environment for public debate and pluralism in the arenas of media and communication? Given that freedom of expression is a fundamental protected right in democratic societies, one may question the significance of state infrastructural engagement.

The Market and the State

Can the market still provide the civic outcomes necessary for maintaining the entire democratic function of the press due to increasingly aware and demanding consumers, as media mogul Rupert Murdoch argues,⁹ or, in the words of Jürgen Habermas: is an active state and a governed infrastructure necessary to uphold the twin function that the quality press has fulfilled up until now – that is, “[...] satisfying the demand for information and education while securing adequate profits”¹⁰ In classical liberal philosophy (that is before the rise of neo-liberalism), it was clear that society had a responsibility for ensuring that freedom of expression and access to information were being exercised. Diversity that is as wide as possible in all forms of expression, openness, and pluralism in the sphere of communication should be promoted. The challenge is how to create the conditions that secure these principles.

From the late nineteenth century and onwards, interest in the relationship between mass media and political developments has been growing, and they have increasingly been at the centre of the debate over democracy and free speech. The focus has been on whether the media promote a rational discourse or mainly serve propagandistic and commercial interests. For the

contemporary discussion on free speech, it is impossible not to take the technological expansion of all media into consideration. There has always been a perceived potential conflict between mass media and the development of democratic self-governance. This is related to several issues. One issue concerns the question of ownership and control.

The fear is that those who own and control the media – be it large corporations or the state, depending on what type of societies we deal with – will use their control to create skewed interpretations and promote one-sided views and agendas that work to the detriment of a pluralistic public debate and democracy. A second concern has to do with the notion that important and alternative information will be omitted and that limitations on who will have the right to speak will be exercised. A third worry is that the content of the media will be solely based on ratings and commercial interests. Entertainment will supersede critical debate. What the dominant media will offer will be more or less the same from channel to channel. Alternative forms of expression will only find their way to minority and niche media.

Such arguments have been behind forms of regulation of the media in mainly three forms by 1. Restricting and preventing media concentration by limiting monopolistic ownership and other types of regulation for securing a pluralistic media situation; 2. Imposing public-interest obligations particularly to broadcast media; 3. Creating subsidy systems that insure pluralism in the press.

In some parts of the world, the main threat to individual liberty and freedom of expression still comes from the state. The rights of the individual have to be protected against excessive use of state power. In the Western part of the world, however, with the transformation of media organizations into multinational, multimedia commercial conglomerates, the right to freedom of expression is confronted by a threat that does not originate in the excessive use of state power, but rather in the growth and activities of monopolistic media organizations in the form commercial concerns. In an age when global communication conglomerates are key actors in the production and distribution of symbolic goods, reflection on the conditions of freedom of expression cannot be restricted to the territorial framework of the nation state.

Media industries, like other forms of multinational business, are driven primarily by the logic of profitability and capital accumulation. There is, however, no necessary correlation between this form of logic and the promotion of diversity that is as wide as possible in all forms of expression, openness, and pluralism in the sphere of communication. The challenge is to create conditions that secure these principles in an era of globalized and integrated media. It would be in the tradition of the classical liberal position, expressed among others by John Stuart Mill, to maintain independent media that are free from state intervention, but at the same time recognize that an unregulated

media market can lead to monopolization and prevent diversity, thus also limiting the conditions for a free and pluralistic public discourse.¹¹

Free and independent media should serve as watchdogs over the abuse of power – both by the state and by market economic institutions – and expose the obstruction of people's democratic rights by state apparatuses or private parties. The existence of a wide range of information systems and forms of media – from libraries to Internet, from community radios to international television channels, from books to newspapers – is an indispensable, if not sufficient guarantee for the exposure of and a remedy against abuses of power. This requires that the right to freedom of expression be more than a formal right. More than anything it must include arrangements that secure the widest possible participation of all groups in the public debate. It must include accountability, safeguards against monopolization and distortion of the free speech principle. Freedom of expression presupposes that reports about rights violations and their perpetrators are not silenced, and that there is public debate about human rights. At the core of the defence of human rights is a communicative situation that presupposes the absence of all forms of censorship, because the protection of human rights implies that people can speak up to defend their own rights or the rights of others. And this presupposes a diversified media situation.

Freedom of Expression and Cultural Technologies

Freedom of speech implies the liberty to express opinions and ideas without hindrance, and especially without fear of punishment. It is obvious that these principles also must apply to communication systems of all sorts, and also, therefore, to the Internet. These fundamentals are technology neutral.

One of the basic arguments in relation to dealing with freedom of speech in modern society is that it is a right that is in the public not the private realm, and that is historically and intrinsically linked to the development of mass media and technological means of communication from the printing press to the Internet.¹² Thus, the old formulation in Article 100 was “There shall be freedom to print”, which was a reflection of the communication technologies that existed in 1814 when the Norwegian Constitution was first adopted. The fact that this was later interpreted as encompassing other forms of mediated speech created problems. Thus up until the new Article was passed, there was no media-neutral way of looking at freedom of expression. Moving pictures were for instance subject to censorship also for mature and autonomous individuals.

This legacy also implied another problematic aspect of the way mediated communication is looked at in relation to arguments for free speech. The role and importance of popular culture have been downplayed in arguments for

free speech, if not looked upon with outright suspicion. The reasons for this are many. Popular culture has been despised by elites, for instance when it comes to arguments for free speech. In such cases, an object designated as art may be considered to have higher value and may be allowed to bypass decency laws whereas a similar image deemed as belonging to the popular sphere (e.g. a sex website) may be considered pornographic. In this context, the question of the relationship between popular and mass culture has been important. Thus what is regarded as mass and low culture has more often been subject to stricter forms of regulation than individual and high culture. However, if the issue is to promote a truly democratic culture it is necessary to be equally concerned with speech that not only deals with public issues, but also forms of expression that have nothing to do with rational and public debate but speak to emotions. They relate to popular and mass cultural forms of expression however vulgar they may seem to some.

Freedom of speech is concerned with the freedom of autonomous individuals to consume, create and distribute cultural expressions of whatever form, as long as they do not conflict with other fundamental rights. Freedom of expression is also about disagreeing with the mores and aesthetics of a society's dominant taste cultures. It is not only the elites who should have the opportunity to participate in, create and consume culture of their choice. Cultural expressions contribute to the development of constitutive meanings of communities and sub-communities. Creating and consuming creative utterances of all kinds is part of the cultural mix in which people live. Such expressions are both linked to interpersonal forms of communication as well as mass communication. The blurring of these forms of communication currently occurs in the new digital technologies, and they create new challenges and opportunities in relation to freedom of expression. People's expressions in the form of day-to-day utterances in the most mundane situations – conversation, accusations, insults, denials, complaints, gossip – are at the margins of public speech, and should not be controlled. One of the problems of laws against hate speech is that they may constitute an invasion of the private sphere of individuals.

Digital communication technologies represent a new challenge to the debate over freedom of speech. They open up for “[...] a new set of conflicts over capital and property rights that concern who has the right to distribute and gain access to information.”¹³ This concerns copyright law and piracy and regulation of telecommunications and relates to issues that are of an ethical as well as a legal nature in relation to issue such as “Internet shaming” – privacy, reputation, etc.¹⁴

These prospects are largely due to the fact that the Internet ideally provides, simultaneously, a participatory interface and a two-way flow of information between many different users. It is a medium that creates virtual spaces where

communities without borders from around the world can enter into communication with each other. This makes the Net particularly suited to serve global as well as new, local social movements. Now, I do not think that any technology constitutes a totally independent logic in itself; technology is linked to political and social contexts, and its development must be discussed in relation to political choices, the Net as well. On the other hand, it has also become clear that the Internet has qualities that make it a very advanced tool for surveillance and that it must be seen in relation to the increasing number of legal provisions and technical systems of surveillance and interception of communications now being introduced.

The Internet community and defenders of freedom of expression fight to hold onto freedom of speech on the Net, and to extend its use as a democratic and free medium.¹⁵ They come up against attempts at censorship and control by states, corporate interests, political groups, and other kind of organizations – among others, religious. The Internet contains all forms of content. The objectives of censorship attempts are to control not only the content but also the possibilities the Net has as a free and democratic area for communication. The digital technologies must be regulated in the same manner as other forms of mediated communication. The principle of freedom of expression is technology neutral.

The responses of a representative selection of Norwegian citizens to the challenges of free speech that I referred to at the beginning of this article show that even in one of the world's most democratic countries, the implications of freedom of expression are controversial. What is not contentious is a broad acceptance of the principle of free speech as a general human and civil right. But as soon as the issue becomes what this suggests in relation to tolerating deviant and extreme and uncompromising opinions, the situation changes.

There is significant suspicion of the principle that utterances that may cause offence should not be permitted. Furthermore there is substantial support for political surveillance of people with extreme views. Furthermore there exists a deeply felt suspicion in relatively broad sections of the media. They are seen by 25 per cent as representing political authorities and by 13 per cent as representing commercial interests. A majority think the media provide broad information and reveal things that should be criticized, but they are not open to people with controversial opinions (as many as 28 per cent feel this way). And this may be substantiated by the considerable support shown for punishment of transgressions both on the Internet (89 per cent) and in the media (85 per cent). This could be interpreted as indicating that the right of the press to administer its own ethical principles in an independent press council is not something that enjoys wide support.

Concluding Remarks on Ethics and Law

In relation to the arguments for free speech, there has always been an over-emphasis on the political and rational elements of freedom expression rather than focusing on its wide cultural implications. Thus in the Norwegian Constitution, the basis for freedom of expression is given in the following manner: “the seeking of truth, the promotion of democracy, the individual’s freedom to form opinions.” This formulation may be criticized for emphasizing political issues as well as rational discourse over other forms of speech. On the other hand, it is important that the formulation emphasizes the importance of the individual’s personal autonomy as a precondition for free speech. The question that arises from this is obviously what is an individual and what is a person.¹⁶ And this is an issue where legal and ethical considerations may enter into conflict.

In a democratic society, the Constitution guarantees that all citizens have the right to express themselves freely also when it may offend the feelings and morals of others. Nevertheless, it is reasonable to relate this right to free speech and not be legally constrained to ethical considerations and responsibilities that recognize the right of all citizens to equal freedom. Freedom of expression does not only relate to individual freedoms and rights, but also to a form of social and intersubjective responsibility. However ethical restrictions are also problematic, for if an ethical majority impresses its interpretations on minorities, then real freedom of expression does not exist and open public discourse will be restricted and thereby the acceptance of deviant opinions as well. There is a dialectic between free expression in a judicial sense, on the one hand, and ethical considerations, on the other. Thus there is a principle of reciprocity at play when we discuss the limits of freedom of expression, and there are limits, however wide they may be. The right to free speech that we claim for those with whom we agree must also be extended to those with whom we do not agree and whose opinions we may detest. Only in this way can reciprocal acceptance be established.

In this perspective, the need to insist that controversial and deviant opinions be part of the broad concept of free speech is essential. So is the need to create conditions for pluralistic media as well as for securing equal rights of expression in all media. Freedom of speech is dependent on tolerance and that is not something that is a given. It is a tenet that must be constantly defended. Freedom of speech is not guaranteed anywhere; it is the result of a constantly on-going struggle.

Notes

- ¹ This issue has been discussed in Norway in relation to debates about what is responsibility in Net fora in relation to hate speech and other objectionable utterances in the aftermath of the July 22, 2011 tragedy. In this context, both the distinctions between ethics and law as well as private and public are central. One article that may exemplify this is: Lysaker, Odin & Henrik Syse (2013) "Ingen ytringsfrihet uten etikk", *Aftenposten* 28.05, 2013. I have used some arguments from this article here.
- ² <http://www.fritt-ord.no/en/hjem/mer/ytringsfrihetsbarometeret/> (Accessed May 13. 2013). The survey will be repeated every second year, and it is also hoped that it can be used for international comparison.
- ³ Now it should be mentioned that the phrasing of some of the questions in the poll is not particularly precise, and that there are methodological weaknesses in the survey.
- ⁴ Egeland, John O. (2013) "De mørke kildene", *Dagbladet*. May 11. 2013.
- ⁵ This issue is discussed in Steel, John (2012) *Journalism & Free Speech*. London. (Routledge)
- ⁶ The Commission was appointed by the Government and served between 1996 and 1999. It went through the principle arguments for freedom of speech internationally, assessed the Norwegian laws pertaining to the issue and came up with a proposal for the new article in its report. I was a member of the Commission. The proposal was adopted in 2004 by the Norwegian Parliament in a slightly different form than the one proposed by the Commission. The original report in Norwegian (NOU 1999: 27) can be found at <http://www.regjeringen.no/nb/dep/jd/dok/nouer/1999/nou-1999-27.html?id=142119> (last accessed May 15, 2013). The Norwegian National Commission published an abbreviated form of the report in English for UNESCO in 2005 under the title *There shall be freedom of expression*. Oslo 2005.

The article is number 100 of the Constitution and it reads:

There shall be freedom of expression.

No person may be held liable in law for having imparted or received information, ideas or messages unless this 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.

It is the responsibility of the authorities of the State to create conditions that facilitate open and enlightened public discourse.

⁷ See, e.g., Lichtenberg, Judith (ed) (1990) *Democracy and the Mass Media*. Cambridge, New York, Oakley. (Cambridge University Press)

⁸ *There shall be freedom of expression*. op. cit. p. 17

- 9 Speech held in London, March 13, 2006 http://www.news corp.com/news/news_285.html (Last accessed 15.05.2013)
- 10 *Suddeutsche Zeitung*, May 16, 2007
- 11 Thompson, John B. (1995): *The Media and Modernity*. Cambridge. (Polity Press) p. 240-241.
- 12 See: Winston, Brian (2005) *Messages. Free Expression, Media and the West from Gutenberg to Google*. London and New York: Routledge.
- 13 Balkin, Jack M. (2004) "Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society. *New York University Law Review*. [Vol 79: 1 April 2004] p. 3.
- 14 See: Levmore, Saul & Martha C. Nussbaum (eds) (2010) *The Offensive Internet*. Cambridge Mass, London, England (Harvard University Press)
- 15 I have treated this issue in Rønning, Helge (2010) "Tools for Democracy or for Surveillance. Reflections on the Rule of Law on the Internet" in Gripsrud, Jostein & Hallvard Moe (eds) (2010) *The Digital Public Sphere. Challenges for Media Policy*. Göteborg (Nordicom)
- 16 This issue has been discussed in Holst, Cathrine & Anders Molander (2009) "Freedom of Expression and Freedom of Discourse. Examining a Justificatory Strategy" in Kierulf, Anine & Helge Rønning (eds) (2009) *Freedom of Speech Abridged. Cultural, Legal and Philosophical Challenges*. Göteborg (Nordicom)

The Satanic Pendulum

Notes on Free Speech, the Public Sphere and Journalism in 2013

Risto Kunelius

If the history of the idea of free speech, the public sphere and public opinion teaches us anything, it is a lesson on historical contingency. What Milton really meant by letting Satan have the best lines in *Paradise Lost* (cf. Peters 2005) will probably remain uncertain forever. But it is fairly clear that he was not thinking of the metaphor of a free “market-place of ideas” (Nerone et al. 1995), nor did he foresee that multinational companies would one day claim freedom of speech similar to individual citizens (Nordenstreng 2010). Nor can one be certain he would have happily inserted the word “blog” or “tweet” into his famous quote defending books as living things.

What makes this lesson of contingency disturbing is the threat of relativity. The emancipatory *power* of the libertarian free speech ideology ultimately emanates from some kind of universal, quasi-metaphysical claims or “fantasies” (if you prefer such wording). To remind oneself that all such claims include historical, ideological elements, which call for deconstruction and contextualization, is a necessary mark of critical thinking. But to completely reduce an idea like free speech to history seems to be draining it – and indeed the critical attitude itself – of its key source of vitality, which reaches beyond individual lives and deaths. Therefore, any account of free speech and publicity will mobilize a two-level rhetoric that oscillates between the universal and the particular, the ideal and material, between realities and imaginaries.

This essay is an attempt to learn something about how this pendulum between realities and imaginaries of free speech and publicity works today. On the one hand, in order to stay in touch with the realities, a critical account of “free speech” calls for a *de-centered* approach to media. We need an analysis of not only the structural transformation of the media environment and its infrastructure, but also of the realities of the world around it and the consequent new dynamics this brings to the “public sphere” (cf. Fraser 2007). On the other hand, a critical understanding of our current debates about free speech

calls for an encounter with ideals, with our received tradition of “publicity”. The crucial question is not so much what the “public” *is* (or is not), but what the changing social imaginary of a “public” encourages us to do (cf. Taylor 2004).

Realities: A de-Centered Look at “Mediatization”

There is no shortage of literature on the revolutionary changes that have taken place in the media landscape. Often, naturally enough, such analysis has been built on narratives of technological change. Some see the developing digital, interlinked, interactive world as a danger, a potential cultural loss (cf. from Postman 1993 to Morozov 2011). Others, and recently with a much more dominant voice, declare the transformative potentials of technology (cf. from Negroponte 1995 to Benkler 2006 and Deuze 2012). Underlying these debates is an older quarrel over whether or not and to what extent innovations in media “technology” are a cause, origin or decent explanatory factor in relation to social change (cf. Winston 1998). Clearly, the self-repeating normative zeal of these debates at least proves that changing realities of media technologies cause uncertainty for social actors and thus have some real enough cultural effects. And even if one assumes a modest view of technology – as just *one* of the key factors that limit and open affordances to social action and institutional forms – there is little cause to deny that the past decades have been revolutionary. In a life-world perspective, everyday life patterns, practices and their links to habits of media consumption are continuing to change radically. From a systems perspective, the activity of governments and corporations in policing and managing the new media frontier testifies to the transformative potential of digitalization. In some sense, then, claims regarding the *mediatization* of everything (cf. Livingstone 2009) may be as trivial as they are important. Mediatization clearly captures something essential about the new material conditions in which both individuals and institutions are situated (cf. Gitlin 2003, Lundby 2009, Hjarvard 2013).

At the same time, it is important to situate “mediatization” within the larger social, political and historical situation we find ourselves in. In this less media-centered perspective, “mediatization” takes place – and perhaps earns its real meaning – in a particular context. At the broadest level, for example, this includes a new global shape of economic power, new conditions and division of labor in global markets, new investment logics and dynamics, a new intensity of cultural diversity in most parts of the world – not to mention unforeseen environmental challenges. Some of these trends have long been identified in the broad trajectories of global capitalism or history’s “long durée” (from Braudel 1982, Harvey 1989, Arrighi 1994), and have recently been accentuated in our imagination by the contemporary economic crisis (cf. Calhoun et al 2010).

However broad and sweeping such remarks on “globalization” sometimes are, they remind us that our newly “mediated condition” – of everyday life, politics, religion, or of journalism – is taking place in a particular moment. New media infrastructures, forms and their uses emerge and become molded by historical circumstances, by specific moments of action, and through specific articulations of social relations. From this perspective, “mediatization” and “globalization” are mutually interdependent concepts (cf. Ekecrantz 2007, Krotz 2009), and any talk about the “mediatized public sphere” is also talk about the “global network society” (Castells 2008) or about the “mediapolis” (Silverstone 2007). Hence, while social media certainly cannot be reduced to the ideological struggles of the political public sphere, it is crucial to bear in mind that social media decisively to off roughly at the “same time” as trends such as the global financial crisis of 2008 and its consequent political challenges to the “European” project. Likewise, crowdsourcing, YouTube, Twitter and the like are – in addition to technological innovations – also phenomena that are taking place “during” the decade of “the clash of civilizations”, “the war on terror”, and intensifying global competition for future energy resources. The rise of anti-immigration and nationalist political parties (in Europe, for instance) or global justice movements (in climate politics, for instance) pose new questions about publics, *both* in their use of new tactics in a mediatized communication landscape *and* in their new articulations of interests.

Accordingly, conflicts about “free speech”, for instance in the Nordic context, are not *just* about free speech. They are a symptom and effect of global economic competition and the increasing material insecurity of earlier hegemonic identities, the newly fragmented and lowered threshold for “public” speech and potential attention, and the imperatives of redeeming the political and commercial “loyalty” of people in the politics of the new media environment. Questions of “mediatization” cannot be neatly separated from *what* is mediated and by whom, even if for us “communication researchers” there are always pressures for believing otherwise.

Realities of Journalism: New Dynamics of Public Spaces

A more concrete take on media realities is offered by looking at the paradigmatic institution of the mass communication era: journalism. The literature on the radical changes in journalism is abundant and in many ways convincing (for a recent collection, see McChesney & Pickard 2011). In many advanced and industrialized democracies, journalism enjoyed a moment of a high level of professional status, and stable and quasi-monopolized market situations. Relatively homogenized national identities, often combined with a corporatist representation of social interests, provided journalists with a central position as the guardians and gatekeepers of *the* public sphere. It is no longer news-

worthy to say that this high moment (cf. Hallin 1992, Kantola 2012) is over. But it is illuminating to consider how journalism seems to have *reacted* to the waning of this moment.¹ Roughly, in a Finnish context, at least three developments appear.

First, journalism increasingly often “performatively” emphasizes the distinction between itself and the other modern institutions it reports on. It has taken more explicit charge of narrative authority in the news, visibly stepping into the role of orchestrating the flow of information, knowledge and opinions. While the old institutional “primary definers” still largely set the routine agenda of public life, journalism controls the style and focus of the attention within that agenda. This has led to an increasingly explicit – partly real and partly theatrical – tension between journalism, politics and various expert systems.²

Second, realizing that their self-evident monopoly over the attention of audiences is gone, newsrooms have entered into a competition with other media, with each other and with other leisure activities. This ethos has transformed into demands to manage newsrooms and editorial offices more effectively³. Aware of the fragmented and elusive character of their audiences, newsrooms look, on the one hand, for ways of serving various special needs with information (instant use value). On the other hand and at the same time, newsrooms are ready to throw exceptional resources at large, spectacular news coverage of issues and themes that can symbolically draw the great audience together.

Third, journalism has increasingly learned to cultivate the idea of the everyday relevance of information and an individualized, “personal tense” in reporting. The audience is believed to be looking for concrete, instrumental added value, utility and everyday relevance from stories. It is also assumed to appreciate the world seen through personal interpretations and the opinions of other persons. There is a pervasive belief that the audience can be attracted to issues through an individualized vocabulary of ordinary people, individual journalists and particular (and private) experiences.

From a sweeping sociological perspective, such observations suggest profound interpretations of free speech and publicity. The sense of constant *performative distinction* betrays a particular logic (and paradox) of professionalization: journalism is wrestling simultaneously with *both* the demand for neutrality and the demand for a visibly critical perspective on power. This easily leads into a position of abstract criticism, and consequently rarely produces coherent and sustaining frames of interpretation for the larger audience. The intensification of *attention management* illustrates how professional journalism sees itself as part of an increasingly dynamic, polarized and less predictable field of attention economy. An image of structurally stable (in terms of infrastructures, stable identities, etc.) system on publics has been eroded and

replaced by an often emotionally charged view of more volatile publics.⁴ The *individualized modes of address*, in turn, betray a sociological imagery of a “secularized” audience with whom readership loyalty must be built on relatively personal, concrete and everyday vocabularies.

Such trends testify to an important emerging dynamics of publics and publicity. On the one hand, we see an imperative to sustain the belief that journalism is able to capture collectively shared sentiments and experiences and produce *inclusive* public moments. On the other hand, we see a thorough recognition of the increasing fragmentation and diversity of the ‘social’ (identities, life-styles, interests, and media uses), which demands *exclusive*, targeted media strategies. Crudely put, then, we seem to live in a political, social and technological infrastructure of communication that favors both *exclusive* and extremely *inclusive* moments, spaces and modes of communication. If this increasing *intensity* of both centripetal and centrifugal forces in the media landscape (cf. Carey 1969) is real, the situation begs us to rethink some assumptions that have framed our thinking about “publicity”.

The Legacy of Publicity: Argumentation and Attention

To unpack our imagination of what the “public” is, a quick look at the Western intellectual tradition can be helpful. Splichal’s (2006) condensed analysis of this distinguishes between two strands of thought (Table 1). *Liberalism* (à la Jeremy Bentham) anchors the purpose of publicity to utility and happiness. Here, publicity aims at creating a sense (and fear) of transparency for the institutionalized power holders – through the medium of a free press. It mobilizes social reforms with the help of free speech, which articulates the potential distrust and moral sanctions of the public. In the conditions of public visibility, institutions of power (the parliament, in particular) are pressured to make reasoned decisions (laws). In this “inverted panopticon” of power, the unpredictable practices of the free press provide a condition where potential public *attention* to power leads to democratic deliberations.

Republicanism (à la Immanuel Kant) builds on a belief in the human ability to reach, at least temporarily, a shared sense of justice through public reasoning and dialogue. The conditions required for this, however, are not created merely by the (Benthamian) sensitivity of the elite to being seen by the “public at large”. More fundamentally, publicity is grounded in the ability of the public to join in on the conversation at hand. The public has the right to communicate (and participate), not only the right to know what is being deliberated. Instead of “curiosity”, what the public brings into these debates is its experience, knowledge and reasoning skills, thus adding the insights of common sense to the intellectual community. Such a collective effort leads, in turn, to temporally morally binding conclusions that are shared by the elite

and various sections of the citizenry. The legitimate outcome, then, is not so much built on freedom as it claims to *construct* freedom (for the people, from their own prejudiced and partial world-views) through argumentation, by enabling people to face, question and re-think their particular interests, routines and traditions.

Table 1. Two Aspects of Publicity (adapted from Splichal 2006)

	Liberalism (Bentham)	Republicanism (Kant)
Principle	Utility	Justice
Purpose	Happiness	Publicity
Preferred medium	Free press	Public reason
Rights	Right to know	Right to communicate
Image of the public	The body of the "curious at large"	Imagined intellectual community based on collective sense
Function of public opinion	Check of legislature (based on people's distrust and moral sanctions)	Moral force (based on binding reasoning for citizens and legislators)
Focus	Attention, visibility, transparency	Argumentation, validity claims, deliberation

Historically, we can see both the aspects of *attention* and *argumentation* at work. For the power of attention – the potential of visibility, scandal and public embarrassment – Robert Darnton's recent (2010) study of libelous publishing in revolutionary France offers insightful evidence. He draws a vivid picture of how the publishing business in the late 18th century produced a stream of scandalous pamphlets and publications for Parisian readers. This "Grub Street" "journalism", often penned by authors who had escaped to the more "free press" conditions of London, dwelled on the (often invented) political, financial and sexual corruption in the court of Versailles. The potential loss of reputation caused by this was irritating enough to the power holders to sustain expensive police control of this literature. Grub Street pamphleteers would send blackmail letters to the court threatening to publish their colorful dirt. Agents of the government would then be sent to London to negotiate the buying off of whole print runs. But the pressure of curiosity and direct market value of the scandals caused by these exchanges worked in a complex way. Experts in this trade – the police and libel authors – would often change roles on the run: early pamphleteers turned into government agents and influential police officers doubled as publishers of libels, double-crossing the government.

For the dynamics of *argumentation*, Craig Calhoun's (2012) work on the role of tradition in political radicalism provides a different kind of historical corrective. Instead of the contemporary dualism of "agonistic" and "deliberative" analyses of the public, he underscores the links between the lifeworlds and the evolving forms of public discourse in 18th- and 19th-century Britain. Stressing the real and messy history of the public sphere and its actors, Calhoun shows that tradition and local experiences (the accumulated, experience-based life-world knowledge and values) were an integral part of the formation and viability of publicity (and its ideal). Many key figures of philosophical radicalism (such as Jeremy Bentham) articulated abstract and systematic (and in a liberal sense "uprooted" universalistic and future-oriented) views of publicity. But many others, often autodidacts rising from the class of craftsmen, rooted their criticism in traditional notions of fair conduct, reasonability and human dignity, also articulated by religious traditions. Thus, during its emergence, public discourse was linked to concrete, local life-world rationalities and systems of habitus. "Counter-publics" were not isolated from the idea and the emerging practices of larger public spheres, nor did they always represent clean "breaks" with the past. Instead, they exemplify how public participation and radicalism were rooted in tradition, but also engaged in a process of emancipation from it.

Attention and argumentation are, of course, mutually dependent and both part of any theory of the public. But it is worth noting that the *distinction itself*, the dichotomy inside our legacy of thinking about the public, is a powerful one. The two models, and the way they become polarized in actual debates, point to different understandings of the role communication plays in the coordination of social systems. Thus also free speech looks different in the respective light of these models. In the liberal frame, measures of happiness and utility are ultimately something that is "sensed", measured and enjoyed by individuals, groups and institutions *themselves*. This implies a society made up of relatively idiosyncratic (autopoetic), internally communicating sub-systems that make sense of their environment in their particularly differentiated ways. In this view, we *pay attention* to others but act and think on our own (terms). This restricts the role and importance of communication, which in the republican frame is easily overcharged. In the republican frame, we engage in "making sense" of things together, with the promise of learning important things and the risk of becoming something else in the process. Social systems are able to conduct mutual, reasonable argumentation (inter-subjective, inter-group, inter-cultural or inter-institutional) and coordinate themselves.

An Exercise in Theoretical Geometry

One way to try to elaborate our imagination about the contemporary conditions of free speech is to conceptually “cross-tabulate” the two ingredients introduced above: the polarizing dynamics of the actual media sphere (or spaces) and the polarized potentials of imaginaries of the public. Table 2 presents this in a crude form. It differentiates exclusive and inclusive moments of mediated communication and juxtaposes these with the ideals of attention and argumentation. This exercise in theoretical geometry suggests that we identify through at least four identifiable “sub-imaginaries” that operate behind our thinking about the current media landscape.

Table 2. Sub-imaginaries of Publics

	Exclusiveness	Inclusiveness
Attention	target audience moments, example: tailor-made, personalized advertising, the “Daily You”	media events, spectacles <i>global rituals, scandals, conflicts,</i> examples: Olympics, WikiLeaks-exposures
Argumentation	enclaves of speech (reproduction) examples: Fandom sites, xenophobic blogs	20th century “public spheres” <i>national, local, communities articulating hegemonic interest</i> example: (nostalgic) image of public service journalism (PSB, provincial newspapers)

Inclusive argumentation. There are moments when we take the attention of the large audience for granted and assume it conditions our argumentation. This is the *imaginary ideal type* situation that informed a great deal of 20th-century public speech. It favors caution in naming others, emphasizes the epistemic (objective, fact-based) dimensions of public argumentation and assumes there is at least a strategically motivated consensus or compromise that social actors can achieve. Historically, such moments have often been based on models of organized social pluralism: seeing society as made up of different and coherent articulations of interest (often represented in corporative structures; parties, classes, etc.). This is the idea of publicity that provided legitimization for journalism (and the free press) in the period of both the political press and the commercial press. In the former, the public sphere was imagined to take place “between” news outlets, in the latter (professionally and objectively) “inside” news outlets. A paradigmatic institutional embodiment of this sub-imaginary is the public service ethos of mass media institutions of the late 20th century: a main evening news bulletin, a territorially dominant quasi-monopolistic newspaper. Freedom of speech in this mode is policed by

references to the *rationality* of what is said. Rationality, in turn, is defined by what is taken to be true (factual arguments) or normatively acceptable, often using the “nation” as the key ideological benchmark or container. Implicitly, this mode of publicity carries with it an extremely powerful rhetoric of social exclusion: silencing with the stigma of being “irrational”. But just as “facts and norms” have effectively served the hegemonic control of free speech, the imaginary of open critical reason has also enabled new claims to be heard in the public (by emerging political identities and new groups).

Inclusive attention. There are moments that are defined by a sense of *exceptional* inclusive attention. This mode of “publicity” is the key element of many if not all “media events”, and it legitimizes particular modes of communication. Often prescheduled and orchestrated by institutionalized actors other than the media, such moments emphasize the show of status and performative enactments of familiar roles and identities (from high-level political meetings to global sports and entertainment events: EU-summits, the Olympics, Oscar galas). This kind of “public” also thrives on coverage of exceptional events, from school shootings and terrorism to political scandals and other exposures. While in principle less structured than the pre-orchestrated media events, their media coverage often also favors ritually repetitive representations and enactments of public drama. In such moments, we are invited to identify ourselves as members of broad, ideological communities, often articulated by nations and states but also reaching to broader cultural units, like the “West”. Even if the *raw attention* in such a moment crosses ideological borders, the dramaturgical features of domestication often enforce the borders and differences between “us” and “them”. Such dramatic re-enactments of status and roles in fact resemble the image we are accustomed to linking to “pre-modern” forms of publicity: public displays of “feudal” power (in Habermas 1989), spectacles of violence (in Foucault, 1992) or moments of carnivalism (in Bakhtin 1984). What (perhaps) distinguishes today’s inclusive spectacles from their feudal predecessors is that they take place in more unstable and diversified contexts of identities. Consequently, identities are not only constitutive of the drama, but importantly constituted in it. Still, control over free speech in such moments often works through this identity logic. Free speech questions in such moments become not questions of what you say but who you are.

Exclusive attention. There are moments that invite us to situate ourselves as part of more *exclusive* attention publics. They are built on an assumption that we are involved in mediated moments of communication with people who have similar interests. A prime driver of this mode, the commercial fragmentation of the public (one constitutive part of the modern practices of publicity all along), has been exponentially strengthened by the technologies of Web

2.0. The idea of a *Daily You*, a personalized menu of news and entertainment, is one example of this, whether we celebrate it (cf. Negroponte 1995) or not (Turow 2011). Your Facebook friend circles and customized Twitter followings build on a similar imaginary. You know that you operate in a somewhat public and porous environment, but also that the attention of “the public at large” is highly structured, sometimes almost to the point of the “public” not being present at all. To be sure, there is an element of obvious irritation in Amazon’s “readers-who-bought-the-book-you-just-bought-were-also-interested-in-this” flirting. But practices of interpellation are also a form of effective flattery. They enforce the idea that we – as *individuals* – authentically exist outside such communication practices. The pleasure of being “addressed” is the pleasure of being recognized as an authentic individual. Hence, ontologically, the exclusive attention mode resembles the inclusive attention mode by assuming that we “are there” before we communicate. But it differs in emphasizing small differences in our identities rather than building large commonalities.⁵ For free speech issues, it suggests a landscape of increasingly compatible “fits” between a highly differentiated system of identities and interests and the communication flows in society. Extremely put, it builds a fantasy of being able to choose (and the right to do so) the kinds of issues and people you wish to be exposed to.

Exclusive argumentation. There are increasingly common situations in which an exclusive sense of the audience is not only assumed (as above), but also translated into the style and culture of argumentation. Such *argumentative enclaves* are, of course, not a new thing. Indeed, the early salons, cafés and “public” houses that (together with the press) were essential to the rise of the idea of the bourgeois public sphere in the 18th and 19th century can be seen as an example of this. Exclusion by class, gender and ethnicity produced the actual conditions of “debating” through which the idea of “universal reason” was created. In the contemporary media landscape, such situations are becoming more frequent for a number of reasons. First, media institutions have made addressing specific target audiences their prime survival strategy. But the habit of the “likeminded” to link up and create communities across time and space has also grown because the hold of broad, hegemonic identities has loosened. By placing more communication tools in the hands of the audiences, social media have helped to turn the public from a “phantom” at large into a set of distinctive, concrete, and often loud social formations and groupings. In the enclaves that these groups produce, communication styles are crucial for articulating and developing this “likemindedness”. This of course betrays a vague sense of the outside, the competing modes of argumentation and “other” communities (other exclusive groups), even when they are not engaged with. But argumentation in such enclaves is easily mobilized as a

tool for exclusiveness: we speak our own language, we strengthen our own set of essential facts and we declare and reproduce our own values. The “others” might be listening, or making small provocative, symbolic appearances here and there, but their presence has no bearing on our own communication practices. In Northern Europe, anti-multiculturalist web-sites offer examples of this, but the use of political targeting as a way of creating loyal audiences and readership structures is not uncommon elsewhere either. Consider the success of FOX News in the US, for instance. Such modes of publicity are somewhat paradoxical to free speech. By virtue of their mode of address – argumentation – they in principle offer a chance for a diversity of arguments and thus more room for free speech. They develop new vocabularies, empower diverse identities and rehearse argumentation strategies that are necessary skills for a wide and diverse public to remain viable. But locally (in time and space), they also create strong enclaves of speech that develop their own set of facts, values and rules of conduct, often with an exaggerated sense of the others as political “enemies”. They react to events and incidents quickly, crafting their own interpretations. They also legitimize forms of communication built on the assumption that while there might be someone “out there” who disagrees with us – they are not worthy of being given a voice in our discussion.

Old Virtues in New Contexts?

We live at a time when unimaginable things can become everyday practices within a generation or less. New material realities of communication provoke new practices and actor positions: journalists have been turned from gatekeepers to storytellers (and may possibly be transformed into aggregators, curators, facilitators, whistleblowers, web service designers or what have you). Audiences and publics will be turned from receivers and spectators into occupiers of other roles. Because all institutionalized practices will eventually produce their own legitimization discourse, this will reshape what we mean by “free speech” or by “publics”. In such times, it is essential that we at least try to identify the dynamic differentiation of the media landscape and think through what it does to our imagination concerning what being in the “public sphere” means.

Current developments seem to have clearly energized the key liberal metaphors of publicity and democracy: attention, visibility, transparency – the power of seeing and being seen by others. You can sense this both while looking at corporate battles over the advertising markets of the “semantic web” as well as in whistle-blowing practices such as Wikileaks. While becoming integral parts of such a new communication system and infrastructure, people have gained at least some potential agency over it. On one side of this bargain, there is our often ironic knowledge of what is going on behind our

backs in the data-crunching clouds that are not located anywhere: a recent study on Facebook's 'like' function suggests that such data can be mined to predict our political preferences and even some personality traits (Kosinski et al. 2013). On the other hand, there is a growing sense of importance linked to the "new visibility" (Thompson 2005) of political power, or hopes about an emerging "monitorial democracy" (Keane 2010). The actual consequences of Wikileaks, the Arab Spring or the Occupy movement might remain uncertain, but the energy put into the counterattacks on them by the powers that be surely testifies to the power of the imaginary of the "masses", the "multitude" or the "curious public at large" (Benkler 2010, Castells 2012).

In the face of an energized liberal ideology of the public, it is good to bear in mind that it can also easily support a dogmatic version of the ideology of free speech theory. The liberal position, at least in principle, *always* favors the leak, the act of ridicule and always encourages us to embrace the risks of blasphemy. It claims to teach cultural *tolerance* by demanding that institutions, groups and individuals *endure* the disturbing *presence* of others (Bollinger 1986). In the intensive, multicultural and complex conditions we live in, this serves as one important ideology of survival, perhaps a baseline of civility. But more disturbingly, it may also favor *postponing* questions of validity. In the liberal frame, questions concerning whether a public speech act is true, fair or acceptable are always pushed into the future. This imaginary of the "emerging truth" has been a powerful legitimization device for politicizing issues and has served many worthy democratic purposes. But in contemporary media practice – both for powerful media corporations and for counter-active groups of all shades – it can also raise troubling implications.

It is not difficult to support the liberal ideology of free speech and publicity when one sees it directed at evidently powerful institutions and groups in society. In the moments of leaking and ridicule, the carnivalistic pleasure of exposing (naked!) power and the democratic hope for reform (or revolution) come together. Think of Wikileaks and the Pentagon – or the exposures of Murdoch's journalists. It is more difficult to trust this simple medicine when it becomes awkwardly clear that it hampers our ability to defend factual information about interdependent global realities. Think of the amount of misinformation circulated and the damage done by the so-called "Climategate" scandal. It is impossible to accept racist, xenophobic, sexist or extreme religious and political hate speech and the twisting of language merely in the name of "tolerance" and "freedom", suggesting that this is good for all of us because it teaches us about difference. Think of any website that pops into your mind.

This opens up an uneasy question about the link between *tolerance* and *power*. It is easy to demand tolerance of *those in power*. But is this ethical demand at the same time (more implicitly) assuming a *status quo*, the continuous dominance of those in power? And does this paradoxically suggest that

our liberal imaginary of *tolerance* is implicitly built on a trust that *other forms of power* will keep the practical status quo as it is? If this is so, is the liberal free speech logic (anchored on attention, visibility and exposure) not in danger of being rendered ineffective by its own definition? From this perspective, the “modern” brand of “liberalism” actually stays within the logic of the spectacular “feudalized” repertoires of medieval publicity it wished to abandon. Such a paradox might feel like a piece of useless scholastic snobbery. But if it captures a grain of truth, it points to some of the limits of the current emerging “mediated opportunity structure” of public participation and resistance (cf. Cammaerts 2011) within the imaginaries of visibility and transparency.

At the heart of the liberal paradox of free speech is the fact dilemmas of free speech are always *also about something more* than abstract freedom alone. They articulate political, religious, cultural, and economic interests and particular relationships, situations, locations and constellations of power. What makes them complicated is the way in which the new communication environment punctures holes in the earlier limits of communities, thus making it much more difficult to control these contexts. The infamous and continuously re-emerging case of the Mohammed cartoons from 2005-2006 is a case in point (Kunelius 2009, Eide, Kunelius & Phillips 2008). This complexity, then, begs the question: what happens *after* the moment of exposure and outrage? This calls for developing the “republican” side of our public sphere imagination and learning to move between moments of *attention* to the process *argumentation* becomes crucial.

The republican imaginary about the public points to the metaphors of speech and listening instead of seeing and visibility (cf. Dewey 1927). Its radical potential lies not only in the right to speak but in the necessity to take others seriously. For individuals, it means exposing your own thoughts and risking a *conversion* by conversation: the possibility that you might *run out* of arguments that support your opinion, point of view, or way of life. Simplistically put, the same is also true for societies and cultures. No wonder then that serious challenges to existing orders have often been rendered to the realm of visibility and spectacle. We know this from the logic of an earlier mass media era: extreme views might well be allowed to be *seen* but not really heard. You can be silenced in bright daylight or in the spotlight. Mere attention – however spectacular – can well be a practice of marginalization.

One recent attempt to navigate these troubled waters has been sketched out by Nick Couldry (2012, see also 2010). Drawing a neo-Aristotelian perspective (and on the work of Bernard Williams and Axel Honneth), Couldry opens a discussion of the *virtues of media practices*, proposing three demands: *accuracy, sincerity* and *care*. These are not to be seen, Couldry underlines, as idealistic, objectivistic moral imperatives (à la clichéd Kantian Enlightenment). Instead such virtues are anchored within a genealogy of how human societies

developed within material necessities of living together, however imperfectly. *Accuracy* points to our default assumption that being able to find out what is going on is always relevant. *Sincerity* – while not something often we practice – is an implicit basis for our sense of everyday mutual trust and the possibility of inter-subjective coordination. Accuracy and sincerity point to familiar dimensions of communication ethics (and considerations for free speech: virtuous “freedom” does not include the possibility to spread conscious distortions or lies). More than these two, *care* represents a potential new member in the family of virtues. It is grounded in Honneth’s idea of how intersubjectivity opens up not only the chance of understanding but also the opportunity to cause moral injury. Couldry argues that “our commonly experienced *connectedness*” and the “common *fabric* of a mediated world” makes “all of us vulnerable to each other”. Consequently:

Just as we need to show care in our use of our shared institution of language, so we need others to be disposed to show care in their use of the media, because through media we can harm each other, *and so, over time, damage the fabric of collective and public life*. (Couldry 2012, 197, my emphasis).

Such conceptual innovations do not solve actual problems of communication when actors involved sincerely think differently about what is “accurate” and what is “fair” (Nor does Couldry think they do). But at a minimum, such conceptualization frame problems of publicity and free speech in a complementary way to the now dominant logic of attention and exposure. They point to the *de-centered* (or other-directed) global imaginaries we surely need when it becomes crucial to move *between* and *beyond* the crudely identified modes of publicity sketched out above (Table 2.) The skill of *publicity*, then, must be a skill of reflective mediating between these moments or situations and a skill of *considering* questions of freedom of speech across these moments. The landscape, infrastructure and material realities of media have changed, thus also changing the conditions in which imaginaries of free speech and publicity are crafted. We will be forced to recognize that free speech takes place in a more shared and limited, interdependent and systemically complex world. In such a moment of flux, it seems utterly unwise to end with a definition of free speech. But it also seems unreasonable not to try. So, here is a working definition:

Free speech means the freedom to *consider* what you say in public (an increasingly diffuse and volatile social formation), the ability to *imagine* what your words and deeds mean to others, and the responsibility to *recognize* the damages they cause and the remedies they call for.

If this sounds dangerously relativistic and utterly problematic for media research and practice, that is probably because it is. But perhaps questions of free speech and publicity are meant to be a kind of dizzy Satanic pendulum between imaginaries and realities. The virtues of *journalism* – as a reasonable and reflective mode of public participation in your own time – will be difficult but no less important than in previous times, which, from a distance, can easily and mistakenly *look* like a *Paradise Lost*.

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Notes

- ¹ Here, I draw on and update an earlier essay (cf. Kunelius 2008).
- ² Think, for example, of the sound-bite studies (Hallin 1992), research on news interviews (Clayman & Heritage 2002), analysis of narrative devices as 'irony' (cf. Glasser & Ettema, 1993), the increasing "authority" of journalists in the news (Barnhurst 2005), or the whole idea of an emerging journalistic field (Benson & Neuve 2005). (In the case of Finland, see for instance cf. Herkman 2009, Kantola 2013, Reunananen et al. 2010, Kunelius & Väliverronen 2012).
- ³ Instead of 'professional reporters' providing the current 'social map' (cf. Nerone & Barnhurst 2003), newsrooms look for flexible professional teams who can adapt to the multimedia, multi-deadline corporate newsroom, which packages the information flows of society (cf. Kunelius & Ruusunoksa 2008).
- ⁴ The actual *centralization of communication structures* can be effectively masked in everyday life and its constant acts of *choice* ("you can click on this", "you can upload this", "you can customize this", etc.). We are well served to remember that an iPad is, in some sense, a super-effective loyal digital customer card and that Google's grasp of the global information flows is, to underestimate it, staggering.
- ⁵ A paradoxical example of this might be Google's logical idea to develop search functions that are increasingly tailor-made to individuals and to different personalized contexts. While building on the idea of a "better" and more effective search of facts, it also fundamentally deconstructs the idea of "facts" as decontextualized, something to be "searched".

Deconstructing Libertarian Myths About Press Freedom¹

Kaarle Nordenstreng

The Nordic countries enjoy top positions in the international rankings of press freedom. Although the criteria used in these rankings are open to methodological as well as political criticism, they nevertheless accord the Nordic countries a prestigious status. Freedom House² gives Finland, Norway and Sweden the highest score, while Reporters Without Borders³ ranks Finland number 1 with the rest of the Nordic countries all among the top 10, clearly surpassing such countries as the USA and the UK.

These rankings tend to support – especially among those at the top – an uncritical approach to the concept of freedom in general and freedom of the media in particular. This is unfortunate, because freedom is more than a concept, especially in the professional and academic circles of journalism. Freedom constitutes a paradigm guiding our ways of thinking about media and society. Moreover, in our Western tradition, the paradigm of freedom is often quite problematic and even biased because it tends to alienate us from ethics by suggesting that values are something that intervene in a natural state of freedom – that values are obstacles to freedom. This situation calls for critical excursions into the concept and paradigm of freedom.

We begin the deconstruction of libertarian myths by reviewing three landmark documents of the international community adopted at the United Nations (UN) and codifying the media-related freedom as a universal concept. The latest is the Millennium Declaration of 2000, while the other two are from the 1940s: the Universal Declaration of Human Rights of 1948 and the Constitution of UNESCO of 1945. These documents introduce an idea of media freedom that is quite balanced and far from the ultra-libertarian version conventionally advocated especially by Western media proprietors – namely, that freedom in this field means absence of state control, including legal regulation other than safeguards against censorship. Indeed, international law does not support a simple notion of negative freedom (freedom *from*); what is suggested instead is a notion of positive freedom (freedom *for*), whereby freedom is not an end

product to be protected as such but a means to ensure other more general objectives such as peace and democracy.

We then proceed to examine the doctrine of a free marketplace of ideas, whereby a free flow of information and ideas will automatically ensure that truth will prevail, notably through a mechanism of self-correcting truth. This doctrine was shaped in 20th-century America, first in legal and political debates between the two World Wars and finally during the Cold War in the 1950s. Meanwhile, going back to the classics of liberal thought, particularly to John Milton's (1644) *Areopagitica* and John Stuart Mill's (1859) *On Liberty*, it turns out that their thinking does not exactly correspond to the later doctrine. Hence, it is a myth to take the free marketplace of ideas as part and parcel of original liberalism.⁴

We conclude by exposing the paradigm of freedom against the notion of power as understood in philosophical traditions. This suggests that narrow-minded advocates of Western freedom are equally fundamentalist as those Islamists who are typically named as such. The lesson is a call for continuous deconstruction of the freedom paradigm.

Millennium Declaration

A largely overlooked paragraph in the Millennium Declaration of September 18, 2000, resolves under Chapter V. Human rights, democracy and good governance:

To ensure the freedom of the media to perform their essential role and the right of the public to have access to information.⁵

Here we have an authoritative document of the international community – although just a Declaration, not a text of proper international law – that speaks literally about the freedom of the media. But how? It is not an abstract freedom granted to the media but a call or even an obligation to perform a certain role in society and to assist people to gain access to information. It is a concept of positive freedom to perform a certain role – not a negative freedom from restraint to do whatever the media may want to do. The parameters for the “essential role” are not specified in the same paragraph, but the Millennium Declaration leaves little doubt about what is meant given the preceding four chapters: I. Values and principles, II. Peace, security and disarmament, III. Development and poverty eradication, IV. Protecting our common environment.

This message is unanimously given in the name of all countries. It stands as a universal political opinion of the international community – a concept of media freedom in the post-Cold War world.

Universal Declaration of Human Rights

The famous Article 19 of the Universal Declaration of Human Rights reads:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.⁶

The subject of the right here is “everyone” in the sense of “all human beings” (the phrase used in Article 1). Beyond everyone appears only “a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”, as stipulated in Article 28 (introducing the concept of “international order”, which later in the NWICO debate was rejected by the Western press freedom advocates). Nothing in Article 19 suggests that the institution of the press has any ownership right to this freedom. The word “media” appears as an open means for the use of “everyone” to seek, receive, and impart information and ideas.

In fact, Article 19 stipulates that media should be in the service, if not the ownership, of the people. It is a myth that the press and media as an institution enjoys protection of human rights and fundamental freedoms. In this respect, some human rights lobbies, including that bearing the name of Article 19, have pursued doubtful policies in favour of media proprietors instead of individual people.

Pedantically speaking, Article 19 introduces the right of “freedom of opinion and expression”, not “freedom of information” or “free flow of information”, let alone “press freedom”. Moreover, it is important to remember that the Universal Declaration of 1948 does not constitute proper international law; this is done only by the International Covenant on Civil and Political Rights adopted 18 years later. And document adds to the definition of the Declaration’s Article 19 provision the exercise of this right “carries with it special duties and responsibilities” and may be subject to certain restrictions under specific circumstances to be provided by law.

Accordingly, the legal form of what is referred to as “press freedom” includes a concept of freedom that is far from the unconditional license to do anything, as is typically suggested by media proprietors and also many journalists. Hence the concept of freedom under human rights turns out to be quite qualified and leads us to be wary of the conventional myth.

Actually, all this is an old lesson that has largely been forgotten. It is important to relearn this lesson, with teaching materials such as those provided by Nordenstreng and Schiller in 1979 (Part 3 with chapters by Eek, Gross, and Whitton), Nordenstreng in 1984 (Part 2 on international law and the mass

media), and Hamelink in 1994. Moreover, here is a challenge for journalism educators to prepare an easy-to-read and up-to-date presentation of the true idea of freedom within the context of international law and politics.

Constitution of UNESCO

UNESCO presents itself nowadays typically as a defender of freedom – not least press freedom. Its website introduces the relevant sector as follows:

The Communication and Information Sector (CI) was established in its present form in 1990. Its programmes are rooted in UNESCO's Constitution, which requires the Organization to promote "free flow of ideas by word and image".⁷

This is a misleading formulation which not only celebrates freedom but disregards its conceptual and philosophical foundation. Let us read carefully what UNESCO's Constitution says about the promotion of "free flow of information by word and image":

1. The purpose of the Organization is to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.
2. To realize this purpose the Organization will: (a) Collaborate in the work of advancing the mutual knowledge and understanding of peoples, through all means of mass communication and to that end recommend such international agreements as may be necessary to promote the free flow of ideas by word and image...⁸

Here, the free flow of ideas is supposed to serve the mutual knowledge and understanding of peoples (Article 2(a)), which for its part is subjected to the overriding purpose of contributing to peace and security (Article 1). Thus, UNESCO's constitutional mission is not to promote the free flow as such – as a simple and isolated aspect – but to do it to the end of advancing the mutual knowledge and understanding of people for the higher cause of peace and security. Moreover, Article 2 (a) specifies that UNESCO's promotion of the free flow should take place by means of collaboration and through international agreements. It is also noteworthy that Article 1 determines UNESCO's overall mandate to further universal respect for justice, for the rule of law, and for human rights and fundamental freedoms as affirmed by the UN Charter.

The conceptual structure of the constitutional stipulation is quite clear, with the mandate to promote free flow placed in the third level below (a) peace and security and (b) mutual knowledge and understanding of people. The reference to human rights and fundamental freedoms in Article 1 does not provide an unconditional license for free flow but rather ties UNESCO's mandate to the general principles of international law as laid down in the UN Charter. In fact, here we have a textbook example of the notion of positive freedom – free flow serving other objectives (*freedom for*) instead of being an end of itself as the notion of negative freedom is understood (*freedom from*).

Reading UNESCO's contemporary presentations of itself in the CI sector leads one to wonder whether the Constitution has been forgotten since 1990 – the end of the Cold War. To put it more bluntly, UNESCO seems to have departed from its legitimate constitutional mandate by elevating freedom of information as a top priority with a self-serving objective. For example, under the theme Freedom of Expression, the text reads: "UNESCO promotes freedom of expression and freedom of the press as a basic human right...." Here and elsewhere, "press" has appeared as the subject of freedom without it being mentioned anywhere in the Constitution or other proper sources of international law.

To be fair to contemporary UNESCO, one should concede that the banner on the main website says: "Building peace in the minds of men and women."⁹ Moreover, the blame for misleading formulations goes not only to the Secretariat headed by the Director-General but ultimately to the Member States under whose guidance the organization operates.

It is not difficult to find an explanation for UNESCO's departure from its constitutional line. It wanted to get rid of its reputation as a fellow traveler of the socialist and authoritarian regimes that had developed in the West along with an anti-imperialist drive in the 1970s. This drive had given rise to such concepts as New World Information and Communication Order (NWICO) as well as to such achievements as the International Commission for the Study of Communication Problems (MacBride et al. 1980). By adopting freedom as a leading theme, especially in the media field, UNESCO draws a dividing line at the world before 1990 – with its division into three worlds, including the socialist bloc of the East and the Non-Aligned Movement of the South. Entering a new millennium UNESCO presents itself as purified from the burdens of the past. Psychologically, this may be understandable as treatment of a trauma, but it is fatally wrong in terms of UNESCO's constitutional status and role in international politics. By wrapping its IC sector in a freedom banner, UNESCO has dissociated itself from its basic mandate and supported the myth that its mission is unconditional free flow. To use an old metaphor: The baby has gone out with the bath water.

To understand what has happened at UNESCO, one needs to recall the history of the anti-imperialist drive of the 1970s. It was part and parcel of a more fundamental development in the global arena with landmarks such as the UN resolutions on a New International Economic Order and equating Zionism with racism. During this radical period in international politics, UNESCO made history by producing the Mass Media Declaration and the MacBride Report and setting up the International Programme for the Development of Communication. It is remarkable that all this was done by diplomatic consensus, although the “great media debate” in the 1970s went through war-like stages of a “decolonization offensive” and a “Western counterattack” before reaching a “truce” (Mansell & Nordenstreng 2006).

What followed after these stages is crucial to understand UNESCO’s traumatic relationship to freedom of information. Ronald Reagan’s advent as president in early 1981 turned the United States from multilateralism to a unilateral employment of power politics, with a relative weakening of the USSR and the Non-Aligned Movement. The truce of the late 1970s was followed by a new Western offensive in the 1980s. At this stage, all the elements of compromise that were earlier regarded as valuable and honorable went suddenly out of fashion and even turned into liability risks, such as NWICO (Nordenstreng 2012).

In a still broader historical context, UNESCO’s current approach to the free flow of information means a return to what Americans had been forging to push onto its agenda since its foundation in 1945 and that largely figured in its communication policies in the 1950s and 1960s – regardless of what the Constitution said. As Herbert Schiller (1976) has shown, the American doctrine of free flow of information has an ironic prehistory between the two World Wars when Associated Press (AP) used it as an argument in encroaching the territories of British and French news agencies Reuters and Havas. Referring to American expansionism, the British *Economist* noted that Kent Cooper, the executive manager of AP, “like most big business executives, experiences a peculiar moral glow in finding that his idea of freedom coincides with his commercial advantage” (Schiller 1976: 29). In the early 1940s, the American Society of Newspaper Editors proposed to the U.S. Congress that it support “world freedom of information and unrestricted communications of news throughout the world” (ibid: 31). This lobbying was successful to the point that John Foster Dulles, one of the chief architects of the American Cold War policy after 1945, declared: “If I were to be granted one point in foreign policy and no other, I would make it the free flow of information” (ibid: 30).

Despite the initial hesitancy among the European allies, the doctrine of free flow of information became indeed a central element in the common Western arsenal of the Cold War. It found its way also to UNESCO, although, as shown by Joseph Mehan (1981), Americans did not succeed in totally turning the

organization into an instrument of the Cold War. A muted but still noticeable line in keeping with the Western free flow doctrine continued until the 1970s, when it was challenged by the anti-imperialist drive. Schiller wrote his disarming historical review at this time in the mid-1970s, suggesting that the American hegemony was on the decline, giving way to a more balanced notion of free flow, whereby the developing world would also have its fair share. Today, we can say that Schiller was wrong and American domination is back again.

The lesson from this history is, first, that free flow of information has never been a neutral and ecumenical concept but rather a tactical argument in socioeconomic and ideological struggles. Second, the constitutional mission of UNESCO, based on a text drafted in the idealistic spirit toward the end of World War II, was contradictory to the free flow doctrine created in the United States and turned into a Cold War instrument. Third, by following the free flow doctrine, UNESCO deviated from its constitutional mission until the 1970s, when the Mass Media Declaration, the MacBride Commission, and NWICO brought it back on track. As we know, this turn back to basics was only short lived and was derailed by political shifts in the world since the 1980s.

Legacy of Liberalism

Siebert, Peterson, and Schramm (1956) summarize libertarian theory in *Four Theories of the Press* as follows:

The libertarian theory of the function of the mass media in a democratic society has had a long and arduous history. This history has paralleled the development of democratic principles in government and free enterprise in economics. The theory itself can trace a respected lineage among the philosophers of ancient times, but it received its greatest impetus from the developments in western Europe in the sixteenth and seventeenth centuries. From Milton to Holmes it has stressed the superiority of the principle of individual freedom and judgement and the axiom that truth when allowed free rein will emerge victorious from any encounter. Its slogans have been the “self-righting process” and the “free market place of ideas.” It has been an integral part of the great march of democracy which has resulted in the stupendous advancement of the well-being of humanity. It has been the guiding principle of western civilization for more than two hundred years. (p. 70)

This text more than anything else has fueled the myth that the idea of a free marketplace of ideas with its mechanism of self-righting truth belongs to the

core of liberalism based on Milton and Mill. The *Four Theories of the Press* became a baseline for thinking about the media systems in the world as it filled a gap in textbooks on journalism and mass communication. However, its huge popularity was not substantiated by a corresponding weight in scholarship, as shown by *Last Rights* (Nerone 1995), which critically revisited the *Four Theories of the Press* – both coming from the same College of Communications at the University of Illinois at Champaign-Urbana.

In point of fact, the doctrine of a free marketplace of ideas with a self-righting truth, as it keeps circulating in contemporary professional and academic discourse, cannot be found in the works of Milton and Mill. Although these classics of liberalism used the market metaphor, it was not understood as an appropriate way for individuals to approach the world of ideas. Actually, both were aghast at the prospect of ideas being treated as if they were goods to be bought and sold in a market. They surely advocated freedom of thought and speech without prior censorship, but the concept of a free marketplace of ideas had no strategic place in their thinking. They also recognized the power of truth over a candid mind but only under fair circumstances – something not necessarily guaranteed by the media marketplace.

The following two sentences from Milton's pamphlet *Areopagitica* are usually quoted as proof that he is the father of the concept of self-correcting truth:

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?
(Altschull 1990: 40)

Milton's main point was to oppose the licensing and censorship of printing. He insisted that all kinds of views should be allowed to be brought to the public and allowed to clash without hindrance. His philosophical view would nowadays be called a maxim of pluralism, whereby we would not find the truth without also encountering falsehood. Milton was passionately opposed to forbidding anything to be published, comparing censorship to murder: "He who destroys a good book, kills reason itself, kills the image of God." In his main work, *Paradise Lost*, Milton (1667) elaborated the struggle between truth and falsehood and made a fervent appeal to challenge official truths, including God's commandments, with an invitation even to commit sins as a means to acquire knowledge and achieve human growth and development.

Accordingly, truth will not automatically prevail but must be cultivated in an active and radical process. This view is simply incompatible with the concept of self-righting truth. In short, Milton cannot be taken as an early advocate of

market liberalism: “Call him radical, call him puritan, call him republican, but do not call him (neo)liberal” (Peters 2005, p. 72).

The myth about Milton as a source of the doctrine of a free marketplace of ideas and self-righting truth began to emerge in the trial of Thomas Paine *in absentia* held in the late 18th century. Paine, author of *The Rights of Man* (1791) and activist in both the American and French revolutions, was accused in Britain of inciting revolution in his native country, whose elite was furious about the revolutionary ideas. Paine’s defense lawyer, Thomas Erskine, used Milton’s *Areopagitica* to prove that no good government needed to be afraid of open discussion. In his argumentation, Erskine twisted Milton’s point toward the concept of self-righting truth. This argument availed nothing in the proceedings against Paine, but it brought about an erroneous version of Milton’s thinking (Keane 1991).

John Stuart Mill, who had minutely scrutinized what Milton had written two centuries earlier, shared the position about the free encounter of ideas and the inadmissibility of censorship. His *On Liberty* is a fine elaboration of the same theme, but it does not include the doctrine of a free marketplace of ideas. The rest of Mill’s production is likewise void in this respect. For a liberal, he was far from dogmatic about the role of the state, considering that state intervention may well be necessary in ensuring social justice and other higher values. Also, the freedom of opinion and its expression was not for Mill an end in itself; he viewed it as “the necessity to the mental well-being of mankind (on which all their other well-being depends)”, as he expressed the ultimate objective in his summary of the grounds for pursuing this freedom.

As to the concept of self-righting truth, Mill actually held a contrary view, whereby it was quite possible that truth failed to prevail in a free encounter and falsehood became a dominant public opinion. In *On Liberty*, he dismissed the concept of self-righting truth as “pleasant falsehood”. Later Mill had bitter personal experience of how falsehood may prevail: With his wife, Harriet Taylor-Mill, he fought for women’s emancipation but failed to gain broader support and even became an object of ridicule, finally losing his seat in Parliament.

Consequently, it is a myth that the standard justification for press freedom by the doctrine of free marketplace of ideas comes from the classics of liberalism. Milton and Mill do not provide direct support for contemporary neoliberalism and cannot be taken as the basis for a libertarian theory of the press. The legacy of original liberalism represents rather social democracy and corresponds to a social responsibility theory of the press proposed by the Hutchins Commission in the United States (*A Free and Responsible Press* 1947). The concept of freedom in the original liberal philosophy was positive rather than negative: freedom *for* something, not freedom *from* something.

Where, then, are the roots of the doctrine of a free marketplace of ideas apart from the trial of Thomas Paine in the 1790s? An often-quoted source in the literature is the proceedings in 1919 against Russian emigrants in New York accused of distributing anti-American leaflets (supporting the socialist revolution of 1917). In this process, Judge Oliver Wendell Holmes referred to “free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market” (Peters 2004: 71). However, as John Durham Peters points out, this is not literally speaking the doctrine and slogan of a free marketplace of ideas.

Peters (2004) traces the first uses of the phrase “free marketplace of ideas” to the pages of *The New York Times* in the routine political discourse of the 1930s, but a more profound occurrence before the 1948 Congressional election campaign comes from an unusual quarter: the communist party of the United States, which wanted to campaign “in a free marketplace of ideas”. Obviously, American leftists employed the slogan as a defense against rising anticomunism. However, Peters (2004) shows that the Cold War context soon turned around the political sponsorship of the slogan and that, already in 1953, *The New York Times* uses it as an argument against the East European countries that had censorship to prevent the emergence of a free marketplace of ideas.

In addition to this Cold War context, the free marketplace doctrine should also be seen as a politically appropriate response to the development of media structures in late capitalism. Because the commercialized and concentrated media market no longer guaranteed genuine competition of ideas, as done in the early modern era with several competing newspapers in a town, the monopolized media declared themselves a virtual marketplace of ideas.

It was in this intellectual and political climate that the doctrine of free marketplace of ideas, with the principle of self-correcting truth, became ingrained in the libertarian theory of the *Four Theories of the Press*. Accordingly, it is correct to say, as suggested by Nerone (1995), that this theoretical construct is built on an ideological ground of a later day and has little in common with the legacy of original liberalism. Admittedly, this myth also has been discovered by other experts of the history of liberalism (e.g., Pole 2000). However, given its popularity among professional journalists and media proprietors, it needs to be constantly exposed.

Freedom in Perspective

Consequently, we can trace a centuries-long historical line from the early modern age to the postmodern world, with a surprisingly coherent idea of freedom of information. In this context, liberalism is not a partisan ideology hijacked by U.S. diplomacy but a balanced philosophy that is far from outdated. In media philosophies, the original liberal tradition stands closer

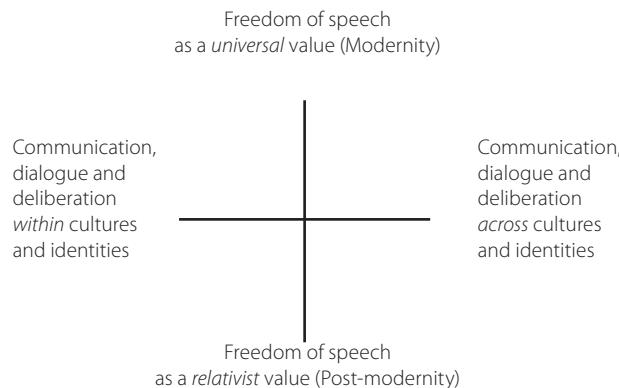
to what was advocated by the Hutchins Commission in the 1940s than to the manifestos of the World Press Freedom Committee¹⁰ in the 1970-80s.

It is instructive to view the paradigm of freedom against the philosophical traditions that can be traced behind the notion of power. In short, there are two fundamentally different notions of power: a Hobbesian view and a Hegelian view. The first of these traditions follows Thomas Hobbes and the Galilean metaphor of a universe of freely moving objects, including human beings and their will – free meaning absence of external impediments of motion. In this tradition, power means intervention against free movement – power is the capacity to block free movement. The latter tradition, for its part, follows the Kantian philosophy, whereby human beings are determined not only by the laws of nature but also by moral reasoning. Marxism later shared more or less the same philosophy. In this tradition, freedom means autonomy from nature and is based on the rational and moral capacity of human beings; freedom “is not the ability to act according to one’s will and interest without being intervened, but rather is almost exactly the opposite – it is the placing of natural desires and interests in a position in which they are governed by moral judgments” (Pulkkinen 2000: 12).

The Hobbes–Galilean tradition defines politics as a game between atomistic individuals, whereas the Hegelian–Marxist tradition understands politics as an organic part of a society, where power is not the relation between two individuals but “an instrument of justice in the process of the self-control of society” (Pulkkinen 2000: 94). The former “libertarian” tradition introduces an ontology, where power appears as a fairly simple (negative) element, with freedom as its (positive) opposition. The latter, “communitarian tradition”, for its part, has an ontology, where power is not an obstacle distracting natural movement but an essential instrument to ensure morality and order in civil society and ultimately in the state. In this tradition, power and freedom are far from simple and mechanistic notions, and therefore this tradition is intellectually more demanding and challenging than the standard libertarian version.

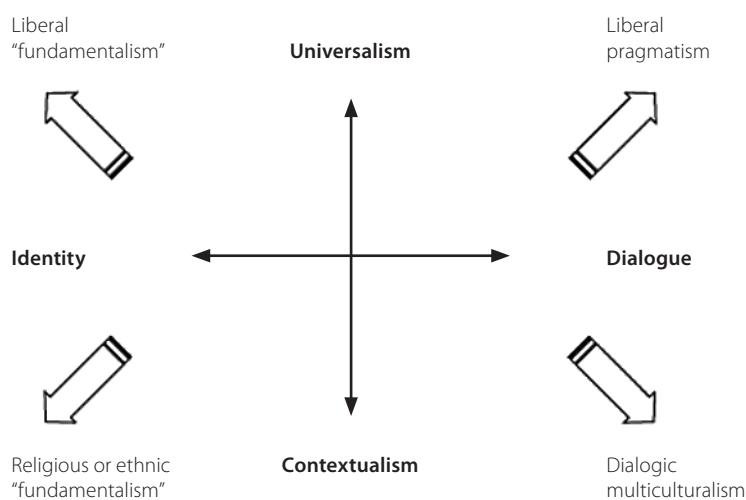
A textbook case for deconstructing the notion of media freedom is provided by the worldwide debate that followed after the Danish newspaper, *Jyllands-Posten*, published provocative caricatures of the Prophet Mohammed in fall 2005. An international study compiled 14 national reviews of the way freedom of speech was understood in the political and professional debates on the cartoon controversy (Kunelius et al. 2007; Kunelius & Alhassan 2008). After empirically examining the free speech rhetoric in a number of media in these countries the study introduces a framework with two underlying dimensions of the debate as shown in Figure 1. One dimension defines the notion of freedom of speech, ranging from a universal value of absolutist freedom to a culture-specific value of relativist freedom. The other dimension defines the nature of communication, ranging from a national sphere where dialogue

Figure 1. Basic Dimensions Behind Freedom Discourses



Source: Kunelius et al. 2007: 17.

Figure 2. Four Extreme Positions in Terms on Freedom of Speech



Source: Kunelius and Alhassan 2008: 90.

and deliberation take place within cultures and identities to a global sphere where dialogue and deliberation take place across cultures and identities. Seen against these dimensions, four extreme positions are distinguished as shown in Figure 2.

Those Islamists who attacked the media and countries where the caricatures were published naturally held a relativist view of press freedom and were placed in the national/culture-centered end of the communication dimension, without respect for a global dialogue between cultures. However, those Western press freedom advocates, who insisted that publishing of the cartoons can under no circumstances be denied on grounds of principle, were typically found in the same end of the communication dimension with the Islamists, placing themselves beyond reflection and thus turning against the idea of liberty as an open and tolerant approach. Thus, there are “fundamentalists” among both liberal and religious camps. For the freedom advocates, this is a bitter lesson that has not proceeded well in the site of the study – rather, the extreme libertarians in Finland have chosen a defensive strategy by accusing the study of condoning censorship.

Yet, the lesson must go on as freedom applied to media is a notoriously problematic concept. Moreover, it is a deceptively ideological concept – especially when understood to be simple and apolitical. We must therefore be alert and critical in order to avoid ideological traps – and complacency fed by top rankings in international comparisons. After all, we are always bound to a certain tradition, and our thinking with all its concepts and paradigms is constructed rather than inherently given.

On the other hand, a critical approach to the topic does not suggest that the idea of freedom – in general or applied to media – should be undermined or suspected. On the contrary, freedom of thought, expression, and media is cherished as a vital element in the lives of individuals as well as societies. It is precisely because of its great value that freedom should not be allowed to degenerate into an ideological instrument, as has too often been the case. To disprove the old myths and avoid the emergence of new ones, it is important that freedom, and the lack of it, remain under constant debate.

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Notes

- ¹ Adapted from Nordenstreng, K. (2010) 'Liberating freedom from libertarian myths', pp. 207-218 in R. Fortner and M. Fackler (eds.) *Ethics & Evil in the Public Sphere. Media, Universal Values & Global Development. Essays in Honor of Clifford G. Christians*. Cresskill, NJ: Hampton Press. With permission from Hampton Press. Earlier version: Nordenstreng 2007. See also: Nordenstreng 2011.
- ² <http://www.freedomhouse.org/report-types/freedom-press> For a comprehensive report of their Freedom of the Press 2012, see Deutsch Karlekar & Dunham 2012.
- ³ <http://en.rsf.org/press-freedom-index-2013,1054.html>
- ⁴ This point was examined by Mäntylä 2007 (Finnish doctoral dissertation supervised by the present author).
- ⁵ <http://www.un.org/millennium/declaration/ares552e.htm> (paragraph 25, last bullet).
- ⁶ <http://www.un.org/en/documents/udhr/>
- ⁷ <http://www.unesco.org/new/en/communication-and-information/about-us/> (Accessed in August 2013)
- ⁸ <http://www.unesco.org/new/en/unesco/about-us/who-we-are/history/constitution/>
- ⁹ <http://www.unesco.org/>
- ¹⁰ <http://www.wfpc.org/index.php?q=node/10>

Freedom of Expression and the Professionalization of Journalism

Arne H. Krumsvik

The conditions for freedom of expression in Northern Europe are changing. A move from a Democratic Corporatist system towards a Liberal model driven by digitization and commercialization of news media, professionalization of journalism, and European trade regulations might challenge the legitimacy of state intervention in the media markets for the purpose of facilitating freedom of expression. The liberal ideal is for the government not to get involved.

The present article discusses how digital and social media innovations interrelate with the professionalization of journalism and changes in media regulations, using Norway as a case. One key finding is the move towards a liberal model, which is occurring at various speeds in different media policy areas.

Freedom of expression and media plurality has been the two main objectives of Norwegian media policy, and the state's responsibility to create conditions that facilitate open and enlightened public discourse was written into the Constitution in 2004. This provided a justification for the use of different policy measures to guarantee a degree of media diversity it is often assumed the market would not be able to provide on its own.

Digitization of media has lead to recent processes of change in three important areas of media policy: (1) press subsidies, (2) media ownership limitations, and (3) broadcasting licence privileges. Regulations in these areas have been rooted in the era of the party press and limited bandwidth for broadcasting. We will look into contemporary attempts at balancing plurality and freedom of expression in the time of professional journalism and social media technologies (Krumsvik 2011).

Measures to Achieve the Media Policy Objectives

Let us begin with a look at the Northern European media model, and how changes in this model are linked to the professionalization of journalism. I

will then discuss the issues of media innovation and professionalization in journalistic media organizations, and highlight some current issues concerning deficiencies in the alignment of media policy and market realities.¹

The state applies different measures to achieve its media policy objectives. Some measures are intended to regulate structural relationships in the media industry (such as the media ownership law and press subsidies), while other measures govern content (for instance the Norwegian Broadcasting Corporation (NRK) statutes). The measures can be divided into different categories. First of all, we can differentiate national and international regulations, where a typical national measure is the broadcasting law. A typical example of international regulations is the EU directive for audiovisual services. Within both national and international regulation, we can further differentiate positive and negative measures, where the positive measures include different forms of subsidies and privileges, and the negative measures include restrictions, prohibitions and orders.

Within both positive and negative measures we find *direct* measures (such as direct subsidies for the press, the broadcasting licence) and *indirect* measures (for instance the VAT exemption). The most extensive state intervention in the media industry is the state ownership of NRK (Hallin & Mancini 2004; Syvertsen 2004).

In addition to the measures described for press and broadcasting, there are similar financial measures for movies (such as direct movie subsidies, grants and production quotas) and books (such as VAT exemption, fixed price agreements and purchasing agreements).

Media Systems

Measures in media policy are closely related to a nation's media system. Discussions about different media systems have taken place since the 1950s. American researchers Siebert, Peterson and Schramm (1956) classified the different media systems according to normative ideals for how the media, and the press in particular, should work: (1) The Authoritative, (2) The Liberal, (3) The Soviet-Communist and (4) The Social Responsibility models. Their *"Four theories of the press"* has been criticized for its partly overlapping categories, and for not being representative of media systems in all countries, but it has had a major influence on media policy research. Their worldview, which was dominated by the cold war, eventually made their classical study less relevant. This contributed to massive interest in the next comparative analysis, conducted by Hallin and Mancini (2004). They had a more empirical approach in their study of 18 countries in Western Europe and North America, which emphasized the media systems' political, social and economic role. They divided the Western world into The Liberal, The Polarised Pluralist, and The Democratic Corporat-

ist model – where Norway belonged to the latter model – based on analysis of (1) the media markets, (2) the relationship between the media and politics, (3) the development of journalistic professionalization, and (4) the degree of state intervention.

One of the most obvious differences among media systems lies in the fact that media in some countries have distinct political orientations, while media in other countries do not. (Hallin & Mancini 2004, p. 27)

Hallin and Mancini are critical of Siebert et al.'s normative idealization of the Anglo-American liberal model, but at the same time they acknowledge that changes both in society and in the media have led to a convergence towards a liberal media system with less state intervention than what we traditionally have seen in the Nordic countries.

The Northern European Model

In our part of the world, media policy is negotiated between the authorities and the players in the media industry, in what Hallin and Mancini characterize as a Northern European Democratic Corporatist media system. Typical for the media system in Northern Europe is (1) that the newspapers have high circulation and readers from a broad section of the population, (2) a strong party political press that has evolved to become more commercial, and to a greater extent politically neutral, and public broadcasting with a great degree of autonomy, (3) a great degree of professionalization and institutionalized self-regulation, and (4) a strong degree of state intervention through regulation and subsidies, while freedom of speech is also protected. The authors place Belgium, Denmark, Finland, The Netherlands, Norway, Germany, Switzerland, Sweden and Austria in this category.

The Mediterranean countries Greece, France, Italy, Portugal and Spain are placed in a *Polarised Pluralist model*. The main difference from the Northern European countries is that, in the South, newspapers have lower circulation figures and are to a greater extent read by the elite of society. Journalism is less professional and more opinionated, and there is more direct state control of broadcasting. In the same way as in the North, there is strong state intervention. France and Italy have press subsidies and, with the exception of France, there have been periods of censorship of media content.

The third category in Hallin and Mancini's comparative study is the Northern Atlantic *Liberal model*, which characterizes the media system in England, the US, Canada and Ireland. Here the market dominates, and with the exception of public broadcasting in England and Ireland, the state has an unobtrusive role. There is a great degree of professionalization and non-institutional-

ized self-regulation. The press is to a great extent commercially and politically neutral, and favours information-oriented journalism. The newspapers have a circulation somewhere between the high level of Northern Europe and the low, elitist level that is characteristic of the Mediterranean countries.

Convergence of Media Models

These three media systems have developed in correspondence with the development of the different political systems in these three parts of the Western world. Among other things, Hallin and Mancini emphasize the different party political systems, the degree of consensus orientation, the state's role in the economy and the development of constitutional government.

As aspects of the political systems become more similar, we also see a convergence in the evolution of the media models. And there is no doubt that the evolution is moving in the direction of the liberal model.

We are moving towards a homogenization of the traditional media models. The driving forces in this development are digitization and American influence, but also forces of change internally in Europe, such as commercialization and a political shift from a collectivist to a more individualistic political culture.

At the same time as political changes influence media systems, it is not unthinkable that changes within media systems have contributed to processes of change in the political systems. For instance, the media have taken over part of the communication role formerly held by the political parties and as a result perhaps contributed to the decline in support for these institutions (Hallin & Mancini 2004, pp. 251-295).

The Role of the Nation State

Naturally, media system models give rise to discussions about the role of the nation state (see Curran & Park 2000; Lund, Nord, & Roppen 2009; McChesney 2004; Morris & Waisbord 2001; Robins & Askoy 2005). Hardy (2008) argues that the differences between Western *national* media systems still are considerable, and can contribute to preventing full homogenization in the foreseeable future.

In addition to (1) the interaction between media and politics, which Hallin and Mancini emphasize as important, Hardy argues that (2) structural relationships such as production and consumption in the national media market, (3) public media policy and regulations, (4) ownership and organization of the media institutions, and (5) culture and cultural processes must also be analysed to investigate the degree of system convergence. Among other things he

points to how, despite increasing globalization, most media consumers rely primarily on their national media.

The Role of European Legislation

The state's degrees of freedom in the national regulation of these three areas are influenced to different extents by international regulation.

The extremes are broadcasting policy, where the EU's broadcasting directive became Norwegian law through the EEA agreement while it has proved impossible so far to come to any agreement on a common EU policy on ownership regulation (Collins 1994, Humphreys 1996, Doyle 2002, Sarkakis 2004, Harcourt 2005). Within the EU we find all of the three media systems we have discussed earlier, something that complicates the development of a common EU media policy. In the discussion about ownership regulation, the European Council² recommends that its members increase regulation, while the EU Commission has not found a legal foundation for regulating ownership to protect diversity (Hardy 2008).

We will see that subsidizing media, which in Norway is clearly defined as a culture policy measure, is limited by the EU's *trade policy* as a result of the EEA agreement. Free flow of goods, services, people and capital (known as the *four freedoms*) are the key principals. In the case of Norway, dispensation or exemption is supervised by the EEA's Surveillance Authority (ESA). Subsidies already established when the EEA agreement came into force, can still be awarded until the ESA demands they be changed. New subsidies, unless they fall under one of the general exemptions, must be approved by the ESA before they can be implemented. If the subsidy is awarded without approval from the ESA, the ESA will order the state to demand that the aid is paid back.

In contrast to the Norwegian situation, both Finnish and Swedish press subsidies have been through an approval process. The objectives of both were to ensure diversity of opinion as well as media diversity. The Finnish arrangement was also based on the desire to strengthen the Swedish language and minority languages.

The VAT area is not included in the EEA agreement, but still the EEA countries do not have full freedom of action in this area. The EEA agreement's Article 14 bans internal protectionist fees, which means that imported media products are subject to the same tax rate in Norway as Norwegian products are. Diverging rates for some sectors can also be considered state aid. The EU member states still have a relatively great freedom to adjust rates at their discretion, which many of them are doing. Because the basis of the state laws governing subsidy is identical within the EU and the EEA, Norway has felt safe adhering closely to the EU's directive. In reality this means that zero-rate VAT in new areas is out of the question.

This also has implications for digital services, where the rule in the EU is that only full rates shall be applied. Norway is not under any obligations to establish such a divide between physical goods and digital services in Norway, but the Finance Department subscribes to the principle of making the Norwegian VAT regime adhere as closely as possible to the VAT regime practised within the EU (NOU, 2010: 14).

Press Subsidies and Innovations

The role of the press as an arena for public deliberation in society has been a main justification for press subsidies, and Norway was one of the first nations in Europe to introduce this controversial governmental support in 1969 to ensure local competition of newspapers with different political party affiliations. Forty years later, most cities have a newspaper monopoly controlled by professional owners more focused on scale and scope, in order to make their newspaper profitable, than on their political impact. It also makes commercial sense to employ professional journalists to produce content with a high degree of diversity in order to increase market reach for each title. At the same time, a diversity of views are increasingly expressed in online media as well.

While the market structure has changed towards a liberal model, the policy measures have been stable, and the Media Support Committee's Green Paper (NOU, 2010: 14) did not discuss the legitimacy of subsidies. The level of state intervention was not on the political agenda. However, two main challenges for innovation and development as a result of the existing subsidies were identified:

1. The distribution of production subsidies according to the size of the print circulation led to a situation in which newspapers receiving such subsidies lacked incentives to develop offerings on new media platforms because they were doubly punished if some of their readers chose to migrate from print to digital: Both the subscriptions and the press subsidies would in that case be reduced.
2. The difference between the zero rate for the print edition and the full VAT rate (25%) for digital services meant bundled products would be charged full or partial VAT: As a result such offerings were not created, despite the fact that the most likely strategy to allow charging for digital services was connected to the print edition.

It was suggested that these side effects of both direct and indirect subsidies could be solved by introducing platform-neutral criteria for awarding production subsidies and a change in the VAT rates.

Users Embracing the Online Debate

Governments are facing challenges on two fronts in developing this policy area. On the European scene, they need to accept changes from the ESA, and in the domestic political debate, 'discrimination' of digital media is an issue. It becomes challenging to use freedom of expression as an argument for continuous support of paper publications over their online counterparts, as these exclusive privileges of the press are being questioned. Digital and social media innovations have led to changes in user behaviour and attitudes.

One study finds that users of Norwegian online newspapers view the online newspaper's discussion forums as more important for freedom of expression than the letters-to-the-editor sections of the paper editions, across all age groups. While the industry debates the ethical implications of user-generated content online, based on the tradition of printed media (Ottosen & Krumsvik 2008), online users are demonstrating increasing acceptance of innovation and experimentation. An example of this is that users embracing the online platform for deliberation tend to be in favour of post-moderation. One side effect of the on-going professionalization process in journalism is the fact that journalists do not see it as part of their professional role to interact personally with users through social technologies (Krumsvik 2009).

To address these concerns, proposed changes in direct subsidies from the Government (pending ESA approval) are presented as 'platform neutral', and in principle not limited to the current recipients (the largest being the Social Democratic *Dagsavisen* and *Bergensavisen*, the Marxist daily *Klassekampen*, the agricultural *Nationen*, and the Christian liberal *Vårt Land*). However, a clause requiring user payment to qualify does in reality disqualify online-only publications. Competition and substitutes in the online environment have made it impossible to charge for general interest online media. The conditions of profitability are extremely different for traditional and online-only media due to the barriers of entry, hence traditional media will be funding journalism even in the future (Krumsvik 2012a).

These market conditions have led to some experimentation with bundles of traditional and online media. However, as newspapers receive indirect state support through zero VAT on subscriptions and single copy sales, while the full rate (e.g. 25 %) is added to sale of digital media, the effect of paper and digital editions bundling in most cases is charging 12.5% VAT – a de facto introduction of VAT on the paper edition (Krumsvik 2012b).

In 2012, the Media Businesses' Association (MBL) moved from a position of defending zero VAT on newspapers, as a means of avoiding taxation on freedom of expression, to a demand for 8% VAT on both paper and digital, in order to remove barriers to innovation. The Norwegian Government, however, does not want to be the first European country to reduce VAT on digital services.

As changes in the media market and professionalization of the institutions of journalism move at a higher speed, changes in policy regarding media subsidies are moving slowly, resulting in policy measures intended to promote freedom of expression becoming barriers to innovations and a disadvantage for the traditional beneficiaries of such media privileges.

Ownership Regulations

Conditions for media innovations are also on the agenda as regulation of media ownership is debated. A 2012 proposition from the Government to include digital properties in the equation limits new media growth of the major domestic media organizations, while international players such as Google and Facebook are increasingly gaining market dominance.

The idea that ownership plurality leads to diversity of content is strong in Norway, and was used as justification for ownership limitations in the licensing agreements³ when TV 2 and radio P4 were established in 1992 and 1993, and for the introduction of ownership regulations in newspapers in 1999. Similar regulation has also been introduced in a number of European countries.

While subsidizing the press is a positive media policy measure, ownership regulation is a negative one. The similarity is that both measures aim to protect key parts of the *existing press structure* and prevent unwanted development. While press subsidies were to prevent newspaper death, the ownership law should prevent further ownership concentration. *The ownership law of 1997* was to a great extent made to fit the existing power structure. The media authority can interfere (1) if a player controls more than 1/3 of the daily press circulation, or (2) if an acquisition results in cross-ownership between two players who both control more than 10 per cent of this circulation, or 60 per cent of regional circulation (Norway is divided into 10 regions). In reality this means that it is very difficult for existing media groups to expand further. At the same time it has been fully possible for local media houses to establish a multimedia monopoly in a city or a municipality.

The two questions that influence the Norwegian debate on the need for ownership regulation most are: (1) is the threat to freedom of expression serious enough to justify strict regulation to be on the safe side, and (2) does specialized legislation in this area serve a purpose, or can competition regulations offer enough protection against misuse of market power?

A key dilemma is that regulation is largely built on fear as a result of anecdotal observations of individual media moguls who, to varying degrees, have used their power as proprietors to achieve political influence, while we lack systematic studies proving any connections between ownership concentration and content in the media (Ohlson 2012; Roppen 1997).

Even if ownership regulation has been stable, ownership concentration has continued to develop in the Norwegian media market, with a high degree of foreign ownership. The belief that regulation would lead to domestic media being less interesting for foreign investors has led to the opposite. Domestically, growth limitation has resulted in international expansion and a higher degree of exposure of traditional Norwegian media entities, resulting in mergers and acquisitions contributing to a development in the direction Hallin and Mancini (2004) expect: from a Democratic Corporatist model towards The Liberal model.

The relevance of domestic ownership regulations as such was not on the table, as changes were rushed through a process to include digital ownership in 2012. The level of state intervention is not on the political agenda. While large media corporations are viewed as a problem for freedom of expression due to a potential limitation of media plurality, this kind of ownership might be a precondition for media innovations.

Ownership and Innovations

A study of strategies for iPad apps in Norwegian newspapers shows that type of ownership is an important indicator of a newspaper's approach to innovation. Ownership was more important than newspaper size in explaining tablet strategy. In fact, only newspapers owned by media groups had plans for iPad apps. In addition, executives of newspapers owned by media groups were systematically more active and optimistic concerning new media development. In a situation where media companies faced the "innovator's dilemma" (Christensen 1997), i.e. the choice between reinforcing their existing products or innovating, there was a significant difference between companies with different types of owners. Media groups may provide not only financial resources and joint product development, but may also be sufficiently distant from immediate concerns about the core customers that they can look beyond the mainstream market for new opportunities. In other words, they not only have sufficient economic resources but also better strategic capacity for innovation. The findings seem to indicate that these characteristics make newspapers more inclined to take risks and thereby be more innovative. This is an important factor that should be taken into account when ownership concentration is assessed (Krumsvik et.al. 2013).

Owners also actively influenced developments of applications for mobile devices and tablets. The editorial department drove product and service developments towards the digital domain for a number of years, but it was not until the advent of applications that the owners became actively involved, championing business development. This suggests that newspapers are becoming more oriented towards business development. Their commitment also essen-

tially signals that they have started to re-define the domain of newspapers, as a hybrid between print and digital (Westlund & Krumsvik 2012).

While this hybrid approach might legitimize cross-platform reform of ownership regulation, the question of relevance for freedom of expression remains unresolved. Newspapers compete in dual markets. In the readership market, most newspapers have a local monopoly. In the advertising market, newspapers also compete for regional and national contracts. Hence, the editorial content is predominantly local, while advertising might be local, regional or national (Krumsvik 2012a). Nonetheless, ownership is regulated on the regional and national level, not at the relevant market for editorial content – the local market. No studies have found any systematic relationship between newspaper content and ownership (Ohlson 2012).

The regular competition authorities monitor market power in the advertising markets. They do not have any legal authority to limit new digital global players from the search and social media industry, as they are gaining market shares at the expense of traditional news organizations.

Broadcasting Policy

State control of broadcasting has been much more extensive than state intervention in the newspaper industry, and, according to Hallin and Mancini (2004, p. 41), public broadcasting is the most important form of state intervention in a media market. In exchange for licensing privileges, which have been justified by the shortage of frequencies, the state has issued strict demands on TV and radio content.

With limited bandwidth in the broadcasting network, the state could reduce the press freedom of broadcasters to secure diversity. Digitization of the distribution has fundamentally changed this. By closing the analogue terrestrial network for broadcasting in 2009, the evolution towards a liberal model was accelerated in the broadcasting area. The main competitors in the advertising market obtained equal distribution, and there is now a low threshold for establishing new, national channels.

New conditions for distribution lead to TV 2 losing an important licensing privilege. Because distribution is no longer a shortage factor, justification for the licensing demands fell away. The authorities feared TV 2 would move from Bergen to Oslo and follow in the footsteps of TVNorge as a pure entertainment channel. As state intervention is not politically controversial in Norway, an innovation in policy measures came out of negotiations between the commercial broadcaster and the Government: In 2010, TV 2 signed a public broadcasting *agreement* where they accepted certain obligations in exchange for a must-carry regulation committing all cable distributors to offer TV 2.

Conclusion

In this chapter, we have seen clear indications of how an interrelationship of technology digitization, market (competition), and policy (European regulations) contributes, at various speeds, to a liberal media system. Eventually this will have consequences for the view on appropriate policy measures to ensure freedom of expression.

In the Nordic and Northern European political tradition, the idea that markets cannot be left to govern on their own has been very influential, if not predominant. This idea is still expressed frequently, at the same time as today's media landscape undoubtedly has moved towards a more market-dominated reality. In the liberal model, the state has an unobtrusive role to ensure freedom of expression.

However, the present analysis of recent issues surrounding the revision of Norwegian media policy does reveal a continuous high degree of state intervention through regulation and subsidies. While both journalists and media institutions demonstrate a high degree of professionalization, key policy measures are still grounded in the era of the political press.

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Notes

¹ The article is based on publications from a post-doc project entitled 'Freedom of Expression and the Professionalization of Journalism' at University of Oslo, Department of Media and Communications. The work was funded by the Tinus Trust.

² The European Council has considerably weaker measures at its disposal than the EU does to ensure its members follow its recommendations and binding declarations.

³ The licensing laws on ownership were removed as a result of implementation of the ownership law.

Norway and 22 July: A Clash of Diagnoses ...?

A Media Debate on Freedom of Expression Revisited

Elisabeth Eide

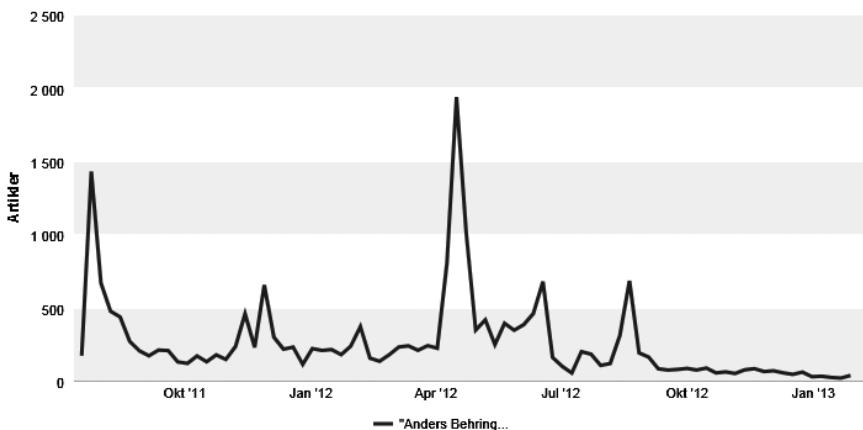
How should we fight ideologies such as the one that Anders Behring Breivik adheres to? [...] Stop excluding minorities from the public debate. [...] Stop quoting them in the media.

Excerpts from a Facebook debate initiated by *Aftenposten* 25.07.2011

In August 2006, the first of three conferences under the “Global Inter Media Dialogue” umbrella took place in Bali, initiated by the governments of Indonesia and Norway. Journalists from more than 60 countries participated, and even if it was almost one year after the initial publication of the Mohammed cartoons in *Jyllandsposten* (30 August 2005), the cartoons controversy served as the background for the initiative, and dialogue was the explicit purpose. After several republications of the cartoons in January 2006, the conflict turned transnational (Eide et al. 2008). At the Bali conference, some journalists from countries of the “Global South” suggested a global code of ethics, to avoid clashes such as those witnessed in the wake of the cartoon controversy. Several European journalists strongly rejected such a view, since they feared it would open the door for curbing freedom of expression and lead to more self-censorship. Suggestions from within the UN Human Rights Committee – that defamation of religion be included in their mandate – have since demonstrated a similar disagreement, with the OIC (Organization of Islamic Conference) spearheading this view, while mainly Western democracies protested. After some years with a majority voting in favour of resolutions to ban defamation of religion, the tables were turned in 2011, when the committee shifted from protecting beliefs to protecting believers.

Another question raised at Bali was: *What about tolerance for the intolerant?* This has been brought forward in discussions on pro-nazi groups in

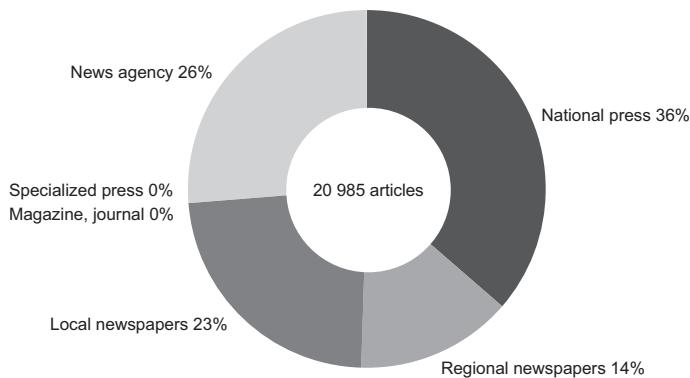
Figure 1. All Norwegian Print Newspaper Coverage of Search String "Anders Behring Breivik" from 23.07.2011 to 31.01.2013 (number of articles)



Note: N= 20 985.

Source: Retriever search 31.01.2013.

Figure 2. Distribution of Coverage of Search String "Anders Behring Breivik" from 23.07.2011 to 31.01.2013 by type of source (per cent)



Note: N = 20985. 36% in the national press, 14% in the regional papers, 23% in the local newspapers and 26% articles from the news agencies.

Source: Retriever search 31.01.2013.

Europe – and when it comes to extremist Islamist groups who at times express themselves as supportive of terrorist acts. No doubt, the same questions have been raised after the January 2011 start of the Arab spring, which brought new Islamist-oriented politicians to power supported by more extreme allies; and opposed by secular politicians and citizens who fear for their freedom of expression and for religious and political minority rights. On the other hand, those who remain enthusiastic about the Arab Spring and its results point to the fact that the old dictatorships supported by the Western powers showed no remorse in their oppression of various opposition groups. All these separate, but intertwined events and processes represent a backdrop against which the terror in Norway needs to be analysed.

Global Media Event...?

Half a year into the Arab Spring wave that started in Tunisia, the 22 July terror in Norway shook the world and the media. BBC World focused all their attention on the terror in Norway for at least 24 hours. In the first reactions to the terrorist deeds, the Norwegian Prime Minister Jens Stoltenberg said that the terrorist should not be allowed to curb the democratic values of the society: “We must never forsake our values [but] show that our open society will pass also this test. That the answer to violence is even more democracy”.¹

The Norwegian media coverage after 22 July 2011 was massive (see Figure 1), particularly during the first weeks. It increased again when the court case opened, when the verdict was passed, and when the commission, whose role it was to investigate the authorities’ actions and responsibilities at the time of the terror, presented its findings. This chapter aims at analysing some of the post-22 July coverage that treats “freedom of expression”, because it was an important debate topic and because (lack of) this freedom at times was mentioned as part of a presumed causality chain. Relevant research questions were:

- Which interpretations or indeed discourses related to “freedom of expression” are to be found in the press material post-22 July?
- Which voices were listened to by the press in the post-22 July coverage?

The aim is to see how mainstream media approached the issue of freedom of expression in a situation of (post WW II) unprecedented national trauma and to identify central discourses related to this fundamental human right.

A Contested Concept

In Norway as in the rest of Europe, the topic of *freedom of expression* has been subject to heightened discussion in recent years, not least due to the cartoon controversy (Steien 2007, Eide et al. 2008, Rose 2010, Stage 2011). But this debate is not new. It also took place at the time when the film “Life of Brian” was first banned in Norway with reference to blasphemy (1980), and again the debate occurred after Salman Rushdie published “Satanic Verses” (in Norwegian in 1989) and after the attempt on the life of his Norwegian publisher William Nygaard in 1992 (see Austenå 2012). What is to some degree new during the last two decades is the variety of media outlets and thereby increased transnational identifications and media consumption.

From the variety of press practices and debates, several attitudes towards freedom of expression may be identified, from adherence to strong blasphemy laws both within and outside Europe² to views in defence of no legal restrictions on freedom of expression at all, with the exception of child pornography and direct incitement to violence. The problem with debates in which conflicting views occur is that they do not always clearly distinguish between legal and ethical questions or arguments. “One may thus operate within ethical ideals for communication in a democratic society, that are not necessarily grounded in legislation” (O’Neill in Stage 2011, 39). On the other hand, legislation also has its foundation in ethical considerations, which may explain why debates move between the two.

The dilemma may also be described as an “uneasy tension between robust protection of offensive expression and protection of the dignity and physical integrity of potential victims of such expression” (Massaro 1991, 212). The concept of *dignity* may be hard to define, while physical integrity is more clearly connected to legislation against discrimination, as with Article 135A in the Norwegian Punitive Law, banning discriminatory and hateful speech based on belief, race, colour of skin, ethnicity and sexual orientation. The *tension* occurs because jurors have had problems drawing the line between utterances that fall within the law and unlawful ones, not least with regard to Article 100 of the Constitution guaranteeing full freedom of expression. The Mohammed cartoon controversy unveiled a situation involving dormant blasphemy laws in many European countries. Such is the case also in Norway, where the law will be totally abandoned.

It looks as if two main positions in the Nordic debates have conflicted when it comes to emphasis: those whose main concern seems to be with communicative *rights* versus those who first and foremost emphasize communication based on *responsibility*. The *responsibility* discourse is more closely associated with the assertion of another right, i.e. the right not to be offended (Steel 2012, 184), while the former is preoccupied with the exercise of a uni-

versal *right*. As Helge Rønning argues, the fact that freedom of expression is historically situated and grew out of a Western political and philosophical tradition “does not make these principles invalid elsewhere” (Rønning 2009, 18), and furthermore free expression is fundamental when it comes to the struggle for other human rights. Within the *responsibility* discourse, one can find both people who defend curbing free expression and those who do not.

Even if one view does not exclude the other, in media utterances a gap between the two is oftentimes claimed, as we shall see below. The gap may have to do with differing analyses of a given society, i.e. a “clash of diagnoses”. Stage, who has studied the Danish coverage and media debate linked to the cartoon controversy, suggests that the main division occurs between “articulations, which focus on threatened freedom of expression and threatened tolerance respectively as the crux of the matter” (Stage 2011, 38, my translation). His analysis thus confirms that in Danish society as well rifts occur when it comes to how one characterizes the historic moment at which the crisis occurred, i.e. where is/was the main threat to a healthy and democratic society?

An additional aspect has to do with the distinction between freedom of expression and freedom of the press, not least due to media ownership and historical experiences through which we have seen how the media curb free expression (Steel 2012). Furthermore, where does the “press” end? Today, the word “media” represents diversity: “The capacity that a person has to air his or her views on a blog is of course significantly different to that of a corporate news organisation” (Steel 2012, 4). Implicit in Steel’s notion is an informal ranking, where mainstream media are on top, while the impact of participating in the blogosphere is associated with lesser attention.

In the terrorist case, an intermediate position may be suggested. For more than one year (2.09.2009- 25.03.2011), Anders Behring Breivik (ABB) participated actively at *document.no*, one of the main Islam-critical, if not hostile, right-wing websites in Norway, with a considerable number of visitors. *Document.no* consistently presents itself as a journalistic endeavour³ (see also Eide 2012). The terrorist thus had access to a well-visited website where he could air his views, and even suggested *document.no* to become a mainstream news medium⁴ to perform a “reverse-engineering” of cultural-marxist⁵ debate [...] techniques” (ABB 25.03.2011 on *Document.no*).

For this endeavour, I have used the search engine *Atekst/Retriever* and operated with search strings designed to capture most if not all articles in the nation-wide newspapers that combine “22 July” with “freedom of expression”. Each issue has been coded by categories, such as date, medium, source, genre, size, voice (position and gender), enabling us to distinguish important features of the coverage. Secondly, a careful reading of the textual sample was necessary to distinguish certain patterns that might be defined as discourses.⁶

The article also briefly analyses the debate in the first issue of the Norwegian Lawyers' journal published after 22 July.

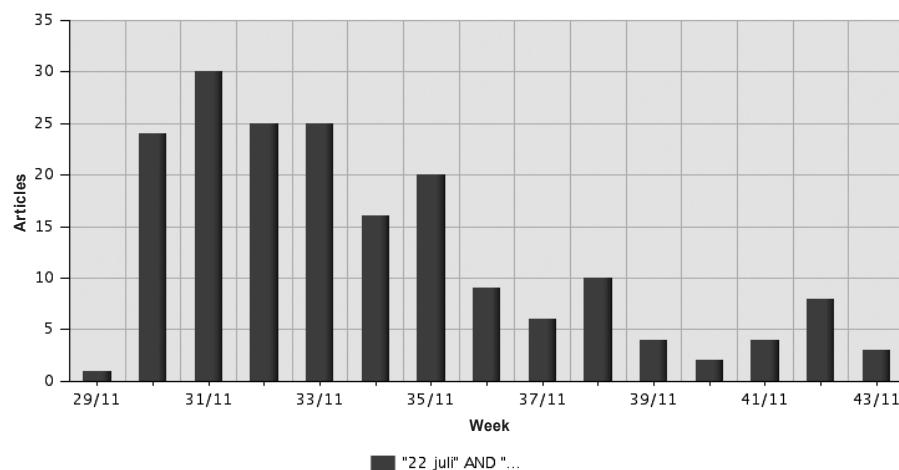
A debate initiated by one opinion article (chronicle) in Norway's largest newspaper, *Aftenposten*, is analysed. The article treats the development of freedom of expression in Norway, and was written by four persons with academic background. A close reading of this followed by a discourse analysis of the debate is the last part of the analysis prior to the conclusion.

Discourses of Freedom of Expression

The search for "freedom of expression" (involving both the Norwegian languages, i.e. both *ytringsfrihet** and *ytringsfridom**) combined with "22 July" generated 162 articles in all, with a maximum of nine published on 8 August.

Freedom of expression is primarily treated in the opinionated sections of the newspapers; 67 per cent of the articles are letters to the editor, editorials or opinion articles. Of these (107), 78 per cent are contributions from the audience, either as columns or larger comments, or as letters to the editor. Ethnic Norwegian men are overrepresented among the contributors, with 65 per cent, while contributors with an ethnic minority background constitute six per cent of the writers. Out of a total of more than 230 voices, almost two thirds belong to these four groups: academics (21 per cent), politicians (19 per cent), writers (14 per cent) and journalists (10 per cent), which indicates a rather elite-dominated discourse.

Table 1. "22 July" AND "ytringsfrihet" / "ytringsfridom"⁷ per week, and numbers, 23.07.2011 to 31.10.2011, printed newspapers



Despite the fact that freedom of expression is founded in the Norwegian constitution, as well as in the UN Declaration of Rights (Article 19), not all expressions are considered legal. As mentioned the Norwegian Criminal Code, seem incitements to violence as illegal, and in addition Article 135A (the so-called “racism article”) in the punitive law rules against discrimination. Although few have been prosecuted or convicted, the article has been cited several times over the past decade, both during the cartoon controversy in 2005-2006 and in the post-22 July debates. This legislation differs from U.S. legal principles, as there:

[...] even extremist political speech is protected because of the principle that to deny a wide range of political speech, even that which is offensive to some people, might according to some [...] give the state too much power and erode the core principles in the United States Constitution (Steel 2012, 19)

Thus, the role of the state – and its possible interference in people’s expressions – is defined differently in the U.S. On the other hand, practice reveals a different story: when it comes to freedom of the press, the U.S. is ranked clearly lower than countries in the Nordic region and many European countries⁸.

Just a few hours after the attack in Oslo, several mainstream newspapers closed their online debate forums or restricted their availability, fearing hateful entries. The long-term consequences have been some change of moderation practices: In *Verdens Gang*, the largest online newspaper in Norway, anonymous entries are now banned, while they continue to be allowed in *Dagbladet*, the other nation-wide tabloid (Elgesem 2012). In the early hours of the morning 23 July, the editors of *Document.no* gathered all ABB’s entries in one file and put them on their website.⁹

Refuse It or Fight It?

A couple of days after the terror took place, *Aftenposten*, the largest newspaper in Norway, asked the following question “How can we fight the ideology of Anders Behring Breivik?” to its Facebook followers. “By refusing to cite people like him” one of them replied. Another one wrote: “Stop giving human beings like [him] too much attention. I fear that the press and people on [...] Facebook are about to help Anders Behring Breivik attain his goal.” Two other followers: “Freedom of speech and candour: Rip arguments and attitudes to pieces. Discuss them to death.” [...] and “Meet them ‘head on’ We shall rip their ideology and all they stand for apart, and fight it.” (*Aftenposten* 27.07.2011. All these suggestions were published in the print version of the newspaper).

The answers to the initial question can be grouped into two different discourses concerning the practice of freedom of expression when it comes to extremism: the first two entries as warnings against the terrorist's and like-minded people's expressions by avoiding them since the terrorist craves attention; while the third and fourth one seem to adhere more to total openness, confident that extreme views, when uttered in the public sphere, will be rejected and gradually die out. The former appeals to editors to ignore such extremist views, while the latter emphasizes that all viewpoints should be allowed and met with solid arguments. Thus, the views on which measures might "help" the terrorist and his points of view also differ. As one of the above statements goes, giving him publicity is one way of helping. But this argument later met with other opposition:

It is almost against nature not to react with disgust when encountering such an action, but simultaneously it is tempting to serve the terrorist when it comes to the larger question. The terrorist can make us feel so distraught and unsafe that we are willing to vote for laws, introduce surveillance, and accept censorship in such a way that democracy is hurt. (Einar Øverenget: Words as weapons, *Dagbladet-magasinet* 27.08.2011)

The gap between genres – the first short and spontaneous Facebook comments just a few days after the terror, and the other one an opinionated text by a regular columnist more than a month after – can explain some of this difference, but as we shall see, the conflict is repeated.

The discourse advocating full freedom may also be labelled the *pressure cooker discourse*, as it sometimes suggests that a lack of access to media (and being marginalized) might be one of the motivations for the terrorist's deeds. This discourse on causality is met with a discourse of *responsibility*, which suggests rather the opposite: that discourses bordering on hate and discrimination are already rampant in the public sphere in general and in some media in particular, and as a consequence, the terrorist might have felt he had support – if not for all his deeds, at least for his views.

Weekly *Morgenbladet*, with a broad-based readership among the "chattering classes" asked 13 well-known individuals in the Norwegian public sphere: "How will 22 July change the debate in our society?" (*Morgenbladet* 29.07.2011). Among these individuals there were five academics, four politicians and four representing organizations, websites or think tanks (six women, seven men). None of them suggest legal curbs on expressions, but several, in particular most of the academics, mention social media and "unacceptable" utterances, while others voice their fear of censorship in the post-terror situation. Of the latter some agree with the former that anonymity should mostly be avoided.

This series of short interviews also demonstrate differing views concerning the (lack of) distance between speech and action. “It is a short distance from words to deeds, especially when it comes to the kind of hate rhetoric we see on some web spaces critical of migration”, says one philosopher. Editor of *Document.no*, where ABB was active, warns against this, by labelling it “guilt by association [...] If that pressure increases, people will withdraw from the public debate and this we cannot afford” (*ibid.*).

Secretary General of the Norwegian Press Association fears censorship, “if a lid is put on the debate, and this can happen again [...] Dissenters should be protected”, he says, while maintaining that celebration of violence and incitement to racial hatred is not acceptable. One parliamentarian from the Conservative Party says that “Freedom of expression neither can nor should be limited. Extreme attitudes must be met and fought in open spaces. This is best done in a free, unlimited exchange”. A leader from an anti-racist organization says that “doing something about the debate climate could be important to reducing discrimination”, and refers to research demonstrating a high degree of press items on migration and integration focusing on *problems*. One may see this journalist-generated exchange as a healthy demonstration of differing views in an early posttraumatic situation, but also as a debate where different groups of *victims* are highlighted. On the one hand, some are concerned with the presumably marginalized right-wing extremists, while others emphasize the groups traditionally defined as vulnerable, such as ethnic and religious minorities.

Lawyers' Disagreement

In addition to the mainstream press, discussions on how to manage freedom of expression also occurred in niche media among academics. One example is the Lawyer's Journal in Norway (*Advokatbladet*). In their August issue from 2011, several judicial issues were raised, such as the role of the terrorist's defence lawyer, possible future surveillance of potential terrorists, and media access for extremist views. The lawyers who were invited to comment seem generally to agree with the Prime Minister's statement on 23 July advocating “More openness. More democracy”, combined with warnings against increased surveillance such as that observed in the US post-9/11. Disagreement occurs when it comes to anonymous contributions to Internet debates. Supreme Court lawyer Cato Schiøtz is not worried about the terrorist's views being spread, but on the other hand:

Quite independent of the terror case, though, we should discuss what today appears to be the large pollution of the public debate – the anonymous exchange of views on the Internet and the personal har-

assment which is communicated via SMS. One thing is making oneself a spokesman for a fanatical celebration of violence – quite another matter is whether one should allow this anonymously (Schiøtz 2011)

He welcomes the way in which some media now demand a full name, and writes that this curb on free expression appears to be sensible (ibid.). Other lawyers in the same journal share his views, while a lawyer working for the Norwegian Journalists Union calls the right to anonymity “the security valve of free expression”, because it also includes protection of journalists’ sources. She maintains that editorial responsibility – with moderation before, when or after expressions are published – will “distinguish between serious, professional media with societal responsibility and unedited debates where it is mostly about shouting loudest or using harsh words” (Ina Lindahl Nyrud interviewed by Rønning, 2011). She is supported by the secretary general of the Norwegian Editors’ Association, who says that “it is more important than ever to enable all opinions to see the light of day so that they can be refuted instead of thriving in small, closed enclaves. Strictly seen it is not anonymity that destroys all the objective debates” (Nils Øy interviewed by Mathisen 2011).

Underlying this discussion is a debate on anonymity that rests on a professional journalism discourse versus an individual’s responsibility for her own utterances. In addition there may be differing evaluative views of the on-going Internet debates, be they comments on articles in net versions of mainstream media or blog discussions. While some see them as mostly valueless contributions with low degrees of substance, others may see them as a democratic outlet for those who feel they have no other ways of airing their views and frustrations. Related to this debate is the question of how to treat extremism and, particularly in the post-22 July situation, right-wing extremism.

Who Advocates Freedom?

One month after the terror, an opinion piece (“Unacceptable expressions”, 22.08.2011, Bangstad et al.¹⁰) occurred in *Aftenposten*. The four writers are of the opinion that, during the past decade, the debate in Norway was “particularly hateful”. They refer mostly to web debates, but also to the mainstream press. As examples they mentioned how Muslims in Norway have been called “quislings” and “Nazis” and have been represented as a threat to “Norwegian values”, and added that “many of us have been totally silent” while they emphasize the risk of being caught in a polarized language game. Furthermore, the writers iterate that freedom of expression is “not absolute” in any society, and they address the relationship between speech and action: “To insist that there is an absolute division between words and deeds is accord-

ingly to distance oneself from any moral responsibility for the reality that may emerge and has emerged from hateful expressions" (ibid.).

This piece also doubts the assumption that the mass murderer would have refrained from his brutal deeds if he had had more access to mainstream media¹¹. They suggest the opposite: "[...] it is likely that his understanding of reality has been strengthened by a public sphere where the limits of hateful expressions have been stretched very much during the past decade" (ibid.). Thus, they reject the *pressure cooker* discourse, and instead seem to support the *responsibility discourse*, and within this responsibility for one's fellow human beings: "one in one's exertion of freedom of expression sees to the consideration for and the rights of others." The writers refer to Article 135A on discrimination in the Punitive Law and appeal to editors and moderators to stand firm against hateful expressions and to "say that not all expressions should be attributed the same value" (ibid.), thus also distancing themselves from a moral relativist discourse. Last, but not least, seen in the light of the distinction between freedom of expression and press freedom, they claim that the Freedom of Expression Commission, in its report (2000), largely "individualize responsibilities for content and style of utterances", which, according to them, entails that powerful editors and moderators ignore their responsibilities. They conclude that "certain hateful utterances from judicial and moral judgments are not acceptable". The chronicle underlines all citizens' responsibility by referring to the vulnerable and taking them into consideration in public debates, but also asks for more *editorial responsibility* instead of – as they see it – prominent representatives of free expression values leaving most responsibility to the individual level. This discussion became livelier after it was made clear that the majority in a committee whose mandate it was to discuss whether or not a new Law on Media Responsibility was needed had concluded that there was no need¹², while people in the press organizations tended to support the minority and thus the need for judicially founded editorial responsibility in the face of increasing media fragmentation.

A Truncated Right?

This item generated debate in *Aftenposten*, but also triggered debate in other parts of the mainstream press, partly probably because the writers placed themselves in a clear-cut position, and partly because they are all well-known and high-profile individuals in the Norwegian public sphere. The first reaction was a smaller comment from a well-known media person ("Truncated right to expression", *Aftenposten* 25.08.2011, Magne Lerø), referring to Article 135A in the Norwegian punitive law, "which actually bans racist and discriminatory expressions. If punishable expressions have been published during recent

years, everyone should have assumed the responsibility to report the issue" (ibid.). This phrase may be seen as a direct answer to the four writers' claims of collective silence in response to the offences of the recent past. According to Lerø, freedom of expression is about voicing an opinion in the public sphere even if it offends others. "The limits are set, among other things, at incitement to violence, hatred and discrimination. That is punishable." He furthermore states:

The multicultural society creates tensions in all countries. The answer to the challenges facing us is not more surveillance and curbed freedom of expression, but to live with disagreement and tensions, keep our calm, preserve values, regulate anonymity and reject insensitivity to using the word as a weapon. (ibid.)

By referring to the "multicultural society", Lerø highlights the existence of the diaspora. In the cartoon controversy, many media across the world emphasized the fact that more than 20 million Muslims are living in Europe. A substantial proportion of new citizens in Europe have migrated from countries with a low degree of both freedom of expression and press freedom, and in many of them blasphemy laws are still in use (see, for example, Eide 2011).

In Norway, ranked at almost the top globally when it comes to Press Freedom,¹³ the Blasphemy law will be abandoned, although the formal procedure takes time. Article 135A in the punitive law was introduced in Norway in 1970, and since then not many judgements have been made primarily concerned with this article. Those cases deemed unlawful mostly have to do with outright extreme racist statements, although "racism" as a word is not used in the article as such. The lack of application during recent years may thus (also) be due to lack of confidence in the fruitfulness of issuing complaints, because they have been overruled by reference to the freedom of expression legislation in the Constitution (§100). A removal of Article 135A was also suggested in the post-22 July debate (Anders Heger, interviewed in *Klassekampen* 30.08.2011). Lerø seems to fear that consideration for vulnerable groups would lead to curbs on free expression and advocates that disagreement and insensitivity be dealt with through open exchange.

Another comment treats the initial four writers in a harsher manner. Under an opinion piece headlined "Dangerous lack of clarity" (*Aftenposten* 26.08.2011, Michael Tetzschner), a parliamentarian from the Conservative Party questions some of the conclusions in the previous piece, hinting at their elitist attitudes. "The underlying question is almost fully expressed in the critique of the Freedom of Expression Commission: How are "we", the adult, grown-up, decent human beings going to limit the expressions of "the others", the immature, and the indecent" (ibid.). He furthermore criticizes the four writers

for promoting a caricature of free expression by stating as a fact that “every expression is given the same value”, as that entails having no values at all. His own argument is that “When good and bad ideas start up, it is not desirable that all should win, but for the bad ones to be rejected [...] The problem is not the socially unacceptable utterances, but what judicial limits, in addition to norms for good behaviour, should constrain freedom of expression”. This writer suggests that by questioning whether it is a human right to express oneself in the public sphere, the four initial writers “downgrade freedom of expression as a value” (*ibid.*) as well as suggest that freedom of expression will be less important in the future.

Elite Discourses and Enlightenment

From the latter contribution, we can discern an *anti-elitist* discourse, blaming the four initial writers for situating themselves on a pedestal as guardians over the less enlightened ones. In addition, this author seems to fear curbs on free expression as a more imminent danger than streams of intolerance, hate speech and racism.

One of the initial writers, in an article in another large daily (which may be seen as part of the same debate), promotes a different anti-elitist discourse leaning more towards the vulnerable sections of society. Vetlesen, a philosopher, refers again to the Freedom of Expression Commission and its leader (a professor of history), and asks with what right he can determine the kinds of expressions we “must tolerate”. Furthermore he asks: “have those who are never subject to discrimination and abuse more rights than those who are [abused] to decide on a limit of tolerance? Or should the authority be distributed in the opposite manner, to the victims?” (“From abuse to killings”, *Klassekampen* 27.09.2011, Arne Johan Vetlesen.) Thus, these two *anti-elitist discourses* defend different non-elite people’s rights: the potential and actual victims of racism and discrimination – or those who harbour (discriminatory or racist) views that are not considered appropriate and are subsequently/ supposedly overlooked by the elite, be they academics, editors or other members of the “chattering classes”. The latent sentiments towards ‘Muslim-looking immigrants’ were expressed in a number of cases in the 22 July hours between the bombing of the government quarters and the time (approximately 10 pm) when the mass murderer’s identity was revealed. Several cases of physical and verbal attacks and harassment were reported.¹⁴ The claims of lack of access for (extreme) right-wing people with critical views on Islam/Muslims still need to be investigated using solid media research methodology. The overview of access from various sources in the coverage of freedom of expression in the material upon which the present chapter is based shows that the proportion

of people with a migrant background – as far as this can be measured – was lower than their proportion in the population (see below).

Nevertheless, it is necessary to acknowledge that (leaders of) minority groups can also misuse power (Stjernfelt 2009). Stjernfelt feels that a lack of this recognition effectively protects "[...] certain groups against criticism, so that it is in bad taste to investigate, for instance, whether certain immigrant groups obstruct the human rights of some of their own members" (Stjernfelt 2009, 133).

As mentioned, we may view these entries as concentrating on different victim positions – positions that have indeed competed for attention in the post-22 July debate. The victim position – though traditionally considered a position without much political or cultural capital – may sometimes inherit a position of power fuelled precisely by the victim status (Kapelrud 2008), particularly if the position is recognized by many. Various victim positions – justified or not, only solid research can decide¹⁵ – may invoke guilt on the part of those whose access to media is more or less taken for granted or indeed among some who may feel guilty about their discriminatory behaviour. And guilt – whether justified or not – as it belongs to the area of emotions more than pure rationality, may change or modify people's attitudes – for example editorial practices. One year after the terror, a prominent editor and columnist refers to the previous leader of the Norwegian Defense League, who stated during the court hearings, that after 22 July 2011 he has had much more access to the media. "This is probably a truer description of the debate than that the debate has been gagged" (Cathrine Sandnes interviewed in *Klassekampen* 16.07.2012).

In weekly *Morgenbladet* the debate editor treats the question of guilt and victim status by referring to the original article by the four writers, and represents the terrorist and his sympathisers, as follows:

Those who now, at their kitchen tables outside the official Norway, say that they "agree a little with Breivik" do of course not agree with what he has done. But they share his feelings of being without representation in the public sphere. Much worse than Breivik having misguidedly thought that he acted on behalf of many, is if he really has experienced his situation in the way he claims he has. This entails that he is pressurized beyond all reasonable limits, by a conformity that does not leave space for his deepest convictions ("The new thought police", *Morgenbladet* 9-15.09.2011, Marit K. Slotnæs).

This writer fears various measures, suggested by writers in the aftermath of 22 July, that would lead to less openness and more narrow participation, and her comments on ABB suggest adherence to the *pressure cooker discourse*. In

the article, she refers to the initial chronicle written by the four academics and voices her fear that, with their guidelines for public debate, it will be “dull” (*ibid.*). Furthermore she discusses one suggested guideline for debate, which is that one should not write anything that one could not say to another person face to face, as a way of confusing private encounters with public sphere debates, because in the latter situation, one would not use the third person, and in private ‘I – you situations’, one would take care not to insult or provoke.

Another approach to victimhood is taken by one of the commentators in another daily (“The struggle about the narrative”, *Dagsavisen* 1.10.2011, Anders Heger). He writes that the Islam sceptics are the only ones in the public debate who have won the right to confuse opposition with gagging. “For years they have sulked about how impossible it is to debate immigration in this country while they have done so increasingly loudly, on an increasing number of arenas and using a steadily harsher vocabulary.” And when the bomb exploded the ones to blame were not those who spoke like him [the terrorist], but those who opposed such rhetoric, he concludes, obviously fearing that the victorious narrative may be the *pressure cooker* discourse.

In spite of disagreements, most debates in the aftermath of 22 July seem to agree that freedom of expression has not been practiced well or widely enough to accommodate all views. But which views are really marginalized?

A report recently concluded that people with a migrant background had much less access to media than their proportion of the Norwegian population would suggest. Even if the media have no obligation to achieve such proportional representation, it is interesting to note that only two per cent of the sources in eight Norwegian newspapers have a migrant background compared to more than ten per cent of the population¹⁶. In the sample of articles on freedom of expression post-22 July, the percentage is six.

Furthermore, the report suggests that media coverage of migrant-related questions has the same proportion of “resource focus” (less) and “problem focus” (more) before and after 22 July, and in addition, “editorial comments, editorials and letters on migrant-related questions have more focus on *problems* shortly after 22 July, but less on *crime*”. Last, but not least, the report finds that, immediately after 22 July, the proportion of persons with a migrant background who were invited to speak in the media is the same as before. On the other hand, when they do get to speak during these days, it is more often as “ordinary citizen” and less in the “role of ‘suspect’ or ‘victim’” (*ibid.*). This indicates a de-ethnification or “normalization”, where one’s Norwegian-ness, regardless of skin colour, religion and cultural features, is taken seriously.

The terrorist obviously has hostile views towards migration and migrants. In his entries on *Document.no*, multiculturalism carries much of the blame for the presumed ills of Norwegian and European societies (Eide 2012). Anders Behring Breivik does not explicitly use the concept “freedom of expression”,

but he addresses the question indirectly in an argument with an adversary: “You are only concerned with paralyzing all debate in the society, gagging all who do not share your opinions, and exercising social control in line with the conservative Muslims in Grønland.” (ABB at *document.no* 25.01.2010).¹⁷ This and other entries situate “dissenters” or “cultural conservatives”, as ABB frequently calls himself and like-minded persons, in a victim position, with the “politically correct”, i.e. “cultural Marxists” or “multiculturalists” as the main enemy.

Conclusion

In the above, I have tried to show that differing analyses of current realities are connected to different ethical considerations and views on freedom of expression in post-22 July Norway. The competing discourses referred to above are perhaps also to some extent linked to another competition, i.e. the one about being the public arena most favourably inclined to accommodate all kinds of expressions. This may be analysed as part of the on-going intensified competition for online readership and ad funds. Opinionated genres seem to conquer larger proportions of the media outlet, both print and online, as views increasingly seem to constitute news in the traditional press.

The question is whether this competition may lead to a disregard for editorial ethics (in discussions about pre-moderation and the right to remain anonymous in online debates) and, in turn, threaten to overshadow the discussion on how to develop a free society in which racism, discrimination and racist-motivated terror do not threaten people’s lives and livelihoods. There is no consensus in Norway on how to work towards such a society or on the urgency to do so. What we have seen, and increasingly so in the post-terror period after the first 100 days, is (also) a battle for an adequate diagnosis of Norwegian society and its public sphere (too restricted or increasingly allowing hate speech?), accompanied by discourses of blame for what happened on 22 July.

Rønning observes “a possible contradiction between the promotion of human rights as a full complex of rights and the protection of one right, namely freedom of expression. However, to secure the other rights presupposes that there is an open debate over all aspects of their role in society.” (Rønning 2009, 3). In other words, is it fair to say that a debate with few or no restrictions is best fit to guarantee a society that is fair for all? According to the analysis of the post-22 July press material, the majority answer to this question seems to be yes. But as the material shows (above), most participants in this debate have been elite persons, whether academics, writers, politicians or members of the press. If this is the case with mainstream media debates and coverage in a situation of national trauma, the question arises of how to treat the increasing occurrence of “parallel debates” – some occurring between

elite persons in print mainstream media and major TV outlets, while others, substantially less listened to or read, take place on the Internet, be it in the debate outlets linked to traditional media, in popular blogs or in so-called echo chambers.

Elite dominance in mainstream media is nothing new. But even if the web now, unlike twenty years ago, offers a wide range of options for those who want to air their views, an unofficial ranking of media may be at work. The first category would still be mainstream print newspapers and main TV channels, the second popular debates linked to mainstream media websites; and the third category media: blogs, Facebook groups and other more limited spaces. In any society such a ranking may still produce feelings of being left out, of belonging to the underdog category. Further research needs to address the different streams of online and social media to enable us to understand the wider history of the post-22 July media debates and coverage. It may also be true that the first 100 days is a too narrow time span to evaluate the coverage, as in the early phases of the after-shock people avoided harshness to a certain extent.

Hindsight

The Sudanese veteran journalist (with a long history of being jailed for his work), who in Bali supported a global code of ethics for journalists, declared that it was bound to come in the foreseeable future. He argued that people's dignity is too precious to be attacked under the banner of freedom of expression. The underlying argument was that we can no longer talk of national public spheres, as most utterances – and visual ones in particular – thanks to modern technology easily transcend borders and boundaries (see also Eide 2009). But the argument may also be turned around. If our living in transnationality implies that conflicts between different ideas about free expression, and for example blasphemy, are becoming more intensified, so will the urge to stand by the fundamental rights of democracies. Only incitement to violence and outright racism may be stopped by the law. And in late modernity, the myriad of media channels offers space for more voices than ever before.

Simultaneously, editorial responsibility will be challenged. Transformations of the media scenes make for a more chaotic era, where elites will no longer be in a position to control the media (McNair 2006). Commercial concerns will opt for sensationalism in mainstream media, with more priorities being given to extremist voices, while other voices may experience a process of backgrounding or silencing. Drawing the line against hateful speech and incitement to violence may at times be difficult, particularly since the diversity of diagnoses of the post-22.07 Norway is bound to remain, as is the diversity of opinion when it comes to diversity politics and free expression.

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Notes

¹ Source: http://www.regjeringen.no/nb/dep/smk/aktuelt/taler_og_artikler/statsministeren/statsminister_jens_stoltenberg/2011/sjokkerende-og-feigt.html?id=673127 Accessed 29.01.2013. All translations from Norwegian are my own.

² See, for example, the debate following the film documenting the court case against the French magazine Charlie Hebdo. http://www.allocine.fr/film/fichefilm_gen_cfilm=135832.html <http://www.rue89.com/2008/09/19/cest-dur-detret-aime-par-des-cons-un-mauvais-film> Accessed 29.1.2013

³ According to their own definition a website where journalists from Norway and other countries write about current topics, especially concerning international politics. They claim to be the first journalistic website using the weblog as a format (since 2003). Source: <http://www.document.no/om/>

⁴ Breivik 29.10.2010 on *Document.no*.

- 5 For Breivik, it seems from his entries on this website as if “multiculturalism” and “cultural-marxist” are synonymous concepts.
- 6 For this part, I am grateful to research assistant and MA student Anja Naper for her work with coding the material and suggesting some of the discourses.
- 7 There are two official languages in Norway, and although the first one is dominant, the search covering the other one as well generated 7 more stories.
- 8 The U.S. is ranked 47 among 179 nations reviewed by Reporters Without Borders (2011-2012), while Norway shares the top position with Finland. Source: <http://en.rsf.org/press-freedom-index-2011-2012,1043.html> Accessed 10.02.2013. There are few rankings of Free Expression in general, most rankings treat Press Freedom.
- 9 See <http://www.document.no/anders-behring-breivik/>
- 10 This article is signed by Sindre Bangstad and Thomas Hylland Eriksen, both anthropologists; by Bushra Ishaq, writer, medical doctor, and Arne Johan Vetlesen, philosopher.
- 11 In an interview on 11 November 2011, the editor of *document.no*, Hans Rustad, warns against linking words with deeds, and asks «Who will define which words kill?»; while a critic says that he avoids reflecting more deeply on why the terrorist found a home on his website. (*Klassekampen* 11. November 2011, pp6-7: “Did words kill on 22 July?”)
- 12 The committee treated “Freedom of Expression and Responsibility in a New Media Everyday” <http://www.regjeringen.no/nb/dep/kud/dok/nouer/2011/nou-2011-12/2.html?id=647022> See also <http://www.journalisten.no/node/35086>
- 13 In the 2012 report, Norway shared 1st place on Reporters without Borders’ ranking, in the 2013 report, Norway was ranked third, after Finland and the Netherlands. Source: <http://en.rsf.org/press-freedom-index-2013,1054.html>
- 14 A report on this harassment was issued by The Norwegian Centre Against Racism: <http://www.antirasistisk-senter.no/index.php?find=22+juli&x=5&y=3>
- 15 This concerns in particular position (2), as there is ample research in Norway at least suggesting that ethnic minorities are overlooked in the media, or very often connected to negativity (crime, abuse, conflict, problem). See Fjeldstad & Lindstad 2005, Eide & Simonsen 2007.
- 16 The report can be found on <http://www.imdi.no/Documents/Rapporter/Medieanalyse-BLD122011.pdf>. The way in which migrants are defined here is as either having migrated to Norway or having parents who are immigrants.
- 17 Grønland is a part of inner Oslo with a high proportion of immigrants. In his rhetoric, the terrorist uses “cultural Marxist” as synonymous with adherents of “multiculturalism”, and both are accused of destroying Europe.

The Scope of Freedom of Information

To What Legal Bodies and Functions Does the Right of Access to Information Apply?

Oluf Jørgensen

For some time it has been common practice to make a distinction between the public and private spheres, and the distinction is fundamental in political discourse as well as in legal, economic and politological thinking. The boundary between public and private remains important and imbues the laws that frame public information policy. Exceptions to freedom of information based on content, e.g., information relating to individuals' private life, business secrets and private communication, will be treated later in the research project, "Access to Official Information in the Nordic Countries". The prime focus in the present article rests not on the exceptions, but on the legal bodies and functions that are included in freedom of information legislation.

It is rather easy to identify the core institutions of the public sector in the framework of the classical trichotomy: Parliament has legislative power; national and local government, including the Cabinet, are central to the executive power; and justice is administered by the courts.¹ But a number of bodies are more difficult to classify, as they are located in a 'grey zone' between the public and private sectors, a zone which has expanded considerably over the past several decades.²

Freedom of information laws in the Nordic countries take their starting point in an organization criterion; all the activities within any given organization fall either within or outside the scope of the law providing for the right to access. Functional criteria play a certain supplementary role. Functional criteria emphasize the character of the tasks or duties in question. Activities that are deemed to be official are considered to fall within the scope of freedom of information, regardless of whether they are undertaken by private or semi-public bodies. At the same time, it is entirely possible for functional criteria not to be applied to other activities performed by the body in question. Key questions in the application of both sets of criteria are: How strong should the

relationship to the core of the public sphere be, and what aspects should be accorded importance in the grey zone?

There are significant differences in how freedom of information laws are applied in the respective Nordic countries, in relation to both core institutions and bodies in the grey zone. There are scattered instances where functional criteria are applied to bodies in the private sphere – particularly in the Norwegian laws relating to environmental information and product control.

The following pages discuss the areas of society to which the principles of freedom of information and obligatory transparency are applied. The conventions, laws, rules, court decisions, etc., referred to in the text may be accessed via links on the research project's home page: <http://www.djmx.dk/offentlighed-i-norden>.

International Rules

Freedom of information and, therefore, the right of access to official information have assumed prominence in recent years and now are considered part of the right to freedom of expression.

The United Nations

The five Nordic countries are among the 167 member nations (2012) who have pledged to observe the United Nations International Covenant on Civil and Political Rights (1966). Article 19 of the Covenant stipulates freedom of information as a constituent aspect of freedom of expression.

In 2011, the UN Human Rights Committee (UNHRC) adopted a binding interpretation of article 19, whereby all individuals have the right to seek and receive information. Exceptions to this principle shall be set out in law and shall only be valid if they serve to protect “the rights or reputations of others, national security, public order, or public health and morals; and they must conform to the strict tests of necessity and proportionality”.

The UNHRC specifies the scope of article 19 with regard to the right to information:

“[A]ll branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party. Such responsibility may also be incurred by a State party under some circumstances in respect of acts of semi-State entities.”

The Committee adds that the organizational criterion shall be supplemented by a functional criterion so as to “include other entities when such entities are carrying out public functions”.³ The Committee did not specify what criteria should be decisive in determining whether or not a semi-public body shall be included, or what defines a “public function”.⁴

The Council of Europe

Like the UN Covenant, Article 10 of European Convention on Human Rights stipulates that freedom of expression may only be limited in order to protect the objects specified in the article, and that concrete measures to limit it can only be implemented when it is necessary in a democratic society. Freedom of information is not stipulated as clearly as in the UN Covenant, and only in 2009 did the European Court of Human Rights establish that the right to information is a necessary precondition for research and for the press to impart information.⁵

In 2008, the Council of Europe adopted the first international convention of general importance regarding the right of access to official documents, and the convention was signed in Tromsø in 2009. The Tromsø Convention stipulates a set of minimum conditions and sets out a full list of considerations, both public and private, that may constitute grounds for exemption from public access. Exemptions can only be made after an assessment of the likelihood that access would impinge on these considerations, and a weighing of that likelihood against the interests of transparency.⁶

Once the Convention has been ratified by at least ten of the Council's 47 member states, it will be binding for all those that have ratified it. Progress has been slow on that account. In April 2013, only six member countries had ratified the Convention, and among the five Nordic countries, only Norway and Sweden. Swedish ratification required a principal proviso inasmuch as the Swedish rules do not provide for the right of appeal when the highest authority (the Cabinet) has denied access.⁷

The European Union

The Nordic countries have different relationships with the European Union. Denmark, Sweden and Finland, including Åland, are members of the Union. Norway and Iceland are not member states, but are affiliated by treaty with the inner market (EES). Greenland and the Faroe Islands are neither members of the Union nor affiliated with EES.

The right of access to official information is included in the Charter of Fundamental Rights of the European Union, adopted in 2000, and rules regulating access to official information were set out in 2001.⁸ The rules apply to documents held by European Union institutions, including documents submitted to the Union by Member States. EU has no power to set aside national legislation on access to information, and access to EU documents that are sought via a national authority in a Member State or other third country is regulated by national legislation in the country in question.

National Legislation

There are significant differences in how the laws providing for freedom of information in the five Nordic countries are constructed.

Constitutional Law

The Law on Freedom of the Press (2:3), one of four laws that make up the Swedish Constitution, does more than declare the principle of freedom of information. Eighteen articles are devoted to the right of access to information (cf. TF Ch 2).

The Constitutions of Finland and Norway provide for freedom of information as an overarching principle. In Finland, the Constitution (art.12) sets out the right of individuals to access official documents, unless for compelling reasons such access is limited in law. In Norway the principle of access to official information is codified in connection with the freedom of information and freedom of expression in the Constitution (art. 100), and in specific provisions pertaining to environmental information (art. 110 b). At present, the process of drafting a new Constitution in Iceland, in which access to information will have a prominent position, has come to a halt in the political process.⁹ The Danish Constitution provides for transparency in the system of justice, but says nothing about access to information in administrative and political bodies.

Freedom of Information Legislation

The Swedish Law on Freedom of the Press contains a full list of grounds that can lead to constraints on freedom of information and stipulates that such constraints shall be set out in, or have their basis in the Public Access to Information and Secrecy Act, which regulates access to official information and obligations of confidentiality.¹⁰ The Act contains specific rules for the respective branches of government – more than 400 articles in 44 chapters.

Comprehensive amendments to the Finnish law pertaining to freedom of information were introduced in new legislation in 1999.¹¹ Many special rules were repealed, but some rules separate from the law on access to official information remain.

The Danish law on access to official information was introduced in 1970-1971 and amended in 1985. A new law on access to official information is adopted by Folketinget in 2013 on the basis of the report of the Official Information Commission in 2009.¹² There are still numerous exceptions and constraints on access to information spread throughout the body of Danish law. The Official Information Commission identified no fewer than 65 such special rules in 2009.

New Norwegian legislation on access to official information was adopted by Stortinget in 2006 and took effect January 1, 2009.¹³ A number of exceptions in other laws and rules concerning secrecy still limit access to official documents in certain contexts.

In Iceland, access to official documents is provided for and regulated in the new Information Act from 2012.¹⁴

Åland, Greenland and the Faroe Islands each have their own laws on access to official documents for matters relating to self-government. Åland's law dates back to 1977¹⁵; The Faroes' back to 1993¹⁶; and Greenland's to 1994.¹⁷ Administrative functions carried out by or for national authorities in Åland are regulated by Finnish law; in the Faroe Islands and Greenland such functions are regulated by Danish law. Åland's law on freedom of information differs considerably from the Finnish law, whereas the laws in the Faroes and Greenland, respectively, are essentially consonant with the previous Danish law from 1985.

The Core of the Public Sector

Sweden

The fundamental framework for the right to access to official information in Sweden is set out in the Law on Freedom of the Press (TF). It is not very specific as to the areas to which the right applies, stating only that it applies to "authorities" (TF 2:3).

The term "authorities" in the Law on Freedom of the Press is presumed to be the same as that in the Law of Government, another of the four Constitutional laws.¹⁸ The law covers the Cabinet and the bureaucracy at national, regional and local levels. Local government agencies and other public sector institutions are also covered. Finally, local sectoral boards of elected officials are considered "authorities" and are included, as well.

The top political organs of central, regional and local government are not considered authorities, but are treated like authorities (TF 2:5). Thus, Parliament (Riksdagen), County Boards and municipal councils are all subject to freedom of information requirements.

The courts are considered authorities, and the rules applying to public access to information apply to courts of justice, administrative courts and special courts, such as the Labor Court.

Finland

The Finnish law on access to official information applies to authorities, and the bodies that are designated as authorities are specified in the law (art. 4).

Government administrative bodies – on national, regional and local levels – are subject to the law, as are government executives and executive bodies, including the President, the Council of State (Statsrådet) and members of the Cabinet (art. 4, 1, 1). Government-owned utilities and agencies are included, as are a variety of other public bodies that perform services (art. 4, 1, 3).

Local and regional bodies are included (art. 4, 1, 4), including political decision-making bodies (e.g., city councils and sectoral boards) and administrations and institutes. The accountants employed to examine municipal finances are included, as well.

The law on access to official information does not cover the Parliament, Eduskunta, but the administration of the Parliament is covered (art. 4, 1, 7). Both the Finnish Constitution and parliamentary Rules of Order contain rules providing for access to information relating to the legislative process in Parliament and the work of parliamentary committees, etc.¹⁹

The law applies to the courts and other organs of justice (art. 4, 1, 2), including courts of justice (district courts, courts of appeal and the Supreme Court), administrative courts (County Administrative Courts and the Supreme Administrative Court), and special courts, such as the Insurance Court.²⁰

Denmark

The Danish law providing for access to official information covers bodies in the public administration (art. 2). It applies to bodies in the national bureaucracy, including the ministries and the ministers. Local and regional administrative bodies are included, as are political bodies, institutions and agencies.

The law does not cover the Parliament, Folketinget.²¹ Neither are the courts covered. The Administration of Justice Act contains rules for public access to meetings, and to documents relating to court cases. Other aspects of the courts administration – e.g., purchasing, matters relating to personnel – are not open to public scrutiny.

The new law on access to official documents does not include the Folketing or the courts, either.

Norway

The Norwegian Freedom of Information Act applies to public administration at all levels – national, regional and local (art. 2, 1 a). The political leadership, from the Cabinet to municipal councils, are included, as are administrative bodies, e.g., ministries, regional bodies of the national administration and government at regional and local levels. Institutions and agencies that are part of the public administration are also included.

The Parliament, Stortinget, is not included in the scope of the Act, but the Parliament has adopted special rules for access to parliamentary documents, including administrative documents.²²

Documents relating to court cases fall under the special rules relating to the administration of justice, but all other aspects of the courts' work, such as personnel matters and purchasing, fall within the scope of the Freedom of Information Act.²³

Iceland

The Icelandic law providing for access to official information applies to all bodies in the public administration, including the political leadership and institutions and agencies (art. 2).

The Parliament, Altinget, is not included in freedom of information legislation.²⁴ Neither are the courts subject to the law. Transparency in court cases is provided in the Constitution, the Courts Act and the Administration of Justice Act. The administration of the courts is not subject to any provisions for transparency.

Bodies in the 'Grey Zone'

A wide variety of public functions and services is provided by bodies in the area between the public and private sectors.

Sweden

Swedish law makes a distinction between public authorities and civil authorities (*enskilda*). The distinction is based on whether the body is founded in law, its activities are regulated in law, or its activities have a governmental character. Furthermore, whether the directorate is appointed by authorities, the body is publicly financed, or is otherwise subordinate to the government. For example: the management of employee funds (löntagarfondsstyrelse) is considered an authority, whereas the Swedish Trade Council is not.²⁵

Companies, associations and foundations are not considered public authorities. Companies, trading companies, economic associations and foundations in which municipalities and counties exert decisive influence, however, fall within the scope of the Law on Freedom of the Press (TF 2:3). The influence of national authorities over these bodies does not have definitive significance. The criterion for inclusion is fulfilled when municipalities or counties, individually or acting jointly:

- 1) own or control shares in the body that constitute more than 50 per cent influence over its operations;
- 2) have the right to appoint a majority of the board of directors or like body; or
- 3) in the case of trading companies, bear full liability for the company.

Semi-public authorities can be subject to freedom of information rules, as set out in an annex to the Public Access to Information and Secrecy Act. Application of the rules may be confined to portions of the authority's activities. A good number of educational institutions organized as private entities are subject to the freedom of information requirement.

Finland

Independent public bodies – e.g., the Bank of Finland, the Social Insurance Institution and the University of Helsinki (Helsingin Yliopisto) are subject to Finnish freedom of information legislation (art. 4, 1, 5).

The law does not generally apply to semi-public bodies, such as publicly owned companies, but the organizational criteria in the law have been supplemented with a functional criterion, with the result that public services and administrative functions that are undertaken by private entities (companies, foundations, associations, etc.) fall within the scope of the law (art. 4, 2).

Denmark

The new law on access to official information specifies that it will apply to autonomous institutions and funds that are either founded in law or on the basis of law (art. 3, 1, 1). This means, for example, that labor market organs like the Supplementary Pension Fund (ATP) and the LD Fund for cost-of-living adjustments (Lønmodtagernes Dyrtsidsfond), and many educational institutions will remain open to public insight. Autonomous institutions, funds, associations, etc., that are subject to close public regulation and/or supervision are subject to the law (art. 3, 1, 2).

According to the new law, companies will as a rule be subject to the law if more than 75 per cent of their shares are controlled, directly or indirectly, by Danish public authorities (art. 4). Individual companies may be exempted by the responsible minister, provided (1) that they do not perform public administrative functions, and (2) that the greater part of their activities are open to market competition. Publicly quoted companies are exempted.

National interest organizations representing local and regional government (Local Government Denmark and Danish Regions) are included in the new law (art. 3, 1, 3).

The law on access to official information apply to utilities providing electricity, fossil gas, and centrally generated heating (art. 3, 2). The requirement of transparency is confined to the operational level, whereas the companies' top management may remain exempt. In the case of providers of electricity and heating, there is a threshold capacity, so that smaller companies are excluded.

Norway

The law providing for access to information applies to semi-public bodies over which the public sector exercises dominant influence (art. 2, 1 c and d). Two organizational criteria are applied to determine 'dominant influence'. According to the first criterion, any body in which government – national, regional or local – has ownership that yields a majority of the votes (art. 2, 1 c) falls within the scope of the law. 'Influence' is measured in terms of the cumulative influence of all public sector bodies, and can be exercised directly or indirectly.

According to the second criterion, a semi-public body is subject to the law if government at all levels has the authority to appoint more than half of 'voting members' of the body's top management (art. 2, 1 d). This criterion, too, focuses on the cumulative influence of all public service bodies, including influence via another company.

Typically, the first criterion will be relevant to companies, and the second will be applied to foundations. Both criteria focus on the potential ability of the public sector to dominate the body, not the actual exercise of that influence. If any of the criteria of dominant influence is fulfilled, the law will in principle apply to the whole of the company's activity, including institutional operations, business operations and personnel management.

Some semi-public bodies over which government exerts dominant influence, however, fall outside the scope of the law on access to information, namely, bodies that have commercial operations that compete on the open market with privately owned businesses (art. 2, 1, 2). Competition on the part of other public sector entities does not qualify them for exemption. A majority of the body's activity shall be open to market competition. A/S Vinmonopolet, the state-owned monopoly wholesaler of wine and spirits, is not exempted, despite the fact that the company's products can be purchased in privately owned supermarkets throughout the country. Neither is the Norwegian railroad corporation exempted, because the competition from other means of transportation – automobile, bus and air – is not direct. The commercial competition criterion means that the government-owned companies, Statoil (oil) and Telenor (telecom), fall outside the scope of the law.²⁶

Regulations that accompany the Freedom of Information Act allow for exempting other semi-public bodies in which the public sector exerts dominant influence or exempting certain classes of documents of such bodies. Conversely, the scope of the law may be extended to cover other semi-public bodies.

Iceland

According to the new law, companies in which the government or public sector bodies control 51 per cent or more of the ownership are subject to the

law (art. 2). A company may be exempted from the law by the responsible minister if the greater part of the company's operations are open to market competition. The Prime Minister's office shall compile and maintain a register of the companies that have been granted exemptions, and all exemptions shall be reviewed at three-year intervals.

Public Functions Performed Outside the Public Sector

Many public functions are outsourced, i.e., performed outside the public sector on contract from government authorities or on some other basis. In most cases, the authority retains some measure of responsibility for the service, etc., supervises its execution, and pays for it.

Sweden

Tasks performed outside the public sector that are listed in an annex to the Public Access to Information and Secrecy Act are also subject to the Swedish rules providing for freedom of information. Among the many functions specified in the annex are the vehicle safety inspections performed by AB Svensk Bilprovning. The records relating to disbursements and revenue collected by unemployment insurance funds are subject to freedom of information rules. The administration of public funds received by organizations like national-level adult education and sports federations is also covered.

In certain cases, documents held by a private entity are subject to freedom of information rules. For example: When a private consultancy is engaged to receive and process applications for employment in the public sector, the public body in question is required to produce documentation of the selection process from the consultancy, if requested.²⁷

Municipal governments that outsources a function to a civil body shall stipulate in the contract, that the civil body reports some information of its execution of the function.²⁸

Finland

The Finnish law providing for freedom of information (art. 4) introduces a functional criterion to complement organizational criteria. Public functions performed outside the public sector by civil bodies, organizations or individuals are included when public power is executed on the basis of law or statute (art. 4, 2). The Act applies to the execution of public functions, but not other sectors of the body's operations. Decisions regarding openness are, generally speaking, the province of the authority that has outsourced the function (art. 14, 1).

The term 'public power' is not defined. Documents surrounding the Act indicate that prime focus rests on functions that have bearing on individuals' legal status and actual conditions.²⁹ This provision should be construed in the context of article 5 of the Act, which sets out the kinds of material to be considered official documents and therefore falling within the scope of the Act. Among these documents are those written and received in connection with the performance of official functions by civil actors, including individuals. Typical examples are social service institutions and private schools.

Denmark

The starting point in Danish law is that official tasks performed by civil bodies fall outside the scope of freedom of information. In the area of social services, however, tasks 'outsourced' to civil organizations are subject to freedom of information legislation.³⁰

The new law apply as a rule to civil bodies, when they exercise administrative authority in concrete cases (art. 5, 1).

According to the new law, the authority that outsources a function to a civil body shall see to it that the civil body reports its execution of the function on a continuous basis (art. 6). Preferably, this shall be stipulated in the contract. This requirement applies to all outsourcing of functions that are regulated by law.

Norway

Autonomous legal entities, whether public or civil, are subject to freedom of information rules when they exercise administrative authority in concrete cases or formulate and enforce regulations (art. 2, 1 b). Public access shall apply to all documents related to functions of these kinds.

Iceland

The scope of the new law extends to civil bodies insofar as these entities have, through legislation or agreement based on a statutory authorisation, been assigned to take government decisions or perform services which are otherwise considered an element of a government authority's official role (art. 3). Requests for access to information shall be addressed to the body which has taken or will be taking a decision in the matter at hand, whether it is in the public or civil sector (art. 16).

Environmental Information

The Aarhus Convention of 1998 contains rules providing for transparency in matters relating to the environment and environmental protection. The Convention is in the purview of the United Nations Economic Commission for Europe (UNECE), and nearly all the countries of Europe, including the five Nordic countries, have pledged to abide by its terms.³¹ The Convention is followed up in a European Union Directive.³²

The terms of the Convention call for high standards of transparency regarding environmental issues on the part of “public authorities”, which, on the national level includes:

- (a) Government at national, regional and other level; (b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; (c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above (art. 2.2).

The Convention applies to services controlled by government bodies, whether they are performed within or outside the public sector. For example, utilities like heating, electricity, water and transportation.

Denmark and Iceland have special laws that implement the requirements of the Convention and the Directive. In Sweden, the requirement of transparency with respect to environmental matters in the public sector is regulated by the Public Access to Information and Secrecy Act; a special law has been adopted to apply to public functions performed by civil bodies. In Finland, environmental information is treated in the general law on freedom of information, and only the law on water services has had to be amended to secure public access to information in this area.³³

Norway has gone further than the Aarhus convention’s minimum requirements with respect to the scope of the law. The Norwegian Law on the Right to Environmental Information applies to all kinds of information, whether public, semi-public or private. All branches are covered, e.g., agriculture, fishing and industry. The law also applies to environmental information held by non-commercial civil organizations; by and large, only private households are excluded. The Norwegian law on environmental information is complemented by regulations providing for freedom of information in matters relating to “product-specific health information”.³⁴

Re-use of Information

The European Union Directive on Re-use of Public Sector Information (PSI) imposes certain requirements on re-use of information that Member States themselves may have placed in the public domain.³⁵

The scope of the directive encompasses the core areas of the public sector, plus certain autonomous bodies – in the words of the convention: “public sector bodies” or “the State, regional or local authorities, bodies governed by public law and associations formed by one or several such authorities or one or several such bodies governed by public law” (art. 2, 1).

Denmark and Sweden have adopted special laws to regulate re-use of PSI.³⁶ Norway and Iceland have chosen to include rules for the re-use of public sector information in the general laws pertaining to access to official information, noting that they shall correspond to the scope of the PSI-directive. Finland has no special rules for implementation of the directive.

Summary

Freedom of information and, thus, the right of public access to official information have assumed greater importance in recent years and are beginning to be considered an integral aspect of the defense of freedom of expression as a human right.

The core areas of the legislative, executive and judicial branches of government are covered by article 19 of the UN International Covenant on Civil and Political Rights (1966). The Covenant also extends to certain semi-official bodies, but does not further specify criteria. The European Convention on Access to Official Documents, the Tromsø Convention of 2009, applies to administrative functions in parliaments and the courts, but not to legislation or court cases; the extent to which freedom of information shall apply to semi-government bodies is left for member states to determine.

The UN Covenant, Art. 19, has a supplementary functional criterion that includes government functions performed by civil bodies and other bodies outside the public sector. In the work to draft the European Covenant, significant differences between member countries surfaced, and work toward reaching a common set of criteria to define public tasks and services was abandoned. The Tromsø Convention confines the functional criterion to the exercise of administrative authority outside the public sector.

In Sweden, the Parliament and ancillary bodies fall within the scope of the Freedom of the Press Act and the Public Access to Information and Secrecy Act. The Norwegian Parliament is not covered by freedom of information legislation, but the Parliament has adopted special rules for access to the work of the Parliament, including documents relating to the institution’s administra-

tion. Finnish law covers documents relating to the administration of Parliament. In Iceland and Denmark the Parliaments, including their administration, fall outside the scope of freedom of information laws. Access to information about the legislative process is, however, guaranteed through regulations and rules. Neither Denmark nor Iceland fulfill the requirements of international conventions, since the administration of their parliaments is not open to public scrutiny.

The core of the executive power is covered in all the Nordic countries. This is true of the national administration at all levels and regional and local government, including elected bodies.

In Sweden, Finland and Norway, both cases brought before the courts and the administration of the courts are covered by freedom of information laws or special laws pertaining to the administration of justice. Denmark and Iceland have rules that provide for access to official documents relating to court cases in their laws on the administration of justice, but they fail to live up to the international conventions because public insight into the administration of the courts is not guaranteed.

The Nordic countries display a variety of approaches to the grey zone between the public and private sectors. All take their starting point in organizational criteria that are applied to determine which bodies are to be considered public authorities or agencies. The laws in Finland, Denmark, Norway and Iceland have fairly clear-cut definitions. The law in Sweden is based on a somewhat diffuse definition of 'public authority', but an annex to the Public Access to Information and Secrecy Act presents a list of bodies that shall be subject to freedom of information rules.

It is difficult to estimate the number of bodies that fulfill the various organizational criteria. The Norwegian law, with its prime criterion of dominant influence, would appear to have narrower coverage; the Danish law, on the other hand, has broader extent with its emphasis on regulation, supervision and control. The list in the annex to the Swedish law is growing, but includes far from all the bodies having close ties to the public sector.

Companies, in which a majority of shares are controlled by public sector institutions, typically fall within the scope of freedom of information laws in Finland, Norway and Iceland. This is not the case for state-owned companies in Sweden, and the threshold for inclusion in the new Danish law is 75 per cent ownership. Energy companies of a certain size and upwards are subject to freedom of information laws in Denmark, whether they belong to the public, the semi-public, or the private sector.

Where provisions for the public's right to freedom of information hinge on organizational criteria, it is necessary to create special laws to maintain public insight into outsourced functions. Finland and Iceland have the most extensive provision for access to information in these cases. That is, Finland and

Iceland complement organizational criteria of relatively narrow scope with far-reaching functional criteria, and thus fulfill the requirements of Article 19 in the UN Covenant. The Swedish model is based on a list of bodies that are subject to freedom of information in an annex to the Public Access to Information and Secrecy Act. Norwegian law regarding outsourced functions is essentially confined to functions in matters that ultimately will be decided by public authorities. The new Danish law and the local government law in Sweden complement the scope with a ‘soft’ version of a functional criterion: authorities are required to monitor some information of the operations of bodies performing outsourced functions.

The Aarhus Convention sets a high standard for freedom of information based on international agreements that provide for the protection of the natural environment and human health as a human right. Provisions for access to environmental information in Denmark and Iceland copy the scoping criteria set out in the Convention. Norwegian law goes even further, extending freedom of information requirements to actors operating in the private sector, as well. Interpreting ‘public functions’ somewhat broadly, the Finnish provisions for transparency and the special Swedish law that extends freedom of information requirements to environmental information held by civil bodies may also be said to correspond to the scope of the Convention.

Stated Purpose

The scope of the respective countries’ freedom of information legislation should be assessed in relation to the stated purposes of the laws. Three examples from international agreements illustrate the diversity and evolution of purpose.

International Rules

Enhancing democracy is in focus in the Tromsø Convention on Access to Official Documents:

Transparency of public authorities is a key feature of good governance and an indicator of whether or not a society is genuinely democratic and pluralist, opposed to all forms of corruption, capable of criticising those who govern it, and open to enlightened participation of citizens in matters of public interest. The right of access to official documents is also essential to the self-development of people and to the exercise of fundamental human rights. It also strengthens public authorities’ legitimacy in the eyes of the public, and its confidence in them.³⁷

The stated purpose of the Aarhus Convention is to strengthen the human right to a sound environment and well-being:

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.³⁸

Public sector institutions collect and produce information in many areas: social conditions, economic and geographical data, weather conditions, tourism, business data, education and so forth: The objective set out in the European PSI Directive is to contribute to the development of new services and, thereby, economic growth in the Union:

Public sector information is an important primary material for digital content products and services and will become an even more important content resource with the development of wireless content services. Broad cross-border geographical coverage will also be essential in this context. Wider possibilities of re-using public sector information should *inter alia* allow European companies to exploit its potential and contribute to economic growth and job creation.³⁹

National Rules

Swedish jurist and Professor of Jurisprudence Nils Herlitz interpreted the institution of the Swedish Law on Freedom of the Press in 1766 as a reaction to the absolute power exercised by the bureaucracy of that age. The powers of state had to be brought under control, not only by and for the Estates, i.e., the political and social elites, but for the people. First of all, the right to accurate information would serve the cause of public enlightenment. Secondly, the new right would provide insight into the rationales and positions taken by those in power.⁴⁰ The law itself states its purpose succinctly: “to secure the free exchange of opinion” and “the availability of comprehensive information”.

The Swedish Public Access to Information and Secrecy Act neither broadens nor deepens this stated purpose. The documents surrounding Swedish freedom of information legislation mention several objectives, such as enhancing administrative efficiency. Correct and efficient administration is promoted when officials and staff members know that their actions may be open to public scrutiny. Efficiency is also enhanced when public discussion of social conditions and public policy can be based on the actual facts of the matter;

errors and injustices can be corrected, and rumor and baseless criticism are less likely to take root.⁴¹

The purpose of the Finnish law to ensure openness of government activities is to enable citizens and organizations to review the exercise of power and the use of public resources, which, in turn, gives them a basis for decision-making and allows them better to take advantage of their rights and defend their interests (art. 3).

The corresponding Norwegian legislation is meant to enhance freedom of information and freedom of expression, to encourage democratic participation, to strengthen the legal rights of individuals, to facilitate public scrutiny of the public sector, and to enhance public faith in government.

The new freedom of information legislation in Iceland specifies the objectives of enhancing freedom of information and freedom of expression, democratic participation on the part of citizens, the ability of citizens to review the performance of public officials, to facilitate media's reporting of information, and to enhance public faith in government (art. 1). The same purposes are specified in the new Danish law (art. 1).

Neither Swedish nor Danish legislators have set out the aims of the rules pertaining to public access to environmental information that were introduced to comply with the Aarhus Convention. As noted earlier, Finland has not introduced any such rules. The purposes stated in the Norwegian and Icelandic laws echo those stated in the text of the Convention. The Norwegian law states an intent to secure public access to environmental information, thereby making it easier for citizens to protect the environment, to protect themselves against threats to their health and the environment, and to influence both private and public decision-makers in matters relating to the environment.

In the European Union, the PSI-Directive has no force with regard to the extent of public access to official information set out in national rules. Prime focus rests instead on access to database information. No purpose is stated regarding its implementation in national legislation. The Norwegian law on re-use of official information states only that the law shall facilitate re-use of official information. The first article of the corresponding Danish law purports to state the purpose of the law, but in fact only points out that the law establishes minimum standards for re-use of documents and databases held by public authorities.

Comments

Nordic laws providing for access to information give different characterizations of the importance of freedom of information to democracy. Publicity/openness as a prerequisite to scrutiny and citizens' participation in democratic

processes are two important aspects. Only the Finnish law explicitly mentions the ability to monitor the exercise of power. The Icelandic law makes reference to the role of mass media in informing the citizenry, as does the new law in Denmark. In Sweden the fact that provisions for freedom of information are included in the Act on Freedom of the Press reflects a recognition of the importance of freedom of information to freedom of the press.

A number of subordinate objectives are also expressed in the laws. Individual citizens' ability to defend their personal interests is mentioned in the Finnish law, while in Norway this aspect is treated in the context of strengthening the legal rights of individuals. A desire to stimulate administrative efficiency is not expressed in any of the laws, but it is noted in documents related to the drafting of the law in Sweden. Enhancing public confidence or faith in government is mentioned among the purposes of the Norwegian law, the Icelandic law and the law in Denmark.

The aim of stimulating commerce or the creation of new services is not included in the Nordic freedom of information laws. The reason is that the EU PSI-Directive has not been implemented in direct connection with rules for data collection and storage, and without this connection the directive loses some of its meaning.

There is good reason to differentiate between the prime objectives, those that constitute the *raison d'être* for the right to information, and subordinate objectives. The former are the rules that make it possible to examine the exercise of power and equip citizens to take active part in democratic processes. The right to information is of crucial importance to journalists' and journalistic media's ability to provide accurate information, to investigate and to ask critical questions. That the general public has the right of access to information about the exercise of power, including the grounds for decisions, is what distinguishes a genuinely democratic society.

It is also important that freedom of information rules enable individuals, organizations and other bodies to defend their own interests. For individuals, access to information can inform their decisions, and not only in matters of legal rights. Rules that presume a personal involvement do not ensure that individuals, organizations or other bodies will have access to the information they need to make informed decisions in their day-to-day lives. Transparency ensures equal access to information and can therefore stimulate free and fair competition between commercial entities, e.g., in connection with inviting tenders of public functions and with public contracts.

Administrative efficiency can be an important side-effect. Access to official information can lead to the discovery of failures, mismanagement and abuses of power, and the preventive effect is important. Furthermore, free access to information is an important source of inspiration. The benefits to efficiency can shrink appreciably if public servants spend many man-hours on process-

ing requests for information. Being able to respond efficiently to such requests requires that efficient routines for filing and storing documents and digital data be built into the architecture of IT-systems from the start. Clear criteria in the laws, limiting exceptions to what is absolutely necessary in a democratic society, and personnel who are familiar with the rules and effective systems for appeal are other important factors.

Faith in the public administration is another side-benefit, but on a subordinate level. Freedom of information can expose abuses of power and inefficiency, which in the short term might instill a mistrust of government. In the longer term, however, it is reasonable to assume that freedom of information will have a positive effect on public confidence, as well as on efficiency.

An organizational approach to defining the public sector is falling increasingly short of the objective of freedom of information as a growing number of public sector functions are entrusted to semi-public bodies or are outsourced to private bodies. The need for democratic control, citizen participation, efficiency, and faith in government does not diminish because important administrative tasks are performed outside the public sector.

Generally speaking, bodies and functions in the grey zone assume a variety of forms and are linked to the core of the public sector to different degrees: e.g., 1) a statutory basis, 2) public ownership, wholly or in part, 3) in connection with public appointment of directors or appointment or approval of other management, 4) concessions or other provision for monopoly status, 5) contract concerning specified functions, or 6) financing, wholly or in part, with public funds.

It is vital that both organizational and functional criteria be set out in the laws providing for access to official information. The rationale behind the two sets of criteria are similar, but they have different effects. Organizational criteria apply to all the functions performed by a given body, whereas functional criteria apply only to specified functions. Organizational criteria do not guarantee transparency if a body undergoes a change of ownership or is restructured. Therefore, functional criteria are a necessary complement. The Danish energy sector provides a good example of what happens when functional criteria are not in place. Vital information can be hidden from scrutiny through changes in corporate structure, while company functions that have nothing to do with energy supply issues are subject to the law.

Freedom of information considerations weigh heavy with respect to bodies that have a basis in law or statute or are under the close supervision of authorities, and to functions entrusted by statute, contract or other arrangement to private or semi-public bodies.

In a global human rights perspective, freedom of information is increasingly recognized as an important facet of freedom of expression. Individuals' freedom to express their thoughts and views is not in itself sufficient. Access

to information is essential to be able to document or discuss public affairs knowledgeably. Conversely, freedom of expression is necessary in order to enable the spread of knowledge and information. Ensuring that both rights are in place has great synergetic potential.

Freedom of expression is not limited to matters in the public sector and the semi-public 'grey zone'. The European Court of Human Rights has determined that freedom of expression extends to all matters of public interest.⁴²

The pivotal question is to which societal conditions freedom of information shall apply. Both primary and secondary objectives of the right to access suffer when freedom of information depends on ownership, organizational structure or other formal characteristics.

There is reason to consider extending freedom of information rules to encompass vital societal functions that are performed within the private sector. In view of the fact that laws regulating personal data provide for access to one's own personal data, even if held in the private sector, it cannot be out of the question to introduce freedom of information rules that provide for access to certain kinds of information held in the private sector.

Regulation in one area demonstrates that it serves the public interest, and the right to access to information, when combined with regulation, has a strong synergetic potential. Transparency can arouse public awareness of both opportunities and problems, while enhancing the effectiveness of regulatory agencies and appellate bodies. It can also inform public discussion of issues like product safety, quality and prices.

The Norwegian laws providing for access to information about the environment and 'product-specific health information' demonstrate one way to ensure citizens' right to information that is of importance to their decision-making in everyday life. Freedom of information is also vitally important when it comes to infrastructural services, like the supply of electricity, water, heating, public transportation and telecommunications – be they privately or publicly owned. When scrutiny of the exercise of power is acknowledged as a principal *raison d'être* for freedom of information, we have reason to consider extending it to functions in the finance sector, which in recent years have proven to be able to exert decisive influence over the premises for democratic rule.

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Notes

- 1 Swedish Constitutional law, which is not based on Montesquieu's theory of the three branches of government, does not recognize the judiciary as an independent branch. Cf. Johan Hirschfeldt, *Domstolarna som statsmakt – några utvecklingslinjer* [The courts as instruments of the power of state; some lines of development]. Reprint from *Juridisk Tidsskrift* 12:1 (2011).
- 2 We find a number of terms used in the literature to characterize this 'zone', for example: quasi-government, paragovernmental organization, semi-state entities, indirect public administration, mixed administration, public administration outside the official sphere, and semi-public.
- 3 Human Rights Committee, 2011, General comment No. 34.
- 4 International Covenant on Civil and Political Rights (1966).
- 5 Case of Társaság a Szabadságjogokért v. Hungary, final 14.07.2009 and Kenedi v. Hungary, final 26.08.2009. See K Eggen (2002), *Ytringsfrihet* [Freedom of expression], pp. 654-58.
- 6 European Convention on Access to Official Documents, 18.06.2009.
- 7 Sweden ratified the Convention on April 19, 2010. Norway required a proviso to allow exemption of certain documents relating to the royal family, cf. the Law on Public Information, art.17.

⁸ The Charter of Fundamental Rights of the European Union, 18. December 2000, art. 42. Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. The Commission has proposed amendments to the Regulation, COM 2008, 229 final, but the process is still under way.

⁹ A proposal for a new Constitution for the Republic of Iceland drafted by a Constitutional Council appointed by an Althingi resolution, 24.3.2011.

¹⁰ The Public Access to Information and Secrecy Act (2009:400) replaced previous legislation from 1980. The preliminary work behind the law is included in Government Bill 2008/09:150 and in the report of the parliamentary committee on constitutional law, 2008/09:KU24.

¹¹ Act on the Openness of Government Activities (21.5.1999/621).The Minister circulated a review and evaluation of the new law's consequences in 2003; it was amended in 2005.

¹² The Danish Public Information Act (1985:572)
The government's proposal for new legislation, L 144 2012-2013, is adopted by Folketinget 4.6.2013. The preliminary work is documented in the report of the Official Information Commission, 1510.2009.

¹³ Act of 19 May 2006. The preliminary work is documented in the report, "Ny offentlighetslov [New Freedom of Information Act]" (NOU 2003:30).

¹⁴ The new Information Act, adopted by Altinget 21.12.2012

¹⁵ Self-government law 1977:72 from Åland's Lagting on access to public documents.

¹⁶ Self-government law no. 133 of 10 June1993 from Lagtinget on openness in government, amended by law no. 76 of 8 May 2001.

¹⁷ Self-government law no. 9 of 13 June 1994 from Landstinget on openness in government.

¹⁸ Bohlin (2010) Offentlighetsprincipen (The principle of the right to information), p 58.

¹⁹ Art. 50 in the Constitution and art. 43 in the Rules of Order laid down December 17, 1999.

²⁰ Laws introduced in 2007 regulating the information policy of administrative courts and courts of justice, respectively, contain special rules.

²¹ The Rules of Order empower the presiding officers of the parliament to set out the rules that regulate access to parliamentary documents and information.

²² Rules on the right of access to parliamentary documents, nr 1358, 10.11.2009

²³ The regulation on public access (art. 3, 1, 2) sets out that fees and emoluments paid out to attorneys and expert consultants shall be subject to the law.

²⁴ The Rules of Order adopted by the Altinget contain certain provisions for transparency.

²⁵ Bohlin (2010) Offentlighetsprincipen (The principle of the right to information), p 60.

²⁶ Guidelines relating to the Freedom of Information Act, clause 3.3.2.

²⁷ Bohlin (2010) Offentlighetsprincipen (The principle of the right to information), p 51.

²⁸ Local government law 3:19a (2002:249)

²⁹ A supporting rationale for article 4 in the Bill.

³⁰ Consolidation Act on Legal Protection and Administration in Social Matters, article 43.

³¹ Convention on access to information, public participation in decision-making and access to justice in environmental matters. As of September 20, 2012, 46 countries had declared their adherence to the Convention.

³² Commission and Council Directive on public access to environmental information 2003/4/ EC

³³ The Swedish Public Access to Information and Secrecy Act (10:5) and the Act on environmental information in some individual agencies (2005:181) ; the Danish Act on Access to Environmental Information 660.2006; the Icelandic Law on Right to Information about the

Environment 2006 no 23 as amended March 14, 2012; the Finnish law amending art. 16 in the law on water services of January 28, 2005.

- ³⁴ Law on the Right to Environmental Information of May 9, 2003, no. 31 and Law on the Control of Products and Consumer Services § 10 with amendments by laws no. 31 2003 and 23 2005.
- ³⁵ Directive on Re-use of Public Sector Information (PSI) 2003/98/EC.
- ³⁶ Act on the Re-use of public sector information (2005:596) and Act on the Re-use of documents held by the public administration (2010:566)
- ³⁷ European Convention on Access to Official Documents (2009), Explanatory Report, Preamble 1.
- ³⁸ Convention on access to information, public participation in decision-making and access to justice in environmental matters, art. 1.
- ³⁹ The Directive on Re-Use of Public Sector Information 2003/98/EC, Preamble, 5.
- ⁴⁰ Nils Herlitz (1971) *Förvaltningens offentlighet i nordisk lagstiftning* [Legal provision for the transparency of public administration in the Nordic countries]. *Tidsskrift for rettsvitenskap*, p 271.
- ⁴¹ SOU 1975:22 [an official report on the management of public documents, preliminary to the Secrecy Act of 1980], p 87.
- ⁴² The European Court of Human Rights, the Case of Bergens Tidende and Others v. Norway, judgment of May 2, 2000, and the Case of Jerusalem v. Austria, judgment of February 27, 2001.

Views from
Global and European Horizons

Freedom of Expression in the Internet Era

Rikke Frank Jørgensen

In the beginning of 2011, the uprisings in North Africa and the Middle East gave rise to the term 'Facebook or Twitter revolution', referring to the role that social media played as a resource to organize and distribute information amongst the individuals and groups opposing the regime (Ghannam February 18, 2011). At a gathering in Copenhagen in May 2011, a number of the participating bloggers, activists, writers, etc., shared their stories and debated the role of the Internet in the revolution¹. At the meeting, several of the speakers stressed that while the revolution did not start in cyberspace, social media did provide an important platform as a space for expressing views, sharing information and mobilizing voices.

On the policy level, the link between freedom of expression and the Internet had been on the agenda at several high-level meetings. At the 17th session of the UN Human Rights Council, the United Nations for the first time received and debated a report specifically focused on the Internet and the right to freedom of expression (Rue 2011). The report produced by UN Special Rapporteur Frank La Rue stresses that the Internet has become an indispensable tool for realizing a range of human rights, combating inequality, and accelerating development and human progress, hence ensuring that universal access to the Internet should be a priority for all states (ibid.: Paragraph 85). It also emphasizes that censorship measures should never be delegated to private entities, and that intermediaries should not be held liable for refusing to take action that infringes on individuals' human rights (ibid.: Paragraph 75). Subsequently the Swedish foreign minister, on behalf of 41 states, supported the report and stressed that "For us, one principle is very basic: The same rights that people have offline – freedom of expression, including the freedom to seek information, freedom of assembly and association, amongst others – must also be protected online" (Bildt June, 10, 2011).

More or less at the same time the Internet was addressed in the Deauville Declaration: Internet, as an outcome of the G8 meeting in Paris². The Declara-

tion stresses that the leaders are committed to “encourage the use of the Internet as a tool to advance human rights and democratic participation throughout the world” (Article 13). Moreover, the principles of openness, transparency and freedom of the Internet have been key to its development and success, and must, together with non-discrimination and fair competition, continue to be an essential force behind its development (Article 9)³. At the G8 meeting, the German foreign minister spoke at length about freedoms in cyberspace, stressing that free access to the Internet is a human right, and that freedom of expression and freedom of association are only protected in the 21st century, if also valid, in cyberspace⁴.

Most recently, the U.N. Human Rights Council adopted by consensus a resolution on the promotion, protection and enjoyment of human rights on the Internet. Presented by Sweden the resolution affirms that “the same rights people have offline must also be protected online” (United Nations Human Rights Council July 5, 2012).

The examples cited above highlight how the interrelation between human rights and Internet policies appear on high-level policy agendas to an extent not previously seen. Policy-makers practically compete to embrace the notion of Internet freedoms, and stress that these are essential to an open Internet based on human rights standards⁵.

In the following, freedom of expression in an Internet era is examined. The article commences with a brief introduction to the right to freedom of expression and continues with some of the current challenges, including themes of online censorship, privatized law enforcement, Internet access as a fundamental right, and gatekeepers in the online sphere.

The Right to Freedom of Expression

The right to freedom of expression is stipulated in Article 19 of the Universal Declaration of Human Rights (United Nations 1948) as well as Article 19 of the International Covenant on Civil and Political Rights (United Nations 1966) and present in all major international instruments protecting human rights. Freedom of expression is a typical first generation right with an individual emphasis. The point of departure is the liberty of the individual to be protected from arbitrary restrictions when participating in public debate. One of the shortcomings often emphasized in relation to freedom of expression is the lack of emphasis on the structures and conditions that shape the public sphere in which communication takes place (Kortteinen, Myntti et al. 1999: 395). Restrictions on freedom of expression do not necessarily take the form of censorship, but can also be structured as self-censorship, institutional and/or social constraints, or merely a lack of access to communication. “The regulation of the structures of communication will actually have more impact on

communication than direct measures with regard to some specific contents of expression. The most revolutionizing recent change in these structures has taken place as a result of the tremendous advances in information technology. (..)" (ibid. 396).

A central aspect of the right to freedom of expression is freedom of information. Freedom of information prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him (ibid.:413). The right to freedom of information is increasingly used in relation to laws that give individuals or organizations a legal right to demand information on how the government is acting in their name (Banisar 2006:73)⁶. This was also recognized in a recent *General Comment* on Article 19 of the International Covenant on Civil and Political Rights, which explicitly embraces the right of access to information held by public bodies (United Nations Human Rights Committee September 12, 2011). Related to the online sphere, freedom of information concerns have been raised, in particular, pertaining to online content regulation (blocking and filtering), as further addressed below.

Challenges Related to Internet Freedom of Expression

There are countless illustrations of how the Internet has helped civil society groups, including human rights activists, to report on violations, to campaign across borders and to reach global information and support to strengthen their case, with the Arab Spring as a recent example⁷.

Moreover, an increasing number of national and international groups and networks campaign to protect and enforce freedom of expression *on* the Internet, not least the North American and European NGOs that have focused, since, the 1990s on specific human rights challenges within an online environment, especially in relation to the right to privacy and the right to freedom of expression⁸. The initial North American/European focus on so-called cyber rights has today turned into an increasingly large number of groups from all parts of the world, which focus on protecting and promoting human rights standards online, for example the Association of Progressive Communications – a global network consisting of 60+ organizations occupied with communication technology as a tool to advance social justice and human rights⁹.

In the following, some of the current challenges related to online freedom of expression are addressed.

Online Censorship

Human rights enjoy the same level of protection online as offline as stressed many times by the U.N. and European human rights system, and endorsed by

the Human Rights Council in July 2012 (Human Rights Council July 5, 2012). It follows from this that states have an obligation to respect, protect and promote freedom of expression on the Internet. However, in practice there are numerous ways by which governments around the world restrict citizens' rights of expression and their access to information. Some of the more well known cases include state enforced filtering software that blocks access to content so that only state approved content is available. Other examples include blocking of access to certain categories of information through blacklisting websites, or extensive state surveillance that may lead to self-censorship (Deibert, Palfrey et al. 2010). During the uprisings in Egypt, for example, the Egyptian government disrupted access to Facebook and Twitter, which were used to organize protests. In response, a group of U.N. Special Rapporteurs stressed that they were "alarmed at increasing limitations on the right to freedom of expression and information imposed by Governments actively seeking to suppress the rising number of voices who wish to be heard" (United Nations February 3, 2011).

The online censorship debate has often targeted countries such as Cuba, China, Iran, Tunisia, Saudi Arabia, South Korea, Syria, and Uzbekistan, which are known for blocking and filtering of information, as well as imprisonment of human rights defenders and journalists. Restrictions may also occur through the disconnection of users or blocking access to networks, particularly at the request of governments that seek to suppress civil society. One of the groups working to document the various means of restricting access to information in the online sphere is the OpenNet Initiative (Deibert, Palfrey et al. 2008), however there are numerous groups working in this area of Internet freedoms¹⁰. Whereas there are many examples of online censorship in suppressive regimes, this does not imply that the issue has no relevance in democratic countries. In the following, the focus will not be on "the usual suspects" (although these are important cases) but rather on challenges related to online freedom of expression in a democratic country with examples from Denmark.

Privatized Law Enforcement

The role and responsibility of Internet service providers (ISPs) is a key theme related to freedom of expression on the Internet. Because ISPs control large chunks of the virtual public sphere, they have unprecedented influence over individuals' right to freedom of expression and access to information. Violations may occur, for example, through the blocking, filtering, and removal of content that prevents legitimate information from being distributed and displayed, whether it be to comply with restrictive state demands or to avoid alleged law infringement, for example, related to intellectual property rights.

In recent years, growing pressure has been exerted upon ISPs by states. At the EU level, an increasing amount of law enforcement powers has been delegated to the ISPs, as frequently raised by civil society networks such as European Digital Rights. Examples of this privatized law enforcement role include policing of peer-to-peer networks, and blocking of websites presumed to contain illegal content, without a court order (Joe McNamee (EDRI) 2011). The Europe-wide practice of delegating powers to Internet service providers has been criticized by civil society groups and scholars alike, as the decisions to sanction users and websites are taken administratively rather than judicially (Callahan, Gercke et al. 2009; Brown 2010). Current practices imply that companies that are in the business of providing access to the Internet de facto are being used to implement public policy with limited oversight.

In Denmark, for example, blocking of specific content or websites has been deployed since 2005, starting with public/private cooperation targeting child sexual abuse content, and later expanding to include file sharing sites such as AllofMP3, mp3sparks, and the pirate bay. More recently, blocking of unauthorized online pharmacies as well as online games in conflict with the Danish game monopoly has been stipulated in national law. As to the concrete practice, blocking of alleged child sexual abuse content, for example, is carried out in cooperation between Save the Children Denmark, the Danish National Police, and the ISPs. Save the Children runs a Hotline where the public may report websites with alleged child sexual abuse content. Following an initial assessment the websites are reported to the National High Tech Crime Centre of the Danish National Police, which considers whether content is *prima facie* illegal under national law and, if so, asks the ISPs to block access to the site. The blocking practice is based on a voluntary Cooperation Agreement between the Danish National Police and the ISP (Rigspolitiet 2006). The practice is controversial because decisions to sanction content are taken by the police and the ISP without due process safeguards in terms of judicial review, and as such contrary to the recommendations made by the UN special rapporteur on freedom of expression (Rue 2011) as well as the Council of Europe (Council of Europe 2008). The freedom of information implications of the Danish practice was the topic of a public Parliamentary hearing in April 2011. Prior to the hearing, a number of organizations had signed a letter concerned with the principal and practical implications of content blocking for online freedom of information, including examples where this has led to overly broad blocking of legal content¹¹. Up till now, however, there has been no political will to revise the practice and to install judicial or other types of independent review of the content being blocked.

Leaving the topic of content regulation on the Internet for now, the following theme concerns access to the Internet as a precondition for exercising freedom of expression.

Internet Access – A Fundamental Right?

Several countries have stipulated the right to access the Internet in national legislation,¹² and having such a right has increasingly been proposed by a variety of actors. The EU Universal Service Directive amended in 2009 (2009/136/EC) stresses that everyone within the EU must be able to access a minimum set of electronic communication services of good quality and at an affordable price. As regards rights of access to the Internet, all reasonable requests for connection at a fixed location to a public communication network must be met by at least one operator. As mentioned above, the U.N. human rights council have endorsed a recommendation highlighting that universal Internet access should be a priority for all states (Rue 2011: Paragraph 85). Human rights scholars have also argued that access to the Internet must be kept as cheap, easy, and non-discriminatory as possible as part of the right to participate in the cultural life of the community (Adalsteinsson and Thórhallsson 1999:593). In 2010, a BBC survey amongst 27,000 people in 26 different countries showed that four out of five believed Internet access to be a basic human right (Rytter March 9, 2010). In Denmark, libraries have been obliged to provide Internet access free of charge since 2000 in order to ensure that everyone living in Denmark has affordable means of Internet access¹³.

In a much debated piece from January 2012, Vincent Cerf – one of the fathers of the Internet – argued that the right to access the Internet is not a human right. The main argument of the article is that technology is an enabler, not a right in itself (Cerf January 4, 2012). “There is a high bar for something to be considered a human right. Loosely put, it must be among the things we as humans need in order to lead healthy, meaningful lives, like freedom from torture or freedom of conscience. It is a mistake to place any technology in this exalted category (.)” (ibid.). In contrast, others have argued that Internet access is a precondition for enjoying a number of other rights and should therefore be considered a right in itself (Edwards January 10, 2012).

As an example, the Draft Charter of Human Rights and Principles on the Internet, produced by the Dynamic Coalition on Internet Rights and Principles (a global network of individuals and groups concerned with human rights on the Internet), presents the right to access the Internet as a human right, underpinning all other rights (Dynamic Coalition on Internet Rights and Principles 2010: Paragraph 1). This line of argument stresses the transformative nature of the Internet not only to enable individuals to exercise their right to freedom of expression and assembly, but also to enjoy a range of other human rights, including the right to health, the right to education, the right to gender equality and so forth.

Up until now, the right to Internet access is typically stipulated as part of the state’s universal service obligations as the citizen’s right to access the

physical, technical infrastructure. Despite the growing pressure on states to provide universal Internet access, there is no indication that a positive right to access the Internet will be addressed by the U.N. system as a human right on its own merits. However, cutting off users from Internet access, regardless of the justification provided, is considered to be disproportionate and a violation of the right to freedom of expression (Rue 2011). In sum, users may have a reasonable expectation that Internet access will be provided as part of the state's universal service obligation, however, it would be stretching the point to argue that Internet access is recognized as a human right. Yet, once people are connected to the Internet, the state has an obligation not to interrupt users ability to access the Internet.

Gatekeepers in the Online Sphere

A final challenge to be addressed is that of private actors' increasing power in the online public sphere. Free access to a diversity of information sources has long been under pressure as a result of the trend towards consolidation on the global online market, leading to a strong degree of concentration among key players (Hamelink 2000:146). There are many private actors that influence participation in the online sphere (Internet service providers, search engine providers, web portals), and the role of these private actors is increasingly addressed as a freedom of expression issue. In the following, the focus is on Google, as one example of a significant gatekeeper in the online domain.

Consolidation of the search engine market, and the dominance of Google in particular, has been flagged as an issue of concern in the public debate. The concern addresses the impact of search engines on the accessibility of information and on the values of diversity and pluralism in the online public sphere, including whether they should be seen as strong gatekeepers or "mere reflections of broader democratic social forces" (Hindman 2009:59). The founding corporate motto of Google – "Don't be evil" – was originally used to disassociate the company from some of its competitors, and to stress their public interest vision. However, this initial positive connotation with the company is increasingly countered by more critical accounts of Google's alleged manipulation of search results and their extensive compilation of user data collected via services such as Google Search, Google Analytics, Gmail, Google Google Maps, Google Earth, Google Streetview, and so forth.

The widely endorsed U.N. Guiding Principles on Business and Human Rights focus on the potential and actual human rights impact of companies, and impose a requirement of due diligence on companies (United Nations Human Rights Council March 21, 2011). The unexplored question is whether some companies might invite additional corporate responsibilities beyond the duty to protect human rights outlined in this framwork. Recent scholarship

suggests that such an extra obligation could be placed on companies that are integral to the functioning of democracy with search engines as an example (Laidlaw 2012). “This scale of responsibility is reflected not only in the reach of the gatekeeper but in the infiltration of that information, process, site, or tool in democratic culture” (*ibid.*:55).

Following this line of reasoning, it could be argued that Google *de facto* provides a public utility that is crucial to democratic life in the Internet era. Access to a public sphere and to search information within this sphere should arguably be structured by principles of equality and fairness, while companies to a greater extent are free to design their services according to commercial norms. The first challenge is thus to decide upon the character of the service that an Internet company such as Google provides. Are they merely a private company with a responsibility to protect human rights? Or does the character of their service entail special obligations due to its direct impact on individuals’ ability to participate in online public life. In other words, should Google – as an important enabler of information search in the public domain – have an extra obligation to respect human rights standards?

The research and practice on these issues are still at a very early stage, however the protection of human rights with regard to search engines has recently been addressed in a Council of Europe recommendation (Council of Europe April 4, 2012). The recommendation iterates that search engines can affect freedom of expression and in particular impact on the individual’s right to seek, receive and impart information in the public domain. To address these challenges, states are encouraged to (among other things) enhance transparency regarding the way in which access to information is provided, in particular the criteria according to which search results are selected, ranked or removed.

Conclusion

The Internet is increasingly recognized as an important enabler for freedom of expression, and referred to as such by the U.N. Human Rights Council. Yet the protection of freedom of expression online is subject to numerous challenges, and the policy responses to these challenges are still at an early stage. Whereas some challenges relate to new types of censorship by the “usual suspects” (pressive states), others (and more tricky ones) concern the powers assigned to Internet companies, e.g., when “assisting” with law enforcement or as gatekeepers in the public domain. Moreover, two thirds of the world population remains without Internet access, and thus unable to participate in the online realm of society. The future of freedom of expression on the Internet will be closely related to our ability to confront and solve these challenges in the years to come.

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Notes

- ¹ Conference on Cyber Activism, May 9, 2011, in Copenhagen. See coverage of the meeting in the Danish newspaper Information (Rifbjerg May 13, 2011).
- ² The Declaration is available at: <http://www.g8.utoronto.ca/summit/2011deauville/2011-internet-en.html>, retrieved September 1, 2012.
- ³ The Declaration has been criticized by civil society groups for not recognizing the protection of human rights as core principles above all others. See e.g. the ARTICLE 19 press release May, 27 2011, available at: <http://www.article19.org/>, retrieved July 12, 2012.
- ⁴ The speech was printed in the German newspaper Frankfurter Rundschau (Westerwelle May 27, 2011).
- ⁵ See (Morozov 2011) for a critical take on the notion of Internet freedoms.
- ⁶ See the 2011 global overview of Freedom of Information legislation provided by Banisar at: <http://www.right2info.org/resources/publications/foi-map-by-david-banisar/view>, retrieved August 3, 2012.
- ⁷ Groups such as Human Rights Watch, Reporters sans Frontières, Amnesty International, International Freedom of Expression Exchange, and ARTICLE 19 have, to varying degrees, documented and reported on Internet usage by human rights groups and independent journalists since the mid-1990s. For research related to the Internet and the Arab Spring see, for example, Cyberorient (online journal of the virtual middle east) Vol. 6, issue 1, 2012. Available at: <http://www.cyberorient.net/>, retrieved October 10, 2012.
- ⁸ Examples include groups such as European Digital Rights, Privacy International, Electronic Privacy Information Center, Electronic Frontier Foundation, and American Civil Liberties Union.
- ⁹ See the Internet Rights are Human Rights campaign at <https://www.apc.org/en/node/11424>, retrieved October 12, 2012.
- ¹⁰ Groups such as Amnesty International, Human Rights Watch, Front Line Defenders, and Reporters sans Frontières regularly document online human rights violations. See also the many examples provided by (MacKinnon 2012)
- ¹¹ See http://www.ft.dk/Folketinget/udvalg_delegationer_kommissioner/Udvalg/Udvalget_for_videnskab_og_teknologi/Nyheder/2011/03/Horing_Censur_paa_internettet.aspx for information on the Parliamentary Hearing (in Danish), retrieved October 12, 2012.

¹² Examples include the Estonian Telecommunication Act (2000), a ruling by the French Constitutional Court (2009), Amendment to the Finnish Communication Market Act (2010), a ruling by the Costa Rican constitutional Court (2010), and an amendment to the Spanish Act on sustainable economy (2011). For further details please refer to Pollicino and Bassini (2011:29).

¹³ "The public libraries are an important resource in the government's efforts to develop a network society for all. A new Act on library activities will give the population better possibilities to gain access to information. In accordance with the Bill, public libraries will in addition to books, etc., be under an obligation to provide access to the Internet and digital information resources (.)" (Ministry of Information Technology and Research 2000:paragraph 11, authors translation).

Mapping Freedom of Expression

A Global Endeavour¹

Guy Berger

A symposium convened in Helsinki in December 2012 had the title of “Speaking is silver”. This naturally reminds one of the simile that “silence is golden”. The title, in other words, appears to imply that shiny silence is more valuable than glittering speech. This provocative sentiment would indeed be appreciated by Norwegian scholar Thomas Hylland Eriksen who wrote perceptively on information overload in his 2001 book *“Tyranny of the Moment: Fast and Slow Time in the Information Age”*. Indeed, for many people “golden” silence in this sense is that of being outside of communications – having a respite, as it were, from being bombarded. As the journalist Roger Cohen (2012) has written in a column titled *“Thanks for not sharing”*: “Please, O wired humanity, spare me, and not only the details”. However, for many people, silence is not more valuable than speech – a point that will be elaborated later in this Chapter.

For the moment, if we agree that the terms “gold” and “silver” are already allocated to describe “silence” and “speaking”, how could one characterize “listening”? The remaining high-value metal could possibly be seen as “platinum”, significantly with a greater market price than gold and silver. Perhaps, indeed, listening is the most scarce commodity in the “attention” economy.

Then again, we could reflect that it is somewhat curious for us – in the information age – to use physical metaphors of value to describe and rate phenomena. Perhaps to update the sense, and to move away from rigid rankings, additional terminology could be introduced. Thus we might propose that silence today should be understood as “full filter success” – to develop what Clay Shirky has coined as the notion of “filter failure” to assess “information overload”; we might also suggest that listening is “active learning”; and that speaking is (or should be) “innovation”. These are, arguably, the contemporary precious metals for building what UNESCO calls “the Knowledge Society”.²

Communication and Rights

There is a triptych of communication role possibilities embedded in the remarks above: you as sender (speaker), you as receiver (listener), and you as neither (i.e. being in silence). As many would point out, a state of silence itself is also in effect a particular type of signal, communicating a specific status in regard to listening and speaking. For communication to work as a dynamic circuit, all three need to be in play; we need moments of each – gold, silver and platinum, however they may or may not be applied to any of the three elements in play.

Communication in this holistic sense has a strong integration with rights. It is worth noting here however that the Universal Declaration of Human Rights is silent on silence, and rather gives its attention to *speaking* and *listening* in the form of the right to expression and the incorporated right to seek and receive information. Indeed, these were the critical rights to emphasise in the post-World War Two context, in the aftermath of a time when millions of people had been compelled to live and die in enforced silence and its consequence of manufactured ignorance. When the right to freedom of expression is violated on this scale and on a sustained basis, the result is whole societies where people are afraid to speak out, and where the limited voices that they do hear are only of those who monopolise the power of expression for their views. In some cases, one may as well be in silence for all the value that such propagandist voices contribute to life.

At any rate, the lesson of the War and the subsequent valuation of *speaking* and *listening* rights was incorporated in the UNESCO constitution which perceived that to secure peace, and to end warmongering, societies need a free flow of information. This flow is a function of the right to expression (including the right to information), and arguably it is only when this situation is guaranteed that *silence* then becomes a value – and then as a voluntary option (although some people today would like it be enforceable in regard to a right to be forgotten³).

To drill a bit deeper in the mining of our modern day communication “metals”, let us acknowledge some social contexts where there are *data* and *information* surfeits (indeed where both have become “commoditized” in various senses of the word – i.e. exchanged, priced and prolific). The value that we give to such content in these satiated contexts then depends on whether we are talking about “high level” data and informational content. To be in *silence* of the noise and hubbub of the gamut of low-value messages is a good thing, it is “full filter success”. Not so, however, to be in silence of *knowledge* (whether this is a self-selected silence or the involuntary function of political, educational, linguistic, economic or other kind of deprivation). Likewise, the notion of “high level” content applies to the other two elements of my com-

munications triptych. To be *speaking* is most valuable when one's utterances put new insight out into the world. To be *listening* is to be actively learning something that enriches your life, rather than simply hearing and absorbing trivia. Learning is when you are actively transforming signals into meanings and, more, discerning connections and applying judgements to their ethical, aesthetical and scientific qualities. To apply the metallic metaphor and its frequently-attached connotation of the "rare", if we wish to retain the labels of gold, silver and platinum, we should reserve them for "high level" communication which builds the Knowledge Society.

For UNESCO and others, what is also important, is not what to do with the low-level content (apart from seeking to "upgrade" it), but rather with the "radio-active" materials – information deemed to warrant restriction. This is a critical question in an era where more and more non-state actors are in a position to be gatekeepers with the power to silence all kinds of speaking – whether "dangerous" or not. The Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights have both set out internationally-accepted standards concerning limitation of speech which constrain any such restrictions to instances of legitimate purpose (such as for the protection of other rights, such as reputation or privacy, and for public health, security and morals), and which further specify that limits in principle have to be implemented in terms of prior law and proportionality. Tight adherence by public authorities to these conditions, and therefore to the exceptionalism of constraints, is a way to protect the right to freedom of expression from illegitimate violations – no matter whether on- or offline. These conditions for justifiable gatekeeping have always been seen as relevant to the role of state power in regard to freedom of expression, but nowadays they are being raised in regard to the largely non-state actors amongst the ranks of internet service providers, media websites with commentary sections, cellphone companies, search engines and many others. The approaches to the "radio-active" by many of these "intermediary" entities who bridge between speakers and listeners, seem patchy, inconsistent and emerging at best. At the same time, the legitimacy (and viability) of applying international standards to these private-sector gatekeepers is in debate. In addition, the question of limitations is put into question by the typically global and instantaneous character of much contemporary communications. Online or SMS content, on the one hand, can be immediately and widely disseminated across borders with significant transcendence of limitations imposed on a national basis; on the other, it can also be (and often is) swiftly rebutted within a universe of meanings where the impact of any single item can be counterbalanced or overshadowed by the moving mass of messages that precede and post-date it. All this is also in a context where users are willy nilly compelled to become skeptical

and even critical participants in communications – which feature constitutes an important component of Media and Information Literacy competencies.

These questions about the remit of international standards are important where there are such frenetic flows of content. For some, this anarchic and relatively unregulated situation means that the world's focus should be on how to control the worst features. But the bigger issue, rather, is that the globe's biggest communications problem is that there are still too many people who do not have access to the Internet, and too many restrictions that do not meet international standards and which therefore violate freedom of expression. Proportionately, the challenge is to expend energies in increasing information flows, rather than restriction.

We need to acknowledge too the significance of the resulting information gaps, as well as those data-deficits, which arise from both limits on access as well as suppression. This recognition should not be construed as a simple divide between “information rich” and “information-poor”. The dearth of information about the “information-poor” means that the rich are also deprived. Think of the silences if we consider what people in the developed democracies know about their counterparts elsewhere, not only what the latter are able to know about their diverse selves. A global Knowledge Society cannot be built without an internationally-representative stock of data and information to base it upon. Information-poverty in one place often means a mirror duplicate elsewhere – even in environments that are otherwise comparatively information-rich and purportedly “overloaded”. The challenge is not only to increase access of billions to existing information resources, but the free generation, materialization and circulation of their information resources.

Information, Knowledge and Global Freedom of Expression

These points can inform a particular way to unpack the notion of “high level” content within freedom of expression. The notion prompts one to think about the differences about data, information and knowledge. The distinction that can be proposed is more a functional than a fixed one: a given chunk of meaningful matter can serve as either data, information or knowledge depending entirely on context and the characters who deal in it (probably much like how one might assign gold, silver and platinum labels to a range of signs and meanings). What is one person's information, can serve as another's knowledge (and vice versa). In brief, the argument here is for knowledge to be seen as implicated in a process of *value-addition*. As Althusser (1971) adapted Marx's analysis of the production process to analyse “theoretical production”, we can – in context – identify raw materials for information as constituting data. In turn we can identify raw materials which constitute information that can be converted into knowledge with the help of a means of production

(certain knowledges). In this vein, we can identify a lot of relationships around such an intellectual labour process, such as those relating to power, access, use and interests – and we should not forget geographical, gender and class dimensions in all this.

How then does knowledge, conceived in this way, relate to global freedom of expression? In general, knowledge can supplant a gap of ignorance, can counter intolerance, correct misunderstanding and enrich the resources of humanity. But it is important to know what one does not know. According to one news report (*The Local*, 2011), Swedes waste 20 hours a week dealing with information overload. Suppose this is “true”, it can still be proposed that all in Sweden also have an information underload, not to mention an absence of knowledge, concerning a global overview of freedom of expression – simply because such a body of knowledge does not exist. There are important works emanating from Scandinavia such as that by Anine Kierulf and Helge Rønning, titled “*Freedom of Speech Abridged?*”. There are fragments in various documentation such as that produced by Freedom House and Reporters Sans Frontiers. But one can safely say that no one, anywhere, has the full picture. And yet such a knowledge resource could be of interest and value to the Nordic countries and far beyond, for a range of reasons that any reader of this Chapter could readily provide.

This example is raised because it is based on a real case in trying to develop such knowledge. It is due to a Nordic initiative that, starting in 2013, UNESCO has been required to perform a knowledge operation in the area of understanding the state of freedom of expression worldwide. The task has been to assemble a variety of data and information, and to convert this into a particular knowledge package. The assignment arises from a UNESCO Resolution in 2012 sponsored by, amongst others, Sweden, Denmark, Finland, Iceland and Norway at the 36th General Conference of this UN organization’s 195 Member States. Specifically, Resolution 43 charged UNESCO to: “*(m) onitor, in close cooperation with other United Nations bodies and other relevant organizations active in this field, the status of press freedom and safety of journalists, with emphasis on cases of impunity for violence against journalists, including monitoring the judicial follow-up through the Intergovernmental Council of the International Programme for the Development of Communication (IPDC) and to report on the developments in these fields to the biannual General Conference.*”

Prior to this Resolution, UNESCO had a narrower challenge – to monitor the safety of journalists and impunity issues, and the judicial follow-up by Member States, for the bi-annual meeting the Council of the International Programme for the Development of Communication (comprising 39 UNESCO Member States). What the 2012 Resolution does, in effect, is to expand the monitoring to add “the status of press freedom” to existing safety work, and

to require reporting to the full General Conference (every two years, which takes place in different years to the IPDC Council). The Resolution's wording implies that the report should henceforth be an ongoing feature of UNESCO's work and its reporting to the General Conferences.

In interpreting this mammoth task, the UNESCO Secretariat perceived that the required Report would need to be based upon a more detailed study. The exercise also needed to be scoped in order to define what to focus upon, and to locate the topic in context. The reason is that press freedom and safety are bound up with the broader right to freedom of expression – of which these issues are fundamental corollaries.

It is worth considering the relation between freedom of expression and press freedom, if the latter is seen as the exercise – in a particular form – of the overarching right by any actor (individual or institutional).⁴

First is the question of defining “press freedom”. Jakubowicz (2010) has written about the right to public expression, and this indeed is part of what is meant by press freedom. But due to its history, the concept should be understood not only as public expression, but also of the expression of specifically public-interest content – and often against vested interests who would rather prefer to have such information kept private.

Second, it is more than coincidence that press freedom, as the freedom to publish expression to a public, is bound up closely (though not exclusively) with a very particular form of human expression – namely journalism. This is a form of would-be “realist” (as distinct from fictional) speech that, as Onora O’Neill (2004) has pointed out, is voluntarily “other-regarding” (as distinct from “self-regarding”) and which accordingly sets itself up to honour particular standards of public interest, truth-telling and verifiability. Whether news, features, documentary or opinion, textual or audio-visual, online or off-line, journalistic practice thus aspires to particular hallmarks usually described as “professional”, irrespective of the institutional or individual author, and irrespective of genre or platform. Of relevance to the earlier points in this chapter is Neil Postman’s (1997) proposition that “great” (in my terms “high level”) journalism changes data to information, information to knowledge, and knowledge to wisdom. And it is this particular journalistic exercise of freedom of expression that so often attracts special attention in the form of attacks on press freedom.

Third, in its dynamic evolution, it should be noted that press freedom includes, but is not limited to, the media *qua* institutions or *qua* industrial sector. It is precisely because press freedom can be understood at core as being the freedom to publish journalistically, that it is a notion that extends wider than the printed press or other news media institutions as such. As Jay Rosen put it in 2003, the “press” should be understood as the ghost of democracy in the media machine. Today, this ghost can and does also exist outside of the

machine. We are talking about the “press function”, and it is open to non-institutional actors to fulfill.⁵ (Similarly, those who seek to limit press freedom may be various actors (state-based or not), and the right to press freedom needs to be defended for all practitioners of journalism and from all sources of threat).

On the basis of these points, one can return to the relationship of press freedom to freedom of expression. It can be proposed that if one wants the best barometer in regard to the exercise of freedom of expression within the wider society (in arts, learning, recreation, etc.), then the status of press freedom is a key indicator to look at. This is especially offline and linked to news media institutions, but it is also relevant to these institutions as well as individuals doing journalism in the online space. This is because press freedom is typically the most visible manifestation of the functioning of the general right to freedom of expression, irrespective of media platform.

The approach above contextualises the significance to freedom of expression of doing a Report on the status of press freedom in terms of the mandate given to the UNESCO secretariat. The conceptualisation affords recognition of the changes in news platforms and production practices that are reconfiguring what today constitutes “the media” and the rise of new platforms that include journalism amongst much other content. Within the breadth of this remit of press freedom, the institutional news media (on- and off-line) does nevertheless constitute the main (albeit not exclusive) focus of the UNESCO study – and not least because of their status as a symbol and a trend-setter. This status has a major bearing on the environment for press freedom for all actors, in other words for journalism originating from any source and published on any platform, and it has significance for the much wider right to freedom of expression.

It is in terms of all these points that one can understand why press freedom is integral to the UNESCO notion of Knowledge Societies. It is also why UNESCO’s conceptualisation of “media development” (as evidenced in its Media Development Indicators framework) is inherently premised on the values of press freedom. It is against the background elaborated above that the study to underpin the Report on press freedom and safety of journalists to the UNESCO General Conference has been provisionally titled: “*World Trends in Media Development*”.

Press Freedom Unpacked

To elaborate further, ever since African journalists developed the 1991 Windhoek Declaration, which was subsequently endorsed by the UNESCO General Conference, it has been evident to UNESCO that the realization of press freedom necessarily requires a media system that is *free, pluralistic* and *independent*.⁶ In this perspective, “media freedom” is just one component of “press

freedom" – the other two are pluralism and independence.⁷ This Windhoek concept differs from UNESCO's previous conceptualization of the New World Information and Communication Order, whose rise and fall is linked to a perceived preference for a state-centric media system (see Carlson, 2004). The Windhoek perspective covers freedom of the media from both state and business control of content, as well as the importance of professional ethics that give definition to editorial independence.⁸ Significantly, this outlook emerged in the wake of the collapse of Eastern European state socialism the Cold War bi-polarised world, which is one reason why it stresses the value of pluralism as opposed to either state or corporate monopoly. It is not, however, a wholly market-based view in that states are seen as having a role in promoting pluralism through regulation against monopoly, as well as through the legal and practical support of sectors such as public service and community media.

The World Trends study is structured along the lines of the Windhoek framework, in that it will assess freedom of expression (and especially press freedom) in terms of the three basic categories of media development: media freedom, pluralism and independence (and with a gender-sensitive lense envisaged throughout). Safety as a transversal issue is singled out for special attention. Here is what the study covers:

- *Media freedom* is mainly seen as a matter of the legal and statutory environment in which the news media operate. Key to assessing this freedom are: the legal status of freedom of expression and press freedom; whether news media regulation amounts to political licensing; whether journalism is censored or banned/blocked; whether criminal defamation and other laws are used against news media and journalists; and whether the profession is subject to licensing. This also includes whether journalists can seek information freely, an issue in which physical access and Freedom of Information are two significant contextual dimensions. (The legal environment as it impacts on ownership, control and self-regulation, online and offline, is also important to examine and is done so at relevant points in the categories below).
- *Pluralism* is mainly seen as a matter of economic ownership and control, and the types and numbers of media outlets available in a particular polity. How this relates to the existing policy and regulatory regime in terms of ownership limits and media support mechanisms is a consideration. A register of pluralism is the existence of viable public, private and community media. Pluralism also points in the direction of assessing the diversity of journalistic content on- and off-line.⁹

- *Independence* designates not merely autonomy from outside political or commercial interference. It especially covers the degree of professional autonomy of individual journalists within (or outside) media institutions, as reflected in their ethics and the strength of their professional organisations. It also points directly to the existence of self-regulatory mechanisms (and their autonomy in regard to statutory or other official regulation).¹⁰ An ecology of organisations that supports autonomous journalism through advocacy, training, etc. is also a factor impacting on independence. Independence impacts on the performance of journalism (including whether there is self-censorship), and especially in relation to the quality of information. Media activist AS Panneerselvan (see Panneerselvan and Nair, 2009) has perceptively observed that an exclusively top-down focus on the statutory environment for media freedom misses out on seeing the achievements of bottom-up pressures to advance or defend this dispensation. It is in the elaboration of *independence* that one is sensitized to journalists as subjects and actors, not only as objects. If “media freedom” highlights the view of press freedom from on high, “independence” gives us the vantage point from below.
- *Safety* is a cross-cutting issue. It is relevant to independence because it is a precondition for journalists to work without fear. The absence of safety leads to self-censorship which compromises editorial autonomy and removes ethical choice. This in turn impacts upon pluralism and diversity. Safety is also a dimension of media freedom as regards the responsibility of the state in protecting freedom of expression and ensuring there is not impunity for crimes against journalists. Standards applied by non-state actors, especially “intermediaries”, in regard to protecting press freedom rights for their users, are important to understanding safety online.

The value of such an integrated perspective can be seen in the interdependence of the four components: freedom, pluralism, independence and safety. Laws providing for freedom of the media are hollow if journalists are not safe. Monopolization (whether from state-owned or private media) clearly circumscribes the value of press freedom to a society, and curtails the realization of the rights of would-be entrants. But even if there is media freedom, safety and pluralism, inadequate independence and ethics can undermine these advantages (such as in the UK’s recent scandals about reckless phone hacking and media-wide blinkers in regard to an alleged pedophile media personality).

This Windhoek framework is operationalized further in terms of the more detailed elaboration found in the UNESCO Media Development Indicators

(mentioned above), which have in turn been endorsed by UNESCO's IPDC Council. Together, these set the stage for the 2013 UNESCO World Trends study.

Conclusion

Several issues impact on the knowledge operation that UNESCO has been required to undertake in regard to this implementing this conceptualization in the form of a major study. One is financial resources to pay for this exercise, in a context of severe budgetary constraints at UNESCO following the suspension of the USA's membership fee payments in the wake of the recognition of Palestine as a Member State of the Organization. Another issue has been a different kind of resources – the raw materials for the knowledge operation. It is very evident that data and information on these matters is very unevenly generated around the world, and its linguistic variation is also substantial. There is not information overload in this regard. One amelioration would have been the UNESCO Institute of Statistics to promote the collection of standard global data on media, but this has been put on hold due to budget cuts. Even where basic facts are available, however, there is still often a problem about being able to work off secondary sources in many parts of the world which fail to provide gender-disaggregated and/or gender-salient information.

Then there is the complexity of analysis. As important as it is, phone hacking by two papers in the UK does not necessarily make for a trend, just as the investigative journalism by a third paper that exposed them is also not a trend as such. One way to try and deal with this kind of challenge is to aggregate national phenomena into regions, even though this has still posed a challenge for identifying patterns within (and between) extremely diverse regions. The research requires acknowledgement of many contradictory and partial developments.

In order to produce an internationally-credible study, the production strategy has been to use regionally-based expertise. The modus operandi has been to recruit, in each region, one expert for freedom, another for pluralism and a third for independence, and to encourage them to work with each other as well. (The safety component of the research has been shared between them and also supplemented by UNESCO Headquarters). Additional authors were engaged for global chapters that give augmented attention to gender, and to transnational- level developments with regard to freedom of expression via Internet and via satellite. Identifying the researchers and their tracking down sufficient data has not been an easy task. Much intellectual effort has also gone into developing a viable universal template so that the research findings are standardised, drawing from the Media Development Indicators, as well as on methodologies developed by other international, regional and national

specialized organisations. The different regional studies were brought together into a peer review session in late February 2013, and which was the occasion to discern world trends from the draft regional reports. (See Appendix 1 for a tabular overview of the survey). It goes without saying that a document like this needed to be firmly fact-based, and that projections for future trends had to be based on a solid analysis of developments over the past five years.

The 2011 Resolution behind the research enterprise recounted above also included a clause that referred to reinforcing the need for UNESCO to “promote the free flow of ideas by encouraging dialogue between Member States and by sensitizing governments, public institutions and civil society to strive towards freedom of expression and freedom of the press as a central element in building strong democracies...”. In this light, the World Trends survey was seen as constituting the background document for the required Report to the Member States. The Report thus provides a solid basis for *knowledge-centred* dialogue at the 37th General Conference of the Organization. Further, as per the Resolution clause noted above, the study is seen as a way to sensitise other stakeholders besides governments. With a follow-through strategy, it could also have resonance in other UN bodies such as the Human Rights Council and the Special Rapporteur on Freedom of Expression.

To return to the broader issues raised at the start of this Chapter. The *World Trends* study can be seen as an aspiration to fill a *silence* by providing an internationally-representative body of information that can contribute to a further knowledge process by constituting a credible resource around which UNESCO Member States and other stakeholders can *speak*. For this reason, the goal can been seen as seeking to stimulate active *listening* which constitutes knowledge, rather than mere information transfer. That required at base that the quality of the study was sufficiently “high level” content. Perhaps, in the metallurgical analogies, one could say that form of alchemy has been necessary in seeking to achieve all this. However, we do not have magic available at UNESCO; instead we do have assets of expertise, convening power and credibility. In this way, we have endeavoured to ensure that the total process in mapping freedom of expression has been an exercise in fusing gold, silver and platinum to produce an alloy whose value exceeds the sum of its individual components.

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Notes

- 1 This chapter is based on a speech at the symposium: "Speaking is silver. Symposium on Global and Nordic Freedom of Expression", convened by the UNESCO National Commissions of Sweden and Finland, and Nordicom, and held at Hanasaari, Finland December 13-14, 2012. Thanks to Andrea Cairola for useful comments.
- 2 UNESCO. *Towards Knowledge Societies. World Report*. (2005)
- 3 A recent (Spanish-language) publication has the title (translated into English): "Right to oblivion: between data protection, memory and personal life in the digital era" (CELE 2012)
- 4 This is a different position to that argued by Nordenstreng (2007) who sees the right to freedom of expression as applying to people, not to institutions with their particular owners and managers.
- 5 This perspective is evident in the 2012 decision of the Intergovernmental Council of UNESCO's International Programme for the Development of Communication (IPDC), that UNESCO should produce a bi-annual "analytical report on the Director-General's condem-

nations of the killings of journalists, media workers and *social media producers who generate a significant amount of public-interest journalism* who are killed in the line of duty or targeted for murder because of their journalistic activities.[my italics]" (IPDC Decision on the Safety of Journalists, 23 March 2012.

- 6 See Berger (2011)
- 7 The case for pluralism to be seen as part of the meaning of press freedom is made by numerous scholars. (See for example Lichtenberg, 2002; Lancier, 2009)
- 8 This perspective has similarities to the four-part model outlined by Denis McQuail (1994:140) in his interpretation of the meaning of "press freedom".
- 9 However, it can be noted in passing that research on content diversity is not widely available.
- 10 The relationship between self-regulation and professional ethics is not automatic, however, and the extent of self-regulation (when mixed with other forms of regulation) is often complex. For example, the Leveson Enquiry deemed that newspaper self-regulation in the UK had failed and should be replaced by so-called "independent regulation" which should be done by a body that would be officially verified. Various counterpoints can be made to this. First, it can be argued that the UK's Press Complaints Commission (PCC) was not "self-regulation" as much as "editors' club regulation", and that press independence should include journalists prominently in any self-regulatory body. Second, it can further be proposed that for self-regulation to remain "self" it should retain a majority of media representatives even when incorporating other stakeholder representatives. Third, self-regulation should arguably confine itself to professional standards and therefore ethical regulation, and avoid legal matters. (In contrast, PCC entered a terrain where it had no real authority and which should rather have been referred to the criminal justice system and the general law). Fourth, notwithstanding the Levenson report (and submissions to the enquiry such as by Petley, 2012), official recognition of a press council could be a stepping stone to compromising the independence of such an institution.

Appendix

The output report was originally envisaged as follows (figures refer to number of pages):

PAGES	Freedom	Safety	Pluralism	Independence	Total
Introduction					2
Overview	3	3	3	3	12
Africa	3	3	3	3	12
Mena	3	3	3	3	12
Asia	3	3	3	3	12
LA & Caribbean	3	3	3	3	12
W Europe/US	3	3	3	3	12
E Europe	3	3	3	3	12
Gender	1	1	1	1	4
Conclusion & recommendations					4
Global media	2	2	2	2	8
List of sources	4	4	4	4	16
Totals	26	26	26	26	118

Towards a Better World: What the North Can Do

Safety and an Enabling Environment for Journalists¹

William Horsley

This is a good time to assess what has been achieved in the past couple of years by international efforts to tackle the alarming increase in attacks worldwide on the physical safety and the fundamental rights of journalists, as well as the challenge that lies ahead to create a 'safe and enabling environment for journalists'. I will also offer some thoughts on the part that Finland, Sweden and other established democracies may reasonably be expected to play in those efforts.

I have been a journalist and reporter all my working life, including more than 30 years as a TV, Radio and online journalist with the BBC, mostly reporting from around the world from Asia, Europe and elsewhere.

Five years ago I left the BBC to seek to apply what I learned as a journalist to matters of media policy – in particular, to the often violent battle for control of the flow of information, which is now more than ever before an integral part of the struggle for political power. Journalists and media workers are in the front line of that battle and therefore among the most vulnerable and greatly in need of the protection of just laws and effective law-enforcement, both on humanitarian grounds and as a matter of the common public interest.

At the Centre for Freedom of the Media at the University of Sheffield I work with colleagues to add momentum to the efforts being made internationally, especially at the United Nations and in the major European institutions – the Council of Europe, OSCE and EU. In parallel with that I also represent the Association of European Journalists, a professional network of journalists with more than 20 national sections, in the attempt to raise the consciousness of journalists themselves on these issues, and ensure that their voice is properly heard by governments and decision-makers.

To the World's Democracies: This is Our Fight, Too

The theme of the opening speech at this conference by Guy Berger of UNESCO – why knowledge makes a difference – is well-judged. Knowledge *is* key: a proper understanding of the ways in which censorship and self-censorship work, often through fear and through unseen pressures, is essential to the chances of making “a better world” – or to put it more starkly, of preventing the forces of coercion and lawlessness from engulfing our *own* world. There are disturbing signs that the defences are not strong enough for the task. And there is much for the Nordic states and for all democratic governments to do. This is our fight, too.

The rules that were almost miraculously accepted (as it now seems) by and large in the aftermath of World War Two through the UN system, and again re-inforced with the defeat of communism in Europe and the end of the Cold War, are in urgent need of repair and of re-building stronger than before.

It is surely a vital interest for countries like Sweden and Finland – and others which helped to establish the rules of international law and which enjoy a stable and democratic political system – to contribute actively to that repair work

The BBC's foreign news editor, Jon Williams, has made that point eloquently: “We are not impartial about a free press,” he said of the BBC itself. “We believe passionately that our audiences *and audiences around the world* should have access to free and unbiased media.”

Jon was speaking at the Symposium in London which CFOM co-hosted with the BBC in October 2012 for media editors and journalists in advance of the UN Inter-agency meeting on the Safety of Journalists in Vienna in November. As the man who deploys BBC news teams to trouble-spots to cover and report back the news, Jon was expressing a dawning realisation among those who manage major newsgathering organisations that the task is in too many places simply becoming impossible.

Has that message got through to the top political decision-makers?

No it has not – at least not if we judge by the situation on the ground in scores of countries around the world. Freedom House's annual survey of Press Freedom in the world has found that it has actually declined in 7 of the past 8 years overall worldwide, despite the fantastic opportunities for freedom of expression offered by the Internet and mobile technologies.

But on the other hand the message *does* seem to be getting through if we judge from the attention now being given to these issues in inter-governmental organisations: UNESCO and the UN family as a whole are giving high priority to the safety of journalists and the protection of freedom of expression through the UN's multi-agency Plan of Action on the Safety of Journalists and the Issue of Impunity, which was formally launched at that UN Inter-agency meeting in Vienna.

The Committee of Ministers of the Council of Europe, too, has publicly acknowledged that more needs to be done to reverse the erosion of legitimate media freedom in the wider Europe. Proposals are already being worked up which – if the political will is strong enough – could be approved at the Ministerial Conference of ministers responsible for the media to be held in Belgrade in October 2013. The ground was been laid a year ago when three meetings of the Committee of Ministers' representatives were given over to special Thematic Debates on those matters.

Meanwhile the European Commission is due in 2013 to announce new Guidelines on Freedom of Expression, including the physical protection of journalists under threat. Those guidelines are intended so that EU missions outside the Union may act consistently as part of the EU's external relations policies. In response to strong pressures from civil society the EU is also examining whether it has the legal competence to regulate or intervene in countries inside the EU itself – in cases like Hungary's recently-enacted and repressive media laws.

Yet the sober truth is that the results of these new expressions of concern up to now are less than impressive. The political will of the governments of Europe is being tested and so far it has not delivered.

Please don't misunderstand me: the very significant support that the Nordic states already give to independent media, and to active NGOs as well as to UNESCO, the OSCE and others for work in this area is vital and often effective. But to bear fruit against the growing forces of obstruction, violence and injustice I believe that a more intense level of political commitment is essential.

I want to use this occasion to put forward several ways in which the Nordic states and the world's other democracies could exercise their responsibility more actively for journalists' safety in the councils of the international community, so that others may share the precious freedom that we value so highly ourselves.

Journalism as the Most Dangerous Profession

First let's look at the facts: what evidence is there that the practice of journalism is growing more dangerous around the world?

During 2012 UNESCO recorded a total of 121 journalists around the world who were killed in the course of their work or because of it – a new record high for any one year.

The key factor behind the surge in those killings, as well as other attacks and cases of kidnapping, torture and disappearance, the combination of high numbers of deaths in areas of armed conflict and the even higher numbers of targeted murders in unstable or authoritarian states. Those are typically car-

ried out in order to silence reporting about crime, corruption and systematic abuses of power. Journalists working online now account for about one third of all the fatalities.

This year many journalists have died in armed conflicts or insurgency in Syria, Somalia and elsewhere. That comes on top of an alarming increase over the past two decades in the toll of journalists' deaths in regions which are not considered to be war zones but where there is a breakdown of the rule of law, with drugs barons, criminal gangs or rogue elements of the state's security or intelligence apparatus are all accused of acts of violence and murder of journalists.

The most afflicted countries include Mexico, Honduras, Pakistan, the Philippines and Russia.

And for every journalist who is killed in order to silence him or her, there are always many more who are attacked and injured. A large number of them face credible threats to their safety or that of members of their families, and so are silenced or driven into exile. "Do you love your daughter very much? We know where she goes to school", was one such chilling message delivered to a journalist in Colombia.

More journalists than ever before are also being held in prisons around the world. The Committee to Protect Journalists reported at the end of 2012 that 232 journalists or writers are being locked up on account of their work in 27 countries, an increase of 53 from one year ago. By some estimates Turkey has more jailed journalists than any other country in the world.

Most imprisoned journalists are held under harsh or illegitimate anti-terrorism and state secrecy laws. The CPJ records a "disturbing trend of conflating coverage of opposition groups or sensitive topics with terrorism".

Who Should Protect Journalists?

In *War on Words: Who should Protect Journalists?*, a book published in 2011, two American researchers, Joanne Lisosky and Jennifer Henrichsen, interviewed more than 100 frontline journalists and free expression activists and asked them what they thought were the main factors behind the rising tide of violence directed at media workers. They identified three main factors:

- An increased awareness by combatants that the media have the power to affect the outcome
- A perceived loss of neutrality of the media
- The prevalence of impunity shielding those responsible for killings of journalists

The *first* factor is that with the Internet and modern communications the media themselves have become a battleground in wars and of the struggle for power. The media have the power to affect the outcome, so participants in conflicts seek to control the flow of information about it. Thus silencing critical journalists can come to be seen as a goal of combatants in itself.

The *second* is a perceived loss of neutrality of the media. In some cases there is good evidence that influential broadcasting, press or news agencies have acted as mouthpieces for one side or another in conflicts. In other circumstance journalists are simply an obstacle to the goals of one or another kind of violent or criminal group, and so may become targets simply because of what they do – reporting on matters of legitimate public interest. And all too commonly the state gives no meaningful protection from attacks.

In Iraq, for example, UNESCO's staff report that most journalists can only operate now by hiding the nature of their work. They avoid showing recording equipment or notebooks whenever possible because of the risks of attack. They estimate that as many as 300 Iraqi journalists have been murdered since 2003 and that not one single case has resulted in those responsible being punished.

Impunity is the *third* important factor – that is to say the vicious circle created by the repetition of a pattern in which the killing of a journalist results in no credible investigation and no prosecution. Very often the killers of journalists are shielded from facing justice by official obstruction or negligence. They are therefore encouraged to think that journalists may be eliminated with little fear of discovery or punishment.

As one commentator has aptly observed, up to now a number of what might be called “Mafia states” around the world have been able to use the protection of respect for state sovereignty as a way of shielding themselves from scrutiny or any form of international sanctions over their poor records in terms of journalists’ safety and impunity.

A revealing statistic is contained in the Director General of UNESCO's 2012 Report on the Safety of Journalists and the Issue of Impunity, which was debated by diplomats from member states at the IPDC Inter-governmental Council meeting in March 2012.

The report identifies 36 states where between 2006 and 2009 a total of 244 journalists were killed. In each case the state concerned was asked what judicial follow-up had taken place. Nearly half of them failed to respond at all. And based on the responses that were received, only 8 convictions are recorded related to those 244 deaths.

The authors of *War on Words* implicitly conclude that in reality journalists can look to no-one but themselves.

Personally I believe that that conclusion is wrong and can even be seriously damaging. The first line of defence for the security of journalists in dangerous

working environments is good preparation in the form of training and skills, safety equipment and support. The duty of care given by media employers to their staff and support personnel in the field is of course vital and much more needs to be done. But any long-term improvement will also require the establishment of functioning systems of national law, backed up by credible international mechanisms to bring about compliance.

What is being done? Here is an overview of what is now under way in the main institutions in Europe concerned with freedom of expression and the freedom to report.

The Council of Europe

The issue has risen high up the formal agenda of the 47-member Council of Europe. It is now identified as a priority in the Committee of Ministers, the office of Commissioner for Human Rights, and the Parliamentary Assembly.

I have been able to play a small part in encouraging a coherent response, having been asked to write three detailed background reports on the State of Media Freedom in Europe for the Council of Europe's Parliamentary Assembly since 2009. They are surveys of the most serious attacks on press freedom and individual journalists across Europe. The most recent was published in December 2012.²

Each of those Reports set out numerous examples of physical assaults and intimidation, judicial harassment and failures to protect journalists facing evident threats to their safety. While those responsible include both state and non-state actors, what is manifestly clear is that worsening conditions for journalists and failures of the rule of law are above all matters that are the responsibility of states. In many cases acts of violence are carried out by criminals or opponents of governments. But all too often they are done by public officials – police, prison officers or others.

This reality was publicly acknowledged by the Council of Europe's Committee of Ministers in their 2011 Guidelines on Eradicating Impunity for serious human rights violations. That recognition appears to be a necessary first step towards confronting and removing the underlying sources of the climate of fear under which journalists and others are obliged to live in some parts of Europe.

A new opportunity to move that ambition forward now exists, and the Nordic states and other democracies are in a position to exert influence to achieve that if they so choose. The Council of Europe's inter-governmental Steering Committee on Media and Information Society (known as CDMSI) is drafting proposals for the enforcement of States' obligations more effectively through the application of the legal concept of the 'positive obligations' of States to protect the safety of threatened journalists and the principle of

freedom of expression. The European Court of Human Rights expounds the concept like this:

The Court has held that while the essential object of many provisions of the Convention is to protect the individual from arbitrary interference by public authorities there may in addition be positive obligations inherent in [giving] effect [to] respect of the rights concerned.³

The research department of the court explains why a positive obligation may arise in particular under Article 10:

This is because the Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy and that states must ensure that private individuals can effectively exercise the right of communication between themselves.

If the governments of Europe collectively support this initiative, a text to this effect may be presented for political endorsement at the Council of Europe conference for ministers with responsibility for the media, to be held in Belgrade in October 2013. A subsequent decision by the Committee of Ministers meeting in Strasbourg would give such a text the force of a 'soft law' instrument across the Council of Europe area.

Leading human rights NGOs and journalists associations consider that the Council of Europe needs to act decisively if it is to counter the charge of past inaction or neglect with respect to the protection of media freedom and the safety of journalists. At the 2009 Council of Europe Ministerial conference on media affairs in Reykjavik the ministers of all the member States (with the exception of Russia) issued a pledge to undertake regular reviews of their terrorism-related legislation to ensure it does not conflict with Article 10 commitments.

Four years later no substantial action has been taken to honour that pledge despite intense pressure from legal and freedom of expression NGOs, academics and experts, including three open letters sent to the Council of Europe's Secretary General. And in 2012, without consultation, the matter was removed from the agenda of the media committee, whose remit is to set standards for protecting freedom of expression, and was transferred to another committee known as CODEXTER whose task is the protection of state security

The OSCE

A similar focus on journalists' safety has been seen in the Organisation for Security and Cooperation in Europe, with its 57 participating states (a new-

comer, Mongolia, joined in 2012). At the OSCE Ministerial conference in Dublin in December 2012, for the second year in a row, a draft text pledging to give high political priority to the safety and protection of journalists was drafted for the ministers' consideration. But for the second year in a row it failed, underlining the deep divide between the vision of European security of several states of the former Soviet Union and that of others which give a high priority to compliance with OSCE participating States' commitments concerning free expression and other human rights.

In 2011 a stark warning about the deteriorating environment for media freedom and journalists' security in Europe was delivered at a conference hosted by Lithuania, which then occupied the OSCE chairmanship.

It came in a speech by Professor Michael O'Flaherty, Vice Chairperson of the United Nations Human Rights Committee. He said:

The violations of freedom of expression and forms of attacks on journalists in some OSCE States are among the worst in the world. The Committee has drawn attention to such abuses as the killing of journalists and the failure to investigate the murders or penalise the perpetrators; the enforcement of unacceptable laws that forbid comment on public affairs, criticism of the State or of its high officials; the imposition of suffocating regulatory frameworks and heavy handed and unacceptable efforts to censor the Internet.⁴

In view of the seriousness of these failings Prof O'Flaherty told OSCE governments that to fulfil their obligations with respect to attacks on journalists and the failure to investigate the murders they should conduct a comprehensive review of law, policy and practice in the following terms:

This needs to be across government – affecting ministries responsible for communications, justice, education, and so forth. Programmes need to be both preventive of restrictions and attacks on the media and they need to be protective and restorative for victims of such attacks. Invariably, the Committee emphasises that protection of the media has to be a top priority for States.

The United Nations

In spite of all the work being done by UNESCO, the Office of the High Commissioner for Human Rights and other United Nations bodies, there is a widespread view within the global media and freedom of expression NGOs – which is shared by some concerned UN insiders – that the UN has let journalists down. For example, the adoption in 2006 of UN Security Council Reso-

lution 1738 on the safety of media workers in war zones raised high expectations but it has brought few tangible results. No prosecutions or threats of punitive action have yet resulted from 1738.

Is the climate more favourable now? Is the damage being inflicted on press freedom so acute that the world's democracies are ready to invest the political capital necessary to recover the lost ground? There are hopeful signs, at least.

In September 2012 Austria, supported by other countries in Europe and the UN's other regional groupings, introduced the first ever UN Resolution on the Safety of Journalists to the UN's Human Rights Council in Geneva, and it was adopted by consensus.

That Resolution acknowledges the particular role of journalism on matters of public interest, calls on all states to align their laws and law-enforcement practices with agreed international standards, and opens the way for stronger political pressure to be applied, in the detailed work of the Human Rights Council, on states that violate international norms and commitments.

The UN's Action Plan on journalists' safety and impunity is the result of three years of hard diplomatic slog. It is a blueprint for over 100 lines of action by powerful UN agencies, including the UN Development Program and the Office for Drugs and Crime, as well as the existing human rights machinery, all aimed at giving more protection to journalists.

It is something of a diplomatic triumph that the UN plan has been approved and that work is now under way with national governments and relevant stakeholders to give effect to an Implementation Strategy during 2013 and 2014. But real improvements and remedies are not assured. Any success in terms of effective protection, prevention of attacks, removal of authoritarian laws, oversight of public and state law-enforcement bodies, and combatting impunity, will require unremitting efforts by democratic states, and further political struggles lie ahead.

So here is a shortlist of actions and goals that the Nordic States and others could pursue to help secure effective protection for the lives and work of journalists:

- 1 Dedicate appropriate levels of funding and human resources to practical protection schemes for journalists under threat, training of journalists and public officials, and the necessary work of international bodies in related activities and programmes.
- 2 Demonstrate commitment to the struggle to ensure a safe and enabling environment for legitimate and inquiring journalism by means of public bilateral and multilateral statements and policy engagements; and by pressing the relevant organisations (UN bodies, Council of Europe, European Union etc) to take concerted actions in accordance with their mandates.
- 3 Support efforts to establish new or enhanced mechanisms for achieving better compliance by all states with international obligations under the International Covenant of Civil and Political Rights, the European Convention on Human Rights etc; possible options (sub-

ject to legal advice) may include the application of international sanctions targeting public officials implicated in the committal of violent crimes against journalists and the toleration of impunity.

4 Organise national commissions for UNESCO in ways that ensure that they represent civil society and independent expertise. National commissions should be responsive to real need in the forthcoming work of UNESCO and other UN Agencies concerning the safety of journalists and press freedom, including the first Review and Evaluation of the UN Action Plan in January 2014. Progress could also be achieved through the proposed global survey of press freedom and journalists' safety around the world at the UNESCO General Conference in autumn 2013. And the next IPDC (International Programme for the Development of Communications) meeting in 2014 will be an opportunity to strengthen the effectiveness of UNESCO's regular audit of journalists' killings and the judicial follow-up by concerned states.

5 Within the EU, seek to ensure that the Union uses its trade and economic agreements with third countries to promote compliance with international norms for the protection of journalists and others who exercise the right of freedom of expression; and ensure that any exercise of EU competence in the field of media and freedom of expression is closely aligned with Article 10 rights (freedom of expression) and the case law of the European Court of Human Rights protecting freedom of expression as a precondition for a functioning democracy. Issues of unlawful and irresponsible behaviour by journalists and media are not properly dealt with by state interventions or new media laws but by self-regulation and the enforcement of existing laws consistent with the European Convention and case law of the Strasbourg Court.

6 Give priority in the Council of Europe to measures designed to strengthen early warning mechanisms, interventions and implementation of ECtHR rulings concerning the protection of journalists' safety and legitimate press freedoms, including the Court's jurisprudence on the positive obligations of States; and support transparent measures to ensure that national anti-terrorism and state security laws do not infringe fundamental rights to freedom of expression and the ability of the media to scrutinise the actions of governments.

7 In the OSCE context, seek maximum support for the work of the Office of the Representative on Freedom of the Media and the Office for Democratic Institutions and Human Rights; in particular, give priority to correcting the damage to the rule of law in European countries arising from repression and political interference in media as well as uses of state resources at times of elections, as documented in several ODIHR Reports following its Election Observation missions.

8 Seek to raise the political cost to neglectful governments of ignoring or being complicit in allowing impunity in relation to targeted harassment and violence against journalists; and set a good example at home by repealing criminal defamation laws and putting in place independent oversight bodies to protect all forms of media from undue interference or pressure.

European States – especially the Nordic States – have done much to put in place the international framework which should protect freedom of expression and press freedom. But treaties and conventions are mere pieces of paper

without the political will to enforce those rules and obtain redress when patterns of abuse occur and become entrenched, as they are now in too many cases in Europe and beyond.

Notes

- ¹ This article is based on a presentation made at the Speaking is Silver conference in December 2012, Hanassari, Finland
- ² *The State of Media Freedom in Europe* background report for the Committee on Culture, Science, Education and Media of the Parliamentary Assembly of the Council of Europe, William Horsley, December 2012 http://www.aej.org/page.asp?p_id=372
- ³ European Court of Human Rights Research Report on the positive obligations on member States under Article 10 to protect journalists and prevent impunity, December 2011 http://www.echr.coe.int/NR/rdonlyres/16237F92-BCB9-4F12-9B1C-0EF6E3B2CB27/0/RAP-PORT_RECHERCHE_Positive_obligations_under_Article_10_EN.pdf
- ⁴ Cited in The *OSCE Safety of Journalists Guidebook*, 2012, Author: William Horsley <http://www.osce.org/fom/85777>

European Union: Promoting Freedom of Expression Only an External Affair?

Anna Celsing

Giving a big boost to freedom of expression, the internet has been a blessing for those who struggle for political change and use the net to spread their ideas and criticise the powers that be. This has however created a backlash and intensified attempts by states no longer able to exercise control over information to restrict access to online content or the internet as such.

Restrictions on internet freedom have continued to grow in many countries during the last few years, reports the Washington-based organisation Freedom House. But the methods of control are slowly evolving, becoming more sophisticated and less visible. Brutal attacks against bloggers, politically motivated surveillance, pro-active manipulation of web content, and restrictive laws regulating speech online are among the diverse threats to internet freedom emerging over the past two years, writes the organisation in its Freedom on the Net 2012 report¹.

Concerned about this development, the European Union and its member states are working actively for the protection and promotion of internet freedom and human rights at the international level. But what about the situation of a fundamental right such as freedom of the media inside the Union itself? Is it "above reproach", as required by EU policy? And what about the indirect effects on freedom of expression of EU policies regarding, for example, telecommunication infrastructure, the fight against terrorism, cybersecurity or privacy and data protection?

In the following I will try to answer these questions and to explain some of the background to recent EU policy developments regarding freedom of expression. Given the increasingly pivotal role of the internet in today's world, I have mainly focused on web-related issues. I have also chosen to concentrate on a few topical matters in the policy examples described. The final discussion outlines some of the challenges policymakers face in dealing with these issues and conveys a few recent policy recommendations from experts in the field.

EU Active at the International Level

The European Union and its member states are much involved in promoting freedom of expression and other human rights at the international level. Some recent examples:

In July 2012 a landmark resolution on freedom of expression online – presented by Sweden and five other countries – was adopted by the UN Human Rights Council. The resolution was warmly welcomed by the European Parliament. The Human Rights Council affirms that "the same rights that people have offline must also be protected online, in particular freedom of expression" and calls upon all states to "promote and facilitate access to the Internet and international cooperation aimed at the development of media and information and communications facilities in all countries"².

Freedom of expression on the Internet was one of the topics discussed at the 7th meeting of the Internet Governance Forum (IGF) in Baku, Azerbaijan, in November 2012. The EU delegation showed much interest in the issue and did not hesitate to criticise the meeting's host country on this account. "We are extremely concerned about numerous testimonies during IGF workshops on violations of basic human rights in Azerbaijan... We deplore the many arbitrary restrictions on media, both online and offline", said the EU delegation in a joint statement to the IGF³.

In her speech at the meeting the EU Commissioner for the Digital Agenda, Neelie Kroes, told the audience that the EU promotes technologies that help journalists avoid surveillance and safeguard their right to privacy as well as provides funding to fight cyber-censorship under the European Instrument for Democracy and Human Rights⁴.

At the ITU's World Conference on International Telecommunications in Dubai a month later – which was organised to review the International Telecommunications Regulations (ITRs) – EU member states joined the United States and other countries declaring they would not sign the final revised treaty. "In the opinion of EU participants, the final text risked threatening the future of the open internet and internet freedoms, as well as having the potential to undermine future economic growth", explained the EU Commission⁵.

In 2012 the Commission set aside 3 million euros in the European Instrument for Democracy and Human Rights to provide technical and other support to human rights defenders against cyber-censorship. The Commission is also preparing guidance on human rights as part of the corporate social responsibility of the ICT industry. Furthermore, an EU Special Representative for Human Rights (EUSR) was appointed by the Council "to enhance the effectiveness and visibility of EU human rights policy." The appointment was a result of repeated demands from the European Parliament.

In December 2012 the Parliament called on the EU Commission and Council to adopt a digital freedom strategy in EU foreign policy as soon as possible.

In its resolution the European Parliament acknowledges that digital freedoms, like uncensored access to the internet, are fundamental rights which deserve the same protection as traditional human rights. The EU's trade and association agreements, development programs and accession negotiations should therefore be made conditional on respect for digital freedoms. The Parliament deplores the fact that EU-made technologies and services are sometimes used in third countries to violate human rights through censorship of information, mass surveillance, monitoring, and the tracing and tracking of citizens and their activities on telephone networks and the internet, and urges the Commission to take all necessary steps to stop this 'digital arms trade'⁶.

Lisbon Treaty Brought New Obligations

The increasing concern in the EU for freedom of expression has much to do with the adoption of the Lisbon Treaty, which entered into force in December 2009. This made the Charter of Fundamental Rights of the European Union legally binding.

The Charter's article 11 on freedom of expression and information reads:

- 1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
- 2 The freedom and pluralism of the media shall be respected.⁷

The Lisbon Treaty also made the EU's accession to the European Convention on Human Rights a legal obligation and placed human rights at the heart of the Union's external action. Moreover, since 2010 there is a member of the European Commission with specific responsibility for the promotion of justice, fundamental rights and citizenship (at present Vice-President Viviane Reding).

Problems Only Outside the EU?

As we have seen, much of the EU's growing concern for freedom of expression seems to be directed outwards, to the situation in countries outside the European Union. The Charter of Fundamental Rights should, however, apply to all EU activities, as explained by the European Commission in its strategy for the implementation of the Charter by the European Union. "The Union's action must be above reproach when it comes to fundamental rights," stresses the Commission⁸.

As it turns out, the situation regarding freedom of expression inside the Union can hardly be called exemplary. This is how the organisation Report-

ers Without Borders summarises the results of its World Press Freedom Index 2011-2012 with regard to the EU: “Within the European Union, the index reflects a continuation of the very marked distinction between countries such as Finland and Netherlands that have always had a good evaluation and countries such as Bulgaria (80th), Greece (70th) and Italy (61st) that fail to address the issue of their media freedom violations, above all because of a lack of political will. There was little progress from France, which went from 44th to 38th, or from Spain (39th) and Romania (47th).”⁹

The 2013 World Press Freedom Index shows that the situation is unchanged for much of the European Union. The bad legislation seen in 2011 continued, especially in Italy and Hungary.

In Brussels this issue is not much discussed, except in the European Parliament which for a number of years has been calling attention to problems regarding media freedom in EU member states and demanded that the EU do something about it.

In March 2011, outraged by the introduction of controversial media laws in Hungary – which would tighten the government’s grip on the media and restrict press freedom – and disappointed with the feeble reaction of the EU to these laws, the Parliament adopted a resolution on this matter. Here it welcomes the EU Commission’s cooperation with the Hungarian authorities to amend the law, but “deplores its decision to target only a few points”.

The European Parliament also points out that “media pluralism and freedom continues to be a grave concern in the EU and its Member States, notably in Italy, Bulgaria, Romania, Czech Republic and Estonia”, and asks the EU Commission to propose a directive on media freedom, pluralism and independent governance before the end of 2011¹⁰

No such proposal was presented. Instead the European Commission convened a High Level Group on Media Freedom and Pluralism in October 2011 to advise and provide recommendations for the promotion of media freedom and pluralism in Europe. In addition, the Commission announced that it was establishing a Centre for Media Pluralism and Media Freedom within the European University Institute of Florence to reflect and advise on the underlying issues.

The Commission probably hoped that this would appease the European Parliament, but the MEPs were not overly impressed. In December 2012 the Parliament adopted a resolution on the situation of fundamental rights in the European Union, in which it says that it “regrets the worsening situation of media freedom in various Member States” and calls on the Member States to respect, and the Commission to take appropriate measures “to monitor and enforce, media freedom and media pluralism”. The MEPs condemn the conditions under which some journalists work and the obstacles they face, and are particularly concerned that “some Member States are tempted to challenge the

principle of the protection of journalistic sources and the ability of investigative journalists to investigate circles close to government.” The Parliament adds that it “regrets deeply the attitude of the Commission, which refuses to make any legislative proposal to ensure media freedom and pluralism in accordance with Article 11 of the Charter”¹¹.

In May 2013 the European Parliament adopted a new resolution on these matters (13). Media freedom and pluralism should be monitored in all member states, and the findings published in annual reports followed up by proposals for action, says the Parliament. This should be done by the European Commission, the Fundamental Rights Agency and/or the European University Institute (EUI) Centre for Media Pluralism and Media Freedom.

Furthermore, the scope of the EU Audiovisual Media Services Directive (AVMSD) should be extended to establish minimum standards for protecting the fundamental right to freedom of expression and information, media freedom and pluralism. The revised AVMSD should include rules on the transparency of media ownership, media concentration and conflicts of interest. MEPs call on the Commission to propose concrete measures to safeguard including a legislative framework for media ownership rules introducing minimum standards for Member States (12).

Impact on Freedom of Expression of EU Policy in Other Areas

Media policy is not the only area of EU activity affecting freedom of expression. Political decisions in many other areas can have an impact too. For example those involving telecommunication infrastructure, cyber-security and the fight against terrorism, and privacy and data protection.

In recent years the issue of net neutrality has been much discussed in the EU. Many have criticized so-called traffic management practices by internet service providers, such as the blocking or throttling peer-to-peer (P2P) traffic on networks, and have put pressure on the European Commission to do something about it. As a result the Commission asked BEREC, the new Body of European Regulators for Electronic Communications, to investigate the extent of these and other traffic management practices. In May 2012 BEREC published its results showing that blocking or throttling of peer-to-peer traffic or Voice over IP (VoIP) “can create concerns for end users”¹³.

The EU Commission launched several public consultations on the net neutrality issue but no concrete policy measures have materialized, a fact which seems to frustrate advocacy groups as well the European Parliament. In a resolution on completing the digital single market, adopted in December 2012, the Parliament “calls on the Commission to propose legislation to ensure net neutrality”¹⁴.

EU Commissioner Neelie Kroes however still seems reluctant to propose any kind of legislation that would enshrine net neutrality into law. Speaking in the European Parliament in early June 2013, Kroes identified “transparency,” “consumer choice” and the “ability for consumers to switch providers “without countless obstacles” instead of net neutrality as the main paths to an open internet.¹⁵

The Commission is currently working on laying down recommendations for regulators and industry players that will include guidance on transparency, elements of traffic management, switching and the responsible use of traffic management tools, such as Deep Packet Inspection (DPI).

Security at Any Price?

EU policy on security and law enforcement is another area with repercussions on freedom of expression. In 2012 the European Federation of Journalists (EFJ) together with press freedom groups and professional organisations called on the Council of Europe – of which all EU countries are member states – to respect its commitments made almost three years earlier about press freedom and anti-terrorism laws.

At a Council of Europe conference of media ministers in Reykjavik in May 2009 ministers committed to “review national legislation and/or practice on a regular basis to ensure that any impact of anti-terrorism measures on the right to freedom of expression and information is consistent with Council’s standards”. In their joint letter to the international body’s Secretary General, the campaigners wrote that they “deeply regret” that so far absolutely no progress has been made by member states on this issue. The letter called on Council ministers to act on the issue at the forthcoming ministerial conference in Belgrade in October 2013¹⁶.

Another security issue – increasingly focused upon by policymakers – is cybersecurity. “Growing cyber-security threats and higher vulnerability of networks and systems may hinder the benefits brought about by the Internet... If we want to preserve and promote the benefits of the digital world, we must put cyber security on the top of the agenda”, stressed EU Commissioner for the Digital Agenda Neelie Kroes at a conference in November 2012.¹⁷

Protection of cybersecurity may, however, have an impact on fundamental rights. At the World Conference on International Telecommunications (WCIT) in December 2012 such issues were discussed. “...there were continuing concerns over the vague language used in Article 5A in relation to ‘network security’, which was seen by many as legitimising censorship and sweeping surveillance practices by Member States”, reported European Digital Rights, an umbrella organisation for 32 privacy and civil rights organisations¹⁸.

In early February 2013 the European Commission, together with the High Representative of the EU for Foreign Affairs and Security Policy, published a cybersecurity strategy and proposed a directive on network and information security (NIS). According to the strategy paper, “cybersecurity can only be sound and effective if it is based on fundamental rights and freedoms as enshrined in the Charter of Fundamental Rights of the European Union and EU core values”. The Commission and the High Representative promise to “support the promotion and protection of fundamental rights, including access to information and freedom of expression” in cooperation with the EU member states¹⁹.

Whether such promises will be kept remains to be seen.

Concern About Data Protection

Privacy and data protection is another policy area with an impact on freedom of expression. The topic is currently much debated both at the European and the international level, not least in the context of current reforms of privacy protection in the EU as well as in the Council of Europe, the OECD the United States.

Needless to say, the reason for all this activity is the rapidly spreading, ever growing use of the internet in more and more aspects of contemporary life, a development causing increasing concern about various threats to privacy. A Eurobarometer poll in 2011 showed that 70% were concerned about how companies use this data and they think that they have only partial, if any, control of their own data. Among people’s most frequent concerns was information being used without their knowledge on social networking sites and data being shared by companies without their agreement²⁰. Lately there have also been many media reports about worries regarding increased surveillance, defamation and various forms of hate speech on the internet. The revelations in June 2013 of the PRISM scheme by which the US National Security Agency and the FBI have accessed central servers of Google, Facebook and other big internet companies to gather personal data of millions of users caused angry reactions in Europe, especially following statements from the US government that the monitoring was not aimed at US citizens but only against persons outside the United States.

In January 2012 the European Commission proposed a comprehensive reform of the EU’s 1995 data protection rules “to strengthen online privacy rights and boost Europe’s digital economy.” Trust in online services is vital in today’s economy, the Commission often points out. The Commission’s proposals have caused much controversy and an unprecedented level of lobbying in Brussels, where they are currently being discussed in the European

Parliament and the EU Council. After the revelation of the PRISM scheme the EU Commissioner in charge of the data protection reform, Viviane Reding, commented: "This is a wake-up call for all those who have been blocking the European Commissions reform of data protection rules...It is time that governments as well as members of the European Parliament show their commitment to protecting citizens' data."²¹

Although more protection of privacy may be called for, it could also entail certain problems. "The challenge is that mechanisms to protect online privacy can sometimes be abused by governments or corporations to infringe legitimate freedom of expression in general and the democratic roles of journalism in particular", explained Guy Berger, UNESCO'S Director of the Division of Freedom of Expression and Media Development at a conference in September 2012²². Publishers and journalists are concerned about this, not least in countries with a strong tradition of freedom of expression like Sweden which, already in 1766, introduced a constitutional law where censorship was abolished and the freedom of the press guaranteed.

All EU Work Must Respect Charter

The European Parliament is aware – and worried – about the impact of other EU policies on fundamental rights and freedoms. This is something the EU Commission and the Council should be aware of too. In 2010 the Commission adopted a strategy for the effective implementation of the Charter of Fundamental Rights by the European Union. Here it points out that the Charter concerns in particular the legislative and decision-making work of the Commission, Parliament and the Council, "the legal acts of which must be in full conformity with the Charter" and adds: "We have to promote a "fundamental rights culture" at all stages of the procedure, from the initial drafting of a proposal within the Commission to the impact analysis, and right up to the checks on the legality of the final text."¹⁹ In February 2011 the EU Council made similar committments in Conclusions on the matter²³.

In its recent resolution on the situation of fundamental rights in the EU the European Parliament however notes that "... proposals continue to emerge that fail to consider at all, or fail to consider adequately, the impact of proposed measures on fundamental rights"¹¹.

Discussion

The European Parliament's criticism of the Commission and the Council is perhaps to some extent not quite fair. Judging by an EU Action Plan on Human Rights and Democracy from June 2012 various EU institutions appear already

to be working on some of the problems brought to light or have concrete plans to do so.

Item 24 in the Plan outlines actions planned regarding freedom of expression online and offline. A few examples: “Ensure that a clear human rights perspective and impact assessment is present in the development of policies and programmes relating to cyber security, the fight against cyber crime, internet governance and other EU policies in this regard”; “Include human rights violations as one of the reasons following which non-listed items may be subject to export restrictions by Member States”; and “Incorporate human rights in all Impact Assessment as and when it is carried out for legislative and non-legislative proposals...”²⁴.

If the actions planned will materialize is perhaps another matter. But as the plan includes information on which EU institution is responsible for each action and by when it should be accomplished, one can at least check into it and hold those responsible accountable.

When referring to the EU Charter of Fundamental Rights in calls for more respect for freedom of expression, one must also be aware that the Charter covers other freedoms which must be respected too, for example Protection of personal data (article 8), Freedom to conduct a business (article 16) and Right to property, including the protection of intellectual property (article 17).

Calls for Balance

In policy discussions it is often stressed that a balance must be struck between different freedoms and rights. Proportionality is another key word, mentioned, too, in the Charter itself. In Article 52 it says: “Subject to the principle of *proportionality*, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or *the need to protect the rights and freedoms of others*” (my emphasis)⁷.

The importance of reconciling different rights in the internet age is a topic often discussed in the UNESCO. “We are fully aware that Internet freedom is complex in many ways: this means working to find a balance between sometimes conflicting imperatives – including freedom of expression, national security, protection of authors’ rights, respect for privacy, and others. But ... complexity must not be a justification for curtailing legitimate freedom of expression, said Guy Berger, UNESCO’S Director of the Division of Freedom of Expression and Media Development at the conference in 2012 ²².

Soon thereafter UNESCO published a “Global Survey on Internet Privacy and Freedom of Expression”, which covers a range of issues and gives policy recommendations. In the summary the authors explain that the right to privacy underpins other rights and freedoms, such as freedom of expression. “The ability to communicate anonymously without governments knowing our

identity, for instance, has historically played an important role in safeguarding free expression and strengthening political accountability, with people more likely to speak out on issues of public interest if they can do so without fear of reprisal.” At the same time, the right to privacy can compete with the right to freedom of expression, and “in practice a balance between these rights is called for. Striking this balance is a delicate task, and not one that can easily be anticipated in advance.”²⁵

EU has Restricted Powers

Another challenge is that the EU does not have unrestricted powers to act with regard to fundamental rights. In the case of the controversial new media laws in Hungary, for example, EU Commissioner Neelie Kroes often pointed to this fact in response to criticism from the European Parliament and others that the EU was not doing enough.

Article 51 of the EU Charter on Fundamental Rights defining the field of application of the Charter says: “The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States *only when they are implementing Union law.*” (my emphasis)⁷

The High Level Group on Media Freedom and Pluralism convened by the EU Commission is aware of this restriction but says in its report, published in January 2013, that it believes “the EU can, and should, have a bigger role in supporting media freedom and pluralism in the EU and beyond.”²⁶

The Group points out that there can be no genuine democracy at the EU level if media freedom and pluralism are not guaranteed throughout the European political space. In cases where there is clear interference with the democratic function of media, the EU has an obligation to intervene directly with the country in question. “In extremis, the EU can make use of Article 7 of the Treaty on European Union (TEU), which allows the Council, acting by qualified majority, to decide to suspend certain rights of a member state found in serious and persistent breach of EU values enshrined in the Treaty.” This article can only be used in extraordinary circumstances, but may act as a deterrent, adds the High Level Group, which also recommends that the EU “designate, in the work programme and funding of the European fundamental rights agency, a monitoring role of national-level freedom and pluralism of the media.”²⁶

In March 2013 the European Commission launched a consultation to gather feedback on the recommendations presented by the High-Level Group in order to allow for an open debate on media freedom and pluralism in the European Union.

Growing Power of Private Actors

The High Level Group on Media Freedom and Pluralism brings up another issue of increasing importance. It says the dominant position held by some network access providers or internet information providers should not be allowed to restrict media freedom and pluralism.” An open and non-discriminatory access to information by all citizens must be protected in the online sphere, if necessary by making use of competition law and/or enforcing a principle of network and net neutrality”, stresses the Group²⁶.

The EU Commission is currently working on such a case. In November 2010 it launched an antitrust investigation into allegations that Google had abused a dominant market position. In March 2013 the Commission reached the preliminary conclusion that Google may be abusing its dominant position in four areas. Among the Commission’s worries is the favourable treatment, within Google’s web search results, of links to Google’s own specialised web search services²⁷.

Civil society groups often say they are worried about the growing power of private “internet intermediaries” and call for measures to contain it. In the coming years such calls are likely to become louder, putting pressure on policymakers to take action. In this context referring to the EU Charter of Fundamental Rights will not be enough. As we have seen, Article 11 on freedom of expression and information provides the right to hold opinions and to receive and impart information and ideas “without interference by public authority”. Private entities are not mentioned.

This is a challenge not only in Europe. “Under international law, and in the constitutional law of many countries, protection for human rights is against the potential abuse of power by the State, rather than private actors. At the same time, international law and many constitutions recognise that this may include positive obligations on the State to protect individuals against harm to rights caused by private actors, which is sometimes referred to as the horizontal application of rights”, writes UNESCO in its Global Survey on internet privacy and freedom of expression²⁵.

Whether states – or even larger political entities such as the EU – today have the power, and the will, to control global corporations remains to be seen.

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The Internet and the ongoing digitization of media have transformed media landscapes and in turn the social functions of media and the structure of both governance and markets. In recent years, there has been widespread concern about the ability of the media to maintain and develop their role as a pillar of democracy. Issues regarding freedom of expression, freedom of information and freedom of the press are more complex than ever.

The Nordic region – Denmark, Finland, Iceland, Norway and Sweden – is among the most technology-intensive and “wired” regions in the world. These countries are similar in many respects, including their media systems. In the era of globalization, however, the Nordic countries are undergoing change on many fronts. From the point of view of welfare politics and democratic processes, these changes pose numerous challenges.

The theme of this volume – *Freedom of Expression Revisited. Citizenship and Journalism in the Digital Era* – could be summarized as critical perspectives on experiences and conceptions of freedom of expression and the media in contemporary communication societies. The book reflects Nordic as well as global perspectives. The contributors are leading Nordic scholars, but also professionals outside the Nordic region, who have been engaged for years in research on freedom of expression from different angles.

In 2009, Nordicom published the book *Freedom of Speech Abridged? Cultural, Legal and Philosophical Challenges* written by researchers and authors working in the Nordic countries. The present book may be seen as a follow-up to this earlier volume.

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ISBN 978-91-86523-74-9



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