FREEDOM OF SPEECH CONCERNING DEFENCE MATTERS: ILLUSION OR REALITY

BY

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I

The political and military developments that have taken place in international relations since the end of the Second World War have been such that the strategic significance of Norway has been constantly increasing for the two power blocs, NATO and the Warsaw pact, and especially for the two countries that dominate these two defensive alliances, the USA and the Soviet Union. The development of new weapon and defence systems, including those based on advanced electronics, has, in conjunction with the vast rearmament that has taken place on both sides, led to Norway being placed in a very prominent and therefore a very exposed position. The potential danger that in a critical international situation Norway may be drawn into an open conflict is very considerable—and the consequences such a conflict may have will be far-reaching, if not catastrophic. Hardly any of the inhabitants of Norway will be able to avoid being severely affected by such a conflict.

How the Government of Norway should conduct itself in the current international situation must under these circumstances necessarily be a question of vital importance. In a living democracy such as Norway is today, it must be a matter of course that Norwegian defence policy is subjected to continuing discussion, and it is only natural that the societal debate concerning these questions will become more intense when the international situation becomes more acute, than would be the case under more relaxed conditions. Anything else would be a sign that something was seriously wrong with the democratic system.

The public debate on defence policy serves several purposes. The defence authorities will be aware that their dispositions may be the subject of public discussion. This circumstance in itself is at once an important guarantee that the dispositions to be made will be kept within the limits authorized—e.g. by the Norwegian Parliament—and that the defence authorities will make every effort to ensure that they are the most appropriate in the prevailing situation.

Furthermore, if the defence policy debate is realistic, it will possible to point out weaknesses in the dispositions that have been or will be made. Criticism may demand or bring about improvements. Such criticism will be of direct

* A Norwegian version of this paper was originally published in the Norwegian law journal *Kritisk Juss* nos. 4–5/1985. The present paper is based on the Norwegian version, but abbreviated to some extent, and also brought up to date by a few additions.

value to the defence. Through such public debate it may, however, also come to light that a defence policy disposition will entail different and perhaps more far-reaching consequences than those foreseen by the defence authorities. It may also be conceivable that such further consequences have not been pointed out clearly enough to the responsible political authority; in this case the public debate may cause the disposition to be made on a sounder basis and with greater perception, which will also be of no small importance for the defence system. But it may also be the case that analyses of consequences will lead to previously made dispositions appearing inappropriate or perhaps even unfortunate, so that they may be reversed or altered.

In a public debate the probable consequences for other parts of Norwegian societal life than the defence system may also come to light. As the defence authorities are bound to promote defence interests, it is obvious that defence matters will weigh very heavily in the scale against other societal interests—there is thus an ever-present danger of sector-oriented decisions being made. Public debate on these issues will be a useful or even a necessary counterbalance to tendencies towards sector-oriented thinking. If the decisions are entrusted to a broadly composed political body—e.g. the Storting (the Norwegian Parliament)—such a body will also be able to counteract sector-oriented decisions, but for the politicians to be fully aware of the circumstances, it is essential that potentially negative effects on other societal interests should be brought out in the public debate.

Nevertheless the most important factor is perhaps the degree of confidence and credibility that the defence system inspires in the people. It is of the utmost importance that the people should be confident that what happens in the defence sphere is done in accordance with lawfully made decisions; on the basis of a proper appraisal of what serves the country's interests best and —when it is a question of defence systems that integrate the forces of several countries—that the defence authorities really have the necessary ability to act independently as far as Norway itself is concerned. It is not just the actual occurrence of any shortcoming in the areas here mentioned that is a serious matter; even the suspicion of any such shortcoming is likely to undermine the credibility of the defence authorities—and that would not be in the best interests of national defence.

> "Not to be hated by the people is therefore the best fortress there is; for no matter what fortresses you have, they will not save you if the people hate you; and once the people have taken up arms, there will never be any shortage of foreigners to help them." These words of Niccolo Machiavelli dating back more than 450 years are just as valid today as ever.

Public debate on questions of defence policy can, however, be silenced not only under dictatorial conditions or wherever an apathetic attitude to these ques-

tions prevails among the people. Debate can also be wanting if the people do not get adequate information about what is the real position with regard to the country's defence in relation to the international situation as it develops from time to time. If the majority of the Norwegians get the impression that all is reasonably well with their country's defensive arrangements though this does not accord with the actual facts, the defence authorities will not only have cut themselves off from the important corrective inherent in the conducting of a public debate on these questions, but a disservice will also have been done to both the defence system and the democratic system. In such a case it would not be putting it too strongly to say that the defence authorities would have failed in their duties on one of the most essential points. There is a close connection between freedom of speech, access to information, and the information that the defence authorities provide of their own accord. This connection must not be lost sight of. Distorted or defective information may be directly misleading, and can divert or prevent a real public debate on defence questions. It is therefore of essential importance for the proper functioning of democracy in this important societal sphere that information about defence matters shall not be kept back from the people through unnecessary secretiveness.

> In principle, issues related to national defence are not too lofty for public debate, and it must also be permissible to discuss new aspects of our defence arrangements when the situation calls for new inquiries. It seems therefore to be a doubtful start when one finds the Supreme Court declaring in 1982 NRt 436, *inter alia*, "that the convicted persons have been aware that they were collecting material concerning installations about which according to general opinion information should not be published" (p. 444). Apart from the fact that it can be difficult to clarify what groups of persons or authorities shall determine what constitutes "general opinion", the consequence of such a starting point is that general opinion shall constitute a check on what defence questions may be the subject of debate from time to time. Such a starting point is therefore in poor harmony with the general principle of freedom of speech in art. 100 of the Constitution.
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> It is also in poor harmony with a democratic system when the City Court in the same case declares, *inter alia* (p. 461): "The local population generally has ... knowledge of the fact that military installations are situated in the neighbourhood and they have no need to know anything more." The need for secrecy in certain defence matters cannot be so easily justified.

II

In the introduction a comparatively broad account has been given of the considerations underlying freedom of speech in the defence sphere. This has been done in order to make the point that it is not only a question of the right of the individual member of society to express his or her views on one defence

question or another; there are also other broad societal interests that strongly support freedom of speech for individual persons in this field. These interests must especially be taken into consideration when the question is raised whether there are any limits to freedom of speech in this area, and if so where these limits must be drawn.

The last sentence of art. 100 of the Norwegian Constitution may be taken as the starting point: "Everyone shall be free to speak his mind frankly on the administration of the State and on any other subject whatsoever." This provision has been formulated in general terms; no exemption for defence matters has been made, but art. 100 authorizes the making of laws under which any person who has "shown ... disobedience to the laws" shall be liable to a penalty.

It can scarcely be assumed that legislation can impose any limitations whatsoever on freedom of speech—otherwise it would mean that freedom of speech would really lose its constitutionally entrenched position.

It must, however, be possible to summarize the limitations that follow from the second sentence of art. 100 of the Constitution—at any rate in the present context—in a general notion of what is not permissible. This notion seems to entail, and may be so formulated, that it is such reckless use of freedom of speech as may put the country's security at risk that does not deserve protection. In this regard the country's interests must weigh heavily.[1]

In specifying limits as to how far legislation can go towards restricting freedom of speech, the purpose of the statutory provision in question, and the purpose of the utterances that are prohibited must be taken into consideration and balanced against each other. More severe limitations must be acceptable in relation to utterances made with malicious intent than in relation to utterances intended to promote a worthy purpose. But other factors must also be taken into consideration; it cannot be taken for granted that the limits imposed on freedom of speech shall be drawn up in the same way in every relationship. It can for that matter be said that freedom of speech is in some degree relative. A massive verbal attack on a political party, which, for example, characterizes the party's political programme as idiotic, will normally be protected by the constitutional right to freedom of speech, and legislation must respect this right. It is quite another matter if it is the leader of the political party who is personally characterized in this fashion. The limits for freedom of speech must no doubt also be stretched quite a long way where personal characterizations of politicians are concerned—but the constitutional right to freedom of speech hardly debars legislation that affords politicians as

[1] Cf. the parallel questions that arise as regards freedom of speech and racial discrimination, in H. Jakhelln, "Freedom of Speech and the Prohibition of Racial Discrimination", 26 *Sc.St.L.*, pp. 97 ff. (1982), especially pp. 102 ff., with further references.

individuals protection against gross personal attack—as is the case with secs. 246 and 247 of the Penal Code and other provisions.[2]

The limits as to how far legislation can go towards restricting freedom of speech will also depend on the particular situation the statutory provisions in question are designed for. It can again be said that freedom of speech is in that respect somewhat relative. When faced with serious crises the legislature will therefore be able to go somewhat farther than when it is a question of dealing with peaceful social conditions. But even in the most serious crises freedom of speech cannot be too greatly impinged upon. Freedom of speech is the constitutionally entrenched basic principle—a cornerstone of the democratic system—and it is the restrictions on freedom of speech that must be justified and specially considered.

> In the light of this the considerations underlying the provision in sec. 86, item 4, of the Penal Code must be right in principle. This provision authorizes the punishment of any person who in wartime or with a view to wartime "incites or induces to treachery, carries out propaganda work for the enemy or spreads false or misleading information that is likely to weaken people's will to resistance". The provision was given its present form by a legislative amendment of 15 December 1950 No. 6, at the same time as the preparedness legislation was also revised. In the recommendation concerning a revision of the treason legislation etc. made on 26 July 1948 (reproduced in full in *Ot.prp.* 79/1950, pp. 4 ff.) the following statement, among others, is made in this connection (p. 11): "*Even in wartime it cannot be*

[2] Cf. A. Bratholm, *Spesiell strafferett* (Special Criminal Law), Oslo 1983, pp. 168–70. As regards statutory provisions intended to protect weak and vulnerable groups in society, there may be good reason to go somewhat further in the direction of restricting freedom of speech than when it is a question of utterances directed against well-established societies or social institutions with a solid position in society, as the weaker groups have a greater need for protection on the part of the legislature in this respect. Court practice does, however, only to a certain degree reflect this general view.

If it is a question of *defamation*, the Supreme Court has acted comparatively freely in relation to the actual wording of art. 100 of the Constitution, and it has, *inter alia*, been assumed that a defamatory statement can be punished, even though it may not contain any accusation. Some *weak groups in society* have been given special protection in the legislation, cf. sec. 135 a of the Penal Code, which prohibits specified statements that threaten, deride or expose to hatred, persecution, or contempt any person or group of persons because of their creed, race, colour of their skin, or national or ethnic origin. The same applies in relation to persons in respect of their homosexual bent, form of life, or orientation. In these cases the Supreme Court has attached considerable importance to the constitutional principle of freedom of speech and has interpreted the penal provision restrictively—a view that is fully supported by the present author—even though legal practice cannot be said to have been quite consistent, cf. 1977 NRt 114, 1978 NRt 1072, 1981 NRt 1305 and 1984 NRt 1359. As regards *utterances about the defence system and especially military service*, however, the Supreme Court has been especially disinclined to interpret the penal provisions restrictively on the basis of the principle of freedom of speech. This is not in the least the case as regards court practice regarding sec. 134, para. 3, of the Penal Code, which imposes a prohibition against any person publicly seeking to incite anyone belonging to the armed forces to aversion towards military service etc., cf. 1913 NRt 722, 1950 NRt 1043 and 1986 NRt 267. There is little consistency with this court practice and the decisions concerning racial discrimination and homosexual relations, although the Norwegian defence system is solidly rooted in Norwegian society. Such utterances regarding the military service etc. are, however, not dealt with any further in this paper.

> *forbidden ... to criticize the government or to express hopes for peace or a pacifist attitude.* But criticism that systematically aims at undermining confidence in the government's capacity and the country's ability to defend itself can undoubtedly assume such forms that it must be characterized as unlawful aid to the enemy or a weakening of Norway's power of resistance. To draw the line in this respect must ... be left to the courts of law, having regard to the prevailing situation. This assessment cannot be done without taking into consideration what forms the war takes, how total the war effort is, and what the consequences of a capitulation must be assumed to be. It is also clear that the yardstick must be more strictly applied in an occupied area, where the country's lawful authorities are prevented from having any say, than in an unoccupied area, where *even in wartime one must try to maintain as high a degree of freedom of speech as is compatible with the exigencies of war.*" (Italics added.)

Of interest in this connection are also the *travaux préparatoires* to Act No. 7 of 15 December 1950 relating to special measures during wartime, threat of war, and similar situations. This preparatory legislative work illustrates the relative nature of freedom of speech in so far as this freedom may be more restricted in critical situations than under peaceful conditions. But the *travaux préparatoires* also show that regard for freedom of speech must be accorded very considerable weight. Moreover this preparatory legislative work illustrates the fact that prohibitions against commenting on certain factual matters may act as restrictions on freedom of speech.[3]

> Sec. 3 of the Act empowers the King, when the realm "is at war or threatened by war or the independence or security of the realm is in danger", to make "provisions of a legislative nature", if by reason of the circumstances mentioned there "is danger in delay". Such provisions may be made "to ensure the security of the realm, public order ... in order to promote and secure military measures and measures for the protection of the civil population and property ..." among other purposes.
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> The Ministry had proposed rather extensive rules for the control of printed writings etc., which would have, *inter alia*, empowered the King to lay down "a prohibition against the publication of information or reports of a particular nature and discussion of specified subjects" (sec. 33, item 1, of the draft, cf. *Ot.prp.* 78/1950, p. 13). At the same time the Ministry stated "that provisions of this nature must be enforced with the greatest caution" (*op.cit.*, p. 7).

During the discussion of these issues in the *Judicial Committee* of the Norwegian Parliament, the Committee chose to subject the whole question to "a new

[3] In this connection it can be noted that the Ministry also put forward proposals concerning amendments to sec. 130 of the Penal Code, which would entail that this provision—quite generally—would apply to unlawful publication of, *inter alia*, "any document or information" that any State authority decided should be kept secret, cf. *Ot.prp.* 79/1950, p. 50 and p. 49 with reference to pp. 35–41. The proposal was withdrawn, however, cf. Recommendation to the Odelsting XVI/1950, p. 5. A previous proposal to the same effect, *Ot.prp.* 37/1938, pp. 18–22, suffered the same fate in its day, cf. Recommendation to the Odelsting 111/1939, pp. 31–37, and Proceedings of the Odelsting 1939, pp. 244–48.

critical examination from top to bottom", without feeling in any way bound by the bill—which could in itself be described as quite remarkable.[4] The Judicial Committee arrived at a compromise that could command broad political support,[5] and that entailed, *inter alia*, that the proposed rules for the control of printed writings should be omitted from the bill.

> The Committee submitted, inter alia, that "the fact that statutory provisions relating to ... censorship of the press as a permanent feature of our legislation are enacted could have an unfortunate effect purely psychologically, because such encroachments would thereby lose some of their quite extraordinary character in the general consciousness. Once written statutory provisions to this effect have been passed, the reluctance to use encroachments of this nature may be weakened, and misuse will more easily become conceivable". At the same time, however, the Committee emphasized that it did not oppose such measures being brought into effect "when the situation makes it absolutely necessary. On the contrary ... But the Storting or the government that brings such measures into operation must itself consider whether, in the light of the prevailing situation, it is constitutionally permissible to do so" (Recommendation 0.XV/1950, p. 60).

The Act was passed after a debate, in which principles were much discussed, about how far the legislation could go without transgressing the provisions of the Constitution—including art. 100—and several speakers in the Odelsting and the Lagting pointed out the danger of persecution of opinion.[6]

III

When statements are made—arguing or agitating for or against specific opinions—such statements will normally be based on certain assumptions. These assumptions may be implicitly expressed in the statement or they may be more or less clearly specified, and they may be based on hypothetical suppositions or on more or less definite and pertinent factual conditions. Anyone who wishes to be taken seriously as a debater will normally seek to substantiate his assumptions and conclusions as forcibly as possible with factual information; otherwise he risks being met with the objection that he has only put forward a completely loose assertion. In a topical debate the discussion may be chiefly concerned with the factual conditions—whether they do or do not exist. The

[4] Recommendation to the Odelsting XV/1950, p. 16.

[5] See also the account that the chairman of the committee (Hønsvald) gave in the Odelsting (Proceedings of the Odelsting 1950, pp. 510 ff., especially p. 512) and the statements made by Lyng (*op.cit.*, pp. 525 ff., especially p. 527).

[6] Here mention will only be made of Strand (Proceedings of the Lagting 1950, pp. 156 f.), who quoted, *inter alia*, the Swedish newspaper *Göteborgs Handels- och Sjöfartstidning*: "The point of the matter is that if one prosecutes *the deviant opinion* and not the criminal act, harm will be done not to communism but to democracy".

party who can show or make it appear likely that the other party is wrong in his description of the factual conditions will often succeed in demolishing his opponent's assertions, or at any rate in stamping them as irrelevant or purely hypothetical speculations which it is pointless to go into in greater detail.

In our technologically/economically oriented part of the world many societal issues will depend partly on what technological and economic assumptions apply, and partly on the consequences that will arise if these assumptions are altered to a greater or lesser degree. The discussion will therefore often have to be on two levels (in practice the discussion about the two levels will often be intermixed), but technological and economic matters can be so complicated that in practice it is almost inevitable that the discussion will be largely concentrated on such matters. In public debate, however, the danger of sector-oriented thinking is primarily the technocrat's problem. If the public is clearly aware of what the issue at stake really is, they will themselves be able to make the necessary assessment between the technological/economic factors and the wider societal needs.

But technocratic knowledge is often specialist knowledge confined to the very few, and such knowledge is costly. Well-established groups will in practice have the financial/administrative ability to obtain and exploit such knowledge, whereas such facilities will be far less available to weaker groups. If the weaker groups also succeed in acquiring the necessary technocratic knowledge, not only may disagreement arise between the technocrats, or considerations of prestige enter into the disagreement, but also the balance of power between the groups may be disturbed, perhaps even considerably. The possibility of an actual monopoly of opinion is correspondingly reduced—and it is also possible that confidence in the previously dominant group will be severely shaken if the public gets the impression that previous information has not been reasonably well balanced.

The sphere of defence constitutes no exception to the conditions here described.[7] Here, however, one is faced with the dilemma that the information, assumptions, and calculations are not simply of importance for the purpose of informing the Norwegian people—there is also a possibility that such items may be of use to other States as well. The usefulness to another State may lie in its obtaining information etc., that it has not previously possessed, but it can also be useful to receive confirmation of information previously acquired in some other way, but which has not perhaps been regarded as certain.

The first question will therefore be whether it must be assumed that it is a

[7] This applies also to other spheres in the Norwegian society. As an example can be mentioned the situation as regards the position of natural resources in the Norwegian administration, cf., *inter alia*, H. Jakhelln in *Nordisk Administrativt Tidsskrift* (Nordic Administrative Journal) 1971, pp. 27 ff., especially pp. 30 ff.

question of limitation of freedom of speech because the information contained in public statements can be of some use to another State. The next question will be how the limits for freedom of speech are to be determined in this case; in this regard it will be essential to arrive at a proper appreciation of the problem.

IV

The problem concerning information that has been collected, processed on the basis of insight into current defence issues, and thereafter published, has recently been dealt with by the Supreme Court in three decisions, 1979 NRt 1492 ("the list case"), 1982 NRt 436 ("the Gleditsch case") and 1986 NRt 536 ("the *Ikkevold* case"). It may be of interest first to give an account of the facts of the cases that have occurred so far.

In 1982 NRt 436 ("the Gleditsch case") two researchers had carried out a thorough and comprehensive research work in order to illustrate the relationship between Norwegian bases policy and Norwegian military integration in NATO etc. It seems that the purpose of this research work could be stated as follows (cf. the description in the report, pp. 442 f.): (1) It was thought desirable to throw open to debate vital questions concerning defence and security under the threat of nuclear warfare. The work was intended to illustrate Norway's position under the threat of total annihilation amid the horrors of nuclear warfare. (2) The work was further intended to illustrate our country's position in the power game between the superpowers. (3) The work was meant to illustrate whether the decision-making process in these fateful questions was operating in a lawful manner; *inter alia*, whether the Storting's consent to agreements or arrangements entered into with the USA concerning defence installations was obtained in accordance with arts. 25 and 26 of the Constitution. (4) The research was also intended to reveal whether the activity was carried on in a lawful manner; e.g. whether monitoring of communications between foreign embassies and their home countries was being carried on in accordance with international law.

With these purposes in view the two researchers began a systematic charting and detailed description of Norwegian electronic intelligence installations. The research work was done in conjunction with the Institute for Peace Research (PRIO), and the work was subsidized by the Norwegian Research Council for Science and the Humanities, among others.

In order to arrive at the exact location of these installations information from a number of different official publications was collected and collated: namely, information from *telephone catalogues*, from the survey of State property in *reports to the Storting*, from *Norsk Tjenestemannsblad* (The Norwegian Civil Servants Journal), from *real property registers*, and from *documents belonging to municipal technical services*.

After the installations in question had been located, they were (with one exception) subjected to reconnaissance on the part of the researchers. *From generally available sources* detailed observations were made of the installations with buildings,

especially of the form, extent, and orientation of the aerials. *Photographs* were taken or *sketches drawn*. To some extent, *acoustic observations* were made. *People in the locality were asked about the installations.*

The work of collecting this material took about a year. After that the material was *assessed and systematized on the basis of available technical military publications.*

The result of this work was published in a research report, issued for sale to the public, first in English with the title "Technical intelligence installations in Norway: Their number, locations, functions and legality", PRIO publication S4/79. Linguistically processed but otherwise essentially unaltered, the report was later published in Norwegian, as chapter 1 of the book *Onkel Sams Kaniner* (Uncle Sam's Rabbits) by Wilkes and Gleditsch, Pax Publishing House 1981.

1979 NRt 1492 ("*the list case*"). An office manager in a publishing house was of the opinion that the surveillance service was carrying on unlawful surveillance of lawful political activity in Norway. He was also of the opinion that some persons were being kept under surveillance because they were opponents of NATO, conscientious objectors, or members of the Norwegian Communist Party. It was also his opinion that the intelligence service was cooperating with the USA in a manner that did not always serve Norway's interests, but could serve the USA's interests to the detriment of Norway's. These unlawful activities on the part of the surveillance and intelligence services could involve a danger of these services becoming a State within the State and a danger to the legal rights of individual citizens. He therefore collected material relating to the secret services. This was to form the background for a book he intended to write, in which he wished to expose the unlawful aspects of the activities of the secret services.[8]

The collection of this material was partly done by means of *Norges Statskalender* (Who is Who in Norwegian Public Service), *telephone catalogues, Politibladet* (The Police Journal), *Politiembetsmennenes blad* (Senior Police Officers Journal), *OP-Nytt, Adressebok for Oslo, Kunngjøringer til Forsvaret* (Announcements to the Defence Forces), *Tjenestemannsbladet* (The Civil Servants Journal), etc. Military telephone lists (stamped "For Defence Use Only") were also used, as well as military calendars for the Norwegian Army (stamped "For Service Use in the Defence Forces Only") and the address catalogue for the defence forces (classified as "Restricted"). On *application to the Ministry of Justice* he was allowed to go through the annual reports from the individual police stations in the country, and from these it appeared, *inter alia*, how many persons were working in the surveillance service at the police stations. The names of the higher ranks in the surveillance service, the intelligence service, and the security service, down to heads of departments, were obtained by means of open sources (see the judgment of the City Court, pp. 7 f.).

Through telephone calls he managed to get hold of the names of the subordinate staff (below the rank of heads of departments) in the surveillance service. After having discovered where the intelligence service had its offices and by noting car registration numbers, he found out who were the owners of the cars through the

[8] This is based on the City Court's account of the case, in the judgment of the City Court, p. 14. It is less than satisfactory that in the law reports no more of the City Court's judgment than the personal details of the accused and the indictment are referred to. The City Court moreover found it proved (p. 7) that the collected material constituted "a fairly accurate picture of the organization and manning of these services".

motor vehicle register and thereby the names of the personnel. By means of "open sources" he also found out where the intelligence services' different radio stations (listening in and tracking stations) were situated throughout the country, and while travelling on holiday he observed them from the outside (see the judgment of the City Court, p. 9).

The City Court found it not proved that he had collected this material with the intention of publishing it or in any other way making it known. But when the daily press subsequently commented on the activity of the surveillance service, he got the idea of contacting a newspaper—*Ny Tid*—in order to ask whether it would consider making use of his material in some form or other. He had a meeting with the editor of the newspaper and one of the journalists and entered into collaboration with them. An article was printed about "the Finland case",[9] and notes were delivered to the journalists about (1) the intelligence service's radio stations with the names of the staff, (2) a list of persons employed full time in the surveillance departments of the police stations (which formed the basis for a newspaper article published on 11 August 1977), and (3) a list of names of personnel at the surveillance centre and at the surveillance department of Oslo Police Station, and also a list of names of a number of personnel employed at the surveillance departments of other police stations. The City Court, however, found that the journalist and the office manager had come to the conclusion that these lists should not be published (p. 18).

1986 NRt 536 ("the *Ikkevold case*") was decided by Oslo City Court on 29 May 1935. However, because the grounds for judgment were inadequate, the judgment was set aside by the Supreme Court. The accused were all members of the organization "Folkereisning Mot Krig" (FMK, the Norwegian branch of War Resisters' International), which publishes the paper *Ikkevold* (Non-violence). All the accused except one were members of the editorial staff of *Ikkevold*. The objective of the organization is to solve all conflicts without recourse to war, and the organization is involved in the Norwegian peace debate.

During discussions in 1982 within FMK the question was raised whether installations for nuclear missiles could be found in Norway. A working committee was set up to try to obtain information about background material to be used for information and debate about Norwegian military strategy under the nuclear threat and about bomb targets, as well as about the implications of Norway's being part of the USA's nuclear strategy. It was also an obvious idea that on the island of Andøya they could find out whether a land-based installation for an underwater listening system named SOSUS (Sound Surveillance System) was situated there (judgment of the City Court, p.4).

[9] It does not appear that any charge was brought against the office manager, the editor or journalist for discussing this case. On the other hand, a charge was brought against the former officer who had provided the information in "the Finland case", cf. 1979 NRt 101. To show the connection the facts of the case are reproduced as given in the report (p. 106): A Norwegian officer who worked in the intelligence service and gave special instruction in sabotage was in the spring of 1953 asked whether he was willing to carry out an assignment in Finland. He would be required to act as an instructor. He took on the assignment and went to Helsinki. There he was contacted by an attaché at the Norwegian embassy, who informed him about the assignment. He was to instruct Finns in sabotage, the use of weapons and intelligence work. These Finns were later to carry on intelligence work in the Soviet Union. The duration of his stay was about one month; a subsequent assignment in the same year lasted for about 14 days.

The judgment of the City Court does not go into great detail with regard to how the accused obtained information about the SOSUS installation—in contrast in that respect to the City Court in "the list case". All that appears from the judgment of the City Court is that the accused were on Andøya for a couple of days, drove around in a car, took some pictures of aerials and buildings, which, however, "were of no importance to the question of the SOSUS installation", had a discussion about one thing and another with the editor of the local newspaper *Andøyposten* and announced a public meeting which nobody attended. "After that B went to what is called 'the NATO wharf'. While he was there, he saw a building inside the military area that it suddenly struck him could be a SOSUS installation", and some sketches were made of it. After their return to Oslo new information was collected "through telephone calls, by means of public documents, and other open sources" (the judgment of the City Court, pp. 5 f.). The editorial staff of *Ikkevold* also addressed the Ministry of Defence and in a letter dated 12 August 1983 asked for answers to a number of general and some special questions concerning SOSUS installations in Norway. The Ministry of Defence answered the letter on 24 August, stating that no affirmative or negative answer would be given to any of the questions asked (the judgment of the City Court, pp. 8 f.). In September 1983 a lengthy article in *Ikkevold* gave information about where the SOSUS installation was located "in a new building just by the new hangar ... the building is situated down by Andsfjord". Information was given about the installation's organizational attachment, what departments it has, and about how data received were processed in the departments. *Inter alia*, it was stated that "Data from the SOSUS installations are analysed in the naval department before they are sent on to the American intelligence organization, the National Security Agency. (The article is referred to in the judgment of the City Court, pp. 6 f.)

In the opinion of the accused it was "necessary to disseminate certain facts in order to bring about a proper debate concerning the risk factors that were and are connected with this activity ... The possibility of an American 'first strike capability' is strengthened by the fact that the installation can reveal Soviet submarine activity in the Northern area" (judgment of the City Court, p. 8).

V

Before proceeding to any further discussion there is good reason to stress the difference between freedom of speech and intelligence work on behalf of another State (espionage). Freedom of speech relates to the right every person and organization has to take up different kinds of questions for public debate, and the right to substantiate one's statements, unless special considerations apply. The statements are intended to become generally known; it is a question of statements that are made openly—normally to as large a public as possible—and other people have every right both to take an interest in these statements and to take part in the debate, if possible. Statements concerning defence matters will normally come to the knowledge of our defence authorities, and there is nothing underhand about this.

It is quite a different matter when it is a question of intelligence work on behalf of another State. The purpose of such activity is by no means to bring

about any public discussion, or to point out weaknesses in our defence and our defence system, or any unfortunate consequences of such weaknesses, etc. On the contrary, publicity is a considerable or even a conclusive obstacle to such activity. The purpose is rather to give another State information about our defences without our own defence authorities ever getting to know that such information has been given. If anyone in a public debate happens to give information that in the opinion of the defence authorities impairs the security of the realm, they will be able to take counter-measures. Information to the effect that a warning installation is particularly weak can, for example, lead to the said installation being reinforced with better equipment. If the information is given to a foreign State, the opportunity to improve the defence installation will not occur. There is also the obvious point that whereas freedom of speech is a constitutional right, that is certainly not the case with the intelligence work on behalf of a foreign State!

As the purpose and nature of the two types of activity are so different, conclusions cannot without more ado be drawn from the one kind of activity to the other. The right to make statements does not mean that the same matters can lawfully be reported to another State. From the point of view of criminal law there may be good reason to go a long way towards criminalizing intelligence work on behalf of another State—and the Constitution does not present any special barriers to such legislation. From a legal point of view the situation is quite different as far as freedom of speech is concerned; in this instance the legislature's power to restrict freedom of speech is limited.

Sec. 90 of the Penal Code imposes a penalty for *unlawfully* effecting or aiding and abetting "the revealing of anything that should be kept secret out of regard for the security of the realm in relation to another State". In criminal law it is a question of whether a *combination* of different pieces of information, which do not separately reveal any secret, may nevertheless lead to something secret being revealed when such information is collected and delivered to another State. In 1968 NRt 486 the Supreme Court answered this question affirmatively.

> Cf. 1968 NRt 486, in which a fisherman had carried on intelligence work on behalf of the Soviet Union for a long time. He had, *inter alia*, succeeded in photographing military installations and marking them on a map, and had pumped for information persons who had detailed knowledge of these installations. Some of the photographs were taken from local traffic boats (1954) and motor-powered fishing cutters (1956). One installation had been systematically photographed by single photographs and panorama photographs from 1954 to 1960. The High Court (*lagmannsretten*) stated, *inter alia*: "Together with the map, oral information, and other material, the individual pictures, even though they do not reveal anything secret in themselves, constitute interconnected information material that reveals military secrets", a view in which the Supreme Court concurred (p. 489).

Sec. 90 of the Penal Code is not, however, simply directed against revealing secrets of significance for the security of the realm to another State. According to the wording of this provision it is sufficient that such information is divulged. The conclusive factor according to this provision is simply what has been revealed, not to whom it has been revealed. If, however, the secret has been "betrayed" to another State, the penalty limit is increased, in the same way as when "considerable danger" is caused (see sec. 90, the last and penultimate alternatives). According to the wording of this provision, it thus also covers publication in one form or another, e.g. through a newspaper article. However, the Supreme Court has not stretched the provision quite that far.

> On the basis of a criminal law approach to the question, the Supreme Court has held that it could not be assumed that a secret had been "betrayed" to a foreign State only "because it must be expected that the newspaper report will become known to the foreign State. The use of the expression 'betrayed to ...' indicates that a closer and more direct connection with the foreign State is required ... Nor can I see that there are any real reasons that decisively support the application [of this alternative provision] in these cases", cf. 1986 NRt 536 at p. 538.

As regards freedom of speech—including statements on defence questions—the initial approach to the question cannot, in principle, be via sec. 90 of the Penal Code; it must be via art. 100 of the Constitution. Admittedly, sec. 90 of the Penal Code contains a reservation in the form of the term "unlawfully", and a limitation is also inherent in the expression "kept secret". But to take sec. 90 of the Penal Code as the starting point is not only wrong in principle; it would also mean that criminal law aspects and the need to keep defence matters secret would come to the fore at the expense of the constitutional right of freedom of speech. The expression "the security of the realm" will thus tend to have a predominant effect if the initial approach is via the criminal law—and in practice the question of the limits of freedom of speech in relation to defence matters has arisen precisely because criminal proceedings have been instituted against the person who has made the statement. The cases 1979 NRt 1492, 1982 NRt 436 and 1986 NRt 536 illustrate this point.

> In 1979 NRt 1492 ("the list case") one of the questions that arose was whether the press, in the light of its facilities for engaging in societal criticism, could receive and examine any sort of material—even if the material should happen to contain information that was secret in terms of secs. 90 and 91 of the Penal Code. On the basis of a purely criminal law approach the Supreme Court unanimously stated, *inter alia*: "In my opinion there is no legal basis for proposing a rule of this nature. I cannot see that the courts, without any other guidance from the legislature than what is inherent in the Act's reservation as to unlawfulness, can by way of interpretation introduce such a limitation into the Act's protection of information

that should be kept secret out of regard for the security of the realm. Such an interpretation of the statute would ... entail a considerable and questionable undermining of the protection given to such information" (p. 1500). Statements to the same effect were made in 1982 NRt 436 as well as in 1986 NRt 536.

The present author can take no other view than that we are to a regrettable degree approaching the point where the issue is being turned upside down. Is it not rather freedom of speech that is being undermined in this way to a questionable degree, and would it not be natural, especially on the basis of the reservation as to unlawfulness, to adopt a somewhat more discriminating attitude to the interpretation of sec. 90 of the Penal Code—taking art. 100 of the Constitution as a starting point—when the purpose has been to promote public debate? The significant effect one's purpose has on the boundary between right and wrong should indeed be a not unfamiliar theme in most—if not all—legal fields, and it is difficult to see that this particular item in the criminal legislation is in a special position in this respect.

In this connection it can also be mentioned that whereas the provision in sec. 90 of the Penal Code has remained unaltered since 1902, the other provisions in the Penal Code's chapter on crimes against the independence and security of the State were revised in 1950, cf. above under part II. Especially the emphasis that the legislature then placed on the regard for freedom of speech even under war conditions must also be applied when it is a question of interpreting related provisions within the same chapter of the Act, as is the case with secs. 86 and 90 of the Penal Code.

The *travaux préparatoires* to sec. 90 of the Penal Code are, moreover, very brief. In the commission's draft (1896) on p. 143 it simply states that "secs. 90, 91 and 92 correspond to secs. 9 and 10 of the Code, but are regarded as more general expressions, so that also technical and strategic secrets are included thereunder". The provision does not appear to have been commented on in *Ot.prp.* no. 24, 1898/99.

In the grounds for judgment in the case 1979 NRt 1492 anxiety is expressed about giving any particular significance to the reservation as to unlawfulness because guidance on the part of the legislature is lacking. But this carries little conviction; to assert the individual's constitutional rights is one of the matters to which considerable importance must be attached, and which is traditionally submitted to be a particularly weighty argument in favour of a restrictive interpretation of a statutory provision—regardless of whether the statutory provision contains a reservation as to unlawfulness, or some other form of reservation, or no reservation at all.

In order not to be misunderstood the present author wishes to emphasize that what is objected to is the uncritical application of the same standard of

judgment to cases in which the information is revealed in connection with publicly made statements, as that which is applied to cases in which it is a question of intelligence work on behalf of another State. No standpoint is thereby taken as to whether all information put forward in public exchanges of opinion will be lawful, but in considering whether the limit of freedom of action has been overstepped, there must be room for a more discriminating appraisal than that appearing from the judicial decisions made so far.[10]

In *assessing the penalty*, the Supreme Court has adopted a standpoint of discriminating between intelligence work on behalf of another State and information given as part of a contribution to public debate, cf. 1982 NRt 436.

VI

It seems necessary to take a closer look at the questions that arise when different items of factual information are combined. As has been mentioned, it was laid down in 1968 NRt 486 that information which in itself revealed no secret could be part of an interconnected set of information that revealed military secrets. In relation to information collected with a view to promoting public discussion of defence questions, the same view has been adopted without any differentiation.

Cf. 1977 NRt 1179: "If it is a question of a collection of documentary material, the individual document cannot without more ado be assessed simply by itself. If a systematic collection has been carried out, the information that has been obtained must be evaluated collectively. Items of information that do not contain secrets when they are separately assessed may collectively provide an overall picture that was not previously known, and that ought to be kept secret ..." (p. 1181). In like manner this statement was adopted as conclusive in the final decision of the case 1979 NRt 1492. (Both these decisions concern "the list case".)

A certain modification of this forthright attitude has, however, found expression in 1986 NRt 536. After referring to the previous decisions in 1977, 1979, and 1982, the Supreme Court stated that "... a line must be drawn. In the cases mentioned it is a matter of a very comprehensive collection and processing of items of information. If it is a matter of a few items of information and no problems worth mentioning are involved in combining these items, one will hardly be able to talk about a secret" (p. 540).

Further difficulties, however, arise in this respect. Freedom of speech entails the right to assert opinions concerning defence matters, and one will try to

[10] Cf. O.J. Bae and T. Eckhoff, "Rikets hemmeligheter" (Secrets of the Realm), *Lov og Rett* 1983, pp. 283 f.

substantiate the opinion one has asserted. Anyone who is well informed about defence matters may be able to draw conclusions on the basis of fairly trivial facts that are in themselves generally known, and will, on the basis of his knowledge of defence matters, be able to assume with a fairly high degree of probability that a certain state of affairs may exist, or that certain routines or systems are being followed.

> This aspect of the case is touched on only by way of conclusion in 1982 NRt 436 ("the Gleditsch case"), in which the first judge delivering judgment adds "as a matter of form": "What the accused have been convicted of in this case is not their view of Norway's alliance and defence policy. This they have, of course, the right to assert publicly. They have every right to reproduce the contents of official publications *of a military policy or technical military nature, to draw conclusions* from such publications, and to *base their arguments* on them. But regard for freedom of research and freedom of speech cannot justify them in revealing military secrets to the detriment of the country's security ..." (p. 445).

In present-day society persons who are interested in defence questions will, of course, follow what happens in this sector. If one chooses to follow closely, one can preserve different items of information that appear in our fairly large and varied assortment of newspapers and periodicals. If one is even more interested, one can keep up with what is published in a greater or lesser selection of foreign publications. In addition, there can be mentioned the information and debates broadcast on Norwegian and foreign radio and television. Such activity can certainly be called systematic and perhaps also thorough—characterizations that are usually regarded as providing a valuable basis for debate and societal opinion.

Nor is it an unknown fact that persons who share the same opinion may join together and form an interest organization, perhaps one that also has a secretariat and employees who keep in touch with these issues. Institutions can also be established whose task it shall be to work for the promotion of peace and disarmanent. If one so wishes, it can be said that the systematic work is thus organized and made efficient. This, of course, increases one's ability to keep oneself informed and to deal with the information collected as a whole. Computer technology is making its way into most fields, so perhaps the information collected may be entered into a computer system.

The fact that such activity is organized and carried on systematically in order to put forward specific views on defence policy cannot, however, in itself be a conclusive criterion as to whether the activity is unlawful. If such a standpoint were to be adopted, most of the reality of freedom of speech on defence questions would easily become a thing of the past. The result of the systematic activity, however, is that an overall picture can more rapidly and sharply appear, because factual matters can then be interconnected in a

context that is far from apparent when it is a question of more fortuitous forms of activity. It is this overall picture—this connection between the factual matters—that creates serious problems.[11]

The overall evaluation—the connection between separate items of factual information—must be based on a body of material that is sufficiently definite to allow of its being processed. As long as it is a question of unprocessed fragments of information, no connection arises—if, for example, one simply has some annual issues of various periodicals, newspapers, etc. lying around.

Nor can it be unlawful to receive information from generally available sources—it is highly doubtful whether this can be prohibited by law—such as is the case, for instance, with subscribers to periodicals, newspapers, etc.[12]

To start with, a distinction must be made between information and conclusions drawn on the basis of the factual information. Taking the principle of freedom of speech as one's starting point, it is far more questionable to criminalize conclusions than to criminalize the revealing of information that may harm the security of the realm. Conclusions are subjective—they may be right or wrong—and are a consequence of how factual information has been understood and processed. Technical calculations are also a consequence of the processing of available information on the basis of the special knowledge the person concerned possesses. Such knowledge is normally to be found not only in Norway but also in other States.

The question of what should be kept secret out of regard for the security of the realm in relation to another State must therefore primarily be related to

[11] "The list case" and "the Gleditsch case" illustrate the difficulties with which one is faced in this respect. As mentioned in part IV, the information was largely based on "open sources" in both these cases—sources such as telephone catalogues, *Norges Statskalender*, reports to the Storting, and various periodicals such as *Politibladet* (The Police Journal), *Norsk Tjenestemannsblad* (The Norwegian Civil Servants Journal), announcements to the defence forces, etc. The question whether the systematic processing of information from generally available sources would constitute a criminal offence in terms of sec. 90 of the Penal Code would have been pinpointed if in the cases mentioned *only* such sources had been utilized.

[12] See in this connection 1922 NRt 41, in which, *inter alia*, a package containing 200 copies of "The Communist International" was confiscated pursuant to the Act of 18 August 1914, cf. Act no. 5 of 22 March 1918 and the Royal Decree of 6 November 1920. The Supreme Court set aside the confiscation, pointing out that the Royal Decree went beyond the purpose of the two Acts and also remarking that "the provision for freedom of speech in art. 100 of the Constitution by its very existence also gainsays giving the Acts of 1914 and 1918 the interpretation that has been expressed in the Decree of 6 November 1920, since I am of the opinion that if there had been any intention that the prohibition in these Acts should extend so far, one would when drafting them inevitably have been faced with the question how such a statutory provision would stand in relation to art. 100 of the Constitution". This judgment has been discussed by, among others, T. Eckhoff in *Rettskildelære* (Doctrine of Legal Sources), Oslo 1971, pp. 100 ff., and J. Andenæs, *Statsforfatningen i Norge* (The State Constitution in Norway), Oslo 1981, pp. 371 f.

Admittedly, sec. 91 of the Penal Code imposes criminal liability on any person who unlawfully "gains possession of" anything that should be kept secret out of regard for the security of the realm in relation to another State. But this provision cannot cover a case in which one lawfully receives open information, cf. the reservation expressed in the term "unlawfully". Only when a connection comes to light can the provision then become applicable.

factual circumstances—the conclusions that can be drawn on the basis of factual matters can normally not be regarded as secrets.

> In 1980 NRt 113 the editor of the newspaper *Klassekampen* (The Class Struggle) was convicted in terms of sec. 90 of the Penal Code for having published two reports of manoeuvres from a NATO exercise. The first judge delivering judgment remarked, *inter alia*, that in the reports of the manoeuvres one could "find *information that can provide a basis for conclusions* as to how the NATO authorities regard the possibility of defending areas within the member countries and concerning their plans and strategic and tactical views. Also information about suitable areas for landing troops ... appears from these reports ... As ... these reports of manoeuvres contain *factual information* ... they can for a foreign State form a link in a chain of information ..." (p. 121, italics added). The second judge delivering judgment also pointed out that importance must be attached to "what direct or indirect conclusions a foreign State would be able to draw from the information" (p. 125).

There will not always be a sharp line between factual information and conclusions drawn on the basis of such information. In the present context it may, however, often be important whether the conclusions that come to light stem from what appears from the statement or whether it is a question of repeating conclusions drawn by others, e.g. the defence authorities. That the defence authorities have drawn a specific conclusion may in other words be regarded as factual information. The reference in 1980 NRt 113 to "information about areas *suitable* for landing troops" seems to refer to the defence command's evaluation of which areas would be "suitable".

Nor will there be any factual information given if the information or statement that is published only contains such things as lie within the general level of knowledge within a defence branch—e.g. general precautions to be taken in a given situation

> Cf. 1980 NRt 113, in which the conviction imposed by the City Court was set aside as far as two other reports of manoeuvres were concerned. The second report contained orders concerning how the vessels of the foreign power would respond to a nuclear attack. It was maintained in military quarters that the report revealed NATO's defensive tactics for reducing the vulnerability of naval units to such attacks. In this instance, too, the Supreme Court found unanimously that it could hardly be said "that anything appears from this report except what every naval commander must regard as adequate arrangements in such a situation" (pp. 122–123).

If in a published statement both factual information is given and conclusions are drawn, in principle on the basis of what has been said above, any criminal liability must be assessed on the basis of the factual information that has been given in a greater or lesser context, whereas no importance shall be attached to the conclusions and inferences that may be drawn. Conclusions can no doubt

help to bring out an interconnection of factual material, but can be neither a necessary nor a sufficient cause for considering a matter as unlawful.

> In 1982 NRt 436 ("the Gleditsch case") it is stated that the experts were "of the opinion that the report contains information of great military value to a potential aggressor if the information was not previously known. *A potential aggressor would be able to take advantage of this knowledge and, inter alia, exploit the angles of approach where the installations' ability to provide warning is least*" (the description of the facts in the judgment of the City Court, included in the grounds of the first judge delivering judgment in 1982 NRt 439, italics added).

It seems that the statements by the experts to the effect that certain angles of approach could be exploited were accepted as conclusive without more ado. But if a potential aggressor is to derive any benefit from such angles of approach, the precondition must be that the calculation of such angles has been correctly carried out by the two researchers. The way the experts appear to have expressed themselves, such an assumption is made to appear obvious. But an aggressor cannot know whether the two researchers may have miscalculated the angles. It is also possible, from an aggressor's point of view, that incorrect information and calculations have deliberately been given, for instance in order to mislead an aggressor. It would be risky to base an attack only on the published material. It would in both cases be an obvious step to check the material properly.[13]

If factual information has been given, the situation may be simplified for a foreign State to a greater or lesser degree, because it is easier to get hold of and check information one is aware of than to have to grope one's way to find the factual material. If only calculations, conclusions or inferences are published, the usefulness of such material for a foreign power is rather indirect, and it is even more indirect if a foreign power only obtains a more or less clear confirmation of previous assumptions. As long as it is not a question of very detailed calculations which implicitly provide the necessary factual background material, it seems—when other circumstances are also taken into account—very doubtful whether one can criminalize the material mentioned here.

> When it is alleged in 1980 NRt 113, *inter alia*, that the factual information in the reports of the manoeuvres "could be regarded as a *confirmation* of what had been assumed from other sources" (p. 121), this seems—in principle—to be going too far with regard to what should be made a criminal offence. Paradoxically enough,

[13] The reasoning is moreover static—it is assumed that no alterations are made to the installation after the information has been published. For an aggressor it would be essential to ascertain that the installation has not undergone any changes—otherwise it could be very dangerous to base any attack on the material published.

in the course of criminal proceedings information may come to light that may to a considerable degree facilitate the task of checking for another State. Thus in "the Gleditsch case" the courts—on the basis of the experts' assessments—held that the report contained accurate information about the location of the installations, which gave "a collective and detailed picture of several of the defence forces' radio installations and equipment", and in "the list case" the City Court found it proved that the material collected constituted "a fairly correct picture of the organization and manning of these services". These statements about the substance of the information collected must provide important information if another State should itself wish to collect or control such information.

VII

Systematic work would enable one to bring out the interconnection and consequences of defence dispositions to quite a different degree than when it is a case of individuals fortuitously taking up a question relating to our defences. The interconnection and consequences of our defence dispositions may be of considerable interest in relation to the debate on defence policy in our country. The question, however, is whether—and in certain cases to what extent—the interconnection and consequences can be substantiated by the giving of factual information about what has actually been done, decided, or started in our defence forces, and the systematic work may entail that one finds oneself in possession of a fairly comprehensive factual material which can substantiate interconnections and consequences to quite a different extent than when it is a case of individuals taking up a defence question on a more fortuitous basis.

If every right to give factual information is curtailed, any real possibility of a constructive debate on defence questions will soon be considerably reduced, because a debate will then tend to become one about hypothetical matters that are not related to the factual conditions. There is, therefore, a close connection between the right to make frank statements and the right to give the factual information that is connected with the statement. If the reality of freedom of speech is to be maintained as far as defence matters are concerned, the right to put forward factual information cannot therefore be limited to a greater degree than is proper. It will, therefore, hardly be legitimate to lay down a prohibition in general terms against publishing any information about defence matters. In evaluating what is proper, the considerations supporting freedom of speech must be balanced against the other essential societal considerations that are applicable—on the defence level, primarily considerations for the security of the realm vis-a-vis another State. Of course consideration for the security of the realm must justify certain restrictions of freedom of speech, but these restrictions, on the other hand, must not go beyond what is necessary to maintain the principle of freedom of speech. In principle it can hardly be

doubted that the prohibition in sec. 90 of the Penal Code against revealing anything that should be kept secret out of regard for the security of the realm in relation to another State is not contrary to art. 100 of the Constitution. But at the same time the said provision must also be applied and interpreted with due regard for, *inter alia*, art. 100 of the Constitution. These considerations of principle are, moreover, also quite compatible with the working of sec. 90 of the Penal Code; partly through the reservation expressed in the term "unlawfully", but also because the phrase "should be kept secret" introduces an element of discretion, which also allows room for consideration of the citizens' right to freedom of speech. Sec. 90 of the Penal Code does not, however, transcend the principle of freedom of speech; it is the restrictions to freedom of speech that must be justifiable, and which must, therefore, not go beyond what is necessary.[14]

It follows from the above that the question of what restrictions on freedom of speech are necessary is a question of law that must be decided by the courts, e.g. in criminal proceedings. The extent to which factual information about defence matters can be given is also a question of law. It follows immediately from this initial principle that the defence authorities' own evaluation of the nature of the information cannot be conclusive.[15]

> Within the defence forces, information concerning defence matters will often appear from documents that are more or less strictly classified for security purposes. Security classification is authorized by the "security instructions" and the "protection instructions", both prescribed by a Royal Decree of 17 March 1972. Documents may be classified as "top secret", "secret", "confidential", or "restricted", cf. sec. 3 of the security instructions. It must, however, be maintained that both the above-mentioned instructions are directly applicable only to the internal administration—it is only the administration's own employees who, in accordance with the general power of instruction that superior administrative bodies have over their subordinates, can be assigned duties in accordance with instructions. The fact that a document is more or less strictly classified is therefore not in itself conclusive of the issue of whether an outsider can put forward similar

[14] Professor Andenæs has adopted the view that it would hardly be legitimate to prohibit discussion of a political or military operation that is well known but that can be used for the purpose of criticizing the defence authorities, cf. Doc. to the Norwegian Parliament No. 11/1950, p. 26. This statement is concerned with the situation in wartime or in a state of alert and must be even more readily applicable under other and more peaceful conditions. On the other hand, Andenæs' reasoning seems to be over-simplified when he asserts that "the fact that a prohibition against publishing information of a specific nature is not contrary to art. 100 of the Constitution does not need detailed proof". Andenæs himself mentions that "thereby a restriction is in fact imposed on frank criticism", but states that "this cannot be conclusive". However, it must indeed be conclusive if one imposes greater restrictions on frank criticism than is necessary with due regard to freedom of speech—it is the restrictions on freedom of speech that must have a tenable justification.

[15] Cf. W. Matheson, *Spionasje, opposisjon og straff* (Espionage, Opposition, and Punishment), Oslo 1982, pp. 21 ff.

information in a public debate—e.g. when the person concerned has become acquainted with such information from sources other than the defence forces' own documents.

It would also be questionable to allow the defence authorities' own evaluation to be conclusive of the question whether a piece of information can be brought to the knowledge of the public. As long as it is a question of technical defence matters, the defence authorities will, of course, be possessed of considerable expertise—for example, with regard to such questions as how a unit should be organized, what functions it should have, how an installation shall be equipped, and fitted into the defence system, etc. But the further consequences of defence measures are questions of a more general political nature, where the evaluations of the defence authorities will be charged with general defence policy attitudes—but where there must also be room for other opinions. Due regard for freedom of speech requires that efforts must be made to ensure that there is also in practice room for other opinions concerning questions of a defence policy nature. In practice, however, the distinction in principle between technical defence matters and questions of defence policy may be difficult to draw, as such matters tend to merge into one another. If one allows the evaluation of the defence authorities to be conclusive on this point, one is on the way to enabling the said authorities in fact to restrict freedom of speech on defence matters on essential points.[16] If one also takes into consideration the fact that the defence authorities sometimes seem to have classified "like and unlike" with rather excessive zeal, this danger is probably present to a not inconsiderable degree.

That the defence authorities' own classification of documents is not conclusive as a matter of course clearly appears from the cases 1979 NRt 1492 and 1980 NRt 113, among others, cf. below for further details.

It must further be maintained that to the extent that freedom of speech is restricted, to the same extent the possibility of checking the defence dispositions that is inherent in a vigilant public opinion is also restricted. There is always a danger that a public service, on the basis of the duties that are imposed upon it, may proceed to go beyond the limits that have been laid down for the said service. The defence authorities may, for example, by their dispositions proceed to go beyond the limits that result from constitutional provisions, which may be both unconstitutional and criminal in terms of, *inter alia*, sec. 8(a) of the Impeachment Act no. 1 of 5 February 1932.

Illustrative in this regard are the circumstances in connection with the LORAN C installations and the agreements that were concluded in 1959 and 1960 between

[16] Cf. Andenæs in Doc. to the Norwegian Parliament No. 11/1950, p. 26.

> the US ambassador and the Norwegian foreign minister. As Eckhoff has shown (Appendix 1 to the Recommendation to the Odelsting 28/1978–79), the matter was not dealt with in the Council of State beforehand, as is prescribed by art. 28 of the Constitution, nor was the prior consent of the Storting obtained, which, *inter alia*, should have been done in accordance with art. 26, para. 2, and art. 25 of the Constitution; the matter of the Storting's power to allocate funds also appeared highly problematic. In making an assessment the purely technical matters must also be taken into consideration. Previously developed systems, including LORAN A, were far weaker than the subsequent LORAN C system. The carrying out of the LORAN C project was "something quite different and more than an alteration in detail ... in that it has both a long range and pinpoints positions with great accuracy. It has for this reason a military use that LORAN A has not got, namely to serve as an accessory to missile-carrying submarines that need particularly accurate pinpointing of positions to ensure accurate delivery" (Eckhoff p. 47). Eckhoff's report also mentions that "from the American side strong wishes were expressed that the Storting must be kept out of it" and that the Norwegian government should (of course) not have yielded to these wishes (p. 48).[17]

Since due regard for freedom of speech must be balanced against due regard for the security of the realm in relation to another State, an appraisal must be made of how far it is permissible to restrict the right to give factual information in a statement made about defence matters. According to the circumstances this overall appraisal may be rather complex.

It can be taken as a starting point that a restriction of the right to put forward information confers protection on defence matters. If the defence forces are to benefit from the advantage such protection confers, there is good reason to demand rather high standards as regards the state of the defence forces. It would be unfortunate if our defence authorities should have acted in a deplorable or unlawful manner. But it would be even more unfortunate if the person who points out the deplorable or unlawful state of affairs were to be convicted, if the said person in pointing out such matters should also happen to give factual information that in itself is of significance for the security of the realm in relation to another State, as long as such information is not given to a considerably greater degree than is necessary to reveal the state of affairs. Thus, the more necessary it is that something should be made public and be debated, the less regard must be paid to the external security of the realm.

[17] See also T. Eckhoff, "Var det straffbart å offentliggjøre LORAN C-instillingen?" (Was It a Criminal Offence to Publish the LORAN C Recommendation?), *Hefte for Kritisk Juss* no. 1/1978, pp. 18 ff., where it is stated, *inter alia*: "After reading it, it is difficult to avoid the impression that the real reason for the classification must have been to protect the members of the government who took part in the negotiations about Loran C and Omega in the 1950s and 1960s against criticism for not having informed the Storting about what they knew concerning the military importance of the nagivation system." The LORAN C case is also discussed in T. Eckhoff, "Stortingets unnfallenhet i saker om utenriks- og sikkerhetspolitikk" (The Compliance of the Storting in Cases concerning Foreign and Security Policy), *Lov og Rett* 1980, pp. 275 ff. Concerning the question generally, see P. Helset, *Hemmelighold og demokrati i norsk utenriks- og sikkerhetspolitikk* (Secrecy and Democracy in Norwegian Foreign and Security Policy), Oslo 1981.

In the light of this it is unfortunate that some statements in judicial proceedings—taken by themselves—are designed to effect a rather drastic curtailment of the process of evaluating whether the defence authorities have acted in accordance with Norwegian constitutional provisions. At the same time it seems as if some statements in judicial proceedings are also designed to encourage a very lenient assessment of whether there actually has been a contravention of these provisions. It must, however, be noted that these statements have hardly been conclusive for the result of the individual decisions, and it can, therefore, hardly be said that on these points any conclusive judicial practice has been established.

> Thus the decision in 1982 NRt 436 is marked by a superficial attitude to the constitutional provisions. The City Court stated, *inter alia* (p. 461): "The accused are of the opinion that the establishment of the installations was not done in accordance with the constitutional provisions. It is a question of matters of importance that they think have not been submitted to the Storting. They have not been able to show any grounds for these allegations. Cabinet ministers who have given evidence in this case have stated that the matters were dealt with in the usual way for dealing with such matters, and the court must find this to be the case as long as no foundation is shown for the assumption that proper steps have not been taken". The Supreme Court simply remarked: "It is not quite clear what is involved in the contention that the case has been dealt with 'in the usual way'. But even if it should be the case that the Storting's consent has not been obtained in such manner as is prescribed by the Constitution, this could not justify the convicted persons in publishing without more ado information of a secret nature to the detriment of Norway's security" (pp. 444 f.).
>
> Regarded in the light of what happened with the LORAN C agreements, it seems to be far from reassuring that these questions were regarded as having been dealt with "in the usual way"; it must be an obvious course to go into the way they were dealt with more closely in order to ascertain whether essential breaches of our constitutional provisions occurred. Any other approach entails implicitly recognizing that constitutional provisions need not necessarily be observed in defence questions—and that the public authorities are not at all concerned with such matters—a doctrine that seems to be highly questionable in principle. See also the reasoning in 1979 NRt 101 (the Finland case).

In principle it also seems unfortunate that the courts do not appear to be inclined to go into the question of whether there has in other respects been any irregular or even unlawful conduct on the part of the defence authorities. This attitude on the part of the courts considerably limits in practice the possibility of the defence authorities being exposed to criticism in the public debate, and other sanctions against any irregularities can hardly be said to be distinguished by any special effectiveness.

> In 1979 NRt 1492 the Supreme Court remarked quite bluntly that "a more detailed account ... of the examples invoked of objectionable features of the

activity of the secret services could not be considered to be of any decisive importance for the evaluation of the question of unlawfulness" (p. 1500). From the judgment of the City Court it appears, *inter alia* (p. 14), that the accused was of the opinion "that within the surveillance service unlawful surveillance of lawful political activity takes place in this country. Thus he is of the opinion that some persons are subjected to surveillance because they are opponents of NATO, conscientious objectors, or members of the Norwegian Communist Party". The City Court remarked that such unlawful activity had not been proved, and also referred to the control of the activity of the secret services that was exercised by the Ministry of Justice, the Control Committee and the Ministry of Defence. If the accused has anything to complain of, he should apply to these bodies. In principle, the drawback in the reasoning of the City Court is that the supervisory bodies mentioned can hardly be characterized as critical of the system, whereas in public debate questions may be levied in quite another way against the very system that has been established in relation to the activity of the intelligence and surveillance services.

The relationship to rules of international law is normally accorded considerable importance when the substance of Norwegian legal provisions is to be clarified. It is at any rate a recognized rule of interpretation that Norwegian rules are presumed to be in accordance with international law. In the light of this it is not very satisfactory that some statements in judicial proceedings can be understood to indicate that the rules of international law are not of very great importance in defence questions—even though the existing statements can hardly be characterized as conclusive.

The relationship to the rules of international law is touched on in 1982 NRt 436, in which the Supreme Court remarked: "To the allegation that listening in to embassies' communication with their home countries goes on contrary to international law, the City Court has stated that nothing has come to light that indicates that the installations operate contrary to international law. There is no basis for the Supreme Court to depart from this evaluation of the evidence. But here too I would add that there must be other ways of taking up this question than through a revelation of secret information to the detriment of the country's security" (p. 455). The Supreme Court's remark that the question of breaches of international law can be taken up in another way is, of course, quite correct. But if there should occur breaches of international law of a serious nature, our legal rules should not be so formulated that they protect our authorities against public criticism, and public criticism is also in this context one of the most important guarantees that our authorities will keep within the limits that our legal rules—including international law—impose upon the exercise of authority. The restrictions on freedom of speech out of regard for the external security of the realm must therefore not be made greater than is necessary, and the circumstances that are revealed by making a statement must be taken into account in deciding whether the statement made can be regarded as unlawful. See also 1979 NRt 101 (the Finland case).

There may also be good reason to take into account how a person has gained possession of the information that has been published. If it is a case of

information obtained in an unlawful manner—e.g. by breaking in—there is good reason to be considerably more severe in judgment than if it is a question of information acquired in a lawful manner. But there may also be good reason to attach some importance to whether the information has been obtained passively—by receiving information through newspapers and periodicals subscribed to—rather than by actively collecting information that is less easily accessible, e.g. information obtained by examining real property registers. A hint to this effect is given in 1986 NRt 536, in which the Supreme Court stated, *inter alia,* that the method of collection must also be taken into account in the assessment of unlawfulness: "The matter will more easily be regarded as unlawful if 'artful' methods have been used than if one has acted quite openly" (p. 542).

When it is a case of systematic processing of information received, the very systematization and processing of the information may bring out an interconnection in the material that the individual pieces of information—by themselves—do not provide. It will hardly be possible to lay down any distinction in principle between information received through newspapers, periodicals, etc. and information received from public authorities in accordance with the Public Access to Official Documents Act, or a combination of such information. But as long as it is simply a question of such "open sources", considerably more will be required before the processing brings to light something that can be said to reveal something that should be kept secret out of regard for the security of the realm in relation to another State than when it is a case of information acquired in another way.

Cf. to this effect an opinion from the legal department of the Ministry of Justice, dated 18 January 1984, to the Ministry of Defence in which it is stated, *inter alia* (pp. 6 f.): "The clear starting point must be that information obtained pursuant to the Public Access to Official Documents Act can be freely used in every respect. Thus it is difficult to conceive that publication of information that has been obtained *only* in accordance with the provisions of the Public Access to Official Documents Act that entitle one to see it can in itself be unlawful in relation to provisions intended to protect the security of the realm etc. The matter becomes more complicated if the information that has been obtained pursuant to the Public Access to Official Documents Act is used together with information that has been acquired in other ways." The legal department referred to 1979 NRt 1492 ("the list case") and 1982 NRt 436 ("the Gleditsch case") and continued: "It may be questioned whether this also applies when the open source is the Public Access to Official Documents Act. The Supreme Court decisions mentioned do not automatically solve this question ... It can be asserted that the use of documentary information that all and sundry are entitled to see in accordance with the wording of the Public Access to Official Documents Act is in a special position ... It cannot, however, be excluded that also use of information obtained pursuant to the Public Access to Official Documents Act may form part of a criminal act, especially when

> comprehensive further processing of the information has been carried out", but the legal department held that "exceptionally clear indications must be required" before any such assumption could be made.[18]

A factor that may also be important is whether the defence authorities should have put the Public Access to Official Documents Act into practice and possibly allowed more publicity vis-a-vis various groups that are in favour of or critical of the defence system.[19] If information is given to the former groups, it is difficult to see that more critical groups should be barred from publishing the same information if it has been published otherwise than from defence documents.

It will also be of importance what sort of information is in question. For more general information concerning weapon and defence systems there is good reason to set wider limits for what can be published than when it is a matter of more specific information concerning the individual defence installations. The first category of information borders on and may merge with the special information in this field that a possibly interested other State, among others, must also be assumed to possess. The second category of information refers to how, and possibly to what extent, weapon and defence systems have specifically been developed for individual installations. Such information is to a greater degree likely to reveal defence measures than is the case with the first-mentioned category of information. A further point is that for the purposes of public debate about defence matters it may be of greater interest to bring out the more general features of weapon and defence systems than detailed information about how matters stand with the individual defence installation, whose equipment and organization will moreover be altered as soon as it is found to be appropriate and possible within the technical and financial limits to reorganize or further develop the existing equipment and organization.

> For example, there will be a greater reason to accept that information is given that a SOSUS installation has been established in a district or in a country than information that such an installation is located at an exactly described site in the country. Similarly, in the light of "the list case" there can be greater reason to accept information concerning the general organization and structure of the intelligence and surveillance services, as well as a more general allegation that these services have been installed in very many police stations in the country, than

[18] See also Matheson, *op.cit.*, pp. 27 f.

[19] In the above-mentioned opinion from the legal department of the Ministry of Justice it was also stated, *inter alia* (pp. 8 f.): "It is clear that it is not permissible to take into account the applicant's political opinion or attitude to the defence forces nor, of course, whether it must be assumed that the information would be used in a 'pro-defence' or 'anti-defence' context, cf. the unwritten prohibition against extraneous considerations." The judgment of the City Court in "the *Ikkevold* case" is also noteworthy (p. 20): "... it is also possible that the defence authorities have been rather more reserved towards *Ikkevold's* staff than towards others ...".

information concerning which particular persons are to be found at the individual stations.

In the light of this it seems to be correct that judicial practice has concentrated on how specific and detailed the published information has been.

> Thus in 1979 NRt 1492 ("the list case") it is stated, *inter alia*: "It is especially these comprehensive lists of names with pertinent information that are of significance for the assessment of criminal liability ... I cannot see that a critical attitude to the activity of the secret services and the desire to subject this activity to debate could justify A in gaining possession of and imparting to others material of this nature, material that ... could cause considerable harm to the security of the realm if it got out of control" (p. 1500).
>
> Similarly, in 1982 NRt 436 it is stated, *inter alia*: "... I find it difficult to comprehend that out of consideration for freedom of information about important societal issues and freedom of research it should be of essential importance to be able to collect and publish such *detailed information* concerning military installations as is in question in this case" (p. 447, italics added). There is a similar statement in 1986 NRt 536: "I am also quite unable to see that there is any indication that publication of *such detailed information* can have been necessary in order to initiate a general debate about whether there should be a SOSUS installation in Norway" (p. 542, italics added).

VIII

If the judicial assessment of whether the restrictions on freedom of speech are too extensive is to be realistic, it is essential that the courts should carry out a real and careful examination, based on the above-mentioned factors. Such an assessment may prove to be rather difficult. As a rule it will be a matter of judging technical or purely defence matters, and the material presented may appear complicated and difficult to penetrate. This is a consequence partly of the technicalities and the great developments in technology, in electronics and other fields, but also of the fact that the defence authorities have throughout not been very good at keeping people reasonably well informed about what is happening in the defence sphere. For these and other reasons a court will often feel that it is on rather unfamiliar ground when judging the information published. On the whole, the courts are more familiar with evaluations that have a moral or ethical tone than with evaluations dealing with technical and/or organizational matters.[20] These circumstances can in practice easily lead to the courts' examination not being as careful as it should be, which is—in principle—unfortunate.

[20] Cf. T. Eckhoff, *Forvaltningsrett* (Administrative Law), Oslo 1982, p. 256.

> The question of the intensity of the examination may, in criminal proceedings for instance, arise in relation to the demands made by the rules of criminal procedure as to the adequacy of the grounds for judgment.[21] On this point the decision in 1980 NRt 113 is especially noteworthy, in which the court dissented (3–2) as to whether the grounds for judgment were adequate. It seems that the majority, which found the grounds for judgment adequate, was at the same time less inclined to examine closely the judicial assessment that had been made than the minority. In principle the best reasons seem to favour the standpoint adopted by the minority—where it is also stated that the evaluation must be done on the basis of a number of different factors in line with what has been laid down in the text above. The minority stated, *inter alia*: "It is obvious that in many cases it will be impossible to give a completely comprehensive description of the factual matters that lead a court to regard information as secret, and I agree with the judge first delivering judgment that the starting point must be that in a case of this nature the Supreme Court cannot set aside a judgment on the basis of inadequate grounds for judgment if there is nothing to indicate that the judgment is based on a misapplication of law, and the grounds for judgment meet reasonable requirements. In my opinion , however, an evaluation of the judgment of the City Court leads to the conclusion ... that the grounds for judgment cannot be said to provide adequate certainty that the judgment is based on a correct application of the law" (p. 125).

The question of the intensity of the examination can also be linked to a question of interpretation—e.g. whether according to sec. 90 of the Penal Code a state of affairs existed that should not have been made public out of regard for the security of the realm in relation to another State. As mentioned above, the defence authorities' own evaluation of this question is not automatically conclusive. On the other hand, their evaluation is a factor to which importance must be attached—the question is, however, how much importance should be attached to the defence authorities' evaluation in relation to the other factors involved. The doubts that appertain to attaching decisive importance to the defence authorities' own evaluation also apply to attaching too much importance to their evaluation. The defence authorities' evaluation of whether a matter should be kept secret is not an evaluation that they are bound to make as part of their discretion in defence matters. In principle therefore no special importance should be attached to the defence authorities' evaluation.

> See 1979 NRt 1492 and—more questionable—1980 NRt 113, in which the defence authorities' evaluation possibly was given a qualitative importance.

Finally, criminal liability in terms of sec. 90 of the Penal Code is contingent upon a secret having been revealed. If the foreign State concerned has knowledge of the matter, the matter will not be secret, and sec. 90 of the Penal Code

[21] Cf. on this subject J. Andenæs, *Norsk straffeprosess* (Norwegian Criminal Procedure), Oslo 1984, pp. 355 f.

will not be applicable. It could, of course, be argued that a secret could be known by one State but not by another, and that the matter would thus still be a secret. The decisive question must be, however, whether the matter is known by a State for which the matter may be of specific interest. Today's military situation is strongly influenced by the fact that there are two main power blocs. Within each bloc, the States co-operate quite closely on defence matters. What is known to one of the States of each bloc must therefore be presumed to be known also by the relevant defence authorities of the other States of each bloc. The Norwegian defence system is primarily designed in order to meet a possible attack from one or more countries of the Warsaw bloc. The fact that Norway is a member of the NATO bloc should thus have as a consequence that what is known by one of the States of the Warsaw bloc must be presumed to be known also by the other States of that bloc.

> A reservation should, however, be made for knowledge of the matter obtained by a neutral country like Finland or Sweden. In such a case, the matter should still be regarded a secret in relation to the Warsaw bloc. This will, however, be the case only until the matter—for some reason or another—be made known, for the public or a country of the Warsaw bloc, by the authorities of such a neutral country or otherwise.

The foreign State may have acquired knowledge of the matter by its own activity—partly passively by systematizing and processing open sources, partly actively through its own intelligence work in our country and in other countries with which Norway has a defensive alliance. It is, of course, difficult to ascertain what factual information another State possesses. But it seems to be a fact that active intelligence work on a considerable scale is carried on by the countries allied through the Warsaw pact in relation to the countries that are allied through the NATO pact and vice versa. Thus very recently a considerable number of spy scandals have come to light on both sides. In the light of this it seems that the judgment of criminal liability must take as its starting point what a foreign State must with reasonable probability be assumed to have acquired knowledge of. In making this assessment it seems, further, that the starting point must be how difficult it must be assumed to be for another State to acquire knowledge of the circumstances in question.[22]

This starting point also seems to have been adopted in judicial practice, in which the standpoint has been formulated as a question of whether the criminal act concerned matters "that are so little known that they can be described as secrets", cf. 1968 NRt 486 (p. 488): a formulation that has subsequently been repeated in 1977 NRt 1179 (p. 1180) and 1980 NRt 113 (p.

[22] Cf. Bae and Eckhoff, *Rikets hemmeligheter* (see footnote 10 above), pp. 281 f.

120). Nevertheless the formulation is not entirely apt, because it does not specify to whom the matter is little known. That the matter is little known to the public is of little interest—the question must be whether the matter is little known to persons with special knowledge of defence matters. It must be assumed that the intelligence service of a foreign State does operate with special knowledge of defence matters—to assume anything else would be to underestimate such an intelligence service.

> In the light of this the statements in 1979 NRt 1492 seem to be too facile. It was contended on the part of the accused that the information must be assumed to have already been acquired by the intelligence service of a foreign State. The Supreme Court remarked that the City Court had not found this to be probable and stated: "In my opinion it is moreover part of the nature of the case that assumptions of this nature cannot provide sufficient reason for regarding the information as not secret" (p. 1497). The nature of the case seems to entail a greater or lesser degree of probability that the foreign State concerned has to a greater or lesser extent acquired knowledge of such matters, and the starting point for the assessment of criminal liability must therefore be found in this degree of probability. It is less than satisfactory to brush aside the question by saying that it is simply a matter of "assumptions"; the question is not quite as simple as that. See also 1982 NRt 436 and 1986 NRt 536.

IX

Special questions arise as regards the right of the press to receive information about defence matters. The press will partly receive such information passively—by keeping itself informed about what other newspapers write about these matters—and will also systematize and process such information, by keeping a cutting file etc. An experienced journalist or editor will also possess considerable—and partly detailed—knowledge of defence matters, in the same way as is the case concerning conditions in trade and industry, cultural matters, sporting matters, etc. Depending on a combination of background knowledge and information, the newspaper will be able to publish instructive—possibly also critical—articles on different subjects, and there can scarcely be any doubt that its circle of readers will appreciate being properly informed about the different aspects of society that the newspaper takes up in this way.

It is also a hallmark of good journalism, however, that when the newspaper wishes to take up a subject, it investigates the substance of the information it receives, so that the factual basis is tenable when the spotlight is focused on one societal issue or another.

There are also important societal interests associated with the existence in a country of a vigilant and conscientious press—as mentioned in the introduc-

tion, freedom of speech is a cornerstone of any democratic system—and it is therefore with full justification that art. 100 of the Constitution declares that "There shall be liberty of the Press". Without a vigilant press that can bring to light any conduct on the part of our authorities that calls for criticism, a considerable part of the correction and control that public opinion stands for will be severely curtailed in practice.

If the press is to fulfil its function, it is thus dependent on being able to receive, obtain and control information in order to be able to evaluate both whether a matter should be taken up publicly, and if so how; and whether to content oneself with quite general information or to substantiate it to a greater degree with more specific information. It should also be emphasized that the press does not have a free hand in this respect. Certain restrictions result from the press's own rules (the "Be careful" poster), but also in terms of criminal law the press may have a special liability. As far as defence matters are concerned, the press may incur criminal liability if an article reveals anything that should be kept secret out of regard for the security of the realm in relation to another State, cf. sec. 90 of the Penal Code, and the general considerations set out above.

The question is, however, whether restrictions also apply to the press's right to receive or obtain information—a question that becomes acute if the editorial staff decide that they will not make the information received public.[23]

> In 1979 NRt 1492 ("the list case") the Supreme Court found that sec. 91, para. 2, of the Penal Code was applicable to journalists who received material concerning matters that were secret in terms of sec. 90 of the Penal Code, despite the fact that the City Court had found that the journalists had concluded that the material (the list of names) should not be published. The defence counsel maintained "that the press's right to exercise and possibilities for exercising societal criticism require that it must be able to receive freely and examine every sort of material, regardless of whether it might contain information that is secret in terms of secs. 90 and 91 of the Penal Code". However, the Supreme Court found that the Code did not provide "any basis for laying down a rule of this nature ... Such an interpretation of the Code would ... mean a considerable and questionable undermining of the protection given to such information. This applies even if this interpretation of the Code ... would not exempt members of the press from criminal liability for unlawful publishing". The Supreme Court further pointed out that the many security problems that would arise could not be satisfactorily solved exclusively through the press's own code of conduct. A hint of some concession to the press was nevertheless given: "I will not exclude the possibility that according to the circumstances the special function of the press may be a factor of importance in assessing whether any criminal violation of the second paragraph of section 91 has taken place", but in the present case there was "no such connection between this information and the political debate concerning an alleged deplorable state of

[23] The question is also discussed by Matheson, *op.cit.*, pp. 96 ff.

> affairs in the activity of the secret services that the special duty of the press can be invoked with much weight" (pp. 1501 f.).

As previously mentioned, it is unfortunate in principle that the Supreme Court in this instance took the provisions of the criminal law as its starting point and did not consider whether these provisions and their interpretation were compatible with the principles of freedom of the press and freedom of speech. No balancing of the considerations that the different provisions are intended to promote was therefore undertaken—and it cannot be laid down *a priori* that information of importance for the security of the realm shall be protected to the greatest possible extent. The reasoning of the Supreme Court is, however, also problematical in other respects, in so far as it is based on the proposition that the press's own code of conduct did not in itself provide any satisfactory restriction with regard to the right to publish the information. But this does not bring out the point that the press would be criminally liable if such information were to be published: not just the press's own code of conduct but also the Penal Code thus impose limits on what can be published. The most telling objection to the reasoning, however, is that the possibilities of conducting a serious debate about defence policy matters are encroached upon to a questionable degree. Admittedly, the Supreme Court remarks that the penal provisions will only hit anyone who "is aware of such matters as entail that the information is and should be kept secret out of regard for the security of the realm". The question is, however, how one may become aware of the nature of the information when one has not been given an opportunity to examine it. In practice it may very well be the case that it may appear to be rather doubtful beforehand whether the information in question is secret or not. If one takes the standpoint of the Supreme Court into account, it may appear to an editor or a journalist that the safest step is not to concern oneself with such information at all, thereby depriving oneself also of information that is not to be regarded as secret—with the result that defence policy matters from which the public debate might benefit may be omitted from the columns of the newspapers: e.g. the debate about the secret services, integrated weapon systems, warning systems, etc.—unless one is content to conduct a debate on the premises of the defence authorities. It will indeed be very difficult for an editor—without having had any opportunity to examine material—to decide whether there is any connection between information received and matters that may invite criticism. Any newspaper with any respect for itself will, as has been mentioned, ensure that it has the necessary factual basis for making a criticism. It is not thereby in any way taken for granted that it would also be right to publish all the factual background material. In the light of the principle of freedom of the press and freedom of speech, the most correct

approach would therefore be to lay it down that the press has special and important societal functions from which our democratic system benefits—even when the press becomes unpleasant—and that the press must be able to examine material itself even though it may prove to contain secrets, but the press may also incur criminal liability for any information that may be printed, in terms of the provisions of secs. 90 and 91 of the Penal Code.

As regards the press's right to information concerning what happens in public administration, the provisions of, *inter alia*, the Public Access to Official Documents Act are important. As far as defence matters are concerned, however, important exceptions have been made in sec. 6, item 1.[24] According to a statutory amendment of 11 June 1982, no. 47, the provisions now except from publication "any document containing information that if known would harm the security of the realm, the national defence, or relations with foreign powers or international organizations".[25]

> In a draft memorandum of 25 October 1985 the Ministry of Justice recommended that in new regulations under the Public Access to Official Documents Act general exceptions should be made for documents concerning defence installations, defence institutions, and installations associated with them, and that the High Command of the defence forces should be made an appeal tribunal for decisions concerning inspection made by any institution that is subordinate to the High Command of the defence forces or to the Chief of Defence. Further exceptions were proposed for journals and documents belonging to the surveillance service. It seems to be very doubtful whether a general exception for defence installations etc. could be introduced by regulations, and this proposed general exception was deleted, when new regulations were issued on February 14th, 1986. As has been mentioned, sec. 6, item 1, of the Public Access to Official Documents Act was amended in 1982. The provision excepted previous documents that "are of importance" for the security of the realm etc., and the purpose of the statutory amendment was "to insert a more precise and comprehensive criterion into sec. 6, item 1" and the Ministry of Justice also maintained "that the intention all along has been to introduce a criterion of harm done", cf. *Ot.prp.* 4/1981–82, p. 27. There is the additional factor that also sec. 11, para. 2, of the Public Access to Official Documents Act was amended so that regulations that make exceptions from the said Act can only be prescribed "when especially weighty reasons so indicate". The Ministry of Justice remarked in this connection that the new formulation was intended "to stress that it is not by itself sufficient that the majority of documents in the field in question can be excepted. A specific assessment should be made of whether the benefit accruing to

[24] A comprehensive discussion of the question of the publication of documents in cases concerning defence matters is presented by E. Høgetveit, *Hvor hemmelig? Offentlighetsprinsippet i Norge og USA særlig med henblikk på militærpolitiske spørsmål* (How Secret? The Principle of Publicity in Norway and the USA, especially with regard to questions of military policy), Oslo 1981. See also T. Eckhoff in *TfR* 1982, pp. 161–63, and A. Frihagen, *Offentlighetsloven med kommentarer* (The Public Access to Official Documents Act with Comments), Oslo 1974, pp. 249 ff.

[25] This provision has been discussed by Rolf Christensen, among others: "Overvåking og innsynsrett" (Surveillance and the Right of Inspection), *Lov og Rett* 1985, pp. 23 ff., especially pp. 28 f.

the public from seeing the remaining documents will nevertheless exceed the practical disadvantages for the administration, and whether the remaining documents may possibly give a misleading picture of the case", cf. *Ot.prp.* 4/1981–82, p. 44. The draft memorandum, however, contains no such specific assessment; there is just a laconic statement that "in view of the important security interests that are at stake it is assumed that especially weighty reasons exist" (draft memorandum, p. 5).

In principle, public access to the administration's documents should not be restricted to a greater degree than is strictly necessary. This must also apply to the defence sphere, because it is of value in itself that defence matters too may be submitted to the critical gaze of the public.

To the extent that it can be assumed that the intelligence services of foreign States will at any rate be capable of obtaining information concerning defence matters, the real effect of restricting public access to official documents will be that it is the Norwegian people who will have greater difficulty in obtaining information about their own defences. The opportunities for a Norwegian debate about defence questions will thereby in fact be restricted even though due regard for the external security of the realm does not offer any tenable justification for restricted access to these documents. Such a result must be looked upon as rather absurd and quite inappropriate.

X

In the course of the last few years, the courts of law of Norway have dealt with several cases in which the relationship between freedom of speech and due regard for secrecy out of consideration for the external security of the realm has been the central theme. Partly, however, judicial practice in these cases shows a dubious tendency to consider the issues on the basis of an application of purely criminal law. The result of the individual decisions seems nevertheless on the whole to be compatible with the general restriction that must be laid down even when the starting point is the constitutionally entrenched right of freedom of speech. There is, however, good reason for the courts to be careful, so that a practice is not allowed to develop in which statements that can be considered political are criminalized simply because the statements are substantiated or can be substantiated by factual background material. Such a statement of the law would come dangerously close to the conditions that prevail in countries with totalitarian societal systems, but would not be worthy of a democracy based on the rule of law.

It is therefore essential that the courts should start out from the initial principle that neither freedom of speech nor the security of the realm are absolute values. In the balancing that must be done of the considerations

supporting these two basic values, it is important to find room for varied solutions, depending on what other considerations may also come into the picture. It is essential that the courts pay due regard to the need for a real public debate concerning defence matters and to the central position the press occupies in this connection, and it is also essential that the courts do not give way, but carry out a careful and real examination of the defence authorities' conduct. In any such assessment importance must be attached to the question of whether the defence authorities have taken the law into their own hands; whether breaches of constitutional, international or other rules have occurred; whether it is a case of matters that really should be kept secret; whether the matters in question really can be characterized as secrets in relation to other States—and considerable importance must also be attached to whether the information in question has simply been acquired in a lawful manner and subsequently processed or systematized. In any case it must be maintained that there is nothing criminal or suspicious in individual persons or groups interesting themselves in defence matters—even though they may have a more or less critical attitude to the defence dispositions made—and expressing their opinions of these matters.

Postscript

After this paper was finished, the Supreme Court on August 11th, 1987, by a majority of 3 to 2, pronounced an acquittal in the criminal proceedings against the editors of the periodical *Ikkevold* (Non-violence). The first judgment of the City Court was set aside by the Supreme Court because the grounds for the judgment were considered inadequate, cf. 1986 NRt 536.

Compared with previous court practice, these two decisions seem to indicate an important shift in the basic evaluation of considerations to the security of the realm and to the question whether a matter is to be considered a secret or not. It is significant that the editors' general background knowledge regarding defence installations and administration was considered a relevant factor for journalistic investigations and thereby also for the freedom of speech.

In the specific evaluation of the question whether a matter is to be regarded as secret, the majority of the Supreme Court points out, first, that the question is not simply whether information can be obtained from newspapers and periodicals and other generally accessible documents, but also whether information can possibly be obtained from other, easily accessible, sources. Secondly, the majority of the Supreme Court clarifies the importance of the editors' general background knowledge. The majority of the City Court had found that the combination of information effected by the editors required a rather special insight; that an ordinary person would have had great difficulty in finding out

how the information should be procured; and that the editors' background knowledge must therefore be conclusive, in the sense that the matter could not be regarded as being generally known. This argument was rejected by the majority of the Supreme Court. The editors' background knowledge and insight were related both to general background knowledge concerning the SOSUS installation and to their knowledge of the defence administration which enabled them to carry out telephone inquiries. "Investigations made in the course of journalistic activity will always be stamped with the insight and experience of the individual investigator, and it cannot be considered conclusive that a person with ordinary information only would not have had the same qualifications for making similar investigations." However, the majority of the Supreme Court queried the view that it would be sufficient for an acquittal if the editors had simply followed a usual and well-accepted journalistic approach. The question of how far anyone may go in his investigations and what means may be used are factors to be considered in reaching a discretionary decision. In this regard the majority of the Supreme Court emphasized that the actual investigations had been carried out in a "generally open manner"; no surreptitious procedure was used at all. In principle, weight must also be attached to the damage caused by the publication of the article. In the present case, however, the evidence was so contradictory that this factor could not be decisive.

The minority of the Supreme Court found that the case must be decided by balancing due consideration to the security of the realm against the protection to be given to freedom of speech and to the importance of being able to procure information as a basis for a free debate in a democratic society. The minority, however, attached importance to the fact that the defence authorities had made great efforts to keep the location of the land installation secret; that the editors had been aware of this; and that they had nevertheless determined to obtain this knowledge, and they had engaged in deliberate efforts to achieve this, even though part of the information was obtained fortuitously. Even for persons with a particular insight it was necessary to make a considerable effort in order to arrive at the necessary conclusions.