FREE SPEECH FOR PUBLIC EMPLOYEES IN DENMARK

BY

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I. INTRODUCTORY REMARKS

1. *Delimitation of the Subject*

In most Western countries the issue of free speech for public employees is attracting increased interest, partly because of the mere growth in public employment, partly because of the conflict inherent in the issue of free speech as a democratic right and the interest of the state or the party in government to run a tight ship in an increasingly complex society. This paper deals with freedom of speech for Danish civil servants in general without any specific delimitation. I shall, however, confine myself to dealing only with matters that clearly involve free speech in connection with the work or position of the civil servant. Furthermore, I shall deal only with the issue of civil servants expressing views which differ from those held by their superiors, e.g. politicians or senior government officials. I shall also to a limited extent discuss the position of public employees in the service of local government. Here, however, the issues are less clearly defined, local government not being based on distinctions between administration and a legislative assembly or between government and opposition. In what follows, therefore, the principles discussed do not always apply with regard to local government.

2. *The Current State of Law?*

The traditional sources of law—legislation, customary law, and court practice—are scanty and unclear in this area of Danish law. It is also obvious that the rules applicable grant the employer a great deal of discretion in regard to statements made by public employees, a discretion which is limited in part by the doctrine of abuse of discretionary power and in part by more far-reaching considerations of the prior interests of society in general. To some extent, therefore, the method applied here has to be one of assessing the possible considerations made by a court or some other decision-making body in accordance with what in Danish jurisprudence is often termed "the nature of the case" or "the cultural tradition", i.e. the reasons and policy that lie behind the law.[1] There are two main observations to be made in relation to this method.

[1] The general question of legal sources and interpretation has been widely discussed in Scandinavian legal writing, cf. Alf Ross, *Ret og retfærdighed,* 3rd ed. Copenhagen 1971, chaps. III and IV, Preben Stuer Lauridsen, *Retslæren,* Copenhagen 1977, chaps. V and VI, and Torstein Eckhoff, *Rettskildelære,* Oslo 1975. As for this question, particularly in constitutional law, cf. Max Sørensen, *Statsforfatningsret,* 2nd ed. Copenhagen 1973, chap. 1, including references.

First, it is a characteristic feature of such "other considerations" that they are not subjective or private, but objective or interpersonal. A scholar who attempts to establish what is valid law by supplementing statutory provisions, decisions by authorities applying the law, and legal customs, by considerations based upon "the cultural tradition", seeks to apply assessments which, in his opinion, are currently the relevant, dominating ones in the society of which he is a part, regardless of whether they coincide with his personal evaluation.

Secondly, just as legal tradition gives some guidelines for the interpretation of explicit rules, it also limits "other considerations" to those which are currently applied in legal argumentation.

Although the application of "other considerations" is thus neither arbitrary nor unlimited, a review of valid law basing itself, to a considerable extent, on such "other considerations" will differ from reviews which can be based upon an abundance of explicit rules and decisions by authorities applying the law. In almost every societal field more than one view exists at any given time.[2] Furthermore, one cannot necessarily assume that one group has one view, and another group another view, leaving a simple choice. Until values have crystallized into an act or some other authoritative decision, one may expect incompatible values to be found concurrently within large groups of the population.

Thus, a review of valid law like the present one, which is based upon a very limited body of explicit rules and decisions by authorities applying the law, unavoidably becomes less certain than many other legal reviews. In applying the term "certain" I have two interrelated methods of verification in mind. In terms of a prediction of future decisions, in particular judicial practice, the review is a less certain one. And the chance that the review will be accepted as a "true" exposition of valid law by those who are subjected to the rules in roles other than those of judges is less than would have been the case had the basis been an abundance of explicit rules and/or decisions by authorities applying the law.[3]

With a view to counteracting this uncertainty to some extent, I shall, as meticulously as possible, outline the "other considerations" which in my opinion are relevant at this stage in this field of the law.

A further problem pertaining to the fact that the issue of the lawfulness of a statement made by a civil servant in many cases occurs in situations where the

[2] See, e.g., the Ombudsman concerning statements made by public employees within the social sector and hospitals (as well as the prison administration) 1977 *FOB* (*Folketingets ombudsmands beretning*), p. 384 (393).

[3] Torstein Eckhoff, *Forvaltningsrett,* Oslo 1978, p. 375, concludes a review of the freedom of speech of civil servants by stressing that his review "to a considerable extent is based upon my own assessment of the considerations to be taken into account. Neither legislation nor judicial practice nor any other authoritative legal sources give much guidance". It is, in other words, my ambition to be more "objective".

employer has a great deal of discretion, is that the statement may only be one of several grounds for the employer's action in relation to the civil servant. In such cases, therefore, the issue of the lawfulness of the statement is reduced to the question of whether the employer is allowed to base his decision on the fact that the employee has made the statement or not.

II. SANCTIONS AGAINST UNLAWFUL STATEMENTS MADE BY CIVIL SERVANTS

1. *Introductory Remarks*

The point of departure of Danish law that all citizens enjoy freedom of speech applies also to civil servants. In regard to statements made by a civil servant relating to his service no sanctions may be imposed against him unless the statement is unlawful. In that case sanctions may be imposed in the form of disciplinary punishment and dismissal. However, decisions taken in relation to the promotion, transfer or other changes in the position of the employee may also be regarded as sanctions if the decisions are unfavourable and, at least partly, are based on the statements made by the employee. It is possible that a criminal action could be brought against a civil servant for breach of professional secrecy or for disobedience on account of a statement. This is, however, of small practical importance and will be disregarded in what follows.

About one third of those employed in public service are civil servants. The fundamental rules regarding governmental civil servants' rights and obligations are laid down in a special act—the Civil Servants Act—and, as far as municipal civil servants are concerned, in municipal bylaws. The majority of employees in public service, however, are subject to regulations in collective agreements. Finally, a few persons in public service are employed on the basis of an individual contract only. In practice collective agreements as well as individual contracts are supplemented by an analogous application of the provisions of the Civil Servants Act as well as by the provisions of an act regulating the status of white-collar employees (the Employees Act).

2. *The Various Forms of Sanctions*

2.1. *Disciplinary Action*

Civil servants are subject to special rules on disciplinary punishment as a sanction against offences in the service.

Disciplinary punishment may consist in a warning or reproof, a fine of no more than half the monthly salary, transfer to other work, to another place of work or to another position within or outside the area of employment, downgrading or dismissal. Dismissal as a disciplinary punishment is seldom used in Denmark.

The civil servant may always claim that prior to any disciplinary punishment being inflicted, a special examination of a judicial nature—a disciplinary hearing—shall take place, and in case of more serious disciplinary punishment such a hearing must always be held.

Similar rules apply to municipal civil servants.

Neither the Civil Servants Act nor municipal bylaws specify in any detail those circumstances which could constitute a service offence. There is no doubt, however, that a lawful public critical statement does not constitute a service offence. Should a critical statement made by a civil servant be held against him during a disciplinary hearing, it is always necessary to decide whether the statement was lawful or not.

2.2. *Promotion*

In exceptional cases a public employee has a claim to promotion in so far as he may have the public administration compelled by judgment to grant him a promotion or treat him in a way that corresponds to a promotion.[4]

However, the normal situation is that of the employing authority deciding at its own discretion who is to be appointed, be it a case of promotion or a case of first employment. There are rules on how to establish the basis for choosing between applicants and also on who shall participate in taking the decision. Such rules may be of major significance in preventing abuses or in ensuring that particular points of view or interests are given weight, but they do not in themselves change the fact that in by far the majority of cases decisions regarding promotion are entirely discretionary.

2.3. *Dismissal*

As a main rule public administration is free to dismiss employees on a discretionary basis. The most extensive rules on this so-called discretionary dismissal have been issued in relation to *governmental civil servants.*

The national assembly of 1848 drafting the 1849 Constitution considered discretionary dismissal of civil servants appointed by the King a consequence of the new constitutional provisions on ministerial responsibility, and dismissal was explicitly provided for in the Constitution. Protection against any arbi-

[4] Cf., e.g., 1965 UfR 269 H.

trary or biased abuse of the right of discretionary dismissal was to be found in the right of civil servants to a pension in case of dismissals for reasons not attributable to them.[5]

Governmental civil servants are still subject to discretionary dismissal. However, the 1953 Constitution contains no rules on the matter but the rules are now found in ordinary statutes.[6] The right to a pension as a guarantee against abuses has also been maintained. A civil servant entitled to a pension who is dismissed for reasons not attributable to him, has a claim upon a pension, cf. sec. 2(1) of the Civil Servant Pension Act. Where dismissal takes place for other reasons, the civil servant only has a right to suspended pension, i.e. a pension based upon his period of service, etc., at the time of dismissal, but with payment suspended until he reaches the age of 67, cf. sec. 24 of the Civil Servant Pension Act.

An additional guarantee against abuses has been introduced by sec. 31 of the Civil Servants Act, which requires that the civil servant and his organization be heard and that the reasons for the dismissal be stated. Similar rules apply to *municipal civil servants*.

Other employees in public service are also subject to discretionary dismissal,[7] though rules on notice to be given, damages, and the involvement of organizations safeguard the employee.

In case of gross misconduct the employee may be summarily dismissed. Otherwise he is entitled to notice.[8] Sec. 2(b) of the Employees Act and the collective agreements contain rules to the effect that a right to damages may exist where dismissal is not justified by the situation of the employee or the institution.[9]

2.4. *Changes in Position*

Far-reaching and complicated rules have been drawn up for *governmental civil servants*.

Changes in the civil servant's position may be made as a disciplinary punishment, cf. 2.1 above.

Furthermore, public authorities have a general discretionary right to change the extent and nature of civil servant positions, although this right is not unlimited. Under secs. 12 and 13 of the Civil Servants Act, the civil servant is

[5] Report no. 282 of 1961 of the Commission on future conditions of state employment, p. 23.
[6] Report no. 483 of 1969 submitted by the 1965 Civil Servants Commission, p. 127.
[7] H. G. Carelsen, *Dansk funktionærret*, 2nd ed. Copenhagen 1974, p. 237, Ole Hasselbalch, *Ansættelsesret*, Copenhagen 1975, p. 444.
[8] H. G. Carlsen, *op. cit.*, p. 227.
[9] *Ibid.*, p. 281, Hasselbalch, *op. cit.*, p. 451. *Overenskomst mellem finansministeriet og Danmarks Jurist- og Økonomforbund* (Collective agreement between the Ministry of Finance and the Association of Danish Lawyers and Economists) 1977, September 7, § 9.

not obliged to accept changes which amount to a change in the nature of his service, or which result in the position not being a suitable one. Furthermore, if the change involves a different kind of employment, the consent of a special board is required. If the change amounts to a transfer, sec. 27(3) of the Constitution gives a civil servant appointed by the King a right to demand a pension as if he had been dismissed for a reason not attributable to him. Other civil servants are assumed to have a similar right.[10]

Similar rules apply to *municipal civil servants*. As for *other employees in public service* their position is based on implied conditions in the collective agreement or the employment contract, unless otherwise agreed. These implied conditions usually grant the employer management prerogatives to transfer employees and to assign work. If the changes go further and the employee refuses to accept them, the rules on dismissal apply as outlined above.[11]

3. *Discretionary Decisions in Relation to Unlawful Statements*

If the competent authority wishes to use one of the sanctions mentioned above against a public employee in consequence of a critical public statement, it has to make a preliminary decision as to whether or not the statement is unlawful. This decision may manifest itself in one of the following forms.

In one form—disciplinary punishment or summary dismissal of an employee who is not a civil servant—the decision is contingent upon the statement amounting to a service offence or gross misconduct.

In the other form—refusal of promotion, dismissal, or changes in the position—the decision is a discretionary one. This is not to say, however, that the public authority may act in an arbitrary manner. The decision is subject to the doctrine of abuse of discretionary power.

The essence of discretion is to enable the public authority to balance various considerations within the area of legal criteria. Therefore, if the public authority considers a statement unlawful, but chooses not to instigate a disciplinary action against a civil servant or summarily to dismiss an employee who is not a civil servant, it is nonetheless free to take the statement into account in a discretionary decision on promotion or dismissal.[12] This position seems to be in conformity with practice.[13]

[10] Report no. 483 of 1969, p. 22.

[11] H. G. Carlsen, *op. cit.*, p. 93, and Hasselbalch, *op. cit.*, p. 371.

[12] Commentaries of Supreme Court Judge P. Spleth to the judgment in 1967 UfR 262 in *UfR* 1967 B, p. 258, particularly the concluding remarks.

[13] Cf., e.g., *Folketingstidende* (parliamentary records) *FT* 1977/78, p. 12988, and *FT* 1978/79, p. 2710. I am not taking any position on the effect of a pending or concluded court action or of

According to the doctrine regarding abuse of power, a public authority may not use its discretionary powers to prevent its employees from exercising their legal freedom of speech. Where a decision is to be taken on promotion, dismissal or changes in position in situations where a public employee has made statements not conforming to the position of the particular political head or board or institution, the public authority in question must, therefore, first consider the legality of the statement. If the statement is found to be a lawful one, the public authority must disregard the statement. In other words, one particular criterion, namely the critical statement itself, is excluded from the many criteria involved in the discretionary balance.

It is essential to underline this rule. The mere fact that the rule is established will presumably have a bearing upon the behaviour of public authorities. Some of the sanctionary mechanisms in the law of public administration may become operative merely on this basis. This applies, for instance, to criticism by the Ombudsman.[14]

However, a good deal of legal writing in the field of public administration concentrates on the possibility of a judicial review of public decision-making. Where the decision is a discretionary one, however, such a review has its shortcomings.

First, it does not result in any specific result on a discretionary decision regarding promotion, dismissal or changes in the position. The consequence of a statement being lawful is that the statement must be disregarded. The result may not necessarily be that the person in question is promoted, avoids dismissal or changes in his position. This follows from the fact that the decision is a discretionary one. Other factors such as the needs of the public authority, the particular person's efficiency, experience, ability to cooperate, period of service, etc., should also be taken into account, with the possible result that the decision stands.[15]

These circumstances may result in the courts being faced with considerable practical difficulties in their review, particularly as the cases taken to court presumably will be the dubious and complicated ones.

There seem to be two possible approaches open to the courts. They may attach importance to the subjective causes underlying the decision. Should the court find that the public authority would not have reached its decision had the lawful statement been disregarded, the court may invalidate the decision. The court may also make its own assessment as to whether, in its opinion, the

disciplinary action upon the discretionary powers. These are traditional problems of *res judicata* of small relevance to the main topic of this review.

[14] Torstein Eckhoff, "Tjenestemens loyalitetsplikt og ytringsfrihet", *Lov og Rett* 1975, p. 105, mentions another example, namely a statement by a special standing committee of the Norwegian Parliament, Stortingets protokollkomité.

[15] *FT* 1978/79, p. 2710.

decision is justified by other considerations, even if unlawful criteria might also be part of the basis for the decision.[16]

It has not been clarified how the courts actually proceed in practice. However, regardless of whether one considers one possibility or the other the most appropriate one, it is obviously difficult in the majority of cases to predict the outcome of a court action, where a discretional decision regarding promotion, dismissal or changes in position is contested on the basis of the doctrine of abuse of power. This will lead to some reluctance in bringing such court actions.

Secondly, the result of a judgment regarding the freedom of speech of public employees may be of small satisfaction to the contesting party.

Even if a court were to conclude that the discretionary decision regarding promotion, dismissal or changes in position is unlawful on account of unlawful criteria, the court cannot pass a judgment which compels the public authority to grant a promotion, to retain the person dismissed in his position, or to leave his position unchanged. In employment cases, whether they involve the private or the public sector, the courts cannot issue an order for "specific performance". The reactions open to the courts are those of establishing what is valid law, granting damages, an extended period of notice, full wages until a legal dismissal is substituted for an illegal one, pension, etc.[17, 18]

III. SUBSTANTIVE RULES ON THE FREEDOM OF SPEECH OF CIVIL SERVANTS

A. EXPLICIT RULES

i) Constitutional Protection of Freedom of Speech?

In the general discussion concerning freedom of speech for public employees reference is frequently made to constitutional guarantees. This fact in itself makes it important to attempt to establish the significance of the Constitution in relation to the freedom of speech of public employees.

[16] Cf. Poul Andersen, *Dansk forvaltningsret*, 5th ed. Copenhagen 1965, p. 361, and Ole Krarup, *Øvrighedsmyndighedens grænser*, Copenhagen 1969, p. 75.

[17] Ole Hasselbalch, *op. cit.*, pp. 300 and 400, H. G. Carlsen, *op. cit.*, p. 175, the collective agreement mentioned in footnote 9, § 9, cf. Spleth in his commentaries mentioned above in footnote 12.

[18] To abolish, or considerably reduce, discretionary powers in matters regarding promotion, dismissal or transfer to other duties, involves the risk of making public administration even more rigid than it is already. If one wants to counteract the "drawback" pointed to in the text, the solution seems to be to make the basis for such decisions a more comprehensive and particularly a more discernible one.

In what follows an account will be given of the various theories concerning the impact of the constitutional provisions on this matter.

I shall first discuss sec. 77 on the freedom of speech and, subsequently, other provisions of the Constitution which may be relevant.

1. *The Freedom of Speech Clause of the Danish Constitution in Relation to Civil Servants*

1.1. *Sec. 77 of the Constitution*

Sec. 77 reads as follows:

> Any person shall be at liberty to publish his ideas in print, in writing, and in speech, with the proviso that he may be held liable in court. Censorship and other preventive measures must never again be introduced.

The words "in writing and in speech" were added in the 1953 Constitution. Otherwise, the wording is identical to that of the 1849 Constitution.[19] There are several theories as to the meaning of this provision. Here an account will be given of the most important aspects of these.

1.1.1. Sec. 77 of the Constitution Protects "the Essence of the Freedom of Speech"

In his 1973 thesis "The Essence of the Freedom of Speech", Peter Germer maintains an interpretation of sec. 77 to the effect that it protects the possibility of freely expressing opinions on public affairs.

In relation to the freedom of speech of public employees the consequence of this position would be the following: Any rule of law, including the rules on professional secrecy, limiting the essence of the freedom of speech as thus defined would either have to be subjected to such a narrow interpretation as to leave room for the freedom of speech guaranteed by the Constitution, or to be set aside as contrary to the Constitution, should a sufficiently narrow interpretation not be possible. Consequently, any legal sanctions against statements on public affairs would become unlawful.

[19] All general books on constitutional law contain interpretations of the Constitution's provision on the freedom of speech (provision on freedom of printing), see in particular C. G. Holck, *Den danske statsforfatningsret* II, Copenhagen 1869, p. 343, H. Matzen, *Den danske statsforfatningsret* III, 4th ed. Copenhagen 1909, p. 364, K. Berlin, *Den danske statsforfatningsret* II, 2nd ed. Copenhagen 1939, p. 427, Poul Andersen, *Dansk statsforfatningsret,* Copenhagen 1954, p. 651, Alf Ross, *Dansk statsforfatningsret* II, 2nd ed. Copenhagen 1966, p. 687, Max Sørensen, *Statsforfatningsret,* 2nd ed. Copenhagen 1973, p. 369. The conceptions of the various authors contain nuances of meaning, but it is not important to bring out such nuances in this context. Additional references to legal writing in the field of constitutional law are given in what follows only to the extent to which they contain views specifically referring to the freedom of speech of public employees. Reference is likewise made to K. A. Frøberg, *Den grundlovshjemlede ytringsfrihed,* Copenhagen 1975.

If this approach is adopted, sec. 77 acquires decisive importance in relation to the freedom of speech of public employees.

1.1.2. Sec. 77 of the Constitution only Provides a Protection against Censorship

Legal writing on constitutional law in Denmark traditionally makes a distinction between a substantive and a formal freedom of speech (prior to the 1953 Constitution: freedom to print). Substantive freedom of speech implies a right to express oneself without being met by any legal sanctions, whereas formal freedom of speech means freedom from censorship, i.e. an examination by a public authority of the legality or appropriateness of a statement prior to its publication.

This distinction invites an interpretation of sec. 77 to the effect that it refers only to the censorship of printed material in which the Church and the state had indulged for centuries before 1849, whereas it does not prevent the legislative assembly from subsequently introducing sanctions against public statements. This appears even explicitly from the words "may be held liable in court".

If this theory is adopted, sec. 77 does not prevent legal sources other than the Constitution—acts, ordinances, service instructions, etc.—from prescribing limitations upon the freedom of speech of public employees subsequently sanctioned by punishment, dismissal, transfer, or other reactions. Consequently, sec. 77 only prevents the prior examination of public statements made by public employees.[20]

1.1.3. Only the Courts have Jurisdiction in Disputes concerning Freedom of Speech

Sec. 77 contains the proviso that a person "may be held liable in court". This means, at least, that there shall always be a possibility of bringing an action in a court which is independent of the government concerning a violation of rules involving limitations of freedom of speech. However, the wording can be given a wider interpretation, namely that the courts have exclusive jurisdiction in matters of limits to the freedom of speech. If so, the public authority concerned may not decide on a service offence that allegedly relates to public statements.[21] Consequently, even a subsequent judicial review would not suffice.

1.1.4. Sec. 77 of the Constitution and the Principle of Legality

The fundamental principle that the acts of the public administration, in particular those conferring legal rights and duties on the citizens, require an

[20] Poul Andersen, *op. cit.*, p. 662, and Ross, *op. cit.*, p. 698, and Ole Krarup, in *Juristen* 1971, p. 482.

[21] Poul Andersen, *op. cit.*, pp. 672–3, Ross, *op. cit.*, p. 705, and Ole Krarup, in *Juristen* 1971, p. 486, cf. Berlin, *op. cit.*, p. 439, and Max Sørensen, *op. cit.*, p. 376.

authority given in the law, applies in Denmark as well as in other countries adhering to the principle of a constitutional state founded on law.[22] But the specific extent and substance of this principle is unclear. It is, for instance, a point of dispute in Denmark whether the principle applies exclusively to the public administration's external relations, in other words, relations to the citizens, or whether and to what extent it also applies in the relation between the government or the municipalities as employers and civil servants as employees. It is also uncertain what should be demanded in terms of clarity and explicitness, and to what extent legal sources other than an act adopted by Parliament might, in exceptional circumstances, suffice. The traditional theory assumes that the demands concerning clarity vary with the severity of the infringement that the public administration wishes to undertake. Similarly, deviations from the principles and ideas on which any Western society is built, such as free access to trade, personal liberty, freedom of speech, etc., demand a particularly clear authority. There exist, however, additional variables and, on the whole, the more specific substance of the principle of legality remains unclear.

Thus, in relation to civil servants sec. 77 requires, by means of the principle of legality, specific authority for any rule limiting the freedom of speech.[23] The requirement may be phrased in different ways. One may demand an act adopted by the legislative assembly or at least an ordinance issued according to a statutory provision authorizing a limitation of the freedom of speech. Or one may, in a general way, demand a specific authority in the sense that only limitations which are entirely unambiguous are to be upheld. In consequence many vague rules e.g. on professional secrecy would have to be disregarded or subjected to a narrowing interpretation.

1.1.5. Sec. 77 of the Constitution in No Way Deals with the Freedom of Speech of Public Employees

The words "any person" in sec. 77 cannot be understood literally. Thus, the provision only protects those who are liable in (Danish) courts. Therefore freedom of speech cannot be invoked by, e.g., minors. Freedom of speech may

[22] The principle of legality is dealt with extensively in legal writing. Among the more recent works may be mentioned Poul Andersen, *Dansk forvaltningsret*, 5th ed. Copenhagen 1963, p. 387, Ole Krarup and Jørgen Mathiassen, *Forvaltningens retlige afhængighed*, Copenhagen 1973, p. 6, Jens Garde in *Forvaltningsret. Almindelige emner*, Copenhagen 1979, p. 131, Alf Ross, *op. cit.*, especially § 57 and 8th part, Max Sørensen, *op.cit.*, chaps. 9 and 10, and Bent Christensen, *Forvaltningsret, Hjemmelsspörgsmål*, Copenhagen 1980, chaps. II and XI.

[23] Anders Hind and Oluf Jørgensen, *Magt/Misbrug*, Kongerslev 1978, p. 27, cf. Poul Andersen, "Om tjenestemænds ytringsfrihed" in *Grundtvig som rigsdagsmand*, Copenhagen 1940, p. 101, and Ole Krarup, in *Juristen* 1971, p. 483. As for Swedish law, reference is made to Lagerdahl, in *Förvaltningsrättslig Tidskrift* 1970, p. 193, Lavin, *ibid.* 1973, p. 325, and 1974, p. 1, and Nordström, *ibid.* 1973, p. 235, 1974, p. 1, and 1975, p. 20.

also be limited where certain special relations of dependence as well as contract relations exist. Institutional relations are a case in point. Subjecting school magazines[24] or the letters of prisoners to censorship does not violate the Constitution.[25] Nor does a prohibition against certain pamphlets in military areas involve such a violation.[26] The rules regarding institutional relations are equally applicable to public administration.

Furthermore, sec. 77 does not prevent classifying as a breach of contract the fact that an employee of a private firm violates a prohibition against public statements.[27] This holds true also for public employees.

If this approach is adopted, it follows that sec. 77 is of no legal relevance whatever to the freedom of speech of public employees.

1.2. *Other Constitutional Provisions*

The writers advocating the view that sec. 77 does not protect a substantive freedom of speech often maintain that other provisions of the Constitution may prevent the legislative assembly from introducing limitations. As an example one may mention sec. 67 on religious freedom. This provision prevents religious preaching from being made punishable or otherwise subject to sanctions, unless contrary to "decency and public order". It would, therefore, violate sec. 67 if the legislative assembly were to introduce sanctions against religious preaching that deviates from that of the Church of Denmark.

Secs. 49 and 65 of the Constitution regarding public meetings in the legislative assembly and public proceedings in the administration of justice may also be interpreted as providing a protection of the substantive freedom of speech. Public reports of, and debates on, such meetings and proceedings may not be prohibited. Some writers also find in secs. 13 and 31 of the Constitution on the liability of ministers and proportional representation, a limitation upon the authority of the legislative assembly to restrain political debate similar to that following from sec. 67.

Views on such a limited protection of the substantive freedom of speech are not advanced with special reference to public employees, and it is no easy task to ascertain the consequences in relation to them. One possible consequence would be, e.g., that participation in a public debate on religion by an employee of the Ministry for Ecclesiastical Affairs or the Church of Denmark could never become a service offence.

[24] *FOB* 1958, p. 165.
[25] 1952 UfR 538 and *FOB* 1959, p. 31.
[26] 1963 UfR 439.
[27] Cf. H. G. Carlsen, *Dansk funktionærret*, pp. 126 and 225.

2. *Discussion*

2.1. *The Effects of the Constitutional Civil Liberties in General*

Taking as a starting point the effects of the provisions of the Danish Constitution which restrict the substance of legislation and do not merely lay down procedural rules,[28] the civil liberties of the Danish Constitution may, in particular, have three different effects.

They may serve as a guideline for the legislative assembly in drafting statutes. In this particular respect the rules of constitutional law are not enforceable through traditional sanctions but they are abided by due to respect shown by the highest governmental bodies, the pressure of public opinion, etc.

They may influence the way in which judicial and administrative authorities apply valid law. If so, the principles of civil liberties put their mark on the interpretation of other rules of law.

They may serve as a legal boundary to the legislative assembly—a boundary enforceable by the courts which may, in the exercise of their judicial review of the constitutionality of legislation, set aside provisions violating the Constitution.

Legal writing traditionally concentrates on the last effect. However, in Denmark there is reluctance on the part of the courts to set aside statutes as unconstitutional. An act will not be set aside unless it is unconstitutional beyond any shadow of doubt. It does not suffice that an act is contrary to the interpretation of the Constitution which the courts find preferable, if another interpretation, apparently adhered to by the legislator, is also justified. In Denmark, the result of this trend has been that, up till now, no act has been set aside as unconstitutional.

This reluctance is related to Danish political history. For a long time, the question of whether it is for the courts to undertake a judicial review of legislation, thereby vitiating parliamentary decisions, was one of the traditional bones of contention between left-wing and right-wing political parties. Another historical fact that may have contributed to the timidity of the courts is the outcome of some important Supreme Court cases from the 1880s. At that time, the Right with a majority in the Upper House and the backing of the King governed against the wishes of the Left majority in the Lower House. One of the means by which the Right governed were so-called provisional finance bills, which were promulgated without the consent of the Lower

[28] This question has likewise been treated extensively in legal writing—at least compared to the general magnitude of Danish jurisprudence. Max Sørensen, *op. cit.*, p. 293, gives a list of references to earlier writings. Cf. also Bengt Christensen, *Dansk miljøret* 1, Copenhagen 1978, p. 149, and Bernhard Gomard, *Privat pension og social forsikring*, Copenhagen 1968, p. 148.

House. The Left found such provisional finance bills unconstitutional, but the Supreme Court of the day held them constitutional. Eventually, however, the Left won politically, and history has tended to see political motives behind the behaviour of the Supreme Court.

Until quite recently, constitutional jurisprudence has approved the position of the courts and adopted a reserved and modest approach to the interpretation of civil liberties. However, one may now discern a certain tendency to come closer to the American and German trend, at least so far as political and personal civil liberties are concerned.

As yet, however, no change in the attitude of the courts can be discerned. Furthermore, no action has been brought before a court concerning the constitutional protection of free speech of civil servants, e.g. in regard to the theories mentioned above (1.1.2 and 1.1.3), at least not in a distinct and unambiguous way.

2.2. *Case Law*

It appears, therefore, from the sparse existing judicial practice, scattered timewise and areawise, that so far the courts have attached no significance to the provisions of the Constitution on the freedom of speech in relation to public employees. No rule of law has been set aside as contrary to the Constitution, and only to a limited extent have the courts interpreted the rules of law in favour of the freedom of speech.

As Germer himself has pointed out, there is no foundation in Danish judicial practice for the idea of constitutional protection of the essence of the freedom of speech—the possibility of freely and publicly expressing opinions on societal problems (1.1.1).

Some judgments were rendered in the 1880s dealing with reactions against public political statements. It was a characteristic feature that the provisions of the 1866 Constitution (sec. 86) were not even invoked.[29] The judgments are old and were rendered under circumstances entirely different from those of our days. I refer to them, nonetheless, because the political strife at that time was mainly couched in constitutional terms. The fact that the provisions of the Constitution on the freedom of speech were not invoked consequently indicates how remote the idea of a constitutional protection of the substantive freedom of speech was at that time.

Two of the judgments involved the freedom of speech of public employees.[30] A circular of April 22, 1885—the so-called muzzle circular—issued by the Ministry of Ecclesiastical Affairs and Public Instruction instructed school

[29] 1887 UfR 142 H, 1887 UfR 221 H, 1887 UfR 533 H and 1887 UfR 829 H.
[30] 1887 UfR 533 H and 1887 UfR 829 H.

teachers not to criticize the government. By the first judgment a school teacher lost his position for publishing an article in a newspaper which constituted a breach of sec. 142 of the then Penal Code on disobedience. In the second judgment a school teacher, who was also a member of Parliament, was fined under the same provision for making oral statements at a public meeting. The two cases were apparently handled in an identical manner. The section on the freedom of speech which could have been invoked in the former case is not even referred to in the report of the judgment.

There also exist more recent judgments from which it can be seen that the courts have not, so far, based themselves upon a constitutional protection of a substantive freedom of speech.[31] None of these judgments deals with the freedom of speech of public employees. But it is remarkable that sec. 84 of the 1920 Constitution on the freedom of speech is not even referred to in the only comparatively recent judgment regarding public employees, 1935 UfR 995.

> The case involved an employee of the state railways upon whom the public authority had imposed a fine on account of his having published an article in an internal journal of his employee organization, which had been reprinted in the daily press. The article reported a train accident which had not previously been mentioned by the press. The state railways had issued service instructions supplementing the general provisions of the Civil Servants Act on professional secrecy by a rule saying that "without special authorization from the General Directorate the employees may not provide magazines or journals ... with information stemming from service documents not meant for publication ... or regarding internal affairs, particularly circumstances which could have a detrimental effect upon the customers' confidence in the railways". The case was brought before the courts by the organizations of civil servants which claimed that the fine was invalid due to the fact that no disciplinary hearing had been held. The court held in favour of the organizations because, in its opinion, the employee had not pleaded guilty in writing and without any reservation. In other words, the judgment does not directly pronounce anything on the freedom of speech of public employees but, once again, it is a characteristic feature that, according to the report of the judgment, constitutional protection was not even invoked.

Nor does judicial practice in any way support the more limited versions of constitutional protection, i.e. a prohibition against requiring public employees to secure permission prior to making public statements (1.1.2), and the exclusive competence of the courts to decide cases regarding the freedom of speech of public employees.

In this connection it may be mentioned that the latest Civil Servants Act changed the rules regarding disciplinary hearings, without the least discussion of the possibility of administrative decisions on the basis of disciplinary hearings being contrary to the Constitution.[32]

[31] 1949 UfR 922 HK, 1963 UfR 439, 1965 UfR 914, 1966 UfR 194 and 1977 UfR 872.
[32] Report no. 483 of 1969 by the 1965 Civil Servants Commission, part 1, p. 202.

Nor is there any basis for support in judicial practice, old and scattered as it is, of the idea of a constitutional protection of a substantive freedom of speech for public employees on religious and political affairs (1.2).[33]

The most limited consequence of sec. 77—that of stricter demands regarding authority where rules of law limiting the freedom of speech are involved (1.1.4)—does, however, find some support in a recent case, 1977 UfR 872.

> A police ordinance prohibited the distribution of pamphlets within a distance of 100 metres from military barracks. By a majority judgment of the High Court four persons accused of having distributed antimilitary, propagandistic material within the prohibited area were exonerated. The court substantiates this conclusion as follows: Sec. 77 of the Constitution does not exclude prohibiting the distribution of printed material within limited areas. Consequently, the provision of the police ordinance is not contrary to sec. 77. However, the 1871 Police Act does not contain sufficient authority for the provision. The more specific reason for this is the following: It falls outside the tasks of the police to secure order and discipline within the barracks area. In other words, the provision of the police ordinance cannot be sustained on that basis. Only the requirements of peace and order in the street could justify the provision. But as far as that is concerned the rule is unnecessary, partly because there is no reason to assume that the risk of disturbance is greater within than outside a distance of 100 metres from the barracks, partly because the police have the possibility of intervening should a concrete disturbance, or a risk thereof, actually develop. "Bearing in mind that the possibility of bandying opinions about should not be unduly restricted, the court consequently considers it difficult to regard the provision of the police ordinance as necessary to secure public order."

It is primarily the sentence just quoted which supports the demand of strict authority. But the support is not a strong one. The judgment rejects the position that sec. 77 could have been violated; and the conclusion of the judgment may also be viewed as a consequence of two well-known general principles of administrative law, namely the doctrine of abuse of discretionary power and the principle of proportionality between means and objectives. The Police Act does not authorize any securing of peace and order in the barracks, and the rule of the police ordinance is unnecessary to achieve the objective of peace and order in the streets.

At any rate there is no support in legislative and judicial practice for the more specific consequences of the line of thought that limitations of the freedom of speech of public employees presuppose particularly strict demands of authority. Provisions regulating the freedom of speech of public employees

[33] 1886 UfR 77 H and 1886 UfR 1101 confirmed by 1887 UfR 972 H do not manifest any particular tolerance regarding religious statements made by public employees. The two judgments referred to in footnote 30 demonstrate that the idea of a particularly wide freedom of speech for public employees in political matters was unknown at that time. A judgment reported in 1966 UfR 194, which did not involve public employees, did not attach any importance to an allegation regarding a wider freedom of speech in political matters.

are actually laid down in legal sources other than statutes and ordinances,[34] and most of the provisions on professional secrecy are vague indeed.

2.3. *Conclusion*

Bearing in mind that the material forming the basis of an evaluation is sparse, the following tentative conclusion may be drawn.[35]

So far, the courts have not vitiated any statute as a violation of the freedom of speech secured by the Constitution, and the courts have been reluctant to interpret the law in such a way that the scope of the freedom of speech be widened. The judgment in 1977 UfR 872 may, however, possibly be seen as an indication of an increased disposition to such an interpretation.

Therefore, the major significance of sec. 77 on the freedom of speech of public employees lies in the section constituting a particularly solemn declaration of one of the evaluations which must be included in the "other considerations" stemming from the nature of the case which form part of the basis for deciding individual cases.

ii) Other Explicit Rules

1. *Professional Secrecy*

There are numerous rules on professional secrecy of public employees, most of which are statutory. Some are found in ordinances or bylaws.

A characteristic feature of the general rules on professional secrecy is that

[34] The so-called muzzle circular referred to above was a general service instruction. As far as can be seen from the report in 1887 UfR 533 H, the courts were, however, of the opinion that the behaviour of the dismissed teacher was "entirely incompatible with his position as a servant of school and church", which conclusion the courts reached independently of the service instruction. The professional secrecy which was imposed in the case reported in 1935 UfR 995, and which was stricter than the requirements of the Civil Servants Act, had been established in service instructions, but this circumstance was not invoked during the case. In the case reported in 1963 UfR 439, which concerned a textbook for seamen, sec. 77 of the Constitution was invoked but without success.

[35] Including the opinions of the Ombudsman does not make the basis much broader. As appears from footnotes 24 and 25, the Ombudsman has expressed the view that sec. 77 of the Constitution does not exclude censorship where a special relation of dependency exists, *FOB* 1958, p. 165, and *FOB* 1959, p. 31, and that it does not violate sec. 70 of the Constitution to demand that a teacher must not, in his relation to the pupils of the school, be engaged actively in a religious ministry different from that of the established church, *FOB* 1959, p. 177. Apart from an opinion exclusively on legal policy in *FOB* 1977, p. 384, there is only one opinion from the Ombudsman which draws a different picture. In *FOB* 1977, p. 435, the Ombudsman stated that in taking decisions under the Highways Act (sec. 102) on allowing the exposure of hoardings beside the road, the Highways Board was obliged to take into account the possibility open to the citizen for public statements as one of the considerations to be taken into account in the overall assessment of each particular case. The reason for this was not found directly in sec. 77 of the Constitution, but in "considerations akin to the ones which underlie the political civil liberties of the Constitution including in particular freedom of speech and freedom of assembly".

they do not provide even a reasonably exact indication of just what is to be kept secret. Sec. 10(2) of the Civil Servants Act prescribes that a civil servant "shall maintain secrecy regarding circumstances coming to his knowledge in exercising his duties, if the nature of the case requires secrecy or if secrecy is ordered".[36] The collective agreements covering employees who are not civil servants, e.g. sec. 16 of the agreement of September 7, 1977, between the Treasury and the Association of Danish Lawyers and Economists, contain similar rules.

Under sec. 152 of the Penal Code any person exercising a public office or function is liable to punishment if he reveals what he has learned in the official course of his duties as a secret or what the law or any other relevant regulation declares to be secret.[37] Sec. 264(b) contains a similar prohibition against any revelation of secrets of a private nature.

Over and above such general rules on professional secrecy there exist a great many rules regarding particular areas, many of which are based on instructions or contracts. Frequently they are more precise.

It goes without saying that no attempt will be made here to review and interpret all the rules on the professional secrecy of public employees. I may limit myself to the following observations:

No doubt professional secrecy constitutes a limitation of the freedom of speech of public employees. Freedom of speech is definitely ruled out in matters subjected to professional secrecy.[38] Naturally, however, in concrete situations it may appear doubtful whether there has been a breach of professional secrecy.

The following discussion presupposes that no such breach has taken place. In other words, the scope of my analysis consists in limits to the freedom of speech of public employees based on rules other than those on professional secrecy.

2. *The Open Files Act*

The 1970 Open Files Act does not explicitly regulate the freedom of speech of civil servants. It gives the public at large a specifically defined right of access to public administration documents. Furthermore, the Act presupposes that public authorities may grant even wider access provided that the rules on professional secrecy are abided by. The Open Files Act, however, presupposes an external initiative.[39] Therefore, the Act does not apply directly to statements made by civil servants on their own initiative.

[36] Poul Andersen, *Dansk forvaltningsret*, p. 167.
[37] Greve, Unmack Larsen and Lindegaard, *Straffeloven. Speciel del*, Copenhagen 1975, p. 92.
[38] Poul Andersen, *Om tjenestemænds ytringsfrihed*, p. 101.
[39] Cf. in relation to what follows Report no. 857 of 1978 on a revision of the Open Files Act, pp. 69–70 and 288 ff.

The Open Files Act refers to documents only. A civil servant, therefore, is not protected by the Act if he makes public "thoughts" and opinions which he may attach thereto.

The fact that public authorities may grant access to files beyond its statutory obligation does not vest a similar right in the individual civil servant. The problem of the freedom of speech of public employees becomes of practical importance precisely in situations where the public employee disagrees with the authority employing him.

In my opinion a public employee may on his own initiative publish documents which a third party could demand be made available to him under the Open Files Act. However, the borderline between documents which are and which are not accessible to the public is vaguely and flexibly drawn, particularly by sec. 2 of the Act. Even a party well familiar with the preparatory work and practice may in borderline cases find it difficult to decide whether a document falls within the scope of the Act. Consequently, if the civil servant in question does not happen to be the official who is competent to decide whether a document is encompassed by the Act, he must prior to publication either submit the question to the competent official or run the risk that his own non-authoritative interpretation of the Open Files Act subsequently is set aside during a court action, disciplinary hearing, or the like.

The relevance of the Open Files Act to the freedom of speech of civil servants is thus limited. It should be noted, however, that the philosophy behind the legislation on open files is of major significance as an element of the "other considerations" which are to be included in the assessment of the freedom of speech of civil servants.

3. *Obedience, Decorum, and Allegiance or Loyalty*

3.1. *Obedience*

A public employee who does not obey service instructions commits a service offence,[40]—at least if the instructions are lawful. Should the lawfulness of the instructions give rise to doubt, the most important question in practice concerns the prerogative of interpretation, i.e. the question of whether the employee may refuse to obey a service instruction which he considers unlawful, or whether he must comply until the matter has been settled. This problem is one of the classical issues in labour law in general as well as in public employment law. With regard to civil servants it is generally considered that a civil servant may refuse to obey an instruction that is unlawful in the sense that it is contrary to rules of law that protect the civil servant's very interests. In other

[40] Poul Andersen, *Dansk forvaltningsret*, p. 170, Ole Hasselbalch, *Ansættelsesret*, p. 144, H. G. Carlsen, *Dansk funktionærret*, p. 123.

situations he must obey unless the unlawfulness is obvious, or if implementation of the possibly unlawful instruction involves particularly grave consequences.

The main question connected with freedom of speech is whether a civil servant must obey instructions prohibiting him from making any statements. Such service instructions are not automatically unlawful because of their possible incompatibility with the interests of civil servants in participating in public debate. As indicated above, secrecy may be imposed through service instructions. This appears explicitly from sec. 10(2) of the Civil Servants Act and corresponding rules in the collective agreements. The question therefore is one of ascertaining the limits of the extent to which secrecy may be imposed upon civil servants through service instructions. It is obvious that limits must exist. It would not be acceptable if a particular public authority or superior were allowed to prevent employees from making public statements on "matters of which they acquired knowledge during their service" simply by imposing secrecy.[41] A public authority may not impose secrecy beyond the scope of the rules on secrecy or to the extent it would be in conflict with the rules outlined in this paper. However, service instructions may be relevant as a clarification of the position precisely in the situation at hand.

3.2. *Decorum*

Sec. 10(1) of the Civil Servants Act prescribes that civil servants "shall prove themselves worthy of such respect and confidence as their position may require, be it within or outside the service".[42] Other employees have a similar, although possibly somewhat more limited, obligation.[43] Although the obligation is not explicitly mentioned in the collective agreements, a similar principle undoubtedly applies to those employed under these agreements.

The demands of decorum are variable, not only according to the position, but also according to the environment of the service.

In exceptional situations the demands of decorum may acquire an independent relevance to the freedom of speech. The reaction of those around him to an employee's public statements may be such that intervention against this particular statement is justified, even if an identical statement made by another employee in the presence of a different group of people would not be contrary to the demands of decorum.[44]

[41] Cf. Poul Andersen, *Dansk forvaltningsret*, p. 168.
[42] *Ibid.*, p. 168.
[43] H. G. Carlsen, *op. cit.*, pp. 102, 129 and 226.
[44] Poul Andersen, *Om tjenestemænds ytringsfrihed*, pp. 100 and 106.

3.3. *Obligation of Allegiance and Loyalty*

The former Civil Servants Acts contained a provision that, upon his first employment, the civil servant should sign a declaration in which he promised solemnly and upon his honour to fulfil his service obligations meticulously and loyally.

This provision was regarded as a manifestation of an obligation of allegiance and loyalty. The precise substance of this obligation was, however, uncertain. In legal writing it was emphasized that the obligation did not include any obligation to subscribe to the policies of the government or to submit personally to superiors, and an attempt was made to define the obligation of allegiance as follows: The obligations of a civil servant go beyond those of an employee involved in private employment due to the fact that in establishing the precise obligations of civil servants it will frequently be relevant that the individual interests of the civil servant are at variance with public interests in carrying out governmental affairs.[45]

The provision under discussion was repealed by the 1969 Civil Servants Act because it was "hardly any longer of independent legal relevance". The substance of the matter was covered already by sec. 10(1)(1) of the Act under which a civil servant shall conscientiously abide by rules regulating his service.[46]

Even though the explicit rule of the Civil Servants Act on an obligation of allegiance has been repealed, a non-statutory obligation of loyalty may reasonably be maintained not only for civil servants but also for public employees in general.[47] However, so long as one deals with the freedom of speech of public employees such a non-statutory obligation of loyalty amounts to no more than a handy label covering the limitations of the freedom of speech which follow from those "other considerations" based on the nature of the case which are reviewed below.

B. CASE LAW AND LEGAL CUSTOMS. PRELIMINARY CONCLUSION

1. *Legal Customs*

One cannot point to any legal customs in the area under discussion. There is some disagreement on the frequency of critical statements made by public employees on matters relating to their service—at any rate, such statements

[45] Poul Andersen, *Dansk forvaltningsret*, p. 166.
[46] Report no. 483 of 1969 submitted by the 1965 Civil Servants Commission, p. 116.
[47] Hasselbalch, *op. cit.*, p. 192, and H. G. Carlsen, *op. cit.*, pp. 125 and 331.

are not particularly frequent—and there is no basis on which to decide whether this pattern stems from a feeling of obligation.

2. *Concrete Decisions*

The few concrete decisions taken by authorities touching upon the freedom of speech of public employees are not particularly informative.

The judgments and decisions mentioned in section A, on a freedom of speech guaranteed by the Constitution, at best illustrate the relevance of the Constitution to the problem. The judgments which deal explicitly with a delimitation of the freedom of speech of public employees are so old and influenced by attitudes which have subsequently been abandoned that they are irrelevant in relation to the law of today.

The public at large is aware of only a few decisions made by public authorities.

> In the middle of the 1970s, a disciplinary action was initiated against the Director of the Copenhagen Airport. The government claimed that he had committed a service offence by making statements to the press on an expansion of the airport at a time when the airport's future was about to be decided by Parliament. His statement was not considered a service offence, but no position was taken on the issue of whether it would have been lawful to dismiss the director with pension on account of his statement.

A few cases exist in which use has been made of the discretionary powers regarding promotion, dismissal or changes in the position in situations where the public employee has made critical statements regarding matters clearly falling within his service.

> A district dentist was dismissed as a result of critical statements he had made regarding a reform of the education of dentist assistants in Greenland. The ministry was of the opinion that the statements were incorrect, and the dentist had refused to correct them. He was dismissed because against this background the authorities could not have the necessary confidence that he was able and willing to cooperate loyally regarding the new educational policy and also because of some errors regarding appropriations and accounts.[48]

> A chief of section in the Department of Administration was transferred from an office in the Department dealing with electronic data communication to another office after he had published in the press criticism of the policy adopted regarding computer registration of data. The reasons for the transfer were partly the circumstances surrounding his public statements, partly other circumstances. In the ministry's opinion the articles published were based on incorrect facts and they were couched in terms which were open to criticism. As a result of the articles other authorities which had been criticized lost their confidence in the employee in

[48] *FT* 1978/79, pp. 7133–7 and 8024–7.

question. One of the additional circumstances referred to was the fact that the chief of section did not adjust written presentations which stemmed from working groups in accordance with the view of the groups—possibly due to his strong personal engagement.[49]

A chief of section employed by the Governor in the Faroe Islands under a collective agreement was charged by the governor, because he had written a fairly critical review of a report drafted by a committee of which the governor was a member, although the governor had warned him. The reason was that an article such as the one in question was in itself a violation of the service obligations of the chief of section in his capacity as an employee under the governor and as a representative of the Ministry of Education on the board of directors of various business schools. The case emphasized that the Faroe Islands constitute a small closed society with the governor having a very special position. The case was submitted to the Department of Salaries and Pensions, which refused to take a position on the issue of whether publication of the article was in itself a violation of the service obligations of a person employed under a collective agreement, but which expressed the opinion that, everything taken into consideration, the governor had not—in the eyes of the Department—acted contrary to the agreement.

3. *Preliminary Conclusion*

In the preceding sections I have attempted to give a detailed review of the most certain part of the basis for establishing the legal limits of the freedom of speech of public employees, namely explicit rules and case law.

In my opinion this material leads to the conclusion that an effective guideline exists on only one point: professional secrecy constitutes a limit to the freedom of speech.

Otherwise, very little guidance can be found.

Seen in the light of the previous practice referred to in section A, the relevance of the Constitution lies primarily in the fact that it gives solemn expression to the idea of public debate being of considerable value. A few more recent decisions may, however, manifest a trend towards the interpretation of other rules being influenced by sec. 77 of the Constitution.

The Open Files Act may give support to a rule that the individual public employee may publish documents on his own initiative if a third party could have demanded access to them. In a few exceptional situations the demand of decorum may limit the freedom of speech.

Nor does much guidance seem to be provided by case law. The most informative case—the one involving the chief of section employed by the Governor in the Faroe Islands—is influenced by the special character of this particular position. The other two cases regarding dismissal and transfer to

[49] *FT* 1978/79, pp. 12988, 2710.

other duties may be used to illustrate the consequences of the doctrine of abuse of discretionary power, but do not establish any borderline except in one respect: The information on which statements are based must be correct.

Consequently, the "other considerations" stemming from the nature of the case which were characterized in greater detail in section I.2 must play a major role.

C. OTHER CONSIDERATIONS

In my opinion three main considerations are relevant in this area of the law.[50] The first one favours public employees being allowed a considerable freedom of expression. The two other considerations favour limitations.

1. *The Consideration of Public Debate*

In a society such as the Danish one there is a continuous public debate taking place in the mass media, in books and journals, through posters and handbills, at meetings, in theatres, etc., the essence of which is the free exchange of information and opinions.

Our society accords a very high degree of priority to such extensive and free public debate. It is intimately connected with the core of Danish political life. Democracy in Denmark presupposes public debate. During the election campaign as well as during the period until the following election, the parties competing for votes must submit, maintain and adjust the basis on which the election took place.

Public debate constitutes an efficient control of those in power. The more light that is shed on their actions, the less the abuse of power.

Furthermore, an extensive public debate with a confrontation of points of view is necessary if one is to find the truth. Public debate is also necessary in order to achieve that minimum of consensus which is required if society is to function. Finally, progress in a dynamic society presupposes public debate.

The greater the value one attaches to public debate, the fewer should be the limitations to which it is subjected. Consequently, public employees should also be free to participate in the debate. Indeed, there are good reasons in favour of public employees participating in the debate with statements regarding their own field.

One reason is the mere growth of the public sector. One may perhaps accept

[50] The argument regarding these "other considerations" that follows is based upon some very scattered reading by a politically interested lawyer. I have not included references to the literature since such references would have been purely accidental and could not have justified the nuances in phraseology.

that a few per cent of the population may not participate in public debate regarding their own field. But today the employees of the public sector constitute approximately one third of the entire labour force.

There is, however, a more important reason. In the complex society of today public employees are in possession of knowledge and informed points of view which cannot—or at least cannot quite as easily—be found elsewhere. If public employees are denied participation in public debate, it will be deprived of valuable professional knowledge and attitudes based upon such knowledge. Particularly in a small country it may be that a certain expert knowledge is available only from public employees, employed for the very reason that they possess expert knowledge to be used in their work.

A third reason is interrelated with the point of view of control. Public administration and its activities have expanded tremendously and guiding it politically has become more complicated. The employees are those having the best knowledge of weaknesses in public administration and drawbacks of public activity. Without their statements public control of those in power would be curtailed.

2. *The Consideration of the Political Decision Process*

The most important of the "other considerations" which may argue in favour of limitations of the freedom of speech of public employees is the consideration to be given to the political decision process. In what follows I shall try to formulate these considerations in three different ways, which are, of course, not mutually exclusive.

One may take as a starting point *ministerial responsibility*. In the entire executive branch political responsibility is incumbent upon the ministers only. They are the only ones whom Parliament may dismiss. Furthermore, in relation to Parliament ministerial responsibility covers all actions of the executive branch. As a correlate the politically responsible minister must be able to demand obedience and loyalty from his employees, who are not politically responsible.

Here political theory tallies with constitutional law:

The government and each individual minister has to try to implement the policy in favour of which its supporters have cast their vote. The executive branch is one of the most important means in the implementation of policy, but the executive branch is a vast machine which is difficult to handle. The government must be able to depend on absolutely loyal advisors. If the ministers could not get assistance from the non-political, permanent civil servants, they would have to get the assistance elsewhere. That would mean

that each time there is a change of minister, he would have to be accompanied by "his own" loyal staff.

One may also take as a starting point the *political parties*. In a Parliament in which no single party has had a majority for generations, the nucleus of the political process consequently lies in the compromises between political parties which are necessary to procure the majority desired in each individual situation. It is obvious that the government's position would become precarious if civil servants who had advised the government were to publish opinions contrary to the policy submitted by the government, for instance, by publishing advice which the government had decided not to take.

The concept of the political process as *continuous negotiations* leading, it is hoped, to compromises, particularly on the basis of the submissions of the government, may be expanded to apply to areas other than the parties sitting in Parliament. In many other areas similar negotiations take place with organizations which fundamentally influence our society and during such negotiations the government's need of loyal civil servants is even more obvious. According to the rules of private employment it is lawful for an organization to dismiss employees whose public statements oppose the policy which the organization tries to have implemented. The government would be in an untenable and unequal position in negotiations if its servants were free to come out against the government.

Therefore, the government and the individual ministers need servants with knowledge of and experience in public administration who can gather information, submit alternatives to the decisions of the government, and assist in their implementation. It would amount to a change in the way in which the Danish political system has operated for generations if such assistants could also participate in public debate by expressing opinions at variance with those of the government and of each and every minister.[51]

3. *Consideration of the Decision Process of a Board or Institution*

The "other considerations" tentatively outlined in section 2 above refer to relations between the public employees and their political heads. The decision process which does not involve politicians, in other words the decision process of the board or institution, may also require limitations upon the freedom of speech.

There is no clear line of demarcation between the considerations reviewed in

[51] As for the relevance of the political decision process in a related area, namely the Open Files Act, see Report no. 857 of 1978 on a revision of the Public Files Act, chap. IX B, pp. 226 ff.

this section and those in the previous one. It is a characteristic feature of most public administration that problems which are normally discussed and decided exclusively at the administrative level *may* be included in the political decision process.

Consideration of the decision process of boards and institutions is more difficult to phrase in a way which is likely to be accepted as a basis for assessing valid law in concrete situations than was the case with regard to consideration of the political decision process. It would seem that the considerations under discussion here do not find the same measure of support in generally accepted fundamental political ideals.

Even so, the consideration may be phrased in three ways. The last one is the most tangible one.

The first way is based upon fundamental ideas similar to those used in section 2. At any given time, many boards or institutions may have a "policy". Once the policy has been established, it does not improve the efficiency, working climate, and external esteem of the board or the institution if it is publicly criticized by its employees, especially if the critics have participated in the decision process but have not been able to have their views accepted.

One may also phrase the consideration in conjunction with a fact frequently stressed by more recent political science. Identification takes place in all organizations—even in public ones. The employees identify themselves with the board or the institution or some section thereof. Such identification is seen as adding to the efficiency of the institution. Considerable efforts are often made to strengthen such identification by having as many as possible of the employees participate in the establishment of, or at least have an understanding of, the policy of the board or the institution.

The third and most tangible way of putting it refers to collegiate cooperation. In many boards and institutions a major part of work is carried out in meetings or other types of personal cooperation with colleagues or with third parties. Frequently, such cooperation can only become reasonably efficient if the cooperating parties adhere to certain norms. It is entirely possible that one such norm would be to the effect that any divergence of opinion is not published. It is also possible that the engagement which may follow from a keen participation in public debate makes any exchange of views arduous.[52]

4. *Turning from General Considerations to Concrete Points*

As already mentioned, one gets but limited guidance from explicit rules of law, concrete decisions, and legal customs when assessing the lawfulness of critical

[52] Consideration of the internal decision process of the authorities is likewise considered relevant in relation to open files, cf. Report no. 857 of 1978, pp. 178 ff.

statements made by public employees regarding their particular field. Consequently, "other considerations" based on the nature of the case, such as the ones which I have attempted to formulate in the previous sections, play a major role whenever a decision is to be taken on the legality of a particular statement.

Evidently, the considerations in question do not carry the same weight in all contexts.

In order to be able to apply the "other considerations" as a basis for an assessment, it therefore becomes necessary to point out at least some of the more obvious variables which may be relevant.

The enumeration of variables which follows is in no way exhaustive and it goes without saying that in a concrete situation the arguments in favour of the lawfulness of a particular statement must be balanced against arguments against it in the light of the particular situation.

IV. VARIABLES

A. THE SUBJECT OF THE STATEMENT

As mentioned in section I.1, this review has in mind statements which are undoubtedly connected with the work of the particular public employee and which express a position different from the one held by the employer, i.e. the politicians or higher officials.

I shall not attempt to give an exhaustive account of possible variables but will confine myself to certain types of subjects which seem to me significant. No importance is attached to defining borderlines between the various subjects.

1. *Issues of Major Political Significance*

The clearest illustration of the problems is to be found in central government.

Some of the proposals submitted by the government to Parliament and the public are evidently of particular political relevance in the sense that the political parties, as well as their associated organizations, consider them decisive for their present and future position. The more obvious ones are easily recognizable in practice, such as the economic compromises in the field of economic policy which frequently rank among the pivotal issues within the policy of the government or one of the parties in government, particularly in the parliamentary situation in present-day Denmark. Even matters which at first glance would appear as of minor political significance may, in a concrete situation, for one reason or another occupy a crucial political position and

presumably influence the government's chances of survival or the chances of the government or major opposition groups at the next election.

Matters of this nature may also occur at the municipal level. Some typical examples are the building of roads, building construction, closing of schools, and the like, which for one reason or another become decisive where political opinion is concerned.

Even though this group of politically relevant matters cannot be precisely defined, it is relevant to the freedom of speech of public employees. It is in this area that consideration for the political decision process carries particular weight.

2. *Additional Controversial Societal Problems*

At some stage, most fundamental societal problems become political matters of the type just referred to. It may, however, happen that even fundamental societal problems for some time are kept outside party politics, the reason being that, e.g., the parties, or at least some of them, are divided among themselves. The issue of nuclear power presents a current example in Denmark. Naturally, in such cases consideration for the political decision process plays only a limited role.

3. *Non-controversial Political Issues*

In Denmark as well as elsewhere it is quite common that Government Bills are carried by a large majority in Parliament. The reason may be that a broad consensus exists or that the Bills in question deal with a field which, for the time being, is not within the area of political strife. Frequently the matters dealt with will be but decisions which are obvious consequences of decisions already taken or decisions of a technical nature.

In such situations consideration for the political decision process carries but small weight. Nonetheless, since we are discussing decisions which will be taken by political bodies consideration for the administrative decision process may become considerably at variance with the consideration of control which also underlies public debate.

4. *The Allocation of Resources Within the Public Sector*

The extent as well as the distribution of public resources is a constant bone of contention.

In most cases, the dispute occurs between the spending authorities and those that coordinate public finances, but it is a characteristic feature that many

public authorities may belong to one category in one particular situation and to the other category in another situation. Spending authorities are often supported by organizations of clients or the sector organizations of public employees and the dispute may very well assume overtones of party politics.

The question regarding freedom of speech becomes an issue where management of an institution, or an organization or a subdivision thereof, has argued in favour of additional resources, but has not had its demands accepted, or where an employee at a lower level within the institution or organization finds that the demands of management are insufficient. Should the public employees whose demands have not been met in such situations be allowed to continue the fight for additional resources in the public debate?

It is tempting to argue that the considerations for the political and the administrative decision processes cannot carry great weight in this situation. Such a multitude of incompatible demands on resources already exists that a few more or less make no important difference, particularly where the stamp of a personal interest is obvious to anyone, even if this interest is far from always a personal financial one.

5. *"Affairs"*

One characteristic of our society is that for some reason or other certain events acquire political significance through being brought to light by the mass media, even though they would have had no special political or societal significance had they been seen in isolation. Some events acquire political significance because they involve politicians. Others, such as, for instance, matters regarding the removal of a child, the dismissal of an employee, the expulsion of a foreigner, etc., are but concrete cases which are brought into focus and which draw attention to statutory provisions or legal practice which are considered open to criticism.

I would imagine that these are the cases where politicians in particular feel a need for loyalty from employees in the administration who are familiar with such matters. On the other hand, there will frequently be situations where the knowledge and experience which public employees possess are especially needed in the public debate.

6. *Errors and Unlawful Actions*

When discussing the freedom of speech of public employees regarding errors and unlawful practices in public administration, the obviously unlawful actions are not the ones of special interest. Conceivably, one may demand from a public employee that he must attempt to have an obviously unlawful action

rectified prior to making a public statement. Special circumstances may naturally be relevant, but the main rule must be that such statements are within the freedom of speech.

In cases where the error or the unlawfulness of an action is questionable, however, some regard must in my opinion be given to the fact that the civil servant honestly believed that an error or an unlawful action had occurred. This is particularly important when it is a matter of imposing sanctions on him.

B. THE STATUS OF THE CIVIL SERVANT

In what follows three aspects will be discussed which seem to carry some weight. In effect, we are faced with three partly different approaches. In conclusion a brief review will be made of some more specific factors.

1. *Closeness to the Centre of Decision*

This point of view finds its most easy application in the departments of the executive branch.

The minister is the centre of decision. Consideration for the political decision process requires that narrow limits are set to the freedom of speech of the circle of persons normally advising the minister. It is hardly possible to define this circle in the abstract. It includes at least the undersecretary of state and, in major departments, the chiefs of divisions.

However, consideration for the political decision process may also involve other employees of the department, if they have participated in the preparation of a particular decision. As far as they are concerned, the limitations will, however, refer only to the particular area within which they have participated. In other words, extensive discretion is required of the permanent nucleus of advisers to the minister. Employees who participate only intermittently by giving occasional advice are influenced by considerations of discretion only within the particular field in which they have acted as advisers.

Consideration for the political decision process may be relevant also in boards and institutions not headed by a politician. That is the case when employees of such boards and institutions do in fact participate in advising ministers. In most cases, however, these employees participate merely in the internal decision-making process of the board or institution in question. Therefore, any limitation of their freedom of speech can be based only upon consideration for the administrative decision process—a consideration which

at this juncture carries smaller weight with the public at large than consideration for the political decision process.

2. *The Role of Expert*

Typically—but only typically—one may participate in a decision process in two different ways. One may be in a position to influence the entire basis for decision. Such is the case if one participates in oral negotiations, regardless of whether they are concluded by a vote or by one person taking the final decision, or if one submits a draft of the final decision, or the like. But one's advice may also be limited to a particular part of the basis for decision, e.g. because one or one's institution takes care of special interests or represents special professional knowledge. If so, one's role is, more ore less, that of the outside expert.

The closer the role of the employee comes to being that of the expert, the fewer the limitations upon his freedom of speech.

3. *Groups Enjoying Very Wide Freedom of Speech*

Certain groups of public employees enjoy very wide freedom of speech even when expressing themselves on subjects that are clearly within their area of service. Relevant examples are teaching personnel—above all university teachers—and the non-administrative personnel of museums, theatres, and the like.

The fact that limitations upon their freedom of speech are so few is probably linked with the fact that their area of work is rarely directly relevant to the political decision process, and that there is no special reason why the institutions in question should display to the world at large an appearance of conformity and unity.

A special problem may arise in relation to goal-orientated research institutions outside the universities, such as the Institute of Social Research or the State Building Research Institute. Where special rules have not been laid down for such institutions, one must probably assume that scholars in such institutes are in the same position as that of university teachers rather than that of civil servants in the executive branch.

4. *Politicians, Trade Union Representatives*

A public employee who is elected to Parliament or to a municipal board, or who is running for election, has more freedom of speech when speaking as a politician. On the other hand, if a person who thus engages in a double role is transferred to a position where possible conflicts between two roles are dimin-

ished, one cannot base an objection to this decision on the doctrine of abuse of discretionary power.

The issue of whether a public employee who is elected by his colleagues to some kind of representative post thereby has more freedom of speech, is of greater practical importance.

My knowledge of actual circumstances and of any possibly existing practice is not sufficient for me to form a general opinion. I shall limit myself to a few observations.

If it is assumed that there exist limitations upon the freedom of speech in relation to the allocation of resources—in spite of what was brought out under A.4 above—such limitations can at any rate not be fully maintained in relation to trade union representatives, particularly not those representing employees within that particular public sector.

One may ask whether very wide freedom of speech exists for representatives elected by employees in situations where there exists some co-determination arrangement which allows the trade union representative to participate in management. In my opinion, one cannot give a general answer. The question becomes an issue if one has an administrative staff organized in a hierarchical system and representatives of this staff sit on the boards of management as is, for example, the case in the universities. I am inclined to believe that any limitations upon the freedom of speech motivated by the decision process in the administration must also apply to the representatives of the administrative staff on the boards of management.

C. THE TIME OF THE STATEMENT

The time at which a public employee makes his statement in relation to the decision process is, undoubtedly, a relevant factor. The longer the time lapse between the statement and a policy being established—be it by Parliament, the minister, the municipal board or the institution itself—the wider the freedom of speech.

D. THE PLACE OF THE STATEMENT

Of relevance also is whether a statement by a public employee appears in the mass media or in a professional journal with a limited number of readers, and whether the statement is couched in generally understandable language or in terms understood only by other members of the profession.

On the other hand, the relevance of this variable should not be overrated. If, shortly before or right after a compromise on economic policy, the chief of an

economic affairs department vehemently criticizes this compromise in a professional journal and makes abundant use of mathematics, the freedom of speech will nonetheless have been violated. The mass media have their experts who are able to analyse, and who have the task of analysing and "translating" such articles.

V. THE MINIMUM REQUIRED OF A STATEMENT

Statements made by public employees relating to their service are of a special value to public debate, because the public employees possess knowledge and experience not available to others—at least not to the same extent or of the same quality. In other words, the public employee's special insight and experience are what makes his participation in the debate valuable.

Consequently, one requirement is that statements made by a public employee relating to this service are based upon correct information.[53]

It may be difficult to define precisely what this requirement of correctness amounts to but in general the requirement must be quite a strict one. For instance, the public employee must not rely on his memory, but is required to check the relevant data.

The question is whether one may require more than that, e.g. that a statement shall be balanced and objective rather than polemic and one-sided, or that it shall be decent and professional.[54] This is a doubtful point. One would prefer public debate in general to be decent and professional, but such is not always the case. If one wishes to promote the participation of public employees in public debate, one must also accept that such participation takes place on the prevailing conditions of the debate.

Yet another, and different factor is that the more balanced and professional a statement, the smaller the risk of side-effects which endanger cooperation and therefore justify resorting to discretionary powers such as dismissal and transfers to other duties.

VI. CONCLUSION

It is obvious that a precise, generally applicable, and easily recognizable delimitation of the freedom of speech of public employees cannot be made if one, in all essentials and without going into details, accepts the basis for

[53] Cf. Poul Andersen, *Om tjenestemænds ytringsfrihed,* p. 112, Torstein Eckhoff in *Lov og Rett* 1975, pp. 108 and 110, as well as the decisions mentioned above under III B.

[54] See *FT* 1978/79, p. 5918.

assessment described in the foregoing. In each particular case the decision will depend upon a knitting together of a series of elements the weight of which may vary considerably according to the specific situation.

This state of the law will be found also in other areas, and it appears unavoidable in the area under discussion. Consequently, the following two points deserve emphasis:

First, the state of the law—vague and variable as it is—often results in the freedom of speech being subject to no other limitations than professional secrecy.

Secondly, in this as in other comparable areas the state of the law may be further clarified by doubtful cases being settled explicitly as they arise.

In this paper I have tried to trace the fundamental aspects of the law concerning freedom of speech for civil servants in Denmark. It seems that the state of the law is characterized by a lack of statutory rules as well as by a lack of constitutional provisions regulating this matter. In particular the impact of the constitutional rules is very limited. Of the ordinary statutory rules only those dealing with secrecy seem to have a substantial import. Therefore, for most practical purposes, the core of the regulations is found in the rules governing the decisions taken by the employer within the employment relationship. These decisions may either be decisions on disciplinary action in regard to the civil servant or other decisions with negative consequences for the civil servant, such as discretionary dismissal, a transfer or other change in employment. In the case of disciplinary action the point of law in relation to purportedly unlawful statements by a civil servant is concerned with the question of whether the statements are unlawful or not in the sense that they may warrant disciplinary actions. In the case of other decisions the point of law concerns the limits of discretionary decision-making. The crux of the matter is whether the employer may lawfully base his decision on the statements of the civil servant. In essence it is a matter of applying the doctrine of abuse of discretionary power. A lawful statement by the civil servant is consequently one which the employer must disregard.

Apart from the cases where guidance may be found in statutory rules, as mentioned above, in both situations the lawfulness of statements by public employees must be ascertained in relation to "other considerations", i.e. considerations based on fundamental principles of Danish democracy and the interests of efficient government. In the concluding sections of this paper I have tried to outline some of the basic traits of these principles and interests. As I see it, this review shows that the freedom of speech for civil servants in Denmark may only be curtailed when the interests of government and the political process present compelling reasons. To what extent this conclusion will have an impact on discretionary decision-making remains to be seen.