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## The Norwegian Declaration on the Rights and Duties of the Editor - from Private Arrangement to Public Law

### Abstract

The paper starts by describing the political process that is about to elevate the Norwegian Declaration of the Rights and Duties of the Editor - or the Editors' Code for short - from private arrangement to public law. It argues that

1. Establishing the Editors' Code by law will not enact the principle of editorial independence, but manifest the power of media owners
2. Establishing the principle of editorial independence by law will not solve the problem of monopoly control with the freedom of expression, but create new forms of monopoly control

Firstly, the Editors' Code has been hailed for being the Magna Carta of the Norwegian media. The Magna Carta is the English medieval freedom charter for the nobility. In this paper it is argued that the Editors' Code resembles more the Norwegian medieval code of conduct for the nobility, the King's Mirror. It endows the editors with responsibility, while the media owners retain the power. Secondly, the purpose of enacting the Editors' Code is to prevent owners controlling many and influential media outlets from obtaining centralized monopoly control over media content. However, by enacting the principle of editorial independence the state will have introduced itself as the freedom of expression's court of appeal. Thereby the existing, and for the state threatening, relation between the four estates (the legislative, executive, judicial - and the media) will be turned upside down. Rather than the media as the fourth estate controlling the three real state powers, the legislative state power will have empowered the executive and judicial state powers to control the media.

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## Foreword

The manuscript is based on a paper presented at the international workshop "Corporate Governance of Media Companies" in Stockholm 1-2 October 2004, sponsored by the Media Management and Transformation Centre (MMTC) of Jönköping International Business School (JIBS). Selected papers from the workshop, addressing media internal governance issues, are presented in JIBS Research Reports No. 2005:1, edited by Robert Picard.

This paper addresses a different issue: External government interference into internal media governance, by means of elevating a private arrangement of the Norwegian newspaper industry, the Editors' Code, to the status of public law. The paper updates and expands the argument presented in two earlier essays written in Norwegian, "Redaktørplakaten - en alternativ fortolkning" ("The Editors' Code - an Alternative Interpretation") and "Lovfesting av redaktørens uavhengighet" ("Enacting the Independence of the Editor"), both published in the report "Statsmakt og mediemakt" ("State Power and Media Power"), Research Report No. 5/2002 from the Norwegian School of Management BI.

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## Introduction

In 1953 the National Association of Norwegian Newspapers (now: the Norwegian Media Businesses' Association) and the Association of Norwegian Editors adopted a declaration on the rights and duties of the editors. In Norway it is known as the *Redaktørplakaten*; it will be referred to as the Editors' Code. Since 1995 a proposal to promote it into public law has been an issue on the media political agenda. By 2004 it seems that the main obstacle towards legislation, the Constitution's present §100 on the Freedom of expression, is about to be removed.

The stated purpose and justification of the proposed legislation is that it will prevent monopoly control with the freedom of expression. However, in my paper I will argue in favor of the following two assertions:

- Establishing the Editors' Code by law will not enact the principle of editorial independence, but manifest the power of media owners
- Establishing the principle of editorial independence by law will not solve the problem of monopoly control with the freedom of expression, but create new forms of monopoly control

State intervention and legislation is different from the approach recommended by the Council of Europe. The Council's Recommendation No R (99), a document otherwise hailed by Norwegian media policy authorities (cp. e.g. St. meld. no. 57 for 2000-2001, paragraph 3.4.1), was that "Member States should encourage media organizations to strengthen editorial and journalistic independence voluntarily through editorial statutes or other self-regulatory means" (Council of Europe 1999, Appendix IV). The Norwegian approach therefore supports Knut Heidar's proposition that a distinct feature of Norway is "the primacy of politics", with a "state/society mix" that is "somewhat more 'state-biased' than most other West European countries" (Heidar 2001: 5-7).

## From Private Arrangement to Public Law?

The first attempt to enact the Editors' Code was not surprisingly made by the Association of Norwegian Editors. Their proposal attracted the attention of the government's Media Ownership Committee, appointed in 1993 and reporting two years later. The mandate of the Ownership Committee was (1) to survey the development of ownership change in the Norwegian media, (2) evaluate the consequences of ownership concentration and foreign ownership for the freedom of speech, editorial freedom, and the preservation of a differentiated media system, (3) to evaluate the need for governmental regulations to prevent undesirable consequences of ownership concentration and the increasing rate of cross-ownership, and (4) to propose regulative measures in order to prevent undesirable manifestations of the concentration tendencies,

and safeguard freedom of speech, editorial freedom, and media diversity. This task led the committee to the Editors' Code as a measure to curb the power of media owners and thus reduce the potential negative effect of media concentration on freedom of speech. In its report the committee wrote that

*“Editorial freedom in the media is important for the freedom of speech. In practice editorial freedom will be linked to the independence and autonomy of each editor. Safeguarding editorial freedom will thus contribute to counteracting possible negative effects of ownership and ownership concentration ...*

*The principle of editorial freedom is basic for free and independent mass media, founded on the editor's responsibility for what is being published as well as protecting editors against intervention and oversteering in the discharge of their profession. Editorial freedom is expressed in the voluntary agreement between the National Association of Norwegian Newspapers and the Norwegian Editors Association – Redaktørplakaten”(NOU 1995:3).*

The Ownership Committee feared that the status of the Editors' Code was not sufficiently solid as “to withstand pressure from among others public authorities, pressure groups, the media owners, the media employees, and pressure due to economy and market development”. There was reason to believe that such pressure would increase. Therefore editorial freedom should be strengthened by legislation. This would prevent the present media owners from terminating or limiting the existing agreement, secure that new media owners will not set aside or limit it, and ensure that new media are not established without an agreement on editorial freedom as a foundation of their business (p. 110).

The facts that the issue at stake was enacting an existing agreement between the parties involved, and that the three large media owners were all represented in the unanimous Ownership Committee, indicated that the Editors' Code could become law rather quickly. However, ten years later the issue is still pending, despite repeated attempts to obtain legislation. The first setback came in 1998, when the Ministry of Justice, responding to a hearing note from the Ministry of Culture, assessed that enacting the principle of editorial independence could be in conflict with the Constitution's §100 on the freedom of expression, as it could prevent the media owners from expressing themselves in their own publications. The Association of Norwegian Editors tried to overrule the Ministry of Justice by asking a reputed firm of lawyers for their opinion, but despite a favorable statement from the lawyers, a new Cabinet Minister of Culture in 1999 told the Parliament that the government would not propose legislation, as it could be unconstitutional. Later that year, however, the governmental Commission on Freedom of Expression, appointed in 1996 to revise the Constitution's §100, reopened the issue and gave it a thorough examination in its report (NOU 1999:27, p. 97-100). The Commission was divided on the desirability of legislation, and did not make a clear recommendation. Still it did make an impact on the following political debate, as it stated that a law on editorial freedom would not be in conflict with the new §100 that it proposed. This linked the issue of legislation to an amendment of the Constitution, a

lengthier process that in Norway presupposes election of a new Parliament (in this case for the period 2005-2009). This became clear when the Parliament in 2002 debated the Ministry of Culture's new media report (St. meld. nr. 57 for 2000-2001). All political parties except the Progressive Party were in favor of legislation as proposed by the Ministry, i.e. provided it was not in conflict with the Constitution.

Then in March 2004 the Ministry of Justice published its report to the Parliament on amendment of the Constitution's §100 (St. meld. nr. 26 for 2003-2004). Here the Ministry announced its intention to propose a law on editorial independence. According to the Ministry, the considerations in favor of legislation carry heavier weight than the considerations implying that the legislators should restrain themselves from intervening in the media-internal distribution of competence. Furthermore, the Ministry had noticed that legislation would not be in conflict with the proposed prohibition of prior censorship, provided that the law would respect the kind of reservations implicit in the Editors' Code's reference to "fundamental views and aims". As far as possible the law must subdue the considerations weighing against legislation. A basic condition will be that a law on editorial independence must not interfere with the right of media owners to set up superior aims and guidelines for the editing. The Ministry considered this necessary for investments in media enterprises to be interesting for other but purely commercial motives. Furthermore, the law should not apply to organizations publishing members' magazines or the like.

These considerations indicate that the intention of the Ministry of Justice is to establish by law the Editors' Code exactly as it already exists as a private agreement.

## **The Editors' Code as the Magna Carta of the Norwegian Media**

The common interpretation of the Editors' Code is that it establishes the principle of editorial freedom and independence from the media owners (cp. Eide 2000, Østbye 2000). The editors consider it their charter, and compare it with the British *Magna Carta* of 1215. After a revision in 1973 it is as follows ([www.nj.no/English](http://www.nj.no/English)):

*“An editor shall always keep in mind the ideal purpose of the press. The editor shall promote the freedom of opinion and in accordance with the best of his/her abilities strive for what he/she feels serves society.*

*Through his/her paper the editor shall promote an impartial and free exchange of information and opinion. The editor shall nurture a type of journalism that makes it clear to the reader what is reporting and submission of information and facts, and what are the opinions and judgements of the newspaper.*

*An editor is expected to share the fundamental views and aims of his/her publication. But within this framework the editor is entitled to a free and independent leadership of the editorial department and editorial work and full freedom to shape the opinions of*

*the paper even if the publisher or the board does not share them in single matters. If the editor finds himself/herself in irreconcilable conflict with the fundamental views of the paper, the editor is obliged to resign. The editor must never allow himself/herself to be influenced to advocate opinions that are not in accord with the editor's own conviction.*

*The editor bears the judicial responsibility for the paper, and has the full and personal responsibility for the contents of the newspaper. The editor directs and is responsible for the activity of the members of the editorial department and is the link between them and the publisher/board. The editor may delegate authority in accord with his/her credentials. The newspaper may appoint more than one editor, including an editor for advertising contents”.*

"The Rights and Duties of the Editor" contains about ten duties and only two or three items that with some benevolence may be called rights. For such a document to be considered a freedom charter at least one of two conditions must be present. Either the rights are much more important than the duties, and/or the duties too are in reality rights. The latter must imply that the editors have duties superior to the interests of the owners, and that these duties give the editors rights the owners must accept. This implies that by signing the agreement the owners acknowledge the right of editors to disobey orders that are in conflict with the editor's duties. The purpose of the Editors' Code is then to legitimize editorial disobedience to the owners.

However, victory to the editors is merely one of three possible interpretations of the Editors' Code. It may also be interpreted as a compromise between the parties, and as a victory to the media owners. Interpreted as a compromise the distribution of rights and duties may be said to express this. The owners have given the editors some rights in return for accepting their duties, and the editors have accepted some duties in return for being awarded some much-coveted rights. Interpreted as a victory to the owners, even the rights of the editors must be understood as duties.

## **The Editors' Code as the King's Mirror of the Norwegian Media**

In October 2003 the Association of Norwegian Editors celebrated the 50<sup>th</sup> anniversary of the Editors' Code. In its issue preceding the celebration, *Dagens Medier*, the journal of the Norwegian Media Businesses' Association, published an interview with the author of this paper. Under his portrait, covering most of the front page, the title was a quote put in his mouth: "No reason to celebrate" (*Dagens Medier* no. 10/03). Inside the journal a whole page was devoted to the Editors' Code. Rolland was quoted saying that it resembles not the British medieval document Magna Carta but rather the Norwegian medieval document the *King's Mirror*, in which "the admonishing father is tutoring his son. In the Editors' Code the media owners are tutoring their editors", he said. Rolland maintained that the declaration gives the editors the responsibility while the owners retain the power. Thus the owners have power without responsibility, and the editors have responsibility without power. Obviously it benefits the owners that their editors

think they have won a freedom charter. It improves the editors' work moral without altering the real power distribution, he said.

The journal confronted three significant actors with Rolland's opinions, and they all responded by shaking their heads in disapproval. The significant actors were: the president of the media businesses' association, who also happens to be newspaper editor, the deputy general secretary of the editors association, and the media professor who on commission wrote an historical narrative of Norwegian editors for the associations' 50<sup>th</sup> anniversary in 2000. However, having finished shaking their heads they all declared that they agreed with Rolland, who was said to kick in open doors. In the following issue of *Dagens Medier* Rolland could not resist comparing this with H. C. Andersen's fairy tale, where the crowd politely admired the emperor's new clothes until a child said he does not have any, after which the crowd said of course not, we knew that all the time. Rolland also elaborated the Magna Carta/King's Mirror metaphor, and said that if the Editors' Code were to resemble the Magna Carta, it would have been the editors instructing the media owners, and not conversely (Rolland 2003a).

## The Two Interpretations Compared

The essay "The Editors' Code, an Alternative Interpretation" (in Rolland 2002b) argues that the code must be understood against its historical background. It was made and agreed upon in the heydays of the party press, when the media owners were political parties or persons sympathizing with them, and when the employed editors also were politicians, as the position itself was political, purposively or effectively. The party press had great potential for conflict between owners and editors. The owners were in business for political rather than economic reasons, and shared the editors' interest for media content. Thus they had strong motives for editorial interference and oversteering, which obviously must have been a nuisance for the editors. The owners also knew that by appointing editors they were making some of their own employees politically very powerful, as their editors were in fact full-time non-elected politicians controlling the means of daily communication with the voters and party members. Obviously the editors too were aware of the power entrusted to them. It was a system where owners and editors could have their own, opposing political agendas, in agreement or conflict with the party program or the party leadership's agenda, as in all parties there could be opposition, conflict, and wings. It was a system where loyalty and trust continuously could be challenged. Hence it was a system in need for internal traffic regulation as means for its own survival.

The editors took the initiative, but the media owners have lived comfortably with the code for more than fifty years. This could imply that in 1953 the owners were put in their place in no uncertain terms, or that the media (at first only the newspapers) have been favored with unselfish and trustful owners having no scruples depositing their fortunes in the hands of independent editors. However, two parties are needed to make an agreement, and a good one has advantages for both. The fact that the media owners

have been against enacting an agreement they signed long ago indicates that they are satisfied with the present arrangement, and fear a loss of control if the state enters it at the side of the editors. The fact that the media owners are in control is contrary to the interpretation of the code as the media's Magna Carta.

### The ideal Purpose of the Press

The first paragraph of the Editors' Code identifies a series of editorial duties that all must be transformed into rights in order to correspond with the Magna Carta interpretation. It starts with the editor's duty always to "*keep in mind the ideal purpose of the press*". The item holds up an ideal standard against which the owners can measure the performance of their editors. The ideal is however not controversial in the media industry, but set, approved, and guarded by the media's ethical organization, the Norwegian Press Association, where the owners' and the editors' associations are both members (it also includes broadcast media). The Magna Carta interpretation of the code requires disregard of this fact. The item is then not expressing the editors' duties to ideals shared with the owners, but duties to ideals superseding the interests of the owners, who do not "always keep in mind the ideal purpose of the press". This transforms the duty to a right: the right of editors to ignore what they consider illegitimate orders from the owners. Consequently it cannot be left for the owners to decide whether an editor's performance is in accordance with the ideal standard. Who should then be authorized to do this? The Editors' Code leaves this open. The answer may be other editors, judgment by peers. However, it can also be the society as a whole, which may require delegation of the competence to the state. It may require elevation of the Editors' Code to public law.

The King's Mirror interpretation of the code implies it must be the *media owners* who are concerned about "the ideal purpose of the press", and therefore want to ascertain that their hired editors share their concern. By delegating the power of editing the owners make themselves dependent on the editors, and will naturally look for measures that can reduce the risk they take. Furthermore, at the time of the party press there was hardly any conflict between the ideal purpose of the press and the ideal purpose of the political party, as they were both serving the society as vehicles for obtainment and preservation of democratic power. Keeping in mind the ideal purpose of the press could therefore be equal to respecting the political objects clause set by the owners.

The item can also be interpreted as a limitation of the editor's area of responsibility. The media may have ideal (political) and commercial objects clauses. According to this interpretation the editor's responsibility is limited to the ideal (political) goals, while somebody else is responsible for the commercial goals. "Somebody else" – could that be the owners themselves? Then there is the question of goal hierarchy. However, even when politics is the goal and economy the means, it will be the means that determine the possibilities of realizing the goal. In that sense the economy will always be superior.

## Promoting the Freedom of Opinion

*Promoting the freedom of opinion*, also in the first paragraph, is another obligation against which the editor's performance can be measured. Again the Magna Carta interpretation implies that the owners do not respect the ideal, but are forced by the editors to accept what for them is sacred. The interpretation turns the duty to a right: The right of editors to print opinions disliked by the owners without risking sanctions from them. According to the Kings' Mirror interpretation, however, the freedom of opinion is important for the owners (too). It is important for their freedom of trade as well as their party political activities. Particularly for the party press freedom of opinion was fundamental. While a commercial press can exist with limited freedom of opinion - although this restricts its freedom of trade - a party press will under such conditions cease to exist, or it must go underground. However, for the party press freedom of opinion is not merely freedom *from* public intervention. It is also freedom *to* decide who is allowed to express what to whom. It presupposes freedom of print, but not the duty to print. The individual party newspaper is perhaps not the quintessence of freedom of opinion, but the party press system may be that. The power of editing trusted to the editor is the power to distribute the freedom of opinion, including reserving it for the editor him/herself. From this point of view an order from the owners to the editor to promote the freedom of opinion serves to *limit the power of editing*. Editors are not permitted to manage the freedom of opinion at their own discretion, and run the risk that the owners will consider this abuse of power.

## Serving the Society

By insisting that the editor "*in accordance with the best of his/her abilities [must] strive for what he/she feels serves society*", also in the first paragraph, the owners once more point with exhortation against the editor. And once more the Magna Carta interpretation requires that the editor has societal duties that are superior to the owners interests, that the owners reluctantly recognize this, and are forced to guarantee the editor safe conduct if their interests conflict. The editor is then obliged to take the society's side against the owners, and must use their media property to take care of the society's interests against them. Hence it can hardly be left for the owners to decide whether the editor fulfils his/her societal obligations.

The King's Mirror interpretation is once more that the media owners (too) aim at serving the society. A clear indication of that is the fact that they linked their newspapers to the political parties. Their intention with this item in the Editors' Code is then to ensure that the editors are committed to the same objects clause. Alternatively the editor may use the owners' newspapers to promote the editor's own interests, or the editor may allow it being used to support third party interests at variance with those of the newspaper owners.

## Facts and Opinions

The second paragraph of the Editors' Code, concerning the duty to *promote an impartial and free exchange of information and opinion*, and to *make it clear to the reader what is reporting and submission of information and facts, and what are the opinions and judgements of the newspaper*, follows the same pattern. That is, in order to coincide with the Magna Carta interpretation the duties must be superior to the interests of the owners, who acknowledge that the editors have the right to fulfil their superior duties even when it is detrimental to the owners. The alternative Kings' Mirror interpretation is once more to prevent editors from promoting their own or third party interests. The Magna Carta interpretation implies that the owners prefer partial information as well as opinions and judgments presented as facts, which may have contained an element of truth at the time of the party press. From the Kings' Mirror point of view, however, the second paragraph provides the owners with opportunities for control. The owners have empowered the editor with the task to express opinions on their behalf. As for other readers confusion of opinions and facts makes it difficult for the owners to control what the editor really means, and hence whether his/her opinions correspond with their own. For the owners it is therefore advantageous that editorial opinions are clearly expressed.

## Freedom to shape the Opinions of the Paper

The third paragraph of the Editors' Code, in particular the item that *the editor is entitled to a free and independent leadership of the editorial department and editorial work and full freedom to shape the opinions of the paper even if the publisher or the board does not share them in single matters*, is obviously the one most frequently referred to when interpreting the Code as the editors' charter and guarantee of editorial independence. Thus in his account for the Norwegian governmental study *Power and Democracy 1998-2003* media professor Helge Østbye comments the paragraph as follows:

*"Generally industrial owners have full control over the production taking place in their enterprises, and its organization. There is no formal lower limit to what details the owners may interfere in. Through the Editors' Code the newspaper owners have waived the right to control details in newspaper content, i.e. is a voluntary and contracted transfer of power from owner to editor. ... Behind this lays an understanding of the newspapers' special importance as information providers and opinion leaders in the society" (Østbye 2000).*

However, Østbye is also aware that the freedom item appears in a paragraph that wraps it with obligations. Preceding this item is the editor's duty *"to share the fundamental views and aims of his/her publication"*. Following it is the *obligation to resign "if the editor finds himself/herself in irreconcilable conflict with the fundamental views of the paper"*. Following it is also the obligation never *"to advocate opinions that are not in accord with the editor's own conviction"*. The Editors' Code does not question the exclusive right of owners to decide what is the publication's aim and scope, or their right to operationalize this as detailed as they want to. Neither does the Code prevent

them from ensuring that they appoint loyal editors (on the contrary, it is presupposed that they do so), nor to appoint an editor from their own ranks if they so wish.

### Delegation of Power

The Kings' Mirror interpretation is that the third paragraph *does not* give the editor freedom to act independent of and contrary to the interests of the owners. It merely expresses the most effective way of securing editorial loyalty to the owners while simultaneously maintaining efficiency in the fight against deadlines and competitors to be first with the news. There are two ways of preventing unwanted expressions in newspapers as well as other media. The Norwegian Governmental Commission on Freedom of Expression called them "prior censorship", and "freedom under responsibility" (NOU 1999:27, Ch. 7). We may simply call them "censorship" and "self-censorship". Without self-censorship freedom under responsibility implies post-censorship and sanctioning of the expressions. The educational effect of holding someone responsible is self-censorship.

The editor's main task in a newspaper is not to write, but to edit. What editing is, the Commission on Freedom of Expression explained by posing a rhetorical question: "What is the difference between editing and prior censorship?" (p. 56). The editor censors the paper's own journalists as well as contributions from outside. Guideline for the censorship is the publication's "views and aims". According to the Editors' Code there are other considerations too - the ideal purpose of the press, the freedom of opinion, the society, impartiality. Neglect of these considerations is probably not advantageous for the editor. However, it is only irreconcilable conflict with the "views and aims" that has a contracted effect upon the editor's position, and the effect is then final, as it obliges the editor to resign. The publication's "views and aims" is therefore superior to the other considerations in the Editors' code. The implication is that if a conflict emerges between the other considerations and the publications "views and aims", the editor must put the other considerations aside or resign.

Appointing the editor normally satisfies the owners' need for prior censorship. As stated in the Code the editor is the link between the owners/the board and the editorial department. Sverre Høyer has described how this functions. "The editor is the owners' spokesman to the journalists and the journalists' spokesman to the board" (Høyer 1975). In order to overrule the editor the owners must have delegated authority to additionally one or two control instances, for example the board or its chairman. The alternative to delegation is summoning a general assembly before each deadline, with debate and vote on each item to be published. If one such control instance were empowered with the same authority as the editor, this instance would obviously take over the role as editor-in-chief. The issue would then be who should control the control instance, guard the guardian. The result would be a hierarchy of control instances - the editor, the chairman of the board, the whole board, the general assembly - and a paralysed bureaucracy. The newspaper would lose the fight against its own deadline, and unless all newspapers did

the same, the one that introduced prior censorship by the owners would be the sure loser in the fight to be first with the news.

Prior censorship by the owners therefore has an obvious downside in the form of reduced effectiveness in every sense, and loss of profit due to this. For censorship despite this to be profitable to the owners, it must have an upside greater than the loss. The upside will probably not be of an economic kind, but must be related to the need to prevent unwanted information and opinions from being printed.

In order to assess whether such an upside exists we may return to Østbye's assertion that behind the voluntary and contracted transfer of power from owners to editors "lies an understanding of the newspapers' special importance as information providers and opinion leaders in the society". Østbye suggests that the newspapers are particularly important information providers and opinion leaders; hence their management cannot be left to amateurs. Fortunately the owners have understood this, and therefore they have transferred the power to the editors who have the necessary competence. Østbye maintains that such a power transfer is unique for enterprises having signed the Editors' Code, but similar arrangements can be found in other fields where the daily operations require skills that the owners do not necessarily have.

It is not unusual to demand a certain level of competence, and authorization, before one is entrusted the right to express opinions. The assertion that newspapers are particularly important information providers and opinion leaders must also imply that they are particularly important for the democracy, which in fact is how this is explained in the ethical codes of Norwegian media. For the democracy, however, the competence requirement is very low, as for most Norwegians reaching the age of 18 is sufficient to be authorized as competent to cast a vote. The democratic competence of the media owners is acknowledged by the Editors' Code, which presupposes that the owners have set up the "views and aims" the editor must comply with.

### Big and small Issues

However, what is special for the newspapers is not their contribution to the democracy. Other institutions too contribute to the democracy, not least the political parties. Special for the newspapers (but common to them and other media) is their continuous and endless production of micro information, called news, among which some are important for the democracy, but most are irrelevant and trivial. Each news item is inextricably linked to opinions and judgments, among which the most fundamental is the opinion that the news item is worth publishing. Other judgments take the form of comments or evaluations. Together with the endless stream of news there is therefore an equally endless stream of judgments and opinions, most of which are ephemera just like the news. After each football match newspapers pass an opinion on each player, the referee, and the audience, for instance. Obviously confidence in the newspaper is greater if this opinion is based on professional competence, as this ensures that it is in accord with the accepted norms for achievement. Still football is something everyone is entitled to have

an opinion on, and the opinion of the newspaper's opinion may be divided. The owners too may disagree with the newspaper's opinion, and as the editor obviously has accepted its printing, a situation has come into being where the editor has used his or her right "to shape the opinions of the paper even if the publisher or the board does not share them in single matters". However, although the owners disagree, they may still have confidence in the sports journalists and consider them more competent to evaluate the players.

The owners have not yielded power in matters important for the democracy. What is important they decide by giving the newspaper "*views and aims*". "*Within this framework*" it can hardly cost them much to give the editor "full freedom to shape the opinions of the paper". It saves them the trouble of having an opinion themselves on all kinds of trivialities. It is also at the micro level of detail information that professional competence is important for the judgment, and hence for the readers' trust in it. At this level being able to lean on journalistic competence is therefore in every sense an advantage for the owners.

At the macro level of big issues, however, like the issue of democracy, professional competence is not required for expressing opinions and obtaining influence by doing so. Every person of age is qualified to decide the nation's health policy, for instance. It is only at the micro level, like carrying out surgery on a person, that health decisions require professional competence. The bigger issue, the more entitled are all citizens to express their opinions. All except the editors. For them applies the opposite rule: The *smaller* issue, the more entitled are they to express their own opinions. The bigger issue, the more committed are they by the Editors' Code to express the "*views and aims*" of the media owners.

### Post-Censoring the Editor

The Editors' Code entitles the editor "to a free and independent leadership of the editorial department" - on their own responsibility and at their own risk. The owners do not assist with prior censorship that could have exempted the editor from responsibility or reduced the risk, relative to the readers, sources, the penal code, or the owners themselves. It may also be advantageous for the owners that the editor has "full freedom to shape the opinions of the paper". It enables them to avoid responsibility for unpopular and controversial opinions, even when they agree with the editor, who is then left in the lurch. Neither does the Code allow the editor to distribute responsibility internally, because the editor "has the full and personal responsibility for the contents of the newspaper". Irrespective of who actually produced the unwanted opinion, the responsibility is glued to the editor.

By abstaining from prior censorship the owners show that they trust the editor. They trust that the editor will pass reasonable judgments, and expect that the editor's own prior censorship, called editing, will cater for the "*views and aims*" set for the paper. However, they do not trust the editor more than to threaten with the consequences if the editor proves unworthy of their confidence. "If the editor finds himself/herself in

irreconcilable conflict with the fundamental views of the paper, the editor is obliged to resign", is the solution the editors have accepted by signing the Editors' Code.

The item presupposes that the right person was appointed, but then something happened that was unacceptable to the owners, which the editor will realize and take the consequence of by resigning the position as editor (the Code says nothing about leaving the paper altogether, nor about the owners' responsibility to find the editor another job). A silk cord is handed out. Perhaps for that reason it is not stated how *the owners* intend to find out whether the editor is "in irreconcilable conflict with the fundamental views of the paper". This however is something the owners may ascertain by carrying out *post-censorship* of the published paper. For the post-censorship it must be advantageous that the editor has:

- Made *"it clear to the reader what is reporting and submission of information and facts, and what are the opinions and judgements of the newspaper"*
- Never allowed *"himself/herself to be influenced to advocate opinions that are not in accord with the editor's own conviction"*

Particularly the latter duty must help clarifying whether the editor is "in irreconcilable conflict with the fundamental views of the paper". Then both parties know what the Code demands from the editor. An editor who wants to stay in office despite an *"irreconcilable conflict"* knows also what to do. The editor must break the rule never *"to advocate opinions that are not in accord with the editor's own conviction"*. The editor must choose self-censorship, a widespread phenomenon in the party press (Dahl 1999). Then the owners can unchallenged ascertain that the editor did support their view on a free and independent basis, as the editor has *"full freedom to shape the opinions of the paper"* and *"must never allow himself/herself to be influenced to advocate opinions that are not in accord with the editor's own conviction"*.

This must be the editors' freedom and independence according to the Editors' Code. It is freedom to disagree with the owners in matters that are unimportant to them. In important matters the editor has free choice between agreeing with the owners and resigning office.

The Magna Carta interpretation of the Editors' Code presupposes antagonism between owners and editors. If the editor's conviction is the same as the owners, the interpretation becomes irrelevant. However, the editor's full freedom to shape the opinions of the paper is then full freedom to express the opinions of the owners. At the time of the party press appointing editors and journalists who were also party members catered for this. The item "an editor is expected to share the fundamental views and aims of his/her publication" is also a typical product of the party press. Otherwise it would probably suffice referring to the aims, which obviously may be something else than a party programme, for instance serving the readers, the society, the market, or making a profit. Particularly the latter aim has taken over as "problem" since the party press was abolished. Thus the Norwegian Governmental Commission on Freedom of

Expression states that "wanting owners who are not interested in media content is in a sense to ask for owners who give priority to the profit, which indirectly can have large and harmful effect on the content despite the editor's independence, or rather precisely because of that independence" (NOU 1999:27, p. 98).

The King's Mirror interpretation seems to confirm that the Editors' Code gives the responsibility to the editors and the power to the owners. No wonder the Norwegian Media Businesses' Association considers it a splendid agreement. When the association is against it becoming Norwegian law, it must be because they know the intention is to wrest power from the owners. In their comment to the proposal the association therefore threatens that irrespective of whatever the legislators may decide, no responsible editor "can stay in profound conflict with the owners".

When the Association of Norwegian Editors and its members can accept and applaud a Code that gives them responsibility without power, it must be because the alternative is even worse. The alternative to self-censorship is prior censorship, and as the Commission on Freedom of Expression states, "this is a particularly unfortunate form of sanction against expressions" (p. 166). To this we may add that probably the owners have not so strong opinions that they cannot live with those of the editors - and that the editors have not so strong opinions that they cannot live with those of the owners.

Thus elevating the Editors' Code to the level of Norwegian Law should enact right of the owners to decide the "*views and aims*" of the media, and the duty of the editors to use the silk cord if they find themselves in "in irreconcilable conflict" with these views and aims. The most obvious effect is to save the owners from the trouble and cost of providing resigning editors with financial parachutes. Having got rid of the editor causing problems the owners are free to appoint themselves as editors if they so wish, or to edit all papers belonging to the same group from its central office. This would effectively prevent the problem of "*irreconcilable conflict*" from reappearing.

## **Establishing the Principle of Editorial Independence by Law**

The proposal to enacting the Editors' Code is not the only outcome of the Media Ownership Committee. It also resulted in the Media Ownership Act of 1997 (in force from 1999), and a new Media Ownership Authority to supervise it. In addition the media are under surveillance from the Competition Authority, whose legal instrument is the Competition Act. Double control makes the media the most scrutinized sector of trade and industry. Economically the media business is not particularly important. Politically however it attracts more attention now than under "the old media order", as the newly completed governmental study of power and democracy called it (Slaatta 2003, Østerud et al 2003, NOU 2003:19), that is at the time when the politically relevant media were all under the control of political institutions (the party press, the state broadcasting monopoly). We must assume it attracts attention precisely because it is no longer under direct political control, while still being highly relevant for political

affairs. "The new media order" is challenging the political system from a politically autonomous position where it is answerable only to the market.

The ideal purpose of the Media Ownership Act is "to promote freedom of expression, genuine opportunities to express one's opinions and a comprehensive range of media". The real purpose deduced from this is to prevent media concentration. The main legal instrument is intervention to prevent acquisitions resulting in the new owner gaining "significant ownership position in the national, regional, or local media market". What is a significant position is left for the Ownership Authority to decide. The act states that no intervention may be carried out unless the acquirer gains a share of 20 per cent of the national newspaper circulation, and the acquisition results in increased ownership concentration in the newspaper and broadcasting industries in a local or regional market. As guideline for intervention the Authority set the share to 33 per cent.

In 2004 the Ministry of Culture and Church Affairs proposed some changes in the act. At the national level it opened for more concentration, as the limit for intervention was raised to 40 per cent (KKD 2004a and b). This part of the proposal the Media Businesses' Association approved (MBA 2004). Locally the proposal was to drop intervention altogether, which hardly makes any difference, as most local media markets already are monopolized (Rolland 2002a). Controversial were the limits proposed for regional ownership (60 per cent) and multimedia concentration (20-30 per cent), which were said to "strangle media-Norway" (Dagens Medier no. 3/04). The MBA was against both. On the other hand, the association accepted the proposal to enacting the principle of the editor's independence, provided it did not weaken or undermine the agreement between owners and editors as expressed in the Editors' Code. The MBA noted that the whole media business now stands behind this proposal, and that all the three big ownership groups all have established arrangements that limit the power of the owners.

### Ownership Concentration

We may ask why all of the media owners, big and small, now are in favor of enacting the principle of editorial independence. They know the intention is to prevent concentration of power over editorial content. They know also the assumption that this power presupposes concentration of ownership, and that the number of media outlets with the same owner will not matter if each outlet has an autonomous editor. Each editor will then have full control, and the joint owner no control, over editorial content. However, from this they can also easily deduct that if law guarantees editorial independence, the state has no reason to prevent further concentration of media ownership, and can allow their companies to continue growing by acquisitions. In accord with transactional power theory (Coleman 1973, Hernes 1975) they are therefore willing to make an exchange whereby they reduce their political power in return for increased economic power. Particularly if the Editors' Code is the instrument used to reduce their political power, then this implies they will have it both ways. The

reduction of their political power will be only nominal, but the increase of their economic power will be real.

Executive Vice President Jan Erik Knarbakk of Schibsted, Norway's leading private media group, argued along these lines in a recent newspaper article with the title "Enact the principles of the Editors' Code" (Knarbakk 2004). "We do not need strong restrictions on media ownership in order to protect freedom of expression and media pluralism", he maintained. "These values are better protected by enacting the principle of editorial freedom", which will make "any other regulation of the media business than the Competition Act superfluous". The thought that editorial independence makes the Media Ownership Act superfluous has struck even the Media Ownership Authority, which argues vehemently that the politicians must not let the media owners fool them.

*"It is not certain that enacting the principle will have any practical impact. Like today the editor must adapt to the views and aims decided by the owners for the media enterprise. Like today it will be the board that appoints editors. Like today it will be power that rules, and an editor who has lost the confidence of the board or the owners will not stay in office for long"(Gramstad 2002),*

the Authority's director Sigve Gramstad told the Media Businesses' Association at their annual meeting in 2002. Gramstad also had problems seeing what sanctions an act on editorial independence could have. His warning was clearly picked up by the Ministry of Culture and Church Affairs, as it is repeated in their proposal to amend the ownership law (KKD 2004a).

Obviously the Authority is also fighting for its own reason to exist (partly without success, as from 2005 it is swallowed by a new Media Authority), and is therefore contributing to William Niskanen's Public Choice theory of bureaucracy, that public services, like actors in the market, are motivated by self interest (Niskanen 1971). However, precisely for that reason the Authority is able to see the Editors' Code as the King's Mirror of the media, not the Magna Carta that makes ownership intervention superfluous.

### State-guaranteed Autonomy

We must ask what would happen if legislation actually resulted in the editors becoming a state guarantee for autonomy and independence of the media owners. This Magna Carta interpretation of the Editors' Code was particularly argued by the former Labour government's Ministry of Culture in their media report to the Parliament (St. meld. no. 57 for 2000-2001). The Ministry gave two arguments in favor of total independence (p. 101). One was rooted in the freedom of expression:

*"A basic element in the concept of freedom of expression is that there shall not occur any censorship or pressure on individuals in order to prevent opinions from being expressed".*

The other was rooted in the desirability of audience trust in media's credibility:

*"The editors are important in our democracy. They shall be guarantors for the freedom of expression, for independence, that the audience can trust what is being published and transmitted by the media".*

Editorial independence is an "important condition for media's function as channels for information and opinion", the Ministry stated. Its conclusion was therefore that the Ministry wished to "fortify the editorial institution".

What the Ministry considered "a basic element in the concept of freedom of expression" was obviously that "there shall not occur any censorship or pressure" on the *editors*, from the *owners*, " in order to prevent opinions from being expressed". Apparently the editors have a extraordinary demand for freedom of expression, greater than that of other people, and this demand requires protection against the media owners who have appointed the editor to carry out a job for them, a work condition the editor has agreed to by accepting the appointment.

No doubt editors express themselves in public more often than persons not working in the media. As the Commission on Freedom of Expression said, they are guardians for the channels to the public sphere (NOU 1999:27). Therefore they are in much better position than others to control the public debate.

Due to their more frequent contributions, it is also reasonable to assume that editors more often than others find themselves in conflict with actors wishing to prevent or sanction their opinions. More often in absolute figures, then relative to the number of attempts we must assume that editors more often pass the censorship - their own censorship, which they under the name of editing bring upon all those who try to compete with them for public attention.

However, the frequency of contributions should not imply that editors have an extraordinary right to express themselves. Here quantity and quality seems to be confused. The Ministry of Culture did not state it openly, but tacitly it apparently was about to introduce graduation in the freedom of expression. This seems a giant leap from the Constitution of 1814, which in its §100 gave freedom of print and speech to everyone without reservations. However, the leap had a fresh precedence in the Commission on Freedom of Expression, which in 1999 proposed that freedom of expression should be limited to qualified persons, those having come of age, what Norwegians do when turning 18 (NOU 1999:27, p. 22-23). It seemed that a hierarchy was emerging, where unqualified persons had no freedom of expression at all, qualified persons had it, and editors had it in particular.

Contrary to this the Department also stated that the editors "shall be guarantors for the freedom of expression". We must assume it is not their own freedom of expression the editors must guarantee, but the freedom of others to express themselves via the mass media. If other persons are to have the same rights as the editors, if "a basic element in the concept of freedom of expression is that there shall not occur any censorship or

pressure" *on those who wish to express themselves*, there is reason to question the autonomy of the editors. Freedom of expression seems then rather to put editors as well as owners on the sideline, as they are the only ones in position "to prevent opinions from being expressed". The ideal media outlet seems to be a marketplace of opinions where the editor functions as mouthpiece for everyone in turn. Enacting editorial independence will then prevent the owners from interfering and stopping expressions. Independence enables the editor to accomplish the institution's task as lackey for those wishing to express themselves.

However, it is well known that editors have problems accepting the role as mouthpiece. In fact, in the journalism of "the new media order" nothing is more insulting (Slaatta 2003, Østerud et al 2003). It is also in the nature of things that the media must be edited, at least when there is surplus of opinions relative to the available space and time. Here we glimpse another role for the editor in the Department's proposal, the role as "channel guardian" or censoring instance, the one deciding who shall be given access to whom in the public sphere for what expressions. Then the editor is not only to guarantee freedom of expression. The editor must also guarantee "that the audience can trust what is being published and transmitted by the media".

Obviously the media's power increases the more we trust in them. With a combination of high confidence and low efforts to obtain information from other sources the audience becomes the dependent part in a dominance/dependency relationship controlled by the media. Hence the media are very concerned about the trust they receive from the audience, and conduct frequent studies of confidence and credibility. That this is motivated by a desire for power rather than money, at least in Norway, is revealed by the fact that the large and quite affluent tabloids are the media constantly receiving the lowest scores on the trust barometers. Confidence is apparently not necessary for economic success.

The concept of 'trust' may be defined as confidence in the good intentions of the media, faith in their willingness and ability to work for the good of the citizens and assurance they will not abuse their power (cp. Elliott 1997:41). However, we may also ask how wise it is of the audience to place its fortune in the hands of the media. It presupposes that the media deserve being trusted, especially if the audience abstains from controlling them. There are also aspects of media content that cannot be controlled. Particularly important is the impossibility of controlling the truthfulness of opinions. They may be liked or disliked, but they cannot be true or false. Involved here is the media ethical distinction between facts and evaluations, information and comments. The truthfulness of an asserted fact may be controlled, at least in principle. Evaluations and comments evade control.

To the editor's evaluations belongs the selection of facts to be published. This evaluation too is neither false nor true. The audience's reliance on the media, and the media's power over the audience, is of course at its greatest when the audience accepts

the editor's selection of facts and opinions. The audience then accepts that the editor decides what the audience shall know and mean.

It is not unlikely that editors enjoy seeing themselves in the role as spiritual leaders for their audience. Nor is it unlikely that in the audience there are many who need an editor as their opinion leader. This need is presupposed by the two-step hypothesis of media effects, although the opinion leader originally was conceived to be a trusted person who read and guaranteed for the editor's evaluations (Lazarsfeld et al 1948).

It may still be argued that blind faith is not a wise audience strategy (Lund & Rolland 1987). Even the audience should learn to distinguish between facts and evaluations. The audience should pose a quality demand on the media that their facts are credible, and if they pass that test over a longer period of time this will build confidence to what they present as facts. However, the audience should stay sceptical to the media's evaluations, including the evaluation of what facts and comments that should be made available to the audience. If the audience builds confidence even in the evaluations, they give the media total power over them.

The Ministry of Culture obviously thought that editors know best what facts and evaluations the audience should have access to, and hence that the audience should trust the editors' selection of facts and evaluations. The audience should have blind faith in the editors, contrary to what above was considered a wise audience strategy.

### Concentrated Censorship

The Ministry of Culture staked the freedom of expression on one card, the editor. Thereby power over the freedom of expression would be concentrated to one institution. This is the opposite of the Ministry's strategy concerning media ownership. That strategy is to prevent power concentration by spreading ownership on as many hands as possible. Jens Cavallin (1998) has given this a constitutional basis. Central to democratic theory is the principle of power distribution, and this principle must apply even for the politically powerful mass media.

Concentrating power over the freedom of expression may in itself put the editorial institution under pressure for transformation into an expeditionary office for expressions. Such pressure will be difficult to withstand if the editor depends on those who want to express themselves, for example as sources, which would be the case for politicians, or economically as for advertisers. The conditions are then present for exchange of power, where those who have something to offer, in return obtains freedom of expression.

As stated already, it is highly unlikely that editors will accept their role being degraded to that of the expeditionary office for expressions. In order to ease the pressure the editors may then be interested in abrogating their own power monopolies. Albert O. Hirschman discussed this phenomenon in the chapter "How monopoly can be

comforted by competition" in "Exit, Voice, and Loyalty" (Hirschman 1970). According to Hirschman there are many instances where "competition does not restrain monopoly as it is supposed to, but comforts and bolsters it by unburdening it of its more troublesome customers". In order to get rid of "voice" leading to pressure there must be options for "exit". The editor will then refuse unwanted expressions by pointing to other media outlets that may want them. To some degree the editors and those who want to express themselves therefore have common interests in the existence of alternatives. In the Norwegian media system, however, competition is limited to the national level and the larger cities. Locally the media monopoly dominates completely (Rolland 2002a). Lack of alternatives deprives the editors of an opportunity to get rid of "troublesome customers". For the freedom of expression it is of course an even greater problem that those who want to express themselves, too, have no alternatives. The editor's power is then what Hirschman calls that of the "traditional, full-fledged monopoly", where the "customers are securely locked in".

### The Need for a Court of Appeal

For those who are denied the right to express themselves, freedom of expression depends on their ability to surmount the editor's power monopoly. Are there no horizontal alternatives, they must look for vertical courts of appeal. They must find and convince someone in position to overrule the power of the editor. Above the editors stand the media's owners.

In competitive media markets it would make no difference for the freedom of speech whether the editor or the owner had the last word in disputes concerning publication. The existence of horizontal alternatives would at any rate be more important. The absence of competition in Norwegian media markets therefore implies that by enacting true editorial autonomy, there will neither be alternatives nor courts of appeal for those who wish to express themselves. With monopolized markets and a high degree of concentration in the business, enacting the editor's independence will create a media system not unlike the medieval fief system. In theory the local lord was the king's vassal, but in practice he governed his fief at his own discretion.

The choice seems therefore to be between two evils, either to establish a fief system where the editors are local lords over the freedom of expression, or to establish an appeals system where power over the freedom of expression is concentrated in steadily fewer hands. However, for the freedom of expression it can hardly be doubt as to which of these evils is the lesser one. The best solution is to reinstall the active owner, who take an interest in media content and is willing and able to interfere if the local editorial lords abuse their power.

Firstly, this is the only way to obtain power distribution with monopolized media markets. Without horizontal alternatives power must be distributed vertically in an appeals system. Incidentally a vertical understanding of this kind now serves to sustain the Norwegian state press subsidy system, the original purpose of which was to prevent

monopolization by maintaining the existence of the so-called "number two-newspapers". With virtually all of the horizontal competition having been eliminated the press subsidy system is preserved by pointing to the fact that vertical competition still exists; hence the press structure in Norway may still be considered competitive (cp the report of the latest governmental press subsidy committee, NOU 2000:15). The Press Committee refers to Rosse's umbrella model in order to justify this (Rosse 1975, Rosse & Dertouzos 1978, Høst in NOU 2000:15), the implication being that divergent opinions at different geographical levels are welcomed by the state's press policy.

Secondly, vertical power distribution enables us to exploit the only feature that is advantageous to the freedom of expression in a concentrated media system. While concentration is a national business phenomenon, most media markets are local, and in the national market it hardly matters for the freedom of expression if an actor appears only there or is also active locally. The advantage for the local freedom of expression is that the national owners are not active themselves in each local market where they are present with their media and editors. The owners are then at a greater distance to the local events, and unlike the editor they are not part of local networks. It is well known that considerations stemming from this lead to a tendency to avoid conflicts in the local environment. The Swedish professor of journalism Lars Furhoff called it "the treason of the press" (Furhoff 1963). We must assume that this "treason" also cover the way the freedom of expression is managed in relation to these conflicts. Perhaps even the local editor may benefit from being able to say that the decision to publish was taken at a higher level.

The main argument against the active owner is its detrimental effect on the efforts to elevate the social prestige of the editorial institution. Besides serving the vanity of the editors this also serves the economic interests of the media owners, and therefore they may not be willing to accept the role as court of appeal. Interesting are the arguments of the trade and industry conglomerate Orkla, one of Norway's three large private media owners, in favor of enacting the Editors' Code. This apparently came out as a result of an internal study of their newspaper activities. The study concluded with economic centralization and ideological decentralization as the most profitable business model (Journalisten 2003). Orkla's vision seems to be that the strong and independent local editor will serve them just like the news anchorman serves national television companies. It builds confidence, attracts viewers and readers. However, the effort to elevate the editors' social prestige is similar to and intertwined with the process of professionalization, by which the holders of editorial positions obtain a recognized monopoly on practicing the craft. In this sense the state's efforts to enact editorial independence assists the editors in their struggle for higher social status and professionalized monopoly control with the freedom of expression.

## **The Media Power of the State**

We may then finally ask: is it likely that the state, the ultimate power in the society, will surrender any of that power to anyone who thereby is empowered to threaten the state itself? From the Public Choice theoretical point of view the answer is negative. From the same perspective we must also assume that it is not sufficient for the state to jerk the power to control editing out of the big media owners' hands. The editors must be answerable to someone. By enacting the principle of editorial independence that someone will be the state itself.

For more than a decade now, the document guiding Norwegian media policy making has been the government's report to the Parliament on "Media in our times" (St. meld. no. 32 for 1992-1993). During all of that period it has been absolutely clear which media actor the state sees as the greatest challenger to its own power. It is the media owners, not the editors that represent the threat from the fourth estate. Hence the owners are the actors the state must defeat.

It is not difficult to understand why the state fears the media owners. After the unwinding of the party press and the de-monopolization of broadcasting there has appeared for the first time in Norwegian history significant media owners who neither the state nor the political parties control. Under "the old media order" the state controlled broadcasting. The state did not control the press, but actors who had or legitimately sought state power controlled it. Now there is a "new media order" with media owners autonomous to the state and the established political system. They are beyond political control. They derive their power from the market, and challenge by that the political power, as their audiences and customers are also the citizens of the state and the voters of the parties. They represent an unpredictable power (NOU 2003:19, Østerud et al 2003, Rolland 2003b), and what is unknown causes fear. The state does not know what the new media owners want. The state is not even sure who the new owners *are*. It fears that trade and industry may take control over the "media carrying opinions". Above all it fears control by foreign owners, who in a sense represent a threat to the nation's independence. The Norwegian nation-state is young, celebrating its 100<sup>th</sup> birthday in 2005, and has twice in referendas voted against EU membership.

### Post-Censorship

In a democracy, where the Constitution prevents prior censorship, the state must look for other means of control. An obvious alternative is the threat of post censorship. Enacting the principle of editorial independence seems a suitable instrument for this. Empowered by the law the state can control whether the editor has fulfilled his or her obligations according to the Editors' Code. Empowered by the law the state can control whether the editor has

- Kept in mind what the state considers the ideal purpose of the press
- Promoted the state's interpretation of the freedom of opinion

- Strived with the best of his/her abilities for what the state considers to serve the society
- Promoted what the state considers an impartial and free exchange of information and opinion
- Nurtured a type of journalism that makes it clear to the state what is reporting and submission of information and facts, and what are opinions and judgements

The state does not even have to carry out such controls, which may be controversial in a democracy. The threat of post censorship may be sufficient to obtain the most disciplining and uncontrollable censorship of them all, that of self-censorship.

A presage of this we can find in the state's conditions for obtaining a licence to broadcast. Private broadcasters must sign the following agreement with the state (quoted from the equal licence conditions for Kanal 4 and P4 for 2004-2014:

- The licensee must carry out its program activities in accordance with the principles of freedom of expression and editorial independence. The licensee must act completely independent of the owners or other interest groups of political, economic or other character
- As part of the yearly report the licensee shall each year give a public service account to the state for its program activities

Adherence to the principles of the Editors' Code is also a condition for obtaining state press subsidies. Judged from Trine Syvertsen's recent book on Norwegian media pluralism and policy making, the reason why the press has not yet been asked to give public service accounts to the state is that it unlike broadcasting does not reach the whole population with its messages. Hence the press is a smaller challenge to the state, and it is less important to control its activities (Syvertsen 2004:75-79).

## The State Controlling the Media

By enacting the principle of editorial independence the state will have introduced itself as the freedom of expression's court of appeal. This is in accordance with the Governmental Commission on Freedom of Expression's proposal to amend the Constitution's §100 so that it becomes "the responsibility of the State to create conditions enabling an open an enlightened public debate" (NOU 1999:27 p. 255), a responsibility that the state has been more than willing to accept, cp. the Ministry of Justice's parliamentary proposal for amendments of §100 (St. meld. no. 26 for 2003-2004) approved by the Parliament on September 30, 2004 (Stortinget 2004). It is also in accordance with Syvertsen's observation that Norwegian political authorities tend to consider the relevant media *political instruments for themselves* for the fulfilment of media policy goals set by the same authorities (Syvertsen 2004:73). By making the state the freedom of expression's court of appeal, the existing and for the state threatening relation between the estates will be turned upside down. Rather than the

media as the fourth estate controlling the three state powers, it will be the second and third estates that control the media. This will be perfectly in line with the observation made by the Governmental study of Power and Democracy that politics in Norway is about to become a legal matter (Østerud 2000, 2001, NOU 2003:19, Østerud et al 2003). However, it does not confirm that the judicialization replaces politics. It is rather the politicians who have found new means to obtain power and control.

## References

- Cavallin, J. (1998): 'European Policies and Regulations on Media Concentration'. *International Journal of Communications Law and Policy*, Web-Doc 3-1-1998.
- Coleman, J. S. (1973): *The Mathematics of Collective Action*. London: Heinemann.
- Council of Europe (1999) Committee of Ministers, *Recommendation No R (99) 1 of the Committee of Ministers to Member States on Measures to Promote Media Pluralism*, Adopted by the Committee of Ministers on 19 January 1999 at the 656<sup>th</sup> meeting of the Ministers' Deputies.
- Dagens Medier* no. 10/03, 11/03, 3/04.
- Dagspressen* no. 5/02.
- Dahl, H. F. (ed.): *Sensur og selvsensur i nordisk presse*. Fredrikstad: Institutt for journalistikk.
- Eide, M. (2000): *Den redigerende makt. Redaktørrollens norske historie*. Oslo: Høyskoleforlaget, IJ-forlaget.
- Elliot, M. (1997): *Förtroende för massmedia: tv, radio och dagspress i allmänhetens ögon*. Göteborg: Göteborgs universitet.
- Furhoff, L. (1963): *Pressens forraderi*. Stockholm: Bonniers.
- Gramstad, S. (2002): *Medieeigarskapslova*. Foredrag på MBLs årsmøte 11. september. Norwegian Media Ownership Authority.
- Heidar, Knut (2001): *Norway: Elites on Trial*. Nations of the Modern World, Europe. Colorado and Oxford: Westview Press.
- Hernes, G. (1975): *Makt og avmakt*. Oslo: Universitetsforlaget.

Hirschman, A. O. (1970): *Exit, Voice, and Loyalty. Responses to Decline in Firms, Organizations, and States*. Cambridge, Mass.: Harvard University Press.

Høst, S. (2000): 'Lokal avis konkurranse'. In *NOU 2000:15*, pp. 228-235.

Høyer, S. (1975): 'Dagspressen'. In M. Berg (ed.): *Massemedier i Norge*. Oslo: Gyldendal.

Journalisten (2003): *Orkla vil lovfeste redaktørplakaten*.

<<http://www.journalisten.no/2003/artikkel.asp?GUID=%7BCECA58FD-9128-4ACC-8>>. Accessed 25.05.04

Knarbakk, J. E. (2004): 'Lovfest prinsippene i redaktørplakaten'. *Dagbladet* 24.5.

<<http://www.dagbladet.no/print/?/kultur/2004/05/24/398720,html>>. Accessed 25.5.04.

KKD (2004a): *Høyringsnotat om endringer i medieeigarskapslova*. 9.1. Kultur- og kirke departementet.

KKD (2004b): Lovendringer om eierskap i medier vil verne om ytringsfriheten. Press release no. 41/04. Kultur- og kirke departementet.

<<http://www.odin.dep.no/kkd/norsk/aktuelt/presse/043031-070246/dok-bu.html>>. Accessed 15.5.04.

KKD: *Konsesjonsvilkår for Kanal4 AS i perioden 1. januar 2004 til 31. desember 2013*. Kultur- og kirke departementet.

KKD: *Konsesjonsvilkår for P4 Radio Hele Norge ASA i perioden 1. januar 2004 til 31. desember 2013*. Kultur- og kirke departementet.

<<http://odin.dep.no/kkd/norsk/medier/konsesjon/043061-990060/dok-bu.html>>. Accessed 11.06.04.

Lazarsfeld, P. et al (1948): *The People's Choice*. New York: Columbia University Press.

Lund, S. & A. Rolland (1987): 'Faith in the Media - an Unmixed Good?' *Nordicom Review* no. 1.

MBA (2004): *Mediebedriftene: Mediebedriftene støtter 40 pst. eiergrense*. Mediebedriftenes Landsforening.

<<http://www.mediebedriftene.no/printable.asp?id=40144>>. Accessed 15.6.04.

Niskanen, W. (1971): *Bureaucracy and Representative Government*. Chicago: Aldine.

NOU 1995:3 *Mangfold i media*. Eierskapsutvalget.

- NOU 1999:27 "Ytringsfrihed bør finde Sted". Forslag til ny Grunnlov § 100. Ytringsfrihetskommisjonen.
- NOU 2000:15 *Pressepolitikk ved et tusenårsskifte*. Dagspresseutvalgets innstilling.
- NOU 2003:19 *Makt og demokrati. Sluttrapport fra Makt- og demokratiutredningen*. Makt- og demokratiutredningen 1998-2003.
- Rolland, A. (2002a): *Mediemakt og mediemonopol*. Research report no. 1. Sandvika: The Norwegian School of Management BI.
- Rolland, A. (2002b): *Statsmakt og mediemakt*. Research report no. 5. Sandvika: The Norwegian School of Management BI.
- Rolland, A. (2003a): 'Redaktørplakaten, Magna Carta og Kongespeilet'. *Dagens Medier* nr. 11.
- Rolland, A. (2003b): 'Lovfesting av Redaktørplakaten'. *Medieverden* no. 29.
- Rosse, J. N. (1975): Economic limits of press responsibility. Discussion paper, Studies in Industry Economics No. 56. Stanford, CA: Stanford University.
- Rosse, J. N. & J. N. Dertouzos (1978): 'Economic issues in mass communication industries'. In *Proceedings of the Symposium on Media Concentration*, Vol. 1:40-192. Washington, DC: Federal Trade Commission.
- Slaatta, T. (2003): *Den norske medieorden. Posisjoner og privilegier*. Makt- og demokratiutredningen 1998-2003. Oslo: Gyldendal Akademisk.
- Stortinget 2004: *Forhandlinger i Stortinget nr. 239*, pp. 3583-3607.
- St. meld. no. 32 (1992-1993): *Media i tida*. Kulturdepartementet.
- St. meld. no. 57 (2000-2001): *I ytringsfrihetens tjeneste. Mål og virkemidler i mediepolitikken*. Kulturdepartementet.
- St. meld. no. 26 (2003-2004): *Om endring i Grunnloven § 100*. Justis- og politidepartementet.
- Syvertsen, T. (2004): *Mediemangfold. Styring av mediene i et globalisert marked*. Kristiansand: IJ-forlaget.
- Østbye, H. (2000): *Hvem eier norske massemedier?* Report no. 25, Makt- og demokratiutredningens rapportserie. Makt- og demokratiutredningen 1998-2003.

Østerud, Ø. (2000): 'Maktfordeling og rettsliggjøring'. *Nytt Norsk Tidsskrift* nr 17 (2).

Østerud, Ø. (2001): *Judicialization and parliamentary democracy*. Nordic-Scottish Seminar on Democracy, May.

Østerud, Ø., F. Engelstad & P. Selle (2003): *Makten og demokratiet. En sluttbok fra Makt og demokratiutredningen*. Makt- og demokratiutredningen 1998-2003. Oslo: Gyldendal Akademisk.