

# Blowing in the Wind? Swedish Protection of Whistler- Blowers in the Public Sector

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\* Thanks to Professor Iain Cameron for helpful comments. The usual disclaimers applies.

## 1 The Subject

Protection of freedom of speech is a central part – perhaps the central piece – of constitutional law in most democratic states. The part of this protection which is subject to most discussion is its limits in regard to the content of expressions. Should freedom of speech protect against venomous attacks on others in books or newspapers? Can companies and governmental institutions be protected from such attacks? Can pornography, or some kinds of pornography, be banned without contravening the principles of protection of freedom of speech? How much tolerance must society show intolerant, ignorant and clearly racist expressions in the name of freedom of speech? Such are the questions that all democratic societies have to come to grips with and – consequently – so do courts and the rest of the legal system. This paper will not address these areas of freedom of speech-law, but instead look at a more neglected area of this field of law.

This less discussed, but not less important, area is the protection of those persons who “feed” the media with information on what is going on in society, especially on wrongs and mismanagement of public interest. These persons are often called “whistler-blowers” as they provide the public with vital information on things that are of importance to all or most of us. Different conflicts of interests appear here as compared to the areas mentioned above. The main issue is not what we – as the public- should tolerate or be protected from, but rather to what extent the legal relationship between employer and employee should limit the scope of freedom of speech. Revealing information about your employer and the way its business is conducted can be harmful in many ways. If the employer is a public authority there is also the question of how much exposure of secret information that should be allowed.

In Sweden we have in some respects a rather unique system of constitutional protection of whistler-blowers in the public sector. Below I will briefly introduce the legal framework of this protection and then move on to four issues that are of growing importance for the real impact of that protection. If these issues are left unsolved a carefully designed system of constitutional protection with more than a hundred years of practice behind it may turn into a castle in the air. This would doubtless have effects not only on the central questions of freedom of speech in Sweden, but also, at the risk of being overly dramatic, on the very foundations upon which our democracy is built.

## 2 Legal Framework

The legal framework for whistler-blower’s protection in Sweden is basically divided in two.<sup>1</sup> One part is constitutional in nature and sanctioned foremost by

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<sup>1</sup> See Marcusson, *Freedom of Press. Rights and protection of Informants to the Press*, In: Göransson (ed.), *Modern Legal Issues*, (1993) pp. 217 ff. for an overview of the system and comments, particularly on the subject of whistle-blowing outside of governmental organizations.

criminal law, the other is part of labour law and sanctioned by civil-law remedies.<sup>2</sup> For reasons of space, I will only address the former in this paper.

Freedom of speech is generally protected in Swedish constitutional law through the rules in Ch. 2 in the Instrument of Government, Article 1, 12, 13 and 14. In addition two other constitutional documents, The Freedom of Press Act (*Tryckfrihetsförordningen*) and The Freedom of Expression Act (*Yttrandefrihetsgrundlagen*) contain rules on freedom of expression. It is in these latter two that we find the constitutional protection of whistler-blowers, as both Acts are concerned with protecting certain forms of expression that are intimately connected to the protection of sources, i.e. newspapers, radio and television. The protection of whistler-blowers is part of that wider protection of sources, but not exclusively limited to situations where a person secretly acts as a source.

The basic rules are found in the Freedom of Press Act.<sup>3</sup> In Chapter 1, Article 1 it is provided that, in order to secure an open society, all citizens are guaranteed a right to give information for the purpose of publication. This is of course a mere restating of the principle of freedom of speech, but as we will see, it comes to have a more far-reaching meaning in the context of the Act. The gist of the guarantee is to provide for necessary information to the press (or any other publicist). Article 3 states that no sanctions may be brought upon anyone using his or her freedom according to the Act without explicit support in the Act itself.<sup>4</sup> That means that the constitutional Act contains all necessary procedural and criminal rules to enforce limits to the freedom of speech. In practice, this means public authority's needs explicit support in the Act for every action they take as a result of anyone using the right to inform the press or otherwise express their views in topics of public concern in such media. The Act lacks any particular rules on sanctions when public officials express themselves in media and, in a rather technical and complex way, it contains a few exceptions that make it possible to sanction breaches of public secrecy in certain – but only certain – cases. The most important consequence of this regulation is that no sanction can be applied to a public official for his or her contacts with the press (outside a narrow field of exceptions regarding military secrets etc.). Instead, it is contrary to constitutional law and its guarantees of freedom of speech to take any measures that would include a sanction against a public official making a statement in the media or providing the media with information, even if such behaviour could be deemed as less loyal or harmful to the immediate interests of the authority.<sup>5</sup> In practice, this is a prohibition of reprisals against those who choose to use their freedom of speech.

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2 This is, of course, a simplification, but will have to do for this text.

3 The Freedom of Expression Act is to a large extent similar to that act, and in the aspects we are concerned with here it is identical, so it will not be covered as such below.

4 This is called “the principle of exclusiveness”, as it means that the Freedom of Press Act is the sole permissible legal basis for governmental restrictions on expressive conduct (of the type covered by the Act).

5 The regulation can be said to promote the wider public interest in free flow of information over the more narrow interest of the authority in the running of its business.

Some rules in the Chapter 3 are also of importance in this context. First of all, there are a number of rules protecting the media's anonymous sources. The rules above can be said to protect anyone who openly or not has dealings with the press, the rules in the Chapter 3 are more specifically aimed at safekeeping the secret sources of the media. Of interest in this context is the rule that makes the searching for breaches of (most types of) secrecy, and persons responsible for anonymous contacts with the media contrary to the constitution in Article 4. Article 5 includes a constitutional criminalisation of actions taken in conflict with that prohibition. Even asking whether a person has had any contacts with media comes in conflict with this protection, so it is fairly wide-reaching and can be sanctioned by a sentence to jail.<sup>6</sup>

Now, we turn to the substantive questions that this regulation gives rise to at the moment. The first is the extent of the freedom to "leak" secret information to the media and its effects on the efficiency of public authorities. The second is connected with that and concerns to what extent it is possible to make investigations of sources without trespassing the constitutional protection of those by arguing that the investigation in question was conducted "privately". A third question relates to the protection against any kind of sanctions against anyone who openly or anonymously uses their constitutional rights. It is namely not clear just how far this prohibition against sanctions goes – does it include any negative response from the employer on the use of the rights in question, or does it only protect against more tangible negative consequences? The fourth question relates to the central matter of the real scope of the constitutional protection against such sanctions (whether they take the form of concrete punishments or more subtle responses). The only legal safeguard to guarantee that higher ranking official respects this protection is the criminal offence of "misuse of public office" (*tjänstefel*).<sup>7</sup> The criminal responsibility is limited to acts performed in connection with the use of public power, and as we shall see, this has had unexpected consequences for the effectiveness of the constitutional guarantees here discussed.

### **3 The Relationship between Secrecy and Protection of Whistler-Blowers**

As has been noted the Swedish rules in this area allow for something quite contradictory; the legal (even constitutional) exposure of secret information if it is done in order to inform the public. Not surprisingly, this state of thing has not gone without criticism. A case in point – and the most frequently used (or abused) part of this right – is the spreading of secret information regarding ongoing police investigations. Daily newspapers have a great interest in such issues, making dramatic headlines on the handling of high-profile cases of murder, theft and the like. It is generally assumed that they actually buy this information from

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6 For a practical case, see the Court of Appeal for Western Sweden, case B 4926-01, judgement 2002-12-02.

7 Criminal Code, Chapter 20 article 1(*20 kapitlet 1 § brottsbalken*).

employees in the police department, not necessarily serving police-officers but perhaps more often administrative personnel with access to such information. Due to the restricted area of unprotected “leaking” of secret information, this is perfectly legal.

The police force and its workings are of vital interest to all of society because of its unique tasks and powers, ultimately protecting the institutions and the functions of democracy.<sup>8</sup> To “put the lid on” information from that institution would be to create a potentially dangerous “state in the state”. On the other hand, the more or less commercial use of this tool to watch the watchdog is of course galling to everyone seriously committed to effective police-work. Having sensitive information released to the public too early can seriously hamper criminal investigations and it is clear that many working within the police-force feel frustrated at the present state of things.

Is the solution to abolish the protection of those who leak confidential material to the press? This could seem to be the obvious answer. There are already a number of such exceptions so it could be argued that it would not in fact be a breach of the central principles in this area.<sup>9</sup> The negative effects on the efficiency of police investigations could be regarded as a further strong argument in favour of such an extension of the demands of secrecy. The constant leakage of confidential police material to tabloid press threatens the important societal interest in efficient police-work. In both the political and the academic arena such views have been voiced. What effect, if any, such a change would have to the main rule on freedom to inform the press is unclear, but so far the discussion have been limited to the area of law enforcement.

Not disregarding the force of these arguments, it is submitted that they should not carry the day in this crucial area of constitutional law. To begin with it should be noted that arguments of effectiveness are of a precarious nature, especially as regards police-work. All constitutional (and other) limits on the use of public power lead to reduced effectiveness, at least from a certain, more limited, perspective. It is the real function of such constraints, as constitutional protections and guarantees are the modern democracies’ answer to a historical experience of rather too much effectiveness. Effectiveness is always something relative and something that can not be maximised outside Utopia. In the real world the question is: is the current level of effectiveness – given the number of factors that affect this – unacceptable or otherwise below what could be expected? Keeping in mind that we are considering reducing the level of protection in an important area of constitutional law, connected to both the function of the democratic system and the preservation of good administration, such a move should only be taken if it is clear that it is necessary.

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8 Even widespread “normal” criminal activities can be a threat to democracy itself if they go unhindered as the stability of society breaks down under such circumstances and trust in all public institutions (including the elected ones) goes down to point where it is “everyone for himself” – a climate most harsh for democratic values to survive in.

9 The exceptions concerns information on the relation to foreign states, information on matters of personal health etc., see Freedom of Press Act Chapter 7 article 3 and Chapter 16 of the Act of Secrecy.

Framing the question like that clearly shows, in my mind, that an exception to the rule of transparency, limited to police-matters, would be too strong a medicine, for at least two reasons. First of all, the problem with a police-department that “leaks” confidential material is not necessarily best combated through changes of constitutional significance. Changes in internal organisation and routines are a much less intrusive, and perhaps also more efficient, way of stopping the really sensitive material from becoming publicly known prematurely. Such measures have been taken and it seems like some of the more frustrating kinds of leaks have been eliminated this way. This casts doubt upon the necessity of legal reforms as such in this area. In this context it must also be remembered that not all of the reports in mass-media on criminal matters in the press hurt ongoing investigations, as the recent use of television by the police itself shows.<sup>10</sup>

Secondly, it would be a first step on what could amount to very slippery slope. When efficiency starts to outweigh the interests behind the constitutional regulation, there is no logical or self-evident limit to that arguments force. Due care should therefore be taken before one starts to take a path that undermines a basic constitutional principle. If one considers that the Swedish police is not remarkably ineffective, then a reduction of the transparency of that institutions work would be unwarranted and perhaps even contra-productive. The public still have great trust in the police, compared to other societal institutions, and this has at least in part to do with openness – secrecy seldom breeds trust. It could thus be said that an institution like the police needs transparency even more than other public authorities and that the constant leakage of information from within police departments, however unwanted, is a healthy sign instead of a problem.

#### **4 Men with Many Hats**

The second issue concerns the way the prohibition of searching for “leaks” works in practice. In 2001, the Supreme Court had to decide a case concerning an elected member of the council of the local authority that had called up an employee of the local government on the telephone and asked her whether she was the person behind certain articles in the local press.<sup>11</sup> He was prosecuted for acting in conflict with the constitutional protection of sources to the press. Of interest here is that in the Court of Appeal, he was acquitted because the court found that he had asked not as a superior in the local government (which he was) but as a local politician and private person. The prohibition only forbids “authorities” to make inquiries on sources and as he had made the enquiries as a private person, he could not be punished. The Chancellor of Justice, acting as exclusive prosecutor in these cases, appealed to the Supreme Court, being very critical to the reasoning of the Court of Appeal. The Supreme Court, however, ruled on a completely different ground and found that it could not be proved that the ac-

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10 I am referring here to the TV-shows “Efterlyst” (Wanted) and “Cold case Sweden”, both in which police-officers play an active part and in which the public is encouraged to contact the police with tips etc.

11 NJA 2001 pp. 673.

cused actually had the necessary (criminal) intent to expose a protected source. The reasoning of the Court of Appeal was thus left uncommented upon and it is until today unclear whether it is “the law of the land” or not.

This state of things is highly unfortunate in any legal matter and particularly so here, as it affects the constitutional protection of thousands of employees in the governmental and local governmental authorities. Due to the organisation of Swedish local government, it is especially troublesome for the protection of freedom of speech in such institutions. Local government in Sweden consists of a large number of politically elected officials that act on several levels of decision-making, as chairpersons and/or members of decision-making bodies. A staff of professional civil servants prepares and executes these decisions. This means that almost all personnel in local government have politicians as their immediate superiors as well as ultimate bosses. Local politicians are thus both politicians and (central) parts of the local authorities. The Court of Appeals reasoning makes it possible for all these politicians to use their different roles as a way of circumventing the constitutional safeguards of freedom of speech. It is enough to make it somewhat plausible that the attempt to unearth a certain source was conducted as a private person, acting out of a political interest, not as a representative of the authority. Given rules on evidence in criminal proceedings, this will be enough doubt for an acquittal. Sources are no longer protected in the largest, and perhaps most important, part of Swedish public administration, a part that even without this terrible hole in the constitutional safety-net around freedom of speech, is an organisation that has problems with respecting this freedom.<sup>12</sup>

Now, this would not be much of a problem if only the reasoning of the Court of Appeal was the only example of this kind of (miss)interpretation of the scope of the constitutional protection. However, that is not the case, as the Chancellor of Justice just recently came reinforce this line of reasoning by not prosecuting in a case quite similar from 2001.<sup>13</sup> The Chancellor explicitly refers to the decision of the Court of Appeal in his decision not to press charges. The omission by the Supreme Court has thus left us with a leading case from a lower court that influences (or even guides) the interpretation of the rules in question.

Of course, there is some merit in the reasoning of the Court of Appeal. Even persons of high rank within the administration must be able to act as private persons and this is perhaps particularly so when someone holds political posts as well as administrative ones. The problem is that this common-sense notion does not work well in the context of Swedish local government and protection of sources of information within the administration. Here, this double role is ever present and it is virtually impossible to find any bright line separating one role from the other. The superiors can always refer to their political posts as an excuse for making enquiries in connection to “leaks” and this conduct will go unpunished. The whole constitutional regulation is undermined by allowing this spontaneous switching of roles. Given the importance traditionally attributed to

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12 See the Parliamentary ombudsman’s yearbook 2005/06 pp. 23, where the ombudsman says that he is worried over the apparent lack of knowledge about fundamental rules in this area displayed by local authorities during the preceding year.

13 See decision 2006-04-12, dnr 2597-06-31.

this area of constitutional law it is actually surprising that nothing has been done about this.

So, what solution can be found short of a change of constitutional law? The easiest solution by far is to acknowledge the fault in the reasoning of the Court of Appeal (and nowadays, the Chancellor of Justice too). This area of law has no room for double roles. The intention of the far-reaching prohibitions in The Freedom of Press Act is to secure that important information reaches the public and one way of doing that is to forbid superior officials to “dig” after constitutionally protected leaks by persons falling under their authority. To secure that, the rule should be once an official, always an official. This will leave no room for calling persons after working hours, no “private” investigations, no wearing one hat one minute, another one the next. As far as I can see, there are very few situations where a superior has any reason to discuss an employee’s contacts with the media if not to express some (negative) opinion on that very matter. Such opinions should not be voiced at all, because of the risk of scaring people to silence, a silence detrimental to good administration and democratic governance. And from the perspective of the employee, the boss is always the boss, no matter the context. It is someone you have to obey in the workplace and someone that has influence over many aspects of your working life. Failing to acknowledge that, is leaving the employees without real protection and risking that silence will become the trademark of Swedish administration.

If this cannot be achieved by the legal machinery itself, by way of interpretation and guiding case-law, Parliament will have to act. This would mean a change of the constitutional regulation, somehow including the group of “private” investigators under the criminal law. As such a process is slow and as there is bound to be legal/technical difficulties in just how to frame such an extension of the law, the former solution is to my mind much to be preferred. But so far, the only sound made by Parliament in this area of law is silence, somehow echoing the state of affairs in local government.

## 5 The Nature of the Sanction

As mentioned above no action may be taken against a public servant due to the fact that he or she has used the rights guaranteed in the Freedom of Speech Act, if the Act itself does not allow for that action. The critical issue in this context is just how far this barrier against reprisals goes. On this issue, the two central institutions, the Parliaments’ ombudsmen and the governments’ Chancellor of Justice seem to split.<sup>14</sup>

On the one hand, the Parliamentary ombudsmen (JO), takes a rather far-reaching view and considers that any criticism or expression of displeasure with employees’ contacts with the press is a breach of this prohibition.<sup>15</sup> The authori-

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14 Both JO and JK are institutions of extraordinary control of the administration, investigating individual complaints and doing controlling visits at public authorities. The control is mostly formal and legalistic in nature, focusing on administrative procedures and respect for fundamental legal rules (like the constitution).

15 See i.e. JO 2005/06 pp. 458.

ty as such, and the management level of it, is restricted to the use of public channels to counter any false or misleading information regarding the authority and its business. On the other hand, the Chancellor of Justice (JK) has taken a somewhat more restrictive view, saying that short of actions with tangible negative effects on the person concerned, no breach of the protection of free speech is at hand. The Chancellor has taken the view that internal criticism must be allowed, as the generous system of protection of sources presupposes that the privileges are used in a measured way and not solely for individual gain.<sup>16</sup> According to the Chancellor, forbidden acts are negative sanctions of a concrete kind, not general criticism of employees who leak information or management-initiated discussions on the use and “abuse” of constitutional freedoms.

This split has some negative consequences in itself, as it breeds uncertainty in this field of law, an uncertainty that can chill expression that is perfectly legal and protected by the constitution. From that perspective, either of the views of JO or JK is preferable to the situation today, as long as it is a clear rule. From the perspective of freedom of speech, the matter is not so easily solved, as there is a significant difference between the views discussed. The Chancellor seems to take a view closely connected to the effective functioning of the administration; something that perhaps is natural considering that he is the government’s representative. The practical effects of less loyal use of freedom of speech can be negative for an authority as a whole, affecting its image in the public eye, its everyday functions and the atmosphere in the workplace. Doing nothing in a situation like that might not seem like an option to the leaders of a government agency.

That is more or less what JO would demand of them, only responding by official channels and by public statements giving the views of the authority. One could argue that this is a too restrictive attitude towards what should be allowed by senior public officials in protecting the reputation and functionality of “their” agency. However, there are good reasons for JO’s view, reasons that have to do with the practical functioning of workplaces and internal critique in relation to the use of freedom of speech.

The starting-point would be that most people are disinclined to act disloyally towards their employer in any way. The nature of the relationship between employee and employer is one of dependence in which the first (typically) is in a weaker position. It takes some guts to criticise the one who pays your bills. Even if the employer doesn’t do anything that affects the employee directly such things as individual wage-setting, the placement of working-hours etc can in practice have a major impact on the individual’s working conditions and be used to express displeasure without an actual connection to the use of freedom of speech. Secondly, raising critical views internally or externally can also be socially uncomfortable, invoking distrust or even hostility from superiors and colleagues. This can be a rather subtle process, were nothing is really said or done, but more of a silent exclusion from the ties between people working together, drinking coffee on breaks, going out on a Thursday after work, etc. Troublemakers thus takes risks not only with their bosses, but also with everyone at the

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16 See i.e. decision 2003-05-30, dnr 295-01-30.

workplace, because no one likes a troublemaker. These are some of the more invisible “costs” that the use of freedom of speech can have for the individual raising complaints in public. Partly because of this, most public employees will not report internal mistakes, faults etc. to the press (or to anyone else), but rather take the view that it is “we” against “them” if such matters are exposed.

In a legal regime that is concerned by this, by the silence that threatens to spread in public authorities due to an atmosphere of “we don’t speak with the press here”, it is not enough to prohibit only the clear sanctions against the outspoken few. The logical step for a real and wide protection of freedom of speech is to try to shelter the users of that freedom from any (or as much as possible) formal inconvenience due to their choice. There will still be deterring factors like the ones mentioned above, but the fact that the “bosses” can not criticise you (openly) in any way might just make a difference for someone considering whether to answer a journalist’s questions. Culturing an administration that is keen to acknowledge its own weaknesses and that tries to use criticism as input for change is a difficult thing, as the spontaneous reaction often might be the opposite. So to get people to be willing to risk the consequences of outspokenness mentioned above less intrusive measures must also be prohibited, not only those with clear negative effects. JO’s line of reasoning should therefore, in my opinion, be preferred.

What about those who have no interest in contributing to the public discussion on how the administration is functioning, but only use the constitutional protection for their own gain – should nothing be done about them? This problem is actually smaller than it seems, because it is mainly about those who deliberately breach rules of secrecy in order to inform the press of more or less scandalous and/or headline-making information on police matters and the like. This is of course frustrating for hard-working police officers, who sometimes see their work undone by irresponsible reporting. As have been discussed above, one part of the solution to this problem has nothing to do with legal matters, but is rather a question of internal organisation and of media ethics (you don’t have to publish everything you know).

The other part of the solution is that there really is no solution. If we really think that the workings of our administration is of great public interest, then the conclusion would be that the occasional misuse of this right is a price we have to pay for the possibility that something worthwhile might be brought to the public’s attention, as in fact does happen from time to time. The fact that this constitutional right also protects “trash” can not, in my view, reduce the value of the transparency it does provide. It should be remembered that the value of these rights is not solely dependent upon how they are used, but also upon their very existence. The fact that major mismanagement could be exposed without much fear of reprisal is in itself a deterring factor for those who could otherwise succumb to the temptations of power. And it helps preserving the trust in the administration, as no news really would mean good news.

## **6 Now You See It, Now You Don’t**

The last issue to discuss here is perhaps the most astonishing legal upheaval in recent Swedish legal history. It is a constitutional earthquake gone unnoticed by most, but one that sends tremors through the constitutional structure of Swedish government. The protection against reprisals that we discussed above is only directed against authorities. If an authority (or rather a person representing the authority) steps over the line and acts contrary to this prohibition the remedy for that is a criminal prosecution for misuse of public office (*tjänstefel*). Now, this crime consists of culpable behaviour in using public power, so all kinds of faults are not criminalised. The idea is that only faults regarding actions that are more or less typical of the relationship between citizen and the state (a rather one-sided relation of dependence of one sort or the other) should give cause to criminal sanctions. Typical examples would be sentencing someone to jail, deciding to take someone's child into custody and granting an application for governmental financial support.

In a recent case a senior official of local government took action against an employee because of contacts with the press. It was, in all appearance, a clear cut and simple case of unconstitutional behaviour. The Chancellor of Justice prosecuted but was surprised (I speculate here, but I think it is a good guess) to find the trial court acquitting the accused.<sup>17</sup> The reason for the decision was that the court found that the relationship between the local government and its employees was of private-law nature. Actions taken against employees could therefore not be an exercise of public power, but instead a power founded in the collective agreements between the parties concerned. The criminal provision was simply not applicable in the area of employees of local governments. The consequences of this, duly noted by the Chancellor, is that a major part of the public servants in Sweden actually fall outside the criminal protection of their constitutional rights.

How could this happen? Well, the answer seems to be that the nature of public employment has gradually changed and especially so in the case of personnel in local government. The development has been from a highly regulated area with special legislation due to the nature of the position as civil servant, to a more or less identical situation as other groups in the work-force on the labour market. This has happened without anyone considering the effects on the constitutional provisions on protection of sources and uses of freedom of speech. On the contrary, everyone seems to have considered that nothing had happened that affected that part of the legal protection of freedom of expression. Until the court in Borås dropt the bomb...<sup>18</sup>

The Chancellor of Justice has notified the government and the issue is at this moment being considered by experts within the Government. The Government has signalled that it will initiate an analysis of the rules in question and that it

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17 The decision of Borås tingsrätt judgement 2005-10-04, case B 930-05 and the Chancellor's decision 2005-10-24, dnr 3841-04-35 not to appeal.

18 This is of course somewhat over-dramatic. Employees of (national) government are still protected by the criminal code, so all public servants are not affected by this finding. But the great majority of public employees are employed in local government. As the Chancellor points out, this difference in treatment does not seem like a rational order of things.

takes the situation seriously.<sup>19</sup> Nothing will happen soon on this front though, so the situation will not improve (from a freedom of speech perspective) within the foreseeable future. What, then, can be done?

A first solution would be to change the scope of criminal conduct, including actions that have no immediate connection with the use of public power as such. Acting contrary to the constitution is clearly a fault by any standards when it comes to evaluating the conduct of public officials, so it would perhaps not be such a controversial move to protect constitutional rights by criminal responsibility. On the other hand, since the 1970's the Swedish legislator has been reluctant to use criminal sanctions in the public sector unless absolutely necessary, so the likelihood of extended criminal responsibility in this area is low.

A second, more narrow, solution would be to legislate that officials in local government have a special criminal responsibility in this type of situation. It is hard to see how that kind of rule would be constructed, but it could perhaps be included in the law on municipalities (*kommunallagen*) as a general requirement as to how the local government runs its business. That kind of public law intrusion into the labour law area is not unusual in areas that the state thinks too important to hand over to the parties on the labour-market. Most of the time this kind of legislation concerns other areas of law (safety, non-discrimination, etc.) so it would be a new kind of intrusion.

A third solution would of course be to hand this matter over to the parties on the labour-market, with a clear indication that unless they find a satisfactory solution to the problem, legislation will follow. The sanctions against unconstitutional reprisals would thus be regulated in private law, perhaps by collective agreements. That would, however, go contrary to the often expressed view that criminal sanctions are an indispensable part of the system of public officials' responsibility, even if they are not used that often. It would also give a somewhat strange impression to let private parties take responsibility for the protection of constitutional rights, an area of law central to the state. That reason alone is perhaps enough for this alternative to be disregarded.

The last solution here discussed would be not to accept the interpretation of the local court on the relationship between the local government and its employees in *this* context. As the court – and the Chancellor of Justice – notes, the legal nature of employment in local government is not obviously “private”. Many aspects are the same as in the private law sector, but some differences do exist. First of all, local governments are to a high degree fulfilling public law tasks, taking care of education, infra-structure, health-care, etc. These tasks are given to the municipalities by law and a court-system controls the practical implementation.<sup>20</sup> Secondly, these tasks are mostly financed (or subsidized) by taxes, strengthening the public nature of local governments' activities. Together these two factors could be enough to “see through” the private law dressing of the relationship between employed and employer in local government, much as the Supreme Court recently did in another context.<sup>21</sup>

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19 See government bill 2005/06:162 (prop. 2005/06:162).

20 Extraordinary supervision is done by the Parliaments ombudsman.

21 See NJA 2005 pp. 568.

Thirdly, the connection with a constitutionally protected activity like freedom of speech does put a “public law” character on the specific actions of the local government in this kind of case. A fourth argument in favour of such an interpretation is the pure teleological observation that the system otherwise is fundamentally flawed contrary to the purpose and function of the constitutional regime. If an interpretation is available that would save the system it should be the one adopted because of the consequences of any other choice.<sup>22</sup> Such an interpretation respects the will of the Parliament, the integrity and coherence of the constitution and the rights of individuals in an area essential to the function of the democratic State. All things considered it would not – in my opinion – be uncalled judicial creativity to find that sanctions against public employees for using their freedom of speech is a form of use of public power, even if other aspects of the relationship between the parties involved would better be characterized as “private”.

## **7 Conclusion**

As we have seen, there are significant cracks in the armour of freedom of speech in Sweden. These weak points are mainly visible on the “input” side of expressive conduct, potentially reducing available information for journalists and others who engage in coverage of societal phenomena. Without input, there is of course a risk for no, or at least worse, output and this is the serious consequence of the “culture of silence” that seems to spread through the public sector. In a society more complex than ever, with citizens more educated than ever and with more physical, financial and psychological power in the hands of public and private persons than ever, the importance of freedom of speech is – in my view – growing. Perhaps “the truth is out there”, but how are we to know if no one dare to tell? So, even if the proud principles of Swedish freedom of speech regulation still stand tall in many ways, unchecked and unforeseen developments are undermining the whole protective structure. We need to talk more about the freedom of speech; about the conditions and functions of that lofty ideal and we need to do it now.

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<sup>22</sup> Some would think that attention to the effects of judicial rulings is contrary to “legal method”, but I do not agree, nor do most courts. It is a factor, not always a conclusive or even important one, but here that is so, given the interests at stake.