SWEDISH LEGISLATION ON LIABILITY FOR BROADCASTING

BY

STIG STRÖMHOLM

Assistant Professor of Comparative Law,
University of Uppsala

I

More than most other fields of activity, broadcasting entails, from a legal point of view, the crossing of many roads. So many that to the specialized lawyer—and most lawyers are specialized—it seems a most uncomfortable area to venture into. Nowhere, in this modernistic landscape of concrete roads and fast traffic, are there any of those snug corners which can be claimed for one particular branch of law and neatly fenced round for undisturbed expert discussion. Moreover, the whole area is continuously swept by the cold winds of public debate; it is flooded by critical searchlights; it is extremely noisy. Legislators fear to enter it. Yet legal rules and legal discussion are inevitable.

Few words are needed concerning the position of broadcasting (including television) in modern communities: it may be safely stated that, since the second world war at any rate, it has not only taken the place of the press, the theatre and the cinema as the most important vehicle of news, debate and entertainment, but has also, far beyond the limits ever reached by its competitors, attained a unique position as a source of facts, ideas and opinions.

The principal questions of *municipal private law* to which broadcasting gives rise—whether it be carried on by private enterprise or public authorities or by both—belong to the fields of copyright and of torts. For many years now, broadcasting has been, in developed communities and even more in those countries where large sections of the population are illiterate, by far the most important single consumer of copyrighted goods. Its position as the most widespread mass medium also puts the accent on such elements of the law of torts as defamation and—where such a right is recognized—the right of privacy.

In so far as the rules now referred to are subject to criminal sanctions, broadcasting also interests *penal law*.

The subject matter of this study falls mainly within the domains of private and—to a lesser extent—penal law. I propose to describe, and discuss, the way in which Swedish law, mainly em-

bodied in an Act of December 30, 1966, has tried to solve the problem of the liability for defamation and similar torts committed by broadcasting. However, since the Swedish legislature has chosen to base this solution upon the rules governing the freedom of the press which are part of the Constitution of the Kingdom, since certain particularities of the legislation referred to are explained by the semi-public status of the only existing Swedish broadcasting organization and since, finally, there is in Swedish law a specific relationship between the law of torts and criminal law—facts which all illustrate the inextricable interconnection of different groups of rules relating to broadcasting—our discussion of the new legislation (V) must be preceded by surveys of the organization of broadcasting in Sweden (II) and of the principles governing the civil and criminal responsibility of the press (III). It would also seem useful to add a short survey of the legal position of broadcasting in other countries (IV).

From what has been said, it might be inferred that Swedish broadcasting legislation, being profoundly marked by various national technicalities, is a somewhat parochial topic. It is submitted, however, that upon at least two points it raises questions of more general interest. In the first place, it may be asked whether *the similarity between press and broadcasting* is sufficient to justify the introduction of closely similar liability rules. Most countries possess some kind of special press legislation or at least some rules, within the general framework of the law of torts, which are intended to take into account the particular position and functions of the press and the conditions under which it works. Is it advisable, or even natural, that the privileges which are usually granted by such rules should be extended to broadcasting?

Secondly, a fundamental question is *to what extent it should be attempted to lay down statutory rules on the liability for broadcasting* and to what extent it is possible and preferable to rely upon such standards as may be recognized and upheld by broadcasting organizations themselves or by professional organizations. It should be stressed that this problem was not envisaged by the Swedish legislators who, when borrowing to a large extent the general principles on the liability of the press, also adopted the substantive rules defining the contents of that liability; it should further be pointed out that the general question of finding suitable rules on the private-law liability of mass media—a question which, in later years, has most frequently been studied, in

England and elsewhere, in connection with that of an increased protection of privacy[1]—cannot be discussed at length in this paper. What may be examined, on the basis of the Swedish legislation on liability for broadcasting, is only the problem whether statutory rules in this field should be confined to laying down basic standards, in the hope that they will be supplemented by the competent organizations, or should enter into details and form, as it were, a complete code adapted to the particular needs, conditions and responsibility of the mass media.

II

The legal bases upon which the Swedish State has founded its claims to authorize and supervise broadcasting are a succession of statutes (of 1907, 1924, 1939, 1946 and, finally, of December 30, 1966), in which that activity has been defined—each time in accordance with the degree of development of broadcasting technique and the requirements of the international Conventions and Broadcasting Regulations attached thereto[2]—and where the rule has been laid down that broadcasting can be performed only with the authorization of the King in Council.[3]

The right of having and using receiving apparatus has been subject, from the beginning, to the authorization of public authorities; since 1924, such authorization has been granted by the Royal Telecommunications Board in the form of an annual licence, the fees for which still provide the economic bases of broadcasting in Sweden.

As elsewhere, the significance of broadcasting as a mass medium only gradually became clear to the authorities and the public. It was originally presumed that broadcasting could hardly offer anything more than news and light entertainment.[4] However, the

[1] For a recent survey of legislative initiatives in this field, *vide* Strömholm, *Right of Privacy and "Rights of the Personality"*, Stockholm 1967, pp. 167 ff.

[2] The last international Convention and Regulations were adopted at Geneva in 1959.

[3] It is not necessary to discuss here the problems of interpretation—in particular with regard to transmissions by wire—which these statutes have given rise to, nor is it necessary to describe the various exceptions from the general rules. For a survey, *vide* the Commission Reports *Radions och televisionens framtid i Sverige I* (*S.O.U.* 1965: 20), pp. 45 ff., and *Radiolag* (*S.O.U.* 1965: 46), pp. 9 ff.

[4] *S.O.U.* 1965: 20, p. 48.

responsible public services held that the state must keep some form of control over broadcasting. In 1922, the Telecommunications Board made a start, in a very modest way, with broadcasting, usually of gramophone music; at the same time, a private company commenced with similar programmes. When, in 1923, a certain number of applications were made for the King's authorization to start broadcasting in Sweden, the Government had to face the question of policy—free enterprise or public control?—for the first time. The solution finally adopted, which has been retained ever since, albeit with considerable modifications, was as follows. The technical aspects of broadcasting, including the construction and maintenance of all the necessary equipment, were entrusted to the Royal Board of Telecommunications. All other aspects—for which the term "programme activities" will be used in what follows—should be handed over to one limited company, owned jointly by the state, the press, and the radio industry. The board of the company should consist of two state representatives, one of whom should be chairman, three representatives from the press, and two from the radio industry. The company thus constituted signed a contract with the Telecommunications Board on the use of the technical equipment administered by that authority; it was further provided that the company should be entitled to a share (originally 50 per cent) of the licence fees paid to the Board by the owners of receivers. On January 1, 1925, the newly founded company, Radiotjänst, started its activities.

The *ratio* underlying the policy decision thus carried into effect is of some interest. It is, from an ideological point of view, "liberal" in a traditional sense (the Cabinet in office consisted of moderate Conservatives). State intervention was held necessary to maintain order, in so far as the technical aspects were concerned. On the other hand, it was felt that it was not a proper task for the state to carry on the programme activities as such; the only public interests which had to be safeguarded so far as those activities were concerned were those of objective and reliable information. It was natural to try to interest the press in the new venture.[5] The inclusion of the radio industry may be considered as a concession to a branch of business which had an obvious interest in broadcasting and which had some reason to feel that its possibilities of expansion were curtailed by state intervention.

In the statement by the Minister of Communications in which

[5] *Op. cit.*, pp. 45 f.

the policy question and its solution were outlined, there was nothing which indicated any preference for a system where only *one* body was authorized to carry on programme activities. The Telecommunications Board was in favour of such a system, on the ground that it would be difficult to find a formula for a just distribution of licence fees among several organizations,[6] but that argument hardly touches on principles. On the other hand, the chosen organizational solution, which put the emphasis on the similarity of tasks between press and broadcasting and laid a substantial share of the responsibility for the programme activities on the whole of the Swedish press, including newspapers of all colours, left little scope for a competing broadcasting organization.

However that may be, the company founded in 1924 has remained the only authorized broadcasting organization. Its activities soon turned out to offer much greater possibilities and to assume much greater importance than had originally been foreseen. In the early nineteen-thirties, voices—almost exclusively from left-wing parties—were heard which advocated complete and direct state control over broadcasting. A very thorough Royal Commission report[7] supported this claim, in the modified form of an independent corporation governed by a state-appointed board. There were, however, dissentient voices in the Commission, who claimed that the existing order had not proved to suffer from any serious drawbacks. The development of the state-run German broadcasting system was cited as a warning example. The Socialist Cabinet then in office favoured state ownership, but failed to obtain a majority in the Riksdag for a bill to that effect.

The relations between the state and the broadcasting corporation, as well as the distribution of tasks between the latter company and the Board of Telecommunications, were discussed several times in the course of the nineteen-forties and fifties.[8] The basic solution adopted in 1924 was retained, however: a contract concluded for a term of years laid down general rules for the operation of the company. The idea of complete state control over the programme activities had lost its force, not least under the impact of wartime experience. What was now proposed was that representatives of important nation-wide religious, cultural or

[6] *Loc. cit.*
[7] *S.O.U.* 1935: 10.
[8] *Vide S.O.U.* 1965: 20, pp. 50 ff., *S.O.U.* 1964: 1 and *S.O.U.* 1954: 32.

economic organizations should be accorded some influence upon the policy of Radiotjänst. These ideas were adopted by the Cabinet and submitted to Parliament in 1956. The bill resulted, in 1959, in a redistribution of the shares in the company—40 per cent were retained by the press, 40 per cent assigned to a consortium of organizations and movements, and 20 per cent held by industry. The composition of the Board was also modified: out of eleven members, six including the chairman were to be appointed by the state, and the others by the three groups of shareholders in proportion to their interests in the company. At the same time the name of the broadcasting corporation was changed to Sveriges Radio AB.

Within the legal and organizational framework we have now outlined, the programme activities of the broadcasting organization were still regulated by periodically renewed long-term contracts concluded between that organization and the Crown. The duties undertaken by Radiotjänst (Sveriges Radio AB) vary somewhat in the successive contracts, but from an early date certain elements have recurred. Among these, mention should be made of the obligation to give the public reliable and impartial information in a suitable form, and of the prohibition against permitting any commercial advertising in radio programmes. In return, the Board of Telecommunications was bound not to put its technical resources at the disposal of any other broadcasting organization. This means, in practice, that the authorized company had a monopoly of broadcasting in Sweden. A special Broadcasting Supervision Board (Radionämnden), was appointed by the King in Council to survey the programme activities of the company.

In 1966, the legal and organizational bases of Swedish broadcasting were modified on several points; at the same time, special legislation on the liability for the contents of programmes was introduced. These changes were the results of the work of three legislative commissions. The Radio Commission, appointed in 1960 by the Minister of Communications to consider the whole range of problems relating to the future development of sound broadcasting and television, submitted its two-volume report in 1965.[1] A one-man commission (Professor S. Bergström, of Uppsala University) was appointed in 1962 to prepare new general rules on radiocommunications; his report was also published in 1965.[2] Fin-

[1] *S.O.U.* 1965: 20 and 21.
[2] *S.O.U.* 1965: 46.

ally, another one-man commission (Judge J. Björling) was set up, in 1960, to examine the need for special liability rules. After this commission had presented its report,[3] which led to no immediate result, the problem of liability was raised at the inter-Scandinavian level, and the same expert was reappointed to study it on the basis of the discussions which had taken place in the Nordic council and which had resulted in the conclusion that no uniform Scandinavian legislation was possible; his work was finished in 1965.[4]

The proposals made by the three commissions were overhauled in the Ministries concerned and submitted to the Riksdag in 1966. They resulted in the enactment of two statutes: the Radio Act (*Radiolagen*) and the Broadcasting Liability Act (*Radioansvarighetslagen),* both of December 30, 1966. The report concerning the future development of broadcasting did not lead to legislation, but the Riksdag approved the proposals for a reform of the organization and financing of broadcasting. On the strength of that decision, the Government proceeded to bring about a modification of the agreement with Sveriges Radio and also effected a redistribution of the shares in that company which gave predominance to the organization and popular-movement element. This was done mainly at the expense of the press, for the proportion held by the business interests remained essentially unchanged.

On the ground of the changes made in 1966, a number of ordinances on the application of the new statutes and a new Royal Instruction for the Supervision Board (*Radionämnden*) were issued in 1967.[5]

The new Radio Act is of interest for the purposes of the present study only upon certain specific points. It defines the relevant technical terms (sec. 1) and affirms the principle that broadcasting equipment—as opposed to equipment for transmission by wire—may be owned or used only by persons who have obtained the authorization of the King in Council or by the authority

[3] *S.O.U.* 1962: 27.

[4] *S.O.U.* 1965: 58.

[5] The principal enactments regulating broadcasting are now: the Radio Act, Dec. 30, 1966 (S.F.S. no. 755/1966); the Broadcasting Liability Act, Dec. 30, 1966 (S.F.S. no. 756/1966); the Royal Ordinance of May 25, 1967, on the Application of the Broadcasting Liability Act (S.F.S. no. 226/1967); Royal Decrees of June 9, 1967, on radio stations (S.F.S. no. 446/1967) and on receivers of wireless communications and transmissions by wire (S.F.S. no. 447/1967); the Royal Instruction of June 9, 1967, for the Broadcasting Supervision Board (*Radionämnden*; S.F.S. no. 449/1967).

empowered to issue permits (sec. 2). Receivers may be owned and used freely but the keeping of them is subject to a licence fee determined by the King in Council or the authority duly appointed (sec. 3).

Four sections of the Radio Act deal directly with broadcasting. That term is defined as covering both transmissions borne by electromagnetic waves and transmission by wire, provided they are intended for direct reception by the public and are not confined to closed circles bound together by a clear community of interest. Under sec. 5, a corporation appointed by the King in Council has the exclusive right to decide what programmes may be broadcast from stations within Sweden; this right cannot be wholly or partly transferred to another subject without the King's consent. Practically, this means the continuation of the *de facto* monopoly already held by Sveriges Radio AB.[6] In what follows, we therefore use the name "Sveriges Radio" or "the corporation" also when referring to statute texts where a neutral term or a more complete description ("the authorized corporation" etc.) is adopted in that text.

It should be pointed out here that the possibility of a transfer of the exclusive right[7] raises a problem relating to the construction of the Broadcasting Liability Act. That statute is applicable to the freedom of expression in those radio and television programmes in which a Swedish programme corporation has the exclusive right of broadcasting (sec. 1, subsec. 1), and the Act is entirely based on the assumption that programmes are prepared by one such corporation, i.e., for all practical purposes, Sveriges Radio. Now, if the exclusive right is partly transferred, the question arises whether that corporation or its servants remain responsible in certain cases. To meet these questions it is provided, in the Royal Ordinance on the application of the Broadcasting Liability Act, May 25, 1967 (SFS no. 226/1967, sec. 1, subsec. 2), that in case of such a transfer of part of the exclusive right, the King in Council shall issue such orders as may be necessary for the application of the Liability Act in respect of broadcasting covered by the transfer of rights.

The monopoly which the Radio Act (sec. 5, subsec. 1) confers

[6] *Vide,* however, *S.O.U.* 1965: 20, pp. 263 ff.; *S.O.U.* 1965: 46, pp. 28 ff.

[7] The commission had proposed that such transfers should be made on a large scale for the purpose of "special broadcasting" by organizations etc., but this proposal was rejected by the responsible Minister. *Vide* Kungl. Prop. no. 149/1966, pp. 5 and 27.

upon one corporation appointed by the King in Council is limited in two ways. On the one hand, the definition of "broadcasting" does not cover transmissions which are not intended for the public or are intended only for closed circles with a clear community of interest. Such circles may be considered, for the purpose of other statutory provisions in the application of which the problem of defining "closed" gatherings has arisen (copyright law, administrative rules on film or theatrical performances), to be "the general public"; this is why it has been held necessary to provide specifically for them. On the other hand, the mere "closedness" of a group of people—e.g. persons living in a certain area—is not sufficient to make the definition of broadcasting inapplicable. There must be a real community of interests which is not based solely on a common intention to listen to or view a programme.[8]

The second limitation of the scope of the monopoly is embodied in the provision according to which Sveriges Radio shall have the right to decide what "programmes" may be broadcast from Swedish stations (sec. 5, subsec. 1). The term "programme" is defined, in sec. 1 of the Radio Act, as the contents of wireless communications or communications by wire, except where they consist of simple communications of news, or concern time, weather or similar data, whether or not these are accompanied by indications of names or sources. In his report, the expert charged with the drafting of the Radio Act had proposed a somewhat different solution; he defined "programme activities" as any activities for the preparation of radio transmissions—wireless or by wire—unless these only contain simple communications of the kind referred to in the final text or recorded music or merely imply the duly authorized retransmission of programmes arranged by another organization.[9] This definition, which had been critized by several authorities and organizations invited to give their opinion on the report, was rejected in the final draft. As stated by the responsible Minister in the explanatory memorandum accompanying the bill, the consequence of the solution finally adopted is an extension of the domain in which the authorized broadcasting corporation enjoys an exclusive right.[1] Thus, although the keeping of equipment for transmission by wire is free to anyone, its use for other purposes than communications to closed groups as defined above is subject to the consent of Sveriges

[8] *Op. cit.*, pp. 31 f.
[9] *S.O.U.* 1965: 46, sec. 1; cf. pp. 27 f., 43 ff.
[1] Kungl. Prop. no. 149/1966, pp. 32 f.

Radio (which requires, in its turn, the permission of the King in Council) as soon as the contents of such communications falls within the definition of a "programme".

Under sec. 6 of the Radio Act, the exclusive right is to be exercised "in an impartial and reliable way" and in conformity with such principles as shall be laid down in an agreement between the King in Council and Sveriges Radio.

Under sec. 7 of the Radio Act, the Broadcasting Supervision Board (*Radionämnden*) has the task of examining "programmes which have been broadcast" in accordance with such regulations for its operation as are issued by the King in Council. The choice of tense—"programmes which *have been* broadcast"—is not fortuitous. Sec. 8 of the Radio Act lays down the principle that no censorship of programmes which are intended to be broadcast may be exercised by any authority or other public body and that no transmission, whether wireless or by wire, may be prohibited because of its contents. The only exception (sec. 8, subsec. 2) concerns such pictures representing Sweden or parts of its territory as contain information relevant to the national defence.

The prohibition of censorship raises two questions, one of which has been given some attention in the legislative material of the Radio Act. That statute lays down a principle which, in actual fact, has the result that both the operation of equipment for wireless transmission and any transmission, whether wireless or by wire, which falls within the definition of "broadcasting" and contains anything amounting to a "programme", require the permission of the King in Council or a duly appointed authority. It may be asked, in the light of sec. 8 of the Radio Act, whether such permission may contain any *conditions* relating to the contents of future programmes. The point is not of merely theoretical interest, for, as will appear below, the contract between the Crown and Sveriges Radio does in fact contain conditions of this kind, and it is only natural that permits to broadcast which may, in the future, be granted to other organizations presenting less solid guarantees of impartiality and reliable information may contain similar conditions. As far as the relations between the state and the authorized corporation are concerned, the responsible Minister seems to consider that the *form* adopted for settling them—the conclusion of an agreement under private law—is sufficient to make the censorship provision of the Radio Act inapplicable. As for those cases where no contract under private law has been concluded but a permit has been granted as an act

of public law, the Minister confines himself to stating that conditions laid down in such permissions must be framed so as to avoid violations of the prohibition against censorship.[2] Since that provision is of general scope—transmissions, whether wireless or by wire, "must not be prohibited on account of their contents"—it is not easy to see how any permit could be granted which is restricted in respect of the contents of the contemplated communications.

The second question relating to the censorship prohibition has a more immediate impact upon the problems of liability for broadcasting: By whom and against whom is censorship forbidden? The prohibition is directed against authorities and public bodies. One of these is clearly the Broadcasting Supervision Board. The head and the senior officers of Sveriges Radio are obviously not representatives of authorities or public bodies, since Sveriges Radio is a limited liability company. Thus the prohibition does not preclude measures of internal control within the corporation. In fact the Broadcasting Liability Act is based upon a system which presupposes such measures. It is likely that if permits to broadcast are granted to other bodies, similar principles will be applicable. In these cases, however, the problem of censorship will arise if the body concerned is a public authority or organization. It is true that the broadcasting legislation seems to be based upon the assumption that radio transmissions by state agencies are not concerned by the new provisions and consequently fall outside the prohibition against censorship. This principle appears from a comparison between sec. 2 of the Radio Act—under that provision only persons who have obtained the King's permission may keep transmitting equipment—and secs. 1 and 2 of the Royal Decree of June 9, 1967 (no. 446) on radio stations. According to the latter enactment, permits for other subjects than public authorities to keep or use transmission equipment are granted by the Telecommunications Board (sec. 1, subsec. 1); public authorities are allowed to keep and operate such equipment subject to certain provisions of a formal character set out in sec. 2. Thus, the necessity to obtain the King's permission does not apply to public agencies. The solution is logical enough; it follows from the idea that the public services are subject to the exclusive competence of the King, and no statutory rules are needed to enable the King to survey and regulate the use of transmission

[2] *Op. cit.*, p. 34.

equipment: the state need not, and cannot, grant permission to itself. Suppose, however, that educational authorities, which are very largely a matter for local government, not for the State, were to obtain the right of broadcasting. In that case, the state authorities responsible for the school system at the national level would be unable to exercise any control. In fact, the prohibition against censorship might cause problems already now in so far as persons taking part in, or preparing, educational programmes for Sveriges Radio are at the same time officials in the public education system. Since the prohibition of censorship is of general scope and does not only concern those cases where the special system of liability instituted by the Broadcasting Liability Act is applicable, the question against whom and in favour of whom the prohibition is maintained recurs in respect of those broadcasting programmes which fall outside the system, i.e. "programmes or parts of programmes which consist of direct transmissions of current events, or of divine services or other public arrangements organized by some person or persons other than the programme corporation" (sec. 1, subsec. 1, Broadcasting Liability Act). Does the prohibition of censorship imply, in these cases, that public authorities or public servants cannot use their authority to exercise control over what is said by their subordinates, even where there is reason to apprehend that prejudice may be inflicted upon public or private interests? It is unlikely that the point will often be raised, for the special liability system will be applied whenever a programme representing "a current event" contains elements which demand that the agents of the broadcasting corporation, instead of merely registering what goes on, shall take active measures for the arrangement of the programme, e.g., by interviewing individuals or groups taking part in the event.[3]

There are, however, two more cases in which the prohibition against censorship goes further than the special liability system. The latter is applicable only to "programmes" (sec. 1, subsec. 1, Broadcasting Liability Act); that term should obviously be construed in accordance with the definition in sec. 1 of the Radio Act. Censorship, on the other hand, is also excluded in respect of news and similar communications, although the guarantees of internal supervision which are the counterpart of the special liability system do not exist in these cases. Finally, censorship cannot be exercised in respect of such transmissions, whether

[3] *Vide* Kungl. Prop. no. 156/1966, p. 54.

wireless or by wire, as are not "broadcasting"; thus the prohibition extends, e.g., to such transmissions by wire of material not amounting to a "programme" as can be performed without any permission.

The Swedish press legislation contains a prohibition against censorship upon which the corresponding provision in the Radio Act has been modelled. On the other hand, that legislation provides for a system of control permitting rapid and efficient measures *after* it has been found that punishable matter has been published in a newspaper or a book. As pointed out by one of the Swedish Courts of Appeal in its opinion on the 1962 report on liability for broadcasting, it is impossible to create a similar system in respect of broadcasting[4] (let alone those other forms of communications by or without wire to which the Radio Act applies). Another Court of Appeal as well as the Royal Cinematograph Board—an official body charged with the censorship of films—has pointed out that cinematographic films are subject to censorship, and that the same considerations as justify this control apply to many television programmes.

In principle, it seems clear that there is a close similarity between the press and those kinds of radio communications which fulfil the function of informing public opinion and encouraging public debate, as is the case with *broadcasting*. What makes a prohibition against censorship desirable in the press legislation is the importance of freedom for the creation and maintenance of an enlightened public opinion. The same reasons are valid in respect of broadcasting, although, from another point of view, the interests involved are radically different: freedom of the press means that the owners and editors of newspapers and other printed matter cannot be prevented from publishing facts or opinions disagreeable to the régime; in broadcasting, when performed by a corporation bound to be impartial and controlled by all or most of the principal opposed groups of the community, the freedom is granted to the individual employees responsible for programmes. The very structure of the only authorized broadcasting corporation prevents the occurrence of most of those conflicts for which the special rules on the freedom of the press are designed. That structural framework makes censorship far less redoubtable, as long as the community as a whole functions according to the pattern of a free society. However, there are several

[4] *S.O.U.* 1965: 58, p. 37.

good reasons for proclaiming the freedom of broadcasting: public confidence in the authorized corporation is likely to increase, and pressure upon the Government—whether by foreign powers or by national organizations—to exert its influence upon the tendency of radio programmes can be more easily withstood.[5]

Conversely, the legitimate needs for control outside the sphere of broadcasting in the sense defined by sec. 1, Radio Act, would frequently seem to weigh more heavily than the interest in complete freedom of communication. The sending of messages by wire or wireless telegraphy implies the use of a technical facility, the resources of which are not unlimited, and which calls for traffic regulations taking into account the relative urgency and importance of different kinds of messages. Moreover, such communications, even where it is vitally important that they should remain secret, can easily be intercepted. These considerations seem to militate against the adoption of a wholesale prohibition against public authorities scrutinizing communications beforehand and possibly preventing their transmission.

The provision now contained in sec. 8 of the Radio Act was not included in Professor Bergström's draft of 1965. A rule to the effect that censorship should not be allowed in respect of "programmes", and that "broadcasting" by an authorized corporation could not be prohibited on account of its contents was part of the draft on broadcasting liability prepared by Judge Björling the same year.[6] The extension of the rule against censorship and its inclusion in the Radio Act was based upon a joint decision by the Minister of Justice, responsible for the bill as regards broadcasting liability, and the Minister of Communications, who was responsible for the bill as regards radio communications in general.[7] It is submitted that the proposals of the experts were preferable. The most logical solution, given the close affinity between the liability system of the press legislation on the one hand and that instituted by the Broadcasting Liability Act on the other hand, would have been to give the prohibition against censorship the same field of application as the special liability.

Whereas sec. 7 of the Radio Act provides that the Broadcasting Supervision Board shall examine "programmes which have been broadcast", sec. 1 of the Instruction for the Board, June 9, 1967,

[5] Kungl. Prop. no. 149/1966, p. 33.
[6] *Vide S.O.U.* 1965: 58, sec. 3, pp. 35 ff. and 48 ff.
[7] Kungl. Prop. no. 149/1966, p. 5 *in fine* and p. 33.

contains a wider formula: it states that it is incumbent upon the Board to ensure that the corporation authorized to exercise the exclusive right referred to in sec. 5 of the Radio Act exercises that right in an impartial and reliable way and otherwise observes the principles governing the corporation's programme-making activities under the contract concluded between the Crown and the corporation. In sec. 2 of the Instruction, the provision that the Board shall examine programmes which have been broadcast recurs; it is added that the Board is to try objections raised against individual programmes.

There is an obvious difference between the general competence to exercise surveillance over the operation of Sveriges Radio and the more limited power of examining individual programmes and trying objections against them. The former definition would seem to enable the Board to examine *the programme policy* of the corporation: the choice of programmes, the proportion between different kinds of programmes, the general tendency of the broadcasting performed by the corporation, or even such questions as the policy adopted for the recruiting of employees. The second definition renders the functions of the Board more similar to those of a disciplinary tribunal competent to deal with individual cases. The fact that only the latter, narrower definition appears in sec. 7 of the Radio Act, which empowers the King in Council to issue regulations for the operation of the Board, raises some doubt as to the construction of sec. 1 of the Instruction, where the wider definition is adopted. The preferable solution would seem to be to presume that this section only defines the principles according to which the right of examining individual programmes shall be exercised and does not confer upon the Board general powers of inspection unknown to the Radio Act. This construction is supported by the fact that those other provisions of the Instruction which do not lay down the basic organization of the Board deal exclusively with procedural questions relating to the examination of individual programmes.

The jurisdiction of the Board, as defined in sec. 7 of the Radio Act and sec. 1 of the Instruction, has the same limits as the exclusive right granted to Sveriges Radio. Thus only "programmes" in "broadcasting"—both these terms being taken in the technical sense set out above—are subject to the Board's examination.

Under the Royal Instruction, the Board has to submit a yearly report on its activities to the Minister of Communications, to propose to the King in Council such measures within its field of com-

petence as seem called for and to issue rules for its own operation. It consists of seven members and a sufficient number of substitutes, appointed for a period of four years by the King, who also appoints the chairman and the vice chairman. One of the members must have a legal training. The Board is to have a secretary and is empowered to engage the necessary office staff and to consult experts. Four members make a quorum, and decisions are made by simple majority; the chairman has a casting vote.

There are no rules on the procedure for bringing a case under the Board's examination. It follows from sec. 2, however, that two ways are open: the Board is empowered to examine a programme on its own initiative, and the public has a right to make complaints to the Board about individual programmes. Decisions are made on the report of the secretary, or of the chairman, if he so wishes, or of any other person appointed by the Board. Anyone who has lodged a complaint with the Board may be invited to appear before it. The head of Sveriges Radio or any of its employees may be called in to give information if this is found useful, but the Board has no duty to hear the person or persons responsible for a programme which it is examining or against which a complaint has been made. The deliberations of the Board have to be recorded; dissenting opinions expressed by one or several members or by the person reporting the case must be taken down; decisions in cases concerning complaints against a programme must state the grounds of the decision and be communicated to the corporation and the person who made the complaint. There is no appeal against the Board's decisions.

The most notable *lacuna* in the Instruction—apart from the absence of rules enabling the person responsible for an incriminated programme to appear in his defence—is the complete silence of that text concerning sanctions. Indeed, it is nowhere stated what the "decisions" of the Board may or must contain. It follows—and this conclusion has been drawn by the Board itself—that the only thing that body can do is to state its opinion on the question whether or not a programme violates the principles of impartiality and reliability or the principles for broadcasting laid down in the contract between the Crown and the authorized corporation. A second measure the Board can take and which has the character of an informal "sanction" is to report abuses or violations of the contract to the King in Council and to propose suitable remedies.

That contract, then, is the last text calling for our attention

before we can conclude this survey of the legal and organizational status of broadcasting.

The present contract, concluded on June 30, 1967, for a period of ten years, repeats the terms of sec. 5, subsec. 1, of the Radio Act: "Sveriges Radio Aktiebolag" is granted the exclusive right to decide what programmes shall be broadcast from stations within the Kingdom (art. 1). Apart from provisions relating to the technical aspects of broadcasting, the distribution of tasks between the corporation and the Telecommunications Board, the internal organization of the former body, financial and procedural questions (including an arbitration clause), the contract deals rather fully with the duties of the corporation respecting the contents of programmes. The importance of programmes of common interest for the whole country, with due regard to local interests and to the special needs of Swedes abroad, is stressed in arts. 4 and 5 of the contract. More specific duties are laid down in arts. 6–8, 10–13. Some of these provisions are of a technical character and can be left aside here (arts. 10 and 11 concerning educational programmes and important messages from public authorities and, exceptionally, private citizens). Other rules may be described as natural consequences of the monopoly position of the corporation: according to art. 6, it has to "maintain the fundamental democratic values", to provide information about current events and important cultural and political questions and to stimulate public debate on such topics. The provisions in art. 7 stress the need for variety in the programmes.

Under art. 8, first paragraph, the corporation is enjoined to carry into effect the principles laid down in sec. 6 of the Radio Act (impartiality and reliability) while maintaining an "extensive freedom of expression and information" in broadcasting. This provision is of particular interest for the purposes of the application of the Broadcasting Liability Act, which deals precisely with "abuse of the freedom of expression in broadcasting programmes". The duty to recognize an "extensive"—which is obviously not the same thing as a "complete"—freedom of expression must be considered as an important element of those facts which are the background of, and justify, the particular liability system: this duty may be characterized as a contractual obligation to incur certain risks for abuses. The precise extent of that obligation is not easy to ascertain from the contract. Para. 2 of art. 8 does not provide any guidance: it states that the activity of the corporation "as a whole" shall achieve "a reasonable

balance between different opinions and interests". This obviously means no more than that in, e.g., political debates or labour-management disputes, both or all sides shall be given an opportunity to state their case; it does not imply that the principles of impartiality and reliability must be maintained by admitting all the parties within the framework of each individual programme.

Two more specific rules complete the general principles set out in art. 8, para. 1—and aggravate the conflict between them. It is incumbent upon the corporation to verify statements made in coming programmes "as carefully as the circumstances admit" (art. 8, para. 3). and "to respect the private life of individuals unless an imperative public interest demands otherwise" (art. 8, para. 4).

The last-mentioned clause is the only provision in the whole network of statutory and contractual rules that regulate broadcasting which contains a direct reference to the protection of privacy; being one of the principles the observance of which is submitted to the control of the Broadcasting Supervision Board, it is a matter falling within the exclusive competence of that body. As will be discussed more fully below, the protection granted to privacy by Swedish *statutory* rules is incomplete; the notion of "privacy" as such is unknown. Some protection against invasions of privacy in broadcasting is offered by the criminal-law rules on defamation and by existing statutory provisions on the secrecy of certain public documents. Apart from these fragmentary provisions, the safeguarding of privacy is a matter for the professional organizations concerned and for public opinion. The clause in the contract of 1967 is therefore an important element in the development of non-legal rules in this field.

Under art. 8, para. 5, erroneous statements in broadcasting programmes must be corrected when this is called for, and persons who can state good reasons for refuting a statement must be given an opportunity to reply without unreasonable delay. Such provisions are unknown to Swedish statute law and create an extralegal remedy the importance of which cannot yet be assessed.

A provision of great practical consequence is contained in art. 12, para. 1: the corporation is forbidden to allow commercial advertising in programmes or parts of programmes. The second paragraph of the same article is an even more far-reaching attempt to prevent Sveriges Radio from commitments which involve risks for partiality: if the corporation's right to broadcast a given programme is dependent upon any kind of remuneration

paid by a third party to the person or body authorizing such broadcasting, the programme concerned must not be used.

Finally, art. 13 enjoins the corporation to observe arts. 1–5 of the International Convention of September 23, 1936, on the use of broadcasting in the service of peace.

By way of conclusion, it may be stated that the existing body of rules on the non-technical aspect of broadcasting—only a few of which are contained in statutes or statutory instruments, the majority being found in a private-law contract concluded between the King in Council and a corporation (with six out of eleven members of the Board appointed by the King) on the basis of principles approved by the Riksdag and referred to in the contract—is an interesting specimen of the modern form of law-making by agreement—with subtle undertones—which has the obvious advantage of being able to lay down standards both more general and more detailed than would be possible if legal rules in a strict sense were resorted to.

The Liability Act is applicable in a limited number of extreme situations. As will appear from what follows, there can hardly be any doubts as to the practical reasons for this state of affairs: once it had been decided that the legislation on liability for broadcasting ought to be modelled, on a number of important points, upon the press laws, strong and obvious reasons could be invoked in favour of a close parallelism also in respect of the list of offences sanctioned by the two groups of enactments. However, nothing prevented the legislature from considering a complete re-examination of the matter in connection with the new radio legislation. The small proportion of cases where penal rules intervene is thus a matter of some interest. It can be considered as an expression of the decline of legislation as a means of settling questions which are of particular delicacy because they are likely to touch upon controversial political issues. It is equally possible, however, to regard rules of the kind referred to as a preliminary stage in relation to statutory enactments, as experiments capable of furnishing the practical experience that may be judged necessary before the heavier machinery of legislation is brought into action, with all the responsibility and the political consequences which that entails. Thirdly, the rules embodied in the broadcasting contract may be held to express a standard too high to be imposed by means of legislation and consequently enforced by the courts; they would then correspond to the body of general principles elaborated by the press organization Publicistklubben: since

there can be no organization of broadcasting corporations in a country where only one such body is permitted, the state has taken upon itself to see to it that similar rules of professional ethics are laid, as it were, on top of the elementary principles laid down by statute. For one obvious and important difference between the régime created by the broadcasting contract and that which would follow from a statutory regulation is that the only party entitled to make claims under the contract is the *state,* as party to the agreement. A statutory regulation would establish rights for the individual citizen. Finally, these rules may be considered too particular—since up to the present broadcasting has been entrusted to a single body—to have their place in the statute-book; the absence of corresponding provisions concerning the press is an argument in point.

As has been stated already and will be shown more fully below, the special legislation on liability for broadcasting is modelled on Swedish press law, and a comparison between the provisions in art. 8 of the 1967 broadcasting contract and the restatement of Publishing Rules ("Publiceringsregler") at present (July 1967) in preparation by the Board of the Publicistklubben and applied, although as a set of broad principles rather than as a body of binding rules, by Pressens Opinionsnämnd, which corresponds, in this particular function, to the Press Council in Britain—reveals clear similarities. If we confine ourselves to the private-law aspects, both these texts deal with the protection of privacy. As far as sanctions are concerned, Pressens Opinionsnämnd has at its disposal no other remedies than disapproving statements published in the yearbook of Publicistklubben; the press also gives publicity to these statements, but cannot be compelled to do so. It is true that the "Publishing Rules" are more detailed than is art. 8 of the broadcasting contract, but this does not affect the basic similarity between the documents in their respective contexts. For the status of the broadcasting corporation implies what may be called "institutional" guarantees against such abuses as are explicitly dealt with in the Publishing Rules, applicable to a great number of newspapers which, obviously, offer no corresponding guarantees. In fact, Sveriges Radio has adopted, as a part of its internal regulations, a body of "Programme Rules" (*Programregler*) in which the Publishing Rules adopted by the press are reproduced with short comments.

It seems justifiable, in the light of these facts, to conclude that the pattern of statutory and extralegal rules at present applicable

to the Swedish press has served as a model for the framing of corresponding principles in the field of broadcasting: the rules laid down in the form of contract clauses represent an ethical code which it has not been felt possible, or appropriate, to accord the status of statutory rules.

III

The next topic to be considered is *the statutory rules applicable to the civil and criminal liability of the press in Sweden.*

These rules are to be found in the Freedom of the Press Act, of April 5, 1949, which is an integral part of the Swedish Constitution—as were the earlier Acts, of 1810 and 1812—and in some statutes of lower constitutional status, which deal, *inter alia,* with procedural questions and with the secrecy of certain public documents. For historical reasons, the press legislation deals not only with the principle and the limits of the freedom of the press but also with the question of access to public documents. These, apart from a break of a few decades around 1800, have been available to the general public since 1766, subject to strictly defined exceptions; the latter, originally specified in the Freedom of the Press Act itself, are now set out in a special statute of 1937.[8]

The Freedom of the Press Act holds a rather special position in Swedish law as a whole: it introduces a highly specific system of criminal responsibility for certain offences which are explicitly stated as giving rise to such responsibility and it contains detailed procedural rules, providing, *inter alia,* for the participation of jurors in the Anglo-American sense (subject to some important reservations, e.g. the principle that the court may acquit the accused even against the verdict of the jury) in the hearing of actions based upon such offences.

There are basically two groups of offences which are punishable as "offences against the freedom of the press" (*tryckfrihetsbrott*): the publication by the press of words which are unlawful by reason of their contents and the publication of matter which, under the secrecy rules, should not be made public (ch. 7, sec. 1

[8] *Vide* H. Eek in *Scandinavian Studies in Law,* vol. 5 (1961), pp. 9 ff., and N. Herlitz in *Public Law,* 1958, pp. 50 ff. For a general survey of the Swedish press legislation, *vide* Professor F. E. Fahlbeck in *Einführung in das schwedische Rechtsleben,* Hamburg 1958, pp. 55 ff.

of the Act). The Freedom of the Press Act is exclusively applicable to these two groups of acts; under ch. 1, sec. 3, it is strictly prohibited to impose criminal or civil sanctions in respect of the contents of printed publications in other cases and in other forms than are provided for in that statute. Moreover, in the first chapter of the Freedom of the Press Act, which sets out general principles (including a prohibition of censorship, ch. 1, sec. 2) and contains a number of important definitions (*inter alia,* of "the press", of "publication" and of "periodicals" secs. 5–7), there is a provision which may be characterized as the expression of a "presumption of innocence" more far-reaching than the normal criminal-law principle that guilt must be proven: the judge, it is stated, should "remember that the freedom of the press is the basis of a free society, always consider the unlawfulness of topics and ideas rather than that of the expressions actually used, and acquit rather than condemn whenever there is any doubt" (ch. 1, sec. 4). The rule, which was drafted in 1812, is not mere hollow eloquence, and has been cited by courts.

Printed and published communications which are not unlawful by reason of their immediate contents, but only in combination with underlying facts—such as fraudulent advertisements or infringements of copyright—are not regarded as "offences against the freedom of the press" (ch. 7, sec. 2). Nor does the complete freedom from civil and criminal sanctions that is extended to anyone giving information to the author or editor of printed communications for the purpose of publication cover those cases where such information is not subsequently published and involves defamation of private persons.

The kinds of contents which make printed and published communications unlawful are enumerated in one section (ch. 7, sec. 4) of the Freedom of the Press Act, which is based upon the definitions of the corresponding offences in the Penal Code. The present text was enacted in 1965, in order to harmonize with the new Penal Code which came into force that year. Most of the offences are such as concern public interests: high treason, rebellion, insults against the King, public officials or foreign powers, dissemination of false rumours imperilling national security, blasphemy, and offences against public morality. There is no reason to enter into a more detailed description of these acts. The fifteenth and last offence enumerated in ch. 7, sec. 4, of the Freedom of the Press Act is defamation, which is divided into two branches: insults and calumny, the latter branch being described,

in conformity with ch. 5, sec. 1, of the Penal Code, as "pointing out another person as being a criminal or as reproachable for his mode of life or otherwise giving information likely to expose him to the disesteem of others". It is considered a good defence if, having regard to the circumstances, the giving of information in the matter was defensible", and the defendant "proves that the information was true or that he had reasonable grounds for it". Defamation of a deceased person is actionable "if the act is offensive to the survivors" or if it must otherwise be held to "disturb the peace to which the deceased should be entitled". The first branch of the crime, insults, implies "vilifying another by an insulting epithet or accusation by other outrageous conduct".[9]

Since it was understood, when the Penal Code was debated in the Riksdag, that the relevant provisions were to serve as the basis of the corresponding rules in the Freedom of the Press Act, the question was raised whether the proposed definition of defamation, and particularly the defences, could be used for that purpose without serious difficulties.[1] As will be shown below, the special liability system characteristic of Swedish press law implies that a specified person, the "responsible editor", is solely liable for the contents of a newspaper, independently of any actual knowledge about statements made in the paper. Another basic principle, which has already been touched upon, is that any person giving information to an author or a newspaper editor's office for the purpose of publication is—subject to a few well-defined exceptions—completely free from responsibility and may remain anonymous if he chooses to do so. The individual collaborators are also free not to reveal their identity. In both cases, it is formally prohibited for police, prosecution officers and courts to make any inquiries or to take any other steps to identify such persons.

Now, the present rule of the Freedom of the Press Act as well as of the Penal Code on the defences which may be pleaded in actions for defamation—that it was defensible under the circumstances to make the incriminated statement, that it was true, or that there were reasonable grounds for making it—would seem to be difficult to apply in cases where the responsible person may have been quite unaware that the statement was ever made.

[9] The quotations are taken from a translation of the corresponding sections of the Penal Code (ch. 5, secs. 1, 3 and 4) made by Thorsten Sellin (in *The Penal Code of Sweden* published by the Ministry of Justice, Stockholm 1965).

[1] *N.J.A.* 1962, part II, pp. 157 f.

The problem—which also concerns the Broadcasting Liability Act—was discussed by the parliamentary committee entrusted with the examination of the Penal Code Bill. A private member had suggested that the responsible editor ought to be able to invoke the proposed defences in all those cases where he could prove that the circumstances attending the giving of information subsequently published in the newspaper were, from a strictly objective point of view, such as to justify the incriminated publication;[2] consequently, the actual knowledge or ignorance of the responsible editor should not be taken into account. The committee, in its report, rejects this standpoint. It would be unfortunate, says the committee, if the responsible person were allowed, as it were, to select only the facts which he prefers to invoke in his defence. If the actual knowledge or ignorance of a specific person were no longer to be taken into account, it would hardly be possible to maintain the fundamental principle that it is knowledge or ignorance at a precise date which counts. Thus the courts would really have to examine something quite different from the situation as it was when the incriminated article was published, and the whole *ratio* of the defence would be lost from sight. The committee concludes by stating that it is necessary to maintain, even in defamation cases, the fiction whereby the responsible editor is presumed to have known and approved everything published in the newspaper concerned.[3]

The second group of "offences against the freedom of the press" is defined in ch. 7, sec. 5, of the Freedom of the Press Act. It consists in the publication by the press of "such public documents as should be kept secret". There is no reference to the legal rules setting out what official documents are exempted from the general rule of free inspection by the public and free publication in the press. The responsibility for the observance of such rules is laid upon the competent authorities, and the provision of the Freedom of the Press Act which has just been cited refers to their decision: a document which the authority concerned has—rightly or wrongly—decided to treat as secret under the relevant statutory rules is one which "should be kept secret". Liability under ch. 7, sec. 5, of the Freedom of the Press Act is incurred in two further cases. The first is where information is published about facts the disclosure of which implies, under existing statutory

[2] *Op. cit.*, p. 158.
[3] *Loc. cit.*

rules (i.e., for all practical purposes, the rules of the Penal Code), an offence against the security of the Kingdom, whether such facts are taken from public documents or from other sources. The second case is where facts are published which are to be kept secret under a court order, an order by the prosecution officer responsible for the investigation of a crime, or a condition laid down by a public authority when delivering a document. Finally, it should be mentioned that the general privilege extended to persons giving information for the purpose of publication is subject to an exception, here as in respect of defamation: under ch. 7, sec. 3, of the Freedom of the Press Act, persons who, through their position in the public service or in the performance of national service, have obtained information about matters the disclosure of which would be an offence against the security of the Kingdom or which must be kept secret in accordance with statutory rules—administrative regulations or the orders of superior officials are not enough—are liable to be punished for disclosure of such information even if it is made for the purpose of publication.

The punishments for "offences against the freedom of the press" are the same as for the corresponding offences under the Penal Code (ch. 7, sec. 6, of the Freedom of the Press Act).

Civil liability for unlawful acts committed by publication is subject to the same restrictions as is criminal responsibility: an action in tort will lie only where the incriminated act is punishable as an "offence against the freedom of the press" (ch. 11, sec. 1, of the Freedom of the Press Act) and only against the person responsible for such offence; the presumption that the responsible editor of a newspaper knew and approved matter published in the paper is also applicable. However, there are some exceptions from the principle that only the person criminally responsible is responsible in tort. Thus, in the case of offences committed in periodicals, the owner is liable jointly with the responsible editor; similarly, the publisher is responsible together with the author in the case of other publications. If the person responsible for an offence against the freedom of the press is, *inter alia,* the representative of a corporation, then civil—but not criminal—liability may be enforced against the latter. Finally, an action in tort may be sustained even where a criminal action is excluded, e.g. by limitation. Whereas criminal actions may be introduced, in principle, only by the King's Chancellor of Justice (an official whose functions are similar to those of the English Attorney-Ge-

neral) and the plaintiff's right to bring such an action is subject to very restrictive conditions, a civil action is always open to the offended party.

We now come to the system of rules laying down who is responsible for the contents of printed and published communications. The general principle of this system — for which the French term *responsabilité en cascade* is frequently used — is that only one person, designated by statutory rules, is responsible and that the normal penal- and civil-law rules on joint liability are set aside. Swedish law makes a fundamental distinction in this respect between periodical and non-periodical publications.

Liability for the contents of periodicals may be imposed only upon the person designated to the Minister of Justice as "responsible editor", or upon his substitute—whose name must also have been communicated to the Ministry of Justice—if the latter was in charge at the time of the unlawful publication (ch. 8, sec. 1). There are several provisions in ch. 5 of the Freedom of the Press Act which are intended to ensure that the owner of a periodical appoints a responsible editor (who must be a domiciled Swedish subject and fulfil certain other conditions), communicates his name to the Ministry and applies for a "certificate of publication", which will be granted if certain formal requirements are fulfilled.

The person coming next after the responsible editor in the "chain of responsibility" is the owner of the periodical (ch. 8, sec. 2): if no certificate of publication had been obtained, or if the appointed editor no longer fulfilled the conditions for appointment or had given up his employment, the owner is solely responsible for the contents of the periodical. The same rule applies if the responsible editor was manifestly appointed with intent to deceive or was manifestly not in such a position as to exercise control over the contents of the periodical. This provision was introduced in order to prevent the earlier frequent practice of hiring some obscure individual for the sole purpose of serving any sentence that the contents of the newspaper might lead to.

If the identity of the owner cannot be proved in those cases where his responsibility is engaged, the printer carries the whole liability (ch. 8, sec. 3); if no printer is indicated in the periodical, or if the indication is false within the knowledge of the person distributing the periodical and the actual printer cannot be identified, the person responsible for the distribution is solely responsible.

There is no need to discuss here the system of liability for non-periodical publications. The chain of liability—author, unless anonymous, "editor" (i.e. the person who, without being the author of the publication, has it printed or published), publisher, printer and distributor—is based upon the same principles.

The special procedural rules set out in ch. 12 of the Freedom of the Press Act are of little interest for present purposes. It is worth mentioning, however, that whereas censorship in any form is explicitly prohibited (ch. 1, sec. 2 of the Act), there is a fairly efficient surveillance of the contents of publications after these have appeared; one copy of every printed publication—with few exceptions—must be submitted to the authorities for scrutiny. Interlocutory measures in the form of seizure can be taken very quickly, before an action is brought, by the Minister of Justice or by such local officials as are entrusted with the control of printed publications and have received special powers to order a seizure.

IV

The following brief survey of *foreign rules* on the liability for broadcasting will be limited to certain West European countries where, as in Sweden, broadcasting is carried on by public or semi-public corporations. This is the case, *inter alia*, in Britain, France and Western Germany. The principal questions to which we shall try to find an answer are whether broadcasting is subject to special liability rules in these countries and to what extent the principles governing the responsibility of the press are applied, directly or by analogy.

The *English* Defamation Act, 1952, the only statute of interest for present purposes, drew the consequences of the position of broadcasting as competitor—if not successor—of the press by extending to broadcast statements both the special responsibility and the privileges of the older mass medium. Thus, under sec. 1 of the Act, the broadcasting of words is to be treated, for the purposes of libel and slander, as publication in permanent form. Among other things this means, in terms of practical consequences, that statements made in broadcasting are generally held to constitute libel, not slander, and that no specific damage need to be proved for an action to lie. On the other hand, broad-

casting is granted certain special defences previously valid only for printed publications. Thus proceedings cannot be brought in respect of the broadcasting of extracts from or abstracts of parliamentary papers (sec. 9, subsec. 1), nor of reports of proceedings before courts exercising judicial authority within the United Kingdom (sec. 8). Finally—and this is undoubtedly the most important feature of the system introduced in 1952—broadcasting is put on an equal footing with *newspapers* so far as the qualified privilege for the purpose of the law of defamation is concerned (sec. 9, subsec. 2). It is not necessary to examine here the extent of this privilege. What matters is the equality established between broadcasting and the press. It should be noted that the qualified privilege only extends to *reports* of public proceedings, documents or notices and thus does not cover *comment* upon persons or events (sec. 7, subsec. 1, of the Defamation Act and the Schedule attached thereto). It is worth mentioning, finally, that under sec. 7, subsec. 2, of the Defamation Act—a provision which is also applicable to broadcasting (sec. 9, subsec. 2)—the privilege is forfeited if the newspaper or broadcasting corporation entitled to it has refused or neglected to publish or broadcast a reasonable letter or statement by way of explanation or contradiction, or has published or broadcast it in an inadequate or unreasonable way.

France, where broadcasting is likewise carried on under a monopoly by a public corporation, has so far refrained from enacting any special rules on liability for the contents of programmes. The rules on defamation in general (with one exception of little practical interest) are found in the Press Act, 1881—which makes the same distinction as we have found in Swedish law between insults (*injures*) and defamation (*diffamation*), i.e. allegations or imputations detrimental to a person's honour (art. 29 of the Press Act)—but the provisions specifically applicable to newspapers, among which mention should be made of the right of reply (*droit de réponse*) have not been extended to broadcasting, which is consequently subject to the same principles as are applicable to any oral communications. Proposals have been made to extend at least some of the special provisions of the press legislation—in particular those establishing the *droit de réponse*[4]—to sound broadcasting and television, but so far these proposals have not met with success.

The position in *Western Germany* is rather complicated. Under

[4] *Vide S.O.U.* 1962: 27, p. 33.

arts. 70, 72 and 75 of the Constitution of 1949, the legislature of the Federal Republic is competent to issue *general* provisions on the press, while the different *Länder* are alone authorized to lay down *detailed* rules. So far, no general enactment has been adopted, in spite of several endeavours.[5] The Press Act of 1874 is still in force as "local law" in the *Länder* to the extent they have not made use of their legislative competence to promulgate new provisions on the press. However, most, if not all, of the *Länder* have enacted new provisions. The old Act did not deal with broadcasting, but most of the new local Press Acts, which are largely uniform, contain provisions on that topic. Moreover, both the Federal Republic and the *Länder* have adopted laws or signed treaties applicable to their own broadcasting corporations. Some of these texts contain special liability rules, others refer to the corresponding rules in the press legislation.

The organizational framework of the numerous German broadcasting corporations varies somewhat,[6] but the most frequently adopted pattern includes a general council (*Rundfunkrat*) with representatives from parliaments, political, religious and cultural organizations and a board (*Verwaltungsrat*), which deals principally with financial and administrative questions. The heads of the broadcasting corporations enjoy considerable freedom in respect of the contents of programmes, and the influence of the governments seems to be rather weak.

The Press Act of Lower Saxony, promulgated on March 22, 1965, may be used as a typical example of the recent press laws of the German *Länder*. It is closely similar to the "Model Law" which was proposed by the representatives of the *Länder* in 1963[7] and which has served as a model for several German statutes that have been recently adopted.[8] Among the characteristic features of the Act, the following may be mentioned. Broadcasting, like the periodical press, is entitled to claim that it fulfils a *public function* when spreading information, expressing an opinion, criticizing, or otherwise trying to create a public opinion on matters of public interest (sec. 3). This means, *inter alia*, that broadcasters can invoke certain special defences in defamation cases (sec. 193, German Penal Code). In principle, general

[5] Scheer, *Deutsches Presserecht*, pp. 28 ff.

[6] *Vide* Pigé, *Le statut de la télévision*, Paris 1960, pp. 104 ff.; *S.O.U.* 1965: 20, p. 69.

[7] *Vide* Scheer, *op. cit.*, pp. 155 ff.

[8] E.g. the Acts of Berlin, Bremen, Rheinland-Pfalz and Schleswig-Holstein.

rules of civil and criminal responsibility are applicable to broadcasting, as to the press, but the responsible editor, or the corresponding officer of the broadcasting corporation, is held liable for the unlawful contents of communications which he has wilfully or negligently permitted to be inserted (sec. 20 of the Press Act of Lower Saxoy), and there are further provisions under which editors, journalists and the responsible officers of broadcasting corporations may refuse to give evidence about their sources of information (secs. 23 and 25). Thus, in terms of practical consequences, the liability is concentrated upon one responsible person in much the same way as in the Swedish press legislation. Finally, there are rules on a right of reply, or *Gegendarstellung*, (sec. 11) which imply that the responsible editor of a periodical publication, as well as the corresponding officer of a broadcasting corporation (sec. 25) must allow any person about whom statements have been alleged to publish his own version of the facts at issue, subject to certain conditions.[9]

Rules on broadcasting are lacking in some German press laws, e.g. those of Hesse and Bavaria. On the other hand, even those statutes which contain such rules explicitly reserve the application of the special laws and inter-state treaties on broadcasting (*vide*, e.g., sec. 25, subsec. 5, of the Act of Lower Saxony). The Broadcasting Act of Bavaria (August 10, 1948, as later amended) contains liability rules which are essentially identical to those of the press legislation referred to above (sec. 19) and also provisions on the right of reply (secs. 17 and 18). The latter right is also granted by the Broadcasting Act of Hesse (sec. 3, no. 9). The other laws and treaties on broadcasting vary in this respect. Thus the treaty between Lower Saxony, Schleswig-Holstein and Hamburg concerning the Norddeutscher Rundfunk (February 16, 1955) contains no special provisions on liability or right of reply, whereas the agreement, concluded by several *Länder*, on the Südwestfunk (August 27, 1951) and the treaty on the Zweites Deutsches Fernsehen (June 6, 1961) introduce a right of reply (arts. 7 and 4 respectively). The Federal Act on the Deutsche Welle and the Deutschlandsfunk (November 29, 1960) also contains rules on *Gegendarstellung* (sec. 25).

In general terms, modern German law recognizes the strong similarity between press and broadcasting on two points: on the

[9] This right, which is characteristic of German press laws, is lacking only in Baden-Württemberg.

one hand, the far-reaching community of interests is taken into account both by the provisions which affirm the important functions of broadcasting in the public debate and by those which give persons mentioned in the course of broadcasting a right of reply modelled upon that existing in press laws; on the other hand, a liability, which is formally only a subsidiary co-responsibility for the contents of programmes, is laid upon the shoulders of specially appointed officers; the rules recognizing their right to refrain from giving evidence both create a protection for their sources of information and make their co-responsibility virtually exclusive.

It may be mentioned, by way of conclusion, that the tendency to subject broadcasting to liability principles identical or similar to those prevailing in the press legislation is not confined to Western Europe. It may also be noticed in the Communist states.[1]

V

In Sweden, before the coming into force of the Broadcasting Liability Act, civil and criminal responsibility for the contents of programmes was governed by the general principles of the—largely uncodified—law of torts and of the Penal Code. Since very few decisions had been rendered in this field, there was considerable uncertainty upon such points as whether the broadcasting corporation could be held liable in tort for unlawful acts committed by its servants in the course of broadcasting and what person or persons were criminally responsible.[2] Although the almost complete absence of reported conflicts could obviously be regarded as an argument against the need for legislation, this uncertainty was felt to be a sufficient reason for examination. As stated in II above, a one-man commission was appointed in 1960, and a first report, containing a Bill with a very full *exposé des motifs,* was published in 1962. It should be added that in the same year, a Supreme Court decision was rendered, which seems to clarify the

[1] *Vide* Pigé, *op. cit.*, p. 40, on a Polish initiative in this field.

[2] Bergström, "Det juridiska ansvaret för rättskränkningar i rundradioprogram", in *Festskrift tillägnad Halvar Sundberg*, Uppsala 1959. *S.O.U.* 1962: 27, pp. 18–31 and pp. 35–37; Bergström, *Yttrandefrihet i radio och skydd för enskilda intressen* (Acta Universitatis Upsaliensis, Studia Iuridica Upsaliensia 4) Uppsala 1963, pp. 22 ff.

question of the master's civil liability for the acts of his servants in a similar case, but whether this case was not sufficiently taken notice of or it was felt that broadcasting was such a particular activity that general rules could not be applied to it, the solution adopted by the Supreme Court does not seem to have been considered as an answer to the questions discussed by the expert in his report. We shall give some attention to the principal ideas embodied in this report.

The expert was given a fairly free hand with regard to the scope of his enquiry. The only points which had to be dealt with, under the terms of reference issued by the King in Council on the competent Minister's advice, were the general principles of civil and criminal liability for broadcasting and the question whether broadcasting corporations should be liable in tort for the acts of their servants.[3] The expert refrained from discussing the problem *what* acts should be held unlawful when committed in the course of broadcasting and concentrated upon the question *who* was to be responsible. It was also held superfluous to examine other acts than those where the unlawfulness lies in the *contents* of broadcast communications.

The first problem which the expert set out to examine was whether the few actions brought before courts, the somewhat more numerous complaints lodged with the Broadcasting Supervision Board and the incidents reported in the press justified changes in the existing liability system. It is of some interest to consider the cases discussed by the expert. Apart from alleged infringements of copyright or similar rights,[4] and apart from the considerable number of complaints based upon alleged partiality in political questions, blasphemy, bad taste, and infringements of the rule which prohibits commercial advertising in broadcasting, the cases brought before the Supervision Board may all be brought under two general headings: *invasions of privacy* and *disparagement of goods or services*.[5] It should be added that an increasing number of such cases have been brought before the Pressens Opinionsnämnd in recent years; their prominence in the material used by the expert preparing the Broadcasting Liability Act is certainly not fortuitous. The common feature of these cases would seem to be that persons or firms had been named—or that other circumstances permitting the identification of a person had

[3] *S.O.U.* 1962: 27, p. 11.
[4] *Vide* 1949 N.J.A. 645.
[5] *S.O.U.* 1962: 27, pp. 35–39.

been made public—in connection with facts felt to be discreditable or at least disagreeable to the persons concerned or in connection with critical comments upon goods or services. The nature of these cases is of interest, because Swedish legislation does not grant any protection of privacy as such; the only remedies available in cases of the kind referred to must be found in existing civil and criminal rules on defamation.[6] Now, since the expert entrusted with the preparation of rules on liability for broadcasting had decided to refrain from studying the question what acts ought to give rise to liability—and thus did not consider the possible necessity of an enlargement of the protection of privacy—the reported cases may have carried less weight than if a reform of the grounds for liability had also been contemplated. On the other hand, the expert states that the prevailing uncertainty about the limits of freedom of expression in broadcasting and about the person responsible for infringements, as well as ignorance about the way in which actions or complaints should be brought, may have reduced the number of cases actually brought to the knowledge of the authorities or made public, e.g. through complaints to the press.[7] Summing up on this point, however, the expert concludes that so far the drawbacks of the prevailing situation have hardly been sufficient to justify legislative measures. The *ratio* for legislative action is rather, he considers, to be found in the expected future development of broadcasting along lines already visible.[8]

The expert then goes on to compare the situation of broadcasters, from the point of view of liability, with that of the press. His conclusions are that journalists are in a more favourable position than the persons responsible for broadcasting programmes, since the individual journalist is normally free from any liability, and that the sources of information of the press are also more efficiently protected, because the identity of persons giving such information need not and, indeed, must not be revealed. The difference that exists in the latter respect raises a special problem which the expert analyses in some detail. As stated in III above, the anonymity of persons giving information is protected only where such information is intended to be published by the press. Since the news agencies, to which information is frequently given

[6] *Vide* Strömholm, *Right of Privacy and "Rights of the Personality"*, Stockholm 1967, p. 59.
[7] *S.O.U.* 1962: 27, p. 39.
[8] *Op. cit.*, p. 42.

with a view to publication, serve both the press and broadcasting, a person giving news to such an agency cannot claim the anonymity protection of the press legislation unless he has explicitly stipulated that the material delivered by him may be distributed only to newspapers. The state of the law on this point, although a detail which could be corrected without a thorough-going reform of the liability for broadcasting, is considered by the expert as indicating a need for at least some legislative measures.[9]

By way of conclusion, the expert states that the introduction of clear liability rules would be likely to offer greater security to those members of the public who claim to have suffered harm from the contents of broadcasting programmes, and that such rules would also be useful for the work of the broadcasting corporation, with its strong monopoly position. The comparison with foreign law provides at least some arguments for the creation of a special liability system. In the first place, the applicable general principles of the Swedish law of torts do not impose a strict liability upon the corporation for the acts of its servants; in most foreign jurisdictions, such liability is recognized. Moreover, foreign press laws do not generally comprise any prohibition against revealing the identity of persons giving information to the press; nor have they introduced an "artificial" liability "*en cascade*" of the kind characteristic of the Swedish press legislation.[1]

The system of civil and criminal responsibility for the press was created at a time when the powers that be could be expected to use all their influence to curb opposition newspapers. The unique position of broadcasting differs radically from that of an isolated, fighting newspaper. The idea underlying the press legislation of Sweden—as of other democratic countries having special rules in this field—is that public opinion is created and nourished by a continuous exchange of views between newspapers standing for different opinions. To make possible such an exchange of ideas, it is particularly necessary to protect what may be called the extreme wings of the press. The method used is to concentrate liability upon one person and to assure an efficient protection of the sources of information. The practical result of the Swedish press rules is that it is impossible for the authorities to penetrate *inside* the newspaper office, to threaten or punish those engaged in the collection, drafting and discussion of news. Each paper is

[9] *Op. cit.*, pp. 44 ff.
[1] *Op. cit.*, pp. 46 f.

one voice in the public debate, and one person answers for it. The question now is whether broadcasting, in a country having one corporation which enjoys a monopoly and which is organized in such a way that *all* voices in the public debate are, by built-in mechanisms, granted a hearing, is best served by the same kind of rules as are applicable to the press.

As we have already stated above (under II), the Liability Act governs "the freedom of expression in those radio or television programmes which a Swedish programme organization has the exclusive right of broadcasting" (sec. 1, subsec. 1). Under sec. 2, subsec. 1, criminal responsibility, civil liability, seizure of property or any other sanction for misuse of the freedom of expression in broadcasting programmes may be enforced only where such abuse corresponds to the definition of "offences against the freedom of expression" in the Act. That definition (sec. 2, subsec. 2) is a simple reference to the Freedom of the Press Act: there shall be considered as an offence against freedom of expression in broadcast programmes any communication or publication which would have been an "offence against the freedom of the press" under ch. 7, secs. 4 or 5, of the Freedom of the Press Act if the communication or publication had been made in print. It is moreover required, for an "offence against freedom of expression" to exist, that the incriminated programme shall actually have been broadcast. The close similarity between sec. 2 of the Broadcasting Liability Act and the Freedom of the Press Act is obvious. According to sec. 2, subsec. 3, of the former statute, any provisions, in the Penal Code or elsewhere, on the sanctions of offences set out in ch. 7, secs. 4 and 5, of the Freedom of the Press Act are equally applicable where such offence is committed in the course of broadcasting.

After this definition of the cases where liability may be incurred, there follow provisions which imply the adoption, on the second point of practical importance, of the solutions embodied in the press legislation: the *responsabilité en cascade*. Under sec. 3, subsec. 1, there shall be appointed for all radio (or television) programmes a responsible "programme editor" with the task of preventing offences against the freedom of expression. The "programme editor" must be domiciled in Sweden and enjoy full legal capacity (sec. 3, subsec. 2); he is to be appointed by the head of the broadcasting corporation or by another officer of the corporation under rules issued by the King in Council, and before the transmission of the programme concerned his name must be en-

tered in a register which is to be kept by the corporation and made available to the public (sec. 3, subsec. 3).

Detailed provisions on the appointment of responsible editors are given in the Royal Decree (no. 226, May 25, 1967) on the application of the Broadcasting Liability Act. Under sec. 2 of that decree, such an appointment may be made by an officer of the corporation specially empowered by its head to do so. However, such an officer may only appoint persons who have previously held the position of responsible editors by virtue of an appointment by the head of the corporation. The appointment is to be valid for a specific programme or series of programmes, and only persons who have sufficient legal knowledge and sufficient experience of broadcasting to judge for themselves in matters concerning offences against the freedom of expression may serve as responsible editors. Appointments may not be given to a greater number of persons than is necessary to enable the programme activities to be followed and, if need be, programmes to be examined. The board of Sveriges Radio has to determine the maximum number of appointments which may be made for one and the same period; it is incumbent upon the head of the corporation to inform the board of the names of the persons appointed (sec. 3 of the Decree).

It seems justifiable to emphasize the fundamental difference between the position, on the one hand, of the responsible editor of a newspaper, appointed by the owner but exclusively competent to examine the contents of the paper—limitations of his powers are void under ch. 5, sec. 3, of the Freedom of the Press Act—and authorized to appoint substitutes (with the approval of the owner; ch. 5, sec. 9) and, on the other, the servants of Sveriges Radio appointed, either by the head of the corporation or by some senior officer in the hierarchy, to act as responsible editors of certain programmes or series of programmes.

The Royal Decree on the application of the Broadcasting Liability Act contains certain other provisions of interest for present purposes: there are detailed rules on the keeping of the register referred to in sec. 3 of the Act (secs. 4 and 5, a provision to the effect that the broadcasting corporation has a duty—subject to one minor exception—to record all programmes which are broadcast and to keep the record for a period of at least six months (sec. 6 of the Decree), and to allow the King's Chancellor of Justice as well as persons claiming to have suffered harm from the contents of programmes to inspect the recordings of these

programmes; Sveriges Radio has a duty to supply transcriptions of the recordings to presumptive plaintiffs free of charge (sec. 7 of the Decree).

Sec. 4, subsec. 1, of the Broadcasting Liability Act expresses the fundamental principle that the programme editor is alone *criminally responsible* for the contents of programmes which he has been appointed to survey; under sec. 5, subsec. 1, which is also modelled upon the press legislation, no other person can be held liable for offences against the freedom of expression in broadcasting. If no responsible programme editor has been appointed or if the name of the editor has not been duly registered, criminal liability falls upon the person who had a duty to make the appointment (sec. 4, subsec. 3).

The rules on *civil liability* are based upon the same principle of exclusivity: the person responsible under criminal law is equally liable in tort (sec. 6, subsecs. 1 and 3). However, the broadcasting corporation is liable jointly with the responsible editor (sec. 6, subsec. 2).

The rules now set out are, on the one hand, enforced by provisions tending to protect the sources of information of broadcasting according to principles similar to those prevailing in the press legislation, and are, on the other hand, subject to exceptions of considerable importance.

The exclusivity of the criminal and civil liability established by the Act (sec. 5, subsec, 1, and sec. 6, subsec. 3) has already been mentioned. Thus the normal principles of criminal law on instigation and complicity are set aside. Under sec. 7, subsec. 2, the responsible programme editor (and the person liable, if no editor has been appointed) is considered to have known the contents of programmes broadcast upon his responsibility and to have approved of their being transmitted. Persons who have given information intended to be made public by broadcasting are free from any responsibility under the same conditions as would apply if such information had been given for the purpose of publication by the press (sec. 5, subsec. 2). Moreover, in actions concerning criminal or civil liability under the Act, the question who—apart from persons liable according to the special system of responsibility—is the author or producer of a programme, or appeared in the programme or gave information intended to be made public in the course of it, may not even by raised (sec. 7, subsec. 3). This protection of the individual collaborators and the sources of information is reinforced by the provisions of sec. 9:

programme editors, servants of the corporation or other persons who take part in broadcasting programmes or news intended for such programmes are not allowed to reveal the identity of the author or producer of such programmes or of persons who have appeared in them or given information intended to be made public in the course of programmes, unless other statutory rules make it a duty to reveal the identity of such persons. This prohibition is sanctioned by pecuniary fines or a term of imprisonment, provided a person who alleges that he has suffered from the non-obervance of the duty of secrecy denounces the offence to the King's Chancellor of Justice, who is the only competent prosecutor in such actions (as in actions for offences against the freedom of the press and of the freedom of expression on broadcasting programmes).

The principle that liability for the contents of broadcasting programmes may be enforced only against the responsible programme editor (or, where no such editor has been appointed or indicated in the register, the officer who ought to have made the appointment) is subject to certain exceptions. It should first be recalled that important limitations to the scope of the principle result already from the definitions of "broadcasting" and of "programmes" (*vide* under II above). But even where a broadcast communication is part of a programme, important elements of the special system of liability—the rules under which liability is incurred exclusively for "offences against freedom of expression" as defined in sec. 2 of the Act, only the programme editor is responsible, persons giving information intended to be made public in broadcasting programmes are free from liability, and the identity of other collaborators than the responsibile editor must neither be discussed nor revealed as well as the special procedural provisions (*vide* below)—are set aside in favour of ordinary principles of civil and criminal responsibility in those cases where a programme or part of a programme consists of "live" transmissions (a concept to which we shall have to return) of current events or of religious services or other public arrangements organized by persons other than the broadcasting corporation (sec. 1, subsec. 2; cf. sec. 6, subsec. 1). In respect of all "live" programmes the officer responsible for the appointment of the programme editor is free to decide that the persons appearing in the course of the programme shall themselves carry the liability for any offences concerning freedom of expression that they may commit. The decision must be notified to the persons concerned before

the transmission take place, otherwise it cannot be invoked against them (sec. 4, subsec. 2).

Sec. 7, subsec. 1, of the Broadcasting Liability Act lays down the rule that the particular "lenient", or comprehensive, attitude which ch. 1, sec. 4, of the Freedom of the Press Act enjoins the authorities to take in all actions concerning offences against that freedom shall also be observed in respect of the freedom of expression in broadcasting programmes.

Finally, mention should be made of sec. 8 of the Liability Act, under which most of the special procedural rules of the press legislation—including that of trial by jury—are equally applicable in actions concerning offences against the freedom of expression in broadcasting programmes. Subject to certain exceptions, the City Court of Stockholm has exclusive first-instance jurisdiction in such actions.

We can now return to the discussion carried on in the course of the legislative process concerning the reasons for and against the wholesale adoption, in respect of liability for the contents of broadcast programmes, of the principles characteristic of the Freedom of the Press Act. In the debate which took place before Judge Björling was appointed to prepare legislation on liability for broadcasting, several voices were heard in favour of that solution.[2] The expert subjected the idea to a close examination. In general terms, he states, the parallel between press and broadcasting seems natural: both are mass media, both require the cooperation of a great number of persons, and in both it is often difficult to find out who was actually responsible for offensive statements.[3] On the other hand, the expert says, these similarities must not conceal the existence of considerable differences. In the press, the responsible editor has at least a theoretical possibility of checking beforehand the contents of articles; in broadcasting, this possibility does not exist at all in the case of "live" programmes—which are very important: some 24 per cent of the Swedish sound-broadcasting programmes in 1961 were "live"—and is considerably reduced even where recorded programmes are concerned, since recordings cannot be "perused" as a newspaper article can.

Judge Björling then goes on to consider the question whether the *ratio* underlying the special liability system applicable to the press is also valid for broadcasting. He states, on the one hand,

[2] *S.O.U.* 1962: 27, pp. 51 ff.
[3] *Op. cit.*, pp. 52 f.

that the position and functions of the broadcasting corporation differ from those of the press—a semi-public institution like the Swedish broadcasting corporation cannot consider it to be its proper task to attack social evils—and on the other, that a protection of the anonymity of sources of information is certainly called for in broadcasting as much as in the press. Summing up, the expert concludes that, while a wholesale adoption of the system of liability instituted by the Freedom of the Press Act is hardly desirable, some of the press rules would be well suited for broadcasting also, in particular those protecting anonymity. This, however, necessarily leads to the adoption of and "artificial" system of liability, for it is difficult to grant complete exemption from responsibility to persons giving information without rules which designate someone as responsible for the use made of such information in broadcasting. On this basis, the expert goes on to set out the reasons for limiting the liability of the responsible "programme editor" to certain distinct offences and for exempting other persons taking part in a programme from responsibility, and thus arrives, on this point also, at principles closely similar to those of the press legislation. With respect to "live" programmes, the expert stresses the material impossibility for an officer of the broadcasting corporation to exercise effective control over what is said or done in the course of such transmissions, except where they consist in the reading of a script, which can be inspected beforehand.[4]

When the expert was reappointed to consider the question, his task was to examine whether the reports submitted in 1965 on the future of broadcasting and television in Sweden and on a new Radio Act (*vide supra,* under II), the inter-Scandinavian discussions concerning the possibility of uniform rules in this field, and the opinions of authorities and organizations invited to give their opinion on the 1962 report contained anything which ought to lead to a modification of the solutions proposed in 1962.

Although the 1965 report differs on several points of importance from the earlier draft, it may be stated that the basic ideas and solutions are retained. In very general terms, the new text comes even closer to the corresponding provisions of the press legislation than does that submitted in 1962. Acting on the principle that the rules of the Freedom of the Press Act should be adopted only to the extent called for by identity of facts or of

[4] *Op. cit.*, pp. 54–66.

interests, the expert had proposed, in the first report, a number of important exceptions from the special liability system. In these cases, normal rules on criminal and civil responsibility were proposed to apply as against persons expressing opinions or making statements in broadcasting programmes. The scope of the exceptions was narrowed in the 1965 draft. The final Government Bill, however, went even further towards complete similarity between the liability for broadcasting and the press legislation.

"Once it has been decided to introduce a one-man liability and a system of responsible programme editors", says the Minister in the explanatory memorandum accompanying the Bill, "it seems natural to make the rules on liability for broadcasting as closely similar to those of the Freedom of the Press Act as possible, and to depart from that model only where important differences between press and broadcasting justify it. Under these circumstances, such arguments as, e.g., that it seems desirable that persons who voice their own opinion openly in the course of programmes should carry the responsibility for what is said cannot be considered to have much weight. They could equally well be applied with regard to the press. The editor of a newspaper answers also for the contents of articles signed by their authors, and this system has been practised without any difficulties arising."[5]

The Minister also discusses another objection put forward by the expert against the complete adoption of press rules (in respect of statements made by named persons): the Swedish broadcasting corporation, the expert said, is comparable not to a single newspaper, but to the press as a whole, and must provide opportunities for all shades of opinion to be expressed. If responsibility even for the expression, by persons appearing openly, of extreme or unpopular opinions is laid upon the corporation, there is reason to apprehend that it will prefer not to offer opportunities for such opinions to be voiced. These conclusions, the Minister says, are too farreaching. The principal safeguards against the corporation's suppressing opinions and news have only a distant connection with the question of legal responsibility for offences against the very extensive freedom of expression. These safeguards are found in the independence of the corporation vis-à-vis the authorities and the representatives of various interests, in the existence of an impartial body—the reference is to the Broadcasting Supervision Board—which is competent to try complaints

[5] Kungl. Prop. 156/1966, p. 42.

against individual programmes, and in the fact that the public, the organizations and the press are continuously following and criticizing the programme policy of the corporation.[6] For this reason—and others which are of a more technical character and may be left aside here—the Minister proposes an extension of the field in which the rules on broadcasting liability ought to be strictly modelled upon the press legislation.

There would seem to be three distinct purposes which the legislation on liability for broadcasting ought to serve: it should give private persons efficient remedies against prejudice inflicted upon them by the contents of programmes; it should guarantee, or at least help to guarantee, the independence of the broadcasting corporation and its possibilities of giving information and expressions of opinion on matters of legitimate public interest; finally, it should protect the servants and collaborators of the corporations, as well as persons giving information, against pressure both from outside and inside. We propose to conclude by examining briefly whether and to what extent the system created by the Liability Act seems capable of achieving these aims.

As far as the protection of private persons is concerned, it should be noted that the harm which may be inflicted by the contents of programmes differs to some extent from that which may be caused by newspaper articles. Generally speaking, the effect of an unfavourable statement made in a broadcasting programme is both more immediate and more intense. Where such statements are made in "official" contexts, particularly in news, they are likely to make a considerably stronger impression than when they are contained in newspapers. The monopoly position of the Swedish broadcasting corporation confers upon it some of the authority traditionally claimed by public bodies. Now, the Liability Act is only applicable to "programmes", and as we have indicated above, "news" is among the elements used in the preparatory works to exemplify elements of broadcasting which cannot be brought under that heading. On the other hand, the expert who prepared the Radio Act stressed that more elaborate news transmissions are undoubtedly "programmes"; only simple statements based upon communications from news agencies, etc., fall outside that category.[7]

The second important group of cases where private interests

[6] *Op. cit.*, p. 43.
[7] *S.O.U.* 1965: 46, pp. 44 f.

may be prejudiced coincides very largely with those "live" programmes where it is possible, under sec. 4, subsec. 2, of the Act to make the persons appearing in the programme liable for their own acts. This may not be a very serious objection against the system, however, for even in these cases the broadcasting corporation is subject to *civil* liability jointly with the actual tortfeasor (sec. 6, subsec. 2), but it nevertheless deprives the elaborate system of responsibility of a good deal of its practical importance as a safeguard of individual interests.

There is, finally, a third category of problems where it may be doubted whether the Broadcasting Liability Act takes the particularity of broadcasting, as opposed to the press, into sufficient account. As appeared from the cases from the Broadcasting Supervision Board examined by the expert preparing the Liability Act, most complaints concerned invasions of privacy and disparagement of goods. In so far as the latter group is concerned, the similarity between press and broadcasting is undoubtedly strong enough to justify similar rules. In respect of privacy, it must be granted that, so far, broadcasting has been much more disciplined than have certain sections of the press. However, programmes, in particular "live" television programmes, involve risks of invasion of privacy, e.g., of persons attending meetings, patronizing music halls, or only passing in the street, which are unknown to the press. Now, even where such invasions are actionable under Swedish law—which is the case only in a few extreme situations, e.g. where a programme implies a defamatory disclosure of private facts or has been prepared by acts unlawful in themselves—they would not seem to fall under the Liability Act at all, that Act being applicable only to questions which concern the "freedom of expression" in programmes (sec. 1, subsec. 1).

Upon the whole, it seems regrettable—as Judge Björling appears to think[8]—that the problems of privacy were not taken into consideration in connection with the new legislation. It would seem far easier to make a start with broadcasting than with the press, where any attempt to restrain abuses in this field is likely to meet with fierce opposition.[9]

Apart from these *lacunae*, it seems justifiable to describe the introduction of the new liability rules, and particularly of the

[8] *Vide S.O.U.* 1965: 58, pp. 43 f.

[9] Cf. the German and English experience on this point (Strömholm, *Right of Privacy and "Rights of the Personality"*, Stockholm 1967, pp. 169 ff., 174 ff.).

principle under which the broadcasting corporation answers in tort jointly with the person criminally responsible, as a reinforcement of the individual's possibility of obtaining redress for wrongs committed by statements made in the course of programmes—in those few cases where liability exists.

Whether the purpose of safeguarding the independence of the broadcasting corporation has been achieved would seem to be a more difficult question to answer. It is on this point that the Minister of Justice argued, in the explanatory memorandum accompanying the Government Bill, that the liability rules are of minor importance for the attitude of the broadcasting corporation. The truth of this statement cannot be denied, but it is worth pointing out that it is true only because the scope of the liability is so reduced. Had an efficient protection of privacy been introduced, or had some formula been found to define statutorily the corporation's duty of objectivity and the obligations which this imposes upon its servants, the Minister's judgment would have been more questionable. As it now stands, the Broadcasting Liability Act has little impact upon the programme policy of the corporation because the cases where liability can be incurred by the corporation itself are so few and, from the point of view of broadcasting, relatively unimportant; where that is the case, the system of protective rules, including the special procedure, borrowed from the Freedom of the Press Act, gives the corporation a very strong position. To some extent, it is at the expense of the efficient protection of private interests that the independence of the corporation has been achieved.

The question of the independence of the corporation arises in a somewhat different form where the relationship between that body and the state is concerned. Here, obviously, the solution given to the problem of liability is of small importance. What matters is that the organizational framework within which broadcasting operates shall offer sufficient safeguards.

The third point which must be considered is whether and to what extent the Liability Act helps to secure the independence of individual officers and collaborators of the corporation. This is really the crucial point, for unlike a newspaper, which has one or several owners who can be identified with it, e.g. in so far as economic sanctions imposed upon the newspaper are concerned, the corporation is really, in terms of economic responsibility, more similar to a public body. Since the prohibition against censorship is obviously inapplicable to the work *within* the corpora-

tion, and since liability under the Act is normally carried by a number of its own servants, the ultimate guarantees of independence would seem to be found, once more, in the organization of that body.

In so far as the Liability Act is concerned, there are three distinct groups of persons to consider: those who give information to the corporation for the purpose of publication in the course of programmes, persons who appear and give statements of facts or express opinions in such programmes, and the responsible programme editors.

As for the protection of persons giving information, it must be stressed, in the first place, that its efficiency depends upon the sense given to the definition of "programmes" and, concomitantly, to that of "news" as opposed to "programmes". The anonymity which can be claimed by persons giving information is subject to the same limits as the special liability system. There is little use in discussing the advantages and disadvantages of the principle under which the anonymity of such persons is strictly maintained in the Liability Act. The similarity of interests between press and broadcasting on this point is obvious, and the principle is firmly rooted in Swedish press law. Although it may seem doubtful from an ethical point of view, and although it might possibly be claimed that the position and resources of the broadcasting corporation are such that it could do without this principle, the public interests underlying it are generally felt to be paramount. Provided the responsibility for those who decide, in the last resort, whether such information shall be used or not is framed in a suitable way, the principle would not seem to do much harm; in periods of political tension, it may be indispensable. It should further be pointed out that the protection goes no further than the special liability system itself, which is exclusively applicable to "offences against the freedom of expression in broadcasting programmes" (sec. 5, subsec. 1, Broadcasting Liability Act). Beyond that limit, normal rules of criminal and civil responsibility are applied.

The question whether persons making statements or expressing opinions in the course of programmes should be covered by the special liability system was one which remained controversial throughout the preparation of the Liability Act. The solution (sec. 4, subsec. 2), which consists in extending the system to such cases but leaving open the possibility for the competent officer of the corporation to let the persons appearing in the

programme carry the liability themselves—the corporation remaining, however, jointly liable in tort under sec. 6, subsec. 2—seems reasonable in itself, although it involves certain risks. The economic liability of the corporation does not, however, hit any particular person—it would seem to follow from sec. 6, subsec. 3, that the corporation cannot recover damages from its officers, even if they have acted negligently, e.g. by preparing a programme (where the persons appearing are duly notified that they carry the liability themselves) which can be expected to contain defamatory or other unlawful matter. Given the fact that even subordinate officers of the corporation enjoy, among the general public, considerable notoriety from the mere fact that they appear regularly on the television screen, this position may be abused in different ways. One such way could be for a person to create for himself, with little risk and only a small expenditure of creative invention, a reputation for "radical", "daring" or "revealing" programmes, which consist in letting obscure and even doubtful individuals—who often are difficult to find afterwards and are quite indifferent to the possible sanctions—freely voice their opinions on life, society and such particular persons as displease them. This temptation, in a scandal-loving market where the highest price is paid to the seller of the most unsavoury goods, should not be underestimated. Here again, the only efficient safeguards lie in the organization and internal discipline of the corporation. However, to judge from the public reaction which follows upon the dismissal of servants of the corporation who have been particularly successful in acquiring popularity, the enforcement of disciplinary measures would seem to be difficult in many cases. The solution which would consist in laying the liability for the contents of live programmes, without exception, on the shoulders of the corporation's officers might contribute to more discrimination in cases of the kind referred to above, but is hardly practicable, in the case of, e.g., political debates. Moreover, the adoption of such a principle might create particular difficulties in drawing the boundary between "live" programmes arranged by the corporation's servants and such reports of public events as are, in principle, exempted from the application of the special liability system under sec. 1, subsec. 2, of the Liability Act. Moreover, the fact that a senior officer of the corporation must decide whether a programme shall be broadcast under the responsibility of a programme editor or under the personal liability of those preparing and appearing in it undoubtedly offers some guar-

antees. Generally speaking, the appointment of responsible programme editors—the only persons whose "independence" is clearly put to the test by the new legislation—would seem to imply certain safeguards for the lawfulness of programmes. The fact that the Liability Act has such a narrow field of application reduces the scope of the problem how to give these editors a position admitting the same independence as is enjoyed by the responsible editors of newspapers. That problem recurs, on the other hand, in the far more important field where the Broadcasting Supervision Board is exclusively competent, but since there is nothing to indicate that the Board is bound, in the exercise of its jurisdiction, to observe the exclusivity of the programme editor's liability—it is only in respect of legal sanctions, imposed by courts, that the latter is solely responsible (cf. sec. 5, subsec. 1, Broadcasting Liability Act)—the responsibility within that domain does not fall upon the programme editor alone.

It is premature to pass judgment on the operation of the new liability system.[1] Upon two points, however, some comments may be offered. In the first place, the narrowness of its scope seems regrettable. A law revision commission is now studying the problems of privacy, and it is to be hoped that at least some basic rules will emerge which will put these problems, too, under the jurisdiction of the courts. Secondly, apart from the problem of privacy, it must be granted that the distribution of tasks between statutory rules administered by the courts and other technical devices—administrative and contractual provisions, some of which are applied by the Broadcasting Supervision Board—is probably based upon a realistic appreciation of the particular problems of broadcasting in a community where that activity is handled by one body which possesses a virtual monopoly and holds a semi-official position. By and large, the independence of such an organization ultimately rests upon its organization and the willingness of the powers that be to respect a set of complicated rules of a moral rather than a legal character. It seems reasonable to lay

[1] According to an article in the newspaper *Svenska Dagbladet,* September 22, 1967, 32 responsible programme editors had been appointed at that time. No action under the new Act had been brought. Certain administrative measures had been taken within the organization to meet the demands upon surveillance and control of programmes made by the Act. Some interviewed senior officers claimed that a feeling of "uncertainty" was the result of the new rules, and that the officers engaged in the actual making of programmes might have felt it expedient to observe greater caution in their work.

down statutory rules only where they can be applied without forcing the courts to take sides in issues which are so distant from the problems normally settled judicially and so closely interwoven with political controversy that to do so might jeopardize public confidence in the administration of justice.