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Freedom of Expression and the Limits of Tolerance: A Swedish Saga

1 Introduction

Sagas are epic tales from the Scandinavian countries, dating from the Middle Ages. They were often realistic but also legendary and fictitious. As legal and political discussion on freedom of expression and its limits seem to have the same qualities, I will tell you a story of how Swedish law in the area of freedom of expression has developed in recent years. It is realistic in most parts, it includes some legendary topics and fiction does play a role. Furthermore, the topic is hopefully of interest to all those find comparative studies useful, even though Swedish law might seem a bit “provincial” in the global village of jurisprudence. Using the metaphor of a Saga I hope to catch your attention. I will try to show that Swedish law has some unique features that can be of more than anecdotal interest to scholars, legislators and practitioners in other jurisdictions, while at the same time being affected by the regional and global changes in how law is interpreted that is affecting every jurisdiction. It is thus something unknown and something well known, at the same time. Two substantive areas of the protection of freedom of expression will be used to illustrate this: hate-speech and whistle blowing.

The legal situation in Sweden on racist speeches (or hate-speech) will be discussed, particularly in context with the effects of incorporating the European Convention on Human Rights into Swedish law. What we will see is a rather restrictive regulation undergoing change as Swedish courts interpret the Convention and its demands on Swedish law. The limits of tolerance of extremist speeches in Sweden seem to be shifting and I will point out some of these shifts and discuss their impact. A comparison

with the USA will further highlight what is specifically Swedish/European about the solutions of the Swedish courts.

When it comes to whistle blowing, the wide protection of persons “leaking” information from public authorities under Swedish law will be discussed in regard to recent criticism of that protection. Tolerance of employees criticizing the authority they are employed in or exposing its weaknesses seems to be lower than ever. This will be analyzed in context with a shift in the way Swedish law regards the public employee, which more and more emphasizes the “employee” side of the relationship with the State and less and less the “public” component. It will be shown that public employers’ demands on loyalty and efficiency are gaining ground at the expense of public insight into the workings of governmental agencies. This trend is certainly making Swedish law more “normal” in a European context, as was the case with hate-speech, but shows that this “Europeanization” is a mixed blessing. Also in this context, some reflections on differences and similarities with the legal solutions in the USA will be included.

Before we proceed to tackle these questions, we need some background information on the legal protection of freedom of expression in Swedish law. This will be done by comparing Swedish law with US law in this field, as that will serve to highlight some of the particularities of Swedish law well.

2 Different yet similar

It is difficult to imagine two democratic countries more different than Sweden and the USA when it comes to constitutional law. Sweden had an old constitution from 1809 until 1975 and in time – contrary to the situation in the USA – this document was in many ways bypassed by reality. Much of the 20th century has been known as the “constitution-less period”, as fundamental political and legal changes took place without much constitutional change in the formal sense.¹ The political and legal culture of Sweden can be compared with that of the UK in the sense that

¹ I will not dwell on the well-known discussion of constitutional change in general and the differences between formal and informal changes. For the US context of this discussion see i.e. Ackerman, *We the People: Transformations* (1998) and Strauss, *The Irrelevance of Constitutional Amendments*, 114 Harv. L.R. 1457 (2001). For Nordic and Baltic perspectives, see Smith (ed.), *The Constitution as an Instrument of Change* (2003)

the Parliament (*Riksdagen*) is in theory supreme and that judicial review is something, if not unknown, so at least unwanted. The constitutional system of Sweden thus has had few checks and balances that a US lawyer would recognize. To this might be added that Sweden is a continental legal system, with no “common law” that gives the courts a special position in the legal system. So, all in all and only with a slight exaggeration, Swedish constitutional law has a history as different from the USA as possible.

But this is not entirely true. When it comes to the constitutional protection of freedom of expression, it is not as different as in other areas of constitutional law. On the contrary, in many ways it would be justified to regard Sweden and the USA as the two countries in the world where freedom of expression is most protected. On the other hand, this similarity is one of results only, not of legal technique. The ways in which Swedish and US law protects freedom of expression are very different indeed. Let's turn our attention to those details.

3 USA and Europe: A Substantive Approach

The US constitution provides protection of freedom of expression in the First Amendment. The rulings of the Supreme Court have supplemented the text with a number of principles, categories and judicial tests into a framework for legal analysis and judicial review. Case law has been the US solution to the problem of finding the limits of freedom of expression. A quick glance at the protection under the European Convention of Human Rights Article 10 shows a similar approach: a rather vague rule, clarified and refined by case-law from the European Court of Human Rights (ECtHR). As we can see, these two systems are very similar in structure, even if the legal solutions in substance are not always the same.

The main thrust of the case law of both these systems is that the protection of expression is intimately connected with its substance. This means that certain categories of expression get more or less protection: political speech is at the core of the protected area, obscene and defamatory expressions are at the outer edge. Arguably, not only the content of the expression is of importance, as factors like the nature of the infringement or limitation, the media used and the intended audience also are relevant. Nevertheless, the legal analysis is to a large degree centred on the substance of the expression, this structures much of how other factors interplay and to what degree they are decisive.

What really makes the US approach different to the ECHR is the way the Supreme Court has used judicial doctrines like overbreadth, void for vagueness, strict scrutiny and neutrality (color-blindness) to limit the scope of regulative (and interpretive) options in coping with problems related to freedom of expression. The effect has been that the US case-law is more protective as regards freedom of expression than the European experience has been, but less attentive to issues of protecting personal integrity and the often problematic situation of ethnic or religious minorities.² The ECtHR has adopted a more balancing approach, with special attention on factors such as political context etc. but mainly using the principle of proportionality on the concrete case as its tool for identifying breaches of the Convention. As an example, hate-speech would be protected if it is part of a “serious” discussion of societal issues, but not if it is right-wing intolerance.³

4 Sweden: Formalism Above All

4.1 A technological approach

To understand the Swedish way of protecting freedom of expression, we need to travel back in time, to trace its almost legendary status in Swedish law and politics. In the 18th century, the main means of expression was printing material and disseminating it. The Swedish way of protecting expression was therefore from the start connected to the form of expression rather than its content. It is the use of a certain technique that is the starting point of our system of protection. In 1766 the first Freedom of Press Act was enacted, probably the first systematic legal instrument intended to protect freedom of expression and information. It prohibited prior restraint, regulated the criminal responsibility of expression and made public documents widely available to the public. This tradition has – with certain exceptions 1772–1809 – been continued until today. The

² This is of course a gross simplification, but on the whole I think it is tenable, see Barnedt, *Freedom of Speech*, (2005) which contains an extensive comparative analysis of different regimes that protect freedom of expression, and Bull, *Reglering av yttrandefrihet* (Regulating Freedom of Expression, 2006), which is something similar, but only includes six countries.

³ See the case *Jersild v. Denmark*, 19 EHRR 1 (1995).

Freedom of Press Act in force now is from 1949 and a document that has constitutional status in Swedish law.⁴

The Freedom of Press Act sets up a specific legal framework for legal issues arising from a publication that was printed or made by some other similar techniques. Publications not made in those ways (photocopies, for example), can, under certain circumstances, also be included under the Freedom of Press Acts umbrella of rules. It is mainly a choice up to the ones who wants to spread such material if they want it to fall under the constitutional system of the Act or not. All that is needed is to clearly state the name and address of the one responsible for the material and some other pieces of information. If that is done, the material will fall under the protection of the Act.⁵ The basic rule, however, is that everything *printed* is protected by the Act. The Freedom of Expression Act – also a part of the Swedish constitutional law – sets up a similar system of rules for expression through broadcasting and recording-devices. I will not discuss this Act to any great extent here, as it is almost identical to the Freedom of Press Act in all of its substantial rules, just covering other technical means of spreading expression than printing.⁶ Below, the term “the Act” will refer to the Freedom of Press Act, but it may be borne in mind that in most cases the Freedom of Expression Act will have the same rules and what is said about “the Act” will be relevant for that Act as well.

Perhaps somewhat surprisingly, everything “protected” by the Act is not free to be printed and spread, not in any way. “Protected” is not the same as “allowed” (or “not forbidden”) in the Freedom of Press Act. What it means to be protected by the Act, is that the Act’s special rules on criminal responsibility and civil liability takes precedence over any ordinary criminal, administrative or civil law. Furthermore, its special procedure is used for any and all judicial decisions about a publication protected by the Act. This brings us to the content of the Act, what are the parts of this unique system of protection?

⁴ Sweden has four constitutional laws, the Instrument of Government (1974), The Freedom of Press Act (1949), The Freedom of Expression Act (1991) and the Act of Succession (1810).

⁵ This is of course an exception to the technical approach of the Act.

⁶ Some differences exist, for example due to the need of regulating frequencies etc. that are special to the broadcasting area, but the constitutional principles discussed below are identical in the two Acts.

4.2 The Parts of the Machine

The first rule we need to know has already been mentioned, the rule of exclusivity. If a legal claim is to be brought against anyone on the grounds that something was printed (or otherwise falls under the Act, see above), it has to be done through the Freedom of Press Act or not at all.⁷ Statutory law is not applicable in those cases. This means that the Act itself contains rules on criminal responsibility and civil liability and that these can only be changed by the procedure of constitutional revision.⁸ The other main features of this system of protection of the freedom of expression are a special system of criminal responsibility, a protection for sources and informants, a prohibition of prior restraint, a special judicial procedure for cases under the Act, special rules on evidence and intent and very strict rules of limitations. All of these interact so as to form a system that makes it very difficult indeed to take legal measures against any publication that falls under the protection of the Act.

Let us take a closer look at some of the particularities of this system.⁹ The second important feature we need to highlight is the rule of “single-person-responsibility”. The Act stipulates that for any crime under the Act only one single person may be held legally responsible and the Act regulates this by a “chain of responsibility” in Chapter 8 of the Act. This sets out who will be criminally responsible as well as liable in case of a crime or other breach of the Act. In case this person cannot be held responsible, the “chain” stipulates who will be the next in line to be held responsible. Schematically the system works step by step, so that for pub-

⁷ A useful example is the Swedish Supreme Court case NJA 1999 p. 275, in which a threat was published on the front page of a well-known tabloid. As the Act did not criminalize unlawful threats (but ordinary criminal law did), the persons responsible could not be convicted. The Act was later changed as to include unlawful threats by publication.

⁸ Something that is comparatively easy in Swedish law, it takes two ordinary decisions by the Parliament with an election held in between. It is thus mainly a brake against very hasty changes of the constitutional framework. In practice constitutional revisions are never done unless a supermajority of at least 75 % of the members of Parliament accepts it, but this is a political convention and not a constitutional requirement.

⁹ I will almost exclusively discuss the regulation in the Freedom of Press Act, but it should be noted that the Freedom of Expression Act of 1991 is almost identical in its structure and content and gives the same kind of protection to media like film, video, DVD etc. I will furthermore not deal with the issues of prior restraint (which is uncomplicated) and the particular way that criminal responsibility is regulated in the Act (which is of importance, but would bring us even further from the main issues of this contribution).

lications with an editor, the person responsible will be the editor, or the owner, or the printer and or the disseminator. It is only allowed to take a step “down” the chain if no one at the top can be found. In practice, this will typically leave all involved with an edited publication (such as a newspaper) free from responsibility, as the chief editor will be known.¹⁰ All the others involved, such as authors (in edited publications), owners, printers or distributors are then free from any legal responsibility due to the publication. Under the Act, there can be no partners in crime. This formal limitation of legal responsibility – remember that the Act takes precedence over any ordinary concepts of joint responsibility in criminal or civil law – is intended to make the practical use of the freedom of expression as foreseeable and risk-free as possible.¹¹

Any legal procedure against someone on the basis of a material protected by the Freedom of Press Act is restricted or made difficult by a number of procedural rules in the Act. This is the third aspect I want to highlight. First of all, all procedures have to be initiated by one single special prosecutor for the whole country, the Chancellor of Justice (*Justitiiekanslern*, JK).¹² This means that all decisions to prosecute (or not) are filtered through the same individual’s legal analysis and this person is at the same time expected to take the greatest possible care not to unduly infringe freedom of expression. The effect of this is that most potential cases are never even brought to court, as JK will find that the interest of freedom of expression outweighs other considerations. Very short periods of limitation make it even more difficult to start proceedings, as it will in many cases take too long before the JK is made aware of a potential crime and the rules on limitation will stop prosecution.¹³ Lastly the proceedings

¹⁰ There is a system of registration and documentation that supports these rules so that it will be ensured that information on editor, owner and printer are included in any published material. In practice this means that if there is no editor, an owner can foresee that he or she will be “the next in line” if legal consequences follow. Similarly, a printer that prints material without information on editor or owner can draw the same conclusion.

¹¹ There is in fact a double purpose, as the formal limitation of responsibility is paired with a fictitious test of criminal intent, the other side of the coin is that the police/prosecutor will always get *someone* and this will not be the fruits of a complicated criminal investigation, but rather a simple application of the formal rules of the Act.

¹² There is one exception, in the case of defamation the defamed person has the primary right to start proceedings and CJ does so only in rare cases (not even once a decade).

¹³ In case of periodical (ordinary) newspapers, the period of limitation is six months. Other printed material (such as books) has a period of limitation of one year. (See Ch 9 § 3 of the Act) The period of six months applies to radio and TV broadcasting as well,

themselves are very special: a trial on the basis of the Freedom of Press Act is the only kind of trial under Swedish law that includes a jury, it is impossible to appeal against an acquitting verdict, so the state only gets “one shot”, and the Act makes it explicit (Ch 1 § 4) that the court should be very hesitant in restricting the freedom of expression when deciding a case under the Act – the so called “instruction” of the Act.¹⁴

Lastly I would like to point to a fourth factor, namely the protection of informants. Every system of freedom of expression has a way of protecting sources, as the right for these to stay anonymous is recognized as imperative to the function of free speech. Swedish constitutional law has, I think, taken this concept a step further than most. Not only is there a right to be anonymous as a source, there is an explicit prohibition in the Act to ask questions on the subject of sources in any legal proceedings and this prohibition is applicable in all proceedings, barring those that concern grave issues of national security.¹⁵ Furthermore, in the context of public authorities, it is prohibited to investigate which public employee it was that might have leaked information to the press or an author. This goes so far as to prohibit the state or local government from investigating how secret or confidential information could have found its way to the press. In essence, it is a right to expose governmental secrets as long as this is done in order to publish or otherwise make these secrets public.¹⁶ This regulation is of course connected to the idea of a “single-person” being responsible. If informants etc. were not protected, that system of holding only one person responsible would only be an illusion, as the authorities could in practice punish more than one person for the same publication.

and the one-year limit to other technical means of distributing expressions (such as CDs and DVDs) (See Freedom of Expression Act Ch 7 § 1).

¹⁴ For the sake of completeness, I should mention that private individuals may bring cases of defamation against others under the Act. In those cases, JK has no role, but the rules on procedure and the “instruction” apply and damages in Swedish law are quite low. Only a few such cases arise per year.

¹⁵ Cases that never (sic.) happen in Sweden.

¹⁶ There are, of course, some exceptions to this, mainly concerning information on defense and foreign policy issues and on individual health (most schools and hospitals are public institutions in Sweden and holds sensitive information on pupils and patients).

5 Having Your Cake *and* Eating It!

The practical impact of the way the protection of freedom of expression is protected in Sweden is that few cases ever go to court and fewer still result in convictions or damages. The limits of what can be said are not decided in courtrooms, but in public debate. Politicians and publishers are the key figures in this debate, not lawyers. On a more abstract level this might be characterized as a system that lets us have our cake and eat it at the same time. Nothing less than a paradox!

As long as a material made public falls under the Freedom of Press (or Expression) Act a number of factors make it very difficult indeed to take legal measures against it. Both substantive and procedural rules in the Acts preclude action that would ordinarily been possible. In practice, freedom of expression is thus very well protected. At the same time, the criminal and civil law – both in statutory law and in the Acts – contains rather far-reaching restrictions on freedom of expression. Two practically important areas of law can illustrate this: Defamation law does not contain a defense of truth as in many other jurisdictions and racist speech is criminalized to the extent that ridicule and “disregard” is prohibited.¹⁷ We can thus see that Sweden has a regulation in law that in substance is not as friendly to freedom of expression as for example the USA, but that *the formal structure* of the constitutional regulation in practice leads to a result that is very much the same as in the USA.

Pragmatically, you might say that the Swedish system of protecting freedom of expression allows politicians to legislate against speech that is upsetting, unsettling and intimidating, as long as this is done in the form of constitutional amendments. As the Swedish constitution is very easy to amend, that is not a very hard obstacle for a majority in the Parliament to overcome. At the same time the Act system makes sure that little of that kind of legislation will have any real silencing effect, as few cases will ever see the inside of a court. The politicians get their opportunity to act opportunistically – silencing what they (or the public) cannot

¹⁷ See the Criminal Code Ch 5 para 1 (defamation) and Ch 16 para. 8 (incitement to hate on the basis of color of skin, religion and sexual orientation). In the preparatory works to the latter, the criminalization of hate speech, it is mentioned that all discussion of groups of peoples that goes beyond a sensible and factual (*saklig och vederhäftig*) discussion falls under the law. It does not take much “hate” to be hate-speech, one might say. I will discuss this in greater detail below.

bear to hear – while the function of freedom of expression is basically untouched. The very fact that all cases must go through the Chancellor of Justice makes sure that prosecutions on the basis of expression that falls under the Acts will never be a common thing. Together with other ingredients mentioned above, the practical impotence of any restriction on freedom of expression is almost assured.

Is this a masterstroke of political and legal prudence – making it possible to bow down to public opinion without actually abandoning the ideals of free speech – or an unwarranted manipulation of the political process – making the public and those elected think that they can change the balancing of interests in this fundamental area of law, when they really cannot? To this question there is no clear answer, but it is clear that in Sweden the discourse on free speech and its limits is not generally played out in the legal arena, that the courts in Sweden cannot (until recently, perhaps) be considered to be part of a greater project of spreading tolerance in society¹⁸ and that public attitudes towards racism or political extremism is not one of tolerance.¹⁹ The latter is also, as mentioned, reflected in the substantive legislation. The conflict between the general opinion and the constitutional framework of the Freedom of Press Act is not easily observable, as in the case when the First Amendment of the US constitution stops legislative action, because the Act does not really stop any attempt to restrict free speech, it just dissipates it. This means that potential conflicts of values in a way are “swept under the carpet” instead of brought out into the open. Perhaps we can see a glimpse of that elusive concept (political/legal) “culture” in this and that is all there is to it.

6 Cracks in the Armor

The system of protection of freedom of expression described above might seem exotic, but it all the same puts Sweden at the top of the league for legal protection of freedom of expression in the world. All will be well, one might think. Of course, that is not the case; there are several prob-

¹⁸ As, for example Bollinger, *The Tolerant Society*, (1986) argues that the courts have a role in “teaching” tolerance and Gottlieb/Schultz, *The Empirical Basis of First Amendment Principles*, 19 *Journal of Law & Politics*, 145 (2003).

¹⁹ This is clear from the substantive legislation on limits on freedom of speech, as well as from the public debate, where most voices heard argue for more restrictions on intolerant speech.

lems with the formalistic approach of the Swedish constitution. Some of them are currently being investigated by a legislative committee on a constitutional revision of the Freedom of Press Act and the Freedom of Expression Act. At the core of the problem is the idea of tying the protection to the use of certain techniques, as the technological rate of change greatly outpaces the legal one. That is, however an issue that I will not delve deeper into here. Instead I will concentrate on other problems with the connection between technology and constitutional protection.

One of these is the fact that ordinary unadorned speech – spoken words to an audience at a meeting or on a street corner– is not protected under the Acts discussed above. The absence of technological means of mass-production of the expressions leaves these kinds of “simple” messages under the more general protection of the Instrument of Government, Chapter 2. This Chapter contains a very general statement that freedom of expression must not be infringed unless important societal interests so demand and that the principle of proportionality must be observed when such legislation is passed. As a constitutional barrier against infringements of freedom of expression, the regulation in Chapter 2 has a rather unsuccessful track record.²⁰ Criminal, civil and administrative law can take full effect and limit the free word in a number of ways. This is also clear in the context of what US constitutional lawyers would call “speech-plus” situations, as these seldom involve any of the techniques required to fall under the protection of the Acts. Symbolic speech and issues of “time, place and manner” are often not viewed as related to freedom of expression at all under the Instrument of Government.²¹ One might suspect that the dominant position of the Acts – their almost “mythical” position in Swedish political and legal thinking – have blinded us to the importance of some of the other aspects of the free word.

Let me give you an example of this blind spot. In Sweden *offensive conduct* is a crime, sorted under the heading of “crimes against public order” in the Criminal Code (Ch 16 para. 16). It prohibits conduct that typically enrages the public and there is an obvious risk that this could be

²⁰ In part, this is due to the fact that judicial review in Sweden is conducted against a standard of “manifest mistake” (Ch. 11 para.14) – a standard that in practice works out rather like the “rational basis” test of US Constitutional law – all in all a very lenient attitude to the choices of the legislator.

²¹ See Ch. 2 § 13 Section 3.

used in contexts where the “conduct” was in essence “speech”. The preparatory works of the criminal law acknowledge this risk and direct courts not to apply the regulation as a limitation to freedom of expression. At the same time however, the leading comment on criminal law in Sweden expresses the view that the message of a certain conduct can fall under the criminalization, if that message is made public by the conduct.²² The inconsequence of the guiding texts is apparent and has made the case law all but foreseeable. Two brief examples might be sufficient to illustrate this for our purposes. Burning or desecrating flags in clearly expressive situations have been punished under Swedish law without as much a reference to the protection of freedom of expression by the courts.²³ This is quite different from how similar cases have been handled in the USA.²⁴ Likewise, expressing dislike of a player in a sports game by reference to his color of skin was found to be a crime of enraging conduct, without any reference to freedom of expression.²⁵ The crime of enraging conduct seem to be “under the radar” of many Swedish lawyers (and judges) sensitivity to freedom of expression issues.²⁶

It may seem as the Swedish system of protection of freedom of expression under the Acts gives such weight to some forms of expression that others are easily overlooked. In a world where not all have the means – financially or otherwise – to express themselves through the mass media this can be a serious problem. The difference in treatment of expression

²² See Berggren, *Brottsbalken en kommentar* (The Criminal Code a comment) Ch 16 § 16.

²³ See the Court of Appeal cases RH 84:37 and RH 97:24.

²⁴ *Texas v. Johnson*, 491 U.S. 397 (1989) and *Spence v. Washington*, 418 U.S. 405 (1974).

²⁵ Judgement by Svea Court of Appeal 2006-07-04, case B 8117-05. The court does note that expressions of opinions are common during games, but that does not change its evaluation of the specific comment, which was something like “take that nigger off the field”. In the context of a youth game where the accused was one of the parents, the court found the remark well beyond what could be accepted. No specific reference was made to the constitutional protection of freedom of expression or the protection offered by the European Convention, which might have had an effect on the interpretation of the criminal statute (see below).

²⁶ Not all, though. The Swedish Parliamentary Ombudsman (JO) has recently criticized the police for stopping expressions of opinions on the grounds of enraging conduct, see JO report to the Parliament 2006/07 p. 140 and JO decision 2008-04-10, file 2128-2006 (available on www.jo.se).

covered by the special constitutional protection of mass media and other expression becomes more and more difficult to explain rationally, particularly as people's media habits are changing.²⁷

7 Racist Speech and a European Challenge from Within

7.1 Free Speech in The Supreme Court

I will now turn to the first of the substantive areas of law in this field that was mentioned in the introduction: racist and otherwise intolerant speech directed against certain groups in society. As noted above, Swedish substantive (criminal) law in this area has been rather far-reaching and restrictive from a freedom of expression perspective. One might say that the Swedish legal regulation and case law in many ways have been the opposite to that in the USA.²⁸

In a recent string of cases from the Swedish Supreme Court, this state of affairs has been challenged.²⁹ In short, it can be said that the Supreme Court for the first time applied Swedish criminal law to hate-speech law with specific regard to the European Convention on Human Rights (ECHR) Article 10.³⁰ The result has been controversial to say the least and sparked a debate on the role of courts in our constitutional system. The Supreme Court has namely applied the law narrowly, in direct contradiction of statements from the Parliament in the preparatory works dating back as late as from 2002. However, before we discuss the general impact of these cases on the limits of freedom of expression, I would like to point out some of the specific issues that were under consideration.

The first case was about the elderly Reverent Green, a conservative

²⁷ For example, blogs seem to be taking over from editorial pages as leading instruments of raising public opinion, but these are not covered by the Freedom of Expression Act.

²⁸ See cases *Brandenburg v. Ohio* 395 US 447 (1969) and *RAV v City of St Paul*, 505 US 377 (1992). For comparative analysis, see Barendt (supra, note 2), Rosenfeld, *Hate Speech in Comparative Jurisprudence: A Comparative Analysis*, 24 *Cardozo L.R.* 1523 (2002-2003), Knechtle, *When to Regulate Hate Speech*, 110 *Penn. St. L.R.* 539 (2005-2006) and Alford, *Free Speech and the Case for Constitutional Exceptionalism*, 106 *Mich. L.R.* 1071 (2007-2008).

²⁹ *NJA* 2005 p. 805, *NJA* 2006 p. 467 and *NJA* 2007 p. 805.

³⁰ In earlier cases, like *NJA* 1996 p. 577 and *RH* 1998:77, the Convention played a very limited role in the courts decisions.

Christian (in a Swedish context). He held a sermon on the theme of homosexuality and the Bible, in which he made some very negative comments on homosexuals as a group. The one that went furthest is probably the statement that “homosexuals are a cancer on society”, something that could be interpreted as a threat, but that at the very least constituted a disregard for homosexuals. The district court held Green responsible for the crime of incitement to hatred on the basis of color of skin, religion or sexual orientation.³¹ The Court of Appeal reversed it on the grounds that a conviction would be a too far-reaching limitation of religious freedom of expression and made references to the Swedish constitution as well as the European Convention. In the Supreme Court, the case was decided on the grounds that a conviction, however in line with the intentions of the legislator, would not be proportional and thus in breach of the ECHR. Article 10 of the European Convention played a dominant role in the Court’s analysis and it was clear that what would otherwise have been an acceptable application of the criminal statute, in the Court’s view could not live up to the European standard. Swedish criminal law had to be interpreted in the light of the Convention and this made the Court uphold the decision of the Court of Appeal. The decision was criticized on a number of grounds, but the ones of interest to us are the fear that it would open the way to all kinds of hate-speech under the cover of religion and that the Court overstepped its constitutional role in going directly against the legislators’ clearly expressed will.

The next case, from 2006, was about a leaflet that two young men distributed in a high school. It contained a criticism of the education on sexual orientation, which was said to be dominated by homosexuals. Homosexuality was, among other things, said to be “unnatural” and “perverse” and juxtaposed with “other perversions” such as pedophilia in the leaflet. The men were convicted in the district court, but the Court of Appeal acquitted them with reference to the Green case. A divided (3 to 2) Supreme Court, put great emphasis on the case law of the European Court of Human Rights that stresses that freedom of expression must be used with regard to other people’s feelings³² and the fact that the school is a special environment where other restrictions on freedom of expression are acceptable than in society in general. To most observers, the old order was restored and Green was a special case, explained by its atypical

³¹ A statute much like the one tried in the US case RAV (see note 28 supra).

³² Citing the case *Otto Preminger Institute*

context (the sermon). The minority could not find that the environment itself was of importance and pointed out that the statements, however misinformed, were part of a debate on the content of education and no worse than the statements in the Green case. In the view of the minority, this kind of speech was better countered in an open debate, then in criminal proceedings.

So, when the Court in 2007 again handed down two decisions (gathered in the same case) that limited the application of the criminal statute, it was something of a surprise. The first (I) was about the content of a blog on a religious home page. The statements published there were quite scary; killing homosexuals to save them from sin was one of the ideas put forward. But the accused was not the author of these statements, only the administrator of the blog. According to a specific law on the publishing of some internet material,³³ the administrator of a blog has a legal responsibility to monitor the content of the blog and remove any material that is “manifestly” illegal. The issue was whether the accused should have realized that the statements were clearly within the criminalized area or not. The other (II) situation was also about the content of a homepage, but this time it was the homepage of right-wing extremist newspaper. That kind of material on the internet falls under the protection of the Freedom of Expression Act (*Yttrandefrihetsgrundlagen*),³⁴ so the special rules on procedure etc. mentioned above were applicable. The published material was about gypsies and homosexuals and generally critical and intolerant towards such groups. The lower courts convicted in the first case, but acquitted in the higher and some further guidance was clearly necessary.

Again the European Convention played an important role in the Court’s argumentation and again the Court was deeply divided. Now however, the minority from 2006 was in the majority. The majority stressed that the decisions from 2006 were about expression in a special environment, one which is dedicated to education.³⁵ The Court also pointed out that in the 2006 case, nearly all students in the school

³³ That for technical reasons falls outside the protection of the Freedom of Expression Act, and thus can be regulated in ordinary law.

³⁴ Due to some technical issues, that we will not give more attention.

³⁵ An environment that is also treated as somewhat special in US jurisprudence, see *Grayned v. City of Rockford*, 408 US 104 (1972), *Bethel School District No. 403 v. Fraser*, 478 US 675 (1986), *West Side Community Board of Education v. Mergens*, 496 US 226 (1990) and *Veronica School District 47J v. Acton* (1995).

received the leaflet, willingly or otherwise, while in the 2005 and 2007 cases, receivers of the expressions in question had to take their own initiative in order to receive the message. Furthermore, the Court gave some importance to the fact that religion as such should not be given special treatment. Instead the Court stressed the need for a contextualized analysis, in which the religious background could be a factor, but not a decisive one.

The idea of right-wing extremists “hiding behind religion” was thus rebutted, but in a way that surely disappointed some, as right-wing extremist speech was treated on a par with religious expression. In its carefully balancing approach, the court closely followed case law from the European Court of Human Rights but had to tackle issues never decided upon by the Strasbourg Court. Otherwise, in Case (I) the Court gave some weight to the fact that after the decisions of 2005 and 2006, it would almost unrealistic to have high expectations on an individual to be able to find the expressions in question “manifestly” criminal. In Case (II) the Court stressed the special character of the Freedom of Expression Act and the carefulness it demanded from courts so that free debate would not be hampered unnecessarily.³⁶ In both cases the accused were acquitted.

7.2 Disregarding “disregard” and taking on a tough job

I would like to highlight two conclusions that can be drawn from these cases. The first regards the application of the Swedish criminal law and the “disregard” part of the crime “incitement on the grounds of color of skin, religion and sexual orientation”. The Court’s decisions must be understood as that the earlier interpretation of this in Swedish courts was going too far, limiting freedom of expression too much. This view might be contested, as the cases from 2005 and 2007 are both quite special. The first one is about a sermon and a religious context. The second is about a kind of subsidiary responsibility for other persons’ expressions (I) and about an expression protected by the special constitutional Freedom of Expression Act (II). All of them might be viewed as exceptions in themselves, which would mean that the case from 2006 and earlier – quite far-reaching – cases are still “good law”.

³⁶ The minority once again stressed that freedom of expression is to be used with good judgment and care for other people’s feelings.

However compelling such an argument might be, I would not subscribe to it. First of all, the Court's division on the cases of 2006 and 2007 speaks of a greater difference of opinion than the technical explanation above can imply. The majority of 2007 does not accept the argument of a certain responsibility when using the freedom of expression and the way it argues, the "special" case is the one from 2006, as the 2007 majority places emphasis on the educational environment and the "captive audience" of students in that case.³⁷ Also, it would seem strange for the Supreme Court, with its function of giving guidance to the lower courts, to spend its time with legal questions at the fringe of the issues involved, while at the same time sending a message of status quo. The repeated acquittals are, in my view, better understood as a message to the lower courts that something new is afoot. And it is clear from the way the Court uses the Convention, that this change has something to do with the way the European Convention affects the application of Swedish criminal law.

Finally, it must be noted that the Supreme Court in these cases – if they are interpreted as a general move towards a more restrictive application of the criminalization – takes "ordinary law" closer to the practical application of the Freedom of Press and the Freedom of Expressions Act.³⁸ The differences between cases falling under the special protection of mass media and those that do not are reduced by these decisions, something that might make freedom of expression a more coherent and logical area of law as a whole. I would thus like to view the string of cases from 2005 to 2007 as a general "liberalization" of Swedish hate-speech law. There are also signs from the lower courts that this is the message they have heard.³⁹

³⁷ In US jurisprudence the concept of "captive audience" has mainly been used in situations where someone has no choice but to suffer a message, for example in the context of noise close to home, etc, see *Cohen v. California*, 403 US 15 (1972) and *Frisby v. Schultz*, 487 US 474 (1988). The Swedish Court's analysis is not precisely comparable to that, but the idea that exposure to the ideas whether willing or not as a special factor in the freedom of expression analysis is akin to the "captive audience" argument, as I understand it.

³⁸ As mentioned above, the Chancellor of Justice is generally restrictive in bringing charges against someone on the basis of published material, not prosecuting religious magazines and other material for a long time even though they have contained material much more disregarding than what was on trial in the cases of 2005–2007 (of course Case II from 2007 was brought to court by the CoJ and that is in itself a bit surprising).

³⁹ See Svea Court of Appeal, case B 7166-07, judgement 2008-02-26 and the Skåne and

The second issue of interest to us here is the way the Swedish Supreme Court has had to use the European Convention “on its own”, that is without any clear guidance from the case law of the Strasbourg Court. In a way this has had a constitutional impact, as Swedish courts by tradition have been very loyal to the legislature, trying their best to achieve the ends of any legislative product.⁴⁰ What we have is a case where the Government and the Parliament have considered the impact of the European Convention during the legislative process and found it possible to criminalize certain expressions. The fact that the Supreme Court finds to the contrary without clear support in the case law of the ECtHR is a bit revolutionary in the Swedish context.

This can in itself be a sign of two different things, worthy of some discussion. The first is a different constitutional position for Swedish courts, a change that comes with the influence of European law. In order to be able to question the legislation, courts need a “higher law” and Swedish constitutional law has traditionally not been that law. European law has an effect very similar to a federal legal system and provides national courts with that higher law. This is particularly evident in constitutional systems where courts have had little to do with control of the legislative branch of government.⁴¹ The second is the way this has brought at least the Nordic higher courts into a convergent interpretation of the limits of freedom of expression.⁴² The Supreme Courts of Sweden, Denmark, Norway, Iceland and Finland are well aware of each other’s decisions and seek guidance from (but are of course not controlled by) that case law.⁴³

Blekinge Court of Appeal, case B1729-07, judgement 2008-05-12 in which concern for freedom of expression had the courts reverse district court verdicts.

⁴⁰ This has provoked a long-standing and rather heated debate on judicial reverence towards the Parliament (Riksdagen), see for example Nergelius, 2005 – The Year When European Law and its Supremacy was Finally Acknowledged by Swedish Courts, in Bull/Cramér (eds.) *Swedish Studies in European Law* vol 2 (2008) pp. 145–157.

⁴¹ Even more obvious than the Swedish example is the change in the British legal system brought about by the membership in the Union and the Human Rights Act of 1998. As British courts traditionally had no power to involve themselves with judicial review of Acts of Parliament, the impact of European law has been nothing less than a constitutional revision of the system of government in the UK:

⁴² See Bull (supra, note 2) p. 351.

⁴³ Due to cultural and historical connections and closely related languages, a certain “communication” between these courts has always existed (in modern times), in many fields of law. Constitutional law has, however, been somewhat outside of that “sharing” experience as both Sweden and Finland has had different constitutional set-ups when

A “common law” of human rights might indeed be growing in – and in between – what is essentially continental legal systems.

What we see is a growth of quite independent interpretations of the Convention, something that the ECtHR has sought for a long time,⁴⁴ but that has the downside that it overthrows national constitutional arrangements regarding the relations between courts and legislators. Once again, the counter-majoritarian difficulty of judicial control of political institutions comes to the forefront of the discussion. How far can the Supreme Court judges in our region push the interpretation of the Convention before their legitimacy to do so is questioned? The debate in the wake of the decisions on hate speech in the Swedish Supreme Court might indicate that this limit has now been reached. If the Court wishes to proceed down the road of independent interpretation – something I regard as highly likely – we will see a debate in Sweden much like the one that has been going on in the USA for many years. So, even if the Convention might not bring US and European law closer in substance, it does put the European discussion on judicial review into a position that is very similar to the one in the USA.⁴⁵

8 Openness or Loyalty?

8.1 An open administration

Swedish constitutional law has not managed to export as many of its concepts as German and US law has. Our legal tradition is a small one and our language is not well known around the world. But there are two institutions that we have had certain success with in “selling” to the world. The first and most well known is the Ombudsman.⁴⁶ The other is the Swedish system of openness and transparency in governmental

compared to the other three countries (see Husa, *Guarding the Constitutionality of Laws in the Nordic Countries*, 48 *Am. J. Comp. L.* 345 (2000)).

⁴⁴ See *Kulda v Poland*, where the ECtHR states that the very system of the Convention demands that national courts takes the prime responsibility for controlling that the Convention is followed in law as well as in practice. The Strasbourg Court is presently overwhelmed by cases and needs to push that caseload back to the national systems.

⁴⁵ The US literature on the subject is vast. Some views that have made major impact are Bickel, *The Least Dangerous Branch* (1962), Ely, *Democracy and Distrust* (1980) and Bork, *The Tempting of America* (1991).

⁴⁶ Together with “smorgasbord”, this is one of few Swedish words that have found its way into the English language. For a brief overview of the background and constitutional

administration. In a European context, this is something unusual, as the traditional way of viewing the inner workings of government has been to regard it as the private affairs of the King or Crown. Even after the spread of democracy (ending after WWII), this tradition has been strong. It is characterized by the attitude that documents and information on the inner workings of government are secret and only disclosed at the leisure of governmental officials. There is no “right” for citizens to have access to this information.

As already mentioned, the contrary is true in Swedish constitutional law. Based on the Freedom of Press Act of 1766, a right to access public documents was recognized very early on in Swedish administrative law. The rule is that public documents are accessible, and the exceptions to this rule must be carefully drawn and gathered in a single Secrecy Act.⁴⁷ It is forbidden to ask why a person wants to see a certain document and no other costs than those immediately connected to the disclosure of the document (i.e. copying) is allowed. Decisions to withhold information are subject to appeal in a court of law. The whole system of access to public documents is founded on a rather far-reaching regulation on the duty to keep informative records of any document arriving at or leaving any public authority and keeping these records public as well. One of Sweden’s major ambitions in the work on a political system in the European Union has been to export this tradition of openness to the political and administrative institutions of the Union. This has so far been somewhat successful, even if change is taking place slowly.⁴⁸

In Sweden this right to get information on the inner workings of the government and governmental authorities has always been closely connected with the idea of the Press as a watchdog of political power. It is journalists and critics of government that have special use for openness in the administration. From this perspective it is only natural that not only should the Press have access to documents, but also other information on how public power and public funds are being used. From this a broad

position of the Swedish Ombudsman, see Bull, *The Original Ombudsman*, 6 *European Public Law* 3 (2000), pp. 334–344.

⁴⁷ *Sekretesslagen*, SFS 1980:100.

⁴⁸ In the case-law of the European Court of Justice, Sweden has often taken part or Swedish people have been involved in just these kind of issues, pushing the legal development towards a “Swedish” approach to openness, see i.e. C-64/05 P, *Kingdom of Sweden v. Council of the European Union*, judgment 2007-12-18 and C-39/05 P, *Kingdom of Sweden v. Council of the European Union*, judgment 2008-07-01.

right for public employees to give the press information on these matters follows on logically. In the Freedom of Press Act, this is made concrete by the special right to be an informant of the press (*meddelarfrihet*).⁴⁹ Informants are protected by a number of constitutional provisions, some well known in other jurisdictions, such as the right to remain anonymous. But in Sweden this protection has been taken to another level. In the context of public administration, it is forbidden – and constitutionally sanctioned – to try to find out which employee is responsible for leaks to the press.⁵⁰ Furthermore, some of the limits to the Freedom of Expression of public employees that are common in other jurisdictions, such as restrictions on membership in political parties, organizations etc, are not allowed under the Swedish system.⁵¹

More than that, it is actually allowed to act in contravention to the Secrecy Act and expose information classified as “secret” *if* this is done in order to publicly discuss the workings of our administration. In practice this means that what you cannot tell your spouse, you can tell the press. And, furthermore, even in cases when someone acts as an open informant to the press or otherwise takes part in the public debate, the government (and its authorities) is forbidden to resort to any kind of reprisals against that person on the grounds of the expression or disclosure.⁵²

Internationally, this broad right for public employees to inform the press or speak out themselves without fear of any sanction is quite unique.⁵³ Swedish constitutional law views the public employee as part of the machinery of public power to the extent that the employers’ interest

⁴⁹ Actually, the right encompasses giving information to anyone with intent of making it public in a media covered by the Acts, and not only journalists as such.

⁵⁰ Crimes may be punished by prison, something that might be quite surprising for a senior administrative manager who has tried to uncover who leaked unflattering information to the media.

⁵¹ For US, see *Broadrick v. Oklahoma*, 413 US 601 (1973) and *Rankin v. McPerson*, 483 US 378 (1987).

⁵² This follows from a rather sophisticated interpretation of the Freedom of Press Act Ch. 1 § 3 and the principle of exclusivity (supra note 4): As no action may be taken against a person on the grounds of an expression in the media covered by the Act if there is no specific support for that action in the Act, no negative sanction may be enforced against an employee due to his or her expressions about their employer (the government). The Act does not include any rights for employers to sanction the employee for publications, information etc. and the principle of exclusivity rules out any sanctions on the basis of contract law, labor law or otherwise.

⁵³ See Barendt (supra note 2) pp. 108–112 and 193–197.

in loyalty and efficiency has had to give way to the idea of control of public power. Now, the reader should not think for a minute that this special constitutional framework is problem-free. Here I will only concentrate on two of the difficulties, namely the idea that only civil servants are protected by the special rules on whistle-blowing and the issue of what constitutes a “sanction” in the system of that protection.

8.2 As time goes by, Public goes Private

The constitutional protection of whistleblowers and other informants (mentioned above: anonymity, a right to disclose classified information, prohibition on trying to unveil the source and protection against sanctions) is wholly dependent upon the classical distinction between public and private. Only public employees enjoy the constitutional protection, as only they are intimately connected to the use of public power.

In 2005, the Chancellor of Justice, who has the task of guarding the rights in the Freedom of Press Act, brought charges against a high ranked official within local government for having acted in a way that was incompatible with the prohibition on sanctions for using one’s freedom of speech.⁵⁴ A district court handed down a verdict in the case and their finding surprised many observers. The court first stated that criminal responsibility for breaching the prohibition in question was dependent upon whether the action of the official was regarded as a use of public power or as a measure taken within a contractual relationship – a private law issue. If the measures were only of a public nature, criminal responsibility was possible.⁵⁵

Now, the system of protection of whistleblowers under the Freedom of Press Act is basically from 1949. The rules on criminal responsibility were from the 1970s. At both these times, there was no doubt that the relationship between local government and people employed there – was a public law relationship. A sanction taken by an official in local government against an employee was therefore an exercise of public power. Since then however, the court noted, the nature of the relationship between local government as an employer and its employees has changed. It has

⁵⁴ See Chancellor of Justice, decision 2005-10-24, dnr 3841-04-35.

⁵⁵ The Swedish Criminal Code, Ch. 20 § 1 criminalizes wrongdoing in public service, but connects this with the exercise of public power. Sanctions for other faults in public service should be handled as labor law cases, not criminal law issues.

been deregulated and basically turned into an “ordinary” contract between parties. Viewed this way, it was now difficult to say whether the action taken by the official should be regarded as an exercise of public power or not, but the court found that the strongest arguments supported the view that the private components of the relationship were dominant. Thus, criminal responsibility was out of the question. By a few strokes of the pen, the court did away with constitutional protection of over 400 000 potential whistle-blowers.⁵⁶ The CoJ did not appeal and it seems that the reasoning of the district court has also convinced the Government. The issue of criminal law protection of whistleblower in local government is now being considered by a public enquiry but it is unclear if anything will come out of that, and if it does, it will probably not be before the year 2011.⁵⁷ For at least six years employees in local government have had to wait for the right to speak out without fear for losing their jobs. A long time one might think ...

8.3 The Nature of the Sanction

The second problematic issue with Swedish protection of whistleblowers I would like to discuss is one of definition. As mentioned above, the Freedom of Press Act prohibits reprisals that have no ground in the Act itself. Sacking someone for expressing their views in media is certainly something that is covered by the protection, by just how far does it go? Are measures such as lack of promotion, assignment to new (and less interesting) positions, open or indirect criticism of the employee, etc. also forbidden? These questions are not easy to answer and the institutions that have to assure that the administration respects to freedom of expression have somewhat different opinions on the matter.

The Chancellor of Justice (JK) has drawn the line by using the concept of *a concrete negative sanction*. By this the JK means that if it is shown that a certain action from the public employer is taken *because* an employee has used their freedom of expression and the action is *negative in a concrete way*, like loss of income, worse working hours etc, then it is

⁵⁶ The number of persons employed by local government in Sweden is 2/3 of the public employees in the country.

⁵⁷ See the proposal in the report SOU 2009:14, which should lead to a constitutional amendment that comes into force 2011, if nothing unexpected happens in the Parliament.

unconstitutional. Merely criticizing an employee, directly or indirectly, is for example not such a concrete sanction, as it has no specific negative consequences for the employee. The same goes for threatening with legal consequences of a certain kind, as long as no legal procedure is actually started. Instead, the JK has used a secondary analysis of such statements in order to discuss their appropriateness. While not constituting a breach of the constitutional protection of freedom of expression, such action might be *inappropriate* if it gives the employees the feeling that using their constitutional rights will be viewed negatively by the employer. Officials in the administration should therefore be restrictive in how they express their views on employees' contacts with media. One explanation for the Chancellor's rather restrictive view is that in cases where a breach of the constitutional protection has occurred, criminal sanctions might follow. It is of course important that there is a clear line between what constitutes a crime and what does not. By adopting the concrete negative sanction-approach, the JK has a tool for drawing that line with some consistency.

JK does leave open a certain area of legitimate criticism, holding that an administration must be able to have an internal dialogue on how the constitutional rights of the employees are used without that constituting a breach of those rights. The Chancellor has furthermore pointed out that the far-reaching freedom of public employees to inform media and express themselves therein is connected with a responsibility to use that freedom sensibly. If the right is misused, for example by selling media information for monetary gain alone, and this leads to the obstruction of the administrative or legal system, it might not be possible to keep this freedom in its current form. If the administration constantly leaks vital secret information, for reasons of personal gain, the situation will soon reach the limit of what is acceptable. Terms like "efficiency" and "decency" will take priority over "openness" in the public debate and the result may be that our long tradition of openness terminates itself.

Now, the other institution with the special task of guaranteeing that the administration respects the rights of the citizens is the Parliamentary Ombudsman (in Sweden most often called Justitieombudsmannen,⁵⁸ JO). JO has taken a somewhat different approach to the problem of which actions that can constitute a breach of the constitutional protec-

⁵⁸ The correct term is *Riksdagens ombudsman* (see Instrument of Government Ch. 12 § 6), but that is only used in statutory language.

tion of whistleblowers. Consistently, JO has held that even indirect criticism, expressing for example disappointment that certain information has reached the media, is unconstitutional. JO maintains that the only legitimate response of an administration that feels that its employees are giving the public a false picture of the administration is to publish contrary, correct information. Even careful expressions of criticism will, according to JO, lead to a climate where public employees know that it is better to be silent than to speak out, that contacts with journalists are not approved of, etc. In order to avoid that, which in time will lead to a decline of informed public debate, no criteria of concrete negative sanctions can be upheld when discussing the constitutionality of actions against informers.

We do not have any guiding decision from the courts on this issue, so the question of which perspective is the legally “correct” one is still in the balance. While understanding the more restrictive approach of JK – it is after all a question of criminal sanctions and misuse of the constitutional protection is not unheard of⁵⁹ – I do, however, feel that the view of JO is better in the long run. The inclination of most employees is not to embarrass their employer, and most people want to be proud (or at least not ashamed) of their workplace. And there are many subtle ways in which an employer can make the employees hesitant to use their freedom of expression in a critical way, regardless of what approach you take. Most legal disputes in this area are about whether actions taken by the employer were a reprisal for using freedom of speech, or if some other – legitimate – ground existed. Many times it is difficult to establish that the sole or main purpose of the action was to get back at someone for talking to the media or otherwise using their freedom of expression, or if there were other problems with the employee. Taken altogether, I feel that any opening for more subtle reprisals should be closed in order to give employees as much support as possible in using their constitutional rights. Because of this, the approach of JO is to be preferred. Public employees that secretly expose the inner workings of their administration or that are openly critical of the administration will probably never get much support from the employer and perhaps not even from fellow

⁵⁹ Just recently, a 2000-page long police investigation on a well-known murder in Sweden was made public on the internet, containing pictures of murdered children etc. The father of the children asked the publishers to take the pictures away, but they refused and referred to their constitutional rights of disclosure. The Minister of Justice has since – no surprise – expressed the view that the system might need an adjustment and that the Government will look into that question.

workers, families or communities. Troublemakers are little loved, sometimes for good reasons, sometimes not. In order not to make it even harder than it already is to speak out or to inform the media, the constitutional protection in Swedish law should be interpreted as also covering indirect reprisals and the like.

9 Conclusion

In the end, it must be noted that the Swedish system of protection of freedom of expression has some real challenges to confront. First of all, the influence of European law – and the European Convention in particular – is affecting how the boundaries of tolerance are drawn in Swedish law today. We are not wholly in command of that anymore and our courts have been given the difficult task of merging our traditions with the influence from the ECtHR. In the case of hate-speech this, as we have seen, has meant that we have in certain aspects been forced to adopt a more tolerant jurisprudence in practice. This has been obvious in the areas where the formal, technology-centered system of protection of freedom of expression has not reached. In this respect, the encounter with European law has been a story of more tolerance for the intolerant. For a long time Swedish self-understanding has been connected with the idea that we have the best-protected freedom of expression in the world.⁶⁰ That Europe had something to teach us was a surprise to many and it will not be the last one.

Secondly, we have seen a story of subtle change, where a protective constitutional framework has been sidestepped by changes in the way public employment is regarded. It is a significant example of how legal distinctions – however fictitious – still matter in the life of law. They control our minds and thus the world. In this field we have also encountered another limit to our tolerance of free speech, namely the function and legitimacy of the public administration. In Sweden public employees have been very free to inform the media or speak out themselves without any fear of reprisals, due to the constitutional protection of freedom of expression. We have seen that the tolerance of such openness is now under fire, as it is used more for personal gain and public gossip, than for informed debate and exposure of maladministration. Maybe the Swedish

⁶⁰ Likewise, we still like to think of ourselves as people from the country with good tennis-players and excellent cars.

tradition of the 18th century, the open administration, has reached its limit in the 21st century, where loyalty, efficiency and privacy are reasons to reduce openness? Our story thus concludes with a question, a fitting end for a story that never really ends – the ongoing Saga of the open society necessary for democracy.

