

Freedom of Expression and Freedom of Discourse

Examining a Justificatory Strategy

Cathrine Holst & Anders Molander

Article 19 of the Universal Declaration on Human Rights states that “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Article 19 of the International Convention on Civil and Political Rights and Article 10 of the European Convention on Human Rights are approximately the same. Regarded as a human right, freedom of expression is a moral claim on any political order. To be legitimate, a political order has to guarantee this right.

In constitutional democracies, freedom of expression is transformed into positive law and has the status of a constitutional right. Generally, a right is a relation between the holder (a), the addressees (b), and the object (R) of the right. If we speak of a constitutional right, (b) is a polity and (a) every citizen. That (a) has a right to (R) means, conversely, that (b) is obliged to guarantee (R) to (a). Any constitutional right gives rise to questions about how (c) is to be understood: What is the right a right to, i.e. what does it entitle citizens to do (or not to do) and what does it oblige the polity to do (or not to do)? These questions concerning rights as legal positions and relations can be distinguished from questions concerning the justification of rights, on the one hand, and the application and implementation of entrenched rights, on the other (Alexy 1991: 164-168). The reasons for rights answer the question “what entitles (a) to (R)” or “in virtue of what does (a) have the right to (R)”. Of course, questions on the three levels are interrelated. How we answer questions of justification has implications for how we answer questions of legal positions and relations as well as questions of application and implementation, and vice versa.

In the present article, we will focus on the justificatory level, more specifically on the view developed by the Norwegian Governmental Commission on Freedom of Expression (1996-1999). On the basis of its justificatory considerations, the Commission proposed a new Article 100 in the Norwegian Constitution.¹ The Commission’s amendment reflected its considerations quite literally. The Commission presented three reasons for why freedom of expression should be protected. All three were incorporated in the proposed amendment: “No

person may be held liable in law for having imparted or received information, ideas or messages unless such liability can be justified in relation to the grounds for freedom of expression, which are the seeking of truth, the promotion of democracy and the individual's freedom to form opinions."² Today, this passage is part of Article 100 of the Norwegian Constitution.

The Commission's view strongly relies on the Norwegian philosopher Gunnar Skirbekk's attempt to clarify the normative foundation of freedom of expression as a constitutional right.³ Skirbekk was himself a member of the Commission. Moreover, the Commission itself very explicitly states in its report – in the chapter on justification ("Why freedom of expression?") – that it follows Skirbekk's explication of the three reasons for freedom of expression (19, n. 7).⁴ The three reasons are referred to as the principle of truth, the principle of democracy and the principle of autonomy. Together, the Commission says, these principles give a robust and potentially universal justification of the freedom of expression (25).⁵

We start out by presenting the Commission's argument for freedom of expression and Skirbekk's philosophical elaboration of it. In the following paragraphs, we clarify and discuss the argument more thoroughly, and argue that the Commission and its philosopher have chosen a questionable justificatory strategy.

I. The Argument

a) The Commission presents a *precondition* argument for freedom of expression. Freedom of expression is considered as a precondition for truth-seeking, for personal autonomy, and for democracy. In order to seek truth, fallible human beings need a common use of reason (19). Freedom of expression is "necessary" for "counter-arguments to be heard", which again is necessary for truth-seeking, because "if we are not familiar with the counter-arguments, we cannot know whether we are right" – because we are fallible beings, and could very well be wrong (19). This argument – an argument from truth – is, the Commission says, "probably the most robust argument for freedom of expression" (20). An argument from autonomy could be linked to this: If individuals are to develop into "mature" persons, they need "intercourse, discourse and discussion"; it is "by testing one's views against those of others that they can be made 'morally refined'" (21).⁶ Once more, freedom of expression enters as a precondition, this time for what the Commission refers to as personal autonomy or *Bildung*.⁷ This dialogical understanding of human "maturity" makes it "possible to place greater emphasis on the content of statements", while "individualistic rights thinking discriminates poorly between the various types of statements" (22). According to the Commission, it is "broadly speaking the political statements" that must enjoy "special protection" (22), as these statements concern questions of a "social, ethical and cultural nature that we as citizens are expected to take a stand on, and where the use of collective reasoning in a public sphere is requisite" (22). The argument from autonomy is thus closely related to the argument from democracy. Openness and criticism are "the two most important

constituents of democracy” (22). According to the Commission, democracy’s deliberative aspect – “debate between mature adults” – is “at least as important” as decision-making procedures such as voting. Public deliberation is “intended to result in improved insight” (23). Hence, the argument from democracy is again related to the argument from truth.

The Commission’s justification, focusing, in short, on the deliberative qualities of truth, autonomy and democracy, is sketchy and in need of elaboration. To be sure, “precondition” probably means “necessary precondition”, as when the Commission speaks of freedom of expression as “constitutive” of democracy. However, even with this qualification, the structure of the argument is far from clear. The Commission is clearly trying to find a politically viable ground and therefore avoids “deep” justificatory or philosophical questions. This is, of course, an attractive option for a governmental commission seeking broad support. At the same time, the Commission moves far into the philosophical domain with its justificatory claims, for example by taking a stand on what is a proper concept of “the individual” and human “autonomy”/“maturity”. Moreover, and crucial from a juridical point of view, the Commission writes its justification into the proposed new article, and again this justification is today written into the Norwegian Constitution. Hence, what freedom of expression means, legally speaking, is in the end dependent on the more exact meaning of the Commission’s three reasons for freedom of expression: one can “be held liable in law” for one’s expressions if – and only if – such liability can be justified with reference to “the seeking of truth, the promotion of democracy and the individual’s freedom to form opinions”. From this perspective, the Commission’s report does not tell us enough about how to understand its precondition arguments. We thus turn to Gunnar Skirbekk’s writings for a more detailed account.

(b) Skirbekk argues for a justificatory strategy in terms of “necessary preconditions”. Generally, he says that freedom of expression can be justified as “a necessary precondition for free and open deliberations in the public sphere on public matters among enlightened persons” (1998: 90). Like the Commission, Skirbekk refers to three elements (but not in the same order): a so-called “qualified concept of the person”, a concept of public argumentation, and a concept of deliberative democracy (1998: 90).

Skirbekk presents the three elements separately, even if he, like the Commission, assumes that they are interconnected. His concept of the person is neither “an idealized concept of autonomous persons (as in Kant)” nor “an idealized concept of a pre-political individual (as in Locke)” (1998: 90, 91). What he has in mind is rather a less “controversial”, “minimal concept of individual autonomy”, a “modest concept of persons that are at the same time rational” – or reasonable⁸ – and “fallible” (1998: 91, 97). They are rational (or reasonable) in the sense that they are “able to take part in public deliberations”, they are “discursively competent” and thus “mature”; they are fallible in the sense that they are situated persons who see things from a partial perspective, and “need

to be exposed to counter-arguments and alternative perspectives” (1998: 91). He limits himself, moreover, to “discursively competent persons” in “modern societies”. Such persons, Skirbekk presumes, “participate in argumentative discourse not exclusively to validate claims”, but also “to *improve* [themselves] as [...] *person[s]*”. An element of *Bildung* is thus involved (1998: 91, 106, 123). Furthermore, he is concerned with persons only “in those contexts where they seriously discuss public issues in the public sphere”, and not in their roles as “private persons” (1998: 91). It is for persons in their public role that freedom of expression is “an unavoidable precondition”, and if this freedom is denied them, they will be “disrespected as persons” (1998: 92).

The justification of freedom of expression with reference to truth-seeking (i.e. the second element of Skirbekk’s justification, introduced as John Stuart Mill’s argument), is based on the idea that “reasonable” views require “knowledge of counter-arguments” (1998: 92). For truth-seeking persons who are, or recognize themselves and others as rational and fallible persons,⁹ “free and open deliberation” is the only way to proceed (1998: 92, 112). Hence, freedom of expression is not only “a value among other values”, but “an unavoidable precondition” for “beings of our kind”, beings who inhabit modern societies, and who are “interested in distinguishing between more or less valid or invalid views about complex issues of public concern” (1998: 92).

The Millian justification of freedom of expression is a “strong” one (1998: 92), because “it is self-referentially inconsistent to claim: ‘I know that position X is true [...], but I refuse to be confronted with alternative positions and relevant counter-arguments, because then it may turn out that position X is refuted [...]’” (1998: 92, 104, 111). Not recognizing that one is rationally “obliged” to subject oneself to the force of “*the better argument*” is thus a kind of deep, “logical” mistake (1998: 112). Because freedom of expression is an unavoidable precondition for fulfilling this obligation, to disrespect it is equally self-referentially inconsistent. It follows from this line of reasoning, however, that one not only simply has a “passive” right to freedom of expression; one also has an equal “active” obligation to follow the better argument: Freedom of expression is “actively realized in disciplined interaction with others” (1998: 115).

In addition to this justification in terms of what is self-referentially consistent, there is particular reason for modern people to accept Mill’s view, Skirbekk argues. “Fallible truth seeking” and argumentative discourse belong to the fundamental characteristics of “modern, science-based societies”, they are practices that such societies “depend on” (1998: 92, 115).¹⁰

The third element of Skirbekk’s justification of freedom of expression, the concept of deliberative democracy, refers to “a modern representative democracy based on [...] majority vote that in addition is based on the free and enlightened discussion of public issues in the public sphere” (1998: 93). And freedom of expression is an unavoidable precondition for this kind of democracy, just as it is a precondition for truth-seeking and personal maturity. This is why a democratic majority cannot vote against the free speech principle without acting “self-destructively” (1998: 93).

Skirbekk distinguishes his justification of freedom of expression from three other justifications. In contrast to “individualist views”, he does not consider freedom of expression as a pre-political right: “the normative basis of freedom of expression” does not “lie within the individual” as “a metaphysical and unchangeable fact” (1998: 96).

Skirbekk also considers his view as differing from “the value-based view” (1998: 96). One version of this view stresses that freedom of expression is “a value because it is *good for the individual*” (1998: 96). It is then argued that “the *self-realization* of the autonomous individual” requires freedom of expression, not only of “argumentative expressions about public issues in the public sphere”, but of all kinds of expressions, “verbal and non-verbal” (1998: 96). Another version instead stresses that freedom of expression facilitates a “*good society*”, for example when freedom of expression facilitates “creativity, as in art, that again is *good for others*” (1998: 96). The problem with value-based views is, according to Skirbekk, that they do not recognize the fact of value pluralism: “cultural values” differ between traditional and modern (typically “Western”) societies, as well as within modern societies (1998: 96, 97). This makes the value-based justification of freedom of expression inevitably controversial.

Finally, Skirbekk contrasts his justification to “the functionalist view” that freedom of expression is “useful, for society or for parts of society” (1998: 97). The question then becomes “whether and in what sense such a functionalist (or instrumentalist) claim is *empirically* true, i.e. well-founded” (1998: 97). Empirical connections of this kind may be hard to establish, Skirbekk notes. Perhaps what we value, whatever that is, can be better served by social arrangements that do “*not* clearly protect freedom of expression” (1998: 98). To raise such questions, however, is not to generally dismiss the functionalist view, but to bring awareness to the fact that empirical arguments are always fallible (1998: 98).

Skirbekk claims that “*all* intellectual resources” contained in the individualist, value-based and functionalist views are taken care of in his approach (1998: 104). What his approach offers is thus something in addition, namely a “deeper *justification* of freedom of expression (in the end we can talk about it in terms of a philosophical *Letztbegründung*” [ultimate justification]) (1998: 104).

Furthermore, his approach has implications for how strongly different categories of expressions are protected. The categories that are given the strongest protection according to his justification are “argumentative” or “discursive expressions about public issues in the public sphere”, in particular legal and “political-administrative” expressions and deliberations in “civil society” (1998: 94, 95, 99). Weaker protection is reserved for expressions in “the private sphere”, expressions about “private issues”, “strategic expressions” that are aimed at “manipulating or indoctrinating other persons”, commercial expressions, such as advertising and pornography, as well as aesthetical and emotional expressions with limited or without cognitive content (1998: 95, 100, 110, 116-119). These implications are intended: In any case, one will need to differentiate between the protection of different kinds of expressions; this is the case even if one takes “an extremely wide concept of freedom of expression” as one’s point of departure (1998: 101).

Skirbekk's more "focused" concept differentiates at the outset: "Public, political and legal deliberation" is needed to decide the strength and extension of the protection of other kinds of expressions, such as advertising or pornography, and of expressions made in other places, such as in the private sphere. The first is a "precondition" for decisions about the latter, whether such decisions are on the restrictive or the permissive side (1998: 101). In this sense, public, political and legal argumentation is logically prior to other modes of expression and constitutes the core domain of freedom of expression.

II. "... An Unavoidable Precondition"

Skirbekk argues that freedom of expression is an unavoidable precondition – for truth-seeking, for democracy, for being a mature person. The argument has the logical form 'q only if p': to say that p is an unavoidable precondition for truth-seeking (q1), democracy (q2) and personal maturity (q3) is to say that the latter are not possible without freedom of expression (p). As far as we can see, the notion of unavoidable precondition is given different meanings throughout Skirbekk's discussions. The nature of his argument for freedom of expression changes accordingly.

Let us start with the "deep" variant of Skirbekk's argument, his outline of a *Letztbegründung*, an ultimate justification, for protecting freedom of expression (1998: 104). This variant of the argument relies on the analysis of the presuppositions for argumentation made by Karl-Otto Apel and Jürgen Habermas.¹¹ These presuppositions are unavoidable, according to Apel and Habermas, in the sense that in denying them one involves oneself in performative self-contradiction. Skirbekk regards freedom of expression as one such presupposition. Truth-seekers, democrats and mature persons contradict themselves on a performative level (i.e. involve themselves in "self-referential inconsistency") if they oppose freedom of expression: they deny a precondition for doing what truth-seekers, democrats and mature persons do. And what do truth-seekers, democrats and mature persons do? Apart from whatever else they do, they *argue*. To seek truth, to participate in democratic practices and to be a mature person is to participate in argumentation (q4), and freedom of expression is therefore "contained in the constitutive norms of argumentation", it is a "discursive *a priori*" (1998: 114).

One *does* in fact involve oneself in a performative self-contradiction if one participates in sincere argumentation while at the same time denying other actual or potential participants in argumentation discursive freedom; this is not what we would dispute. According to Habermas, participants in argumentation cannot avoid making presuppositions that can be formulated in the form of "rules of discourse" such as:

- (3.1)¹² Every subject with the competence to speak and act is allowed to take part in discourse. (3.2) a) Everyone is allowed to question any assertion

whatever; b) Everyone is allowed to introduce any assertion whatever into the discourse; c) Everyone is allowed to express his attitudes, desires, and needs. (3.3) No speaker may be prevented, by internal or external coercion, from exercising his rights laid down in (3.1) and (3.2). (1990: 88-89)

In short, these “rules” articulate the idea of discursive freedom. However, how is the relationship between discursive freedom and freedom of expression to be understood? Is a defence of freedom of *discourse* sufficient to defend freedom of *expression*? We address these questions in Part IV. Another question is how the relationship between the identification of necessary argumentative preconditions and a justification of constitutional rights should be conceived of. How do we get *from* something being a precondition *to* it being the object (R) of a right? We deal with this question in Part V. First, however, the relationship between q1, q2 and q3, on the one hand, and q4, on the other, needs to be clarified. Skirbekk assumes an internal or conceptual relationship between q1 and q4. This seems plausible: Few would deny that truth-seekers argue, apart from what else they do. A definition of truth-seeking as involving arguing does not seem to be very controversial.¹³

The conceptual relationship between q2 and q4 is both less obvious and less obviously relevant to establishing a relationship between p and q2. In his overview of different theories of how to justify freedom of expression, Larry Alexander distinguishes between the general democratic theory and the public discourse theory of freedom of expression:

The general theory account of freedom of expression is easy to state and grasp. Democratic government requires that the citizenry has access to the information that bears on the performance of the government, both past and future. And that informational requirement in turn requires that expression conveying such information not be suppressed. (2005: 136)

The argument of the public discourse theory is different:

According to this theory, the democratic will is legitimate only if it reflects public opinion. And the latter is a legitimate basis for the democratic will only if it is formed under conditions of freedom. (2005: 139)

The argument from democracy thus relies on an assumed relationship of some kind between q2, on the one hand, and non-suppression of information (q5) or a particular notion of legitimacy (q6), on the other. Stating his argument from democracy, Skirbekk mentions, however, neither q5 nor q6 (or something that equals q5 or q6). On the contrary, he assumes a conceptual relationship between q2 and q4 – democracy is defined as deliberative democracy. Given this definition, Skirbekk can argue that q2 only if p, because q4 only if p. The exact role of argumentation in democratic rule is not, however, made clear. Why define democracy as deliberative? Is it because q4 is required to assess

adequately the information that bears on the performance of the government (i.e., to secure the relationship between q5 and q2)? Is it because the formation of a legitimate public opinion presupposes public deliberation in addition to freedom of expression, i.e. due to a relationship between q4 and q6? Are there other reasons? Ultimately then, Skirbekk's argument from democracy does not seem to add anything to his argument from truth – or validity;¹⁴ in both cases the idea is that q4 only if p.

Regarding his argument from personal maturity, the case is different. Here p is not primarily outlined as a necessary precondition in accordance with the ultimate justification variant of his argument,¹⁵ but rather, if we understand Skirbekk correctly, as something such mature persons *need* and therefore are or ought to be interested in. Needs express 'in order to' relations: x needs y in order to z. Skirbekk does not explain this relation in any detail, but one interpretation of his argument could be as follows: Rational persons who recognize that they are fallible need p in order to reach well-founded beliefs, since such beliefs can only be reached through participation in public deliberation where one is exposed to "counter-arguments and alternative perspectives" (1998: 91). This would imply that people who recognize themselves and others as fallible persons seeking well-founded beliefs, i.e. as having the needs of such persons, could also be said to have an interest in freedom of expression: p would generally be good for them.¹⁶

If this interpretation is correct, we seem to be dealing with a "goal-based" argument (Dworkin 1981), or a mix of what Skirbekk refers to as a value-based and a functionalist (or instrumental) argument for freedom of expression. The argument is value-based, because freedom of expression is considered as something people need in order to be mature persons, i.e. to realize a higher order interest and not only more or less contingent individual preferences. Mature persons in modern societies do not only participate in argumentation to validate claims (assuming they have an interest in validity¹⁷), according to Skirbekk, they also value argumentation because it improves them as persons (Skirbekk 1998: 123). Skirbekk himself holds value-based arguments for freedom of expression to be problematic given the fact of pluralism. Clearly, he considers his own notion of maturity as less disputable than alternative values, which it has been suggested that freedom of expression is instrumental to (Skirbekk 1998: 96-97). However, he does not elaborate upon why; to us, this is hardly self-evident.

Furthermore, a positive causal relationship between freedom of expression and truth-seeking cannot be taken for granted. For one thing, "history provides too many examples of falsity triumphant over truth", even in cases where discussions were allowed to go on freely (Schauer 1982: 25-30). In addition, expressions are in fact not simply "freely" expressed in institutions where obtaining truth is imperative; they are rather regulated and circumscribed (Alexander 2005: 128-130). When we are very concerned with finding out what is true (or right), discourses are bounded and participation restricted. This is the case in legal adjudications, but also in science: "[...] professional journals refuse to publish

claims that the editors believe are not properly substantiated, and faculties and laboratories refuse to employ those who hold what in the opinion of those faculties and laboratories are outlandish views” (Alexander 2005: 128). Hence, in contrast to what Skirbekk assumes, the procedures of “modern science” do not in any straightforward way exemplify that “we”, modern persons with confidence in these procedures, generally accept the instrumental relationship between freedom of expression and obtaining more well-founded beliefs (1998: 92, 115). And even in institutionally unbound discourse, as delineated by Habermas in his discourse theory of validity, participants’ freedom of expression is constrained by rules of logic and reasoning. The discourse rules require, for example, consistency and oblige the participants to provide relevant reasons.¹⁸ Discursive freedom is thus equal to freedom of expression within rules of communicative rationality, which put restrictions on what can be said.

Finally, that freedom of expression is regarded as something we need or have an interest in might mean that it is to be thought of as equivalent to a collective good. Skirbekk only occasionally refers to freedom of expression as an individual right (even if that is what it is, legally speaking; see Part V). What he intends to justify is generally referred to as “the legal protection of freedom of expression”. Only a couple of times throughout his discussions does he talk of it explicitly as a legal *right* to freedom of expression. One way to make sense of this systematic and somewhat peculiar avoidance of the notion of right, is that p is regarded as a collective good worth protecting as an infrastructure for making truth-seeking possible. This means privileging “audience interests” at the expense of “participant interests”, i.e. the interest in having “a good environment for the formation of one’s beliefs and desires” above the “interest in being able to call something to the attention of a wide audience” (Scanlon 2003:186-191).

III. The Concept of a Person

We will now return to Skirbekk’s claim about his concept of a person as a modest one. Persons, according to his concept, are discursively competent and fallible. To be discursively competent is what it means to be rational or reasonable. Fallibility is introduced on some occasions as a condition of human cognition: The “persons” Skirbekk has in mind “are fallible” (1998: 91, 92). On other occasions, fallibility is treated as a sign of rationality: A rational person is a discursively competent person who “recognizes” his own and other people’s fallibility (1998: 112).

In the end, the modesty of this concept depends on the meaning of the term “discursively competent persons” (1998: 91). Generally, it means that such persons are “*able* to take part in public deliberations”. But how is this to be understood? Does it just mean that they have communicative competence? Or does “public deliberation” signify more or less institutionalized forms of discourse? If the first were what Skirbekk had in mind, he could reasonably

have referred to his concept of a person as modest, as it would simply denote a competence that is coincidental with the human sociocultural life form as such. Argumentation or discourse is, however, what Habermas calls a reflexive and demanding form of communicative action, characterized by a series of idealizing presuppositions. Hence, a concept of the person making the ability to take part in argumentation the core of personhood is in fact a highly idealized concept, comparable to the highly idealized, but “monological” concept of a person in decision theory.

If Skirbekk thinks of a distinctive “public” use of communicative competence (i.e., if persons in fact are to be considered only “in those contexts where they seriously, discuss public issues in the public sphere”), his concept of a person is tied to a certain (normative) concept of the citizen. This is, however, only a partial concept of a person. When Skirbekk pushes his argument further in this direction, stressing that “we are not talking about all persons at all times, but limiting ourselves to adult, well-socialized persons in modern societies in certain modern contexts” (1998: 91), his “modest” concept of a person ends up as a highly contextualized concept, and truly deprives great groups of persons freedom for their expressions. It remains to be shown that this concept of a person is not only a plausible reconstruction of a more or less shared self-understanding among “modern” persons within a certain period of time, but also represents a self-understanding that is more adequate than other conceptions of the self from a normative point of view. Moreover, this contextualization of the concept of a person is in variance with Skirbekk’s universalistic claim, as it strictly speaking implies that freedom of expression is not a universal human right, but something that is reserved for or of vital interest only to a certain group of “modern” human beings.

We may understand Skirbekk as trying to work out a “political” concept of persons freely communicating arguments. In the end, however, Skirbekk does not really focus on what it means to be *free* in a communicative sense. Communicative freedom is, as Klaus Günther has put it, the freedom to take a position toward an utterance (a validity claim) with yes or no, and primarily the possibility to say *no*. This possibility is “constitutive for the possibility of alternatives” and to take an affirmative position means “taking a negative position towards counter-reasons” (Günther 1996: 1040). Focusing on this basic aspect of communicative action brings us to a more “modest” concept of a person. It also points to freedom of expression as a negative freedom, which Skirbekk tends to overlook in his attempt to show all the good things freedom of expression is a precondition of.

IV. Freedom of Discourse or Freedom of Expression?

To highlight freedom of expression as a negative right is also to highlight the distinction between freedom of discourse and freedom of expression, or more specifically, the fact that the latter cannot be reduced to the first; as a

constitutional right freedom of expression does not only protect discursive utterances. We return to this in Part V. Here we want to stress a similar point from a different angle. Skirbekk claims that freedom of expression primarily ought to protect “argumentative” or “discursive expressions about public issues in the public sphere”, whereas the protection of other expressions should be considered a secondary question to be settled in the argumentation/discourse that freedom of expression primarily protects (1998: 94, 95, 101). He thus gives the vindication of validity claims stronger protection than the communication in which such claims are raised. Basically, by freedom of expression Skirbekk seems to mean discursive freedom and not communicative freedom as such. This position not only disregards freedom of expression as a negative right, it is also unsustainable in the sense that the vindication of a validity claim will not take place at all if the claim is not communicated in the first place. Protecting vindication presupposes a similar protection of communication; to say that the former should be more strongly protected than the latter, is to say that a claim should be both strongly protected (as vindication) and less strongly protected (as communication) at the same time.

Moreover, one cannot know at the outset which expressions might contribute to discourse. Whether for example an artistic expression or for that matter a pornographic expression,¹⁹ or an expression of a seemingly “private” nature, is of relevance to public discourse cannot be decided elsewhere than in public discourse. This does not mean that we dismiss the question of what importance should be assigned to different categories of expression. What we oppose is the idea that expressions occurring in certain institutional contexts (for example, expressions concerning “political-administrative” questions) are privileged above expressions occurring in other institutional contexts (for example, “aesthetic” expressions), certain topics (conventionally thought to be of “public” relevance) above others (conventionally thought to be simply of “private” relevance) already on the level of *Letztbegründung*. The question of priority cannot be decided upon *a priori*.

V. From Precondition to Right

All arguments for rights in terms of necessary preconditions involve a problem of inference: how do we get from the statement of some kind of necessary precondition to a moral (human) and legal (constitutional) right? We will focus on Skirbekk’s transcendental/formal pragmatic argument.²⁰ Even if this argument is successful, it only justifies freedom of expression as a discourse-internal norm, not as a general norm of action or as a legal norm. In order to derive a right from discourse-internal norms, a series of additional steps is necessary. Firstly, an interest in truth, and thereby in discourse as a procedure for answering questions about truth, must be presupposed. Secondly, to justify a general freedom of expression, not only related to truth questions, one has to show that discourse is a procedure for seeking answers to other types of questions

too, for example concerning what is right or wrong, good or bad, beautiful and ugly, and so on. That is, everyone seriously interested in these questions should also be interested in discourse.

From here, there are different ways to proceed.²¹ One could argue that recognition of the autonomy of the other is presupposed in sincere participation in discourse, and ought to be translated into a legally guaranteed right to freedom of expression as part of a set of basic rights that guarantees personal autonomy. This would be a discourse-theoretical variant of Kant's argument about "das angeborene Menschenrecht".²² Another way is to argue on the basis of a discourse-theoretical interpretation of normative validity, such as Habermas' discourse principle, that a legal order could only claim to be legitimate if it is freely accepted by its addressees, and that this presupposes the institutionalization of basic rights, including the right to freedom of expression. Freedom of expression as a legal right is then the outcome of the application of the discourse principle (which presupposes freedom of expression as a discourse rule) to the legal form.²³ To be sure, a principle of autonomy is built into the discourse principle, but this argument would anyway differ from the argument from autonomy in that it argues from a (consensual) concept of validity, and considers the right to freedom of expression as a right that is necessary for a legitimate legal order and legitimate law making (and not as a right following directly from a principle of autonomy). This argument from validity could again be developed into an argument from democracy on the premise that only democratic procedures can approximate this discursive concept of legitimacy, i.e. that these procedures justify an expectation that outcomes are legitimate. If this is the case, anyone interested in the legitimacy of a political order ought to be interested in democracy which presupposes freedom of expression.

The basic meaning of a (legal) right to freedom of expression is negative: If one has this right one is *prima facie* free – in the sense of not being hindered by prohibitions – to express oneself publicly. Whether or not protecting freedom of expression also implies positive obligations, i.e. obligations not only to abstain from interference but also to affirmative and supporting protection of freedom of expression, is another question. As a negative right it is part of a general right to freedom, as it is formulated in for example Kant's principle of right or Rawls' first principle of justice.²⁴ This general right to freedom follows from the idea that any restrictions to freedom should be such that they can be freely accepted by free or autonomous persons. In other words, they have to be justified as restrictions that are in the interest of the freedom of everyone.²⁵ However, a negative right means that one is not obligated to justify what one is free to do. Freedom of expression is obviously a precondition for rational discourse, but as a legal right – contrary to what Skirbekk argues – it neither permits discursive utterances only, nor obliges us to justify our utterances or take part in rational discourse (Wellmer 1993: 39). A negative right is an exit option, and even a right to act "selfish, deranged, eccentric, irresponsible, provocative, obsessive, self-destructive, monomaniacal etc." (ibid.). One's nega-

tive right to freedom is conditioned only by the same right to freedom for all others. It seems that Skirbekk simply jumps over this basic aspect of freedom of expression as a legal right.

Moreover, rational discourse (or a metaprinciple of rational discourse), even if presupposing discursive freedom, does not in itself generate an idea of individual *rights*, but in combination with such an idea it may be argued that rational discourse implies an equal distribution of such rights and certain restrictions to arguments for restrictions to personal freedom (impartiality). In his justification of a system of constitutional rights, Habermas presupposes not only the discourse principle but also, as we have mentioned, the legal form (individual rights permitting individuals to do what is not legally forbidden). What follows from the discourse principle (in combination with the legal form) is everyone's right to the most extensive equal liberties that are mutually compatible (Habermas 1996: 123). Skirbekk presupposes a principle of rationality (and thereby of human autonomy), but not, seemingly, a principle of individual rights to freedom. This also contributes to explaining why he falsely juxtaposes respect for persons with respect for arguments; falsely, because individual rights protect persons without regard to their arguments, while the rules of discourse protect arguments without regard to persons.²⁶

Notes

1. NOU 1999:27. "Ytringsfrihed bør finne sted". Forslag til ny Grunnlov § 100.
2. Ibid, p. 3.
3. "Same friedom for alle ytringar? – om ytringsfridommens normative grunnlag" (1996) ("Similar Freedom for All Expressions? – on the Normative Basis of Freedom of Expression"). We will also refer to "Din tanke er fri ...' – om å grunnngi det rettslige vern av ytringsfridom" (1997) ("Think Freely ...' – on Justifying the Legal Protection of Freedom of Expression"). Both articles are printed in Skirbekk (1998). The translations of quotes from Skirbekk's articles are ours. The translations of the quotes from the Commission's report follow the English excerpt ("*There shall be freedom of expression*". *Proposed new Article 100 of the Norwegian Constitution. EXCERPTS*. <http://unesco.no/images/pdf/ytringsfrihet.pdf>).
4. We refer to pages in the Commission's report (NOU 1999: 27).
5. For some reason, the ordering is however different in the proposed amendment and in the justificatory chapter: the principle of autonomy is number three in the first case, number two in the second. We refrain from speculating about why this is so.
6. The Norwegian text uses "anstendiggyøres" ("be made 'decent'").
7. The Commission contrasts their understanding of autonomy as *Bildung* with what they take to be a flat understanding of autonomy as negative liberty. The latter reflects an American "individualistic" tradition, the former a European tradition, rooted in an Aristotelian conception of politics as a "cultivation of the virtue and moral character of the citizens" (2.2.2). How a universally valid justification of freedom of expression could be based on a particular, supposedly European concept of a person – and why other concepts, such as supposedly American concepts, are flawed – the Commission does not explain.
8. Skirbekk uses the Norwegian term "fornuftig", which can be translated both ways.
9. Skirbekk sometimes says that the persons he has in mind are rational and fallible persons. Other times he talks about them as persons who see themselves as rational and recognize their fallibility (see Part III).

10. Skirbekk defends a “gradualistic fallibilism” or a “negatively oriented meliorism”: The aim of inquiry and argumentation is not to reach final truths, but to eliminate “less well-founded” views (1998: 112, 113).
11. In Skirbekk’s two articles on freedom of expression only Habermas is explicitly referred to, however.
12. Habermas refers to Alexy’s list of rules of discourse. The numbers refer to the ordering of this list. The complete list is in Alexy 1983: 233-272 and *Anhang*.
13. Instead of truth-seeking, one may talk about seeking “the strongest reasons”, the “best” beliefs, etc. (Cohen 1993: 228). However, this does not alter the assumed conceptual relationship between what one is seeking – truth or a more moderate substitute – and a notion of arguing.
14. When Skirbekk talks about truth, he not only has in mind a standard of empirical validity, but standards of validity generally, for example when assessing moral norms (as more or less right) and political principles (as more or less legitimate) (1998: 116-119).
15. Considered as an ultimate justification of freedom of expression, the argument from personal maturity could have relied on a definition of a mature person as someone seeking valid answers in argumentation. In other words, p could have been regarded as an unavoidable performative precondition for q3 if q3 was defined in terms of q4 (because p is an unavoidable performative precondition for q4).
16. According to “the interest theory of rights”, “the essential feature of rules which confer rights is that they have as a specific aim the protection or advancement of individual interests or goods” (MacCormick 1977: 192).
17. See V.
18. Cfr. the rules that proceed the rules guaranteeing discursive freedom cited above (Habermas 1990).
19. For an interesting argument against the idea that pornography is apolitical, see Scanlon (1979).
20. A similar problem occurs if the unavoidable precondition is understood for example as a need, and we are to go from need to right. Here we will, however, concentrate on the ultimate justification variant of Skirbekk’s argument.
21. See Alexy’s (1995) elaboration in “Diskurstheorie und Menschenrechte”.
22. See Kant (1797/1977: 346) and for an interpretation Niesen (2005).
23. See Habermas (1996).
24. Kant: “Eine jede Handlung ist recht, die oder nach deren Maxime die Freiheit der Willkür eines jeden mit jedermanns Freiheit nach einem allgemeinen Gesetz zusammen bestehen kann” (1977: 337). Rawls: “Each person has an equal right to a fully adequate scheme of basic liberties which is compatible with a similar scheme of liberties for all” (Rawls 1993: 291).
25. See Scanlon (1972) on legitimate restrictions to freedom of expression.
26. Cfr. Wellmer (1986: 108).

References

- Alexander, Larry (2005) *Is There a Right of Freedom of Expression?* Cambridge: Cambridge University Press.
- Alexy, Robert (1983) *Theorie der juristischen Argumentation*. Frankfurt am Main: Suhrkamp.
- Alexy, Robert (1991) *Theorie der Grundrechte*. 2. ed. Suhrkamp: Frankfurt am Main.
- Alexy, Robert (1995) *Recht, Vernunft, Diskurs. Studien zur Rechtsphilosophie*. Frankfurt am Main: Suhrkamp.
- Cohen, Joshua (1993) ‘Freedom of Expression’, *Philosophy and Public Affairs*, vol. 22, no. 3, 207-263.
- Dworkin, Ronald (1981) ‘Is There a Right to Pornography?’, *Oxford Journal of Legal Studies*, vol. 1, no. 2, 177-212. Reprinted in Dworkin, Ronald (1985) *A Matter of Principle*. Oxford: Clarendon Press.

- Günther, Klaus (1985) 'Die Freiheit der Stellungnahme als politisches Grundrecht', *ARSP-Beibef*, vol. 54.
- Günther, Klaus (1996) 'Communicative Freedom, Communicative Power, and Jurisgenesis', *Cardozo Law Review*, vol. 17, no. 4-5.
- Habermas, Jürgen (1990) 'Discourse Ethics: Notes on a Program of Philosophical Justification', *Moral Consciousness and Communicative Action*, 43-115. Cambridge: The MIT Press.
- Habermas, Jürgen (1996) *Between Facts and Norms*. Cambridge: The MIT Press.
- Kant, I (1797/1977) *Metaphysik der Sitten*, bd. VIII i *Werkausgabe*. Frankfurt am Main: Suhrkamp
- MacCormick, Neil (1977) 'Rights in Legislation', *Law, Morality and Society: Essays in Honour of H.L.A. Hart*, red. P.M.S. Hacker and Joseph Raz, 189-209. Oxford: Oxford University Press.
- Niesen, Peter (1998) *Kants Theorie der Redefreiheit*. Baden-Baden: Nomos.
- NOU 1999: 27: 'Ytringsfriled bør finne sted'. *Forslag til ny Grunnlov* § 100.
- Rawls, J (1993) *Political Liberalism*. New York: Columbia University Press.
- Scanlon, T.M. (1972) 'A Theory of Freedom of Expression', *Philosophy and Public Affairs*, vol. 1, no. 2, 204-226. Reprinted in Scanlon 2003.
- Scanlon, T.M. (1979) 'Freedom of Expression and Categories of Expression', *University of Pittsburgh Law Review*, vol. 40, no. 4, 519-550. Reprinted in Scanlon (2003)
- Scanlon (2003) *The Difficulty of Tolerance*. Cambridge: Cambridge University Press.
- Schauer, Frederik (1982) *Free Speech: A Philosophical Enquiry*. Cambridge: Cambridge University Press.
- Skirbekk, Gunnar (1998) *Vit og vitenskap. Postmodernistisk ordbok om modernitetens babelske forvirring*. Bergen: Fagbokforlaget.
- Wellmer, Albrecht (1986) *Ethik und Dialog*. Frankfurt am Main: Suhrkamp.
- Wellmer, Albrecht (1993) *Endspiele: Die unversöhnliche Moderne. Essays und Vorträge*. Frankfurt am Main: Suhrkamp.