PROTECTION OF NEWS SOURCES BY THE CONSTITUTION

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PRESS FREEDOM IN Sweden has many special features. Sweden was the first country apart from England to abolish censorship. When this happened—in 1766—the foundation was laid for a system of safeguarding the freedom of the press by written law embodied in the Constitution itself. The present paper deals with the development of that system and particularly with how it achieved an effective protection of the news sources of the press.

THE SWEDISH PRESS ACT OF 1766—AN HISTORIC EVENT

The invention of the printing press, which made it possible to communicate simultaneously with a large number of people, was in most countries followed by severe control of printing shops and their product, the printed word. In those days freedom of expression was far from being regarded as a human right. Speaking of the situation in England at the beginning of modern times, Clyde states that it was certainly not "part of the Englishman's birthright" to put his thoughts in print before the public and any demand for freedom of the press would have appeared as "a dangerous and undesirable claim for anyone to make".[1] The printing press was looked upon by those in power, that is to say the princes or the Church, as a machine with alarming potentialities and its products as highly incendiary. Governments felt that it must be severely supervised and controlled in the public interest —just as today they deem it necessary to control the exploitation of uranium resources and to monopolize the manufacture of nuclear weapons.

In Sweden, an elaborate system of press control existed under an ordinance of 1684 which had superseded several decrees of an earlier date. This ordinance provided for censorship of printed

[1] Clyde, *The Struggle for the Freedom of the Press from Caxton to Cromwell*, London 1934, p. 9.

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matter by a *censor librorum* acting on behalf of the Royal Chancellery. Only academic dissertations, the scrutiny of which was left to the universities, were exempt from the supervision of this official. This was the situation when in the middle of the eighteenth century internal political dissonances in Sweden grew stronger.

Since the death of Charles XII in 1718 the executive as well as the legislative powers had been exercised by the Riksdag (the parliament), the King being a mere figurehead, and by 1760 the more authoritarian of the two parties, "the Hats", was in power in the Riksdag. More and more serious attacks were, however, directed against them by the opposition party, "the Caps", whose popular influence was increasing. As a result of elections held in 1764, the Caps found themselves the leading party in the Riksdag when it met at the beginning of 1765. In the preceding years the Caps had accused the Hats of having, by their way of running the censor's office, promoted a state of obscurantism detrimental to the nation, assumed "jurisdiction over reason" and withheld information on vital political matters from the people. In particular, the Caps had raised objections against the policy of keeping public records secret under a rule of public law (unwritten) by which they were regarded as the "property" of the administration. Thus it was in full conformity with views already expressed while in opposition that the Caps in 1765 and 1766 carried through a reform of the press legislation as a whole, resulting in the adoption late in 1766 of a *Constitutional Act relating to the Freedom of the Press.*[2] At one stroke the earlier system of governmental censorship and supervision was abolished and replaced by a comprehensive and legally protected system of freedom of expression through the printed word.

It is true that less than ten years later the Act was repealed by Gustavus III, when he by a *coup d'état* re-established royal rights and prerogatives, and that the freedom of the press again became precarious during the latter part of the eighteenth century and remained so until the revolution of 1809. However, the ideas embodied in the Act of 1766 greatly influenced the contents of the new Constitutional Act relating to the Freedom of the Press

[2] See for the legislative history of the Act of 1766 Eek, "1766 års tryckfrihetsförordning, dess tillkomst och betydelse i rättsutvecklingen", *Statsvetenskaplig tidskrift,* Vol. 46, 1943, pp. 185 ff. Cf. Kjellin, *Rikshistoriografen Anders Schönberg. Studier i riksdagarnas och de politiska tänkesättens historia 1760–1809,* Lund 1952, pp. 61 ff.

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which was adopted in 1812. This Act in its turn was superseded in 1949 by a revised Freedom of the Press Act. That statute too, being in substance only an enlarged and supplemented edition of the Act of 1812, rests upon the ideas and principles contained in the original Act of 1766.

In spite of this, the historical importance of the 1766 Act has on the whole been overlooked by Swedish jurists and historians. One reason for this is, of course, that it did not remain in force for very long. It should also be taken into account that at the time of the adoption of the Act, the legislators themselves seem not to have fully realized what far-reaching consequences their decisions were going to have. The situation appears, in some respects at least, to have been similar to that prevailing in England at the time when in 1695 the Licensing Act of 1662 expired and was not renewed. Macaulay says of the Commons in those bygone days that they did not know "what they were doing, what a revolution they were making, what a power they were calling into existence". He further remarks that this great event passed almost unnoticed: "Evelyn and Luttrell did not think it worth mentioning in their diaries. The Dutch minister did not think it worth mentioning in his despatches. No allusion to it is to be found in the Monthly Mercuries. The public attention was occupied by other and far more exciting subjects."[3]

The Act of 1766 deserves attention for three reasons: first the fact that it was part of the Constitution, "a basic law"; secondly its abolition of censorship; and thirdly its introduction into Swedish public law of the principle of free access to public records. The Act was proclaimed as "an irrevocable basic law", part of the Constitution of the realm. This seems to be the first historical instance of press freedom being guaranteed by the constitution of a country. When it was adopted, the legislators believed that freedom would henceforth be safe. While this assumption proved far from correct, it remains of particular historical interest that the Swedish

[3] Macaulay, *The History of England from the Accession of James The Second,* Vol. VIII, Leipzig 1855, pp. 5 f. While in Sweden the principle of press freedom was discussed at length, both before and during the Riksdag in 1765–1766, this does not seem to have been the case in England. Writing of the Commons, Macaulay says:

"They pointed out concisely, clearly, forcibly, and sometimes with a grave irony which is not unbecoming, the absurdities and inequities of the statute which was about to expire. But all their objections will be found to relate to matters of detail. On the great question of principle, on the question whether the liberty of unlicensed printing be, on the whole, a blessing or a curse to society, not a word is said."

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Act preceded both the French *Déclaration des droits de l'homme* of 1789 and the First Amendment to the United States Constitution, adopted in 1791.[4]

By the Act of 1766 the censor's office was abolished and censorship was retained only for religious matters, where a scrutiny before printing was to be carried out by the *consistorium* of the diocese within which the printing office was located. No other prior restraints were permissible. Penalties were prescribed for various statements, such as those involving blasphemy and libel, but the ordinary courts alone were entitled to impose penalties.[5]

It is true that in England the licenser's office ceased to exist as early as 1695 through the expiry of the Licensing Act of 1662. That Act, however, was long regarded as declarative of common law. It was only at the end of the eighteenth century, i.e. at about the time when the Swedish Act was adopted, that it became clear through a number of judicial decisions and the writings of Blackstone on the subject that the Englishman had "an undoubted right to lay what sentiments he pleases before the public", but on the other hand he could be punished for abuse of this right or freedom.[6] An oft-cited decision to this effect is *Rex* v. *Dean of St. Asaph* (1784), where Lord Mansfield declared that "the liberty of the press consists in printing without any previous licence, subject to the consequences of law".[7] Thus, developments in England and in Sweden were in many respects parallel.[8]

[4] The Declaration of Rights of the state of Virginia was, however, adopted the same year as the Swedish Act, namely on June 12, 1766.

[5] It is noteworthy that the Act prohibited expressions attacking the basic laws; penalties in the form of fines were prescribed for such expressions. While this kind of prohibitive rules do not exist in the Swedish law now in force the German Bonn Constitution of 1949 includes in Article 18 a provision by which "whoever abuses the freedom of expression of opinion, in particular freedom of the press ... to combat the fundamental free democratic order, forfeits this freedom". The forfeiture and its extent are to be pronounced by the Federal Constitutional Court. See Castberg, *Freedom of Speech in the West,* Oslo & London 1960, pp. 378 ff.

[6] Blackstone, *Commentaries on the Laws of England,* Book IV, 12th ed., London 1795, pp. 151 f.

[7] Cf. the comments by Dicey in *Introduction to the Study of the Law of the Constitution,* 8th ed., London 1926, pp. 244 ff.

[8] It is of interest to note that the example of England was often held up to the members of the Riksdag in 1765 and 1766. Sometimes this example may even — in order to create an impressive contrast — have been depicted in brighter colours than it deserved. At a committee meeting in the Riksdag in 1766 Anders Chydenius, a member for the Estate of Clergy and one of the most ardent spokesmen for the reform, described how in England "Maboth as the first and last censor" had on his own accord resigned from his office and Chydenius suggested to the Swedish censor in office that he follow "Maboth's

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As already mentioned, it was laid down in the Act of 1766 as a fundamental principle of public law that the citizens should have free access to public records and all other documents in the offices and archives of the administration. The Act also stipulated that a public official who did not upon request immediately put a document before the eyes of the claimant was to be dismissed from his office. The right to inspect public records still prevails. The general principle is stated in the Freedom of the Press Act of 1949, which is a part of the Swedish constitution. This Act envisages exceptions to the general principle, but these exceptions must be defined in a statute adopted by joint decision of King and Riksdag. The statute referred to, an Act on Free Access to Public Documents (1937), as amended, describes every exception in great detail.

Freedom to inspect public documents is a right of great practical importance to the press and other media of information, since it gives them, on the whole, unhampered access to news from the central administration and also from regional and local government authorities. However, it is not intended as a special privilege of the press but constitutes a general principle of public law from which the individual as well as society as a whole is supposed to benefit.[9]

WRITTEN CONSTITUTIONAL LAW AS THE PROTECTOR OF FREEDOM

Press freedom was achieved in Sweden by a statute of a constitutional character. The Act did not merely proclaim, as many constitutions do, that "the press is free"; it aimed at regulating in detail all matters relating to the press and thereby limiting the possibil-

example". The report of the committee also referred to "the celebrated Maboth in England". In 1768 Chydenius published in Stockholm a translation of "Maboth's application to Parliament in England to be allowed to abolish his office as a licenser as dangerous to Truth and to the Nation". The person referred to is probably one Gilbert Mabbott who was a licenser in England from 1645 to 1649, when he resigned. (See Clyde, *op. cit.*, pp. 172 f.) Mabbott was not the first or the last licenser in England. Licensing continued in spite of his resignation and in fact he received a new commission as a licenser in 1653. (See Clyde, *op. cit.*, p. 241.) The celebrated Mabbott is not included in the *Dictionary of National Biography*. — The same Chydenius published in 1766 a booklet entitled "Description of the Chinese freedom of writing", purporting to be a translation from Danish (!), the authorship of which was later attributed to Chydenius himself.

[9] See further Herlitz, "Publicity of Official Documents in Sweden", *Public Law*, 1958, pp. 50 ff., and Herlitz, "Swedish Administrative Law, Some Characteristic Features", *Scandinavian Studies in Law*, Vol. 3, 1959, pp. 120 ff.

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ities of arbitrary governmental action against the press.[1] The Act of 1766 contained only 14 sections. The Act of 1812 followed in substance the same pattern but its provisions were more numerous. The wording of the Act of 1812 was, however, often vague and ambiguous and its interpretation became increasingly difficult as time passed, and the material conditions of the press as well as legal techniques changed. When the Freedom of the Press Act, 1949, was drafted, great efforts were made to achieve clarity and completeness. The aim was to exclude every possibility of undesirable interference on the part of public authorities.

The idea that protection of freedom can be achieved by legislation seems to be alien to the thinking of Anglo-Saxon countries. In England and the United States it is often said that the absence of legislation is the best protection of freedom. This view is not generally shared in civil-law countries.[2] While Sweden does not properly belong to that category, its method of protecting press freedom constitutes, it is submitted, an argument in favour of the written law approach.

The Act of 1766 was meant to be the exclusive source of law with regard to the press. No restrictions on press freedom not foreseen by it could be applied, and the drafters believed that governmental or administrative action contrary to the Act would simply not occur, since it would be unconstitutional. Such an assumption is, of course, not always safe. Respect for the constitution varies from country to country and, even within the same country, is not equally strong at all times. However, a written constitution, in every country where such exists, is meant to serve as a safeguard of some basic principles of society which the fathers of the constitution have regarded as unalterable or at least as valid for an indefinite period. This aim is achieved by various means such

[1] It should be mentioned that the Swedish Constitution consists of four "basic laws", namely the Instrument of Government, the Riksdag Act, the Act of Succession and the Freedom of the Press Act. The Instrument of Government of 1809 includes in Article 86 the following provisions relating to press freedom:

"By freedom of the press is understood the right of every Swedish citizen to publish his writings without any previous interference on the part of public authorities, and not to be prosecuted afterwards on account of the contents of his publication except before a regular court, and to be punished only if the contents are in conflict with a law enacted to preserve public peace without restricting public enlightenment. All public documents may be published without any restriction whatever, unless otherwise provided by The Freedom of the Press Act."

[2] Cf. Eek, *Freedom of Information as a Project of International Legislation*, Uppsala 1953, pp. 17 f.

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as the requirement of more than a bare majority of votes in the legislature for amendments to the constitution or, as in Sweden, the requirement that an amendment to the constitution must be passed twice: first at one session of the Riksdag and then at the next succeeding session of the Riksdag which takes place after new general elections to its Second Chamber. In most countries there are also in existence various guarantees aiming at protecting the constitution against violations of its rules. In Sweden, the Ombudsman, a high magistrate elected by the Riksdag, can be said to represent the people *versus* the administration and the constitution *versus* the persons actually in power.[3] In him are vested far-reaching powers to investigate and prosecute. Since the creation of this office in 1809 the Ombudsman has, among other things, done much to prevent violations by public agencies or officials of the freedom of the press as established by the Press Act.

We assume for the reasons stated that the rules of the Constitution are respected. If, however, the constitution of a state proclaims that "freedom of the press is guaranteed" and little or nothing more, it is left to the legislators and the administrative agencies and/or the courts to elaborate the concept of press freedom and to specify its limitations. In Sweden the framers of the constitutional enactments of 1766, 1812 and 1949 did not leave it to the ordinary legislator, the courts or administrative agencies to define press freedom. The Freedom of the Press Act now in force deals in great detail with all matters relating to the press. Matters regulated by the Act cannot be the subject of ordinary legislation. In other words, the fact that press matters are subject to a constitutional act prevents the Riksdag from adopting legislation concerning the press except by the laborious procedure prescribed for amendments to the Constitution. Any other legislation would be unconstitutional. The Freedom of the Press Act, therefore, is comparable in its effects to a "declaration of rights", but one that goes into detail to an unusual extent. The "declaration" is binding upon the legislature as well as upon the executive power.

It follows from what has been said that the Freedom of the Press Act has a dual function. On the one hand it has a function similar to that of written press laws in other countries, namely to provide for permissible restrictions of the freedom of the press and for procedural and administrative matters. This function is re-

[3] Cf. concerning the Ombudsman (full title in Swedish: *Justitieombudsmannen*) Herlitz in *Scandinavian Studies in Law,* Vol. 3, 1959, pp. 122 ff.

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flected, *inter alia,* in provisions for the punishment of press offences, such as libel, which are exhaustively enumerated in the Act, and for the seizure of printed matter pending a court decision. Further, there are provisions concerning the trial of actions in press cases, for the handing in of inspection copies of all printed matter, and for notification to the Ministry of Justice of the names of responsible editors, etc.

Another group of rules relates to that part of the function of the Freedom of the Press Act by which public authorities are prohibited from taking measures against the press. Printed matter must not be subject to censorship. No authority or other public body may take any action to hinder the public circulation of printed matter (other than action specifically authorized by the Act, such as provisional seizures or confiscation as a penalty imposed by a court). Chap. 1, sec. 3, of the Act reads as follows: "Except in the manner and in the cases laid down in this Act, a person shall not on the ground of abuse of the freedom of the press, or complicity in such abuse, be prosecuted or declared liable or responsible for damages, nor shall the publication be confiscated or seized." The right of anonymity is upheld. There is a specific system of responsibility by which, so far as newspapers are concerned, liability for offences shall lie with the person who has been notified to the Minister of Justice as being the editor.[4] This means that no other person can be prosecuted or even heard by the police or the public prosecutor. Thereby, the author as a source of information of the newspaper is protected. The guilt of the accused person is tried by a jury of nine persons. Printed matter may not be considered criminal unless six jurors concur. If the jury finds that the matter is not criminal, the accused must be acquitted. If the jury considers the act a criminal offence the court itself (i.e. the judges) must then proceed to try the matter and it has power to acquit the accused in spite of the contrary opinion of the jury. Thus, the safeguards and privileges run from the moment the news is being gathered until the final stage, seldom reached, when the legality of printed matter is being tried by a court.

Difficult problems of legislative technique and of statutory construction occur when the borderline is to be drawn between those actions of public authorities, which are permissible and must be defined in and based upon the Act, and the rights and freedoms of the press which the Act is meant to protect. The difficulties

[4] Cf. footnote 7 below.

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became particularly apparent when during the drafting of the Freedom of the Press Act of 1949 efforts were made to enhance the protection of the news sources of the press. It does not seem possible, however, to meet the need for such protection without resort to written law. Making public records available to the press is not the same as protecting the non-official sources from which the newsmen have collected their information. In both cases, however, protection has been provided by written law. Not only in Sweden is this so: in the United States legislation has become the means by which, in recent years, a general right of inspection of public records has been introduced in several states. In common law, on the other hand, there is no general right for all persons to inspect public records.[5] As to the protection of non-official sources of news, it can be achieved only by legal rules which prohibit an editor from revealing them or grant him the privilege of refusing to reveal the channels of information used by a newspaper. Where such rules exist, they will quite likely be statutory rules (written law) as they may contain exceptions from general rules (written or unwritten) which uphold freedom of expression or, in some instances, make it a duty of the citizen to give information, e.g. as a witness in legal proceedings.[6] The relevant rules of the Swedish Freedom of the Press Act of 1949 constitute perhaps the best example to be found in the Act of the endeavour of its drafters to make the intended protection of an individual right or privilege watertight.

PRIVILEGED INFORMATION

News is normally brought to the attention of newspapers by a human agent. News is sought and collected by journalists at the headquarters of a paper, by correspondents around the country and abroad, by other collaborators and by members of the public at large. News may, however, contain utterances which are punishable by law. The source of information becomes, to some extent, "protected" when the legal responsibility for the publication of news transmitted to a paper by an informant rests with the paper.

[5] See Cross, *The People's Right to Know. Legal Access to Public Records and Proceedings,* New York 1953.

[6] Information concerning such legislation as is referred to in the text is to be found in *United Nations documents E/CN.4/Sub. 1/146* and *E/2693* and *Add. 1–3.*

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In such a case the informant can communicate with the paper without any fear of being prosecuted because of the content of the news. This protection is important to the paper as it makes it easier for it to seek and receive news from various quarters. Persons who have given information to a paper may, however, even though not legally responsible, in some cases suffer if it becomes known that they have provided the paper with the news item. The fact that a person has given a paper certain information may meet with disapproval in his social environment, for example from his family, friends, colleagues, superiors, business contacts and so on. In order to protect him from annoyance and unpleasant aftereffects, the law may grant him a right of anonymity by providing that the editor of a paper is not permitted to reveal the name of persons who have collaborated in the paper. This duty or onus on the editor not only protects the collaborators but also makes news more easily available to the paper. Moreover, as criticism and exposure of maladministration and other evils are desirable, the legal protection of news sources serves society as a whole as well as the individual newspapers.

On the other hand, there must be means of protecting individuals against libel and society against other kinds of undesirable utterances in newspapers. It must be possible to impose penalties and damages on persons who control the contents of newspapers. As already mentioned, this is achieved in Sweden by the Freedom of the Press Act making the editor whose name has been registered with the Ministry of Justice the only person responsible for the contents of the paper. Complicity is not punishable.[7] In press cases, therefore, no criminal investigation is necessary in order to find the culprit; a telephone call to the Ministry of Justice is generally enough. This rule relating to responsibility in itself excludes any inquiry into the news sources. The police have no business in the newspaper office or the printing works. This is also underlined by the rule according to which the editor

[7] If there is no responsible editor notified to the Ministry of Justice, the responsibility rests with the owner of the newspaper. If the identity of the owner cannot be determined, the printer shall be liable in place of the owner. If the printing establishment cannot be determined, the distributor shall be liable in place of the printer. The question of responsibility is decided at the preliminary stage of the trial. If it is found that the action should be directed against the printer, for instance, he alone will be responsible and any further quest for the owner is excluded. In the case of newspapers, a responsible editor has usually been announced to the Ministry. Obscene publications, however, are sometimes published under circumstances which make it necessary for action to be directed against the printer or even the distributor.

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is legally responsible even if he had nothing to do with the punishable article. Its content "shall be deemed to have been inserted with the knowledge and consent of" the editor. The presence or degree of his criminal intent becomes immaterial.

The responsibility rule does not in itself prohibit the editor from revealing his sources. Other sections of the Freedom of the Press Act, however, establish a right to anonymity. According to those provisions, the author of any printed matter is not bound to have his name appear thereon. And "no question shall be raised in any action concerning freedom of the press as to the authorship of matter appearing in a printed periodical". A printer, publisher or any other person concerned with printing or publishing printed matter who, without the author's authorization, discloses the latter's name commits a punishable offence. In a few exceptional cases, however, disclosure is prescribed by law and therefore becomes both permissible and compulsory; these cases are dealt with below.

In our days "authors" are only of limited importance to a newspaper as sources of news. Of much greater importance are the individuals who bring items of information to a paper of their own accord or who are approached by newsmen because they are supposed to have some interesting information to hand out. In the Freedom of the Press Act of 1812, which was in force until its replacement by the Act of 1949, there were no legal rules protecting the anonymity of informants. Their identity could be revealed against their wishes. Moreover, it was believed in some quarters that the informant could be punished for his action in transmitting information to the paper; such action was, according to this construction of the Act of 1812, not to be regarded as falling under the Act and the rules of general criminal law should therefore apply. This, it was argued, was even more true if the paper decided not to publish the information received. As examples were given slanderous statements and the disclosure of facts which the informant was legally obliged to keep secret. In the Act of 1949 this problem was solved in favour of the informant (and, indirectly, of the papers). In Chap. 1, sec. 1, of the Act it was stated: "Every person shall ... have the right in all cases not otherwise provided for in this Act to make statements and communicate information on any subject whatever to the author or editor or to the editorial office, if any, of a publication with a view to have the matter published therein." In 1957, the words "or to any enterprise gainfully engaged in supplying news to a printed periodical" were

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added.[8] This amendment was hardly necessary, however, as the text as it stood covered, if properly construed, those who gave information to news agencies. By another section of the Freedom of the Press Act the right to anonymity is extended to informants. Therefore, an editor is, in principle, legally prohibited from revealing the name of a person who has transmitted information to the paper and, as a consequence, a public official who in that capacity asks the editor to reveal without authorization his source of information commits a punishable offence.

The "right" of "every person" to communicate information to authors, publishers and newspapers means that the informant cannot be held legally responsible for the content of his communication, whether his piece of information is published or not. The communication is regarded as part of the process of producing the printed matter. For the contents of a newspaper the editor is exclusively responsible. If publication does not occur, it seems correct to describe the situation as one of a privilege of immunity in the case of statements, even such as are in principle punishable, addressed *with a view to publication* to anybody belonging to the vast group of persons enumerated in the quoted section of the Freedom of the Press Act. The presence of this intent is a prerequisite of the privilege; its absence, however, is obviously very difficult to prove in individual cases.

The rule which establishes this privileged position of the informant is not without exceptions. There are other important considerations involved besides the need to protect the news sources of the newspapers and other printed matter. Exceptions are indicated in the provision quoted above by the words "in all cases not otherwise provided for in this Act". The Act, in a later chapter, introduces the following three exceptions to the privilege of informants.

(a) Some official documents are as already mentioned excluded from the general right of inspection. If a public official hands over such a document to a newspaper with a view to its publication, he is not protected. He can be prosecuted for a breach of duty.

(b) The second exception relates to information not published. If such information contains slander against a private person, no privilege exists and the informant can be prosecuted for that offence. If this exception had not been made, A could very ef-

[8] There is no privilege in existence with respect to information given to the radio or newsreel producers with a view to having the matter published by such media.

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fectively carry out a slanderous campaign against B by telling every journalist or prospective "author" in his circle of acquaintances an unprintable story detrimental to the reputation of B. But if a slanderous communication is published by the newspaper the situation is different. The privilege is valid. An action by the injured person may be directed against the editor but against him alone.

(c) A further exception relates to the case where the informant by his communication has disregarded his duty to keep certain matters secret. This exception only concerns holders of public office and persons who are performing service for the State, for instance military service. Such persons may not reveal what they have got to know owing to their position, if disclosure is deemed dangerous to the security of the State (military secrets). Nor are such persons allowed to disclose what they otherwise have to keep secret. However, for the exception to apply it is necessary that the duty of secrecy shall have been provided for in a statute adopted by the Riksdag. If that is not the case, the privilege is valid. This latter rule has been much discussed. Statutes are adopted jointly by the King in Council[9] and the Riksdag. Legislation on less important matters may take the form of ordinances or decrees issued by the King in Council alone or by governmental agencies. Now, the Riksdag in 1949 was anxious to combat tendencies towards secrecy within the administration and therefore preferred an exception relating only to what a public official may not say according to legislation which the Riksdag itself had approved. The result is that a public official has complete freedom to communicate information to the press, with a view to publication, as long as his duty not to hand out the information is based only on a royal ordinance or upon other directives, for instance an order from his superiors. A police officer, for example, is prohibited from revealing information which he has obtained owing to his position. But this duty is imposed upon him by an ordinance (not a statute which has been approved by the Riksdag). Therefore, if a police officer passes information concerning the results of a criminal investigation in progress to a newspaper, with a view to publication, this action is privileged and the police officer cannot be prosecuted for neglect of duty, even if he admits that the information came from him. But if he tells the same story to his wife at the breakfast table he commits, in principle, an act for which he can be pun-

[9] According to the Constitution, the King has to act in Council, i.e. upon the advice of his ministers (the Cabinet).

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ished.[1] While both the press and the police seem to be satisfied with this state of affairs, suggestions have been made for a reform. It could be achieved by the Riksdag's reviewing of all legal provisions in force acording to which public officials are prevented from communicating information, followed by the inclusion in a statute of those found proper.

As stated above, in an action concerning freedom of the press, no question can be raised as to the authorship of a matter appearing in a newspaper. The same protection applies to the informant. An action concerning freedom of the press is an action concerning an offence consisting of an utterance in print prohibited by the Freedom of the Press Act. In other actions the editor of a paper may be obliged to disclose the name of an author or an informant. Those other actions may concern copyright, or fraud committed by means of the printed word, or disregard of a statutory duty to keep certain matters secret. In such lawsuits the editor like all other citizens may have to give evidence; the name of an informant can obviously be relevant in a case regardless of whether action is directed against him or not.[2] Editors are, of course, reluctant to reveal their sources even in lawsuits of this kind. However, under the Judicial Procedure Code a person may refuse to reply to questions put to him by the officer in charge of the pre-trial investigation. In the case of such refusal the officer in charge may request a hearing by the court, but the hearing

[1] The Act on Free Access to Public Documents provides, as stated above, for some exceptions to the principle that official documents are open for inspection. A public official who gives a journalist access to a document which is secret according to the Act can be prosecuted for breach of duty. It is, however, not expressly said in the Act that public officials are forbidden orally to reveal the contents of secret documents. Therefore, according to the prevailing opinion amongst Swedish lawyers, a public official is not prohibited "by statute" from revealing the contents of secret documents, that is, if such a duty is not provided for by another statute than the Act on Free Access to Public Documents. Consequently, the privilege applies to an official who, with a view to publication, reads aloud the text of a secret document to a journalist to whom he could not hand it over. In our opinion this construction of the Freedom of the Press Act and the Act of Free Access to Public Documents is not well founded. See Eek, "Några tryckfrihetsrättsliga principspörsmål", *Sv.J.T.* 1955, pp. 145 ff.

[2] In a case in 1955 a judge in a City Court permitted the counsel for one of the parties to ask a witness the question whether he had transmitted certain information to a newspaper. The Ombudsman took up the matter and found that the judge had committed an error in allowing the question. The case was a criminal case which did not concern the freedom of the press. The Ombudsman pointed out that even in such a case questions concerning authors or informants can legally be raised only if the reply is relevant to the legal issue in the case.

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cannot be held until the investigation has proceeded to a point where there is reasonable ground for suspecting a named person of having committed the crime. Therefore, it is natural that an editor may refuse, and feel himself legally bound to refuse, to give the name of an informant to the police before that stage has been reached. In civil cases concerning, for instance, the fee for an article the duty to bear witness occurs only when the court proceedings have started.

Before the adoption of the Act of 1949 many cases occurred where the Ombudsman took action against public officials, prosecutors or others, who had requested information about the author of an article in a newspaper or a person who had given information to a newspaper. It was gradually established by court decisions that public officials were not entitled to try to ascertain the identity of persons not legally responsible for the contents of a newspaper even if they might appear as the true offenders. The status of the informant remained uncertain, however, particularly in cases where publication had not occurred. The Act of 1949 achieved what the case law had not been able to do, and the legal protection of the news sources of Swedish newspapers can today be described as watertight.

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