



On Academic Freedom for Police Researchers

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ABSTRACT

Few would contest the value of academic freedom, i.e. the principle that researchers are free to ask critical questions and publish their findings without interference from the authorities. In practice, difficult questions may arise concerning both what questions should be asked and how they are answered. In this article, I take as my point of departure the Norwegian legislation, with some examples from other countries. The question of the researchers' part in discussing heated questions and party politics is addressed. The article underlines the value of academic freedom as a guideline for the way researchers should deal with disagreement between each other: We should welcome disagreement and accept that, on any issue, the final word has not yet been said. An important topic is whether the rules of confidentiality for researchers should be clarified. Such a clarification could strengthen the researchers' freedom to work with informants who are especially concerned about the risk of their identity being revealed.

Keywords

academic freedom, confidentiality, protection of sources, freedom of speech, research, human rights, trust

INTRODUCTION

In 1521, Martin Luther was summoned to Worms to defend his writings confronting the authority of the church of Rome. The University of Wittenberg demonstrated its support for the young professor (Schilling, 2017, pp. 174–175):

The university had equipped him with twenty gulden for his expenses on the journey. In effect he was on a work trip, financed by magistracy and university, to give account of his revolutionary research findings before the highest court of the Empire. [...] [T]he group that travelled clearly and impressively documented the solidarity of the university at Wittenberg with its professor under fire.¹

Few researchers may hope – or fear – that their research will change the religious and political landscape of a continent or even the world at large. Neither could Luther have had any idea of the consequences of his research. It is a hallmark of research that it is difficult to

know where it will lead. For the purpose of this article, it is interesting to note that the University of Wittenberg must have looked upon the conflict as one of principle.

The idea of academic freedom won further ground with the age of enlightenment. The principles of academic freedom were further developed in many countries, and the principles of *Lehrfreiheit* (“freedom to teach”) and *Lernfreiheit* (“freedom to learn”) were firmly established with the founding of The University of Berlin in 1811.

Academic freedom will hardly be contested as a general principle. In a way, it is an example of “motherhood and apple pie”: impossible to oppose. However, the important question is how the principle is played out in practical life – by the authorities, and by the academics themselves.

This is the focal point of this article. In this special issue on police research methods, it is my aim to encourage researchers to stay grounded in the vital principle of academic freedom – for themselves, and for their colleagues. The use of academic freedom is fundamental if scientists are to fulfil their tasks in a modern society (Holmboe, 2016). The part of the article that discusses the principle of academic freedom in general terms should be relevant to researchers no matter their method. The part of the article that addresses the question of confidentiality of sources is probably most practically relevant for qualitative researchers, but I hope that readers interested in the working methods of researchers will find something of interest here as well.

Being a Norwegian lawyer, I take as my point of departure the Norwegian laws governing academic freedom. But this article is not merely intended to give a detailed discussion of the finer points of Norwegian law.² Hopefully, the discussion may be of interest to researchers in other countries, as well.

Whenever possible, I have sought to refer to sources that are available in English. However, I have allowed myself to refer to sources that are written in Norwegian and Danish, as well.

According to the Norwegian Constitution Article 100, the authorities of the state shall create conditions that facilitate “open and enlightened public discourse”. The task of researchers is to contribute to the discourse in such a way that it becomes open and enlightened. This means that the researchers must be able to access information, and to share their results. This article discusses both aspects of the principle.

WHY IS THERE A PRINCIPLE OF ACADEMIC FREEDOM?

The principle of academic freedom is closely connected with the general principle of freedom of expression. A society fares better when the principle of academic freedom is applied. The reasons for the principle are put forth, inter alia, in a well-known statement by

1. “Die Universität stattete ihn mit 20 Gulden Reisegeld aus. Es handelte sich gleichsam um eine von Magistrat und Universität finanzierte “Dienstreise” zur Vertretung der umstürzenden “Forschungsergebnisse” vor den höchsten Institutionen des Reichs. [...] [D]ie Reisegesellschaft [dokumentierte] eindrucksvoll die Solidarität Wittenberger Universität mit ihrem in die Kritik geratenen Mitglied.” (Schilling, 2013, pp. 211–212). In the Norwegian translation, the quote is in Schilling (2016, pp. 202–203).
2. All current Norwegian laws are freely available on www.lovdata.no. The Supreme Court’s judgments from the later years are available on www.hoyesterett.no. Where I refer to a Norwegian law or judgment that is also available in English, I have indicated the place where the translation can be found.

The American Association of University Professors from 1940, with later amendments (Kallerud, 2006):

Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.

The authorities are obliged to seek the best possible information in order to govern in the best way. Legally speaking, the duty of a minister is not to win the next election, but to see to it that the matters of state and every citizen are taken care of in a diligent manner. In Norwegian law, this principle is stated in the instructions for the government,³ but it would probably apply in most jurisdictions. It is hard to imagine that a modern government would not support academic freedom, at least in theory. Nevertheless, it is still important to keep these principles in mind and defend them when necessary (UNESCO, ILO, UNICEF, UNDP, & Education International, 2017).

Any policy or idea helps us to categorise the world, but it comes with a price: If unchecked, they make it difficult to see other perspectives (Rosling, Rosling, & Rönnlund, 2018, pp. 186–187):

Being always in favor of or always against any particular idea makes you blind to information that doesn't fit your perspective. This is usually a bad approach if you like to understand reality.

Instead, constantly test your favorite ideas for weaknesses. [...] And rather than talking only to people who agree with you, or collecting examples that fit your ideas, see people who contradict you, disagree with you, and put forward different ideas as a great resource for understanding the world.

Thus, listening to critical research is a bit like going regularly to a dentist: One would not mind in the short run if the dentist was not available, and it may be a bit painful to have one's teeth scrutinized. Sitting in the dentist's chair, one hopes that nothing is wrong. But if it is, it is shortsighted not to heed what the dentist is saying.

Of course, the analogy breaks down at some point: A research report will seldom be as unassailable as a dentist's conclusion that there is a problem with the teeth of the patient. But if the authorities choose not to listen to – or worse, try to undermine or silence – proper research, the long-term consequences may be dire to the citizens and to the authorities themselves.

We can see the connection with the general principle of freedom of expression, which gives protection to the press as a public watchdog: Even if the authorities may deem it favourable in the short run to limit the freedom of expression, it may be disadvantageous for society as a whole.

3. Regjeringsinstruksen, 23 March 1909, Section 3: “*Som departementchefer paaligger det statsraaderne, enhver for sit departements vedkommende, at paase og være ansvarlig for, at enhver til departementet indkommen sak tilbørlig behandles og fremmes til avgjørelse; at Statens og enhver borgers tarv nøie varetages.*”

The rules that allow journalists to protect their sources are derived from the European Convention of Human Rights (ECHR) Article 10 (Baumbach, 2018, pp. 99–100).⁴ Freedom of expression includes “the freedom to hold opinions and to receive and impart information and ideas without interference by public authority”.⁵ The right for journalists to protect their sources is built upon this rule. Without the freedom to receive information, the right to hold (informed) opinions is not worth much. Of course, researchers cannot contribute in a meaningful way if they are not able to receive information from sources. If such sources are able to give information about crimes or questionable behaviour committed by themselves or by people they are close to, they are less likely to do so if they fear that the researcher may be compelled to identify the source.

It is a difficult question, however, how far the *researchers’* right to protect the confidentiality of their sources reaches compared to the jurisprudence concerning the press. I will discuss this question further below.

QUALITY

The quality of universities and university colleges is of vital importance. The Norwegian Act relating to universities and university colleges states (Section 1-1) that the universities and colleges shall provide both higher education and conduct research and academic and artistic development work at a “high international level”.⁶ This principle is described in more detail in Section 1-3 of the Universities’ Act.

Good research requires both that researchers are free to ask the questions they deem important, and are free to supply the answers that the researcher finds conclusive. Thus, the principle of academic freedom is not a “fringe benefit” for academics, but a necessary part of a system that shall ensure that research and teaching reaches a high international level. “Academic freedom” is not something a researcher or teacher can choose whether or not to invoke, but an integral part of the ethics of science. For a researcher to waive his or her academic freedom is thus unethical.

CRITICAL TRUST

In this age of “fake news” (or, rather, the accusations thereof), how shall academia earn the trust of the citizens and the government? Alas, there is no safe way. We human beings tend to assign greater intelligence and better judgement to people we agree with than to people we disagree with. Nevertheless, research must be conducted in such a way that the methods are worthy of trust. When I put forth the idea that research should be conducted in such a way that it is possible for the public to trust the research, the concept of “trust” must be explained more precisely. I do not hold, of course, that research should have the aim of being trusted in the sense that everybody will always trust the *conclusions* of the researchers. Serious research should not be expected to be accepted at face value. Indeed, serious

4. See also The International Covenant on Civil and Political rights (CCPR), Article 19.

5. ECHR, Article 10 para 1.

6. A translation of the Act can be found at <http://app.uio.no/ub/ujur/oversatte-lover/data/lov-20050401-015-eng.pdf>.

researchers should not only expect, but also hope to be read thoroughly – and gainsaid when necessary.

The aim is that the research shall be conducted in such a way that there is reason to trust that the research has been carried out in a scientifically acceptable manner, that the researcher has taken all possible steps to reduce the risk of bias, etc. This means that in order to win and keep the trust of the public, a researcher must be willing to be open about his or her methods. A researcher has no right to expect to be trusted if he or she does not make it possible to verify the methods and conclusions. A quote from the world of technological science seems apt for police researchers, too:

An old Russian proverb, made famous by Ronald Reagan, states, ‘Trust, but verify!’. This means that, in all trust relations, there is a limit to how far blind trust can go. At the end of the day, trust must be confirmed through observations; thus our need for trust depends heavily on our ability to observe. (Lysne, 2018, p. 18)

As has been held concerning risk perception, the binary opposition of trusting or not trusting is inadequate (Walls, Pidgeon, Weyman, & Horlick-Jones, 2004). The aim should be to cultivate – and expect – *critical trust*.

ON DISAGREEMENT IN ACADEMIA

Disagreement brings science forward; most people would agree. This is somewhat heartening: In delivering a lecture or submitting a manuscript, the researcher should be satisfied with having done his or her work properly, given sufficient reasons for the conclusions, etc.

If researcher B contradicts researcher A, the latter should be delighted that someone has cared enough to disagree. However, this is not always the case. As a group, researchers will probably hold that the principle of academic freedom is important in the sense that the state should not hamper free research, and ideally fund research so generously that the researchers are free to choose their topics. So, how do we deal with disagreement?

This may depend on the situation. If a researcher is about to contradict another researcher, he or she may hope that the colleague will find the discussion interesting. But if the researcher is contradicted, it is easy to fall into a trap. The American writer Katryn Schulz has sorted the common reactions to disagreement into three groups: The *ignorance* assumption, the *idiocy* assumption, and the *evil* assumption (Schulz, 2010, pp. 107–108). The mildest form is the ignorance assumption: “that people who disagree with us just haven’t been exposed to the right information, and that such exposure would inevitably bring them over to our team”. Worse is the idiocy assumption: “Here, we concede that our opponents know the facts, but deny that they have been able to comprehend them.” And worst, of course, is the evil assumption: “the idea that people who disagrees with us are not ignorant of the truth, and not unable to comprehend it, but have wilfully turned their backs on it”.

Any of these three reasons for distrusting an opponent may apply in a concrete case. But to sort out a disagreement based on such presuppositions is hardly constructive. The default position should be that a serious person disagreeing with us might have good rea-

sons to do so. And even if we do not change our conclusions, the reasons given for the opposite view may enlighten us and even make us formulate the reasons for our view more clearly.

Sometimes, academic discussions can become rather harsh. Researchers may contradict each other quite strongly, and the legal boundaries for the freedom of expression are rather wide. One example is the Azevedo case, in which a researcher had criticized an earlier work in his field for being mediocre: “Les derniers ouvrages sur la question transpirent la médiocrité”. The author was convicted of defamation. The European Court of Human Rights found that the conviction was a violation of the researcher’s freedom of expression.⁷

POLITICAL ISSUES

Questions concerning the police and crime in a society will sometimes be controversial in the political debate. How should the police behave towards people? Shall the police be armed in everyday police work, or only when it is necessary to use force? How should the rules concerning the gathering of evidence be balanced against the rights of the accused?

Police researchers will often discuss questions where different political parties may have differing opinions. Should the researchers shun the public debate on highly charged political issues? If not, can researchers be accused of abusing research for their own political aims?

In my opinion, this question should be rephrased. What are politicians? They are elected by the people, and it is a sign of a vital democracy that the citizens take part in the public debate. Researchers are citizens and entitled – even obliged – to take part in the debate on controversial issues. A researcher cannot be expelled from the public debate just because he or she knows much about the issue being debated.

When a researcher considers whether to take part in a debate on a contested issue, the question should not be “is this a political question?”, but “does my political view make me biased? Am I willing to state my views in the debate even if my intervention benefits political parties I do not agree with?” A researcher should be willing to criticise friends as well as foes.

THE LEGAL QUESTIONS

Law in books

In Norwegian law, the academic freedom is regulated in the University and University College Act, Section 1-5.⁸ The rule was expanded in 2007 in order to underline that the academic freedom protects both the university or university college, and the individual researcher, teacher and student (NOU 2006: 19).

It follows from the rule that universities and university colleges shall promote and protect academic freedom. This is closely connected with the duty to ensure that teaching,

7. Azevedo c. Portugal, 27 March 2008, 20620/04. The judgment is only available in French. See Kjølbros (2017, p. 1019).

8. The translation referred to above was made before the Act was amended in 2007.

research and artistic or scientific development work maintains a high quality. The institutions may not be instructed regarding the academic content of their teaching or the content of research or artistic or scientific development work or individual appointments.

It follows further from the rule that the institutions cannot be instructed on the methods etc. concerning their teaching, within the framework of the subject. A researcher has the right to choose his or her subject and methods within the framework of the position.

The principle of academic freedom is not mentioned in the Norwegian Constitution. However, in my opinion, this principle should be included in the curriculum on the freedom of expression at the relevant universities. Not only teachers and researchers, but also government officials, etc. should have a thorough knowledge of the rules and principles of academic freedom.

... and law in action

Working as a legal researcher in an environment of researchers from the social sciences, psychology and the police, I am aware that the world may seem too much like a well-ordered place to a lawyer: This is the law, these are the written sources, and this is how to interpret the normative texts. Thus, we can know the law in books (though it is not always easy to draw the line between legal and illegal behaviour). Alas, the world is not so simple. How are the rules applied in real life? Are they well known? Do the people in power adhere to them? Will a researcher on a temporary research grant feel confident enough to stand up against a powerful employer? (UNESCO et al., 2017).

These are important questions. The battle for academic freedom is not won just by pointing to the law. But even though the ideal can probably not be reached fully (Hessen, 2018, p. 41), we need to look to the law to see where we should be headed. Only by having a good grasp of law in books, we can work on making the law in action conform to the law and the principle of academic freedom.

The freedom of the academic institutions

As the principle of freedom of expression applies to everybody, the question arises: To what extent does the principle of academic freedom give any more leeway than the general rules?

Even though the principle of freedom of speech applies widely, academic freedom gives both researchers and universities and colleges more freedom than would follow from the general rules on freedom of expression.

Academic freedom means that universities and university colleges have a freedom to organise their work. This implies both deciding on the content of the curriculum and deciding who to appoint for positions as teachers and researchers.

This article is not the place to give a substantive overview of the laws governing academic freedom in different countries, but I will refer to some examples.

One example of a recent law stating the principle of academic freedom is the UK Higher Education and Research Act 2017, Section 36. The Act states that institutions are free to “determine the content of particular courses and the manner in which they are taught, supervised and assessed” and to “determine the criteria for the selection, appointment and

dismissal of academic staff and apply those criteria in particular cases”. In October 2017, an MP, Mr. Chris Heaton-Harris, wrote to the vice-chancellors of the universities and asked for the names of the professors being involved with teaching European affairs, “with special reference to Brexit”. Furthermore, he asked for “a copy of the syllabus and links to the online lectures”. This did not go down well with the universities. Though the universities minister claimed that the MP was doing research for a book, the letter was considered by many as an attack on the academic freedom of the universities and academics (Mason, 2017).

In Denmark, the freedom of research is anchored in the University Act, Section 2, paragraph 2. In Sweden, the principle follows from the Higher Education Act, Section 6. In Finland, the principle of the universities’ right to self-government follows from the Act relating to the Universities, Section 3. An overview over Nordic perspectives on academic freedom is given by Haugen (2013).

Freedom for the academic personnel

The freedom of institutions will often go hand-in-hand with the freedom of the academic personnel. But their interests may differ: Researchers and teachers cannot be instructed concerning their methods and conclusions.

Of course, a teacher in criminal law has to stick to the topics in the subject. And as a teacher, one has to inform the students about the general consensus of the research on the subject. This does not mean that the teacher cannot raise critical issues, but it should be made clear when the teacher departs from the general consensus of the field. If a teacher should be of the opinion that prison is never harmful to the prisoner, this should come with a very clear signal that the opinion is not representative for the scientific community. If a researcher holds that a national statute cannot be enforced because it would be contrary to human rights or the constitution, he or she must also make the students aware of other views on the question. As the adage says: To break the rules, you must know them.

A researcher does not speak on behalf of his or her institution. Sometimes, when academic personnel voice controversial opinions, the opinion is met by a demand that the leadership of an academic institution clarifies whether this is the view of the institution – and maybe challenges the leadership to write against the academic. An academic institution does not have to comment upon the opinions voiced by the academic staff. It would be contrary to the idea of academic freedom if deans or governing boards saw it as their task to write contrary opinions whenever a researcher voiced a controversial view (Ottersen, 2017).

As has been stated earlier in the article, the free discussion between academics is vital. Academic freedom is not a freedom from being contradicted. It may help to look to the difference between discussions on the *horizontal* level and pressure applied *vertically*. If a researcher voices disagreement with a colleague, that is as it should be. However, if a researcher is summoned before his superiors to explain himself, or the superiors correct the researcher in public, that would not be in accordance with the principle of academic freedom.

In some cases, a research report is published by an academic institution. The institution may, as other publishers, be liable if the content of the research report is in violation of, *e.g.*,

rules protecting right to privacy or against defamation. It may also occur that findings in the report violate the presumption of innocence.⁹ The institution cannot be obliged to publish a report which may probably make the institution legally liable. But serious publishers would probably not be deterred by a threat of being sued in itself, and neither should academic institutions when they decide whether to publish research findings.

The principle of academic freedom also applies to *students*. Of course, the students will need to show that they are well acquainted with the curriculum. Nevertheless, critical comments from the students should be welcomed and encouraged.

In police research, many students are employed in the police while doing studies. Police officers are protected by the general rules of freedom of expression, of course. In Norway, there has been a discussion as to whether police officers have a duty to be loyal towards the authorities in not protesting against opinions that are voiced by, e.g., the Minister of Justice. In my view, such a view is built upon a misunderstanding of the reasons for free speech: To make the authorities better equipped to govern justly. Police officers are obliged to be loyal in enforcing law and order but are not obliged to keep silent about their field of expertise. This applies even more to police officers who are also students.

It is important to underline that the students are free – even obliged – to write their papers as free academics and not hold back from proper criticism of police policy and practice.

How can the authorities govern research?

Proper research needs funding. The authorities will be able, of course, to decide on a broader level what kind of subjects to include in a curriculum, etc. Grants for research may be given with no strings attached, leaving it to the academic institutions and the researchers what to research. Funding may also be given to specific projects, e.g. to explore a topic and publish a report.¹⁰

Both kinds of funding have their place. But even when the authorities ask for and pay for a report to be made, the report cannot be “improved” by the authorities. The authorities may, of course, publish an opinion that challenges the research report, but cannot dictate the content of the report.

Rules may be handled in two ways: Sometimes, lawyers try to find the exact borderline between legal and illegal. The other way is to treat the idea behind the law as an inspiration and a guiding principle: If we really adhere to the principle of academic freedom, to where does that principle point us? It is not necessarily good governance to test the limits of the law.

In my view, research free from constraints is important. Giving answers may be difficult enough, but sometimes researchers may ask important questions that no one else had thought about before (Hessen, 2018). The funding of research should be made in such a way that researchers have time to think about new questions. It would be a bad omen for a society if all research in a given field was done as specific projects ordered by the authorities.

9. See The Norwegian Constitution, Article 96 (2), and the ECHR, Article 6 (2).

10. See, concerning the Norwegian police, Sefland et al. (2014, pp. 24–29). For the sake of good order, I mention that I was one of three secretaries of the committee and drafted a part of the report.

CONFIDENTIALITY AND ITS LIMITS – HOW TO MAINTAIN TRUST?

Police researchers will sometimes meet respondents who give vital information about crimes or misconduct committed by themselves or others. In many cases, the respondents will want to stay anonymous and may demand a promise of confidentiality in order to give information to the researcher. This raises two questions: When is a researcher obliged to alert the authorities of crimes or miscarriages of justice, and when is a researcher obliged to testify in a court of law?

The obligation to hinder crimes and report on miscarriages of justice

Under Norwegian law, all citizens are obliged to try to avert serious crimes and to inform the authorities if a miscarriage of justice has occurred in a case concerning a serious offence.¹¹ Those rules also apply to lawyers, doctors, priests, journalists and researchers, even when the information is subject to rules of professional secrecy (Holmboe, 2017).

Researchers discuss ethical questions concerning secrecy and the duty to inform the authorities (Fossheim & Ingierd, 2013). However, these questions arise for everyone who depend on the trust of people confiding in them about personal issues, e.g. priests (Leer-Salvesen, 2017; Leer-Salvesen & Andreassen, 2017). Thus, the ethical questions must be considered within the framework of the law.

This duty to alert the authorities may be difficult to relate to, but does not raise more difficult questions for researchers than for many other professionals. Thus, the researchers should know the gist of these rules. The rules do not infringe the researchers' academic freedom. But there are other rules that are unclear and may hamper proper research: The rules on the duty of secrecy and the protection of sources. As the theme of this issue of the journal is police research methods, I want to focus on a question that can have important implications for a police researcher: How to get information from a source who does not want to be identified by the authorities?

THE PROTECTION OF SOURCES

Journalists' right to protect their sources

As I have indicated earlier, the protection of the sources of the press is derived from the need to protect the principle of freedom of expression (Kjølbrot, 2017, pp. 1012–1015). Both investigative researchers and journalists perform an important task in shedding light on questions that could otherwise go unexplored. The rules under Norwegian law differ, though, and the researcher's right to maintain confidentiality varies with the researcher's employment and how he or she has gained access to the information. I cannot go into rules from other jurisdictions, but must mention that under Norwegian law, the protection of sources for researchers is nowhere as clearly regulated as the rules concerning journalists.

11. The Penal Code (*Lov om straff (straffeloven)*), 20 May 2005 no. 28), Sections 196 and 226. The Ministry of Justice and Public Security has given an unofficial translation of the code, which can be found at <https://lovdata.no/NLE/lov/2005-05-20-28>. Similar rules are given in the Danish Penal Code, Sections 141 and 164a (Toftgaard Nielsen, Elholm, & Jakobsen, 2017).

This in itself may create difficult questions for researchers (Bjørnebekk, 2013). It is a difficult question whether a researcher could invoke similar rules of protecting sources as journalists can. I will come back to this question shortly, but first give an overview of the rules relating to the media.

Journalists are entitled to a high level of protection of sources. Under Norwegian law, the main rule is that journalists may not be questioned about the identity of their sources, and their material (notes, recordings etc.) may not be seized if this can lead to the identification of the journalist's sources. An exception is made if there is "an overriding requirement in the public interest" for exposing the source.¹²

The principles of protecting journalists' sources are derived from the ECHR Articles 8 and 10. The European Court of Human Rights (ECtHR) has held that questioning journalists about their sources may have a "chilling effect" on the work of the press.¹³

The Norwegian Supreme Court has interpreted the rules on protecting the sources of the press in favour of the journalists, as the press is fundamental to the freedom of speech in a democratic society. A recent example is The Supreme Court's decision concerning a documentary film maker who had interviewed young people who were suspected of joining a terrorist group (the Rolfsen case).

In connection with the investigation of a case into violations of Section 147d of the Penal Code of 1902,¹⁴ the police had seized unpublished video footage from a documentary film-maker, cf. Section 197, Subsection 2, second sentence, of the Criminal Procedure Act. The film-maker was working on a film documenting why Norwegian citizens allow themselves to be recruited as foreign fighters in Syria. The Supreme Court overturned the seizure. The material was fit to reveal unidentified sources, causing Section 125 to come to apply. In its considerations pursuant to Section 125, the Supreme Court did take into consideration that weighty public interest concerns spoke in favour of granting the prosecuting authority access to the material. On the other hand, strong concerns for the protection of sources were also present in the case, and any doubts as to whether the protection of sources must yield, should favour the protection of sources. Given the weighing of interests and the broad protection of unpublished material fit to reveal the identity of unidentified sources established by the ECtHR pursuant to Article 10 of the ECHR, there were no grounds on which to yield the protection of sources.¹⁵

The Supreme Court found that Mr. Rolfsen's documentary was "at the heart of investigative journalism". The Court recognised the importance of the issues at stake, and concluded (para 71):

12. See the Criminal Procedure Act, Section 125 and the Civil Procedure Code, Section 22-11. See, i.a., Pedersen (2016). A translation of The Criminal Procedure Act can be found at <http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19810522-025-eng.pdf>. A translation of the Civil Procedure Code can be found at <https://lovdata.no/NLE/lov/2005-06-17-90>. The translations have not been updated, but the gist of the rules is still the same.
13. Goodwin v. The United Kingdom, Grand Chamber, Application no. 17488/90, judgment 27 March 1996. On the concept "chilling effect", see Baumbach (2018).
14. [Author's note: Section 147d of the Penal Code of 1902 referred to forming, participating in, recruiting members into or providing financial or other material support for a terrorist organization when the organisation has taken steps to achieve the purpose by unlawful means. See the current Penal Code (2005), Section 136a.]
15. The Supreme court's judgment 20 November 2015, HR-2015-2308-A/Rt. 2015 s. 1286. Quoted from the English summary at www.lovdata.no. The original order in Norwegian can be found at <https://www.domstol.no/no/Enkelt-domstol/-norges-hoyesterett/avgjorelser/Avgjorelser-2015/Avdeling--Straffesaker/kildevern-for-upubliert-materiale-til-dokumentarfilm/>. An English translation of the order is available at <https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/sak-2015-1462.pdf>.

On this basis an especially strong need to protect sources exists. Considerations relating to the investigation of such a serious matter also carry great weight. However, the police have a number of investigation methods available in cases such as this one, and it is unclear how necessary the information in the seized film material is to the investigation. Another aspect of the overall assessment is that B's journey to Syria was prevented when the search took place.

The Supreme Court remarked that the Court of Appeal had been in considerable doubt as to whether the protection of sources should be waived, but had held in favour of the prosecution. When in doubt, the preparatory works to the law had stated that the interest of the press should prevail. The prosecutor was therefore not allowed to seize the film maker's material.¹⁶

As can be seen, the rule on confidentiality of the sources of the press is not absolute. Nevertheless, the Norwegian press generally holds that it will not reveal sources even when compelled to do so by a court (Aarli, 2015, p. 409; Øy, 2013, p. 36). A source speaking to a journalist may be reasonably sure that his or her identity will not be revealed – at least not by voluntary disclosure by the journalist. (If the protection of sources is not upheld, however, the police may seize material that discloses the identity of the source.) The jurisprudence of The Supreme Court also gives the journalist good reason to expect that he or she will seldom be ordered to reveal his or her sources.

When can researchers protect their sources?

As the principle of academic freedom is closely connected to what methods a researcher may apply, it is an important question to what extent a researcher can expect to be allowed to keep his or her sources confidential.¹⁷

For researchers, there is no general rule on the protection of sources in Norwegian national law. The question of whether a researcher can – or must – decline giving testimony in a court of law, depends, *inter alia*, on whether the researcher has a duty of secrecy. Breach of the duty is punishable,¹⁸ but the duty can also be seen as a resource: It may be easier to get a source to talk if the researcher is obligated to keep the identity of the source secret.

A researcher who does not render services to, or work for, an administrative agency, will not have a statutory duty of secrecy unless he or she has gained access to personal information, etc. according to The Public Administration Act, Section 13 e.

Anyone who performs any service or work in connection with a research assignment which an administrative agency has supported, approved, or to which it has provided information subject to a duty of secrecy, has a duty to prevent others from gaining access to or knowledge of information subject to a duty of secrecy which the researcher obtains from an administrative agency, or information received from private sources upon pledge of secrecy in connection with the research. The duty of secrecy also applies to information concerning persons who are dependent upon the body which has arranged for their contact with the researcher.¹⁹

16. The case is discussed in Kierulf (2016).

17. I do not discuss how soon the researcher is obliged to make his or her sources anonymous and untraceable.

18. The Penal Code, Section 209.

19. The Public Administration Act, Section 13 e.

However, the statute regulating the use of testimony from witnesses who are under an obligation of secrecy, does not refer to researchers who are not employed by an administrative agency, even if the research has been supported by such an agency. It is therefore held in legal theory that the ban on testimony does not apply to them.²⁰

For researchers who are employed or doing service for an administrative agency, the ban on giving testimony applies, but it does have exceptions. The duty of secrecy does not bar the researcher from giving information about violations of the law to the prosecuting authorities or the relevant supervising authority if this is deemed desirable in the public interest. The relevant government Ministry may also waive the duty of secrecy if the case is deemed to be so serious that the interest of the private party must give way to the interest in putting the information before the court. The court may override the decision of the Ministry.

Thus, the rules differ according to the employment of the researcher, and according to whether the researcher's project has got support or information from an administrative agency. The situation of the different groups can be summed up like this:

- a. Researchers who are not employed by, or render service to, an administrative agency, and have not received support or information from such an agency have no statutory duty of secrecy, and can be compelled to testify in court.
- b. Researchers who are not employed by, or render service to, an administrative agency, and have received support or information from such an agency, have a duty of secrecy. However, according to legal theory, they are probably not barred from having to give testimony in court. At best, the rules are unclear.
- c. Researchers who are employed by, or render service to, an administrative agency, have a duty of secrecy. The main rule is that they are not permitted to testify in court if the testimony infringes on their right to secrecy. However, the duty of secrecy does not necessarily apply if the researcher gets information about violations of the law. The duty of secrecy may be waived by the relevant government Ministry or overruled by the court.

Thus, researchers may find themselves obliged to testify in court. It is, therefore, ill-advised if a researcher promises his or her informers confidentiality under all circumstances. This unclear legal landscape may in itself have a chilling effect on the sources' willingness to cooperate with the researcher.

When the researcher is obliged to testify in court, the police may also seize, e.g., notebooks, recordings, etc. if they are deemed to be significant as evidence.²¹ (When the researcher is not obliged to testify in court, material which is in the possession either of the researcher or of a person who has a legal interest in keeping it secret, cannot be seized.)²²

That the rules concerning researchers' protection of their sources are difficult to interpret, has been known for a long time. Twenty years ago, professor Eivind Smith (1998) recommended that the rules should be clarified, taking into account the principles of ethics in

20. The Criminal Procedure Act, Section 118. See Bjerke, Keiserud, and Sæther (2011, p. 452).

21. The Criminal Procedure Act, Section 203.

22. The Criminal Procedure Act, Section 204.

research.²³ Since then, the rules concerning *journalists'* right to protect their sources have been clarified and expanded. In Norway, we have got a new Code of Civil procedure, and a government-appointed committee has put forth a proposal for a new Code of Criminal Procedure. We have got a new Act on the Universities and – twice – new acts on ethics in research. None of these acts or the preparatory works discusses the question of protecting the sources of researchers.²⁴

It is not clear how a researcher would fare, should he or she deny answering a question about the identity of a source. If the duty of secrecy does not apply, internal Norwegian law does not give the researcher any right to refuse to answer a question as a witness in a court case. There are, however, some indications that a researcher should be able to argue that he or she should have a similar right as a journalist has to refuse to identify the source of his or her research.

The widening of the scope of the press's right to protect its sources is built upon the case law from the European Court of Human Rights concerning the ECHR Article 10. Researchers in Norwegian universities and university colleges are obliged to research, teach and disseminate the results of research and academic and artistic development work (Kierulf, 2017).²⁵ In a relatively new judgment, the European Court of Human Rights found that a university professor taking part in a public debate could not be held to a stricter standard of proving allegations than would a journalist.²⁶ This judgment concerned the question of whether the applicant could be sanctioned for his allegations. But both the questions of sanctioning a citizen and of protecting sources are fundamental to free speech. Both can have a chilling effect on the right to receive and impart information.

In the EU General Data Protection Regulation (GDPR), academics are put on the same footing as journalists:

Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.²⁷

The GDPR does not regulate the question of confidentiality. But it does carry some weight that the preamble puts academics and journalists on the same footing and connects this rule to the right to freedom of expression and information:

The processing of personal data solely for journalistic purposes, or for the purposes of academic, artistic or literary expression should be subject to derogations or exemptions from certain provisions of this

23. Around ten years later, the Norwegian lawyer Cecilie Schjætvet raised the same question (Jakobsen, 2009). To a researcher who has promised his sources confidentiality, it may come as a surprise when he or she is questioned about the identity of the sources (Blix, 2013).

24. In the autumn of 2018, The Ministry of Justice and Security put forth a draft proposal for amendments in the Criminal Procedure Act and the Code on Civil Procedure (Justis- og beredskapsdepartementet, 2018). The question of whether researchers should be able to deny disclosing their sources was not directly addressed.

25. The University Act, Section 1-3.

26. Braun v. Poland, 4 November 2014, 30162/10.

27. Regulation of the European Parliament and of the Council on the protection of individuals with regard to processing of personal data and on the free movement of such data, Article 85 para 1 (Skullerud, Pellerud, Rønnevik, & Skorstad, 2018, pp. 351–352). See also the Norwegian Act on Personal Information (Personopplysningsloven), Section 3.

Regulation if necessary to reconcile the right to the protection of personal data with the right to freedom of expression and information (Preamble to the GDPR, para 153).

This connection between journalistic and academic purposes is an indication that academic freedom is deemed to be important in a democratic society. Researchers work with a longer perspective than journalists, but that can hardly be a sufficient reason for treating them less favourably.

If we imagine a researcher getting information from the same young people as in the Rolfsen case, it would be difficult to explain why the researcher should be obliged to reveal his or her sources. Nevertheless, no case concerning a researcher's right to protect the identity of his or her sources has been decided by the Supreme Court so far. The Supreme Court's ruling in the Rolfsen case is relevant to the case if a researcher holds that he or she is not obliged to reveal sources, but it is unclear whether the researcher would win the case. In my view, the best advice to researchers must still be that they do not promise their sources absolute confidentiality, as this promise may be legally and practically impossible to honour.

The principle of academic freedom should lead to practical results. The development in the protection of the sources of the press should lead the legislator to clarify the rules concerning secrecy and protection of sources for researchers, to avoid the chilling effect of the current legal uncertainty.

SUMMING UP

A society needs free research. The state should therefore support critical research, also when the research goes against the current acts and views of those in power. This principle should lead to a clarification of how far the researcher's duty of confidentiality should reach in the conflict with other interests, such as the need to investigate crimes.

The scientific dialogue is an ongoing conversation, and researchers should treat disagreement as a resource. If we hold to the principle of academic freedom, we must accept in good cheer that other researchers use it to contradict us. In that way, we will all be the wiser.

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