



IFLA  
2005  
OSLO

## World Library and Information Congress: 71th IFLA General Conference and Council

### "Libraries - A voyage of discovery"

August 14th - 18th 2005, Oslo, Norway

*Conference Programme:*

<http://www.ifla.org/IV/ifla71/Programme.htm>

august 12, 2005

**Code Number:**

**185-E**

**Meeting:**

**71**

**Opening Session**

### **Freedom of information in a modern society**

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A year ago the Norwegian Storting adopted a revised version of the old article 100 of the Constitution on freedom of expression. The old article had remained unchanged since the adoption of the Constitution in 1814. The revision had been prepared by a commission that was appointed in 1996, and which submitted its report in 1999. (A condensed version of the report has been published by the Norwegian UNESCO commission, and is available here at the conference). During the eight years in which the new article was being considered, there was a quite extensive public debate on the grounds for and restrictions on freedom of expression. The reasons for raising the matter were firstly that the old article was out of date and secondly that a need had arisen to adjust the article in relation to article 10 of the European Convention on Human Rights.

Norway is a typical western liberal democracy, where freedom of expression and freedom of information are taken for granted. However, this does not preclude the possibility of considerable disagreement concerning where the boundaries for this freedom should be drawn. When the Swedish government took the initiative to make a similar study during the 1980s, it was held that the position that freedom of expression was so obvious that it was not necessary to argue for it. It was therefore sufficient to concentrate on explaining the restrictions on freedom of expression. The Norwegian commission took the opposite view. We might say that it took as its point of departure Hegel's observation that a principle which has been realised in practice will be weakened in its speculative form. One takes the principle for granted and forgets why it was so important, which may again result in debilitated practice.

The latter is confirmed by the American sociologist Alan Wolfe, who has observed that the left and right political wings in the USA “are both sceptical of assigning a high priority to free speech”. The right has always been sceptical, so “what is more surprising is the degree to which the left has come around to the right’s position on free speech”. Underprivileged groups – blacks, homosexuals, feminists – have lost their faith in freedom of expression and freedom of information as an instrument of emancipation. This has given rise to a demand for something resembling public censorship. We can observe this tendency in Norway too.

At the same time, we see the traditional right-wing scepticism by the way the social authorities try to protect themselves against criticism by defining narrower limits for freedom of expression. In difficult situations, such as when confronted with threats of terrorism, counteractive measures often include restrictions on freedom of expression and freedom of information. *The Patriotic Act*, which was adopted in the USA following the events of 11 September 2001, empowers the authorities to examine libraries’ readership records and computers. There are thus good reasons for bearing in mind why freedom of expression is so important.

Freedom of expression can be justified in a number of different ways. In the USA, the human rights view, i.e. that freedom of expression is a natural individual right, has a strong foundation. In Europe, it is more usual to emphasise the utilitarian ground deriving from the tradition of John Stuart Mill. Freedom of expression and freedom of information are viewed as serving considerations external to themselves. Three such considerations are normally taken into account: truth, democracy and the free formation of opinion. This threefold ground is included in the new article of the Norwegian Constitution: one shall be free to express oneself in the public sphere provided that one does not damage the three considerations, truth, democracy and the free formation of opinion. In article 10 of the European Convention on Human Rights there is a paragraph stating that restrictions on freedom of expression must be shown to be “necessary in a democratic society”. Note that the expressions themselves need not be “necessary in a democratic society”. It is *the restrictions* that shall be necessary. The burden of proof is on the necessity of *the restrictions*.

Consideration for *truth* is the most robust utilitarian ground. We human beings are fallible but, by means of shared knowledge, i.e. by examining matters, obtaining relevant information and listening to the arguments of the various parties, we are able to acquire more well founded opinions. The other two grounds are closely associated with the truth ground. Democracy is based on an open and free debate. In an open society, the social authorities must be able to provide arguments to legitimise their use of force. In an open society, the authorities shall be accountable to the public. The free formation of opinion is associated with the conception of the mature human being. Whether in or outside of positions of power we need other persons and their alternative perspectives and arguments in order thereby gradually to improve our own perceptions of ourselves and others. In the modern society with its wide variety of perspectives it is particularly important to develop the ability to put oneself in other people’s shoes and view matters from where they stand. Such a reflexive identity is viewed by many people as the ideal for the modern, mature, tolerant human being.

One of the reasons why the old Article 100 of the Norwegian Constitution was regarded as out of date was that it did not explicitly refer to *freedom of information* as part of the broad concept of freedom of expression. Freedom of information is included as a matter of course

whether defined as a necessary addition to freedom of expression or included in the definition of freedom of expression itself. Two factors are involved in the need for information. Firstly, one must know who is responsible for the decisions that are taken and, secondly, as a participant in the democratic process, one must have access to specific knowledge of the circumstances.

We cannot demand to live in a society without power, but we can demand that power has a face, that we know who makes the decisions and why they make precisely the decisions they make. In *The Trial*, Franz Kafka presents a horror scenario of a society where power has no face. No-one wants to live in such a society. One must be able to relate to the power in order to have a reasonable degree of control over one's own life. *Openness* is a precondition for attaining the sense of freedom that one should have in a democratic society. But how open are our societies?

In Norway in the 1960s, it was maintained that the public debate only produced noise, while the important decisions were taken behind closed doors by the top persons of society. Even in a well-established liberal democracy like Norway there was apparently a lack of transparency. Another example of the closed nature of modern society is that of the EU. After the Maastricht negotiations in 1991, it became clear that the negotiators at the top level had lacked the support of the populations of the various EU member countries. The democratic legitimacy of the EU was at stake, and the reason was not least the closed nature of the system. In this situation, increased "transparency" was launched as a slogan to regain confidence. However, the recent referendums on the new EU Constitution show that there is still some way to go in creating "transparency" and winning the confidence of the populations in the EU system.

Freedom of information is included in article 10 of the European Convention on Human Rights. It is stated there that freedom of expression means "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers". It is thus seen that freedom of expression applies not only to the right to communicate, but also the right to *receive* opinions and ideas. Freedom of information is even more clearly expressed in the Constitution of Germany, where it is stated that anyone shall have freedom "sich aus allgemein zugänglichen Quellen ungehindert zu unterrichten" (the right to "freely inform himself from generally accessible sources"). Freedom of information is also explicitly included in the new article 100 of the Norwegian Constitution.

Freedom of information as laid down in the legal provisions referred to applies only to the right to seek information, and not to the duty to *give* or *provide* information. Such a duty on the part of the public authorities is an inevitable part of the open society. All states have an information policy – general strategies for informing or communicating with the public. Of course, the danger of such a public information policy is that it almost inevitably results in selection of information that favours the current government policy and withholding of relevant information that might result in criticism of the current policy. The information provided by the authorities must therefore be supplemented by other information.

In his book, *Risk Society*, the German sociologist Ulrich Beck points out that public information concerning major "modern" hazards, such as pollution and major disasters has a tendency to play down the risk so as not to create "undue" panic. The intentions are good, but is it legitimate to withhold important information for this reason, and is it really expedient? A

policy of withholding information may consist of empty incantations that, when repeated, are more likely to foster general unrest than to allay it. A typical example is that the Norwegian government withheld information concerning the radioactivity resulting from the Soviet nuclear explosions in the North during the 1960s. When it subsequently became known that the information had been manipulated by the authorities, this inevitably resulted in a reduction of confidence in the government's information policy.

Freedom of information thus applied to the right to obtain and receive information from accessible sources. In the Nordic countries, steps have been taken to counteract the tendency towards bias in public information policy. This has been done by means of the "principle of public access", which affirms a duty to provide information on request. One can simply request to examine public documents. It is of course lawful to exempt certain documents from public disclosure, and there have been disagreements concerning the criteria for such exemptions. It is characteristic that, when the parliamentary ombudsman investigated the practice of the Norwegian Ministry of Justice in 1997, he found grounds to criticise 32 out of 35 investigated rejections of applications for access to documents. This indicates that the arrangement can hardly be said to have attained perfection, and that there is a lack of transparency here too.

In the new article 100 of the Norwegian Constitution, the final sentence is original in such a connection, and it has aroused a certain debate. The sentence states that "The State authorities shall create conditions that facilitate open and enlightened public discourse". The critics contended that this was tantamount to "setting the fox to mind the geese", calling upon the state to ensure guarantees for individuals and minorities against encroachment by precisely the state and the majority. Historically speaking, freedom of expression is a relatively recent concept rooted in the Age of Enlightenment. Normally, the social authorities – both clerical and secular – have sought protection from criticism and heresy by punishing "false prophets". Until quite recently, *the protection of authority* was the main ground for restrictions on freedom of expression. In the new article it is precisely the same authorities that are being called upon to ensure protection of this freedom.

In response to this, we would point out that the modern state is not a single entity or a collective will. In the modern society, the state is a large, amorphous institution encompassing many wills, where the various state bodies have different and potentially mutually conflicting responsibilities. It is therefore not so paradoxical as it may seem that the state is called upon to mind the state. What is more, freedom of expression is not only threatened by state or public bodies. It is not unusual today for commercial interests to attempt to manipulate information in the public sphere. This may be carried out by means of advertising and as a result of commercial undertakings acquiring major media shareholdings. Protection against these dangers to freedom of expression and freedom of information lie primarily in an institutional diversity that allows alternative information and critical voices to be heard.

An article of the Constitution stating that people shall be free to impart and receive information, ideas and opinions is excellent, but is not worth the paper it is written on unless there are institutional preconditions for an open and democratic public sphere. There must be schools whose purpose is to educate independent, knowledgeable and mature human beings. There must be universities that are capable of generating knowledge and fostering critical reflection regardless of what the social authorities stand for. There must be archives and libraries where the general public can seek knowledge and receive guidance in finding

relevant information. There must be channels to the public in the form of a free press characterised by diversity, so that public discourse can be maintained. There must be institutionalised culture in the form of publishers, periodicals, museums, theatres, cinemas and film producers. There must be meeting places in the form of cafés, discussion fora, etc., where people can associate with each other. What we are referring to here is what Jürgen Habermas called the “bourgeois public sphere” which emerged in Europe and North America in the 18<sup>th</sup> century in the wake of the Age of Enlightenment. Of course, the processes involving development of institutions of this kind, reduction of the protection of authority and the founding of an open society were not achieved overnight. The 19<sup>th</sup> century was a long period of upheaval in Europe in this respect. As I mentioned earlier, right up to our own times, there have been forces that have wanted to limit freedom and to control information and opinions.

The institutionalisation of the public sphere results not only in the gradual development of such institutions. It also results in the development of norms for their independence. It is precisely through their independence that these institutions must legitimise themselves in relation to the public. Public disclosure provides the control that the public sector functions as it should. Such norms in combination with diversity help to solve the problem of who shall “watch the watchers” – within the framework of the diversity, they are to watch each other.

What though is the role of the state and the public authorities in this context? It is a very major role indeed. In our Nordic society, the public authorities hold an extensive direct responsibility for institutions such as schools, universities, libraries and museums. The authorities also hold considerable responsibility for other major cultural areas through financial support schemes. The public authorities also play a major role in newspaper and book production through press subsidies and purchasing programmes. Of course, the degree of dependence of the Norwegian cultural scene on state support is not unproblematic. When press subsidies were introduced in 1974, the spokesman for the matter in the Storting stated that it was reasonable to expect the press to provide something in return. He suggested that a supervisory state body should be set up to prevent the press from establishing itself as a separate estate, marketing its own views. In the event, no such body was set up. On the contrary, the fears of the spokesman were confirmed; the press established itself as a separate estate in spite of – or perhaps with the help of – the public press subsidies. The amorphous, formless, modern state may be said to be behaving according to the intentions of the “infrastructure requirement” formulated as part of the constitutional provision.

Nor is the overall responsibility of the state as worded in article 100 of the Constitution intended to imply that all cultural activities shall be run by the state. On the contrary, it is intended to “provide for” the diversity of institutions necessary for ensuring open and enlightened public discourse. This means, not least, that the public authorities, by means of grants and legislation, shall encourage and support private initiatives. This is also what has come to pass.

There is no doubt that the digital revolution and the development of the Internet have had a revolutionary effect on freedom of expression and freedom of information. The situation is still somewhat chaotic, and we have not seen the full consequences. However, some features can be discerned. Firstly, it is easier to gain access to the public sphere, since anyone can in practice establish his own channel. This does not mean that it is easier to make oneself heard. There has been an explosion of communications in what might be referred to as a grey zone between the public and the private sphere with a cacophony of different voices. It is also

difficult to hold expressors in this grey zone responsible for their utterances. The Internet is also responsible for a flood of information. The problem is not that there is too little information, but that there is too much, while there is a lack of information concerning the information that is not available, and a lack of information concerning the quality of the new flood of information. In short, the situation is rather chaotic.

In several quarters, the situation has been compared to the situation in the early days of freedom of the press, when it was also difficult to separate the wheat from the chaff. There was a stream of anonymous pamphlets, some of them libellous, and it was difficult to identify the perpetrators. The way out of this chaotic situation went through what we have referred to as institutionalisation by means of media, publishers and libraries and through the development of a critical public sphere, which gradually implemented norms for decency and for what could be placed before the public. This does not mean that there was not also an undergrowth of dubious publications, but it does mean that order was brought to the chaos, making it possible for individuals to find their bearings.

What we see today is that technical developments have once more presented the old institutional system with new challenges. This applies to schools, universities, the media, the legal system, culture in general, indeed the whole society. The old institutions may to some extent even be in danger of becoming out of date and irrelevant. The question is thus how the old institutions can adapt themselves to the new technological reality. How is one to integrate the new technology into the social corpus? This perspective places us in a transitional phase and, as is usual as regards transitional phases, this opens up new prospects, both negative and positive. It has been maintained, and I believe rightly so, that the libraries have a potential for adopting a central role in the new institutional system. But this requires that they both see and grasp the potential and, not least, that they receive the public funding that will enable them to exploit the potential.

The libraries, whether national libraries, public libraries, university libraries, school libraries or other institutional libraries, have been the knowledge banks of the modern civilisations based on the printed word. They have taken care of, systematised and disseminated knowledge and information. Their responsibility has been to make “the sources generally accessible,” to use the wording of the German Constitution. The libraries have also been meeting places or free areas for people who have sought information or, for that matter, merely relaxation with a good book. They have been low-intensive meeting places that have lived their lives in relative peace and tranquillity, but that, precisely by virtue of the low intensiveness, have been able to function as meeting places for people from different walks of life. The local public libraries have been a constitutive element of local communities. They have indeed had a democratising function.

The digital revolution has been revolutionary in all of the three areas referred to (taking care of, systematising and disseminating information), and the libraries are already deeply engaged in the process of adapting to the new technology. Many are already well equipped to provide guidance in the chaotic world of information and communications technology. They stand with one leg firmly planted in literature and cultural heritage, and the other in the new technology. And it is precisely this that gives them a potential for the future. At the same time, the need for meeting places, or what we referred to as low-intensive, non-commercial free areas where one can drop in when one likes, on one’s own or in the company of others, is greater than ever in our fragmented society. It is typical that immigrants and other new

residents easily feel at home in the public libraries, which demonstrates the socially constitutive power of the libraries.

Ragnar Audunson and Frode Bakken have described the library as “a burning glass that focuses the rays from the cultural and technological fields, from the local and the virtual, from different ethnic and social groups, from different areas of policy and walks of life.” They recount a beautiful story from a library in an established middle-class neighbourhood in the west part of this city. The library was visited by a group of young people from one of the new suburbs. They had discovered that the library had good computer equipment. At the same time, an Internet group had been set up for senior citizens from the local neighbourhood. There were thus two groups that belonged to separate cultures. They came from different parts of town, belonged to different generations and were socially far apart. At first, the two groups competed for access to the equipment, but as time went on a Cupertino developed whereby the young people from the suburb became instructors and guides for the elderly from the established neighbourhood. This story shows how the library’s physical space, the meeting place itself and the virtual services can function best in an interaction with each other.

In his classic work *The open society and its enemies*, Karl Popper maintains that our civilisation has still not fully recovered from the shock of its birth, “the transition from the tribal or ‘closed society’, with its submission to magical forces, to the “open society,” which sets free our critical powers”. The fact that we have not come over the shock means that there are still forces that wish to return us to the closed society by taking control of the “texts” that constitute our understanding of reality. The new information and communications technology has changed the conditions for the struggle for the open society. In some ways, it has made the struggle easier. In other ways, it has made it more difficult and opened up the prospect of a “big brother is watching you” society. The question is: How to make use of the new technology to ensure that it serves the best interests of truth, democracy and the free formation of opinion? Notwithstanding the degree of freedom of expression and information in the different societies, as librarians, you stand in the front line of the struggle for the open society in the popperian sense.