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Free speech and political exclusion

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Contents

1 FREE SPEECH AND POLITICAL EXCLUSION	1
<i>Constitutive conditions</i>	2
<i>Aspects of the background political theory</i>	4
<i>A Mutual Recognition Restriction</i>	5
2 THE PROSECUTION VS KJUUS.....	7
THE POLITICAL HISTORY OF JACK ERIK KJUUS.....	9
<i>Norway belongs to Norwegians - the anti-immigration movement</i>	11
<i>Racism and anti-immigrationism</i>	13
<i>New measures considered</i>	14
PUBLIC RESPONSES	15
<i>A wide scope of free speech in politics</i>	16
<i>Insufficient reasons for the judgement?</i>	17
<i>Support for the conviction</i>	18
THE KJUUS CASE IN THE COURTS OF LAW.....	19
<i>Racial discrimination as a criminal offence</i>	21
<i>The content of the programme</i>	24
<i>Free speech and anti-immigration as policy</i>	27
<i>The constitutional protection of free speech</i>	28
<i>Justice Gussgaard on the relation between free speech and Article 135a</i>	32
<i>Justice Gussgaard on the constitutional protection of free speech in Kjuus</i>	35
<i>Human Rights in the Kjuus-judgement</i>	38
<i>Justice Lund's democracy argument for free speech</i>	41
<i>Justifying free speech and its limitations</i>	45
3 THE JUSTIFICATION OF FREE POLITICAL SPEECH	47
THE RELATIVE (UN)IMPORTANCE OF FREE SPEECH.....	48
<i>A scepticism about rights</i>	49
<i>Nonsense upon stilts</i>	50
<i>Fish: Freedom of speech a conceptual impossibility</i>	52
<i>Speech as rationality and speech as power</i>	54
<i>Access to the media of communication</i>	55
<i>The relevance of scepticism about the right to free speech</i>	59
FREE SPEECH AS A CONDITION OF RATIONALITY	59
<i>Prior restraints</i>	60
<i>An infection that may spread</i>	60
<i>A discouragement of learning</i>	62
<i>Liberty and truth</i>	63
<i>Mill's argument from human beings as rational and fallible</i>	66
<i>An assumption of infallibility</i>	67
<i>Understanding and living one's belief</i>	69
<i>Complete liberty?</i>	72
<i>Habermas' ethics of free discourse</i>	76
<i>Schauer: A presumption of free speech due to the fallibility of politicians and judges</i>	78

FREE SPEECH AS A POLITICAL RIGHT	80
<i>Free speech as legitimate political protest</i>	81
<i>Spinoza on thought, speech and action</i>	84
<i>Kant: the irrationality of restricting speech</i>	86
<i>Constitutional application of free speech as a political right: the US First Amendment</i>	89
<i>A marketplace of ideas</i>	90
<i>Rawls: Free political speech as basic liberty in the theory of Justice as Fairness</i>	93
<i>The central range of application</i>	96
<i>Dworkin</i>	97
<i>Scanlon: Individual autonomy as limit on state authority</i>	100
FREE SPEECH AS CONSTITUTIVE CONDITION OF DEMOCRATIC LEGITIMACY.....	103
<i>A strong right to free political speech</i>	107
<i>Application to the Supreme Court judgement in Kjuus</i>	107
4 THE MUTUAL RECOGNITION RESTRICTION	111
<i>Implicit rules of the game</i>	112
<i>The relation between free speech and political participation</i>	115
<i>The asymmetry of citizenship</i>	117
INCOMPATIBILITY WITH THE RECOGNITION OF OTHERS	119
<i>Apel's notion of a performative self-contradiction</i>	120
<i>The contradiction in the Mutual Recognition Restriction</i>	121
<i>The context of the contradiction</i>	123
<i>The Mutual Recognition Restriction as applicable to Kjuus</i>	124
<i>The Mutual Recognition Restriction and rationality</i>	126
REPATRIATION, POLITICAL EXCLUSION AND STERILISATION	129
<i>Problems of application</i>	130
<i>Sterilisation as reproductive exclusion</i>	133
<i>The relevance of the Mutual Recognition Restriction to the Kjuus case</i>	138
LAW, JUSTICE, LEGISLATION	139
5 CITIZENSHIP AND CULTURE	143
RACE, ETHNICITY AND CULTURE.....	147
<i>Racism and racial discrimination</i>	147
<i>Ethnicity</i>	148
<i>Culture</i>	150
THE PRIORITY OF THE POLITICAL	151
<i>The relevance of culture</i>	153
<i>Kymlicka's liberalism</i>	155
<i>Autonomy or diversity</i>	157
<i>Culture as a primary good</i>	159
<i>Taylor on recognition</i>	162
<i>The dialogical character of human life</i>	163
<i>Failure of identity-recognition as a moral issue</i>	165
<i>The politics of recognition</i>	166
<i>Two aspects of autonomy</i>	169
<i>Immigration and the protection of cultural identity</i>	170
A VIABLE COMMUNITY	173
<i>Stability through ethnic or cultural separation</i>	174
<i>Sources of legitimacy</i>	177
6 THE LEGITIMACY OF EXCLUSION	179
<i>Exclusion, punishment and qualifications to vote</i>	180
<i>The right to citizenship</i>	182
<i>Referendum, representativity and the popular will</i>	183
<i>Initial conditions of the social contract</i>	187
<i>Compensation</i>	190
SELF-EXCLUSION.....	191

<i>Quisling and his Norwegian Government</i>	191
<i>A duty of allegiance</i>	194
<i>Objects of allegiance</i>	195
<i>A Trojan Horse</i>	198
<i>Fear of cultural extinction</i>	202
<i>Extinction of Baltic national cultures</i>	204
<i>Historical sources of legitimacy</i>	207
<i>A liberal response</i>	210
7 CONCLUSION	213
<i>Implications of this inquiry</i>	215
<i>The validity and scope of the Mutual Recognition Restriction</i>	217
BIBLIOGRAPHY	221

1 Free speech and political exclusion

Late 1997 the Norwegian Supreme Court rejected an appeal from Jack Erik Kjuus, who had been convicted in the Oslo City Court for violating a legal provision commonly referred to as the “Racism Article”.¹ Kjuus was found guilty of claiming that immigrants and people coming to Norway through adoption should be repatriated or sterilised. The context of the claim was the programme of a minor political party, the White Election Alliance, of which Kjuus was the leader. The measures suggested were to be enacted as legislation, should the White Election Alliance get a majority in Parliament through general elections. In defence of Kjuus, it was claimed that the programme was not racist, and that even if the programme was found to be racist, Kjuus' presentation of a political programme was protected by his Constitutional right to free speech.

Kjuus was found guilty according to the “racism article”. On the issue of free speech, the Opinion of the Supreme Court was that free speech had to be balanced against other considerations, which in this case were more important. However, five out of eighteen Supreme Court Justices dissented, claiming that free speech had to be given priority. Basically, the argument for this was the formal one of *lex superior*. Free speech was protected by the Constitution, which was a superior source of law to the racism article of the Penal Code. The justification of free speech as a condition for democratic government was referred to as well in the Opinion of the dissenting Justices.

The Kjuus case, as well as the Supreme Court judgement reflects a conflict between two important intuitions: on the one hand, that free speech is a condition of having a democratic system of government, as well as a condition of rationality and of the autonomy of persons; on the other hand, that what the White Election Alliance proposes is an injustice to immigrants and adoptees. Most people the Alliance proposes to repatriate have arrived in Norway legally according to Norwegian law. A considerable number of the immigrants, and practically everyone who arrived in Norway through adoption by Norwegian parents is a Norwegian citizen. Withdrawal of a permanent right to reside in Norway needs strong justification, but it does happen e.g. in the case of some convicted criminals. To be excluded from the

¹ Article 135a of the Penal Code.

possibility of reproduction by legal force is a serious violation of bodily integrity. To strip citizens of their citizenship seems incompatible with the democratic legitimacy of the political system, which requires the possibility of citizen participation.

I do not find satisfying the solutions to this dilemma proposed by the Supreme Court and by the dissenting Justices. To allow that other considerations simply “outweigh” Free Speech in the case of a political programme has serious consequences for the democratic legitimacy of the entire system of government, and thus of the Courts as well. Even though I sympathise with the strong defence of free speech given by the dissenting Justices, a thorough discussion of the scope of this strong right will be necessary to see if it should apply to cases like *Kjuus*. A third way should be found, in which free speech is recognised as essential to democratic legitimacy, and thus given strong protection, while the injustice proposed in the White Election Alliance programme could be recognised as such. The third option I will suggest, is that conditions for the validity of a right to free speech may be formulated that will account for cases like *Kjuus*, by reflecting upon the justification for the right to free speech itself. In this way the right to free speech will be limited in scope, but have considerable strength in cases to which it applies. The central problem of this inquiry is to explore this third option. *Can restrictions on free speech that advocates stripping citizens of citizenship be justified, without compromising a strong protection of free speech as a condition of democratic legitimacy?*

Constitutive conditions

The conception of free speech in this dissertation is institutionally embedded, in the sense that it is a conception of free speech for a particular system of government - a constitutional democracy. In conceiving of a political system as a constitutional democracy, I interpret the system of government as aspiring to the ideal of a political community of citizens who, through their participation, legitimise the governmental institutions. The constitution of such a system is the rules and regulations that establish the identity of a particular constitutional democracy for a political community within a rule of law. The constitution may be positively and explicitly recorded in a document that is the superior and foundational law of the community, but need not take that form, or even be recorded in writing. A written constitution, or part of one, may be considered an expression of constitutive conditions for a system that is a constitutional democracy. These constitutive conditions are the conditions for the possibility of the system satisfying its own standards, i.e. being a constitutional democracy. They are minimal conditions of justice that need not be part of the positive system, consisting of the Constitution, the Law and the institutions of government. Even though they may not be part of the system, the constitutive conditions are normatively significant within the system. They define a

limit to legal and political measures beyond which the system ceases to be *democratic*, i.e. authorised by the possible participation of the people.

Although institutionally embedded, neither the conception of free speech nor the theory of democratic legitimacy need correspond to existing law or actual politics. As normative conceptions, they are interpretations of constitutive conditions. Constitutive conditions may be violated, and may be realised in a minimal as well as a more robust way. Merely minimal realisation would be a democratic deficiency that should be criticised, and that might be found in actual democracies. Further, as any interpretation, this one may be disputed. Provided the interpretation is right, however, if our practice of politics violates these constitutive conditions, it would fail to meet the minimal requirement for democracy. The fact that real politics differs from the ideal model does not in itself make the model *false*, but an interpretative normative account that fails to address what competent observers finds crucial might anyhow be *irrelevant* to political reality.

The present work is both an analysis of the Kjuus case and a philosophical contribution to the justification and delimitation of free speech. This neither means that the philosophical theory of free speech is merely applied, nor that the case is only illustrative. The analysis of the case, as well as the other cases used for comparison will be helpful in developing our theoretical grasp of the issue or issues of free speech that are discussed. The normative theoretical considerations, on the other hand, should also contribute to the reading of the case. In my opinion, practical philosophy should have as its ambition to be both practically relevant and philosophically interesting. This is not easy, some would say it is impossible, for several reasons.

By working on theoretical models, basic preconditions, abstract generalisations or in other words the thin air where philosophers and their tools are most at home, one may arrive at clear-cut concepts, implications and contradictions. By working from a historical case one is bound to come across a multitude of perspectives from several academic disciplines, and a melange of half-thought ideas, practical solutions, compromises. This is a reality the philosophical model can hope to grasp only some aspects of, and only by neglecting or suppressing others. One may decide to treat the case as a model, too, as a philosophical example with some chosen features. This may make the case more compatible with abstract philosophical reflection, but at the same time the case loses other functions. It ceases to be an object that carries with it a multitude of possible perspectives which may be common points of reference for other people working on similar problems in other contexts or disciplines. Working compromises are necessary. Stressing the theoretical framework too much involves the risk of becoming irrelevant, while trying to grasp the historical phenomenon in its entirety tends to dissolve the unity of the argument. Where between these extremes the mean lies must be decided as we go along.

Aspects of the background political theory

I conceive of society *as if* constituted by a social contract through which civil society becomes a source of legal rights. This contract is not an actual historical phenomenon; neither the enactment of the 1814 Constitution nor any other famous moment of Norwegian history may be identified as the “signing of the social contract”. Rather the idea of such a contract is a constitutive condition of the validity or democratic legitimacy of positive legislation. The concept of a social contract offers an account of the duty of compliance with the law within an actual political community. To consider a political society *as if* constituted by a social contract means to view the system of law and the actions of government as representative of the will of citizens.

On the model of a social contract normative force has its source in the autonomy of individual persons, an autonomy that takes different forms. As subjects of the law, persons have private autonomy. This aspect of autonomy has the character of free choice among options that are limited by criteria that are equally applied. As citizens, on the other hand, persons are participants in the processes by which these limiting criteria of free action are defined. By being both subject and citizen, persons enjoy autonomy in the fullest possible sense, by being able to consider themselves as sources of the legitimacy of the law they are subjected to, and by being free within the options held open within the limits of that law.

The political theory of this dissertation is modern, in the sense of positively affirming an irreducible plurality of values and normative perspectives. Normative validity cannot be established exclusively on objective criteria; ultimately a subjective component is necessary. The diversity of subjective perspectives has the political implication that the law cannot legitimately be based upon the normative perspective of only some of its constituents. The validity of legal norms thus has an inter-subjective component, which finds its positive expression in processes that facilitate citizen participation in government.

Liberal political theories are an important point of reference for my perspective, even though my perspective differs from liberal theories in some respects. One is that my perspective does not involve any metaphysical assumptions about the rights of individual human beings. Within my conception, the idea of autonomous individual citizens is not a hypothesis about human nature, and entering into a social contract is not a hypothesis about the historical origin of human societies. The autonomous individual is a normative ideal that, historically, has to be realised within societies and through complex processes of education, equal legislation and other forms of government action. The social contract is a label for the conditions on which such individuals relate to the law, and which likewise has to be politically implemented.

While liberalism defines justice and right in terms of fundamental or most extensive individual liberty, I conceive of this liberty as immanent conditions that our political system aspires to. I proceed from the idea that our system of government is an institutionally situated constitutional democracy, and attempt to interpret what constitutive conditions has to be satisfied for this to be the case. My ambition is to be working from a normative perspective that is conceived of as immanent in the system rather than fundamental and universal. Although sharing important concepts and intuitions with liberal and other universalist theories, my perspective is rather intermediate between a communitarian and liberal perspective.

A Mutual Recognition Restriction

In chapter two I will give an account of the Kjuus case. Both the historical and the legal background will be discussed, followed by a critical analysis of the Supreme Court Judgement. The purpose of this chapter is to show how the main theoretical problem of my dissertation addresses what will be a core example throughout the argument.

Chapter three concerns the justification of free speech, and takes account of both modern and classical theories of free speech. Through focusing upon selected issues in and contributions to the analysis of free speech, I develop what I take to be a strong justification of free speech, with political participation as the core area to be protected. Free speech is viewed as a constitutive condition of democratic legitimacy. Consequently, I will argue that there is a strong presumption against silencing speech in the political field. Reasons for limiting free speech in a central case as a party programme would have to be sought within the justification of free speech itself.

The Mutual Recognition Restriction, which is introduced in chapter four, shows how free speech may be limited “from within”. Free speech as a constitutive condition of democratic legitimacy has a wide, but limited extension. Some instances of speech are beyond free speech protection. Speech acts that are incompatible with the same or related rights of others having the relevant characteristics in virtue of which the speaker has free speech, are not protected. The Mutual Recognition Restriction identifies a condition that has to apply if the justification of free speech developed in chapter three is to be valid. Chapter four contains an explication of the Mutual Recognition Restriction, including an account of the general normative model that the Mutual Recognition Restriction belongs to, the scope of the restriction, and its applicability to the Kjuus case.

Two basic presuppositions are made in explicating the Mutual Recognition Restriction. The first is that membership in a political community takes priority over ethnic or cultural membership, with respect to rights of political participation. The second is that there is an asymmetry between granting and revoking citizenship in

virtue of which forced exclusion from a political community cannot be legitimate. These basic presuppositions are critically examined in the following two chapters.

In chapter five I discuss the political relevance of ethnic or cultural communities. In chapter six I raise the question whether political exclusion may in some circumstances be legitimate. Through focusing upon several aspects of these problems, with the use of different examples, I discuss the scope and validity of the Mutual Recognition Restriction.

The concluding chapter will give a brief retrospective summary of the argument, and discuss implications of the overall argument for the Kjuus case, for Norwegian Law and Constitution, as well as for political and legal philosophy.

2 The Prosecution Vs Kjuus

In January 1997 the case of the Prosecution vs. Jack Erik Kjuus was heard in the Oslo City Court. According to the Bill of Indictment, Kjuus had threatened or exposed to hate or contempt immigrants and adopted children, by claiming that they should be repatriated, or else sterilised. The case was of particular interest from a free speech perspective. The criminal offence he was accused of was part of the party programme of the White Election Alliance, a political party organising anti-immigrationists.²

Marginal parties like the White Election Alliance do not receive much attention in major news media. Stopp Innvandringen (Stop immigration), one of the two parties merged into the White Election Alliance, had some press coverage when formed in 1989. With insignificant and diminishing election results, however, the White Election Alliance was not the hottest news item around in the autumn of 1995.

What did become a news item, however, was the participation of Øystein Hedstrøm, a Member of Parliament from the right wing, populist Progress Party, in an anti-immigrationist meeting in Oslo. A reporter from the Oslo newspaper *Dagbladet* was also present at this meeting. The connection between Hedstrøm and central figures from the extreme right was reported as confirmation that the strict policies on immigration and refugee asylum advocated by the Progress party were motivated by racist attitudes, as was widely suspected. (*Dagbladet* 6 Sept 1995) Kjuus being a prominent participant at the meeting, the White Election Alliance

² The full name of the party was *Hvit valgallianse (Stopp Innvandringen/Hjelp de fremmede hjem)*, White Election Alliance (Stop Immigration/Help the Aliens Go Home). The Alliance's only success in terms of formal representation was the election of the car-salesman Frank Hove to the City Council of Drammen. The program advocated an ethnically pure Norwegian society in Norway, to be achieved by revocation of citizen rights, extensive repatriation, prohibition against adoption of non-Norwegian children, sterilisation of non-Norwegians who cannot be repatriated and of already adopted children, and abortions if sterilisation has not been done. These measures were intended to prevent the birth of children in Norway who do not have at least three white, ethnic Norwegian grandparents. The program also presented arguments for the necessity of these precautions. Among the arguments was the need to preserve a homogeneous people in order for a culture to flourish. We are told that it is impossible to assimilate immigrants who are too ethnically different. Integration of different ethnic groups in one society will lead to the problems seen in the USA and in former Yugoslavia. A warning is issued that already in a 100 years at least 1/4 of the population will not be ethnic Norwegians. The Norwegian people will eventually face the choice of either extinction as a people or civil war to throw the others out. To avoid a charge of racism, the definition of a Norwegian (at least three ethnically Norwegian grandparents) applies equally to other Europeans as to Pakistani, although some differences *in practice* may be justified by reference to the presumed fact that the presence of Europeans is "more beneficial" to Norway and Norwegians. (*Kjuus* Oslo City Court)

programme for the next parliamentary election in 1997 was covered as part of the Hedstrøm affair.

In this way the public was made aware of Kjuus' proposed measures to secure a purely Norwegian community. Formal complaints were made to the police. An organisation working for the rights of adopted children was among the complainants. Police investigation was initiated, leading to a Bill of Indictment being issued against Jack Erik Kjuus on 8 March 1996. The trial took place 27 and 28 January 1997 in Oslo City Court, with President of the Editor's Association Hans Erik Martre, Professor of Sociology Sigurd Skirbekk, Former Member of Parliament and Director of the Data Inspectorate Georg Apenes on the defence witnesses list.³

A party programme may be considered paradigmatic of protected free speech. It is an opinion on the laws and policies of the government, put forward in order to gain support for the election of representatives to the legislative body of a democratic political community. A court's judgement that the programme was a criminal violation of the dignity of immigrants and adopted children would not settle the case. The Court would also have to consider the constitutionally protected right to free political speech.

Kjuus was sentenced to 60 days suspended imprisonment and a NOK 20 000 fine. He appealed the sentence. Due to the far-reaching principles at stake in the case, especially the question of the statutory prohibition on racist speech in relation to the constitutional protection of free speech, the Supreme Court decided to hear the case in a plenary session, and without previous Superior Court hearing. The Supreme Court upheld the City Court sentence, but with a considerable minority who voted for acquittal.

In the first part of this chapter, I intend to give an account of the situation and events leading up to this trial. This will include some elements of the story of the now retired lawyer Jack Erik Kjuus as a public or political figure; an attempt to situate the White Election Alliance within the right-wing, nationalist political movements in Norway; and an overview of the public reception of the political programme of White Election Alliance before and during the trial. These events provide a historical background for the Kjuus-case. Then I will proceed to examine (mainly) the Supreme Court judgement on the *Kjuus* case, in order to develop an understanding of how Norwegian law - and international law as part of Norwegian law - applies to the case. This analysis of the judgement in *Kjuus* should primarily reflect a legal perspective on the case, with some critical remarks.

³ The Editor's association, *Redaktørforeningen*, organises Norwegian newspaper editors. Skirbekk is Professor of Sociology at the University of Oslo. The Data Inspectorate is a government body licensing the registration of private data.

THE POLITICAL HISTORY OF JACK ERIK KJUUS

The White Election Alliance originated as a joint list for the 1993 general election for two registered political parties, both lead by Jack Erik Kjuus. One of the participants were *Hjelp fremmedkulturelle hjem* [Help the aliens go home], a party originally formed in 1973 under the name *Ensliges parti* [The singles' party].⁴ The other party, *Stopp innvandringen* [Stop immigration] was registered by Jack Erik Kjuus in 1988.⁵

"Stop Immigration" was originally the heading of an advertisement put in the newspaper *Aftenposten* by Jack Erik Kjuus, then posing as leader of a *Tverrrpolitisk velgerforbund* [Association of electors across the political spectrum].⁶ The Association called for a referendum on a proposition recommending a total halt to granting refugees asylum. A complaint was filed against Kjuus and *Aftenposten* by the Antiracist Centre (ARC) for violation of the Penal Code Article 135a, known as the "racism article". The prosecution decided to drop the case. Chief Superintendent Anne Marie Aslkrud at the Oslo Police Department wrote in her recommendation to the Prosecution that the advertisement "ikke er rettet mot asylsøkerne, men (...) er en kritikk mot norsk innvandringspolitikk." [is not directed at the refugees, but (...) is a criticism against Norwegian immigration policies] The ARC complained to the Director General of Public Prosecutions, who found no reason to reverse the decision.⁷

While the Association of Electors, as *Aftenposten* observes (23 Sept 1987), probably was nothing but another name for Jack Erik Kjuus, he managed to collect the 3 000 signatures by registered voters needed to register a political party in 1988. The Marxist political party *Red Election Alliance* protested against the registration of the party, as they found the party in violation of Article 135a of the Penal Code. Kjuus responded that the name of the party was neither racist, nor likely to be misunderstood as such, and the Complaints Committee on the Registration of Political Parties⁸ rejected the complaint.⁹ Among the leading candidates for Stop

⁴ The purpose of organising this party was, apparently, to advance the interests of people living alone. After having changed its name and platform to include the interests of pensioners, the party was from 1988 known as *Folkeavstemningspartiet* [The referendum party]. The next change of name to "Help the aliens go home" in 1993 indicates that the referendum wanted by this party was one concerning immigration policies.

⁵The main source for the history of the White Election Alliance is the electronic archives of the Oslo newspaper *Aftenposten*. The basic facts cited above may be found at the *Aftenposten* web site, in a section on the 1997 general election, <http://www.aftenposten.no/-spesial/valg97/politikk/partier/00115.htm>.

⁶The advertisement was mentioned in an interview with Kjuus in *Aftenposten* 12 January 1987.

⁷*Aftenposten* 12 January, 4 September, and 12 December 1987.

⁸Klagenevnden for behandling av saker om registrering av politiske partier.

⁹The party program of Stop Immigration called for a referendum on immigration. "False" refugees should be refused asylum, and the political system should become more democratic, and less a fraud. Immigrants should be helped to return to their country of origin. Immigrants living in Norway should adjust their ways to Norwegian law, society and culture.

Immigration in the 1989-elections were the lawyer Erik Gjems-Onstad, Professor Harald Trefall¹⁰ and teacher Torfinn Hellandsvik¹¹, all central figures of the anti-immigration movement.¹²

The anti-immigration movement has a serious problem in maintaining stability within their political organisation. Hege Søfteland, second on the Stop Immigration list in Oslo, was removed from the list before the 1989 election. According to Søfteland, Kjuus ran the party like a "club of old comrades in arms",¹³ and could not stand criticism. Both she and Gjems-Onstad questioned the way Kjuus ran the party. Neither Kjuus himself, nor the rest of the leaders were elected. Kjuus had drafted the rules of the party without any democratic process. There had been no general assembly, and outside the board no one knew anything about either the accounts or the membership lists. After the 1989 election, Kjuus excluded Gjems-Onstad and Hellandsvik.¹⁴ Gjems-Onstad refused to leave, and had himself re-elected leader of the Akershus county division of the party.¹⁵ To the accusation of authoritarian leadership, Kjuus retorted that his movement was more democratic than most parties. For those dissatisfied he pointed out the democratic option: "make your own party!"¹⁶ And so they did. In 1990 Trefall fronted another party with a similar programme as Stop Immigration, *Fedrelandspartiet*. [The fatherland party]. He was elected in 1991 to the County Council of Hordaland. Søfteland participated in the 1991 local elections, without success, on a list called *Nasjonaldemokratene* [National Democrats].

Kjuus frequently presents himself as the real representative of the people – a "delivery boy for the popular will".¹⁷ However, if the popular will were expressed through the subsequent elections, the electorate did not see Kjuus as their representative. Following a campaign with immigration issues as a central topic, Stop Immigration was the choice of fewer than 9 000 voters in the 1989 elections. In relative numbers, this means 0,3 percent of the electorate, the best result for any of Kjuus' parties in general elections ever. In the local elections of 1991, Frank Hove was elected to the City Council of Drammen. Re-elected in 1995, he is the only representative of Stop Immigration with some measure of political success. In the

¹⁰ Trefall is Professor of theoretical physics at the University of Bergen.

¹¹ Hellandsvik is a teacher at the Oslo Kokk- og stuertskole [School for Cooks and Stewards]

¹² Among the sources to the early history of Stop Immigration are *Aftenposten* 4 April, 27 April, 30 April, 24 September, and 12 December 1988.

¹³ "En klubb av gamle kampfeller", *Aftenposten* 8 June 1989

¹⁴ The reason given was Gjems-Onstad and Hellandsvik holding a campaign meeting on a day when all political parties had agreed to silence in commemoration of the victims of a major aeroplane accident.

¹⁵ . Kjuus then claimed that the others formed a fifth column actually belonging to the rival anti-immigration organisation *Folkebevegelsen mot innvandring* [The popular movement against immigration].

¹⁶ *Aftenposten* 16 Sept, 20 Sept, 17 Oct, 21 Oct, and 16 Nov 1989. ("Stift deres eget parti!", *Aftenposten* 21 Oct)

¹⁷ "visergutt for folkeviljen", *Aftenposten* 12 January 1987.

general elections of 1993, the support for Stop Immigration was down to fewer than 2000 votes and in 1997 fewer than 500.¹⁸

In the 1995 local elections to the City Council of Oslo, Kjuus first organised a "Common list" against immigration, in which the Fatherland Party participated. In the 1997 parliamentary election Stop Immigration merged with the other party then controlled by Kjuus, "Help the aliens come home". Originally, Kjuus had greater ambitions for his Alliance. In a facsimile to the Progress Party MP Øystein Hedstrøm from 30 November 1994, published by *Dagbladet*, Kjuus suggests that the Progress Party, Stop Immigration and the Fatherland Party unite to form a White Election Alliance. The suggestion was "not seriously considered" by the leader of the Progress Party, Carl I Hagen.¹⁹ Prolonged co-operation with The Fatherland Party was rejected by Trefall in September 1995. Having read the White Election Alliance programme for the 1997 general elections, Trefall told *Aftenposten* that the Fatherland party had "cut off all co-operation with Jack Erik Kjuus and the White Election Alliance".²⁰ Once again, Kjuus' ambition to unite the anti-immigration movement under his own leadership had failed.

The police investigation and court processes lead to some news media attention for the White Election Alliance, but the attention had no positive effect. The Alliance participated in the general election in the counties of Akershus, Oslo and Buskerud, and received a total of 463 votes. The Fatherland Party ran in all counties, and achieved fewer than 4 000 votes altogether. The votes lost by the anti-immigration parties may have been won by the Progress Party, which despite a lot of negative publicity over their contacts with the extreme right, had their best election ever, receiving 15% of the votes.²¹

Norway belongs to Norwegians - the anti-immigration movement

Since 1975 the Norwegian government has pursued restrictive policies with respect to immigration. Regular immigration from third-world countries motivated by economic opportunities is relatively insignificant. Since the late eighties, yearly immigration to Norway has varied between 6000 and 12000, not including citizens of the common Nordic labour market. A considerable number of the immigrants have been refugees or the families of refugees. Family related immigration, not including the families of refugees, accounted for about 3500 immigrants each year between 1990-93. About 1000 people a year have immigrated with employment as the

¹⁸ The renegades in the Fatherland Party reached 0,5 percent of the votes (11 600) in the 1993-elections, but was down to 0,2 percent in the County Council elections of 1995.

¹⁹ *Dagbladet* 8 Sept 1995

²⁰ *Aftenposten* 16 Sept 95: "...brutt alt samarbeid med Jack Erik Kjuus og Hvit Valgallianse".

²¹ Election results from the Norwegian Parliament web site, www.stortinget.no/info/stortingsvalget1997.htm

primary reason, and about 1000 for purposes of education. The rest of the immigrants were refugees and their families.²² The four largest foreign nationality groups measured by country of birth living in Norway today originate in the Scandinavian countries Sweden and Denmark, the USA and Great Britain.²³

A considerable part of immigration from third world countries into Norway today is related to refugees seeking asylum. The anti-immigration movement generally directs its arguments against this group. This is justified either from the idea that refugees should be helped in neighbouring countries, or from the idea that lots of refugees are *false refugees*. They are supposed to be immigrants actually seeking permanent residence, employment or other economic opportunities in Norway, not really being threatened in their home countries. Anti-immigrationists find confirmation for this belief in reports that many asylum-seekers are denied asylum, but still allowed to stay in Norway for humanitarian reasons, and from reports that voluntary repatriation rarely takes place. The general fear is that mainly the cultural or ethnic, and sometimes also the racial, composition of the Norwegian population will change. It is feared that politicians fail to protect the Norwegian people or actually deceive the people by failing to enforce the restrictive regulations on immigration to Norway.

The extremism of anti-immigrationist organisations differ by degrees. Anti-immigrationists within the mainstream political system generally belong to the Progress party, for which restrictions on immigration has always been an important and popular issue. *Dagbladet's* revelation of the meeting between Progress Party MP Øystein Hedstrøm, Kjuus and his former and current associates is an example of interaction between the Progress party and more radical anti-immigrationists.²⁴ There has also been some exchange of candidates among the parties.²⁵ On the other end of the spectrum we find small militant racist groups, some with an explicit neo-Nazi ideology, but no stable, common organisation. Henrik Lunde, researcher at the

²² Numbers from a government white paper on immigration. (St meld nr 17 (1996-97))

²³ 1 January 1999, Statistics Norway. (<http://www.ssb.no/emner/02/01/10/innvbef/tab-1999-10-25-02.html>)

²⁴ Some leading representatives of the Progress party perceive the issue of immigration in ways similar to Kjuus'. *Dagbladet* reports that the leading Progress party 1997-candidate in Aust-Agder County had been a member of the "Popular movement against immigration". The candidate found that the "Popular movement" had "the same opinion on immigration" as the Progress party. The second leader of the progress party, Vidar Kleppe, argued that the other [mainstream] parties had a policy that "nicely and quietly will replace the Norwegian people with another", "...*stille og rolig vil skifte ut det norske folk*". *Dagbladet* 5 Sept 1997

²⁵ The Progress Party originated as *Anders Langes parti* [Anders Lange's Party], a right-wing populist group where among others, Erik Gjems-Onstad was a prominent member. Hege Søfteland claims to have been "head-hunted" from the Progress Party to Stop Immigration (*Aftenposten* 8 June 1989) Several Progress Party candidates, on the other hand, have been exposed as previous members of anti-immigration organisations and parties. Third place candidate in 1997 in Buskerud county Knut Gjerde, had according to *Dagbladet* (5 Sept 1997) been County-führer in the neo-nazi organisation *Nasjonalt Folkeparti* [National Popular Party]. See also (Lunde 1998)

Antiracist Centre, remarks in his 1997 report on right-wing extremism in Norway that activity at present is relatively low, and membership in the groups of activists is constantly changing. (Lunde 1998) When it comes to persons, however, there seems to be contacts between these militant groups and more moderate parties like White Election Alliance, too.²⁶

Besides the people associated with Stop Immigration, White Election Alliance and the Fatherland Party, another leading public figure among the anti-immigrationists for many years was Arne Myrdal and his *Folkebevegelsen mot Innvandring* [Popular Movement Against Immigration], FMI. FMI was mainly known for organising public meetings and demonstrations, but was also at one time subject to police investigation for being involved in planning bomb attacks against refugee reception centres. One of the excluded leaders of Stop Immigration, Torfinn Hellandsvik, is the leader of an organisation, *Den norske forening* [The Norwegian Association], mentioned as the organiser of the previously mentioned meeting between the Progress Party's MP Hedstrøm and other leading anti-immigrationists.

Racism and anti-immigrationism

Anti-immigration issues are sensitive, and the more moderate groups are concerned to draw a line between outright racism, which is generally avoided, and non-evaluative anti-immigrationism based on ideas about separation of cultural or ethnic groups. Together with personal conflicts, the problems of defining oneself within this rather confusing landscape of positions has led to strong expressions of dissociation from other rather similar groups. Member of the Drammen City Council Frank Hove expresses his non-racist beliefs by attacking Arne Myrdal and FMI: "I am a democrat, and those people give me the creeps", he exclaims.²⁷ Carl I Hagen, leader of the Progress Party describes Kjuus, Trefall and other anti-immigration leaders as "persons with no credibility" and their parties as "organisations we are opposed to".²⁸

Kjuus constantly rejects the idea that his policies are racist. In 1987 he threatened to sue teachers at a school in Tana for defamation. The Teacher's Council at the school had passed a resolution naming Kjuus the "driving force behind organised racism in Norway".²⁹ He has made several complaints to the Norwegian press ethics committee *Pressens faglige utvalg* [The Press Professional Committee], and *Dagbladet* was on one occasion found to have acted unethically by refusing to print a letter in which Kjuus denied allegations that Stop Immigration is racist. The

²⁶ For instance, Ole Krogstad, leading general election candidate for White Election Alliance in Buskerud County, is formerly known as leader of the skinhead gang *Bootboys*.

²⁷ "Jeg er demokrat og får frysninger på ryggen av de folkene." *Aftenposten* 11 Sept 1991.

²⁸ "...personer uten troverdighet", "organisasjoner vi tar avstand fra". *Dagbladet*, 8 Sept 1995.

²⁹ *Aftenposten*, 18 Nov and 18 Dec 1987.

committee found the crucial issue to be whether Kjuus was allowed to reply. In a letter to the editor of *Aftenposten*, replying to an article by Bernt Hagtvet, Kjuus claims that his concern is that the Norwegian and Sami populations are worthy of protection, and that his case "is based on quantity, not quality".³⁰ He fears that the immigrant population at its current growth rate will outnumber the Norwegian, and make it difficult to maintain what we know as the Norwegian way of life. This is a question of quantity, different from a claim that the immigrants should leave because their culture is of inferior quality. In another interview, Kjuus replies to the claim that the Common list is hostile to immigrants that he is "not hostile to the immigrants as persons, but to the treacherous politics in our country."³¹ It is a deep mistrust of Norwegian politics and politicians that is claimed to be the motivation of Kjuus' attacks. Mostly however, Kjuus avoids the topic of racism. His primary motive when it comes to the issue of racism may be to stay within the law. When asked by the Oslo newspaper *Arbeiderbladet* whether his sterilisation measures would apply even to adopted children from Sweden, Kjuus answers that the text says all non-Norwegians, and "I don't want to say more, and you probably understand why."³²

New measures considered

The 1997 election programme and campaign marked a radical turn in Kjuus' fight against immigration. Earlier the main focus was on putting an end to immigration and giving financial and other forms of "stimulation"³³ or aid to refugees and immigrants that returned to their country of origin. The main point was to expose an alleged lack of democracy, by calling for a referendum on immigration that could correct the neglect of the politicians. Kjuus feared that ethnic Norwegians would be a minority in Norway if immigration continued at the current rate. To prevent this, Stop Immigration suggested measures like aiding refugees in neighbouring countries instead of in Norway, and denying any residence permits "on humanitarian grounds", i.e. to "false" refugees. Foreigners should have no right to Norwegian citizenship, to forming pressure groups, or to being politically active in Norway. No public financial aid should be given to multicultural activities.³⁴

In the new programme he spelled out the measures needed, not only to halt a process that was going in the wrong direction, but also to restore the pure Norwegian ethnicity in Norway. Non-Norwegians should be repatriated, not only encouraged or

³⁰"Den baserer seg på kvantum. Ikke kvalitet." *Aftenposten*, 9 Feb 1997

³¹"ikke fiender av innvanderne som personer, men av den forræderiske politikken som føres i landet vårt". *Aftenposten* 1 June 1995.

³²"Jeg vil ikke si mer, og du skjønner sikkert hvorfor." *Arbeiderbladet* 12 March 1996.

³³The word *stimulere* was used by at that time Stop Immigration representative Hege Søfteland in *Aftenposten*, 8 Nov 1988

³⁴*Aftenposten* 10 Oct 1988, 20 July, and 11 Aug 1989.

aided in that direction. Adopted children and mixed couples could stay, but should be denied the right to procreate in Norway. Sterilisation and abortion were to be used as means of preventing the birth of non-Norwegians. If taken, the measures would in one generation have secured a Norwegian community almost entirely without people of foreign ancestry. Putting an end to immigration and stimulating voluntary repatriation would not be sufficient, more severe measures were needed in order to prevent what Kjuus had always feared: That Norwegians should become "an aboriginal minority in their own country".³⁵

There are signs of radicalisation even in the kind of people Kjuus chose to associate with. On the general election list in the county of Buskerud, the leader of the skinhead gang Boot Boys, Ole Krogstad, was the top candidate. In the mid-eighties Krogstad served prison time for blowing up the entrance of the Oslo Immigration Authorities office.³⁶

PUBLIC RESPONSES

The press reported strong reactions among adopted children against the White Election Alliance programme. *Dagbladet* (1 Feb 1997) tells a story about eight year old Jens crying when he heard about the White Election Alliance programme on the television news. Inge Eidsvåg, head of the humanist academy "Nansenskolen" in Lillehammer, and father of two adopted children from Korea, finds the programme deeply offensive:

Hvis den skulle bli stående som en legal ytring og noe et politisk parti skal kunne arbeide for å samle oppslutning om, vet jeg at det vil skape angst og usikkerhet både hos adoptivbarn og deres familier. Trusler om fremtidig tvangssterilisering vil dessuten være skadelig for barn og unges identitetsutvikling og selvoppfatning. Jeg ser for meg diskusjoner i klasserom og fritidsklubber der småkjuuser i ytringsfrihetens navn dunderer løs mot barn med en annen hudfarve. (*Aftenposten* 17 Feb 1997)

If this should be accepted as a legal act of expression, and something a political party should be allowed to work towards gaining support for, I know that the effect will be fear and uncertainty among adopted children and their families. Threats of future forced sterilisation will be harmful to the development of the identity and sense of self of children and young people. I imagine discussions in classrooms and youth clubs where little Kjuuses in the name of free speech forcefully harass children of different skin colour.

³⁵"...en urbefolkning i mindretall i sitt eget land." *Aftenposten* 10 Oct 1988.

³⁶According to the anti-racist journal *Monitor*, this bomb attack was the most serious of the crimes and offences Krogstad was convicted for, the other being vandalism against a synagogue, and unlawful possession of arms and explosives. Other candidates were mentioned by *Monitor*, among those were Henrik Bastian Heide, former convicted racist and associated with Erik Blücher, a former Norwegian neo-nazi leader, now a central force in the Swedish neo-nazi movement. See <http://www.hill.se/monitor/artikler/hvvalg.htm>

The possible damage to the sense of self of adopted children, and their exposition to hatred from others, were the main consequences feared by those reacting against the programme. Generally the threat to adopted children dominated the reactions, while the equal threat to all immigrants were mostly mentioned in addition in general critical remarks.

A wide scope of free speech in politics

Before the indictment, there was public pressure towards using legal means against Kjuus. The general impression was that complaints against anti-immigrationists for violating the legislation against racism, the Penal Code Article 135a, almost never lead to legal action. After the Bill of Indictment was issued on 8 March 1996, the public debate almost exclusively consisted of opinions on whether Kjuus should be protected by the right to free speech. By choosing to act on the content of a party programme, the Prosecution had raised a case central to the justification of free speech.

Some early responses concerned the wisdom of fighting the anti-immigrationists in court. In an editorial the Oslo newspaper *VG* pointed out that the public in general had every reason to react against Kjuus and the White Election Alliance programme, but that using the Penal Code and the law courts hardly would serve the purpose: "Will this mean anything but making martyrs of people whose words hardly have defamatory force?"³⁷ Anders Heger feared that the effect of the Court process would be negative, no matter the outcome.

Vi risikerer rett og slett at ikke engang Kjuus kan dømmes etter paragrafen. Da vil vi stå i en situasjon der hans utsagn om formeringsforbud er offentlig godkjent av domstolene, og i det øyeblikket det har skjedd, har vi paradoksalt nok gjort det lettere for den som ønsker å spre grums av denne typen.

Og skulle han bli dømt, vil hans korstog mot det norske samfunnet knapt svekkes, snarere tvert imot, blant sine egne vil han kunne fremstå som martyren, mannen som ble straffet fordi han sa hva mange tenkte, og han vil bli det levende bevis på at han representerer en undertrykket gruppe. (*Aftenposten* 28 March 1996)

We risk that not even Kjuus will be convicted under this Article. Then we will be in a situation where his statements on prohibition against procreation is officially approved by the courts, and the moment that happens we have, paradoxically, made it easier for those who want to spread that kind of filth.

And should he be convicted, his crusade against the Norwegian society will hardly be weakened, rather the opposite. Among his own he will be able to pose as the martyr, the man who was punished for saying what many thought, and he will be living proof that he represents an oppressed group.

³⁷"Blir ikke dette bare å gjøre martyrer av personer hvis ord knapt har injurierende kraft" *VG* 23 March 1996.

If acquitted, Kjuus would consider this a victory, and if convicted, that could be considered a victory, too. Odd Flatner, who seems to be an old acquaintance of Kjuus', makes the same point, but adds some pity towards Kjuus himself. Flatner professes not to understand why someone repeatedly exposes himself to negative publicity, but claims that our democracy should be generous enough to accept the existence of an oddity like Kjuus and his party.

Others point out the dangers to free speech of convicting Kjuus. Professor of Sociology Sigurd Skirbekk was a witness for the defence at the City Court trial, and wrote in *Aftenposten* 3 February 1997 that

Ett prinsipp denne saken dreier seg om, er hvorvidt myndighetene, via domstolene, kan sensurere og dømme et valgprogram til en lovgivende forsamling, fordi enkelte programposter i programmet kan stå i strid med gjeldende norsk lov. Dette er noe myndighetene skal være svært forsiktige med. En lovgivende forsamling skal gi lover, også forandre gjeldende lover når det er tilstrekkelig flertall for det. Partiprogrammer kan ikke straffes fordi de ber om oppslutning for lovendringer.

An issue this case highlights is whether the authorities, through the Courts of Law, may censor and convict an election programme to a legislative assembly, because some item in the programme may violate current Norwegian legislation. This is something the authorities should be careful in doing. A legislative assembly should legislate, and change current legislation when the majority is sufficient. Party programmes cannot evoke punishment because they seek support for amendments to legislation.

Skirbekk identifies an important point in the justification of free political speech. The very reason why the Courts are justified in enforcing the law is that the law is the result of a legislative process in which the people have been able to participate. In so far as a party programme is an attempt to win support by a majority of the people for amendments to legislation, the freedom to form and distribute such a programme is a condition for the legitimacy of the Court itself, and not within the jurisdiction of the Court to limit.

Insufficient reasons for the judgement?

When Kjuus' appeal was finally rejected, strong criticism was voiced against the reasoning of the Supreme Court. Hans Fredrik Dahl³⁸ sees the judgement of the divided Supreme Court as a sign of deep confusion. The court majority has, he claims, put aside the constitution

uten annen begrunnelse enn at [det] i dette tilfellet bør være slik. Flertallet opptar ingen prinsipiell avveining av lov mot grunnlov, og har ingen rettslig teori å støtte seg til. Man overlater til mindretallet å ta saken opp til prinsipiell diskusjon. Det gjør mindretallet gjerne, og kommer da til det motsatte resultat. Grunnloven kan *ikke*

³⁸ Dahl is Professor of Media and Communications at the University of Oslo.

settes til side. Høyesteretts kjennelse lest i sammenheng etterlater den absolutte forvirring. (*Dagbladet* 2 December 1997)

...without any justification, except that this is how it should be in this case. The majority does no principled balancing of statute vs. constitution, and has no legal theory to support its views. It is left to the minority to discuss the principles of the case. The minority is happy to do so, and reaches the opposite result. The Constitution cannot be put aside. The Supreme Court Decision read in its entirety leaves one in absolute confusion.

If Dahl, himself a historian, found the opinions of the court confusing, the Law Professor Johs. Andenæs found them deficient for other reasons. (*Aftenposten* 19 December 1997) He finds that the Supreme Court has given a "bold" interpretation of the party's programme, which takes Kjuus to mean something other than what he says. He finds that the programme is "racially neutral" in its form.

I programmet for Hvit Valgallianse finnes ikke ett nedsettende ord om andre raser eller etniske grupper. Det heter uttrykkelig at partiet er for etnisk pluralisme i verden. Det er utelukkende ulikheten og uforenligheten det er fokusert på, ikke mindreverd. (*Aftenposten* 19 Dec 1997)

In the White Election Alliance programme there is not a single disparaging word about other races or ethnic groups. It is explicitly stated that the party is pro ethnic pluralism in the world. Only difference and incompatibility is focused upon, not inferiority.

Andenæs is opposed by several contributors to the debate. Martin Sandbu argues that even finding ethnic groups incompatible is a normative opinion, which at least must imply that Norwegians of mixed ethnic origin are inferior to the pure ones. (*Aftenposten* 13 Jan 1998) Live Dehli warns against "legal subtleties and a dogmatic defence of free speech", and maintains that there is a limit on the level of pain a society can stand with respect to opinions. (*Aftenposten* 13 Jan 1998) Kjuus' former comrade in arms, the lawyer Erik Gjems-Onstad, claims that when even the leading expert on Penal Law in Norway, Andenæs, and five Supreme Court Justices fail to recognise that the programme is in violation of the Penal Code, one cannot blame the lawyer Jack Erik Kjuus for not being able to predict the legal outcome. Thus, Gjems-Onstad claims, we may have a case of *unnskyldelig rettsvillfarelse*, "involuntary ignorance of the law", on which ground Kjuus could have been acquitted. (*Aftenposten* 14 January 1998)

Support for the conviction

Not everyone agrees that Kjuus has been expressing a political opinion that should be protected. The artist Gro Finne refers to a fundamental attitude among anti-fascists that racists should have no public platform for their propaganda. "Is it just another

opinion they advance?" she asks, "No, it is incitements to violence."³⁹ The Secretary General of *Norsk presseforbund* [The Norwegian Press Association] Per Edgar Kokkvold gives a similar justification for his support to the Courts drawing a "highly necessary line between the right to free expression and the right to be scornful of and threaten a vulnerable minority group". (*Dagbladet* 9 Dec 1997) Like Finne he finds that the White Election Alliance programme is more than speech.

Det er et opplegg for etnisk rensning, et program for statlig rasistisk handling. Det blir for lett når vi som skal forvalte og verne om ytringsfriheten sier at "såpass må vi tåle". Det er ikke "vi" som må tåle det. Det er "de", de svakeste blant oss, som rammes gjennom et program for tvangssterilisering, tvangsabortering og tvangsutvisning av mennesker som ikke har minst tre "norske" besteforeldre.

It is a design for ethnic cleansing, a programme for governmental racist action. It is too easy when we who are defending free speech say "this we must be able to put up with". It is not "we" who will have to put up with it. It is "them", the weakest among us, who suffers because of a programme for forced sterilisation, forced abortion and forced repatriation of people who do not have at least three "Norwegian" grandparents.

Another argument against the White Election Alliance programme deserving free speech is suggested by Professor of Political Science, Bernt Hagtvet. He claims that Kjuus, through stigmatising groups as "fit for forced sterilisation", has violated a "norm of equality" that is a condition for his own free speech. He has denied to the ones he communicates with the right he claims for himself. Thus he has "trådt over en anstendighetsgrense som går til selve nerven av demokratiet, nemlig ideen om et kommunikasjonsfelleskap spunnet rundt alle borgeres fundamentale likhet som moralske og erkjennende personer." (*Aftenposten* 3 Feb 1997) [...trespassed beyond a measure of decency that goes to the very nerve of democracy - the idea of a communication community spun around all citizens' fundamental equality as moral and rational persons.]

THE KJUUS CASE IN THE COURTS OF LAW

As this is a philosophical inquiry, the point of view is a normative perspective on justice, addressing the political and legislative process. The aim is to consider the problem of how far, as a matter of justice, the right to free speech extends. This question is different from, but related to, the question of what sorts of political speech are guaranteed or allowed by Norwegian law. Questions of justice and questions of law relate to each other as norm to fact - the legal question is whether this particular act is within the scope of liberty defined by law, the question of justice whether such acts should be within that scope. However, the law also constitutes a

³⁹"For er det meninger på linje med andre de kommer med? Nei, det er oppfordring til vold." *Dagbladet* 11 Feb 1997.

normative perspective on action. Legal adjudication is the application of an idea of what should have been done to what as a matter of fact was done. And further, in a constitutional democracy, we may in cases like this consider the law an interpretation of justice.⁴⁰ The law administers goods and burdens, rights, liberties and duties, as determined by the legislators as representatives of the people. The law administers these goods and norms from a particular idea of equality, derived on the one hand from constitutional principles defining a society under a rule of law, and on the other hand from conceptions of relevant similarities and differences given partly in legislation, partly as more or less explicit rules defining the particular practice of law itself.⁴¹

Law is then an interpretation of justice, and the practice of law a procedure through which definite answers to questions of whether an act was right or wrong can be given. In this respect, however, the practice of law is different from discourse on justice. Discourse on justice is open-ended and ongoing. One reason for that relates to the fact that our political system is democratic. Thus what is just is articulated and disputed in the ongoing processes of democratic politics. The political function of these processes, however, is to regulate and influence law. The philosophical and political discourse on justice finds its objective reality through the enactment of new and modified legislation in parliament, but retains its independent subjective perspective through always having the competence to reassess the workings of law, and to claim that the outcome of legislation fails to be just.

From this perspective on the interrelation of questions of law and questions of justice, it seems fit to start the substantive analysis of the Kjuus case with the decision of the courts of law. Norwegian law may be considered an interpretation or expression of the ongoing considerations of questions of justice that define the particular and positive legal community of Norway. As such it contains substantive criteria and distinctions, both from national and international sources, that will also be pertinent to the question of justice. These criteria and distinctions have a different function, however, in a philosophical discourse of justice. The text of a certain statute is directly relevant as authoritative source of law, considered from a legal perspective. In philosophy, however, this authority is hypothetical, dependent on whether or not

⁴⁰The law will not always be an interpretation of justice. Sometimes laws are only conventions, such as traffic rules. In these cases, there is no proper question of the provision being just or unjust, only whether or not it serves its purpose.

⁴¹Law is an interpretation of justice, but not in the way that participants in the law-making process, such as politicians, civil servants and lobbyists, might think of themselves as interpreting abstract justice. Neither is it obvious that the practitioners of law, judges, lawyers and public officials, should think of themselves in that way. But the procedures of democratic political life are designed so that, through the possibility of everyone pointing out injustices inherent in the present system of law, law may be changed to avoid these injustices. Thus law may be conceived of as an ongoing interpretation of justice, which of course neither implies that there is or will be found a perfect adjustment of law to justice, nor that any particular change of law will lead to less injustice.

the reasons or principles we may use to justify that particular act, article or criterion are sound. Addressing *that* question amounts to developing a philosophical or critical perspective on current law.

*Racial discrimination as a criminal offence*⁴²

In 1996, the Public Prosecutor of Oslo filed an indictment against Jack Erik Kjuus for violation of the Penal Code, Article 135a. This article is found in the section of the Penal Code dealing with "Crimes Against Public Order and Peace".⁴³ Article 135a was enacted on 5 June 1970, replacing a subsection of Article 135 on racial discrimination enacted in 1961.⁴⁴ The reason for the amendment to the Penal Code was the Norwegian ratification of the International Convention on the Elimination of All Forms of Racial Discrimination (*CERD*). One of the provisions in this convention, Article 4, calls for legislation against racist speech:

States Parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof (...)(*CERD* Art 4)

Among the "immediate and positive measures" the State parties are to adopt is legislation that mandates punishment for racist speech. One should notice, however, that the measures should be chosen with concern for other Human Rights. Freedom of expression is protected by the European Convention (ECHR) Article 10,⁴⁵ in the Universal Declaration of Human Rights,⁴⁶ and in Article 5 of CERD.⁴⁷ According to

⁴²The main source for my treatment of Article 135a is (Nystuen 1991)

⁴³Forbrydelser mod den Almindelige Orden og Fred.

⁴⁴In this subsection of Article 135 punishment was set for "den som offentlig forhåner eller opphisser til hat eller ringeakt mot en folkegruppe som karakteriseres ved en bestemt trosbekjennelse, avstamning eller opprinnelse for øvrig eller som truer en slik folkegruppe eller sprer falske beskyldninger mot den. Medvirkning straffes på samme måte." (Nystuen 1991: 27) [someone who in public is being scornful of or incites to hate or disrespect towards an ethnic group that is characterised by a particular faith, descent or other form of origin, or that threatens such an ethnic group or disseminates false accusations against it. Complicity is punished likewise.]

⁴⁵Cited below.

⁴⁶Article 19: 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. (*UDHR*)

⁴⁷Article 5: In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to

Eggen, (Eggen 1999: 255f) legislators are given considerable latitude in balancing the requirement to penalise racism against free speech. E.g. expressing mere opinions on racial superiority need not necessarily be penalised.

According to Article 135a of the Norwegian Penal Code a fine or imprisonment may be imposed on someone who

ved uttalelse eller annen meddelelse som framsettes offentlig eller på annen måte spres blant almenheten, truer, forhåner eller utsetter for hat, forfølgelse og ringeakt en person eller en gruppe av personer på grunn av deres trosbekjennelse, rase, hudfarge eller nasjonale eller etniske opprinnelse. (...) På samme måte straffes den som tilskynder eller på annen måte medvirker til en handling som nevnt i første ledd.

by a statement or another form of communication that is publicly made or in another way distributed to the public threatens, scorns, or exposes to hate, persecution and contempt a person or a group of persons because of their religion, race, skin colour, or national or ethnic origin. (...) [or] incites or in another way contributes to acts mentioned in the first subsection.

The new article makes explicitly illegal a relatively wide range of speech acts, compared to the previous version. Race and skin colour are now explicitly included among the traits that cannot legally be used as reasons for negative characterisations. While only hate speech that affected ethnic groups ("folkegrupper") was mentioned in the previous provision, the 1970-amendment included individuals and groups defined by other characteristics as well. (Nystuen 1991: 28f)⁴⁸

The facts of the Kjuus-case, as described in the Bill of Indictment, where these:

Primo september måned 1995 i Oslo som ansvarlig leder for det politiske partiet Hvit Valgallianse (Stopp innvandringen/Hjelp fremmede hjem) distribuerte eller foranlediget han [Jack Erik Kjuus] distribuert til bl a avisredaksjoner prinsippprogrammet til Hvit Valgallianse for Stortingsvalget 1997, hvor blant annet følgende uttalelser er gitt;

- a) "Vi tilbyr adoptivbarna fortsatt å bo i Norge under forutsetning av at de lar seg sterilisere".
- b) "Dette gjelder også for mennesker som har inngått blandede parforhold; Dersom de ikke skiller lag eller flytter ut av landet, skal den fremmede parten i forholdet steriliseres, inklusive eventuelle felles barn."

guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (...)
 (viii) The right to freedom of opinion and expression
 (...) (CERD)

⁴⁸Nystuen also mentions that mental complicity or incitement ("psykisk medvirkning (tilskyndelse)") is more precisely stated in the 1970-amendment. I find it difficult, though, to see that the wording "tilskyndelse" is more precise than the formulation "oppfisse til" found in the provision from 1961. Consequently, I have translated them using the same word in English, *i.e.* as "incitement" and "incite". Possibly, but not necessarily, one could understand "tilskyndelse" as normally referring to - in Austin's terminology (Austin 1975: 94) - an illocutionary speech act, and "oppfisse til" as referring to a perlocutionary speech act. In other words, "oppfisse til" could be read as succeeding in inciting someone, while "tilskynde" is committed in attempting. This is, however, if valid, another distinction than the one Nystuen applies.

c) "Så lenge individet bor i Norge, må han/hun imidlertid sørge for å være 100% steril, og skulle en befruktning på tross av dette finne sted, skal abort foretas."

som samlet og sett i sammenheng med prinsippprogrammets form, ordbruk og innhold for øvrig, innebar at innvandrere og adoptivbarn fortrinnsvis av en annen rase og/eller fra en fremmed kultur, ble truet eller utsatt for hat eller ringeakt på grunn av sin etniske opprinnelse. (*Kjuus* Oslo City Court: 2)

Early September 1995, in Oslo as responsible leader of the political party White Election Alliance (Stop Immigration/Help the Aliens come Home), he [Jack Erik Kjuus] distributed or caused the distribution to e.g. newspaper editors, of the programme of the White Election Alliance in the Parliamentary Elections of 1997, where among others the following statements were made:

a) "We offer adopted children the privilege of living in Norway, provided they agree to be sterilised."

b) "This offer is also open to people who have entered into mixed relationships. If they do not part or leave the country, the alien part in the relationship is to be sterilised, as well as their common children."

c) "For the time the individual is living in Norway, however, he or she must be careful to be 100 percent sterile, and if conception still takes place, abortion is to be taken."

which together and in the context of the form, wording and additional content of the programme, meant that immigrants and adopted children, mainly of a different race or from a different culture, were threatened or exposed to hate or contempt because of their ethnic origin.

Assistant judge Tine Kari Nordengen and her lay co-judges in Oslo City Court found Kjuus guilty of acts of speech that was "truende og forhånende" [threatening to and scornful of] adopted children, but not immigrants. (*Kjuus* Oslo City Court: 13) The court argued that immigrants cannot be seen as a weak group in need of legal protection, neither according to ordinary definitions⁴⁹ nor according to White Election Alliance's three-grandparent criterion. By official numbers, the immigrant population in Norway in 1996 was about 223 800 (about 5% of the population), and included people in the highest levels in society. However, the adopted constitute a small group of about 12 000, of whom 50% are underage. These children and youth might experience a real threat, as they cannot be expected to understand that the White Election Alliance programme is "en politisk meningsytring som vanskelig kan la seg gjennomføre" [a political statement of opinion that is unlikely to be realised]. (*Kjuus* Oslo City Court: 13) They have - as children - limited opportunities for defending themselves in public, and constitute an easily identifiable group with problems of identity.

Consequently, Kjuus was sentenced to 60 days suspended imprisonment and a fine of NOK 20.000. He appealed the sentence directly to the Supreme Court, whose Appeal Committee accepted the appeal. The Supreme Court decided to hear the case in a plenary session. This only happens rarely, and only in cases of great public

⁴⁹The court refers to the government research agency *Statistisk sentralbyrå* [Statistics Norway] as a source for defining immigrants as people who either themselves has immigrated to Norway, or whose parents did so.

importance. *Kjuus* was considered such a case, because of the careful balance that had to be struck between the provisions on racist speech and the constitutional protection of the freedom of expression.

The content of the programme

The appeal concerned the application of law. In Norwegian law, the Supreme Court cannot rule on questions of actual guilt, as this is to be decided in the lower courts, and finally by a jury in the Court of Appeal. However, in this case there is no separate question of guilt, as no one disputes the fact that Jack Erik Kjuus is responsible for the publication of the programme in question. The issue of Kjuus' guilt is, however, a question of interpretation of the programme, i.e., whether or not what the programme actually contains is something Article 135a of the Penal Code condemns. In this way the question of what acts of expression are prohibited by Article 135a is in practice inseparable from the question of what acts of expression are contained in the programme. This is partly a normative point about the competence of the courts of law. By ruling that particular acts of expression are prohibited by Article 135a, the Supreme Court is making an authoritative interpretation of that provision. At the same time it is a point about the hermeneutics of law. The moving back and forth between the general kinds of expressions like being scornful, threatening and causing contempt, and the particular acts of expression made by Kjuus in the programme of White Election Alliance; as well as the moving back and forth between a grasp of the whole meaning of the programme that illuminates the single statements, and single statements illuminating the meaning of the whole; such movements of interpretation are the only way, both of deciding what Kjuus really says, and whether the law applies. In any case, it was agreed that the Supreme Court in this case had the competence to construct its own interpretation of the programme. Interpreting the programme is part of the *application of law*, and thus a task the Supreme Court should assume. Differences in interpretation could lead to anything between acquittal and a wider base for the conviction than the City Court had chosen.

The Supreme Court found that the White Election Alliance programme expressed strong contempt of the groups in question, and that this was sufficient for the ruling. In the reasons for judgement, written by Supreme Court Justice Karenanne Gussgaard, it was not ruled out, but neither was it established, that the programme was also a case of scorn or even threats, as the City Court had concluded. Supreme Court Advocate John Henriksen, acting for the defendant, had claimed that the programme had an impeccable form, and did not contain "en nedvurdering ved å tillegge personer eller grupper mindreverdige egenskaper eller negativ adferd" [degradation by ascribing inferior qualities or negative behaviour to persons or groups] (*Kjuus* Supreme Court: 3). Whatever strong statements there are in the

programme, they are directed at Norwegian law, not at the groups in question.⁵⁰ According to Henriksen, the party is opposed to Norwegian immigration and integration policies, and has no ideas of racial or ethnic inferiority of any group. On the other hand the Prosecution, represented by The Director General of Public Prosecutions Tor Aksel Busch argued that there is a clear component of racial or ethnic inferiority in the programme, which should be read as directed at coloured immigrants from third-world countries, not immigrants in general. Justice Gussgaard accepted the Prosecutions view on this. She cites five passages from the programme. Some of them may be interpreted as expressive of a theory of ethnic separation of equally worthy ethnic groups, as Kjuus may have intended them to be. There is certainly support in other explicit statements in the programme for such an interpretation. However, I agree that the general impression of the programme indicates ideas of racial or ethnic inferiority. Signs of this are the use of words like "hvite mennesker" [white people] vs. "mørke folkeslag" [dark peoples], and the claim that European immigrants are, and have been, "til større gagn for Norge og det norske folk" [more beneficial to Norway and the Norwegian people]. (*Kjuus* Supreme Court: 8) Nevertheless, on a charitable reading not only a racist, but also a non-evaluative doctrine of separation of different peoples might be behind these statements.⁵¹ More to the point, Asbjørn Eide mentions two supplementary factors indicating racial discrimination. (Eide 1998: 73) First the name of the party "*White Election Alliance*", and second the fact that sterilisation is suggested as a means. As culture is acquirable, this would be an irrelevant means to the end of preserving Norwegian cultural identity. If, however, blood or race is the relevant factors, sterilisation will be efficient to eliminate other races in Norway.

On the other hand, e.g. the choice of a "neutral" distinction between Norwegians and Immigrants⁵² are expressive of a willingness to avoid differentiation based upon racist ideas. As Kyrre Eggen points out "Selv om motstand mot etnisk blanding kan bunne i forakt for andre folkeslag, er det ikke noen nødvendig sammenheng mellom disse forhold." [Even though opposition to ethnic melange may stem from contempt of other peoples, there is no necessary connection between these ideas.] (Eggen 1998: 262) Eggen fears that the interpretation made by the Supreme Court may be in conflict with the principle of legality, the principle that no act is criminal unless by authority of positive law or precedent. If Kjuus cannot stay within the law by carefully avoiding statements that may violate the Penal Code, because the Supreme Court

⁵⁰This argument is based upon a distinction made by the Supreme Court in *Krogh*, see below.

⁵¹The statements are even, in theory, compatible with an idea that other peoples are in some respects *better or more powerful* than the Norwegian, and for that reason are a threat to Norwegian ways of life.

⁵²Norwegians are those who have at least three ethnically Norwegian grandparents, all others are immigrants, be they Danish or Pakistani.

reads such a meaning into his statements anyhow, this would render law unpredictable and thus be in contradiction with the very idea and form of law.⁵³

The principle of legality is one of several constitutional safeguards against individuals being subjected to punishment upon mistaken and arbitrary court rulings. In penal law matters of fact or actual guilt are decided under a *presumption of innocence*. Only if the accused is guilty beyond a reasonable doubt, upon the available evidence, the court may convict the defendant. Similarly, in questions of the application of law, the principle of legality expresses similar caution in order to avoid mistaken or arbitrary convictions. As interpretation of the content of an act of expression is part of the application of law, caution should be taken in avoiding interpretations that "stretch" either the understanding of the legal provision or of the text that constitutes the presumed criminal act.

It is, at least in some loose sense, unavoidable for the court to read meaning into the text. Interpretation is an activity necessarily performed against a background of socially and historically embedded linguistic competence and contextual knowledge. Thus more than explicit textual evidence is required for reading the text meaningfully.⁵⁴ On an operational level, legality in interpretation still requires that the interpretation be clearly related to the particular text that occasioned the indictment. A legal argument thus should establish what textual evidence is interpreted, why the interpretation is reasonable and within ordinary usage, and why the Court rejects other interpretations not falling under the legal provision. Eggen's point is that the Court fails in accounting for its conclusion that the call for repatriation in the White Election Alliance is based upon the inferiority of non-whites and not upon some other idea, i.e. non-evaluative reasons for the need for separation of ethnic groups.

Having read the programme as referring to coloured non-Europeans, the Supreme Court overruled the City Court's distinction between immigrants and adopted. Justice Gussgaard found that non-European immigrants were in need of legal protection, and that "betydningen av bestemmelsen ville bli vesentlig svekket dersom den ikke også ble ansett å beskytte grupper av en slik størrelse som det her er tale om". [...the significance of the provision would be considerably limited if the provision were not considered as protecting groups of such a number as is here in question.] (*Kjuus* Supreme Court: 8)

⁵³A similar point was made by Andenæs in the article from *Aftenposten* (19 Dec 1997) mentioned in the section on *Public responses* above.

⁵⁴That the phrases "white people" and "dark peoples" are probably referring to skin colour *in this particular case* is an assumption a competent language user is justified in making, because of background knowledge not provided in the text. Eide's argument that the choice of sterilisation as a means indicates that race is the crucial distinction in the White Election Alliance immigrant policy has considerable force. Still, this indication is not explicitly found in the text, and whether Kjuus saw this implication when publishing the programme is doubtful.

Free speech and anti-immigration as policy

It is now time to address the crux of the Kjuus case as far as the present inquiry is concerned. In principle, someone's right to be protected against being the direct or indirect addressee of abusive speech may conflict with the right of the speaker to express his thoughts, feelings and opinions. The philosophical defence of free speech is strong, making free speech a condition of rationality, of democracy, and of the respect for persons. This comes out clearly in Norwegian law, as free speech is given constitutional protection in Article 100 of the Constitution, thus having normative priority before the Penal Code, where the protection against racial discrimination is placed. However, both free speech and the protection of racial discrimination are parts, on more or less equal footing, of Human Rights conventions by which Norway is bound. An important part of the task that the Supreme Court had to assume was to establish the scope of free speech with respect to racial discrimination.

The strategy of the defence was primarily to establish that the White Election Programme did not fall into the classes of speech prohibited by Article 135a. In case the court decided that the programme was in violation of 135a, the defence argued that the right to publish such a programme was protected by the constitution, and by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and that the provisions on freedom of expression would have to be given priority before Article 135a in this case.⁵⁵ The defence also argued that a political programme was only a proposition to be accepted or refuted by the electorate. Consequently, even if enacting the White Election Alliance policies would violate Norway's responsibilities according to International Law, there should be considerable latitude when it comes to making propositions.

The Prosecution however, stressed that this is a case where right must be balanced against right.⁵⁶ In the Human Rights Instruments, Freedom of Expression is constantly balanced against other equally important rights. Based upon the Universal Declaration of Human Rights (*UDHR*), freedom of expression (Art. 19) may in this case be balanced against rights against discrimination (Art. 7), the right to liberty (Art. 3), the right to protection of privacy, honour and reputation (Art. 12), and the right to found a family (Art. 16). Based upon the European Convention (ECHR) freedom of expression (Art 10) is limited within that article itself against

⁵⁵There is also an issue of the right to form a political party, considered as a "konstitusjonell sedvane", a constitutional custom and practice. This argument is supported by and reflected in the opinion of the dissenting judges, written by Justice Ketil Lund. Lund declares that he agrees with the Advocate for the defence that "strafflegging av uttalelsene er jevngodt med å forby partiet" [to administer punishment for these statements is tantamount to prohibiting the party] (*Kjuus* Supreme Court: 17), and that the right to organise a political party is probably guaranteed by "konstitusjonell sedvanerett", constitutional customary law. (18)

⁵⁶The presentation of the Prosecution's statement before the court is based partly on the Supreme Court judgement, partly on my own notes from the trial.

violations of the reputation or rights of others, and further by the right not to suffer discrimination (Art 14), the right to respect for one's private and family life (Art. 8), and the right to found a family. In the International Covenant on Civil and Political Rights (CCPR) the freedom of expression (Art. 19) is granted with special duties and responsibilities, among these respect for the rights and reputation of others. The advocacy of racial hatred and discrimination is to be prohibited (Art 20.2), and there are rights against discrimination (Art. 2.1, and Art. 26), and a right to found a family (23). Most notably the right not to suffer discrimination is secured in the International Convention on the Elimination of All Forms of Racial Discrimination (*CERD*), which as mentioned was the direct occasion for the enactment of Article 135a of the Penal Code. Consequently CERD is an important source for the interpretation of this Article. Even Article 100 of the Constitution does not grant a general protection for political speech. According to the Prosecution, then, there are several rights relevant to this case, and there is no general priority for the right to free speech.⁵⁷

The constitutional protection of free speech

In the Norwegian Constitution of 17 May 1814, Article 100 concerns the issues of free speech:

Trykkefrihed bør finde Sted. Ingen kan straffes for noget Skrift, af hvad Indhold det end maatte være, som han har ladet trykke eller udgive, medmindre han forsætlig og aabenbare har enten selv vist, eller tilskyndet Andre til, Ulydighed mod Lovene, Ringeagt mod Religionen, Sædelighed eller de konstitutionelle Magter, Modstand mod disses befalinger, eller fremført falske og ærekrænkende beskyldninger mod Nogen. Frimodige Ytringer, om Statsstyrelsen og hvilkensomhelst anden Gjenstand, ere Enhver tilladte.

There shall be liberty of the Press. No person may be punished for any writing, whatever its contents, which he has caused to be printed or published, unless he wilfully and manifestly has either himself shown or incited others to disobedience to the laws, contempt of religion, morality or the constitutional powers, or resistance to their orders, or has made false and defamatory accusations against anyone. Everyone shall be free to speak his mind frankly on the administration of the State and on any other subject whatsoever.⁵⁸

⁵⁷It should be observed that this argument is on a very general level, serving mostly to establish that free speech is not the only important human right. To establish the precise relationship between each of these rights and free speech would require serious further discussion, as would the relation between Kjuus' advocacy for repatriation and sterilisation and these separate rights. As constituting the background for Article 135a of the Penal Code, CERD should be important for the balancing of the right to free speech against the right to protection from racism. As seen in the discussion on CERD above, free speech carries considerable weight in that balancing

⁵⁸Unofficial translation on the web site of the Faculty of Law Library at the University of Oslo. (<http://www.ub.uio.no/ujur/ulovdata/lov-18140517-000-eng.doc>)

The first and strongest sentence of §100 is a general prohibition against censorship in printed media. No one should have to present a text to a censor before printing and publishing it. This was the main issue in early struggles for free speech.⁵⁹ The second sentence has the form of a general right against legal prosecution for speech, with some specified exceptions. Court practice has been to interpret these exceptions widely, to the effect that statutory limits to free speech generally are accepted by the Courts. Legal justification for this may be found in the exception made for publications that themselves constitute disobedience to the law. Consequently, the constitutional protection given in the second period against statutory limits to free speech is weak. Protection of speech against the power of the legislators is rather given in the third sentence, stating that free expression on matters of the state or on any other matter is allowed for everybody. In this point, political life is given special mention, but every other *opinion* is permitted to be avowed in public, as well. This means, according to Andenæs, that "saklig kritikk" (Andenæs 1994: 402) [reasonable criticism] should neither be punished, nor lead to confiscation of the written material or liability for damages. However, one should bear in mind that the wide freedom of speech that seems to be indicated by the wording of the Constitution does not correspond to the practical reality of Norwegian law. Andenæs mentions several limitations on the liberty of frank statements. There may be regulations of the time and place of speech. Professional duties of confidentiality or loyalty voluntarily undertaken are generally not thought to conflict with the right to free speech. Anyhow there is a possible conflict between the idea expressed in part two of §100 that expression may be regulated by law, and the more general licence given in part three to express opinions freely.

The Supreme Court has previously heard three cases concerning the provision on racial discrimination.⁶⁰ In all cases, the relationship between free speech and protection against discrimination has been an important element.

In *Hoas*, a teacher was convicted in the Court of Appeals for having, through statements in a newspaper interview, been scornful of and exposed Norwegian Jews to contempt. Hoas had claimed that the Holocaust was a historical fiction; that all foreign workers and others of alien races, including Jews, should be repatriated; and that those Jews who did not emigrate should be isolated in Jewish communities. The

⁵⁹Historically, the issue of censorship or licensing of printed material, was the occasion of some of the classical expositions of the justification of free speech, e.g. John Milton's *Aeropagitica*. (Milton 1996/1644) In his work on the constitution of Norway, *Statsforfatningen i Norge*, Johs. Andenæs gives an account of the interpretation and historical development of the paragraph on free speech. (Andenæs 1994: 386ff) According to Andenæs, censorship in the Danish-Norwegian monarchy ended in 1770, but a reaction came in the form of a decree of 1799 by which political and religious criticisms were strictly regulated, and in several other episodes in subsequent years .

⁶⁰There has also been a Supreme Court hearing of a case concerning a later amendment to Article 135a about discriminating speech against homosexuals. Nystuen points out that this case is interesting because of the more explicit use of the CERD and the ECHR in the reasons of judgement.

Supreme Court supported the judgement of the Court of Appeals unanimously. Justice Michelsen rejected the claim of the defendant that statements of political or ideological opinion were beyond the scope of Article 135a. Both Article 135 a of the Penal Code and Article 100 of the Constitution protects human rights, and in case of conflict "må det gjennom en avveining avgjøres hvilket hensyn som i den konkrete situasjon må gis forrang." [it has to be decided through discretion what objective will have priority]. (*Hoaas* : 119) It is, however, established that Article 135a has to be interpreted "med Grunnloven §100 som bakgrunn og rettesnor" [with Article 100 of the Constitution as background and guideline], as the legislative background of Article 135a shows that the legislators intended no change in earlier provisions on freedom of speech and of the press.

In *Morgenavisen*, the author of a letter to the Editor of the Bergen newspaper *Morgenavisen*, as well as the Editor himself, was fined in Bergen City Court for exposing Pakistani immigrants in particular to contempt. (*Morgenavisen*) Refugees and foreign workers were accused of - among other things - abusing Norwegian social security and committing serious acts of violence. A majority of four to one acquitted the defendants.⁶¹ They found that the overall meaning of the letter was an attack on the government's policy on immigration, and a call for repatriation of the immigrants. Justice Sinding-Larssen finds it plausible that this letter may affect the attitudes of some readers concerning immigrants, and perhaps strengthen their prejudices, but that the negative evaluations are not strong enough to be within the scope of the prohibition in Article 135a. Sinding-Larssen gives the constitutional protection of free speech a prominent place in his judgement. He finds that one cannot put too strong demands on reasonable style and on the tenability of the purported facts given as premises in the argument, as this would limit the freedom of expression for those who "savner forutsetningene for å ikle sine ytringer en uklanderlig form" [lack qualifications for giving their opinions an impeccable form]. (*Morgenavisen*: 1076) This is a reason why the violations must be "av kvalifisert art" [of a qualified kind: i.e. of a certain strength or probability] in order for Article 135a to have effect. He also points out that the right to free expression of opinions implies that all groups must, to a certain degree, be prepared to endure accusations of unjust privileges, even based upon false information.

In *Krogh* a woman, Vivi Krogh, was given a suspended sentence of 120 days imprisonment in Asker and Bærum Municipal Court for having been scornful of, or exposed to hate or contempt Muslim immigrants because of their faith or ethnic origin. (*Krogh*) As leader of the Organisation against Harmful Immigration to Norway, she had distributed leaflets calling for a halt to Muslim immigration, as well

⁶¹The dissenting judge, Blom, dissented less in principle than in the concrete evaluation of the strength of the contempt, and thus in the balancing of free speech against Article 135a.

as to the plans for building a Mosque in Oslo. The target of her most severe attacks was Islam - both as a religion and as a form of society. Terror, torture and the subjection of women were the primary complaints. The Supreme Court gave serious consideration to the freedom of expression here, too. The freedom to speak one's mind frankly on the matters of government or on any other subject must be given considerable weight, according to Justice Aasland, who refers to the two cases mentioned above. In discussing the leaflets, add comma he makes some important distinctions concerning the scope of speaking one's mind frankly. First, he points out that statements on *Islamic religion and culture* may be offensive, but it cannot be a punishable offence to express one's opinions on a religion or a system of government. Second, remarks on *immigration as such*, e.g. that the immigrant culture is a danger to Norwegian society, may expose immigrants to ill will and prejudice. However, as these may be considered statements on the Norwegian government's policy on immigration, there is no reason for punishment. A third category of statements in these leaflets is however within the core of Article 135a. These are "sterkt negative uttalelser som retter seg mer direkte mot de islamske innvandrere her i landet, deres egenskaper og adferd". [...strongly negative and more direct characterisations of Islamic immigrants in Norway, their general qualities and behaviour.] (*Krogh*: 1313) It is against such direct and negative characterisations of the immigrants the court should react, with the reservation that this does not exclude reasonable and objective criticism of immigrants.

As far as the single statements in Krogh's leaflets are concerned, Justice Aasland observes that the boundaries between tolerable political speech and intolerable negative characterisations are difficult to draw. However, he finds that several statements are in violation of Article 135a. On the other hand, he warns against judging the leaflets only based upon the semantic content of the statements. An evaluation of the leaflets as a whole, however, their abusive language and emotional appeal, as well as their being part of a "hetspreget kampanje mot en folkegruppe" [a harassment campaign against an ethnic group] (*Krogh*: 1316) is relevant. Aasland finds that the statements of the defendant violate a group that is easily identifiable, that is exposed to prejudice and negative evaluations, and people who have limited opportunity of defending themselves.

On a few minor points, Aasland belonged to a minority of two against three in rejecting the appeal completely. Justice Schweigaard Selmer - speaking for the majority - maintained that the statements were too unclear to warrant conviction in themselves, as there should be "en rommelig margin for uheldige og smakløse ytringer" [a wide margin for ill-judged and tasteless statements] (*Krogh*: 1318). All things considered, the majority too decided, upon an overall evaluation, considering the whole of the leaflets and the organised campaign the statements were part of, to

reject the appeal on the application of law. On the other hand, the Supreme Court overruled the sentencing of the Municipality Court, reducing the suspended sentence by half.

Justice Gussgaard on the relation between free speech and Article 135a

Justice Gussgaard judged that the White Election Alliance programme exposed immigrants and adopted children to contempt, and thus was within the scope of punishable action according to the Penal Code 135a. Whether or not this should lead to a conviction of Kjuus depends on an overall judgement, in which the freedom of speech is also considered. Primarily the question is whether the constitutional protection of free speech should lead to a narrower interpretation of 135a. Other sources of law referred to by Gussgaard are the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and the International Covenant on Civil and Political Rights (CCPR).

A few remarks are warranted on the status of the ECHR and the CCPR in Norwegian law. Generally, the relationship between Norwegian law and International law is considered a dualism of systems, regulated by three principles, the principle of transformation, of presumption, and of *lex superior*.⁶² According to the principle of transformation ("transformasjonsprinsippet") provisions in international conventions are to be incorporated into Norwegian law through new internal legislation. However, according to the principle of presumption ("presumsjonsprinsippet") it is generally presumed that Norwegian law is in harmony with International treaties and conventions Norway has ratified. From such a presumption of harmony one should be prepared to choose interpretations of law that allow this harmony to be realised. If this is not possible, however, Norwegian law is considered *lex superior*, i.e. has priority. In a particular field of law, there may be a limited sector-monism; i.e. Norwegian law and relevant International law may be treated as one system of law in these fields. The Penal Code is one such field, as the second subsection of Article 1 states that "Straffelovgivningen gjelder med de begrensningene som følger av overenskomst med fremmed stat eller av folkeretten for øvrig." [The Penal legislation is to be applied with those limitations that follow from treaties with foreign states or from International Law in general]. Justice Gussgaard writes in her judgement that "våre internasjonale forpliktelser kan ha betydning for tolkningen" [...our international obligations may be relevant for the interpretation]. (*Kjuus* Supreme Court: 9) Eggen points out that this is a weak expression of such a sector-monism, but that the considerable discussion the Supreme Court includes of the interpretation of ECHR Article 10 indicates a

⁶²These remarks is primarily based upon Nystuen and Eggen. (Eggen 1998; Nystuen 1991)

willingness to interpret the Penal Code 135a narrowly if warranted by the ECHR. (Eggen 1998)

The protection of free speech in ECHR is formulated in Article 10⁶³:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

In addition to the limitations in 10.2, other provisions in ECHR also limit free speech, such as article 14 on discrimination, and article 17 on actions towards destroying human rights, or limiting them beyond the limits set forth in the convention.⁶⁴ The ECHR Case Law shows that the European Court of Human Rights generally prefers to set limits to free speech from the provisions in Article 10 itself. Article 10.2 lists relevant reasons for limiting free speech by law, among these the reputation or rights of others. However, any limits to free speech have to meet the qualification of being "necessary in a democratic society". Justice Gussgaard refers to the *Spycatcher*-judgements (*Spycatcher A 216*; *Spycatcher A 217*), where the notion of necessity is interpreted as a "pressing social need".

In order to evaluate if there is a pressing social need, the European Court considers whether the decision of the national authorities was "proportionate to the legitimate aim pursued", and whether the reasons given for the decision were "relevant and sufficient".⁶⁵ In evaluating the relevance of the justification, the European Court considers whether the legal action taken is likely to serve the proposed legitimate aim, and in evaluating whether the justification was sufficient the court evaluates whether the legitimate aims in question are likely to be reached

⁶³My main source to the interpretation of ECHR Article 10 is Kyrre Eggen. (Eggen 1994)

⁶⁴Article 14: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 17: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention"

⁶⁵The account of the general principles bearing on the *Spycatcher* judgements is found in the Observer and Guardian case (*Spycatcher A 216*) in paragraph 59, and in the Sunday Times case (*Spycatcher A 217*) in paragraph 50.

by that legal action in these circumstances. The criteria of relevance and sufficiency mainly concern the internal relation of means and end. Given the wording, this also seems to be the case when it comes to the criterion of "proportionate to the legitimate aim pursued". However, according to Eggen, it is under this criterion the relationship between the proposed aims and the protection of the freedom of expression is considered.

Justice Gussgaard also mentions that the International Covenant on Civil and Political Rights (CCPR) Article 19 connects the freedom of expression to "special duties and responsibilities"⁶⁶, among these "respect for the rights and reputations of others". (CCPR #226: 19.3(a)) According to Justice Gussgaard, this provision gives no stronger protection of free speech than the ECHR. The conclusion of the Supreme Court discussion of these Human Rights instruments is that the freedom of expression is to be balanced against the right to protection against racially founded denigration. Consequently, the Penal Code 135a, as applied in *Kjuus*, is not in violation of the right to freedom of expression as understood in these conventions. From what is written in the Judgement, however, it is difficult to see that the Supreme Court has investigated this point thoroughly. The notion of a "pressing social need" is only *mentioned* in the Judgement. There is no explicit and substantial *application* of this notion to the *Kjuus* case, analysing why the reasons for the limitation of *Kjuus*' freedom of political speech in this case are *relevant and sufficient*, and the measures taken *proportionate to the legitimate aim pursued*. Despite the reference to the *Spycatcher*-judgements, this failure to make the application explicit gives reason to worry that the notion of a "pressing social need" in Justice Gussgaard's Judgement is used in a rather colloquial and imprecise sense. From the treatment of these issues, it is not sufficiently clear that the Supreme Court majority has taken seriously the important reasons justifying an extensive freedom of political speech. What the arguments of the Supreme Court may establish, is that there is no absolute protection of political speech in International Law, and that legislation towards punishing racist speech is not in itself against Human Rights. Given this, the Supreme Court has justified its right to make a discretionary judgement that the Penal Code Article 135a is in harmony with the mentioned

⁶⁶Article 19:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Human Rights instruments, and that the conviction of Kjuus is likewise acceptable from a Human Rights point of view. This judgement, however, is - at least apparently - justified exclusively by the authority of the Court, and not by argument - as may have been the case had the application been accounted for.

Justice Gussgaard on the constitutional protection of free speech in Kjuus

In what has been discussed so far, Justice Gussgaard's judgement has the support of all the Supreme Court Justices. On the question of the application of Article 100 of the Constitution to this case, however, there is difference of opinion between the Justices. A minority of five Justices, including Chief Justice Carsten Smith, voted for the acquittal of Kjuus. In their opinion, as formulated by Justice Ketil Lund, the constitutional protection of free speech had to have priority in this case. For now, however, we return to the opinion of Justice Gussgaard and the remaining eleven judges.⁶⁷ Two issues are treated here, if somehow interwoven. One concerns the constitutionality of the Penal Code Article 135a; the other what in particular about the White Election Alliance programme is beyond the scope of free speech.

On the issue of the constitutionality of Article 135a, Justice Gussgaard points out that statements made as part of a political discussion on immigrants and immigration are in the "core area" that is protected by Article 100 of the Constitution. However, both in Article 100, the second sentence, and in the practice of the courts it is assumed that there may be limits to free speech, even when it comes to the political processes.

Lovgiver har en viss adgang til, gjennom en avveining av hensynet til ytringsfriheten mot hensynet til andre beskyttelsesverdige interesser, å gjøre begrensninger i ytringsfriheten. Men nettopp fordi vi befinner oss i kjerneområdet for ytringsfriheten, vil adgangen til å beskjære denne være meget begrenset. (*Kjuus* Supreme Court: 11)

The legislators may to a certain degree, and through a weighing of the regard for free speech against the regard for other interests worthy of protection, limit the freedom of speech. Still, just because we are in the core area of free speech, the entitlement to diminish it should be strictly limited.

Free speech may be limited by regard for other worthy interests, but not beyond certain limits. This passage more or less sums up Justice Gussgaard's approach to the dilemma of freedom of expression and racist speech: The main idea is the rather vague one, that free speech may be limited, but not too much. Based upon a reading of this passage in the context of the entire Judgement, I will characterise Justice

⁶⁷Seventeen of the eighteen Supreme Court Justices took part in the plenary hearing of the Kjuus case. The last one, Justice Rieber-Mohn, was excused upon his own request. He was considered prejudiced, as he had ordered the Indictment against Kjuus when he held the office of Directory General of the Prosecution (Riksadvokat).

Gussgaard's position on this dilemma as consequentialist and sentimentalist. By consequentialist, I mean the tendency to treat this dilemma exclusively as a weighing or balancing of benefits and burdens against each other. This is indicated by the "weighing" of free speech up against "other interests", as opposed to the more principled approach Justice Lund represents, which will be discussed later. By sentimentalist, I mean the tendency to be satisfied with having to make a weighing or balancing without attempting to express explicitly the measure of weight or the principle of balance. It is mainly by silent discretion, by the common sense of the members of the Court, that the scope of free speech and the competence of the legislators to restrict it are delimited, not by formulating criteria. The force of the Constitutional provision on free speech is primarily found in the restrictive *attitude* the members of the Court claim to assume in judging whether speech-limiting legislation constitutional or not.

I should make two qualifications. First, what is characterised in these terms is a general tendency in the text of the Judgement. Such characterisation is accurate to a certain degree, and at certain points. One should not expect too clear cut differences here, only that Justice Gussgaard goes further in the direction indicated by these categories than Justice Lund does. Second, as this is a reading of the text of the present Judgement, the Judgement is the object described, not the opinions of Justices Gussgaard and Lund themselves. One should be careful in drawing strong conclusions with respect to the Justices own understanding of their ruling, as well as with respect to their general views on the theory or philosophy of law.

Justice Gussgaard follows the general practice of the Supreme Court in treating Article 100 of the Constitution as "background and guideline" in interpreting Article 135a of the Penal Code. The notion of a contrary-to-law reservation is also mentioned, the notion that Article 135a is valid in so far as it is not contrary to other law that has priority - such as the Constitution. Her general interpretation of how this is to be understood expresses her consequentialist and sentimentalist approach.

Det skal skje en avveining hvor hensynet til ytringsfriheten må veie tungt. Men - og det er for meg helt sentralt - det ligger i rettsstridsreservasjonen nettopp at det skal foretas en avveining. Hensynet til ytringsfriheten skal ikke slå igjennom for enhver pris - uten hensyn til tyngden av de interesser som tilsier at uttalelsen må kunne belegges med straff. (*Kjuus* Supreme Court: 12)

[A weighing shall take place, in which the regard for the freedom of expression must carry heavy weight. But for me the central point is that it is part of the contrary-to-law reservation that a weighing shall be done. There is some price at which regard for freedom of expression should not break through – in view of the weight of those interests that imply that the statement must be punishable.]

The main point of this passage seems to be to reject the view - which we will see Justice Lund profess - that a constitutional provision as Article 100 has a general

priority in its core area, and that there should be a very high threshold for ignoring the force of the Constitution in such core issues. The task of the Court in applying the Constitution on the Penal Code is not to establish or enforce strong principles, but to weigh the interests, benefits and burdens up against each other. The method of weighing seems to be sentimental discretion, as it is difficult to see any reason supporting the right to free speech, except for the rather abstract view that it is a right protecting the liberty and security of individuals. (*Kjuus* Supreme Court: 12) The method of decision is weighing of interests, burdens and benefits, but very little is said on the benefits of protecting free speech, or in other words on why there is something like an interest in free speech at all. Thus it is not easy to be assured that the freedom of expression carries heavy weight in the considerations.

If the law is to be perspicuous it has to be interpreted and communicated in a perspicuous way. Instead, the Supreme Court reports that it has done some weighing of interests. The weight of society's interest in free speech has been compared with the strength of Kjuus' offending immigrants and adopted children, and the latter is weightier than the former. Applying the metaphors of weighing and strength calls to mind publicly accessible and recognised exact measuring procedures. The problem with this weighing of incommensurate items like the weight of free speech and the strength of offensive utterances is that this can be neither publicly accessible, nor exact. Of course the Supreme Court has an obvious right to decide a case even if there are good reasons on both sides; this is what it means that the Supreme Court rules on a case. But if we want to know how the limits between free speech and discriminating utterances are drawn in Norway after the Kjuus-case, we will not find much to go by. The Supreme Court could have made Norwegian law more perspicuous and understandable, not only for professional interpreters, but also for those whose space of free action is regulated by law, the citizens. What judge Gussgaard has written on the matter gives few qualitative reasons or principled distinctions that could help us understand that Norwegian law protects free speech, while Kjuus' utterances are not among the utterances that have such protection.

If Justice Gussgaard is quite silent on the benefits of free speech, she points more clearly to the burdens of this particular token of speech, and to the interests going against giving weight to free speech in this case. The Supreme Court majority goes far in granting the right to protection against discrimination equal weight to free speech in Norwegian Constitutional law as well as in International law. A 1994 Constitutional Amendment (Article 110c) calling upon the State authorities to protect and secure Human Rights is used in support of the view that in measuring the weight of Article 100 of the Constitution one should consider that "vern mot rasediskriminering er akseptert i det internasjonale samfunn som en grunnleggende rettighet" (*Kjuus* Supreme Court: 13) [...protection against racial discrimination is

accepted in the international community as a basic right.] What is not mentioned is that the same Constitutional amendment indicates *legislation* as a means of doing this, and not adjudication. Eggen points out that this way of interpreting Article 110c is controversial. It seems like the Supreme Court finds itself competent to "oppgradere til Grunnlovs nivå de deler av det internasjonale menneskerettighetsvern som de synes passer" (Eggen 1998: 270) [..."upgrade" to a constitutional level those parts of the international protection of human rights they think fit.] The Supreme Court is then, according to Eggen, violating the separation of powers through making constitutional amendments on their own. He also points out a possible contradiction between Supreme Court rulings in this case. In another recent Judgement, the Supreme Court expressed a strong dualism with respect to Article 110c, in interpreting the incorporation of human rights as a legislative task rather than a matter of adjudication.⁶⁸

Human Rights in the Kjuus-judgement

Quite a few commentators have given considerable praise to the Supreme Court for the application of different Human Rights instruments to this case. Asbjørn Eide has noted that the Supreme Court Judgement was important, as it was based upon a "helhetlig anvendelse av menneskerettighetene, ikke bare på de som kom med da vår grunnlov ble til i 1814". (Eide 1998: 72) [a complete application of the Human Rights, not only upon those who happened to be included when our Constitution was drafted in 1814].

Terje Einarsen recognises that Justice Gussgaard by including superior norms both on free speech and freedom from discrimination in her considerations, and by using Article 110c of the constitution, is legitimising a Human Rights oriented approach, while Justice Lund represents "en mer ensporet ytringsfrihetsdiskurs hvor det kun er forholdet mellom interne norske rettsnormer som ser ut til å telle". (Einarsen 1998: 135f) [a more one-sided free speech discourse in which only the relation between internal Norwegian legal norms seems to count] This point is further elaborated by Marius Emberland, who goes on to argue that the Supreme Court should have gone further in recognising Human Rights. He criticises the Supreme Court for not recognising that the two rights in question; freedom of expression and the right to protection against racial discrimination are equally basic. Emberland finds that a historical contingency like the constitutional protection of the one, but not the other right, has influenced the entire hearing. Thus the treatment of both the European Convention on Human Rights and of internal Norwegian law was done on the basis of the provisions on Freedom of Expression. This meant that

⁶⁸Oljearbeidersaken [the oil rig worker case], Rt. 1997: 80.

"Vernet mot rasediskriminering i norsk rett ble redusert til et spørsmål om grensene for ytringsfriheten." (Emberland 1998: 175) [The protection against racial discrimination in Norwegian law was reduced to a question about the limits to free speech.]

Chief Public Prosecutor Morten Eriksen agrees that the differences in protection of equally important human rights are a problem. He warns against putting too much weight on the principle of *lex superior* in cases where the difference in protection cannot be "gjennomtenkt eller tilsiktet" [properly considered or intended] by the legislators. (Eriksen 1998: 278) He sees no reason to assume that there is a considered and intended policy behind the fact that the right to protection against racial discrimination is protected by ordinary formal law (the Penal Code), and the right to free speech by the Constitution. If there is no such intention, Eriksen cannot see any reason why the Court should treat these provisions as of different priority. On the contrary, he explicitly supports the consequentialist tendency of the Supreme Court in *Kjuus*, and claims that Norwegian courts of law should "legge større vekt på reelle interesseavveininger, og mindre vekt på trinnhøydeargumentasjon ved motstrid mellom menneskerettigheter, slik som Høyesteretts flertall etter min oppfating har gjort, men ikke uttrykkelig uttalt." (Eriksen 1998: 279) [put more weight on real balancing of interests, and less on arguments from *lex superior*, when Human Rights conflict - as the majority of The Supreme Court in my view have done, but not explicitly stated.] He further argues that it is unfair that the perpetrators, but not the victims, are parties with rights to representation in the court processes.

One should not ignore the substantially important points made here. It is plausible that the conception and understanding of human rights and of their relative importance will develop or change with time and place. Consequently it is not obvious that an older, but historically contingent, set of civic rights should always be valid and have priority over rights that were properly recognised only at a later date. Of course, it is difficult to decide the relative authority of constitutionally protected rights and rights conceived of in other circumstances and in other times. There are no obvious answers to how determine priorities about which the constitutional fathers could not possibly have had any opinion. Arguably, the right to protection against racial discrimination might be as basic as the right to freedom of expression. The victims of hate speech may be entitled to protection as much as the speaker. However, for at least two reasons, I am troubled, both by the unconditional approval of the role of the Supreme Court as modernisers of the law, and by the claim in relation to the *Kjuus* case that the Courts of law should be more concerned with weighing the relative "real" interests involved than with principled reasoning.

My first dissatisfaction with these arguments is the same one Eggen expressed in pointing out that the Supreme Court may be transgressing the boundaries of their

role as Court of Law, and assuming a legislative function. In general, it seems these proponents of a more Human Rights oriented Norwegian Law blur the important distinction between law and politics. In order to preserve the democratic legitimacy of the law, as well as the independence of the courts, it is important to realise that law and politics have different functions in a constitutional democratic system. It does not follow, even if all of the claims made on behalf of a modern human rights sensitive law were correct, that the Courts of Law should accept the responsibility for making this happen. These are political claims, claims that surely are about how Norwegian law should work, but in a political context, and relevant as a call for the amendment of law through legislation. Especially on a constitutional level the Courts should be careful not to bypass the procedures of amendment.

My other worry goes directly to the question of free speech. I have already mentioned that Justice Gussgaard is almost silent on substantial issues in the justification of free speech, or on what from her consequentialist approach would be the explicit description and measuring of the "weight" of our "interest" in having free speech. Justice Gussgaard argues with strength and passion for the equalising of the different rights involved, following the arguments of the Prosecution. Reasons in support of treating free speech as a special kind of right are neither explicitly rejected nor mentioned. Neither do the commentators supporting this equalising of rights show any knowledge or understanding of claims to such a special status. This failure to address the justification of free speech, and to comprehend the strengths of a defence of Kjuus from a free speech perspective, weakens her ruling, even though the ruling may be interesting on other points. . Free speech is important for many reasons that go beyond the different interests that are weighed against each other in the political processes. Free speech is a right protecting public deliberation and reasoning, a right protecting the political processes that are necessary to have a democratic system of government, and a right central to the recognition of individual persons as having a special dignity reflected in their capacity to reason about matters of moral and political importance. In other words, free speech is not only one among the rights protecting important interests of human beings, but one of the rights protecting the political struggles within which claims to rights are being advanced, disputed and defended. Free speech is not only a political goal that may or may not be reached, but among the conditions that must be met if the weighing of different goals against one other is going to have any claim to rationality and legitimacy. Because of that, the Supreme Court would not be up to their task unless they considered this case under the perspective of the limits to free speech.

Justice Lund's democracy argument for free speech

A more principled account of free speech is found in the opinion of the minority, as presented by Justice Lund. The core of the disagreement between the majority and the minority in this case is the weight of the Constitutional protection of free speech. Justice Lund in general supports the reasoning of Justice Gussgaard when it comes to interpreting the White Election Alliance programme as racist in content, and in finding that this instance of speech is covered by Article 135a of the Penal Code. There is no disagreement when it comes to the question of interpretation of the international conventions involved. The point on which Justice Lund differs with the majority is the significance of Article 100 of the Constitution.

Strictly speaking the core of Justice Lund's argument are the principle of *lex superior*, and more specifically the idea that the Constitution is a superior source of law to the Penal Code.

Etter min oppfatning må hensynet til den politiske ytringsfrihet tillegges større vekt enn det som følger av førstevoterendes votum. Jeg mener dette er forankret i den uttrykkelige henvisning i § 100 til frimodige ytringer om statsstyrelsen, især sett i lys av hensynet til den demokratiske styreform.

Friheten til å formulere politiske meninger er det sentrale innhold i Grunnloven § 100. Straff i et tilfelle som det foreliggende er bruk av statens tvangsmakt mot borgernes meninger. Vi befinner oss her innenfor selve kjerneområdet for ytringsfriheten, der Grunnlovens § 100 etter min oppfatning vil begrense rekkevidden av straffelovens § 135 a. (*Kjuus* Supreme Court: 16)

In my opinion the regard for the political freedom of expression should be given more weight than what follows from the opinion of the first voter. I find that this is grounded upon the explicit reference in Article 100 to speaking one's mind freely on the administration of the state, in particular in view of the democratic form of government.

The freedom to express political opinions is the central content of Article 100 of the Constitution. Punishment in a case like the present would mean using government force against the opinions of the citizens. We are in the very core area of freedom of expression, where Article 100 of the Constitution in my opinion will limit the scope of Article 135a of the Penal Code.

Statement of political opinion is the core area of free speech, and where Article 100 gives the broadest and most explicit protection of a topic of expression, the freedom to speak one's mind frankly on the administration of the State. The Constitution is superior to "et straffebud formulert i lov" (*Kjuus* Supreme Court: 15) [a statutory provision of punishment]. The strength of free speech is not the same on all areas, according to Lund, but Justice Lund finds that the scope of Article 135a of the Penal Code will have to be limited when applied in the core area of the Constitutional provision.

Justice Lund goes on to argue from the justification of free speech as necessary to a democracy. The liberty of framing a political programme and supporting it with arguments, is what free speech primarily is about. The government has no business

deciding "hvilke oppfatninger folket skal få velge mellom". (*Kjuus* Supreme Court: 16)[...among which opinions the people are to choose.] One should notice the smooth transitions in Justice Lund's reasons for judgement between the formal argument of *lex superior* and the more substantial arguments from democracy. Thus the judgement is given a philosophical foundation, *i.e.* from the principles of justice that justifies the constitutional provision. The Constitution trumps the Penal Code according to formal principles of adjudication. It does so because of the very idea of a constitution, which is expressing the conditions that cannot be violated without compromising the integrity of the entire political system. And if these necessary conditions of being a constitutional democracy are well formulated in the Constitution, their legal and philosophical justification may merge into each other, as they do in Justice Lund's reasoning.

Eggen explains the foundational character of free speech thus: "...ytringsfriheten er en *forutsetning* for, men ikke en del av den demokratiske beslutningsprosess." (Eggen 1998: 273) [...free speech is a necessary condition for, not a part of the democratic decision process.] Eggen is claiming here that democratic institutions need free speech in order to function, but cannot deliberate about free speech. This is correct, if properly understood, but may also lead to misunderstandings. As a matter of fact, free speech is part of the democratic decision processes. Constitutional provisions are written by politicians, by popular authority, and may be modified by processes that differ from ordinary legislation, but which in any case are part of democratic decision processes. The scope of free speech is further delimited through formal legislation, explicating what uses of speech are not protected by the right to free speech. Further the material conditions of realising free speech are deliberated about within the political system, such as the question of whether minor newspapers should receive government financial aid in order to preserve a plurality of public perspectives. Free speech *has to be* an issue within the democratic decision process, as we have no other legitimate way of making it part of the law and life of the country. Still, in a very important sense, Eggen is right: something about free speech cannot be decided by democratic procedure. The institutions of a democratic political system cannot, without compromising themselves, make a decision that effectively undermines the essential feature that makes the system democratic, *i.e.* the right of every citizen to work towards influencing the legislative process. If the legislators, governors or judges of a constitutional democracy do that, they are abusing the process of delimiting the legal liberty of speech, effectively undermining free speech in the constitutive sense - *i.e.* the right of autonomous citizens to exercise their democratic authority.

To Justice Lund, as well as to Eggen, finding *Kjuus* guilty will mean doing just that. Lund finds that *Kjuus* in no way goes beyond what he has to be permitted to do

if our political system is to be democratic. This is because he does nothing but suggest new legislation.

Så lenge det dreier seg om lovforslag som partiet vil arbeide for å gjennomføre hvis det får tilstrekkelig oppslutning i folket, vil bruk av straff, i enda sterkere grad enn ved politiske ytringer ellers, være et inngrep i demokratiets virkemåte, som Grunnloven §100 har som sentralt formål å beskytte.

Jeg tilføyer at situasjonen selvfølgelig kan stille seg anderledes hvis et parti i sitt program eller på annen måte oppfordrer til ulovlige handlinger. Jeg tilføyer også at de tiltak Hvit Valgallianse foreslår, i vesentlig grad strider mot grunnleggende rettsprinsipper og i tilfelle måtte settes til side av domstolene. (*Kjuus Supreme Court: 16f*)

As far as this concerns legislation that the party would work towards passing if it receives sufficient popular support, administering punishment will, even more than with other forms of political expression, be an encroachment upon the workings of democracy, which it is the purpose of Article 100 of the Constitution to protect.

I will add that the situation certainly might have been different had a party in its programme or in other ways been soliciting to illegal action. I will also add that the measures White Election Alliance suggests, essentially violates fundamental principles of law and would have to be put down by the Courts of Law.

The first distinction made by Justice Lund here shows that participating in democratic politics is a special case. The right to speak one's mind on what the law should be, and to act within the ordinary democratic processes - by means of public expression - towards gaining support for such legislation, constitute the core of the right to free political speech. To take the same ideas beyond deliberating about legislation, however, would not be acceptable. Political expression cannot include inciting people to take action in accordance with the programme under the *present* legislation. If the programme called for actions to repatriate immigrants without securing any legal foundation, this would be plainly criminal.⁶⁹

Justice Lund's next move is rather difficult to interpret. He has claimed that advocating the White Election Alliance programme should not be punishable, because doing so would "encroach upon the workings of democracy". Still, he finds that the Court would have to take action to prevent the implementation of the measures suggested by White Election Alliance, should the party get sufficient votes to pass the desired legislation in Parliament. This is a peculiar move. Not only are passing and implementing legislation as much parts of the "workings of democracy" as advocating a political programme. But even worse, the possibility of passing legislation *if* the Alliance gets the sufficient number of votes, is a condition of Kjuus' actions being a meaningful part of the workings of democracy at all. If it is already known that such legislation would never be legally implemented, then the political activity of Kjuus loses every meaning. Not only will it be working against all odds,

⁶⁹Notice that Lund does not make the rather problematic distinction between speech and action, if that distinction is taken to imply that anything done in words is protected by free speech. Incitement to violence may, even if done by mere words, be both speech and action, and is not protected.

which it obviously already is. It would be, from a normative point of view, allowing Kjuus to believe that he is acting according to the same rules as the Parliamentary majority, while in fact there is another rule in place, effectively precluding the possibility of Kjuus succeeding at what he is doing. Thus Kjuus is wrongfully led to believe that what he is doing is exercising his powers as autonomous citizen. What he believes has no place in the legislation of this constitutional democracy anyway. He cannot even be a failure as a politician, because failing implies that there could - in theory - have been some event that would properly be called succeeding. He is a non-starter, because what he conceives of as the goal of this political community is contrary to the "fundamental principles of law" of the very same community.⁷⁰

Justice Lund does not account for the "fundamental principles" that would have justified revoking the legislation that Kjuus is working towards. Thus it is difficult to know exactly what they might be. There is reason to suspect, however, that it is difficult - as I have shown - to apply these principles coherently to the implementation process, but not to the entire legislative process including the framing and advocacy of alternatives. If the workings of democracy require that one be permitted to suggest and work towards legislation of absolutely any content, then some theoretically possible state of affairs would constitute the success of that work. If the constitutive principles of this or any democracy rules out the theoretical possibility of success, then neither the suggestion nor the work done will be more than a *simulation* of "the workings of democracy". Provided that this paradox is not resolved, the alternatives are clear. Either Justice Lund should have given up the idea that there are constitutive limits to what may be legislated in a democracy, or in the current Norwegian democracy. Or he should have accepted that some political positions *are* non-starters in our democracy, as the majority of the Supreme Court did.⁷¹

I will mention two other arguments Justice Lund advances in support of acquitting Kjuus. One is the idea that forming a political party is a right according to constitutional customary law. If that right were to include Kjuus' having his political party, but not his party being actually in power, the same kind of paradox as above would probably arise. As my interest is in questions of free speech, I will not go into an extensive discussion of this other, if similar and related, case. The other argument

⁷⁰Legally speaking, rules are fundamental in a relative and temporary sense. As there are procedures for changing constitutional provisions, fundamental legal principles can be changed. As the analysis proceeds in the following chapters to include the idea of constitutive conditions of the political system, I will argue that there are limits to what constitutional amendments could be made without the system ceasing to be a constitutional democracy.

⁷¹My argument is not that the law could not have been that Kjuus was allowed to run his party with his current programme, but never be allowed to implement it. Only that if this were the case, Kjuus' free speech would be according to ordinary formal law, a liberty as licence given, not free speech as the exercise of his constitutional right as citizen of a democracy.

is consequentialist. Justice Lund finds it unclear whether administering punishment for racist speech is an efficient means of fighting racism, and fears that wrong opinions and prejudice, if excluded from the public scene, may well grow stronger without public exposition. This is a relevant consideration concerning free speech, but in its general form it is probably a political one rather than a matter for the Court to decide. If the legislators decide upon an overall consideration to use a legal provision against racism, this may of course be unwise. The empirical question of whether or not this means is likely to be efficient is not settled by the passing of legislation. What is settled in legislation, however, is that this provision is part of Norwegian Law. As a citizen writing in a newspaper, Lund would be justified in pointing out that this legislation does not serve its purpose. As a Supreme Court Justice writing an official legal document, however, he should rather leave that consideration to the legislators, in order to respect the separation of powers.

Justifying free speech and its limitations.

Through this analysis of the Supreme Court judgement in *Kjuus* I have found both the majority and minority reasoning wanting on important points. I do not find that Justice Gussgaard's treatment of free speech shows sufficient appreciation for the importance of this right. Further, her balancing between free speech and other important rights is not properly accounted for. Clear delimiting criteria are few if any. Obviously this conflict has been solved through the court's rulings, but it is difficult to see how the courts opinion on this case should apply to other cases. The main reason for this is that the principle of resolving the problem is a sort of comparing of incommensurate items by degrees, a weighing or balancing. We learn that the offence in speech must be of a "qualified kind", which seems to mean that it must be strongly offensive. Kjuus has expressed severe disrespect, according to the court, but free speech must also be given weight. White Election Alliance's program is thought to be in the "core area of free speech", where one should be "restrictive" in limiting this freedom. Still, The Supreme Court accepts that the legislators, as well as the court, has a right to "weigh" or balance the conflicting interests of free speech and protection against expressions of racial hatred or denigration. It is the weight of interests that for the majority of the Supreme Court implies that Kjuus' utterances should be punished.

On the other hand, I find Justice Lund's arguments for the significance and force of free speech convincing, not so much because of the formal principle of *lex superior* as for his appreciation of the argument from democracy in defence of the provision on free speech. The priority of free speech in the case of a political programme has much to go for it. However, as Justice Lund suggests that the White Election Alliance

would have been unconstitutional *as legislation*, simply considering the programme to be protected by free speech proved to be paradoxical.

In later chapters, I will develop the argument that further analysis of the right to free speech will provide reasons why this programme goes beyond what is protected by free speech, even in the political field. In this way I intend to provide supplementary reasons that would have supported the decision of the majority, but within a frame of political and legal thinking closer to the minority.

3 The justification of free political speech

On a mainstream contemporary analysis, three major components are found in the justification of free speech.⁷² One component is the significance of free speech as a condition of rational discourse. This argument for free speech is commonly referred to as the argument from truth. The second argument is called the argument from democracy, focusing upon free speech as a condition of democratic government being rational and legitimate. The last component of the justification of free speech is the respect for persons as autonomous, both with respect to their private life, and with respect to their participation in public discourse. Through reflecting upon theories of free speech, of political philosophy and of philosophy of law, I intend to show that free speech or freedom of expression has a strong justification. In particular I will argue that there ought to be a high threshold for infringing upon this freedom in what I take to be a core area, the freedom of citizens to participate in democratic government by speaking. Speech that is essential to having a democratic civil society, in which government is authorised by the people, cannot be infringed upon without undermining the very foundation of democratic government. This relation between free speech and democratic legitimacy should be addressed by arguments for limiting free speech by law. Limiting free speech for the sake of other important purposes or rights may only be done at the cost of undermining democratic legitimacy, unless it be established that the limitation is justifiable with reference to free speech or democratic legitimacy itself.

Before embarking on this argument, I will make two qualifications. First, my purpose is to develop an interpretation of arguments in defence of free speech found in the history of philosophy and contemporary discussions. This interpretation will be the account of the justification of free speech that I subscribe to, though it will not necessarily be original. To develop such an account of the justification of free speech

⁷² My primary reference for this is Barendt, who recognises three free speech theories; the arguments from truth, self-fulfilment and citizen participation in democracy. (Barendt 1985) As a general account, I find this typology satisfying, although different authors may have different accounts. Schauer has a richer catalogue, that nonetheless starts with the arguments from truth and democracy. In addition he is discussing different arguments from the good life and from individuality, more or less covering different aspects of the third general category, and some specific utilitarian considerations, as well. (Schauer 1982) My own discussion in this chapter will focus partly on arguments from truth, and partly on arguments where the three components are interrelated, but with the issue of democratic legitimacy as fundamental.

is necessary for my own main contribution, which will be the exploration of a certain condition of such a strong defence of free speech, as expressed in my notion of a Mutual Recognition Restriction. Second, the account provided here will be selective, aimed at providing the background theory of free speech necessary for the further argument. I will provide a discussion of the elements of this background theory, but not one aimed at covering every approach made to the question of free speech.

There is a central point on which my account of free speech theory may differ from others. Any of the three usual elements in the justification of free speech might in principle be considered fundamental. *Autonomy* may be considered essential in human beings, and as such relevant far beyond the political context. *Rationality* may likewise be considered basic, in which case any use of our rational faculties, because of being dependent upon intersubjective communication for validation, should be within the scope of free speech. Considering *rationality* basic, e.g. *academic* freedom would be a core area of free speech equal in importance to political freedom. Focusing upon the political, my perspective highlights democratic legitimacy, and I interpret autonomy and rationality for historically situated constitutional democracies in relation to such legitimacy.

THE RELATIVE (UN)IMPORTANCE OF FREE SPEECH

Defending a strong right to free speech is no trivial matter. On the liberal model I will develop below, free speech is a right to participate in public discourse that sometimes overrides strong considerations in favour of regulation. In the history of political philosophy, the idea of there being such checks on rational or democratic government policy has been seriously questioned. The general idea of rights against government has been rejected as senseless, as has the idea of free speech. Speech is exercising power, and free speech cannot be defended without any regard for the material and cultural conditions of public communication in our society. A non-trivial defence of free speech will have to recognise the power of speech as a condition of its importance in relation to democratic or rational government. Since communication is a powerful social and political phenomenon, the risk that free speech may have oppressive as well as liberating effects cannot be disregarded.

Some of these sceptical and critical perspectives on free speech will be addressed here, as background for the argument for a strong defence of free speech. I hope that this will serve as an important reminder of the normative nature of this defence. This normativity is significant for several reasons. First, like all modern conceptions of justice, this model constitutes a particular perspective, the universal validity of which may be disputed. Second, even though I claim this model to specify restrictions that any society that aspires to being a constitutional democracy should recognise as constitutive of itself, the degree of actual realisation of the model will vary. And

finally, the degree to which actual politics approaches the norm specified in this model is dependent not only upon the constitution and the system of law, but also upon relations of social and economic power.

A scepticism about rights

In his “Five fables about human rights”, Steven Lukes maintains that the idea of rights as checks on what policies may be pursued for the human good are in conflict with core ideas in Utilitarianism, Marxism and Communitarianism.⁷³ (Lukes 1993) Utilitarians have no use for rights, according to Lukes, because they will be used to “question that Utilitarian calculations should be used in all circumstances”. (Lukes 1993: 28) Communitarians would reject rights “because of their abstractness from real, living, concrete, local ways of life”. (Lukes 1993: 28) Marxists consider acknowledgement of rights to be contra-productive in the fight against oppression, since it involves feeling “sympathy for class enemies”. Further, the need for rights was characteristic of oppressive societies where individuals need protection, and would be superfluous in the Marxist utopia. (Lukes 1993: 29)

Lukes’ main point is that affirming human rights involves accepting some egalitarian assumptions. One must accept, first, the possibility of restraints on what may be done, even if it would be “advantageous to society”. Second, one must accept the importance of the individual, who has the right to pursue life projects that transcends local community custom. And finally, Lukes claims that Human Rights presuppose a certain view of the natural dispositions of human beings:

that human beings will always face the malevolence and cruelty of others, that there will always be scarcity of resources, that human beings will always give priority to the interests of themselves and those close to them, that there will always be imperfect rationality in the pursuit of individual and collective aims, and that there will never be an unforced convergence in ways of life and conceptions of what makes it valuable. (Lukes 1993: 29f)

Lukes’ account is put in the forms of fables, indicating that the point is a general observation about these kinds of positions, which are not discussed in any detail or in all their variations. Furthermore, it is on a certain account of *natural, unlimited* rights these kinds of theories cannot accept human rights. This will not necessarily rule out the acceptance of certain particular rights, such as a right to free speech, provided the normative foundation is different. I will consider Utilitarianism as an example.

⁷³Steven Lukes is professor at the Department of Philosophy and Social Sciences at the University of Siena. Instead of Lukes’ “proletarianism”, I have chosen the term Marxism, as the position described by Lukes is more commonly referred to as such.

Nonsense upon stilts

Even though Jeremy Bentham in early 19th century denied that the idea of rights made any sense, a modern Utilitarian philosophy of law would have to account for human or citizen rights as part of positive, constitutional law, as well as of international compacts. Free speech as a legal right may be defended as well as criticised by utilitarian considerations of the pros and cons of having such a right.

Bentham's scepticism about rights is not primarily defended on the grounds that rights are in conflict with the Principle of Utility.⁷⁴ Rather, his scepticism expresses a certain legal positivism and fear of anarchy. In his essay on the French 1791 Declaration of Rights, he maintains that the claim of natural and imprescriptible rights of man in article II of the declaration is false and subversive.

How stands the truth of things? That there are no such things as natural rights, no such things as rights anterior to the establishment of government, no such things as natural rights opposed to, in contradistinction to, legal; that the expression is merely figurative; that when used, in the moment you attempt to give it a literal meaning it leads to error, and to the sort of error that lead to mischief, to the extremity of mischief. (Bentham 1973: 268)

The claim of *natural* rights is “rhetorical nonsense, nonsense upon stilts”, “terrorist language” (Bentham 1973: 269) devised to give revolution, i.e. disobedience to law and to the government, a normative foundation. Bentham finds that, besides being empirically false, the Declaration of Rights has other faults as well, which contribute to its subversive character. The rights in question, such as *liberty*, seem to be abstract and all-inclusive, and as such potentially in conflict with every law and with other rights. Property is a limit to others' liberty: “How is your house made yours? By my being debarred from entering it without your leave.” (Bentham 1973: 274) Even though liberty is limited by reference to others, to other rights and to what is “hurtful to society”, Bentham is not convinced that the scheme of liberties is practicable. In particular, he finds severe problems in conceiving of a workable procedure to decide how to balance different rights of different people against each other. The idea that this could be done by law, seems incoherent. He observes that it is impossible to know whether the right to liberty is limited by law or independent of law. Bentham finds that “this right, which is one of four rights that existed before laws, and will exist in spite of all laws can do, owes all the boundaries it has, all the extent it has, to the laws.”

⁷⁴The Principle of Utility is the cornerstone of Bentham's moral and political theory and method, a principle that “approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question...” (Bentham 1987/1824: 65) My point is that Bentham is not obviously following his own utilitarian method in reasoning about rights.

Bentham does not seem to comprehend fully that an egalitarian liberal political philosophy, based on the principle of equally extensive liberties or rights, may be an interesting alternative or supplement to his own utilitarian principle of morals and legislation. This is a weakness of his argument, as the principle of utility in itself is no less abstract and formal than the alternative. Nevertheless, the difference between egalitarian liberalism and utilitarianism is mainly formal, i.e. it concerns what constitutes a valid argument for some piece of legislation. Thus one may not assume without further argument that any particular right or liberty cannot be defended on utilitarian grounds, provided its scope and relation to other rights are accounted for. Bentham's utilitarianism as a general normative theory of legislation does not rule out rights as a legal category, but then under the test that the particular right be "advantageous to the society in question" (Bentham 1973: 269) – i.e. the happiness principle. Even the idea of free speech as a right to say what is not in itself harmful may be accounted for in utilitarian terms, as a greater benefit for more people from having the legal provision on free speech that outweighs the harm done to some people by the particular act of speech.

There might certainly be limits to what utilitarians may accept. Democratic legitimacy, as will be important to my argument, probably cannot have the force of an independent principle within utilitarianism. Communitarians, on the other hand, may have no problems accepting democratic legitimacy as an independent value, although historically embedded, within democratic communities. Whether an argument from democratic legitimacy is historicist and immanent, or a more fundamental liberal one, may prove less important to the content of the argument.

These remarks mainly illustrate two points. First, to show that liberal egalitarian arguments cannot always be considered beyond controversy. There is such a thing as scepticism about rights. Scepticism about or ignorance of rights is found in democratic politicians who, for the sake of efficiency, would like to act on purely utilitarian grounds in fighting crime or protecting the victims of speech. In extreme circumstances almost anyone would yield to such considerations. Even egalitarian liberals may, although they consider a right to be absolute in principle, recognise particular cases where the cost to society of upholding that right is too severe.

The other purpose of these remarks is to show that, although liberal accounts of some rights, and certainly of the right to free speech, may be controversial, this does not mean that the institutionally embedded constitutional and legal rights to e.g. free speech cannot be justified in other ways within other political philosophies. However, free speech as a legal provision is also met with scepticism. Special protection of speech may be considered an obstacle to regulations that should be enacted for important social reasons.

*Fish: Freedom of speech a conceptual impossibility*⁷⁵

“There’s no such thing as free speech, and it’s a good thing, too.” (Fish 1994) This title of Fish’s essay sums up his opinion on the entire discussion on free speech. The main target of his attack is the U.S. legal tradition of interpreting the First Amendment as excluding effective hate speech legislation of the kind that is part of the law of Canada, and we might add of Norway and most other western democracies. In Fish’s opinion, the First Amendment protection of free speech is currently understood as a formal and principled protection of an unlimited right to political criticism. As there can be no such thing as meaningful speech without rules - at least there has to be rules of grammar – unlimited free speech is a deception covering up what could only be the political priorities of some, but not all.

Fish’s main point is that restrictions on speech are “constitutive of expression” (Fish 1994: 103), a condition of the meaning of speech. All communication depends upon a distinction between meaningful speech and nonsense that is already an exclusion of some utterances from what may freely be said. This distinction goes to the heart of every language community, essentially defining its purpose. This purpose is defended by the practice itself, e.g. what is taught in classes and accepted in exams is constitutive of academic communities. Freedom of academic expression is, unless one does not care about career and reputation, circumscribed by complex professional standards. Thus - and this is Fish’s particular agenda here - adding a hate speech code would not be a radical introduction of speech regulation in a community of free speech, but only a modification of standards of speech that already operate, without which academic achievement cannot be assessed.

What is then *free speech* in American society? Mainly a “political prize”, according to Fish, a rhetorical label or name attached to the “verbal behaviour that serves the substantive agenda we wish to advance”. (Fish 1994: 102) Otherwise free speech is the result of a classification made through the workings of the courts. The distinction between protected speech and unprotected speech is arbitrary, reflecting no more than which party has the upper hand in a political struggle between people with opposing interests, as in the struggle over hate speech legislation.

The practical application of the distinction has to be arbitrary, and thus expressive of the purpose of the community involved, i.e. the U.S.A. Thus what falls outside free speech is what those with influence find threatening to the existence of that community. This is expressed in the legal notion of “clear and present danger”, as well as in free speech theory.⁷⁶ Free speech cannot be defended by principle, as the

⁷⁵Stanley Fish is Professor of English and Law at Duke University.

⁷⁶Fish, being himself a literary theorist and a John Milton-expert, refers to the *Areopagitica* (Milton 1996/1644), but he seems not to be familiar with other classics such as Mill’s political writings. This may be seen from his unreflective use of arguments rejected by Mill, such as the idea of acting upon a “certainty so far achieved” reminiscent of Mill’s certainty “sufficient for the purposes of human life”.

essential distinction between speech and action is impossible to draw in a non-arbitrary way. This distinction rests upon one of two assumptions, either that speech is something entirely different from action, or that speech is a special kind of conduct that does not have consequences. Neither is the case, according to Fish:

... there is no class of utterances separable from the world of conduct and (...) therefore the identification of some utterances as members of that nonexistent class will always be evidence that a political line has been drawn rather than a line that denies politics entry into the forum of public discourse. It is the job of the First Amendment to mark out an area in which competing views can be considered without state interference; but if the very marking out of that area is itself an interference (as it always will be), First Amendment jurisprudence is inevitably self-defeating and subversive of its own aspirations. (Fish 1994: 114)

However, the fact that speech cannot be separated from conduct and has consequences is precisely what makes the absence of free speech a “good thing”. Free speech, in the sense Fish believes is assumed in First Amendment jurisprudence, would be powerless, unable to bring about real political action. A separation of speech from conduct primarily means that what you say will not influence the world. The speech that could have been entirely free would have to be entirely powerless and pointless as well. Giving up the distinction between speech and conduct, however, we may acknowledge that “speech matters, is always doing work”. (Fish 1994: 114) As speech matters, however, we must take responsibility for our speech, and enter into the political struggles over what speech should be free and what speech should not. This involves, of course, the risk of making mistakes. We might, by mistake, permit speech that does harm, and prohibit valuable contributions in politics as well as in art. Avoiding that risk by not taking responsibility for regulating speech at all would, on the other hand, be irresponsible.

Fish’s scepticism about the possibility of a meaningful notion of political free speech does, however, at best succeed in undermining a rather naive conception of what free speech, especially in the First Amendment tradition is all about. To claim that the present way of drawing the distinction between legal and illegal speech is a result of political struggles and legal arbitration does not conflict with a modern liberal conception of rights. A liberal, post-Kantian theory of rights does not have to claim that the scope of free speech has to be determined independently of the will of political agents and the workings of the legal and political practice, only that there is a limit to the political and legal decisions that are possible if the political order is to respect the rights of citizens. Nor does a liberal theory of free speech have to claim that this limit is easy to fix in an indisputable way; no one believes legislation to be an exact science.

There may be a family resemblance between the cases of grammatical rules distinguishing meaningful expressions from nonsense, academic standards

distinguishing excellent from failing candidates and political decisions separating tolerable from punishable acts of expression. There may be borderline cases not clearly the one or the other, and on a very general level all may be said to be ways of regulating speech. Indeed, free speech is not a phenomenon beyond human culture. However, to dismiss free speech as nonsensical would take more than general arguments from the historicity of human evaluations.

The strongest of Fish's claims is that the First Amendment, as it is generally understood, is self-defeating, since one cannot mark out an area of discourse free from state interference. The very marking out of that area is an instance of state interference. This appears to be a strong criticism, as free speech is thought, among other things, to guarantee public sovereignty. If the public cannot deliberate unless regulated by the government, the government and not the public seems to be the supreme authority. Even though this is an interesting formal point, the case seems to be put far too simply here as well. Most important, the "marking out" of the area of free speech does not have to be independent of public influence, even from within that area. *E.g.* a community having a rule that the use of the word "nigger" is a punishable offence does not exclude that community having a strong liberty of arguing for and against hate speech regulations.

Speech as rationality and speech as power

The justification of free speech is related to a model of a liberal political community of equal and independent citizens, deliberating and acting rationally. As social, economical and political life may be far from that ideal, some remarks should be made on the general application of the model in relation to social and economical power.

Catherine MacKinnon has pointed out a potentially *subordinating* effect of expression in case of pornography. (MacKinnon 1993) According to MacKinnon, pornography is harmful, not only because it may incite to violence against women. Pornography *is* violence against women in the form of subordination. Not only because the industry uses women in order to produce its expression, but expression may in itself be oppressing through offering women as *mere means* of male sexuality, *subordinating* women in sexual as well as any other social relation, *legitimising* rape, and so on.

Oppressive functions of speech may easily be exaggerated, as is evident in endless searches for "politically correct" terms. Bearing this in mind, an analogy between MacKinnon's analysis of pornography and the Kjuus-case may point to some pragmatic issues relevant to understanding an influential approach to issues of racist speech.

The White Election Alliance programme obviously is an expression of political opinion. On another description, however, parallel to MacKinnon's analysis of pornography, the programme does more than publicise opinions. Through writing and publishing the programme, Kjuus may be *discriminating* against immigrants and adopted children. He is discriminating in the literal sense of making a conceptual split between these groups and the rest of the population. Immigrants are essentially different; *different from us*, who are real Norwegians. These differences are used to *subordinate* these groups, or *rank* them as subordinate. The differences justify, presumably, different rights in society. Immigrants do not, as do we, have the right to a basic human function such as bearing and raising children. "The others" thus becomes *a mere means to our purpose*, which to Kjuus is the flourishing of an ethnically clean Norway. Non-Norwegians who are tolerated either because they are married to real Norwegians, or because they do something here that is "beneficial" to Norway and its people, may stay here for our common good, as long as they do not spread their offspring all over the place: In other words, Kjuus *ranks* immigrants on a sub-personal level.⁷⁷

Access to the media of communication

Free speech, being a right to express oneself in public without fear of legal prosecution, does not necessarily come without responsibilities. Speech that is constitutionally protected should not be prosecuted, or if it is, it should not be

⁷⁷ A more general view on oppressive descriptions is found in I.M. Young, who in *Justice and the Politics of Difference* (Young 1990) discusses the ways that the very characterisations of members of oppressed groups tend to raise hierarchical oppositions between us (the majority, the 'normal', the right and good) and the other (the 'abnormal', the deficient in virtue and understanding). Majority modes of moral thinking tend to describe essential characteristics of the majority's own culture as fundamental values of mankind, or at least considerable achievements of civilisation, and thus implicitly characterise what is different as deficient. These modes of thinking will also inform the structure of society through laws and policies. Therefore, words or descriptions that explicitly or implicitly conveys attitudes of a hierarchical opposition between us and the other may be harmful through their influence on the ability of members of oppressed groups to affirm their own value and thus lead a meaningful life.

⁷⁸ More would have to be said of the dialectics of public communication in constituting social reality, in order to be convinced of the power of this strain of arguments. As *moral* criticism of individuals, the force of the argument is considerable. From a normative perspective, e.g. a Kantian universalisation principle, where (verbal) action is to be considered as exemplary of a recommended universal norm, a description of expressions as discriminating is reasonable. The efficiency of discriminating expressions in affecting social reality is, however, in some sense mediated by the response of others in communication. Whether or not certain descriptions will be accepted and applied in a sufficient degree to be socially oppressive is an empirical question. Note that this is a different argument from the stoic one ascribed to Judith Jarvis Thomson by Frederick Schauer, that harm through speech is belief-mediated, and thus one that individuals might be expected to "steel" themselves against. (Schauer 1993: 649) Thomson seems here to be confusing normative and descriptive perspectives on persons. As agents, persons are held to be responsible for their actions, even though they were influenced by others?. This is a normative claim, not a description of human psychology. That victims of speech will always be able to "steel" themselves against being hurt, however, is an empirical claim, and does not justify a norm that individuals are responsible for their own being hurt.

convicted in court, but every form of moral correction or counter-argument in public discourse may be used. Even if immigrants who feel threatened or hurt by the White Election Alliance programme could not have been protected by the Court, public discourse would still have been available as arena for opposing the programme. However, an issue of power is involved here as well. In order to respond properly by argument, you will have to be on equal footing in more than a formal sense. Does the general victim of Kjuus' speech acts have access to the means of responding in a proportionate and effective way, unless such cases may be brought to court?

Public speech may have consequences that often cannot be repaired by the victims themselves. Take the case of insults. We generally consider insulting someone in word or behaviour morally wrong. We don't accept insults against ourselves or someone near and dear to us, and we are expected to respond proportionately. Responding proportionately may mean different things, sometimes a verbal protest, sometimes ignoring the offence, sometimes leaving or asking the insulter to leave, or sometimes appealing to the help of others in verbally correcting the insulter. Some jokes, even at our own expense, we should be able to laugh at.

The very possibility of responding directly, in a manner understandable to everyone present, contributes to respect between people on a personal level. The risk of response makes us aware of the other as a person who has claims to be taken into consideration. On the level of modern public media, the individual has no proportionate means of demanding respect. The power of modern public media is out of proportion to any means of response an ordinary individual possesses. The design, organisation and security of modern office buildings ensure that an individual cannot reach the person who wrote the insult unless he wants to be reached. Response given by personal contact would fail, anyhow, as a forceful demand of respect. The response will be completely unknown to almost every perceiver of the original insult, unless the editors decide to uncover it. Even though internal press regulations secures a right to respond to accusations in print, this is a permission granted by the press, not a right the individual has access to independent, i.e. legal, means of enforcing. In matters of public insult, not all individuals are on equal footing.

Even though the ratio of immigrant participants in public discourse seems to be increasing, equal participation is far off. From a cultural relativist perspective, influential in popular perception of issues related to multicultural society, it is likely that "western" or "European" cultural perspectives and attitudes will be privileged in the mostly read newspapers and most frequently watched television stations.⁷⁹ This does not happen, it is thought, because of any conspiracy to oppress non-European immigrant groups – rather, a conscious effort to give a voice to the underprivileged is

⁷⁹Elvin Hatch has discussed the history of cultural relativism and its relation to moral philosophy. (Hatch 1983)

more likely in western media. Still, under-representation of non-European perspectives will happen because of the tendency within a dominant culture to confuse own values with the nature of things. Immigrant groups themselves will seldom be explicitly denied access to media. The case is rather that non-European immigrants will be disadvantaged by language barriers, by lack of public role models, and by their self-descriptions being less likely to receive recognition by participants in and observers of public discourse. It is easy to exaggerate such differences, but the accumulative effects of small differences may still be significant.

On the other hand, the status of immigrant groups may also vary considerably, and we should be careful not to confuse transitional problems with permanent disadvantages. Language barriers, e.g., will be most relevant in first-generation immigrants. Further, even though a cultural relativist perspective may identify serious problems in the structure of society, these problems will probably not be solved merely by political measures aimed at adapting society to facilitate the cultural ways of life of new groups. The transition into modernity probably being irreversible, integration of immigrant groups will only succeed if immigrants themselves adapt to modern society, and reconstitute as political pressure groups appropriate to democratic politics. The character of the dominant culture may be European or Western of origin, but may still be universal or include traits that are irreversibly modern.

Differences in access to public media may to a certain extent be counteracted by voluntary policies of the press and broadcasting organisations and corporations, or by government policies towards funding immigrant publications or facilitating access to major newspapers and electronic media. Still, voluntary or economic measures might not ensure a sufficient degree of equal participation in public discourse for non-European immigrants. There are several reasons for this. First, immigrant publications will probably be read mostly by the immigrants themselves, which is not to say that they might not be very important, e.g. in ensuring immigrant groups positive affirmation of group identity. Second, even if e.g. recruitment policies increase the relative number of immigrant journalists and editors within the press, increasing this number out of proportion to the population will be unfair to native groups. Third, immigrant members of major media organisations will to a certain extent assimilate into the profession, thus becoming less a voice of immigrant groups that resist assimilation, and more adapted to the standards and values expected in a professional journalist. On the other hand, personal assimilation may be a way to group integration, because persons with cross-cultural identities might mediate between cultures, and provide the role models necessary for others to adopt to society at large.

Even though the press is fairly well regulated in Norway today, through their own code of ethics and ethics board, such self-regulation is far from satisfying a requirement of a right of responding proportionately. Individual members of minority groups, as well as the groups themselves, have no *independent* means of responding proportionately to what they perceive as insults, false claims or the conveying of negative attitudes about themselves. Even though we today have media corporations with a relatively well working ethical self-monitoring, this may not always be satisfying. As long as the opportunity for minorities to influence their public image rests upon the discretion of a group they rarely are part of, the relation is a patron-client one rather than one between equals. Unequal relations based on power is, in other fields of public action, compensated by legal means, by giving the individual citizen state-sanctioned means to correct misdeeds. Equality across substantial differences of power may be approached within a system of law.

The general idea that the expression of ideas should be responded to in discussion, rather than sanctioned by public authority, should then be qualified. It seems to matter with what intention political expression is regulated. If public authority is used to prevent criticism of the Government, it seems obvious that this will be contrary to political liberty or citizen autonomy. If public authority is used in order to enable people who do not have equal access to public discourse to fight their public image as powerless, this seems to be enforcing rather than limiting political liberty or autonomy. For many of those harmed by the publication of the White Election Alliance programme, the conviction may have provided a civil response sufficient to uphold self-respect. The inclusive signal to immigrants and adopted children sent by the Prosecution by raising this case in criminal court, and by the courts in convicting Jack Erik Kjuus, may have been received as a public restoration of respect.

Interference by the law may have counter-productive effects as well. This is a question of the dialectic of expressing inferiority. People experiencing an image of inferiority due to acts of speech should be allowed to fight such denigrating expressions. Whether or not decisions by the court contribute to removing an image of inferiority is a complicated psychological matter. A prohibition against expressing some sort of inferiority is at the same time a reminder of the fact that someone believes in this idea of inferiority. A prohibition against saying that the ways of the immigrants are worse for us than the ways of our grandparents will continue to be present as a reminder that this is a candidate for truth. Some may consider this opinion worth believing in because those who believe it are taken seriously by the legislators and the courts of law.

The relevance of scepticism about the right to free speech

A lesson to be learned from these sceptics and critics of free speech is that a strong principle of free speech is no trivial matter. Free speech may have serious costs. Another lesson is that free speech as an abstract concept is in need of explication in order that the relation between free speech and important political goals be accounted for. Even though the right to free speech should be strong, the right does not include anything that is expressed verbally or in other ways. As Frederick Schauer points out, we have to distinguish between the *strength* of a Free Speech Principle, and its *scope*. (Schauer 1982: 134) Free speech is not equally important in every field of communication, as the justification of free speech will not have equal force and relevance for all communication. The initial classification of free speech arguments into arguments from rationality, from democracy and from autonomy gives an indication of how the scope is to be delimited. On the theory I will develop in this chapter, these arguments together relate in particular to democratic politics, and the function of free speech in political participation.

Next I will approach the argument from rationality, starting from John Milton's consequentialist version in *Areopagitica*. John Stuart Mill's discussion of free speech in *On Liberty* admits of a consequentialist reading as well as a transcendental one. On this second reading, Mill's argument for free speech finds a modern counterpart in basic principles of Habermas' discourse ethics

FREE SPEECH AS A CONDITION OF RATIONALITY

In *On Liberty* (Mill 1991/1859), John Stuart Mill claims that free speech is essential to rational knowledge, as human knowledge is and will always be fallible. An earlier contribution to this argument is John Milton's *Areopagitica* (Milton 1996/1644). Milton's pamphlet called for the "liberty of unlicensed printing", and was a protest against the reinstatement of the "catholic" practice of censorship in post-reformation England.

Milton's *Areopagitica* is the colourful expression of a political orator, and contains strong emotional appeals to the Parliament. The members of Parliament are praised as humanist lovers of culture, as moral educators, but most important, as reformed Christians not wanting to be associated with anything medieval or Papist like the licensing of the press. Milton appears to be a well-informed intellectual, a humanist and liberal, but not obviously one who has a considered and comprehensive position on political philosophy. The structure of the argument is not entirely perspicuous: as the text is a means of changing opinions and attitudes rather than a work of calm reflection, the themes and points are to some degree scattered and recurring, and expressed through exaggerations, ridicule and allegory.

Despite these poetic and literary elements, Milton's *Areopagitica* also allows a calmer reading, one that puts the weight on arguments. Read in this way, the *Areopagitica* may be seen as a classic expression of a consequentialist defence of freedom of expression, where liberty of the press is seen as circumstances of progress in education and knowledge, and licensing as leading to corruption of culture. Thus Milton may be viewed as a predecessor of John Stuart Mill, to whose arguments we will return below. In the case of Mill, however, it is doubtful that his arguments are purely consequentialist or utilitarian. The works of Milton, being a clearer example of a consequentialist defence of free speech are thus also interesting as a comparison to bring out the non-utilitarian reading of Mill's position on free speech. Given the style of the pamphlet, one should be careful in ascribing to Milton any specific theories of knowledge or of man. Consequently, any claims I make in that respect must be seen as conjectures.

Prior restraints

Before analysing the text of the *Areopagitica*, I will briefly comment upon the position it criticises. One may distinguish legal provisions that entitle the courts to prosecute speech already made, *i.e.* books already printed, from legal limits to free speech in the form of censorship, or *prior restraints*. Censorship in the case of printed material was the first major obstacle to free speech that was addressed, important enough to warrant special mention in the Norwegian constitution. A Licensing Act enacted by the English Parliament in 1643 was the target for criticism in Milton's book. It is difficult to say if Milton might have had an intention of defending a more general right to free speech as a protection against prosecution for crimes in printed material. A few of his arguments are certainly stronger in the case of prior restraints than in the case of a general liberty of expression. When it comes to the present treatment of Milton's arguments, these questions will be addressed when necessary. However, as some of his arguments tend to be used today in defence of a wide scope of legal freedom of expression after the fact, reading them in that context seems an appropriate application.

An infection that may spread

Milton's argument centres on two interrelated objectives or goals, and in what way licensing or liberty of the press makes it more or less likely that these goals will be reached. One objective is the moral education of people, or the risk that reading certain books might corrupt the minds of people. The other is the more general realisation of truth through education and study. It is feared that error is an "infection that may spread" (Milton 1996/1644) through printing and publishing.

More directly, on the moral side, as virtuous people we do not “expose ourself to temptations without necessity, and next to that, not emply our time in vain things”. Milton rejects the view of education, moral and general, that supposes that we can learn what is good and true without exposing ourselves to what is bad and in error. The dialectics between good and bad, truth and error are relevant to the question of education as the advance towards knowledge, as well as towards virtue.

Assuredly we bring not innocence into the world, we bring impurity much rather; that which purifies us is trial, and trial is by what is contrary. (...) Since therefore the knowledge and survey of vice is in this world so necessary to the constituting of human virtue, and the scanning of error to the confirmation of truth, how can we more safely, and with less danger, scout into the regions of sin and falsity than by reading all manner of tractates and hearing all manner of reason? And this is the benefit which may be had of books promiscuously read. (Milton 1996/1644)

Our minds are not originally pure, and we have to learn virtue by its contrast with vice, and truth by its contrast with error. It is by examining all kinds of books, all kinds of thoughts we ourselves learn to understand and apply the very distinctions of good/bad and true/false. Thus we benefit from reading all kinds of books, not only those that are good and true.

Knowledge of both sides of the distinction is necessary to apply it and make judgements according to it, Milton claims. However, many believe that minds may be corrupted by being exposed to what is bad. Milton mentions Plato, who in his *Laws* recommends that poetry should not be read unless approved of by a judge. Milton's response to such practices of licensing is to claim that, if one believes that the liberty of printing leads to corruption of minds, so will all other kinds of influence, too. To regulate printing is similar to “shut and fortify one gate against corruption, and be necessitated to leave others round about wide open”. (Milton 1996/1644) By claiming the necessity of regulating music, dance, eating and drinking habits, clothing, conversation, and idle resort, Milton ridicules the idea of regulating influence on minds. Regulating such influence would require a considerable number of licensers, as most of social life would have to be examined. All kinds of bad practice influence people, and may be damaging to society, but they cannot be controlled down to every detail. Rather we need to distinguish between what should be regulated through “restraint and punishment, and in what thing persuasion only is to work”. (Milton 1996/1644)

The impossibility of efficient mind-control is not only a question of the practical impossibility of having enough licensers to do the job, but also of having licensers of the right quality of mind. Certainly they stand the risk of being in error, or of being corrupted by their reading. Therefore only the outstanding in learning and virtue should become censors, thus instituting a practice where the talents of leading intellectuals are wasted. For a talented person "there cannot be a more tedious and

unpleasing journey-work, a greater loss of time levied upon his head, than to be made the perpetual reader of unchosen books and pamphlets, oftentimes huge volumes". (Milton 1996/1644)

The practice of licensing is not only likely to miss its mark by lacking qualified men of sufficient number to be efficient. Milton identifies a problem that has become classical among consequentialist arguments for free speech. Prohibitions of ideas have a tendency to draw attention to the prohibited ideas, thus giving them some kind of force. Attempts at restricting the liberty of printing

meets for the most part with an event utterly opposite to the end which it drives at: instead of suppressing sects and schisms, it raises them and invests them with a reputation. The punishing of wits enhances their authority, saith the Viscount St. Albans; and a forbidden writing is thought to be a certain spark of truth that flies up in the faces of them who seeks to tread it out. (Milton 1996/1644)⁸⁰

Limiting the liberty of the press may draw attention, curiosity and even support to the ideas suppressed. Milton merely mentions this point, rather than elaborates it. What might explain this likely consequence of a restrictive practice of printing is that trying to stop books with a certain content means identifying this very content as something that cannot be ignored, that has real force of persuasion. One easily assumes that what has the force of persuasion has to have some kind of reality and truth to it. This appearance of truth cannot be eliminated by oppression, as oppression only reconfirms the belief that the oppressed idea is dangerous, and thus real and with a "spark of truth". It is better to have the opinions of learned men printed publicly with arguments in their support, than to have them spread "privily from house to house, which is more dangerous". (Milton 1996/1644)

A discouragement of learning

The most important point of Milton's pamphlet is that prior restraints on printing obstruct progress in knowledge. He depicts progress in knowledge as collecting scattered pieces of knowledge into a coherent "body" of truth. This process depends on learned men having access to the already collected pieces, and on their being able to make their own contribution known. A lack of liberty to perform the task of collecting knowledge will not protect society and the truth, but rather disrupt it. Knowledge advances through the systematic ordering of newly discovered insights within the fabric of what is already known. Liberty of research into this fabric of oppositions that makes up the unity of our knowledge is what will preserve its unity, while controlling the process will only lead to an appearance of unity, something

⁸⁰There is no precise reference in Milton's text to this aphorism by Francis Bacon (Viscount St. Albans).

“forced”, “outward” and not corresponding to reality. If knowledge is regulated by the government, “she [knowledge] turns herself into all shapes, except her own, and perhaps tunes her voice according to the time”. (Milton 1996/1644) In other words, if knowledge and truth are allowed to be nothing but what are within the will of those in power, then truth becomes *nothing but* the will of those in power, thus undermining the very idea of truth as something real, i.e. independent of particular opinions and points of view. The advancement of knowledge, truth and culture need no policies, but rather liberty.

The way Milton gives evidence in support of this point is not, however, an elaborate philosophy of truth. His main argument is empirical, in the form of an appeal to the experience of the English Parliament with the vitality of culture after the Reformation. His argument from historical experience is that the Parliament, having freed English culture from the intellectual maladies of Medieval Catholicism, such as licensing, should be aware of the beneficial effects of the spirit of liberty.

If it be desired to know the immediate cause of all this free writing and free speaking, there cannot be assigned a truer than your own mild and free and humane government. (...) We can grow ignorant again, brutish, formal and slavish, as ye found us; but you then must first become that which ye cannot be, oppressive, arbitrary and tyrannous, as they were from whom ye have freed us. (Milton 1996/1644)

Mild, free and humane government has led to a flourishing culture, and enacting the process of licensing once again is nothing but a first step from these virtues of government towards the vices of tyranny. Milton’s understanding of the mechanism behind this flourishing and withering of culture is the psychologically simple one of the legal circumstances that encourage or discourage talented men from a life in pursuit of truth. A writer, having laboured hard on his research and developed a fine-tuned understanding of his subject, is by means of censorship reduced from a man to a child, according to Milton. Under a regime of censorship no one reaches maturity. People are treated as children in need of a firm hand to direct them. The consequence of this, Milton fears, will be that no one bothers to pursue a life of study. “Henceforth let no man care to learn, or care to be more than worldly-wise; for certainly in higher matters to be ignorant and slothful, to be a common steadfast dunce, will be the only pleasant life, and only in request.” (Milton 1996/1644)

Liberty and truth

Milton’s argument derives a considerable part of its strength from the historical experience of a causal connection between circumstances of liberty and a flourishing culture that makes advances in knowledge. The empirical foundation of the argument is, however, also a major weakness. As with historical predictions in general, this is not necessarily due to incorrect judgement about the past. I shall not dispute the

perception that relatively liberal societies often have more vital cultures, and that it is reasonable to give such cultures credit for many important developments in intellectual history. However, historical predictions easily fail in being too general, or in assuming that every single case should fall under the general expectation. In the case of the *Areopagitica* the prediction actually was less than accurate. A brief look at the history of ideas shows that not every intelligent Englishman was discouraged from pursuing philosophical and scientific activities while the Licensing act was in force (1643-1695). Hobbes *Leviathan* (1651), the founding of the *Royal Society* (1660), Newton's *Principia* (1687) and Locke's *Essay Concerning Human Understanding* (1689) as well as his *Second Treatise of Government* (1689) could hardly be seen as symptoms of dark ages of the English mind.

There is also reason to doubt that the dialectics of knowledge will only work to the advantage of truth, or be strong enough to counteract human and social forces other than an oppressive government. As Frederick Schauer points out

...it is one thing to say that truth is likely to prevail in a select group of individuals trained to think rationally and chosen for that ability. It is quite another to say that the same process works for the public at large. Only if the process is effective throughout society can the argument from truth support a Free Speech Principle to limit government power. (Schauer 1982: 26)

Only among people playing by the rules of reason may the practice of reasoning with some right be trusted to lead to an approaching of truth. This does not necessarily undermine Milton's objectives. The general drift of his argument is that it is the liberty of learned men that is beneficial to the truth and to society. His argument is different from, and hardly related to, the political arguments for a general and popular liberty of the pen found e.g. in Kant. Licensing is not opposed because of a general opposition to regulation. The criticism focuses on the claim that licensing does not have the purported effect in regulating popular immoral practices. Licensing merely discourages the elite from pursuing intellectual challenges, which in its turn damages society and the advancement of knowledge.

Schauer goes far in recognising the risk that may have been feared also by the members of the English Parliament of 1643. "[F]alse views may, despite their falsity, be accepted by the public, who will then act in accordance with those false views." (Schauer 1982: 28) There is a point to the argument given by Milton that legislation will not be an efficient way of eliminating ideas, while argument may do the job. It is, however, still the case, as Schauer points out, that the ability of argument to do that job partly depends upon there being a general culture that is open to argument. Neither Milton nor Schauer expects people in general to be ready to play the game of reasoning in all circumstances. In Milton's elitist scheme, this does not really matter, because in his times it was obvious that only learned people, not people in general

had access to the printed media. In a modern context this will be different. The technology is cheap and requires few specialist skills. Free speech, including the liberty of printing, is a democratic right of participation not requiring a high level of education in egalitarian societies. It will not be the case that printed material in general will be based upon comprehensive studies and academic achievement. Contrary to what Milton may have thought, the advancement of knowledge is not the only force affecting society through media of expression. Printed and other media may contribute to the effective distribution of propaganda and other forms of manipulative speech, as well. Free speech may fail to be sufficiently effective or quick working to counteract the consequences of abuses. Schauer mentions enmity towards races and religions as examples of emotions that in some times and circumstances have been communicated with a force that could not be, or at least happened not to be, corrected by reason.

Liberty is in Milton a means to an end, and to what degree it serves that end is in many ways an empirical question to be decided by experience, differing by historical situation. Milton believed that truth would always win out if the dialectics of public reason were able to function without government control. This explanation is probably too simple, as government control is not the only possible obstruction to a well-functioning public discourse. Milton's optimism on behalf of truth is thus not convincingly argued.

Other arguments in the *Areopagitica* may still have independent force. Arguing that licensing fails to give learned men the room needed to form their own moral and professional judgement, which is tantamount to treating adults as children, Milton anticipates the argument from autonomy. The context of this argument in Milton is, however, not yet fully modern. To Milton, it is the honour and privilege the learned have come to deserve through their hard intellectual labour that is violated by the Licensing act, not a right derived from the concept of a citizen, a person, or of a human being. And it is the harm inflicted upon community by the loss of the contribution of the learned that is the political relevance of this violation, not the loss in legitimacy by silencing a member of the constituency, or the moral fault of patronising a rational being.

Another possible development would be to improve on the argument from truth. The argument found in Mill's *On Liberty* does not rest on the positive and too strong assumption that we will approach truth by establishing a liberal culture. Mill's negative version of the argument is that unless we have such a liberal culture, we have no reason to trust any belief at all. Interpreted in this way, the core of the argument from truth is not the contingent belief that truth will win out. More plausible is the belief that being justified in trusting our own judgement depends to a

significant degree upon being justified in thinking that we may know any important reason speaking against it.

Mill's argument from human beings as rational and fallible

When Mill published *On Liberty* in 1859, the issue was more than censorship or prior restraints. The liberty of the press in the form of prior restraints could more or less be taken for granted, except in times of “temporary panic”, Mill writes in the beginning of the chapter on the “liberty of thought and discussion”. (Mill 1991/1859) His task was the rather more ambitious one of establishing that the freedom of discussion should never be limited in any way, neither by prior restraints nor by posterior legal prosecution. The argument is perhaps the best known example of what is generally referred to as the argument from truth. In *Freedom of Speech* Eric Barendt considers the core of this argument to be “the importance of open discussion to the discovery of truth.” Thus he finds Mill’s argument to be, with some modifications, the one that was “also made two centuries earlier by Milton”. (Barendt 1985: 8)

Like Milton, Mill is concerned with the importance of a liberal culture in general, and specifically the liberty of the press, for the improvement of knowledge. On a consequentialist or utilitarian reading, it is possible to see Mill’s argument as a refined version of Milton’s. However, by carefully considering Mill’s reasoning it is possible to see a more robust philosophical foundation in Mill’s justification of free speech. Milton defends liberty of the press mainly by an empirical, i.e. historical, hypothesis. His argument is that historical experience shows that improvements in knowledge generally will be more likely to happen in a liberal culture, while attempts at moral control through licensing will be inefficient, and have destructive side-effects. The arguments from historical experience are, as mentioned, historical predictions, and as such stand the risk of being empirically undermined by other historical examples, or by general sceptical considerations. These arguments are present in Mill’s book, too, but with a theoretical foundation that is more elaborate and more convincing than Milton’s allegory of recollecting scattered pieces of the body of truth.

An interpretation of Mill’s argument is possible, according to which very little depends on utilitarian considerations of what state of affairs will lead to what benefits or burdens. The core of this argument, transcendental rather than empirical in character, is the idea of human beings as rational, but fallible. It is the inductive character of empirical knowledge that leads to this fallibility. The problem is more or less this: What conditions are necessary to the advancement of knowledge for human beings who have rational capacities, but who are fallible, i.e. can never have absolutely certain knowledge? Mill’s answer is that all advancement of knowledge

needs communication (discussion),⁸¹ and all impediments to the liberty of expressing contradictory opinions make it impossible to put any trust in, or even understand what we believe we know. The focus is on limitations, not effects. Mill does not promise great achievements in knowledge, but points out what is required if we are to be justified in claiming that we know what we believe.

An assumption of infallibility

An opinion may be true, partly true (and partly false), or false. From this logical division, Mill goes on to argue that whatever the truth value of our opinions, free discussion is what gives confidence in our knowledge and opens the possibility of its improvement. First, Mill proceeds from a Humean academic scepticism to argue that anything we know *may* be false, however likely it is. There is always the possibility that something we are confident of may still prove to be false and unfounded. To use authority instead of counter-argument against opinions we believe are false is unwise, as this undermines the reason why we are justified in believing them false. Mill's response to governments controlling communication is this: "To refuse a hearing to an opinion, because they are sure that it is false, is to assume that their certainty is the same thing as absolute certainty. All silencing of discussion is an assumption of infallibility." (Mill 1991/1859: 37) The possibility that we may believe something that is false is something all human beings must recognise. And this, according to Mill, is a sufficient reason why we need free speech. If there are good reasons to reject what we believe, we should want to know those reasons, as we improve our knowledge by being aware of its limitations, as well as by acquiring better conceptions.

The force of Mill's argument is demonstrated in confrontation with a strong objection. The objection is that as long as we are fallible, we have no choice but to act on fallible judgement. "There is no such thing as absolute certainty, but there is assurance sufficient for the purposes of human life. We may, and must, assume our opinion to be true for the guidance of our own conduct." (Mill 1991/1859: 39) Prohibiting the expression of some idea or doctrine may be what is required in some situations - provided we act on our best judgement when we choose between prohibiting or allowing. We cannot refrain from doing what we think prudent because of a slight possibility that we are wrong. This is the case in every political decision, and thus also when it comes to regulating ideas.

⁸¹Empirical observation is no independent source of knowledge, as all experience require interpretation, and the rationality of interpretation require discussion. (Mill, 1859 #38)

What Mill finds lacking in this argument, is the understanding that the question of free speech is not about just some legal decision to be made, but concerns a condition of the possibility of making sound judgements:

There is the greatest difference between presuming an opinion to be true, because, with every opportunity for contesting it, it has not been refuted, and assuming its truth for the purpose of not permitting its refutation. Complete liberty of contradicting and disproving our opinion, is the very condition which justifies us in assuming its truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right. (Mill 1991/1859: 39)

A rational assurance of being right is just what may be found - as far as possible - in open communication. Human beings are fallible, but may correct their mistakes by “discussion and experience. Not by experience alone. There must be discussion to show how experience is to be interpreted.” (Mill 1991/1859: 40) Human rationality thus is closely connected to the exchange of interpretations happening in intersubjective communication, by which we are made aware of different perspectives that may complement or replace our own. It is through the acquisition of different perspectives human beings improve their power of judgement. Good judgement is the result of openness to criticism, because

the only way in which a human being can make some approach to knowing the whole of a subject, is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind. (Mill, 1991/1859 #40)

We “approach” knowledge, Mill writes, implying that knowledge or truth is not something we will ever be sure of attaining. Fallibility cannot be completely escaped, but by appropriating the perspectives of others, as well as inviting their criticism of our own, we may develop our capacity for sound judgement. Free speech then becomes a condition for the possibility of developing judgement.

Mill also considers the objection that truth may not be the only concern relevant to regulating the liberty of discussion. Thus one may see the purpose of protecting some doctrine from criticism in the social *usefulness* of that doctrine, not its truth. His response is that the question of its usefulness is open to opinion, and that the usefulness cannot be entirely separated from the question of the truth.

Mill is also open to the possibility of different and contradicting perspectives on the same question co-existing indefinitely. This is a point made in his discussion of the case where different opinions “share the truth between them”. (Mill 1991/1859: 63) Different perspectives on the same issues highlight different aspects. Thus one person, or one group, or the people at one time may be blind to some aspects of the matters they are concerned with. One should perhaps expect that Mill considered this always a question of appropriating the different perspectives in a way that makes

possible a balanced judgement. However, Mill does not think that plurality in perspectives will always be overcome. Plurality on an individual level may even be advantageous on a social or political level. First, Mill's image of *progress* in knowledge is not Milton's medieval one of a body of truth being filled in. Even if this may be an ideal to Mill as well, he realises that progress in knowledge often happens as new aspects of a subject are highlighted, while others just as "true" are put aside or forgotten. Progress is just as often a pragmatic matter, "improvement consisting chiefly in this, that the new fragment of truth is more wanted, more adapted to the needs of the time, than that which it displaces." (Mill 1991/1859: 64) Second, it is mostly the case that different positions in modern society exist by the opposition between them. Mill mentions that the existence of both a party of order and stability and a party of progress and reform will often be a sign of a healthy political life, as "Each of these modes of thinking derives its utility from the deficiencies of the other". (Mill 1991/1859: 65) The one-sidedness of the one political movement is balanced and supplemented through the criticism and influence of the other.

This is the case even when what we may think fundamental moral truth is concerned. Christian morality, Mill claims, may be held to be true, but then again rather one-sided and in need of completion. Christianity is a doctrine of passive obedience, Mill claims, and must be supplemented by human virtues of Greek and Roman origin emphasising public responsibility, dignity and honour. (Mill 1991/1859: 67) Again, the condition for the possibility of making conflicting doctrines supplementary and socially expedient is that there is a free exchange of opinions and arguments in open, public discussion.

Understanding and living one's belief

It is important to Mill that free and open discussion has other functions besides correcting falsity. Thus, it is not only because of the possibility of our opinions being wrong we should expose them to public discussion. Even if we actually are right in what we believe, we will benefit from discussing with others. The difference between holding a true opinion to oneself, and debating it in public, is that between a "dead dogma" and a "living truth". Knowing something involves, according to Mill, your being able to defend what you know "against at least the common objections". (Mill 1991/1859: 54) Here Mill discusses an interesting counter-example. In geometry, the student will learn the "grounds of their opinions", as definitions, postulates and demonstrations. Knowing geometry does not consist in knowing arguments why a straight line is not the shortest way between two points. Mill replies that mathematics is a special case, and that wherever difference of opinion is possible, difference of opinion is the way to gain understanding of the field. He may be dismissing the objection too easily. Perhaps some preconditions of knowledge, be it some

Wittgensteinian *form of life* or *language game*, or the elements of a Kuhnian *paradigm*, has to be appropriated before the process of criticism and revision may start - in any field of knowledge. Maybe accepting some of these preconditions is the very foundation by which we engage in an open and free discussion? Maybe accepting some contingent elements of our knowledge as rules of our language and practice of discussion is a first step without which we would not be able to engage in meaningful exchange of opinions.

Even though Mill's argument may have problems as theory of the acquisition of knowledge, it is not obvious what implications this will have for the argument as justification of free speech. Exchange of opinions may not be the only way of acquiring knowledge, and there may be some foundations of knowledge and discussion that are learned in the way Mill acknowledges that geometry is learned. To some degree, we have to acquire a background of language and culture in order to doubt, criticise and discuss in meaningful ways. In Mill's terminology, before we can open our minds to criticisms of our opinions and conduct, we have to have some opinions and modes of conduct. However, the opposition between argument and counter-argument, and the willingness to expose oneself to criticism and to learn from that process, is certainly an important way of improving one's knowledge and probably necessary in order to proceed in education beyond an elementary level. And even if important elements of our knowledge are established without criticism and discussion but rather through instruction and correction, this does not imply that these elements should be protected from critical questions by legal means, or that they should be immune to change. It is rather the case that instruction in matters where differing in opinion does not make sense, such as the basic naming of objects in everyday practices, depends upon public liberty to communicate doubts and misunderstandings, just as much as matters with reasonable difference of opinion.

Discussion, according to Mill, supplies us with the arguments *pro et contra* our beliefs, thus gives us a rational ground for holding those beliefs. Mill is not insensitive to the fact that there may be other important goods than truth, and that there may be e.g. moral reasons why public discussion ought to be regulated, even at the cost of having groundless opinions. However, even the development of moral character requires free speech, according to Mill, because authentic commitment to moral ideals requires understanding. The problem is one of double standards, one moral standard that is explicitly outwardly declared, another standard that is the real attitude which motivates conduct. The development of moral character requires *living one's belief*; that one is capable of understanding and acting on the ideals to which one expresses a commitment. This understanding, as any understanding for rational and fallible persons, requires open communication.

If, however, the mischievous operation of the absence of free discussion, when the received opinions are true, were confined to leaving men ignorant of the grounds of those opinions, it might be thought that this, if an intellectual, is no moral evil, and does not affect the worth of the opinions, regarded in their influence on the character. The fact, however, is, that not only the grounds of the opinion are forgotten in the absence of discussion, but too often the meaning of the opinion itself. The words which convey it, cease to suggest ideas, or suggest only a small portion of those they were originally employed to communicate. Instead of a vivid conception and a living belief, there remain only a few phrases retained by rote. (Mill 1991/1859: 57)

If keeping a true and morally important opinion from being discussed could have secured the moral influence of that opinion, this might have outweighed the importance of free speech for improving knowledge. Keeping this opinion out of discussion, however, deprives it of its meaning, i.e. its power to influence our conduct. Concerned with the problems of his time, Mill uses Christianity as an example of an idea that has more or less lost its force due to lack of criticism and discussion. The radical character of Christian doctrine when it comes to giving to the poor, loving one's neighbour and refraining from responding to evil with evil are generally supported, but hardly acted upon. The Christian's "everyday judgements and practices" only in some matters and to some degree express these ideas, and often oppose them. The life of the Christian is "a compromise between the Christian creed and the interests and suggestions of worldly life. To the first of these standards he gives his homage; to the other his real allegiance." (Mill 1991/1859: 59) Through not publicly discussed, the moral beliefs that are questioned by no one but upheld by everyone become irrelevant to practical decisions.

These considerations may also be relevant for the case of racism. Mill's argument could then have been that prohibiting the public expression of the false belief that race and ethnicity are relevant grounds for social and political discrimination would lead to double standards in these matters. On the one hand, we are likely to have general support for the idea that all races and people are of equal worth, and should be treated similarly in all matters. On the other hand, we are likely to find general practices expressing fear of the consequences of such equal treatment, such as differences in employment opportunities and other socially important matters. Mill would surely find confirmation for his hypothesis in our society today.

However, the causal link between regulations of speech and the gap between opinions and attitudes are ambiguous. Suppose the opinions of the anti-immigrationists are more in accord with current attitudes than the more politically correct idea of the irrelevance of racial difference. Then the anti-immigrationists may just as well gain considerable public support - just by closing the gap between ideal and conduct, norm and fact, theory and practice. Orators praising the discriminating attitudes and practices of the ethnic majority may also seriously discourage

immigrants from voicing their interests, by undermining their sense of worth or self-respect.

Moreover, double standards may be counter-acted by other means as well as argumentative discussion of racist ideas. If speech is to be the means of bridging the gap, modes of speech that seek to create a vivid perception of the gap may be just as efficient as discussion of the ideas involved. If change in explicit opinion is not the purpose, but rather a call for authentic living, argumentative modes of communication may fail to be effective. As Søren Kierkegaard has argued forcefully, changing real attitudes or motivation requires *indirect* forms of communication that provoke or awaken the agent.⁸² Attitudes may also be influenced indirectly through sanctioning the practices themselves. Legislation and economic incentives toward bringing practice more in accord with the ideal of equal concern and respect might actually change general attitudes through people getting accustomed to a new situation.

Thus the assumption that the liberty of public discussion is necessary to prevent double standards in moral matters fails to be empirically conclusive. The difference between a “living belief” and a “dead dogma” that is characteristic of Mill’s treatment of these matters should be supplemented with the understanding that failure of discussion is not the only thing that splits life from belief, and that discussion is not the only thing that might repair double standards.

It follows that I do not find the part of the justification of free speech in *On liberty* presupposing the truth of the prevalent opinions entirely convincing. On the other hand, the stronger first part of Mill’s justification has as its perhaps most important feature that such presuppositions of truth may never be maintained with certainty. If the defence of the liberty of racist speech were to be made upon the argument from truth or rationality, it should rather rest upon this core argument of Mill’s, that silencing the opinions of e.g. racists implies an assumption of infallibility. This assumption is false for reasons that are not purely empirical, i.e. the fallibility of man due to the inductive character of empirical knowledge.

Complete liberty?

“Complete liberty of contradicting and disproving our opinion, is the very condition which justifies us in assuming its truth for purposes of action”, Mill states in a passage discussed above. (Mill 1991/1859: 39) Free speech is “the very condition”, i.e. necessary and sufficient, for rational agency. We may not claim to be sufficiently justified in acting, unless the reasons upon which we act are perspicuous to the public. This publicity is what guarantees - as far as possible - that there are no

⁸²See his Concluding unscientific postscript. (Kierkegaard 1941)

considerations that we have not made that would have led to another decision had they been known. By having legislation or other hindrances that might *possibly* prevent relevant criticism of the opinions we act upon, there is always a possibility that we act contrary to our own good. Consequently, restrictions on the liberty of speech always involve taking the risk of doing just that. On the other hand, if there are no restrictions on speech at all, i.e. *complete* liberty, there is no such risk.

Because of this, Mill's conclusion appears to be that one should have complete freedom to criticise opinions, which also will imply freedom to state your own opinions. Schauer is not convinced by Mill's argument in so far as it advocates such complete or absolute liberty. He maintains that Mill's argument has to rest upon two assumptions: "He assumes that all suppression is based on the asserted falsity of the suppressed view. This, however, is simply wrong. Additionally, he assumes that the search for truth is superior to any other social interest." (Schauer 1982: 23) As noted above, Mill is certainly aware that suppression may be justified by reference to other goods than truth. He tries, if not entirely successfully, to establish that discussion is necessary also to achieve moral ends. On the other hand, much in Mill's justification of free speech depends upon the importance of discussion. This does not, however, have to mean that he thinks that truth is superior to every social interest. Schauer's formulation reveals that he does not grasp the aspect of Mill's argument that is not consequentialist. Mill does not hold truth up against other goods and define it as the highest good that all other goods are means to. Mill's point is not that free speech is an efficient means of attaining truth, but that in the absence of free speech there cannot be rational knowledge and action. What makes knowledge and action rational is, that the conditions for self-correction, for improving on our own knowledge or education, are as good as possible. These conditions are as good as possible, if we can express what we know publicly, and if we may assume that flaws in our public statements are pointed out by others.

Thus, liberty of speech should not be complete because truth is a superior good to others. Liberty of speech should be complete because it is a condition of the very possibility of human knowledge. Even the possibility of making rational decisions about public goods depends on the conditions of rational truth-seeking in communication. Rational decisions, conceived as the outcome of open discussions, may not always be the right decision in objective consequentialist terms. It will not always be the case that what we decide after a particular open discussion will lead to more social good than what we would have decided had we deliberated on our own. I might have stumbled upon the right decision by chance, or I may be misled by persuasive but incorrect arguments. What I cannot want is not to know something that might have changed my mind and led to a different decision. Read in this way, Mill's argument does not rest on the utilitarian assumption that truth trumps any

social good *because of being more likely to increase overall happiness*. Structurally, the argument is better read as similar to the argument from rational government that we will return to below in Kant. Truth then trumps social goods because we cannot want not to know what we ourselves might have found a conclusive reason to change opinion and course of action.

On the other hand, there is a point to Schauer's criticism that Mill disregards other socially important objectives. The problem may be that Mill, perhaps from fear of a slippery slope, sees no possible position between complete liberty and a regime of regulated speech, giving authority and emotional hunches the upper hand. In practice, there may be other strong reasons to regulate liberty. Having e.g. obligations of confidentiality for the medical profession protects the integrity of individual patients. On the other hand, the information may generally be made available for medical research if requested. Not complete liberty of discussion, but close enough?

Mill does not in the chapter on liberty of thought and discussion employ sufficiently fine-tuned distinctions to account for the precise scope of free speech, when it conflicts with other rights and important goals. It seems to be a strong principle that is also wide in scope. The liberty is said to be one of discussion, of contradicting other opinions, of criticism - all aiming at avoiding falsity and approaching truth. However, with the place accorded to these modes of speech it sometimes seems like this is the only legitimate form of human communication to Mill. Later philosophy conceives of the pragmatics of speech as a more plural phenomenon. However, it is not obviously right to interpret Mill in light of these later views on the philosophy of language, as if he intended to protect a limited class of speech, mainly concerned with the locutionary function of language, with making statements and deliberating on their truth-value. That *On liberty* is mainly a political essay might perhaps give an indication of what kinds of cases belong to the core of free speech. His examples include moral, scientific and religious issues, probably reflecting the history of censorship - but also perhaps central issues for free speech. The precise boundaries are however difficult to draw.

One does not for that reason have to conclude that Mill justifies the liberty for everyone to do anything that may be considered speech. According to Ronald Dworkin, Mill's concept of liberty in *On liberty* is not one of *licence* at all, but one of *independence*.⁸³ If liberty means independence, liberty will not be threatened by just any regulations, but only by regulations that puts some individuals in an inferior position to others in the community. Mill's harm principle, or in Dworkin's words,

⁸³Dworkin defines *liberty as licence* as "the degree to which a person is free from social or legal constraint to do what he might wish to do, and liberty as independence, that is, the status of a person as independent and equal rather than subservient." (Dworkin 1977: 262)

“the distinction between acts that are self-regarding and those that are other-regarding (...) was intended to define political independence, because it marked the line between regulation that connoted equal respect and regulation that denied it.” (Dworkin 1977: 263) If this is true also of the concept of liberty in the chapter on thought and discussion, one may apply the harm principle to cases like the professional secrecy of doctors. Confidentiality protects the integrity of all individuals alike, and as such strengthens rather than threatens their independence. Read in this way, free speech protects the independence of individual citizens in forming, correcting and improving their education or knowledge. Limiting the liberty *as licence* of citizens will then be acceptable to the degree that the government does not impose specific opinions on the people, or ban others. A doctor can be told not to publicise his patient’s case sheet if the identity of the patient is recognisable, but not to withhold information of e.g. a certain epidemic in order to hide the incompetence of the health authorities.

However attractive such an interpretation of Mill, it is not obviously Mill’s view on free speech. Mill’s strategy in the chapter on “thought and discussion” is not the application of a conception of liberty as licence interpreted in light of the harm principle. He develops a quite independent argument from notions of fallibility and rationality. The focus seems not to be on the autonomy of individuals, but on the rationality of opinions and conduct in general. And what is necessary to increase rationality in a permanent situation of fallibility, is rather the maximum plurality of perspectives associated with a widest possible liberty *as licence* of discussion, than the equal liberty *as independence* of citizens expressing their thought according to equally applied laws designed in order not to impose or prevent one or more particular perspectives. At least this seems to be how it appears to Mill.

A sign of this may be found in how he deals with one possible limitation on the liberty of thought and discussion. On the subject of fair and temperate discussion Mill contends that weapons of speech like “invective, sarcasm, personality” (Mill 1991/1859: 70) will seem unfair to the powerful, and may destroy the case if used by those contradicting the common opinions. Mill thus sees the need to discourage intemperate attacks on religion, and even more on infidelity, but it is “obvious that law and authority have no business with restraining either, while opinion ought, in every instance to determine its verdict by the circumstances of the individual case”. (Mill 1991/1859: 71) Mill’s response to speech that destroys communication is to encourage a liberal-minded culture which regulates fair speech by verbal sanctions, by the granting of recognition or respect to fair speakers independently of their positions, and by the condemnation of unfair speakers likewise. This implies that, as far as regulating the form of free speech, this is a moral matter to be dealt with socially, not a political matter to be decided by legislation and government authority.

Another passage indicating that liberty of discussion is to be understood as licence is that Mill in a note distinguishes between the general advocacy and discussing of Tyrannicide, of which there should be “the fullest liberty”, (Mill 1991/1859: 36,n1) from “instigation”, which can be punished “only if an overt act has followed, and at least a probable connection can be established between the act and the instigation.” This again indicates that Mill saw speech as an area of unlimited liberty *as licence*, distinguished from action where there has to be only liberty *as independence*.

Habermas' ethics of free discourse

The central principles of Habermas' ethical theory are a Universalisation Principle and a Discourse Principle. Given the central place of discourse, an idea of free speech reminiscent of Mill's fallibility argument has a prominent place in the theory. Communication without coercion is a precondition of realising Habermas' conception of universalisation as well as discourse. Free speech is an important condition for the proper working of the procedures through which rational consensus can be reached on the validity of norms in general, as for any other intersubjective reasoning. On Habermas' theory, democratic legitimacy depends upon free communication.

In Habermas' theory of Discourse Ethics the validity of norms depends upon the possibility of informed consent by the parties affected. On this point Habermas goes beyond Kantian ethics, which is otherwise an important point of reference. Like Kant, Habermas has no substantial moral principles at the fundamental level of his ethics; the substance is to be given by the will of people. Further in the tradition from Kant, Habermas takes Universalisation to be the bridging principle between singular moral intuitions and general norms. However, while Kant's ethics is based upon individual subjective assessment of which norms ought to be universalised, Habermas calls for real discussion and role-taking, and thus the possibility of inter-subjective assessment together with those affected by acting on the norm. In Discourse Ethics universalisation occurs through the possibility of discursively reached consensus, not through individual decisions. According to Habermas' Universalisation Principle, a norm is valid when the consequences of its general observance for the interests of everyone could be accepted by everyone without coercion. The Discourse Principle then states that “Gultig sind genau die Handlungsnormen, denen alle möglicherweise Betroffenen als Teilnehmer an rationalen Diskursen zustimmen könnten“. (Habermas 1992: 138)

The importance of free speech is uncovered through the analysis of the grammar of achieving consent in practical discourse. In order for the result of practical discourse to be valid, those affected must have had the opportunity to participate freely in the discourse. Following Robert Alexy, Habermas suggests the following

discourse rules as an account of the kind of free speech that has to be realised for the consensus to be perfectly rational, and thus the norms valid.

- (3.1) Jedes sprach- und handlungsfähige Subjekt darf an Diskursen teilnehmen.
- (3.2) a. Jeder darf jede Behauptung problematisieren.
b. Jeder darf jede Behauptung in den Diskurs einführen.
c. Jeder darf seine Einstellungen, Wünsche und Bedürfnisse äußern.
- (3.3) Kein Sprecher darf durch innerhalb oder außerhalb des Diskurses herrschenden Zwang daran gehindert werden, seine in (3.1) und (3.2) festgelegten Rechte wahrzunehmen. (Habermas 1983: 99)

Habermas suggests that these rules are already presupposed by any serious participant in practical discourse, and that denying this will lead to performative contradictions.⁸⁴

The standards for free discourse are high. Such a degree of free and general participation will rarely be realised. It is rather the case that institutional arrangements will be necessary, Habermas observes

um unvermeidliche empirische Beschränkungen und vermeidbare externe und interne Einwirkungen soweit zu neutralisieren, daß die von den Argumentationsteilnehmern immer schon vorausgesetzten idealisierten Bedingungen wenigstens in hinreichender Annäherung erfüllt werden können. (Habermas 1983: 102)

Thus the legal right of free speech is justified by the need to fulfil the conditions that every participant in practical argument implicitly accepts.

The legal right to free speech is to Habermas among the fundamental rights [Grundrechte] that are necessary to realise the autonomy of citizens. Different aspects of free speech are part of the “Grundrechte auf die chancengleiche Teilnahme an Prozessen der Meinungs- und Willensbildung, worin Bürger ihre *politische Autonomie* ausüben und wodurch sie legitimes Recht setzen.” (Habermas 1992: 156) Free speech as a legal right is necessary in order that citizens may take part in the formation of the opinion and will of the legislators. The ideal of non-coercive discourse as a source of the validation of moral norms corresponds to the constitutionally guaranteed participation rights as a source of the legitimacy of the law. Habermas expresses this as the Discourse Principle taking on the legal guise of a Democracy Principle. (Habermas 1992: 161)

Free speech thus plays an important role in Habermas’ discourse ethics and philosophy of law. Equal participation under a condition of institutionally guaranteed free speech is a condition of our norms being valid and our law being legitimate. On a fundamental level Habermas thus advances a truth/validity argument for free speech that is as strong as John Stuart Mills’. Although strong in intention, it has only

⁸⁴ Performative contradictions will be discussed in chapter 4, in relation to Apel.

modest ambitions when it comes to making the ideal real. Both in the fundamental case and in the case of the legal right one may assume that there is a limit to the scope of the right to free speech. It is criticising and introducing assertions, expressing attitudes, wants and needs, and avoiding force when this is done that is protected by the Rules of Discourse. It is the form of argumentative discourse that primarily seems to be protected, not any expression.

*Schauer: A presumption of free speech due to the fallibility of politicians and judges*⁸⁵

Mill's argument from rationality and fallibility, if one stresses the transcendental interpretation, has clear parallels with Habermas' discourse ethics. Free speech as applied to a constitutional democracy could then be accounted for as differentiated between different functions of free speech, as Dworkin did by his distinction between liberty as license and as independence. While I have argued that Mill himself would not accept such differentiation of speech rights, the strategy I will pursue in developing a concept of free speech for a constitutional democracy will be similar to Dworkin's.

As this is relevant to the Supreme Court judgement in *Kjuus*, we should also consider the possibility of a utilitarian application of the argument from fallibility to democratic systems of law. This strategy is Frederick Schauer's. As noted above, Schauer interpreted Mill's argument as consequentialist. From that premise, he argued that Mill put too much weight on truth as a social good. In Schauer's own version of the fallibility argument, counteracting a tendency to put *too little* weight on truth is crucial. He offers a quantitative theory of the weighing of free speech against other goods in the application of a Free Speech Principle in legal adjudication.

According to Schauer, the meaning of a Free Speech Principle within a political theory is that speech is

less subject to regulation (...) than other forms of conduct having the same or equivalent effects. Under a Free Speech Principle, any governmental action to achieve a goal, whether that goal be positive or negative, must provide a stronger justification when the attainment of that goal requires the restriction of speech than when no limitations on speech are employed. (Schauer 1982: 5f)

Free speech is a liberty understood in a "narrow sense", as the "absence of interference, control, regulation, restriction, constraint, etc.". (Schauer 1982: 129) Primarily the concern is with *government* interference. Using legal measures to

⁸⁵Frederick F. Schauer is Professor of the First Amendment at the John F. Kennedy School of Government, Harvard University.

regulate e.g. the "private censorship" of newspaper editors would be an interference in *their* free speech. (Schauer 1982: 119ff) Schauer finds that the duty of governments with respect to free speech is mainly the negative one of not interfering with the media of speech, not the positive one of rectifying economic and other differences in actual ability to access these media. (Schauer 1982: 125) What is protected by the Free Speech Principle is communication in general. To qualify for free speech protection the speaker must have had communicative intent, involving a message directed at a recipient. (Schauer 1982: 98) Thus not any kind of speech act is protected. Performatives are mostly excluded; state regulations of the terms of contracting, betting, bidding and such constitute no interference with the freedom of speech. Still, on the theory of Schauer, the *scope* of free speech as a liberty from governmental interference in interpersonal communication is quite wide.⁸⁶

Even though the Free Speech Principle is wide in scope, free speech will not always trump other goods, neither in legislation, nor in adjudication. As previously mentioned, Schauer stresses the difference between the scope of a principle, and its strength. The Free Speech Principle will often have priority, but not at any price, and not against all other interests or principles. Generally, free speech will be given priority before the public interest, but there are other rights as well that are equally important, and sometimes more so. Still, free speech is important enough to warrant accepting the risk of real harms as a consequence of acts of speech.

The higher standard of justification required for state interference in public communication than in other spheres of human action is conceived of as a higher degree of certainty that serious harm will occur as a consequence of a speech act. To interfere with public communication, legislators or courts should have little or no doubt that this communication will lead to serious harms. Schauer compares this to the burden of proof in criminal trials and suggests that applying the Free Speech Principle is a similar case of decision-making when the outcome is uncertain. As we require that a defendant should be found guilty beyond reasonable doubt in order to be convicted, we should require that legislators and judges applying the Free Speech Principle find beyond reasonable doubt that the communication they interfere with will lead to serious harms.

Both the presumption of free speech and the presumption of innocence thus deviate from normal political decision procedure. Usually it is a sufficient justification for political action that some harm is more likely than not to be prevented by that action. 50.1% certainty is enough.⁸⁷ However, as outcomes always

⁸⁶Schauer finds his concept to be intermediate in scope between a concept of Free Speech focusing upon the political as a core area, which he finds too narrow and a concept of Free Speech as *self-expression*, which is too broad - in fact almost co-extensive with human conduct.

⁸⁷Schauer uses statistical decision-making theory to make his arguments, and thus quantifies the risk of harm. I will not raise a discussion here of the sense in distinguishing between different percentages

are uncertain, such decisions will sometimes be wrong. If our degree of certainty is close to 50%, it is likely that our mistakes will be just as often on the side of allowing too little as on allowing too much. In the case of the criminal trial, however, the evil of convicting an innocent person far outweighs the evil of acquitting a guilty. Thus the standard of justification is changed to "beyond reasonable doubt", say 95% certainty. Then we will avoid convicting a lot of defendants we actually believe to be guilty, and quite a few crimes will go unpunished. On the other hand, as we increase the risk of making mistakes in convicting to few, we also minimise the risk that we make the mistake of convicting to many.

The same goes, according to Schauer, for applying the Free Speech Principle. Ideally, seriously harmful speech should be prohibited, all other speech allowed. As legislation, and often adjudication, is decision-making under uncertainty, we will however often make mistakes of including or excluding the wrong instances of speech. As interfering with communication is serious, we will try to avoid erring on the side of being too restrictive. In order to do this, however, we will have to increase the standard of justification, by demanding that there is to be a "clear and present danger" to be prevented. If likely harm is a degree of 55 and clear and present danger a degree of 90, we will often make decisions on the scale between 55 and 90, i.e. we refrain from preventing speech we think is (very) likely to do harm. Still, we then minimise the risk of preventing speech that ought to have been allowed, whether because of truth, because of democracy, or because of individuality.

Schauer's main argument for free speech thus is a special version of Mill's fallibility argument, more directly applied to the workings of the legislature and the courts of law. However, where Mill's arguments allow a non-empirical reading as well, Schauer more firmly builds his argument on a utilitarian calculus of benefits and harms. Legislation as well as the practice of the courts serves purposes. These purposes have a price. We regard free speech and some other individual rights highly, thus they have a high price, but a price that might be outweighed by harms of a certain strength and certitude. However, in a stable society we accept certain risks with respect to speech because of the overall benefit from having a Free Speech Principle.

FREE SPEECH AS A POLITICAL RIGHT

Truth or rationality is one element in the classic analysis of the justification of free speech, the others being democracy and autonomy. In what follows the content and significance of these other arguments will be explored. While the arguments from rationality focus upon human understanding as such, I will argue that the three

of certainty with respect to social harm, but rather presuppose for the sense of argument that judges and legislators can know whether some harm is 90 or 95 percent certain to occur.

arguments considered together have their core application in the political field. The public use of speech in order to participate in and authorise government is a core area of the right to free speech. Political use of speech is in this dissertation primarily considered in its capacity to influence government decisions. Almost any form of political expression has that function directly, through getting the attention of government officials or politicians, or indirectly, in contributing to the horizontal processes of intersubjective communication through which the public will is formed. Political activity may be directly aimed at forming public opinion, as well as or in place of influencing legislation and government policy. This aspect of political speech will not be central to this inquiry. On the other hand, political speech not directly motivated by influencing government will probably be included in the scope of free speech on my theory, because of its indirect effect on government and indirect role in authorising legislation.

Before giving an account of the integrated view of free speech as a condition of democratic legitimacy, different contributions to arguments from democracy and autonomy will be considered. The argument from democracy has different aspects. One may focus upon the perspective of the government and its need to make informed and rational decisions. This is the main part of Spinoza's argument, and an important part of Kant's. In so far as this is the core idea of the argument from democracy, the argument may as well be considered one of rational government, partly an application of the argument from rationality. On the other hand, the argument may focus on the people of a state. Then we have an argument from democratic legitimacy, and free speech becomes a right against the government. Then the argument from democracy becomes closely related to citizen autonomy, to the right of the governed to take part in their own government.

Free speech as legitimate political protest

One strain of arguments for free speech is developed in response to, and as a limit to the Hobbesian idea of absolute government. Both Spinoza and Kant see in some version of a distinction between action and speech a reason why the absolute duty to comply with the social contract, *i.e.* obey the law, is valid for actions only, and not for speech. It is considered imprudent or irrational for the government not to allow free speech.

Hobbes' theory of the social contract⁸⁸ stresses that the transformation from a state of nature to civil society is dependent upon an absolute transfer of rights. The natural right everyone has to do anything they think conducive to the preservation of

⁸⁸In *Leviathan*, (Hobbes 1997). I will use original pagination from the "Head" edition of 1651 in references.

their own life, is in civil society transferred to a sovereign. The sovereign has absolute power to decide the rights and duties of everyone. No subject of the sovereign may disobey the sovereign's commands, *i.e.* the law, as this is tantamount to breaking the social contract and returning to a state of nature, a state of war.

Even Kant, who holds that people have rights against the sovereign, maintains that there is an unconditional duty to obey.⁸⁹ To Kant, the rightness of an action concerns the relation between the freedom of different individuals living together in a state of law. Each person should enjoy the freedom to live as he pleases without interference from the government or his fellow citizens, as long as his freedom does not exclude the possibility of others having the same freedom. The device for ensuring this is a system of law, granting every citizen equal freedom through regulations that apply equally to all. „Eine jede Handlung ist recht, die oder nach deren Maxime die Freiheit der Willkür eines jeden mit jedermanns Freiheit nach einem allgemeinen Gesetze zusammen bestehen kann...“ (Kant 1983/1797: A33) [Every action that by itself or by its maxim enables the freedom of each individual's will to co-exist with the freedom of everyone else in accordance with a universal law is *right*.] (Kant 1991: 133) Anything legally permitted ought to be permitted to everyone.

Concerning what is *right*, the universal law in question is not the *moral* law, the principle on which each agent ought to base his practical considerations. Kant recognises that our moral judgements tend to differ from agent to agent, and that we do not always act on our best moral belief. To institute a universal law equally limiting freedom of action, a decision-mechanism has to be in place, which does not generate contradictory practical decisions. This decision-mechanism will be used to design the system of law, and must also have the final word on how law is to be enforced and the means to enforce it. A representative assembly elected for a limited period of time is an example of a decision-mechanism.

The problem of allowing disobedience to the state has two aspects. First, whether disobedience should be legalised through laws applying equally to all citizens. Second, whether a decision-mechanism can be designed that could decide when an act is an acceptable disobedience to the state. The Kantian answer is in both cases that it cannot be done. If all citizens should be given freedom to break the law when they seriously disagree with what the law prescribes, law enforcement would generally fail to be just. We would no longer be in a state of law if the authority of the judge were to be conditional upon the accused agreeing with the legal provision in question. If law enforcement usually but not always should be considered just, at least the rightness must be subject to *someone's* judgement. And, Kant argues, as the

⁸⁹I have written a NEP course paper on the question of obedience to the law in Kant, on which I base this account of the general problem of disobedience. (Lundebj 1995)

judgement of the state's representatives and the disobedient agent may differ on this, this must be left to the judgement of a third party. But then this third party would be the real head of state, and the agent would of course be permitted to disagree and be disobedient also to this one. It would have to be appointed another judge who would then be the real head of state and so on infinitely. Even to let the sovereign decide the acceptability of a particular disobedience to the law would be unjust, as this would mean unequal treatment, being a kind of despotism.⁹⁰

Outside the decision-making mechanism of the sovereign we have no legal authority for appeal, because it is by this decision-mechanism that decisions about right and wrong are made in relation to the public use of force. No one can give laws to the supreme lawgiver. We may assume that the sovereign acts for the best of the people, but if we think it does not, our reasons for thinking that can never outweigh the importance of having a law-system working; a state of law.

As we will find, Kant recognises that free speech should be allowed, because political criticism should not be considered disobedience. To Hobbes, however, there is no special case of speech. Among the powers of the sovereign is the power of censorship.

(...) it is annexed to the Sovereignty, to be Judge of what Opinions and Doctrines are averse, and what conducing to Peace; and consequently, on what occasions, how farre, and what, men are to be trusted withall, in speaking to Multitudes of people; and who shall examine the Doctrines of all bookes before they be published. For the Actions of men proceed from their Opinions; and in the well governing of Opinions, consisteth the well governing of mens Actions, in order to their Peace, and Concord. (Hobbes 1997:91)

Hobbes considers public speech to be a cause of actions, and thus is to be regulated by government just as actions themselves. As every right of nature is transferred to the government, there is no natural right to free expression within civil society. People may say what is positively legal, and may not say what is not, and the sovereign may - or is even advised to by Hobbes - institute censorship in order to effectively control public speech.

Both Spinoza and Kant seem to accept the claim that a social contract, and thus civil society itself, presupposes that there is a sovereign with more or less the powers ascribed to it by Hobbes. However, both insist that persons still have inalienable natural rights, among them, and in a prominent place, the right to free speech. In order to establish such rights, they have to explain how an absolute duty to obey the

⁹⁰Kant would think that any interference by the sovereign in the case of a particular subject is despotism. Unless the power to enforce laws are transferred to appointed civil servants, there would be no difference between the sovereign's will as individual and as representative of the general will. By making particular judgements the sovereign makes people subject to himself, which is not consistent with freedom as a human right, instead of subject to the law, which is. (Kant 1991: 101)

law may be reconciled with the idea of free speech. Sensitivity to a difference between speech and action is the ground for this reconciliation.

Spinoza on thought, speech and action

Spinoza⁹¹ finds the distinction between speech and action in the *Annals* of the Roman historian Tacitus, where it is observed that “*facta arguerentur, et dicta impune essent*” - what is done is prosecuted by law, what is said is allowed.⁹² Through justifying such a distinction, Spinoza argues that liberty of speech is not a threat to the social contract in the way liberty of action would have been.

Spinoza’s philosophical justification of free speech takes as its point of departure the liberty of thought, which is considered a natural fact.⁹³ It is plainly not possible to transfer one’s power of judgement to the sovereign, as Spinoza argues by example:

If a sovereign were to command a subject to hate someone who has bound him by a service, or to love someone who has done him harm, if it were to command him not to take offence at insults, not to desire to rid himself of fear, and not to feel the many other emotions of this kind which follow necessarily from the laws of human nature, it would command in vain. (Spinoza 1670: 149)

In vain indeed, because we may recognise that thoughts and judgement are not under immediate control of the will, and thus cannot be controlled by another will either. Recognising this, Spinoza proceeds to argue that it would be imprudent or irrational for a sovereign to want to control the public expression of thought, which is speech. The main reason for this is that a sovereign who decided to suppress the freedom of expression, would thereby institute a political culture in which there would necessarily often be discrepancies between people’s thoughts and the opinions being publicly expressed. (Spinoza 1670: 235f) Expression is controllable, thought is by its nature free, and will because of that only contingently conform to expression. It is always possible for what people say to diverge from what they think, but to create a civil order in which honesty in speech is discouraged, is disruptive to that order itself. In a culture where no one can be expected to mean what they say all kinds of dealings and promises between people becomes insecure, even the promise of a transfer of rights to the government that is the basis of the social contract itself. And even worse,

⁹¹My discussion of Spinoza is based upon his *Tractatus Theologico-Politicus* [Spinoza, 1670 #121], and upon papers by Edward E. Pitts [Pitts, 1986 #42] and Leiser Madanes (Mदानes 1992)].

⁹²Cited from Madanes paper (Mदानes 1992: 401 & n1).

⁹³My concern here is the philosophical justification. A considerable part of the *Theological-political treatise* consists of what Spinoza on the title page describes as “several discussions, Which show that Freedom to Philosophize not only can be granted without detriment to Piety and Public Peace; but cannot be destroyed without destroying them as well.” (Spinoza 1670: 49). Some of these discussions clearly have a theological nature, which is also clear from the title of the work. My discussion will be based upon the philosophical argument from the final chapters.

a consequence of such a culture would be, Spinoza fears, that the best citizens, those with the greatest integrity and honesty would become enemies of the sovereign.

The more the sovereign tries to deprive men of freedom of speech, the more stubbornly is it opposed; not indeed by money-grubbers, sycophants, and the rest of the shallow crew, whose supreme happiness is to gloat over the coins in their coffers and to have their bellies well stuffed, but by those who, because of their culture, integrity, and ability, have some independence of mind. (Spinoza 1670: 236f)

One should be careful not to consider this a pure prudential argument. It is not only because an overall consideration of harms and benefits of alternative policies shows that a society with free speech will be better for the citizens and easier to rule for the government. This is part of the rhetoric, too, but there is also a stronger argument here. Because a civil society is based upon the compliance of the people that is the respect for the social contract, and because a political order without free speech will counteract the very motivation of the citizens to keep any promise and respect any contract, such a political order is implicitly self-destructive, and thus irrational. The state has to allow what it cannot prevent, which is free thought. Further, it has to allow what it can only try to suppress by effectively undermining itself, which is the expression of these thoughts. In other words, free speech is - according to Spinoza - a necessary condition for the continued existence of civil society.

The force of Spinoza's justification of free speech is that it is in a way self-limiting. Knowing that free speech is necessary in order to preserve the civil order, Spinoza thinks that this freedom should not be thought to include the freedom to undermine this very civil order by means of speech.

A consideration of the basis of the state has shown us how everyone can exercise freedom of judgement without infringing the sovereign's right. It enables us to determine just as easily which beliefs are seditious; they are those which, when accepted, immediately destroy the covenant whereby everyone surrendered the right to act as he pleased. For instance, if anyone believes that the sovereign does not have absolute right, or that no one is bound to keep promises, or that everyone should live as he pleases, or holds other similar views which directly contradict the said covenant, he is seditious; not so much, to be sure, because of his judgement and opinion as because of the action which it involves; i.e. because merely by thinking in this way he breaks the promise he has given either tacitly or expressly to the sovereign. (Spinoza 1670: 233)

Sedition, the breach of the social contract, is the only legitimate exception to free speech, and not because it is speech ("judgement and opinion"), but because it is an *act* of rebellion against the law. Even if this in effect means that some opinions cannot be held, it is not because they are opinions that they cannot be held, but because having these opinions constitutes an action that implicitly revokes the social contract itself. Madanes (Mदानes 1992) finds in this a sensitivity to insights found

in the speech act theories of the 20th century.⁹⁴ The distinction between speech and action relevant for the question of the freedom of speech can only involve speech that is not simultaneously an act of sedition. Seditious is, as Madanes writes using Austin's concept, a performative speech act, an act that is not only expressing an opinion, or trying to convince others of doing something. One who is using language in a performative way is by the saying of the very words doing something. As the social contract is a contract, a making of a promise, a mutual declaration, it is by its very nature a performative speech act. Free speech being part of the social contract, performative speech acts that explicitly or implicitly deny or revoke the social contract cannot enjoy free speech protection. In performing such a speech act, the agent puts himself outside civil society, and is in a state of war with the sovereign - a war the sovereign must use any means at his disposal to win.

It is here worth remembering what is the purpose of civil society. Civil society is the state of affairs where people, having given up their natural, negative liberty to do whatever it is in their individual power to do⁹⁵, instead live under a rule of law providing *positive* freedom, which is an ability to pursue one's interests safely and in peace. This positive freedom is what gives every citizen a reason to obey the law established by the sovereign, and thus the source of the legitimacy of the government and of the law. Preserving the civil order is in effect preserving the ability of each human being to realise his interests and abilities. But it is necessary that each citizen respects this civil order, *i.e.* obeys the law, for this order to exist - and for citizens to enjoy the protection of their positive freedoms or rights.

To sum up, Spinoza thinks that while sovereignty is absolute with respect to actions, no man can or should be compelled to give up his natural right to free speech. This is because thoughts - judgements - are not controllable. Trying to control the public expression of judgements will then only have the effect of contradicting, and thus undermining the social contract by encouraging a culture of dishonesty - even with respect to respecting contracts. However, as free speech enjoys special protection because it is needed to uphold the social contract, performative speech acts that in themselves constitute breaking the social contract - sedition - is not protected by the right to free speech.

Kant: the irrationality of restricting speech

In *Theory and Practice* (Kant 1983), Kant develops a justification of the right to free speech that has a similar point of departure as Spinoza's. Kant, too, accepts the Hobbesian view on absolute sovereignty to the effect that there can be no legitimate

⁹⁴John Austin is mentioned. (Madanes 1992: n6)

⁹⁵As in Hobbes' state of nature.

civil disobedience, *i.e.* no citizen considered as subject of the law can put himself above the law. However, as in Spinoza, this does not mean that the subjects have no natural rights at all against the sovereign - only that such rights cannot be coercive rights.⁹⁶ In other words, people cannot act contrary to the will of the sovereign, which amounts to breaking the law. However, laws may be *unjust* if they violate natural right, the concept of right in Kant amounting to the widest possible spectrum of positive freedom.⁹⁷ Such injustice cannot be corrected by action, which would violate absolute sovereignty, but may be publicly identified by means of speech. The purpose of this will be to convince the sovereign to correct the injustice. Injustice done by the government is, according to Kant, to be considered as mistakes done from insufficient knowledge.

Mithin, da jeder Mensch doch seine unverlierbaren Rechte hat, die er nicht einmal aufgeben kann, wenn er auch wollte, und über die er selbst zu urteilen befugt ist; das Unrecht aber, welches ihm seiner Meinung nach widerfährt, nach jener Voraussetzung nur aus Irrtum oder Unkunde gewisser Folgen aus Gesetzen der obersten Macht geschieht; so muß dem Staatsbürger, und zwar mit Vergünstigung des Oberherrn selbst, die Befugnis zustehen, seine Meinung über das, was von den Verfügungen desselben ihm ein Unrecht gegen das gemeine Wesen zu sein scheint, öffentlich bekannt zu machen. (Kant 1983: A264f)

What a citizen considers an injustice following from the decisions of the government, he or she should be allowed to make publicly known. Kant calls the freedom of the pen "das einzige Palladium des Volksrechte". (Kant 1983: A265) Free speech is a sanctuary; the media of public expression are protected places where the rights of the people may be defended.

Kant claims that the sovereign, who is legitimate only insofar as he is a representative of the people, cannot intend the citizens not to have freedom of speech.

Denn diese Freiheit ihm auch absprechen zu wollen, ist nicht allein so viel, als ihm allen Anspruch auf Recht in Ansehung des obersten Befehlshabers (nach Hobbes) nehmen, sondern auch dem letzteren, dessen Wille bloß dadurch, daß er den allgemeinen Volkswillen repräsentiert, Untertanen als Bürgern Befehle gibt, alle Kenntnis von dem entziehen, was, wenn er es wußte, er selbst abändern würde, und ihn mit sich selbst in Widerspruch setzen. (Kant 1983: A265)

A government that denies the citizen freedom of speech is not only acting in accordance with its absolute sovereignty, but has the side-effect or implication that the government acts contrary to its own interest. If the government knows less than what the individual citizens could have brought to its attention, the government may

⁹⁶*Zwangsgerichte*. I will mostly follow the English translations of Kant's terms in Hans Reiss' Cambridge edition. (Kant 1991)

⁹⁷"Every action which by itself or by its maxim enables the freedom of each individual's will to co-exist with the freedom of everyone else in accordance with a universal law is *right*." (Kant 1991)

be unable to make the right decision. There are two aspects to this point. First, since the government's task is to make the decisions that are best for the people, making decisions without the citizens being able to state their interests reduces the likelihood that the right decision will be made. Second, this is independent of whatever purpose a certain government actually sets for itself. In any case, without access to all knowledge that is available the government chooses to be less certain than it could have been that the right decision according to its own purposes and standards will be made. This is irrational; in this action, the government willingly risks acting in contradiction with itself.

Freedom of the pen is to Kant the right protecting the medium through which people may try to correct government. Kant formulates a general principle for what constitutes such injustice, and as such will be a proper theme for public criticism, and this will apply to the right to free speech itself, too. This principle is that “Was ein Volk über sich selbst nicht beschließen kann, das kann der Gesetzgeber auch nicht über das Volk beschließen.” (Kant 1983: A266) As the legislators represent the people, they are normatively bound by this representativity not to decide what a people cannot decide for itself. Kant's example of something that cannot be decided in that way, is questions of religious belief and practice. A people legislating that a certain historically instituted form of religion is never to be changed, is like a person deciding not to change his mind in the light of new experience and knowledge. As it would be *irrational* to make such a decision, and *impossible*, as Spinoza would have said of any attempt to control belief and judgement. Such a decision by a ruler cannot have been part of the original contract which legitimises the sovereign's decisions.

Da wird nun klar, daß ein ursprünglicher Kontrakt des Volks, welcher dieses zum Gesetz machte, an sich selbst null und nichtig sein würde: weil er wider die Bestimmung und Zwecke der Menschheit streitet; mithin ein darnach gegebenes Gesetz nicht als der eigentliche Wille des Monarchen, dem also Gegenvorstellungen gemacht werden können, anzusehen ist. - In allen Fällen aber, wenn etwas gleichwohl doch von der obersten Gesetzgebung so verfügt wäre, können zwar allgemeine und öffentliche Urteile darüber gefällt, nie aber wörtlicher oder tätlicher Widerstand dagegen aufgeboden werden. (Kant 1983: A266f)

An original contract that contained an agreement to legislate in contradiction to what the people may possibly will would be null and void, Kant claims, and accordingly the citizens may provide the sovereign with reasons against such legislation. However, we may note that Kant, like Spinoza, includes *verbal* resistance to the law in what goes beyond the right to free speech. Even though free speech is a natural right, there might be crimes in speech, and to Kant incitement to disregard or fight the law is contrary to the duty to honour the promise made in the social contract. Only to pass

general and public judgement upon the legislation and practices of government is appropriate.

The subjects of the law must obey the law, but in Kant's philosophy of law, people are not only subjects, but also citizens and co-legislators, part of the sovereignty. (Kant 1983: A244) Every commonwealth needs obedience to legitimate laws, Kant claims, but also a *Geist der Freiheit* – a *spirit of freedom*. This spirit of freedom is necessary, Kant writes, "da jeder, in dem was allgemeine Menschenpflicht betrifft, durch Vernunft überzeugt zu sein verlangt, daß dieser Zwang rechtmäßig sei, damit er nicht mit sich selbst in Widerspruch gerate." (Kant 1983: A267) Each individual citizen is to identify with the decisions of the sovereign, seeing them as the decisions of the people, and thus also as his own decisions. If he cannot see, by his own reason, that the decisions of the ruler are *legitimate*, he is in contradiction with himself. If the citizens are not able to establish to themselves and their co-citizens that a certain act of legislation is one the ruler is entitled to make - one a people can make for itself - a contradiction occurs: Something he or she as subject is obliged to obey *because* it is part of the constitution to which he or she has agreed, is not something he or she originally could possibly have agreed to.

To sum up, a regime without free speech is irrational both from the perspective of the ruler, and from the perspective of a citizen. A government that chooses not to allow free speech is irrational in the sense that it chooses not to have access to reasoning that might have changed its decision. For a government, not wanting to know what it needs to know to fulfil its purpose is being in contradiction with itself. Citizens, on the other hand, who cannot through free discourse make sure that the laws are actually imposed in accordance with the social contract, are acting similarly blindly, and thus in contradiction with themselves.

Constitutional application of free speech as a political right: the US First Amendment

Already in Spinoza, the substantial right to political free speech was limited to speech acts that involved sedition, or the destruction of the social contract. The right to free speech was conceived of as a requirement for rational government. Then this requirement could only apply in so far as speech was not abused to withdraw from the social contract that was the foundation of government itself. The problem of sedition has continued to be a major challenge to free political speech. Even in the USA where the constitutional protection of free speech has in our century been strong, free speech may be interfered with because of serious harms, especially disruptions of the political system itself.

In the first amendment to the Constitution of the United States of America, we find a strong restriction on legislation limiting free speech. The 15 December 1791

amendment states that “Congress shall make no law (...) abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” During the first century of the American republic the US Supreme Court generally interpreted the amendment as a ban on prior restraints of speech, i.e. the licensing or censorship of the press. An interesting development took place around the First World War, when Supreme Court Justices Oliver Wendell Holmes, Jr. and Louis D. Brandeis voiced a strong defence of free speech even in the case of subsequent punishment. Only when facing a “clear and present danger” of “substantive evils” the liberty of speech may be restricted by law. (*Schenk v. United States*) Although often being the minority opinions, the early opinions of especially Justice Holmes have been influential in present theory of free speech, as well as in the later rulings of the US Supreme Court. Today US constitutional practice in free speech cases gives free speech a more prominent position compared to other rights than perhaps in any other country. The prosecution of a politician (like Kjuus) for forming a political programme, of whatever content, would probably be practically impossible under the current understanding of the First Amendment in the United States.

Some of the opinions of the Supreme Court Justices, especially Justice Holmes, deserve the status of classics of the theory of free speech, although primarily interpretations of constitutional law. Because of that, I will consider some aspects of what I take to be the Holmes' theory, to see what idea or justification of free speech is offered.

A marketplace of ideas

The “clear and present danger”-test was introduced by Justice Holmes in a 1919 case concerning a leaflet against the conscription of Americans to serve as soldiers in World War I. Justice Holmes wrote the opinion of the court, and the conviction of the defendant in the District court was affirmed. In the course of this affirmation, however, Justice Holmes argued that not only censorship, but also punishment for speech crimes in general were unconstitutional, unless “the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” (*Schenk v. United States*) The examples given are examples of speech acts that are more than what Mill refers to as “opinions”. Free speech does not “protect a man in falsely shouting fire in a theatre, and causing a panic”, neither when “uttering words that may have all the effect of force”. (*Schenk v. United States*)

In another case from 1919 concerning leaflets calling for an arms industry general strike during the first world war (*Abrams v. United States*), Holmes did not find it

established that there had been what he now called “clear and imminent danger”. In his dissenting opinion, he further specifies the scope of such a danger. He argues that

we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. (*Abrams v. United States*)

Saving the country is now what necessitates limiting the freedom of expression; thus only speech that threatens to undermine the Constitution or the republic itself seems to justify punishment.

The argument in support of a wide scope of free speech is partly based on an argument from truth, partly on an argument from the democratic nature of the constitution. The democratic element is evident from the fact that speech is not suppressed in the constitution, as this would have been natural if the purpose of the government were to keep itself in power at all cost.

Persecution for the expression of ideas seems to me perfectly logical. If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. (*Abrams v. United States*)

The democratic form of government, however, rests upon what we may call the fallibility of governments, or in Holmes’ words that we realise that “time has upset many fighting faiths”. Thus in what seems like a Millian argument from rationality applied to governments, Justice Holmes argues the case of the “experiment” of free speech that is central to the American political system - or to any democratic system, we might add. Once people realise their fallibility, they will distinguish between believing their own ideas, and believing in the procedure that will most likely give the most rational political decisions in the long run. They

come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. (*Abrams v. United States*)

Government decisions ought to be rational, and they will be if anyone who has a political statement to make is allowed to make it in a “free market”, where others, be they electors or representatives may choose whether or not the idea is worth “buying”. The “best-selling” position in such a market will be the most rational. The widespread acceptance of the metaphor of the market as means of reaching truth is

probably what explains the strength of free speech in American law. The idea seems to be that everyone may expose their thoughts to public scrutiny as they would expose their goods on a marketplace. What then is to be the test of what is the best idea, or “the truth”, must then be which of the competing goods, all plainly in view, is chosen by a majority of the relevant customers. The relevant point seems to be that every political programme that some citizen may want to seek support for is plainly in view, so that the customers - other citizens as electors or representatives - are able to make a free choice among the doctrines offered. Thus it seems that if access to the marketplace is as wide as possible, such that only traders who forcefully attacks the foundations of the marketplace itself are excluded, the buyers will have the greatest possible customer freedom. This way it seems in place to have a wide scope of the liberty of speech *as licence*.

The metaphor of the market still has serious limitations with respect to free speech in relation to democracy. On the level of basic rules of the language games, exchange of goods is fundamentally different from exchange of arguments. The central modes of speech in market relations have a strategic character. Through advertising and negotiations, agents in a market basically attempt to advance their self-interest, albeit often coinciding with common interests of several agents. While arguments play a role in this context as well, this role is different from the function of argument in science and politics. While failing to sell goods in a market threatens one’s standing as a market agent, failure to have one’s position accepted in academic discourse need not do so. Neither is failing to have one’s policy enacted as legislation necessarily destructive of one’s status as political agent. Being primarily distributed as profit, rewards in markets are individualised. Political and scientific outcomes may be *common* to a considerable degree. One reason for this is that hypotheses and political proposals that are rejected might anyhow be recognised as important contributions to the dialectical process necessary in reaching the right conclusion or decision. Another reason is that neither knowledge nor law need be to a greater benefit to supporters than to opponents in the long run.

Another weakness of the market metaphor is that the idea of a market in no way excludes regulations, neither on restricting harmful goods, nor on restricting ways of marketing them. A market is free to some degree. From the perspective of consumers and of prospective businesspersons, a market need not be less free if regulations are in place securing that new products get a fair exposition compared with the major brands, as well as securing that unfair or strongly manipulative marketing or the distribution of dangerous goods are prevented. The “marketplace of ideas” may thus function just as well in arguments toward regulating speech as in arguments against it. Another problem is that, while the success of some product in a market depends solely upon the willingness of consumers to buy, the truth or validity of a statement

does not depend solely upon the number of people agreeing with it. As we must be able to account for the difference between the quality of a product and its competitiveness in order to explain how we might be dissatisfied with something we bought, we must also be able to distinguish between the truth or rationality of a decision and its popularity, in order to understand undesired outcomes.

On the other hand, Holmes' metaphor seems to express an important feature of democracy, if not necessarily one of rationality. It is essential to rationality that we make sure that our opinion, if false, may be contradicted or disproved, as Mill's theory goes. It is, however, essential to democracy that there exist places for advocating policies and for getting properly acquainted with them. How this happens best, whether with a wide scope of liberty as licence, or with a narrower scope (perhaps better serving the equality and independence of citizens), is in principle an open question.

What we find in Holmes is an argument for political free speech involving both rationality, democracy and autonomy as important elements. The fallibility of governments justifies a wide scope of free speech, but it is the autonomy of citizens, their right to make up their own minds as consumers in a marketplace of ideas that are crucial to the "experiment" of democratic free speech. Even though the autonomy of citizens and the rationality of governments are involved, the level of government participation that constitutes a democracy is merely empirically validated. It is because of trust in the empirical hypothesis that free speech will yield better decisions than other procedures that democracy has been chosen in the USA. This is not yet a truly liberal defence of free speech, however, because the rightness of the political decisions is not directly dependent upon the authorisation of the people.⁹⁸ Turning to Rawls' political theory, the idea of a right to free speech is founded upon his entire theory of justice as fairness, in which the right to participation is also accounted for. I will give an account of Rawls' conception of free speech, as it shows how the justification of free speech may be accounted for within a more comprehensive theory of liberal justice. Besides that, the notion of a *central range of application* may guide the process of defining the scope of free speech in a constitutional democracy.

Rawls: Free political speech as basic liberty in the theory of Justice as Fairness

The final lecture in Rawls' *Political liberalism* concerns the justification for the priority of basic liberties. (Rawls 1993: 289ff) In Rawls system of basic rights free political speech is part of "the freedom of thought and the liberty of conscience". The

⁹⁸ I cannot, of course, deny that Holmes may have considered himself liberal in this sense as well. My argument is merely, that the fragmented theory I have ascribed to Holmes does not give evidence of considerations of democratic legitimacy in this sense.

lecture, “The Basic Liberties and their Priority”, is written in reply to criticism made by H.L.A. Hart of two “gaps” in the account of basic liberties in *A Theory of Justice*. As these gaps concern the justification of the priority of basic liberties (1), as well as an account of the application of these liberties (2), this lecture contains the essential features of Rawls’ theory of basic liberties in general. As Rawls has chosen Free Political Speech as an example in his account of application, the lecture may for our purposes also be read as an account of Rawls’ theory of free political speech. Free political speech is on this theory justified by reference to a liberal conception of a person and the theory of justice required for such persons. The problem of application is solved, in outline, by discussions of the significance of free political speech with respect to what constitutes the central range of applications considering the essential interests of liberal persons.⁹⁹

In Rawls’ theory, the priority of basic liberties is expressed as the priority of the first principle of justice over the second. The first principle states that “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.”¹⁰⁰ (Rawls 1993: 291) While the second principle is concerned with the fair distribution of positions and wealth in society, the basic liberties concern minimal conditions of mutual respect between persons in liberal political society. They have “absolute weight” under “reasonably favourable conditions” as compared to social and economic policies, and “can be limited or denied solely for the sake of one or more other basic liberties”. (Rawls 1993: 294ff)

Rawls specifies four features of a scheme of basic liberties. (Rawls 1993: 297f) Basic liberties have a “central range of application” defined by what is required for the respect for persons. Within this central range, the basic liberties “can be made compatible with each other”. In the original position, i.e. as far as the basic structure of society is concerned, the basic liberties are “not fully specified”. This means that the full application of the basic liberties is no requirement of a just society as such, but takes place in the drafting of a constitution, in legislation and in adjudication. And finally, they are “not equally important or prized for the same reasons”. Thus a

⁹⁹ While Rawls in this lecture seems to defend a continuous theory of justice as fairness, it should be mentioned that, in the years between Rawls’ original *Theory of Justice* and the book on *Political Liberalism*, there have been important shifts in his approach. In *A Theory of Justice* Rawls seemed to build his argument upon premise that every rational agent should accept, rationality being primarily understood as instrumental and self-interested. To the later Rawls the focus is more on the possibilities for reaching an “overlapping consensus” on a common political community for people with different “comprehensive views” or moralities. The concept of a person seems to be thicker than the original one. However, the basic elements of the theory, such as the device of the original position, primary goods and the two principles of justice are still the same, even though revisions have been made. For the purpose of showing how free speech is analysed and applied within this system, I choose to ignore these differences. Rawls himself denies that his early theory was exclusively based upon rationality. See note 101.

¹⁰⁰ The list of basic liberties comprise (1) freedom of thought and liberty of conscience, (2) political liberties and freedom of association, (3) freedoms specified by the liberty and integrity of persons, and (4) the rights and liberties covered by the rule of law. (Rawls 1993: 291))

special justification of free speech, what Schauer calls “an independent principle” may fit into Rawls’ scheme of basic liberties.

Rawls proposes to justify the priority of the basic liberties through an account of the liberal conception of the citizen as free and equal persons, in connection with the idea of primary goods for such persons.¹⁰¹ On the liberal conception a person is thought to have two essential moral powers. One is the “capacity for a sense of justice (the capacity to honor fair terms of cooperation and thus to be reasonable)”, the other the “capacity for a conception of the good (and thus to be rational)”. (Rawls 1993: 302) The liberal person is thus a political being, with the capacity to live together with others on fair terms, and an individual capable of forming and rationally pursuing a comprehensive view of the good. Fair terms of co-operation are those that the liberal person would accept as a foundation for social co-operation “over a complete life (...) on a basis of mutual respect”. (Rawls 1993: 303) Finding these fair terms is what specifying basic liberties is about.

To perform this task, Rawls designs the hypothetical device of the Original Position. In the original position, people are to negotiate the terms of the social contract, i.e. the structure of society, as representatives of people in society. The requirement that negotiators be representatives should ensure that the system is rational from the perspective of individual persons, i.e. that it may function as basic for several individual life projects of pursuing different ideals of a good life. Rawls associates this aspect of the Original Position with the second moral power. The other main aspect of the Original Position is certain restrictions, primarily on information. The details of these restrictions will not be discussed here. It will be sufficient to note that the *veil of ignorance* is intended to ensure that the theory of justice arrived at will express and secure the reasonability of the system, which is related to the person’s capacity for a sense of justice.

What may be discovered in the Original Position is of a general nature. The issue is what those represented would accept as terms of fair co-operation, but as the *veil of ignorance* excludes any substantial knowledge of what those represented actually prefer or wish to pursue, only an account of what is in general necessary to exercise the two moral powers is possible. These general necessities are what Rawls calls *primary goods*. First on the list of these goods are the basic liberties. In establishing that the basic liberties take priority if in conflict with other primary goods, he follows a diverse strategy, as different reasons may support different rights. The main idea, though, is that these liberties are indispensable in order to be able to pursue a conception of the good that is freely formed (liberty of conscience), in order to

¹⁰¹ The liberal person is an explicit precondition of this theory of justice. According to Rawls, Hart had believed the theory to be based upon rationality alone, thus leading to the conclusion that there are gaps in the account. (Rawls 1993: 290)

develop fair terms of co-operation (political liberties in their procedural role), or derivatively, in order for the liberty of conscience and the political liberties to be effective (freedom of thought and association). (Rawls 1993: 309) These liberties are thus essential requirements for the exercise of the two moral powers of the liberal person, and are for that reason basic.

The central range of application

The issue of application of basic rights is also a question of deciding when these basic rights serve the purpose of ensuring the exercise of the two moral powers, with a focus on what Rawls calls *the two fundamental cases*. The first of these cases is the “application of the principles of justice to the basic structure of society and its social policies”, the second the “application of the principles of deliberative reasoning in guiding our conduct over a complete life”. (Rawls 1993: 332) The two moral powers of the liberal person have a wider range of application than these cases, but the two cases are fundamental in being foundational for the other forms of exercise of the powers. The central range of application of basic rights is the possibility of fundamental political criticism, i.e. political or civic autonomy, as well as the possibility of making choices that matter to the way we live our lives, i.e. individual autonomy.

The significance of a basic liberty is given through its relation to the exercise of the two powers of the liberal person in the two fundamental cases. In this way the “central range of application” is mapped out. Deciding when a basic liberty is to have “absolute weight”, and when its relevance is less, and the liberty can be restricted, means deciding whether or not liberty is applied within its central range or not.

Several kinds of speech fall outside what is protected. Defamation and libel of private persons generally has no significance in criticising the basic political structure. “Incitement to the imminent and lawless use of force” may also be restricted to protect the democratic process itself. Furthermore, a basic liberty is self-limiting due to the requirement of *equality* between persons in exercising the right. This is a reason for *regulating* the use of free speech in order to protect the effective public use of speech, provided this regulation treats citizens as equals.

Uses of speech that may at different times be controversial, but still according to Rawls are clearly inside the “central range”, are different forms of substantial criticism. There is no such thing as “the crime of seditious libel”, Rawls maintains. (Rawls 1993: 342) If prosecution for “defaming the government” is possible, this will have a serious chilling effect on the press and on public protest, to the degree that the exercise of particularly the first moral power on the basic structure of society is undermined. Prior restraints on the press, i.e. censorship, may also seriously undermine the free exercise of critical thinking on the terms of co-operation in

society. Even subversive advocacy is, according to Rawls, within the central range of protected free speech. Thus the advocacy of revolutionary doctrines is protected free speech, unless there is an “incitement to the imminent and lawless use of force” that is also likely to achieve its intended result. Here Rawls is critical of the use made by the U.S. Supreme Court of the *Clear and Present danger* rule. What would constitute a clear and present danger that warrants responding with limiting free political speech is, according to Rawls, only a constitutional crisis. The clear and present danger must be of “a highly special kind, namely the loss of freedom or thought itself, or of other basic liberties (...) and there must be no other way to prevent these evils than the restriction of free speech”. (Rawls 1993: 356) Thus within its central range, which to Rawls is primarily the advocacy of opinions on the basic structure of society, it is mainly in its self-limiting function that free speech may be restricted. Free political speech may be limited, but only if limiting free political speech *temporarily* is the only possible way of defending democratic political institutions and free political speech *in the long run*.

Dworkin

While Rawls and Ronald Dworkin both are proponents of a modern egalitarian liberalism, their philosophical approaches are quite different. Central to the project of at least the early Rawls is a formal procedure for arriving at the structure of a just society. Although Dworkin may share some of the intuitions behind the original position, his approach is more retrospective and interpretative. Justice, or in Dworkin’s terminology *political morality*, plays a central role in his philosophy of law, but not as an independent perspective. Dworkin’s ideal method of law is to decide particular cases by reference to the best *justification*, in the form of moral principles, of the political and legal structure of society as a whole.¹⁰² This method comes close to a natural law approach in the sense that “what the law is depends in some way on what the law should be”. (Dworkin 1982: 165) The officers of the law should care about the integrity of the law as a whole, even though the ideal to be approached is not part of human *nature*, but rather constructed through an interpretation of legal and political history. This approach is probably characteristic even of Dworkin’s own theory. His theory of rights in *Taking Rights Seriously* (Dworkin 1977) seems primarily to be an interpretation of the place of rights in modern Anglo-American law. Through this approach, however, Dworkin gives a strong account of a modern liberal *political morality* or conception of justice. I will

¹⁰²Lacking positive legal basis for judgement, judges may decide cases by analysing the basic principles of the legal system, and deducing the judgement from these principles.

here briefly give an account of Dworkin's liberalism, and how free speech fits into his interpretation of the system of modern law.

A citizen under a system of democratic law has rights. By recognising that someone has rights, one recognises a deontological component of politics and law, *i.e.* that a government has a duty to respect individual citizens that may sometimes limit what may be done for the overall public good or to realise some ideal state of affairs. The important distinction here is one between *rights* on the one hand, and *goals* on the other hand. Rights are formulated as principles, and express respect for individual citizens. Goals are formulated as *policies*, and have the good of the community or the people at large as their focus. When a decision is to be made, different rights may be balanced against each other, but there will often be a certain *threshold* against rights being out-balanced by goals. Between different goals there can be trade-offs between positive and negative consequences of certain policies, and between different policies. *E.g.* the need for economic efficiency can be balanced against the vitality of cultural life, but none of these goals should suspend the right of an individual to fair trial. This is what is meant by the metaphor that rights are *trumps* held by individuals.

A liberal theory of a just society differs from a libertarian one. The basic notion of libertarianism is an open and indefinite freedom or liberty that every individual human being has from nature. Such liberty the government has no right of infringing beyond what is necessary to uphold peace.¹⁰³ The basic notion of liberalism is for Dworkin *equality*, and the freedom liberalism offers has the form of institutionalised equality between people in a state of law. Liberalism requires that governments treat their citizens with equal *concern* and *respect*. To treat people with concern is to respond to the fact that they are beings capable of suffering and frustration, to treat people with respect is to treat them as beings "capable of forming and acting on intelligent conceptions of how their lives should be lived". A liberal requires that people be treated with equal concern and respect, because people are equal in dignity. Goods and possibilities should not be distributed unequally if this is justified by ideas that some human being are worth more than another, and freedom must not be limited for some citizens on grounds that their convictions are less worthy than those of others.

There are two kinds of equality. One is *equal treatment*, "the right to equal distribution of some opportunity or resource or burden". (Dworkin 1977: 227) The other is *treatment as an equal*, which is the treatment of every citizen with the same concern and respect. Treatment as an equal requires that relevant differences in needs and opportunities be taken into consideration. Treatment as an equal as

¹⁰³Jan Narveson has given an interesting account of a libertarian theory of free speech. (Waluchow 1994)

concerns respect basically means that the rights of each and every individual person should be respected, also the right to have differing goals from the majority or the government.

On a liberal view, treatment as an equal is the fundamental equality, equal treatment follows by implication when there are no relevant differentiating features. Treatment as an equal is also the explanation why some rights are more fundamental than other rights. Some rights are *required* for treating someone as an equal. The autonomy argument for free speech claims that it is such a right. In order to treat someone as an equal, one has to respect their ability to form and act on intelligent conceptions of how their lives should be lived. In order to develop such an ability the individual needs practice in asking the right questions. In order to try to convince others that certain projects are worth pursuing on a political level, the individual needs to be able to argue his case publicly. Thus, free speech is required for treating people with equal respect.

To Dworkin, as to Rawls, a fundamental notion of respect for the autonomy of persons is basic both for the private as well as the public right to free speech. The distinction between public and private autonomy with respect to free speech is in accord with the institutionally embedded perspective from which I approach the analysis of free speech. Private autonomy is to Rawls and Dworkin related to the ability to reflect on one's private life and to make choices relevant to such reflection. In public autonomy, the argument from autonomy is directly related to democratic legitimacy. While the individual person exercises autonomy through participating in public discussion of politically relevant matters, the possibility of doing this in some way is part of what legitimises democratic government. Dworkin's idea is that a government that denies citizens free public speech does not show citizens equal concern and respect. The requirement that the government honour this duty is, for Dworkin, probably a moral principle that is part of a normative interpretation of the legal system.

While private autonomy in these theories is related to the possibility of independence in one's private life, and public autonomy is related to the possibility of influencing public opinion and government, the conception of autonomy we find in Thomas Scanlon's theory of free speech offers a third option. Scanlon's conception of autonomy is a morally based liberty that extends even to the question of obeying the law or not. The possibility of voluntary non-compliance with particular legal provisions, that to classic social contract theories from Hobbes onward was tantamount to breaking the social contract, is in Scanlon's theory the basic justification for free speech.

*Scanlon: Individual autonomy as limit on state authority*¹⁰⁴

Freedom of expression appears to be irrational, Thomas Scanlon observes, as it seems that a class of acts are singled out and held to be immune from restrictions, whether or not the acts are thought to be harmful. The task of a theory of free speech is to answer this “charge of irrationality”. In his version of such a theory, Scanlon insists that singling out such a class is not essential to Freedom of Expression. Rather than trying to distinguish expression from action, or to characterise the subset of expression that is held to be immune, a theory of freedom of expression should rather explain the difference between legitimate and illegitimate justifications for state interference with the freedom of expression. The crucial point seems to be, according to Scanlon, whether the act of expression is intended to move others to act through pointing out reasons for action, or through other means. (Scanlon 1972: 212) Most harmful acts of expression affect others by other means than reasoning. Shouting can trigger an avalanche by the mere noise; threatening someone with bodily harm may trigger the emotion of fear; acts of expression can harm someone’s reputation, cause a panic, or contribute to a harmful act by someone else either by orders, threats, or instruction. In none of these cases does the harm come about as a consequence of actions decided upon because of reasons communicated in the previous act of expression. Thus restricting the acts of expression in these examples would be no violation of the freedom of expression. If, however, the sole point of an expression is to provide another person with reasons that he or she upon consideration may find persuasive enough to act upon, this does not justify restricting this expression. The responsibility for whatever is done is then upon the agent, as it is his or her own deliberations that cause the action, not the fact that the reasons were communicated to him.

However, even communicating ideas might lead to harm. Giving someone false beliefs may be thought of as a way of harming them, and the communication of such false beliefs may be a necessary part of the explanation of harmful activities. Still the trying to convince someone by giving reasons why e.g. a certain law ought to be broken cannot be subject to state restrictions. This is expressed in what comes to be the core principle of Scanlon’s theory, what he calls the “Millian Principle”¹⁰⁵.

There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on these acts. These harms are: (a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; (b) harmful

¹⁰⁴Thomas M. Scanlon is Alford Professor of Natural Religion, Moral Philosophy and Civil Polity at Harvard University. My discussion of his position on free speech is based upon his “A Theory of Freedom of Expression” (Scanlon 1972)

¹⁰⁵This principle is thought to be “a natural extension of the thesis Mill defends in Chapter II of *On Liberty*”. (Scanlon 1972: 213)

consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing. (Scanlon 1972: 213)

Providing others with reasons to think for themselves is something the state may not restrict, no matter how harmful thinking some thoughts and acting upon them might be. The reason for this is that this would violate the autonomy of citizens that is necessary for democratic legitimacy. The essential feature of an autonomous person is, according to Scanlon, that he is “sovereign in deciding what to believe and in weighing competing reasons for action. He must apply to these tasks his own canons of rationality, and must recognize the need to defend his beliefs and decisions in accordance with these canons”. (Scanlon 1972: 215) The autonomy of a citizen is on Scanlon’s conception the possibility for acting on his own reasons, even if this is contrary to the law. “What is essential to the person’s remaining autonomous is that in any given case his mere recognition that a certain action is required by law does not settle the question of whether he will do it.” (Scanlon 1972: 216) Even if obeying the law is something an autonomous citizen may feel a strong obligation to do, there are both limits to what the state may expect compliance with and a general need for deliberation prior to compliance. Autonomous citizens “could not regard themselves as being under an “obligation” to believe the decrees of the state to be correct, nor could they concede to the state the right to have its decrees obeyed without deliberation.” (Scanlon 1972: 217)

On my theory, citizen autonomy is related to citizen participation in public life, primarily with respect to influencing government and legislation. However, the capacity of citizens to participate in the legislative process and thus exercise popular sovereignty has little to do with the citizen autonomy Scanlon finds central to what free speech protects. Deliberation about whether legislation meets the standards citizens would want it to meet is central to the political activity of citizens, through elections and public expression. Such deliberation, however, will be relevant to the legitimacy of the system of law through influencing legislation. Serious considerations of civil disobedience, on the other hand, are rather exceptional. Scanlon’s concept of autonomy is perhaps moral rather than political, calling for a moral independence in individual practical deliberation that the state has no right to restrict.

On the other hand, Scanlon insists that an individual right of liberty is not the issue here, but rather “limitation of the authority of states”, which is an exception to the right of states to coerce its citizens. (Scanlon 1972: 221) This right follows from a theory of legitimate government requiring legislation to be such that autonomous citizens may recognise. The Millian Principle identifies justifications for legislation that cannot be recognised by autonomous subjects. Autonomous subjects cannot let

themselves be protected against having false views, as deciding which views are false or true is a capacity an autonomous person cannot alienate. Neither can autonomous citizens recognise that the state can restrict e.g. the advocacy of some kind of criminal behaviour, as the state is not authorised to “deprive citizens of the grounds for arriving at an independent judgment as to whether the law should be obeyed” (Scanlon 1972: 218).

Without going deeply into the discussion on civil disobedience, I would like to remark that applying a moral notion of individual autonomy to the duty of compliance with the law has problematic implications. Scanlon does not claim that the possibility of independent judgement on what the law *should be* is protected, but independent judgement on whether the law *is to be considered valid for my action*. Post World War II political thinking tends to reject the unconditional duty of obedience found in Hobbes and affirmed by Kant. However, civil disobedience is an exception, and should be considered legitimate only as a political statement, not as an expression of individual autonomy.¹⁰⁶ Autonomy with respect to public matters should primarily be expressed in the form of political criticism. In cases of morally deficient law, citizens should obey, but criticise, civil disobedience being an option chosen only in emergency situations like genocide and irreparable environmental damage.

The Millian Principle is thought to be absolute within its scope. No matter what harms may occur from people coming to have certain views; this can be no reason for restricting public communication of these views. Scanlon considers this principle to be the core of the idea of freedom of expression, but offers several supplementary principles to complete the theory. These supplementary principles are needed to strengthen the protection of freedom of expression in situations where the Millian Principle is not sufficient in itself. E.g. a law against demonstrations or posters and handbills would only violate the Millian Principle if the justification were that harmful views could be communicated, not if the justification were that demonstrations interfere with traffic, or that posters and handbills are messy. (Scanlon 1972: 222)

The other principles that, according to Scanlon, may enter into considerations of freedom of expression are (1) the balancing of competing goods, expression vs. others; (2) distributive justice with respect to the means of communication; and (3) compatibility with the recognition of “certain special rights, particularly political rights” (Scanlon 1972: 224). The main point of Scanlon’s theory is, however, that

¹⁰⁶An adequate theory of civil disobedience would probably have to specify situational requirements as well. Under conditions like the institutionalised violations of human dignity represented by the Hitler regime in Germany, illegal acts performed secretly would sometimes be morally required, like attempting to save the lives of persecuted Jews. In such cases, however, describing the action as revoking the social contract is probably adequate.

public advocacy and deliberation about almost any idea is beyond what the state is authorised to restrict, whatever consequences might follow from people coming to believe in that idea. The argument is one from individual autonomy as a limit to state authority.

FREE SPEECH AS CONSTITUTIVE CONDITION OF DEMOCRATIC LEGITIMACY

Having completed a journey through important aspects of the justification of free speech, a theory of free speech for a constitutional democracy may now be formulated, and applied to the *Kjuus* case. Within an integrated conception of the justification of free speech, I will explicate the relative importance of the three major aspects of free speech justification. Provided this theory is valid for a situated constitutional democracy like Norway, this theory will give a possible account of why the reasons given by the Supreme Court majority in *Kjuus* fails to meet minimum requirements of free speech under such a political system.

The argument from rationality has been analysed both in its consequentialist version in Milton and Schauer, and on the background of a transcendental interpretation of John Stuart Mill's fallibility-argument, which is similar to Habermas' discourse ethics. Mill's core argument was that limiting free speech would express an assumption of infallibility, since improvements in knowledge for rational, but fallible beings may only happen through open discussion. This is a universal thesis about a condition for the development of knowledge, but has an important area of application in political decision processes, which is the central focus for this inquiry. Rational political decisions require open discussion as well, as it is irrational for the government, which knows its decisions to be fallible, to choose not to know what might have changed its decisions. Limiting free speech in public matters means increasing the risk that the judgement of the government is wrong.

When subjects of the law are also legislators, or authorise legislation through a representative system, other considerations are relevant as well. Under the conditions of a hypothetical social contract citizens should be able to conceive of themselves as parties to a contract through which the law has the authority of all citizens. This hypothetical social contract is implicitly accepted by anyone who has a right to participate in the processes by which law is made. A social contract is enforced. For an individual living within the territory of a political community, it is inevitable that he or she will accept the law to some degree. However, in addition to being enforced, some minimal acceptance has to be in place for there to be a *contract* in any sense. A minimal requirement of free speech is then the right to some kind of protest as a formal right of not being interfered with by the government in expressing oneself. The ideal requirement of free speech is the requirement that every citizen have real political influence, through access to effective media of communication. A

democracy has to satisfy the minimal requirement, and ought to have a policy of approaching the ideal requirement gradually and as closely as possible.

While the argument from rationality concerns free speech as necessary for the verification of truth-claims, the argument from democracy concerns the validity of legal norms and government decisions with respect to representativity. Through the idea of representation, the argument from democracy is related to the argument from autonomy. To realise a norm of autonomous or self-governing people, free speech is necessary on two levels. As subjects of the law people have to have free speech in order to make possible individual self-realisation with respect to rational faculties. As citizens, people should be able to influence the structure of rights, liberties and duties that they are subjected to, i.e. positive law. To a certain degree, the two modes of autonomy are co-dependent. Free speech, as a liberty as licence within the law, is, to some extent, necessary for people to develop views and argumentative abilities necessary to participate in government. Minimal free speech within the law is necessary in order to participate as a citizen. Given that some minimal degree of private free speech is established for people to develop some degree of independence, however, free speech as licence within the law is a right to be further specified within the legislative process. This process of specifying the limit of rights and duties, however, including rights and duties in speech, basically has to happen freely. Unless it is possible to participate in the democratic processes that authorises legislation, the system of law cannot be legitimate. On the other hand, legislative limits to free speech outside of the political process itself, such as defamation law, may be legitimate. The legal provisions on e.g. defamation may be valid with respect to legal enforcement, as long as the legal provision itself may be challenged as legislation. In this sense public autonomy, which is where the argument from autonomy coincides with the argument from democracy, is fundamental.

The argument from democratic legitimacy should take priority before the argument from rationality in a theory of free speech for an institutionally situated constitutional democracy. The argument from rationality is in principle universal, as it is concerned with human rationality as such. Although in principle unlimited within its scope, application to a particular system of law will tend to require compromises. Universal application of free speech for any situation where rational communication may possibly be involved is not realisable, for several reasons. One is the possibility of conflicts with other rights. As Bentham correctly pointed out, liberties need to be limited to be part of a coherent system of law. This coherence may be achieved either by discretionary weighing, or by limiting in scope. Discretionary weighing of free speech up against other rights delimits the legal liberty of speech, and is primarily a legislative task. A strong right to free speech, a right that should almost never be infringed upon, cannot extend universally to every kind of

communication situation. The right to participate in the central political processes authorising government decisions, however, should be secured by such a strong right. Free speech as a constitutive condition of democratic legitimacy should be unlimited in the sense that anyone should be able to contribute as they see fit in forming the common will that authorises and influences government decisions. This right corresponds to the exercise of public autonomy by citizens, which is the way citizens participates in specifying the scope of their own private autonomy as well. Moreover, free speech as a condition of rationality has an important application within the scope of the argument from democratic legitimacy. Unlimited participation rights ensure that any limit on the exercise of communicative rationality is itself open to argumentative challenge. For an institutionally situated constitutional democracy both rationality and autonomy are limited in particular cases, but such limitation of particular rationality and individual autonomy is *legitimate* if enacted through political processes that are open to participation.

Liberal theories of justice generally have a presumption against limiting liberty. In Kant, this presumption is expressed as the right to the greatest possible liberty that may be expressed as a universal law, i.e. exercised without infringing on the same liberty for everyone. (Kant 1983/1797: 337) In Mill, we find the idea that liberty may only be limited to prevent harm to others. (Mill, 1859 #38) Even though these principles give a strong presumption of liberty, it will still be the case that a considerable part of human action affects others' interests or liberties. For Mill, if a case can be made that some act harms other people in a serious way, this is a reason to consider prohibiting that act by law. For Kant, if my liberty cannot be reconciled with another person having the same liberty, the just thing to do would be to enact legislation that secures equal liberty.

Probably neither Kant nor Mill would accept limiting the liberty of publicising opinions on government policy. In assuming this, I take it for granted that none of them would consider the possibility that the White Election Alliance programme could be counted as punishable and possibly harmful action. However, the reason for criticising the conviction of Kjuus would probably in both cases be the argument from rationality. For Kant, the crucial point would be that the government could not want not to know of any good reasons Kjuus might give for his policies, for Mill that not allowing a free discussion of the views and strategies suggested by Kjuus would be an assumption of infallibility on behalf of the government.

On my theory, limited rationality and autonomy are necessary to have a coherent system of law, i.e. of rights and duties. The rationality and autonomy of the system of law is secured by the procedurally established democratic legitimacy. For a theory to be applied to a situation with no international sovereignty, though, the normatively significant *fact of citizenship* should be acknowledged as relevant to democratic

legitimacy. As a fact, there is a difference between being a citizen and not, with respect to rights important to the Kjuus case. The right of residence is part of citizenship, but for non-citizens held as licence, i.e. as permission given on conditions freely specified by the political community.¹⁰⁷ The right to political participation is for citizens a constitutive condition of democratic legitimacy, but for non-citizens held as licence.¹⁰⁸

On my theory of free speech as a constitutive condition of legitimacy for a constitutional democracy, free speech for citizens has special relevance. A possible justification for distinguishing between citizens and non-citizens is found in the idea of a social contract as establishing a positive system of law that is binding for the parties of the contract. Essential to the hypothesis of a social contract is that it explains how the enforcement of legal norms may be *valid*. As the validation of norms depends upon rational, but fallible processes of open communication, any question of the *moral validity* of proposed legal provisions is in principle open to infinite discussion. As the legitimacy of law enforcement is necessary to uphold civil society, a right to make *definite* decisions on normative issues has to be ascribed to the institutions of historically situated political communities. This right, i.e. sovereignty, is legitimate if based upon a social contract, the instantiation of which is the procedures through which citizens influence government. The procedures must be unambiguous, for definite decisions to be reached. There will have to be a supreme legislative body, as well as a supreme court of law. This guarantees that issues of what the law is, may always be settled. The legitimacy of the legislative body requires that there is a definite group of citizens, as recorded in a national register, that has the right to authorise legislation.

Founding legitimacy on the members of the political community has the advantage of being able to identify in an operational way the *people* as legitimising body. In a moral sense, however, this advantage has a price. The most important is that in a situation of migration between states, not every subject of the law will be citizen, and not every citizen will be subjected to the law. The validity of the law is mostly territorially bound, while citizenship is a membership right. Thus some permanent residents of Norway will lack full public autonomy on Norwegian territory, while some residents of Italy may have full public autonomy in Norway, but not in Italy. The situation is thus not one of perfect popular sovereignty, i.e.

¹⁰⁷ That the right of residence for political refugees, e.g., may be regulated by international compacts does not undermine the fact that the fundamental authority still resides with the political community.

¹⁰⁸ In Norway, non-citizens mostly hold the same rights to be politically active as citizens, including participation in political discussion, demonstrations, and even a right to vote in municipal elections. On my theory, this right is held as licence, and has its fundamental source of validity in the decision of Parliament, elected by and among citizens. Parliament is competent in setting the limits of political participation for this group, but would undermine its own legitimacy if participation for citizens were seriously infringed upon.

convergence between those participating in government and the governed, but the situated normativity established through political communities will anyhow have to be recognised by a theory of free speech for an institutionally situated constitutional democracy.¹⁰⁹

A strong right to free political speech

Free speech as a constitutive condition of democratic legitimacy may then be accounted for as *a right citizens as constituents of a political community have to exercise public autonomy through political participation*. The right to political participation is realised through procedures that involve the use of speech.

The *argument from rationality* is applied to political speech through the idea that speech may only be limited through legal provisions that are themselves open to discussion and criticism. In this way there is no *assumption of infallibility* involved in regulations or restrictions of speech outside the political field, as no matter of law is beyond criticism, directly or indirectly.

The *argument from autonomy* requires full exercise of the right to take part in democratic political procedures as well as to criticise the design of these procedures. Outside the political field, exercise of autonomy should be equal, but limited. Still, full autonomy is exercised, as the limits on autonomy in non-political situations may be criticised and discussed in political discussions.

The *argument from democratic legitimacy* is central to political speech, as participation in authorising government is open to every citizen as a constitutive condition of the legitimacy of the political system as such, of any legal provision enacted and of any decision by a court of law. The argument from democratic legitimacy is the principle of unity of the justification of free speech as applied to a institutionally situated constitutional democracy, as rationality and autonomy is limited by, yet realised through, free speech exercised in political participation.

Application to the Supreme Court judgement in Kjuus

The court proceedings following the White Election Alliance programme concerned issues of great social importance. Immigrants and adopted children were exposed to contempt, the Supreme Court ruled. It follows that the programme committed serious violations of public image and sense of self, involving also the implied threat to bodily integrity through the call for sterilisation of immigrants and adopted

¹⁰⁹ In practice, it seems that there is a moral presumption in favour of increasing the right to participation as licence for permanent residents. However, a complete solution to these normative issues is probably only possible within a sovereign political system on an international level.

children who could not be repatriated. For these reasons the Supreme Court majority judgement in Kjuus found that the value of free speech was outweighed.

Free speech is merely a formal condition of a democratically legitimate system of law. Realisation of a just society does require a wide range of rights beyond free speech, rights covering substantial issues of justice. To be protected against grave slander and violations of sense of self is considered such a right in present Norwegian Law. However grave the harms to immigrants and adopted children might have been, the authority of the Supreme Court in passing judgement on the programme still resides in the democratic legitimacy of the Norwegian System of Law. This implies that the Court cannot limit the right of Jack Erik Kjuus to write and publish a party programme, unless the limitations are justifiable in view of free speech as a constitutive condition of democratic legitimacy. Even if a case can be made that other rights are equally constitutive of the legitimacy of the system of law, these rights would have to be at least compatible with free speech, as free speech is necessary even for the formulation and critical examination of these constitutive conditions, in so far as they are to be constitutionally or legally implemented.

Imagine Kjuus walking through an immigrant residential area with a poster reading "Sterilise immigrants", or publishing a novel describing the terrible consequences of immigrants being allowed to breed freely in Norway. Convicting Kjuus for violating the racism article 135a of the Penal Code would in these cases have been considerably simpler, at least in view of free speech as a constitutive condition of democratic legitimacy. What Kjuus did, however, was to participate in a procedure central to the exercise of the right to democratic participation in Norway. His party published a programme criticising current legislation, and calling for amendment. The procedures Kjuus took part in are without doubt part of the central range of application of free speech, in other words within the scope of the strong right to free speech for citizens.

Within this scope, the ruling of the Supreme Court majority cannot be valid. Free speech as a constitutive condition of democratic legitimacy cannot be *outweighed* by other rights within its central range of application, as free speech for a political programme is a condition for these or any other rights *having weight at all* in a constitutional democracy. The Supreme Court minority's argument that free speech, as part of the Constitution, is *lex superior* in this case is then not a historical contingency due to the fact that some rights were more in fashion upon the drafting of the 1814 Constitution.¹¹⁰ As Justice Lund suggests, free speech is too important for democracy to be outweighed in this case.

¹¹⁰ Chief Public Prosecutor Morten Eriksen has suggested that the Constitutional Fathers did not intend free speech to be superior to protection against racial discrimination, as the latter right is of a later historical date. (Eriksen 1998) See chapter 2.

In the central range of application free speech is basic. Drafting and publishing a programme for parliamentary elections in which a call for legislative amendment is made, has to be permitted if we are to be satisfied that the system of law is legitimate. A reason to limit free speech within this central range of application would have to have a special structure. Such an argument would have to proceed through a further analysis of the justification of free speech as a constitutive condition of democratic legitimacy, with the purpose of finding further conditions of the validity of a claim to free speech that is not satisfied in *Kjuus*. Such conditions would not provide reasons to give free speech less weight. Rather, they would show that certain acts of speech are not protected by free speech, even though they are performed as part of the central procedures of democratic participation. In the second part of this dissertation, I will propose and critically examine such a condition, a *Mutual Recognition Restriction*.

4 The Mutual Recognition Restriction

There are strong reasons to hold that freedom of expression protects Jack Erik Kjuus' right to publish the programme of the White Election Alliance without legal prosecution. To put it schematically, a citizen has presented to the public a statement of his party's policy. He is convinced that this policy statement identifies a public matter of pressing importance. Argumentative defence is given for the party's position, and strategies for solving the problem are suggested. In expressing the argument, the citizen takes great care in avoiding explicit racist speech, which would be against the law – even though he may not consistently succeed in that attempt. Apparently we could not be closer to a paradigmatic case of what free speech is meant to protect. As Justice Lund recognises in his Supreme Court judgement, we are in the core area of free speech.

According to the justification of free speech developed in the preceding chapters, there ought to be a strong protection of such political participation as described in such a case. The schematic case seems to correspond perfectly to the case of Jack Erik Kjuus. Two strategies may be useful for showing that it might still have been legitimate to convict Kjuus in this case, as the court did. One would be a weaker version of the argument from democracy, allowing the outweighing of free speech by other worthy causes or rights. I have analysed the argument of the Supreme Court majority as an instance of this strategy. I believe however, that this strategy is mistaken, because of the central part free speech plays in securing democratic legitimacy. Balancing other rights against free speech in the core area of the autonomy of citizens to participate in the procedures of democratic politics has a price. The price is undermining the democratic legitimacy that is necessary for justifying the authority of the law, and thus of the courts of law as well. Rather than paying this price, another strategy may provide a valid restriction on free speech for reasons compatible with the argument from democracy. This other strategy is to show that the party program of Kjuus' *White Election Alliance* goes beyond expression within the limits of democratic politics. Provided that producing a party program before an election is a paradigmatic case of what the freedom of expression protects, it is difficult to claim that we have a right to free speech, unless it covers such central cases. What are needed to maintain that the conviction of Kjuus was

just, are reasons why the White Election Alliance programme fails to qualify for free speech protection by being beyond the scope of protected speech.

To develop this second strategy, and to examine critically the validity of this solution, is the central task of this dissertation. The solution I propose is that the scope of free political speech is limited by a *Mutual Recognition Restriction*. The restriction excludes from protection by free speech as constitutive condition of democratic legitimacy speech acts that are incompatible with other people exercising that same, or related rights, even though they have the relevant characteristics in virtue of which the speaker has free speech. In this chapter I will give an account of the notion of a Mutual Recognition Restriction.

Implicit rules of the game

Democratic political practice may be compared to a game with certain rules. The rules of the game demarcate which actions count as moves in the game and which do not. Rules can be bent of course; acting on rules is an innovative business - deciding how to move on in view of experience - and no rulebook can state every possible move. Still, the practitioners of a game are able to see when a player destroys the game by acting contrary or in opposition to its rules. Viewing democratic politics as a sort of game we may try to identify some moves that go beyond what this game is about, and then claim that to use these moves is to step out of the game.

Kjuus appeals to the citizens of Norway to support his program. This appeal is what constitutes the programme's being political speech within the frame of our constitutional democracy. He claims to be a democrat, and will not do anything unless he wins a majority vote. Thus he distinguishes himself from underground movements or terrorists who act illegally to advance their aims. In effect he identifies himself with a certain practice, democratic politics, and implicitly agrees to abide by the criteria of success and failure in that practice.

In so far as the White Election Alliance programme falls within the scope of democratic politics, Kjuus should enjoy free speech protection. Whatever moral standing we might take on the programme, we should recognise his right to express his political views publicly in order to gain support for those views in elections or fail to do so.

In this context we will have to examine the grounds of legitimacy of democratic decisions. Why do citizens in a democratic society under the rule of law have *reason* to accept government decisions and legislation, even when the result substantially goes against their interests, either as an individual or as part of a group, or does not express any values to which they themselves are committed? One reason for the legitimacy of such decisions, and thus for every citizen to accept them, is that every citizen can view himself as the *author* of that statute or decision. This authorship

derives from the citizen's having the opportunity to participate in the processes by which legislation is enacted and authorised. Every citizen of a democratic state has been able to *vote* in the election that authorises the legislators' or the government's right to *make* such decisions. Further, through their right to free speech they have had the possibility to participate in *public debates* where claims are expressed and suggestions criticised. And finally, everyone has through coming elections and continuing public argument the possibility of working towards *changing* the decisions already made.¹¹¹

Examining the Kjuus-case from such a perspective of democratic legitimacy, I doubt that citizens who are adopted from other parts of the world, or who are immigrants, have reason to consider Kjuus' programme a legitimate political option. Kjuus asks *the people* to support the White Election Alliance programme. The programme states that he, if he gets sufficient support, will repatriate a minority of the people, and presupposes that he legitimately may do so. He seems to think that he can do this by invoking an ethnic conception of a people, but the people he conceives of with his ethnic criteria is not the people that has the choice whether or not to support him in elections. The conception of the people relevant in political matters includes citizens who do not satisfy Kjuus' three-grandparents-criterion of ethnicity. If White Election Alliance were to have a majority in parliament, these citizens would be repatriated, and lose their citizenship.¹¹²

Considered as a political possibility in a democracy, what Kjuus suggests is paradoxical: He asks the voters for the right to enact legislation that gives *legitimate* grounds for expelling a minority *because of* this minority's right to participate in an ongoing democratic process of decision-making. This basis for the legitimacy of the decision is effectively undermined by revoking this minority's right to further participation in the process. It seems that there cannot be sufficient reason for the minority to accept such a decision, even if formal rules of procedure are followed, because the substantial basis for the legitimacy of the decision is lost in the process. The decision would be democratically legitimate because the decision-makers were citizens, but entail that some of them no longer should be recognised as citizens; and the decision, for that reason, cannot be legitimate. If I am right in this description, what Kjuus wants to do is something a democratic state under a rule of law cannot

¹¹¹This is a normative account of democracy, a theory of constitutive conditions under which political decisions are legitimate. A normative account differs from empirical theories of democracy explaining general mechanisms working within democracies. The validity of normative accounts thus does not depend on truth or correspondence with actual politics. The validity depends upon the relevance of the account as a critical perspective.

¹¹² This evaluation of what immigrants and adoptees have reason to accept is a normative one, presupposing a basic interest in preserving their interests as individual citizens. Real acceptance would probably differ, as some immigrants might actually accept the idea that "we do not belong here". These immigrants would perhaps share the belief of some anti-immigrationist that ethnic groups are best kept separated.

do, because the decision in itself goes against the conditions under which such decisions may legitimately be made.

Even though such decisions would be anti-democratic, working towards such a decision could still be counted as participating in a democratic process. The dissenting judges in the Supreme Court point to a distinction between enacting legislation in parliament, and declaring an intention to promote certain legislation. The minority of Justices suggests that the former would be illegal, while the latter cannot be. Of course such a distinction is a theoretical possibility, and may have practical applications, too. But I have some doubts as to whether this distinction is very sharp or captures a significant difference. We probably could not even understand the very meaning of declaring an intention to promote legislation, unless we conceive of it as part of working towards making political decisions. The entire process from forming an opinion to the authoritative decision has its meaning through what is aimed at, namely the implementation of the policy. We may treat Kjuus mildly because he *fails* at making a political decision because of lack of support, because there is a difference of degree between attempting something and succeeding in doing something. But if we think that what Kjuus attempts to do violates the constitution, we must at least recognise that Kjuus is guilty of attempting to commit such violation. Further, drawing a distinction between trying and succeeding is relatively insignificant to the issue of democratic legitimacy. To grant someone the liberty to argue in favour of a policy under the condition that such a policy could never be implemented may be an effective strategy of appeasement. In relation to the public autonomy of the agent, however, this licence to do politics tends towards disrespect. What is granted, is the licence to *pretend* that one is participating in authorising government.

I suggested that although there are strong arguments against limiting the scope of political speech, preservation of democratic civil society itself might be such a limit. It is a condition for the validity of Kjuus's claim to be protected by free speech that he himself recognises the same right for every equally entitled participant in the political process. Kjuus claims a right he is entitled to *as a citizen*, a right to advance his political ends *by democratic means*, requiring free political speech. But if Kjuus *qua citizen* has such a right, any other citizen has that right, too. I take this to imply that pursuing goals that implicitly deny the right to political participation for other citizens cannot be protected by liberties derived from this right.¹¹³

¹¹³ Here it is worth pointing out the relevance of the others' being citizens. Kjuus might claim that he is not attempting to deny the right to political participation of anyone, only that some people should have the right to participate in other political communities than this one. Being a citizen, however, one has a relevant characteristic linking ones right to participation to the particular community in question.

The condition of formal equality in relation to the status of a citizen in a democracy is not merely a proposed norm to be freely disputed. Kjuus might question the description of the normative context according to which he makes his claim. He might consider his claim to be generic for all white or ethnically Norwegian citizens. Others might interpret the claim as generic for all human persons. Both these claims are mainly related to a subjective ideal. At least in the case of the group of Norwegian white citizens, this ideal is merely asserted by Kjuus, and although Kjuus may feel morally obliged not to have an incoherent or contradictory set of ideals, this is mainly a subjective and personal matter. Considering the claim to be generic for all Norwegian citizens, however, is related to the institutionally situated political community of the Kingdom of Norway. This particular civil society has a national register and legal institutions that are entitled to give a definite answer to any question whether someone is or is not a citizen. The normativity of the condition of formal equality of citizens in a constitutional democracy is institutionally situated, i.e. related to an actually established political order. This does not mean that the condition is beyond criticism, only that there is a strong reason why it should not be ignored.

The relation between free speech and political participation

Both historically and as a matter of normative justification, popular political participation is a core area of free speech. Political speech is a paradigmatic case of what the right to free speech protects, including publishing a programme for a political party in democratic elections. This is recognised in the Norwegian constitution. Freedom of expression has the weakest restrictions when it comes to “speaking one's mind frankly”, and where such statements on questions of government are specially mentioned.¹¹⁴ An important condition for the legitimacy of democratic government is popular sovereignty, the idea that the supreme authority in political matters is the people, i.e. the citizens. To exercise this authority, citizens must be able to participate, as far as possible on equal footing, in the process by which political matters are decided. In representative democracies the right to a vote is a sanction, by which citizens appoint and remove governments, and thus enforce their approval or disapproval of the decisions made. But, considered as political participation, voting has serious deficiencies, for which free political speech is the remedy. Participating in forming government policy through elections is a means only available at intervals of years, allows few nuances and fails to process the claims of minorities of voters. Participation in public discourse is important, both as a supplement to voting, but also as a way of making one's interests publicly known and

¹¹⁴ Article 100 of the Norwegian Constitution is discussed in chapter 2.

justified, and as a way of participating in the reasoning processes that inform government decisions.

Free political speech is thus one of the main instruments for the exercise of popular sovereignty. As means of political participation and influence, voting in elections and free political speech supplement each other. The vote is a direct sanction of government, and ensures a formal equality between citizens. But this channel is closed when it comes to influencing single political decisions, or policies between elections, and there is only partial congruence between the set of options given in elections and the different comprehensive views on political matters held by citizens.¹¹⁵ There may be considerable minorities whose political views are not reflected by any political programme offered, while at the same time the members of these minorities do not perceive their interests as better served by forming another political party. Politics is a practice that favours certain distinctions more than others; both for good reasons and because of habit, while other distinctions matter at different times in people's lives.

Free speech is the right protecting the means by which any substantial issue is made relevant to politics. Public expression is also an indirect sanction of government. Public protesters or participants in public discourse do not by their very speech acts remove governments, as voters in elections may. Of course this is a formal point, not in any way implying that public opinion, or the public opinion of some agents in some media, cannot be powerful. The power of media, or of public appearance, to influence government cannot be ignored, but will not always be real expressions of the will of the people. Public expression, unlike the vote, will probably always be far from equally accessible. There will always be editors, economic constraints, and criteria of quality and importance that reflect the opinions of leading public speakers and mediators.¹¹⁶

¹¹⁵ The notion of comprehensive views should not be taken to imply that people in general have a coherent, all-inclusive normative guiding theory that informs their practical choices. The point is merely that people will often fail to find that all of their own ideals correspond to the policies of a single Norwegian political party.

¹¹⁶ A principle of equal opportunity for participation among citizens as a condition of democratic legitimacy is part of my interpretation of Norway as a constitutional democracy. On this interpretation, such equal participation is a critical standard that is inherent to, and may be used to assess, the Norwegian state of law. Should one for the purpose of legal application specify in any detail the criteria of when this condition is met, some qualifications would have to be made. I will mention two. Legislation to the effect that everyone be equally rhetorically competent would be futile. Some mentally disabled *citizens* lack this competence to such a degree that participation in government is ruled out. Further, a plausible hypothesis is that a well-functioning public discourse has a limited number of participants. If access to the media of public communication should not be regulated according to any other principle than that of equality among citizens, there is reason to fear that any attempt to develop public reasoning on a common political agenda would be futile amidst the cacophony of different opinions on different matters. In a situation without public editors, important discussions would still take place, but the level of competence necessary for identifying and keeping track of these discussions would increase significantly.

Still, in a situation without serious formal barriers to free speech, such as government censorship, the opportunity for people outside the circles of power to influence the government increases considerably. The channel of free political speech is not limited to the options previously given by the political parties, and may thus contribute alternative perspectives and solutions. Through public expression people may group and regroup according to ad hoc convergence of interests, thus making popular influence on public spending and legislation more fine-grained and reflective. By affecting government popularity, as measured in public polls anticipating elections, public expression may forcefully influence government policy. And finally, elections can be an informed exercise of popular sovereignty only if free expression allows public influence and criticism.

The asymmetry of citizenship

The right to citizenship involves a certain temporal asymmetry. Citizenship in a particular political community is not a human right. It is up to a particular community to regulate access to citizenship by law.¹¹⁷ Popular sovereignty is exercised by peoples that are historically constituted, and which legitimately may extend or not extend membership based on criteria freely chosen as part of the legislative process. Claims of injustice may arise if legislation applies criteria that are inherently racist, or similarly degrading. However, what counts as injustice in this way is a substantial question that probably will have to be decided in the political process itself. The result of such political processes becomes legally relevant through legislation.¹¹⁸

The asymmetry arises, however, in relation to the question of revoking citizenship. Even though the people have the authority to establish rules and regulations that deny some applicants citizenship, the people cannot justly revoke the citizenship rights of one person or an entire group.¹¹⁹ The possibility for every citizen to view himself as co-author of the law is the reason why citizens have a duty of compliance with the law, whether or not the particular citizen agrees with a particular legal provision. This condition cannot be realised in civic exclusion, because co-authorship is based on respect for free speech in the future as well as the present, and on the regular recurrence of elections.

¹¹⁷ This does not mean that any limitation by any criteria would be just.

¹¹⁸ Due to the increasing institutionalisation of Human Rights as international law, the character of the sovereignty of peoples may be changing. Still, both normatively, through the dominant Norwegian legal theory of Norwegian law as *lex superior*, and because of the absence of sufficient international enforcement institutions, I find that a general interpretation of democratic legitimacy as referring to the sovereignty of the people of citizens is still valid.

¹¹⁹ One exception may be the case of dual citizenships. Children may hold two citizenships, but will have to make a choice at the age of eighteen. Technically, the individual may feel excluded from one citizenship, but on the other hand is given the choice of which citizenship to keep.

First, popular sovereignty cannot rest only on the fact that the government was elected. As noted above, elections are inefficient as a channel of influence. In addition, however, comes the fact that some citizens could not, and some citizens did not, participate in that election. Non-participation may have been enforced (the citizens in question were e.g. not of age) or voluntary (the citizens in question chose not to vote). Minors cannot be held responsible for their age, and even though those who did not vote at the last elections might take some blame for their late awakening, this cannot be sufficient basis for exclusion. Furthermore, in constitutional democracies a Hobbesian transfer of sovereignty to a government only takes place in a qualified and temporary sense.¹²⁰ A particular government makes its decisions with full knowledge that its power is given, and its faults only endured by the people, for a limited period of time. Thus it is not only the previous elections, but also the ones coming in the future, that legitimise government decision, and give people a reason to comply with decisions they personally do not agree with. In coming elections, the decisions of the current government are approved or disapproved, through the mechanism of re-election. In this case, there is no difference between voters and non-voters, under-aged or not. All citizens are potential future voters, and thus exercise co-authorship of the law.

Second, as popular sovereignty is exercised through both voting and speech, the future is relevant for the right to speech, as well. Popular sovereignty cannot rest only in speech acts performed prior to government decisions. The legitimacy of government decisions is continually reaffirmed through the continuing public statements and criticisms, praise and protests, signs of respect or ridicule. Because this process is ongoing, particular government decisions are influenced by the people, and are open to revisions being called for by the people. As for the vote, there is a formal sense of co-authorship, whether or not one actually speaks in public.

Thus the formal guarantee of the legitimacy of government decisions through popular sovereignty does include every minimally competent citizen, because and in so far as he or she has the right to vote and the right to speak, not only now, but in the future as well. Thus arises an asymmetry of citizenship. While there may well be a people who authorise decisions to grant citizenship or not to outsiders, the idea of a people that authorises revoking the citizenship of its own members is self-refuting. If the legitimacy of political decisions rest in the authority of the people, everyone should have a potential channel of influence both now and in the future. Consequently, no government decision that denies future political influence through

¹²⁰ The transfer is qualified and temporary as any elected representative may be replaced with another holding another view. In another sense, the transfer is nevertheless absolute and irrevocable, because legitimate reform of the system itself may only be done from within the system. The temporary character of transfer of power thus constitutes no right to rebel against the system itself, only to hold its representatives and officials responsible.

the channels of speech and elections to a group of citizens can be said to be authorised by these citizens.

This asymmetry of participation rights is ignored when, as Kjuus and White Election Alliance does, a political programme is published that calls for the repatriation of people once accepted as citizens of the political community. The assumption Kjuus probably makes is that when someone accepts the rules of the election game, he or she thereby accepts, with no restrictions, any decision made by the majority. I have argued that this may be reasonably expected, only if these decisions may be revoked by a government in the election of which all current citizens may later participate, and in a political process where minority members have the right of free speech.

INCOMPATIBILITY WITH THE RECOGNITION OF OTHERS

The Mutual Recognition Restriction is excluding from protection by free speech as constitutive condition of democratic legitimacy speech acts that are incompatible with the same or related rights of others having the relevant characteristics in virtue of which the speaker has free speech. In relation to the Kjuus case, the incompatibility arises because Kjuus claims a right to free speech in order to state that immigrants and adopted children ought to be repatriated and lose their citizenship. Thus his claim for free speech as a right to participate in democratic politics, i.e. civic autonomy, contradicts the legislation he suggests, which has the implication that a considerable number of immigrants as well as almost every adopted child may be excluded from enjoying the same civic autonomy.

Different analyses are possible, however, of how this incompatibility or contradiction arises. Thus it is necessary to explicate this point of the Mutual Recognition Restriction further, in order to bring out the meaning of the principle, and to assess its validity. As part of the justification of his transcendental pragmatics, Karl Otto Apel has brought attention to the possibility of performing a self-contradiction that is not merely logical or propositional. A self-contradiction is *performative* if the propositional content of a speech act is contradicted by its *performative component*, i.e. what is done in the speech act itself. Taking Descartes' *Cogito ergo sum* as an example, Apel argues that the certainty of that sentence

is a transcendental-pragmatic condition of the possibility of the language game of argumentation in our sense. (...) [T]hat my doubting or thinking guarantees my existence rests upon the fact that when I perform the act of doubting my existence – an act that is explicitly expressed in the sentence "I doubt herewith that I exist" - I refute the sense of that very sentence for my self and, virtually for every dialogue partner. (Apel 1987: 278)

Apel's notion of a performative self-contradiction

In Apel's philosophical works performative contradictions serve as transcendental arguments demonstrating certain *a priori* conditions of valid argumentative discourse, thus providing a final and universal justification (*Letzbegrundung*) of e.g. discourse ethics. Apel's strategy of transcendental arguments is Kantian in origin, but reformulated as a reflection of the linguistic-pragmatic turn in philosophy, the change from a paradigm of the *a priori* of consciousness into a paradigm of the *a priori* of language. There is no understanding that is not mediated by the use of language in communication. As rational and fallible, human beings may only improve their knowledge in intersubjective and rational discourse. Thus certain conditions for the possibility of reaching or approaching intersubjective understanding becomes conditions for the possibility of the validity of moral norms as well.

The idea of Apel's discourse ethics is that the validity of norms depends on the possibility of agreement between all people concerned as participants in rational discourse. Certain conditions has to be accepted by every participant if communication is to serve as critical validation procedure, such as the force of the better argument as well as the absence of external force, and the equal right of other competent persons to participating in the discourse. These conditions are universally valid, as they will have to be presupposed by any serious participant in argumentative communication. They are paradigmatic, i.e. constitutive rules, within a "philosophical language game in which the scope of all language games can from the outset be discussed, and with a claim to universal validity." (Apel 1987: 271)

Apel finds that the validity of these constitutive rules of argumentation can only be shown through transcendental arguments.¹²¹ Through the identification of performative self-contradictions we become aware of the *a priori* conditions that are part of the first-person pragmatic presuppositions that is made through taking part in the language game of argumentation. The finding of these conditions constitutes what Apel finds to be a foundation or final justification of his philosophy, including discourse ethics.¹²²

¹²¹ Deductive reasoning will have to fail in providing philosophical foundations because of the exclusive possibilities known as the Munchhausen trilemma. According to this trilemma, attempts at establishing philosophical foundations will end up either in an infinite regress, a logical circle or an arbitrary decision to end justification. (Apel 1987: 251)

¹²² Although Habermas shares the view that transcendental arguments may uncover the rules presupposed by participating in communication, he denies that this constitutes a foundational argument or final justification (*Letzbegrundung*). The claim for foundations is, according to Habermas, a residue from the philosophy of consciousness. Philosophical *foundation* of certain *a priori* conditions of argumentation is neither possible nor necessary, according to Habermas, as the certainty with which we participate in communication is practical and not reducible to the truth of certain rule formulations. Habermas finds it dogmatic to claim the principles of discourse ethics as

The contradiction in the Mutual Recognition Restriction

Failure to observe the Mutual Recognition Restriction creates incompatible or contradictory claims. I have claimed that Kjuus cannot, given the Mutual Recognition Restriction, validly claim free speech to further certain policy claims in his party programme. The interpretation of the relevant passages in the programme in relation to which the contradiction arises may be formulated like this:

Exclusion claim: A statute should be enacted, according to which immigrants and adopted children should be excluded from Norwegian society through repatriation and revocation of citizenship.

Kjuus' claim of free speech is then a claim that "I am entitled to free speech in order to further the Exclusion claim". The contradiction arises because a condition for the validity of Kjuus claim of free speech is one of *equal treatment*, i.e. that everyone who has the characteristics in virtue of which Kjuus is entitled to free speech, is entitled to free speech as well. We will return to the analysis of the relevant characteristics below. However, the exclusion claim implies, on my interpretation, that persons who have the same entitlement to political participation as Kjuus should not be allowed to participate in elections and public discourse, which are constitutive conditions of democratic legitimacy. The claim of a right to free speech as a constitutive condition of democratic legitimacy to make the Exclusion claim thus becomes self-contradictory, and falls outside the scope of those political claims that cannot be limited by law without loss of legitimacy.

A *performative* contradiction that would be criticisable from the point of view of Apel's transcendental pragmatics may be formulated as an interpretation of the Exclusion claim:

Exclusion claim B: A legitimate statute should be enacted, which some concerned parties cannot have reason to accept in non-coercive communication.

The contradiction in Exclusion claim B is performative. This is because the content of the suggested statute is incompatible with the rational test of validity of norms, which is the acceptance of the norm by all concerned parties in non-coercive discourse. Through advancing in public discourse the claim that this statute should be enacted, Kjuus is *doing something* that makes sense only on the conditions of rational discourse. To deny these very conditions, even if by implication, constitutes a

philosophical truths. Like other reconstructions of pre-theoretical knowledge, the discourse-ethical principles are hypotheses; their validity to be tried in real discourse. (Habermas 1983: 106f)

contradiction between the propositional content and the performative aspect of the speech act.

The Mutual Recognition Restriction, on the other hand, does not refer to rules of rational discourse, but to democratic legitimacy within a political community. The existence of a particular institutionalised constitutional democracy is a normatively significant historical fact. A distinction between citizen and non-citizen is accepted as having normative force, implying an asymmetry between inclusion and exclusion as explained above. It is thus not the case that all concerned persons have full political autonomy, i.e. a right to participate in forming the common will of the political people through elections and public expression. Non-citizens may to different degrees enjoy free speech as a right to participate in public discourse, and thus real power of influencing political decisions, but then only as a legal right, a *licence to speak* granted subjects of the law.¹²³ Citizens, however, have free speech as a right to public participation that is constitutive of democratic legitimacy. A civil society in which non-citizens are denied free speech as a right to political participation may be less than perfectly rational in the sense indicated by John Stuart Mill as well as Apel and Habermas. If citizens do not enjoy such rights, however, this means that the civil society in question is less than perfectly democratic, and that a judgement by the Courts to deny someone such rights is democratically illegitimate.

This recognition of the distinction between citizen and non-citizen is, from the perspective of Apel, a limitation on discursive rationality. This limitation is due to the historical and legal fact of limited membership in a political community. Such limitations are not beyond criticism. Discourse ethics, as an ideal theory of intersubjectively rational morality, might be a relevant perspective, among other ideal moral theories, for assessing the moral relevance of citizenship in legal contexts. For a definite group of citizens constituting a civil society, however, law is democratically legitimate provided certain conditions can be met. A minimal condition is that legal provisions should be compatible with the status of competent citizens as possible participants in authorising legislation. Another is that legal provisions should be decided according to procedures that are themselves authorised by the citizens. Such conditions do not suspend claims of *universal moral validity* for norms on which an ideal consensus may be reached between all persons, not only between those that are citizens. Moreover, these conditions are in themselves put forward in a work of academic philosophy, i.e. for discursive validation. However, the issue here is not to settle the question of the universal moral validity of a certain restriction on free speech. The issue is to suggest a solution to a problem of the

¹²³ There may be *moral* reasons against withdrawing legal rights of speech and residence from non-citizens, but in principle doing so is within the competence of the legislators.

validity of this restriction as one a particular, institutionalised political community is entitled to enact.

To suggest a solution to this problem, I bracket the question of what would be the outcome of indefinite discourse in an ideal community. This bracketing does set a limit to discursive rationality, but a limit that is legitimate. While the universal community of rational and fallible persons may be the source of validity of norms in general, a particular political community may still be the source of valid political *decisions* enacting positive law. It is not obvious what the relationship between these two fields of normative validity is, and I will not explore that relationship in depth here. My normative hypothesis is anyhow that institutionalised political justice cannot be normatively subordinated to the moral perspective without undermining civil society as a state of law.

The context of the contradiction

The Mutual Recognition Restriction requires compatibility with the same or related rights of others who have the relevant characteristics in virtue of which the speaker has free speech. The relevant characteristic that allows the strongest argument in relation to the Kjuus case is having Norwegian citizenship. This is an important point for the application of the Mutual Recognition Restriction to the Kjuus case, but a point which has not been in the centre of attention either in the public discussion or in court. As actual citizenship is a relatively disregarded aspect of the Kjuus case, but the one central to the present analysis, some remarks should be made on possible alternative characteristics upon which the argument could have been built.

The distinction between citizen and non-citizen with respect to a right to free speech is a matter of political justice that is less relevant from the perspective of positive Norwegian law. Within Norwegian Positive Law citizens are privileged with respect to a right to vote in Parliamentary Elections, as well as a right to residence and other rights. Free speech, however, is not differentiated between citizens and others who are subject to Norwegian law through being in Norwegian territory.

The contradiction or incompatibility in a claim for free speech to advance the Exclusion claim must be read against the background of a common reference to conditions of legitimacy for the decisions of a constitutional democracy with definite membership. On the minimal condition of democratic legitimacy for such a society, Kjuus has a valid claim to free speech to participate in public discourse on matters of government. However, this right to free speech is something Kjuus is enjoying because of characteristics he has in common with most adopted children and quite a few immigrants. Provided that my argument for the irrevocability of citizenship is sound, the claim of Kjuus to have free speech as a right to political participation contradicts the very possibility of a legitimate political implementation of the

Exclusion claim. If Kjuus has the right to political participation, so have his fellow citizens, no matter who their grandparents are.

This means that the contradiction I focus upon is not performative. It is a contradiction between two claims made by Kjuus', the Exclusion claim and the claim, made both in public discourse and in court, that the Exclusion claim is protected by the right to free speech. The contradiction involves an implicit impossible situation in which the claims are realised, i.e. the political situation in which citizens do have a right to political participation *and* do not have a right to political participation. This situation is part of the interpretation of the claims, but involves primarily the propositional content, not the performative component of Kjuus' speech acts.

The contradiction is not only present in the two claims made by Kjuus. In fact the realisation of the Mutual Recognition Restriction is *primarily* concerned with legislation, a condition to be satisfied by the system of law. Had there not been a Mutual Recognition Restriction, democratic legitimacy would require that Article 135a should not apply to the public proposal of legislation as part of political participation. Given the Mutual Recognition Restriction, the legislators are entitled to restrict free speech on matters of exclusion, should they have reasons to do so. The restriction is on the level of constitutive conditions for the political system being democratic. The relevance of this analysis of the constitutive conditions to Kjuus is that it undermines the claim of free speech that is almost always valid for political participation, as a claim of justice.

The Mutual Recognition Restriction as applicable to Kjuus

The fact that the contradiction is on the level of the legal system is relevant for the question how Kjuus himself is related to the contradiction. In a performative contradiction the reference to the speaker as responsible for the contradiction is obvious. Mutual recognition is a condition of the possibility of argumentative discourse as a way to assess the validity of norms. If a speaker denies the entitlement to equal right to participation in the discourse, it is clear, if we reflect on the performative act of advancing the argument, and on the presuppositions of that performance, that he fails to make sense at all.

The case is different if the contradiction arises on an institutional level, and presupposes conditions of democratic legitimacy. The contradiction need not arise from the perspective of the speaker. Kjuus may not have considered the possibility that his two claims contradict each other, or if he has, he needs not accept it. Kjuus may fail to see how his claims are related to democratic legitimacy, or he may disagree that they are so related. He would probably disagree by considering ethnicity relevant to the question of the right to citizenship, an issue I will return to in the next chapter.

A main feature of civil society is the possibility of definite legal decisions, and therefore the acceptance of a particular feature of the law is not required for the law to be applicable to somebody's actions. Kjuus is subject to the law whether or not he accepts Article 135a of the Penal code. He has a right to defend himself in court against the claim that he has violated the legal code. He also has a right to try the constitutionality of applying Article 135a to what he has done. He even has the right to participate in public discourse to claim that Article 135a should be abolished. None of these rights is abridged by the Mutual Recognition Restriction. The Supreme Court has decided that the White Election Alliance programme violates Article 135a, and that sanctioning this is compatible with the Constitutional provision on free speech. The Mutual Recognition Restriction provides a justification from the perspective of democratic legitimacy for the legislators being entitled to limit free speech in the case of Kjuus, even though this is not the justification the Supreme Court has given.

The question of whether Kjuus accepts or understands the contradiction made in his claim to free speech to make the Exclusion claim is then of limited relevance. Kjuus' perspective may be relevant in so far as the Courts might have had acknowledged that Kjuus had reason to believe that his programme had free speech protection. In fact, the relatively lenient sentence may reflect such considerations. General acceptance and understanding may also be relevant to the question of what limits should be set to political free speech as a matter of legislation and adjudication, as the limits in question here may be difficult to see.

Failure to grasp the normative context in which the contradiction arises may be a reason to excuse what Kjuus did. The legislators would have to assess whether all participants in the political process should be expected to see and accept the validity of the Mutual Recognition Restriction, and to avoid unintended implications of their views. *E.g.* if Kjuus really thinks there is nothing in his views that implies denying equal rights to people of other races or cultures, and we may point out that there are such implications, is that sufficient reason to consider him politically incompetent, and silence him? Politics is a practice, and any practice can only be learned in practice. Anyone approaching political life from the margins, like Kjuus with his political party with 400 voters may be handicapped with respect to power of judgement.¹²⁴ He will be disadvantaged with respect to developing a sense of political etiquette, because he is not let in to mainstream political life.¹²⁵ He will have atypical

¹²⁴ The reference to the number of voters is to show the disadvantages of being a small party, not to argue towards a legal difference on free speech depending upon the number of voters. The leader of the largest party organisation should, legally, enjoy the same tolerance as the leader of the smallest, but the marginal politician will probably need this tolerance more.

¹²⁵ It is a ironic fact of the case one of the events leading up to the Kjuus case was the fact that a member of the populist right wing party *Fremskrittspartiet* (Progress party) participated in a political meeting where also Kjuus were present. This lead to exposure of different right wing groups, among these The White Election Alliance.

intuitions in political matters because otherwise he would be engaged in one of the major political parties. He will mainly be acquainted with people with the same shortcomings, as this is a consequence of their common place in marginal politics. Because of lack of resources, he cannot participate in political training programs that major parties can afford. Due to this lack of resources and distance from the academic and government centres of policy development, he will not benefit from having his policies refined by professionals and experts in public image. It is not likely that professionals with academic training in political theory will take part in the activities of the group, both because they would probably find the groups political views unattractive, and because less marginal channels of political influence are open to them. Nor will his political shortcomings be corrected by other and more politically educated participants in politics through public debate, because his access to major media is limited. In short, marginal political figures will likely formulate political documents that are flawed by intellectual standards, and unless these documents are allowed in public as attempts at practising politics, they will not stand a chance of further developing their political competence.

A certain degree of tolerance may well be wise in such matters. However, what degree of tolerance should be shown is in principle a question open to the decision of the legislators. The Mutual Recognition Restriction shows that the legislators are entitled from the perspective of political justice for a constitutional democracy to limit free speech in such cases as *Kjuus* is an example of. Whether or not to set such a legal limit, and the specific drawing of the line, is a political question.

The Mutual Recognition Restriction and rationality

In an interview following The Supreme Court's dismissal of *Kjuus*' appeal, the secretary of the Free Speech Commission, Ørnulf Røhnebæk, pointed out that a consequence of this conviction is that Norwegians who oppose general immigration policies of the government may only voice their opinion in vague and general terms. (*Dagbladet* 7 Nov 1997) Once the ramifications of that opinion for policy are spelled out, Norwegian hate-speech law is violated. In other words, *Kjuus* may claim that "Norway belongs to the Norwegians", but he will not be allowed to explain what that might mean when it comes to practical measures. Røhnebæk thinks that *Kjuus* actually served the cause of anti-racists through "detaljert å fortelle hvor mye blod og tårer som må renne for å skape et etnisk rent Norge" [in detail explaining how much blood and tears that would have to flow in order to have an ethnically pure Norway]. (*Dagbladet* 7 Nov 1997) A similar argument to Røhnebæk's has also been put forward by Kyrre Eggen in a recent paper. (Eggen 1998: 274)

The general drift of the mutual recognition restriction is that a view such as *Kjuus*'s, one which calls for the exclusion of Norwegian citizens from the Norwegian

political community, is not a legitimate political option, however abstractly it is put forward. Whether or not the public expression of such views should be allowed, and in what circumstances, is not a matter of the right to free speech as a claim of justice. The delimitation of the liberty of speech in this and similar cases is to be determined by the representatives of the people in the legislative process. One possible response to this argument is then, that it points to a minor incoherence in law, and not to a serious problem concerning free speech. However, one could also see this argument as a challenge to the mutual recognition restriction.

Within the argument from rationality we may ask whether the proper analysis of general points of view may be performed properly unless even illegitimate views may be held, defended and spelled out in public. How can we distinguish between views that violate the Mutual Recognition Restriction and those which do not, if no illegitimate views are put forward (tentatively) in public debate? How will it be possible to partake in a discussion of whether or not *e.g.* the White Election Alliance program violates the Mutual Recognition Restriction if the very object of discussion may not be publicly put forward and further explained by those who support it? Can an argument to the effect that there does not have to be free speech to work for the political exclusion of other citizens be rational? The 1995 White Election Alliance programme certainly was a vivid interpretation of what might be implied by the claim that "Norway belongs to the Norwegians". What would be lost, as a matter of rationality, if such expressions are ruled out by the hate speech provision in Article 135a of the Penal Code?

Is there an assumption of infallibility involved here, to recall Mill's core argument discussed in chapter 3? In general, silencing discussion of certain political measures would, according to Mill's theory, imply an assumption that one cannot be wrong on that question. If there is a possibility that reasons would be given that would make us change our minds, silencing such reasoning is irrational. We cannot rationally choose to make a decision that is less informed than what it could have been. If the validity of norms is equally dependent upon the possibility of discussing different proposed norms, refusing the public suggestion of certain norms is irrational for similar reasons.

The argument from rationality has a certain force. Allowing free speech to be limited means limiting rationality. Still, this does not necessarily lead to the conclusion that the Mutual Recognition Restriction is irrational. One reason for that is that we might have an irreducible conflict of rationalities or conditions of validity. The essential point is that political claims that contradict each other in the way indicated by the Mutual Recognition Restriction violate a core principle of rational, in the sense of legitimate, democratic policy. The legislators might choose to grant free speech to acts of expression like Kjuus' Exclusion claim, by providing a positive

provision of licence in the Constitution or in regular Norwegian Law, or simply by abstaining from prohibition of such claims. If so, the Courts' decisions according to the law have to be *accepted as valid*. Otherwise, considered as a claim of a right to political participation with reference to democratic legitimacy, the claim is, as contradictory, void.

At least this is what follows if the Mutual Recognition Restriction is a valid principle of democratic legitimacy for an actual political community. That, however, is a question that cannot be settled with reference to an actual political community. The question of what democratic legitimacy for such a community *consists in* is a philosophical question, answers to which may only be tested in open discourse, where normative and empirical considerations will be relevant. A requirement of the rationality of political decisions that has considerable force is that such discourse not be prevented from influencing the process of legislation. The Mutual Recognition Restriction gives a justification for the possibility of limiting free speech without limiting democratic legitimacy. The possibility of questioning and arguing forcefully about the validity of this justification, and about Article 135a of the penal code, as well as other legal provision limiting free speech, would not be seriously reduced by implementing legislation according to the Mutual Recognition Restriction. Only the proposal of political measures incompatible with recognising other citizens would.

It does not even follow that explicating the meaning of "Norway belongs to the Norwegians" is ruled out in every context. Academic discourse on the limits of free speech is probably entirely outside the scope of the Mutual Recognition Restriction. Political discourse on the limits of free speech would not be in violation of the Mutual Recognition Restriction even if the White Election Alliance programme is cited as an example. Reporting on the *Kjuus* case is still possible, as is giving hypothetical examples in normative discourse. And Kjuus may participate in these discussions. However, were Kjuus himself to distribute a pamphlet directed at removing or changing Article 135a of the Penal Code in order that calls for repatriation and sterilisation of immigrants be legally permitted, this would be a hard case. Such a political suggestion can hardly be anything else than a strategy for realising the 1995-programme. However, the Mutual Recognition Restriction does not imply that a legal provision that may be applied against claims of political exclusion is *required*, only that it is *legitimate*. Rational public communication about whether such claims should be sanctioned by law, by other means, or not at all still has to be possible. This calls for drawing the line somewhere between an indirect strategy of calling for the removal of the legal obstacles for making exclusion claims, and actually making them. However, there is no easy answer to this question.

Another important point is that most democracies use censorship to a very limited degree, and almost never in the central media of political communication.

Because of that, the claim that the conviction of Kjuus has the effect that one may not discuss openly which views violate the Mutual Recognition Restriction and which do not, only refers to sanctions after the fact. Kjuus or others may freely attempt to publish formulations of their views without full knowledge of what the judgement of the public and the courts will be. On the other hand, due to fear of possible or likely punishment, publication of views that are permitted by the Mutual Recognition Restriction may be prevented by the self-restriction of editors, publishers or the politicians themselves. Such chilling effects of legal sanctioning, even if not a part of law itself, should enter into considerations of justice, considerations of what the law could or should be. Questions of free speech concerns the substantial possibility, and even the attractiveness of making use of the right, too.

REPATRIATION, POLITICAL EXCLUSION AND STERILISATION

Introducing the notion of a Mutual Recognition Restriction to the analysis of the free speech issues in *Kjuus*, I have emphasised a certain aspect of the case. I have argued that the key feature placing the White Election Alliance programme outside the scope of protected free speech, is the intended exclusion of a group of Norwegian citizens from political participation. According to the Mutual Recognition Restriction, there is a contradiction because it is in their political capacity immigrants and adopted children would be affected by the White Election Alliance programme. In so far as the White Election Alliance programme is incompatible with the equal right of citizens that are immigrants and adoptees to political participation, Kjuus' right to participate through publishing a political programme is undermined.

I refrain from making a stronger claim of mutual recognition. I could have claimed that having a right to free speech implies that you ought to recognise the *rights constitutive of the political community*, or the *rights required for human dignity*. The first claim would involve respect for the social contract and democracy in general, and all rights that will be necessary for everyone to be full participants in political life. The other would involve respect for a wide range of human rights that may be necessary in order to exercise your autonomy as a moral person. There would be important advantages to conceiving of mutual recognition in such a wider normative context in its entirety. The concept of human dignity, e.g., does not distinguish between citizens and non-citizens, and thus allows an argument why what Kjuus is doing to all immigrants and adopted children is beyond protection by free speech. Further, it would allow letting not only repatriation, but also the sterilisation of immigrants and adopted not repatriated, be beyond what is protected free speech. Sterilisation is certainly a stronger violation of integrity than repatriation, even if it does not affect the political capacity of citizens. It is, moreover, probably the case that this would be more in accordance with the reasoning of the

Supreme Court majority, which was concerned with violations of bodily integrity more than with violations of political participation rights.

Political exclusion of citizens is not the only possible basis for justifying restrictions on free speech in the *Kjuus* case. Neither is the application of the Mutual Recognition Restriction to this case without problems.

Problems of application

Concerning the application, the argument from the Mutual Recognition Restriction would be strongest if the denial of recognition of the right to political participation, including free speech, were explicitly stated in the programme. Application will also be justified, but more weakly so, if it can be established that political exclusion is implied by the programme, i.e. may be part of a reasonable interpretation. A minimum requirement for application of the Mutual recognition restriction will be that political exclusion is a likely consequence of the implementation of the programme. What differs in degree between these cases is the extent to which the direct or indirect intention of *Kjuus* and the White Election Alliance undermines their own free speech defence. If the political exclusion is explicit, we may infer that *Kjuus* and his party directly undermine their claim to political free speech. As for the minimum requirement, we might say that *Kjuus* is undermining his claim to free speech relative to the predictability of the outcome, i.e. there being decisive reasons to believe that political exclusion will be a result of implementing the programme. The Mutual Recognition Restriction will be stronger the more explicit the intent, the contradiction being internally evident. The minimum requirement is weaker, based upon empirical assumptions on what will be the outcome, and on what outcome is predictable.

As for explicit political exclusion, the programme is clear on two points, citizenship and the right to vote.

1. Ingen utlendinger skal ha rett til norsk statsborgerskap. Bare norske mennesker (jfr ovenstående definisjon) er norske statsborgere. Dette vil si at ingen nye statsborgerskap til utlendinger innvilges, og at alle statsborgerskap til utlendinger etter innvandringsstoppen av 1975 inndras.

2. Valg. Utlendinger som kommer til Norge, f eks i forbindelse med forskningsprosjekter, har ikke stemmerett ved norske valg. (*Kjuus* Oslo City Court: 6)

1. No foreigner is to have a right to Norwegian citizenship. Only Norwegians (according to the definition above) are Norwegian citizens. This means no more foreigners will be granted citizenship, and all citizenship granted to foreigners after the End to Immigration of 1975 will be revoked.

2. Elections. Foreigners coming to Norway, e.g. to participate in international research projects, has no right to vote in Norwegian elections.

Citizenship, and the rights derived from citizenship, is to be a privilege for people belonging to the ethnic group of Norwegians; according to the White Election Alliance's three-grandparent definition. Should the programme be implemented, the citizenship of immigrants who arrived after the formal End to Immigration in 1975 will be revoked. ¹²⁶ As the White Election Alliance programme allows temporary residence of foreigners participating in international co-operative ventures, Kjuus finds reason to include a special article on their political participation. The reason for this is that the right to vote does not always require citizenship. According to current Norwegian legislation, foreign citizens may vote at municipal (but not general) elections after three years of residence in Norway. Kjuus will allow no such political participation.

Exclusion from the right to vote is thus the most explicit form of political exclusion in the White Election Alliance programme, most notably in the special article on the denial of voting rights to foreigners. Denial of citizenship strongly implies denial of voting rights, too. Now Kjuus does not explain the content of his concept of citizenship. Citizenship includes rights and privileges of residence and other elements not necessarily connected to political participation. One may even hold citizenship in states, yet have almost no right to political participation. Still, as the right to vote is among the central features of citizenship in Norway, as in any democracy, we are justified in assuming that Kjuus would deny non-Norwegians the right to vote.

On the other hand, whether or not free speech is among the citizenship rights the White Election Alliance programme implies the exclusion of immigrants and adoptees, is not equally obvious. My argument was that the vote is insufficient on its own as a channel of popular sovereignty, and that political participation sufficient to establish democratic legitimacy required free speech as well. In so far as a citizen of a democracy is understood as a source of political authority, having the right to vote and free speech are necessary conditions for full citizenship on this model. However, even if free speech is necessary in order to be a participant in government, being a participant in government is not necessary in order to enjoy free speech. Immigrants, although not citizens, are still subject to Norwegian Law, in virtue of living in Norway. Therefore, they have a certain liberty of speech defined by what is legal. Even the Constitutional provision on Free Speech grants a liberty to subjects of the law to speak their mind frankly on matters of government, without any

¹²⁶ Concerning repatriation, the White Election Alliance distinguishes between European and non-European immigrants. Europeans having immigrated before 1975 will be allowed to stay, while non-Europeans arriving as far back as 1960 will be repatriated. Strictly speaking, we thus have a group of non-European immigrants arriving between 1960 and 1975 who according to the programme may keep their Norwegian citizenship, but with no right to residence in Norway. It is unlikely that this is intended by Kjuus.

differentiation between citizen and non-citizen. Thus it is plainly possible to participate through the channel of speech in influencing the decisions of the Norwegian government.

The relevance of this point for the present discussion is that we cannot plainly infer from the fact that the White Election Alliance calls for revocation of immigrant citizenship and the right to vote that they also intend to end the liberty of immigrants to participate in political life through speech. Neither will the other measures suggested by the Alliance, repatriation and sterilisation allow such a strong implication. Concerning repatriation, the possibilities for influencing Norwegian politics will be diminished by being in another part of the world, the motivation for doing so will probably also be less. Still, increasing access to modern media like e-mail is making censorship of speech across territorial borders a considerable problem, and prosecution of the speakers a problem of different territorial jurisdictions. Whether or not Kjuus and the White Election Alliance would exclude immigrants and adopted from other aspects of political participation than the vote is an open question, as far as the White Election Alliance programme is concerned.

Looking beyond the White Election Alliance programme in order to decide this question, we find that at least the former incarnation of Kjuus' political organisation, Stop Immigration, called for a wider political exclusion. Giving an account of the Stop Immigration programme, *Aftenposten* reports (10 October 1988) that the party "vil stanse alle utenlandske pressgrupper samt utlendingers adgang til politisk virksomhet i Norge" [...wants to put an end to all foreigner's pressure groups, as well as the foreigners' permission to be politically active in Norway]. In other words, Kjuus would at that time like to put an end to the freedom of political association of those he considers to be foreigners, and to exclude them from political activity. Nothing in particular is specified as to what is meant by political activity. A distinction between discussing and commenting upon politically relevant matters and doing this with a view to influencing politics is possible, as there is both a theoretical and a strategic use of speech. Thus it is possible, in some circumstances, that an end to political activity would not mean an end to free speech.¹²⁷ On the other hand, public speech on political matters within democracies is essentially practical or normative. This is implied by the role of speakers as citizens, i.e. as participants in sovereignty. When a member of the sovereign body speaks publicly on political matters, one is entitled to presume that the speech is to be interpreted as a political proposal, i.e. as political activity.¹²⁸ That the call for an end to political activity

¹²⁷ In the People's Republic of China political activity is prohibited, but information flows quite freely (Gunnar Skirbekk, personal communication).

¹²⁸ Actually other interpretations are possible, depending on the context. The citizen may be joking, giving a parody, posing as politically active when he or she actually do not care, and so on. Still, the

includes an end to free speech at least on that area, is because of that the most likely interpretation.

On the other hand, the significance of the Stop Immigration programme for the interpretation of the White Election Alliance programme may of course be disputed. Legal scholars have, as we have seen in Chapter Four, questioned the legitimacy of using other texts than the one the indictment is based upon, i.e. the White Election Alliance programme, in interpreting Kjuus' statements. Kjuus was tried in court for an identifiable offence, the 1995-programme, not his entire political career. Using other sources than the programme itself in support of a certain interpretation erases the boundaries between this act of speech and others. Even though the notion of one single offence is less clear in the case of the meaning of a statement than in the case of e.g. physical violence, a restrictive practice is understandable in such cases.¹²⁹ In view of Kjuus' rather dominant position within all his political parties and organisations, the rather short period of time between the 1989 and 1995-elections, the tendency to a more uncompromising rather than a more lenient attitude towards immigrants in the 1988-programme gives some support to the hypothesis that Kjuus and the White Election Alliance intends to exclude immigrants from political participation in general, not only from voting and holding Norwegian passports. The legal force of this interpretation may of course still be limited, due to the need to identify the particular offence.

Sterilisation as reproductive exclusion

While calling for repatriation and revocation of citizenship constitutes lack of recognition of immigrants and adoptees as political participants, the call for sterilisation or abortion represents another form of denial of recognition. The violation of bodily integrity such measures represents may be considered a reason for limiting free speech, as is agreed by the Supreme Court majority in Kjuus. The statements made about sterilisation and abortion in the White Election Alliance

general presumption is that public speech on political matters in a democracy is an instance of political participation.

¹²⁹ Interpretation is in general improved by viewing a statement in view of the history of the speaker. Even if a certain statement may be fixed in time and space, the relevant background for the meaning of the statement should be sought in a wider personal and cultural context. With respect to legal enforcement of an interpretation, however, other general considerations of law is relevant. One might invoke a presumption of innocence in the sense of a principle that one, among several possible interpretations, choose the one that is most likely to be legal. Against this consideration counts that interpretation is not, technically, a question of guilt on which a presumption of innocence may be relevant. The question of guilt in the Kjuus case concerns whether or not Kjuus is responsible for publishing the White Election Alliance programme, which is not disputed. Interpreting the White Election Alliance programme is part of the application of law, i.e. the deciding whether or not that which is said is what the law forbids. This application consists in establishing a correspondence between a particular source of law and the explicit expression the law may or may not apply to. The chosen interpretation will have to be justified with reference to the explicit text that is the one Kjuus is indicted for publishing.

programme are considered to be “uttrykk for et syn om at det bør foretas helt ekstreme integritetskrenkelser overfor mørkhudede” [expressive of the view that extreme violations of the integrity of dark skinned people should take place]. (*Kjuus* Supreme Court) These violations, i.e. forced sterilisation and abortion, are put in the balance by the Supreme Court majority, and contribute to the decision that the protection of free speech is not sufficiently important in this case.

The call for sterilisation is thus an important aspect of the reaction against *Kjuus* in the courts, and probably in the public as well. This is in itself a reason to discuss the relationship between my approach, where the Mutual Recognition Restriction and the political aspect of the person is central, and the violation of bodily integrity represented by the call for forced sterilisation. And there are other reasons as well. The crucial issue for the Mutual Recognition Restriction is the political exclusion that is implied by, or at least a likely consequence of implementing the White Election Alliance policy toward repatriation and revocation of citizenship. But if repatriation and revocation of citizenship constitutes exclusion from political participation in society, then forced sterilisation is important as exclusion from the reproductive participation in society. Some reflections will have to be made on this parallel, as this is important in clarifying the concept of a Mutual Recognition Restriction, as well as in discovering its possible limitations. I will focus upon sterilisation, and not discuss the case of forced abortion, as the only purpose of this in *Kjuus*' policy is to compensate for particular failures of performing sterilisation. The issues of reproductive exclusion do not require a separate discussion of abortion.

It is worth mentioning, that sterilisation is not always a violation of integrity. Sterilisation is a surgical procedure, chosen by many as a method of contraception. Forced sterilisation is a violation of integrity, as the person is not allowed the choice whether or not to submit voluntarily to surgery. Still, it is not, or has not always been, obvious that the integrity of the person should be protected without exceptions in the case of sterilisation. In Norway, the Sterilisation Act of 1934 allowed forced sterilisation of the mentally ill or people with “særlig mangelfullt utviklede sjelsevner” [especially underdeveloped mental abilities].¹³⁰ Similar legislation existed in the other Scandinavian countries. Contrary to German practices under the Nazi regime, the purpose of the Norwegian Sterilisation Act was not to discriminate between races. A certain degree of eugenic practice was, however, considered a

¹³⁰ These remarks on former sterilisation practices in Scandinavia are mainly based upon discussions in *Aftenposten*, especially “Nordisk rasehygiene i Auschwitz’ skygge” (30 August 1997), “Misvisende om nordisk sterilisering” by Professor of the Philosophy and History of Science at the University of Oslo Nils Roll-Hansen (8 September 1997) and “Fortjener å bli husket” by Professor of History at the University of Oslo Øystein Sørensen (6 May 1998).

necessary part of public health policy in the emerging Welfare State.¹³¹ The Sterilisation Act of 1934 was in force until 1977.

Norwegian health authorities today do not practice sterilisation as a means of improving the genetics of the population. Still, the question of the legitimacy of forced sterilisation is not easily dismissed. Protecting the bodily integrity of the person is important, but even if public health in general is not considered a sufficient reason for sterilisation, protection of others is a harder case. E.g. in the case of seriously mentally retarded, should their right to conception take precedence before the right of their children to be raised by parents equipped to handle the responsibility?

While Jack Erik Kjuus in 1997 was convicted for suggesting legislation to the effect that immigrants should leave the country or accept sterilisation, the Norwegian parliament discussed (and rejected) a bill proposed by Progress Party MP Jan Simonsen to the effect that people convicted for sexually assaulting children should accept chemical castration or be permanently imprisoned – a suggestion inspired by current Danish practice.¹³² I certainly do not claim that there is no justification for the one case to lead to a fine and suspended imprisonment, the other to parliamentary debate. However, these cases show that the mere suggestion of forced sterilisation or castration is not considered by Parliament to be too strong a violation of integrity to be debated as a serious bill.

It is not obvious what this implies for our assessment of the forced sterilisation aspect of *Kjuus*. As such or similar measures have been part of recent public health policy in our country, and are still debated in Parliament, the Supreme Court claim that forced sterilisation is an extreme violation of integrity is quite remarkable. The Supreme Court gives no account of the general legal and political implications of something being an extreme violation of integrity. A reasonable assumption would be that violation of integrity is considered a strong reason against implementing a policy, while such violation in the extreme is considered a reason that should not be outweighed by other considerations. The Supreme Court characterises sterilisation as an extreme violation, and the mere suggestion of such measures a reason to suspend free political speech. Thus it would be reasonable to read these remarks made by the

¹³¹ According to Nils Roll Hansen (*Aftenposten* 8 September 1997), Karl Evang, a central force in Norwegian health policy and for many years Director of Public Health in Norway recommended eugenic measures on socialist criteria in a 1934 book attacking Nazi race theories and policies (*Rasepolitikk og Reaksjon*), as well as in a 1955 article in the medical journal *Nordisk Medisin*.

¹³² Simonsen suggested that medical treatment (castration) should be a condition of leaving prison after completed serving of the sentence for people repeatedly convicted of sexually assaulting minors. (Dok.nr.8:109(1995-96), Innst.S.nr.121(1996-97)) In Denmark, felons may be sentenced to custody for an indefinite period of time if their release is likely to be seriously dangerous to the life, body, or health of others. Those in indefinite custody may apply to the Prosecution or the Court for release twice a year. Since 1989 chemical castration has in several cases been accepted as a condition of release for sexual offenders. Before that, different forms of medical treatment were tried, after surgical castration of sexual offenders was abandoned in 1970. (*Aftenposten* 2 September, 13 September 1996)

Supreme Court as a strong moral dissociation from former practices, and implying a strong reprimand to Parliament for considering such measures as policy against crime. On the other hand, if the Supreme Court intended setting a limit to free speech excluding the suggestion of measures that were in force twenty years ago, as well as similar suggestions currently being made and debated in Parliament, one should expect the Court to be more explicit. This is a reason to suspect that the Supreme Court did not see the possible significance for the scope of free speech of the remark that forced sterilisation is an extreme violation of integrity.

Probably the disgust expressed by the Supreme Court for the sterilisation measures suggested by the White Election Alliance should not have been directed at the issue of forced sterilisation in general, but rather at forced sterilisation without relevant justification. Still, the question of what justification could be relevant would also have to be decided in open political discussion. Sterilisation as a means of purifying the race has not been practised in Norway, although issues of the general health of the population were considered important fifty years ago. Sterilisation of people with seriously underdeveloped mental abilities is abolished as a policy today, and castration of criminals has no history in Norway. Still, considering such measures to be beyond what may be politically debated, requires strong justification. In the case of political exclusion, such justification was provided through the requirement of Mutual Recognition. As political recognition of immigrant citizens, both now and in the future, is required for the legitimacy of our political system, a restriction on free speech may be warranted. Prohibiting forced sterilisation in general may be in accord with current moral beliefs, but Millian considerations should warn us against letting too much depend upon the correctness of these moral beliefs. To limit discussion on such grounds comes close to what Mill refers to as “an assumption of infallibility”. At least in cases where the rights of other parties are at stake, e.g. children born to incompetent parents, or children exposed to the risk of sexual assault, the opinions in favour of sterilisation or castration are not that unreasonable. Or, in other words, the reasonability of such opinions will have to be settled through the political process itself, which requires free speech.

A wider sense of reproductive exclusion, may, however be relevant even for the question of political exclusion. The sterilised would not only be excluded from biological parenthood. Generally, they would also be excluded from the social aspect of parenthood, i.e. from raising children. To the persons involved this may threaten their sense of self-realisation, as well as membership in a society of families. But more central in a social and political sense is the family as the institution responsible for the ethical reproduction of society. Children acquire the ability to see something as valuable, and to pursue worthwhile goals through their primary socialisation within the family. Communitarians may overstate the point that our ethical

perspective derives from the culture within which we are brought up. However, we need only acknowledge that our parents play some important role in developing our ability to take a moral stand to public issues. If some such role is played by our upbringing, then social parenthood is a part of what forms the way interests are formulated and defended in political life - and contributes to giving our political position its substantial content. Following this line of thought, people who have been sterilised for belonging to another culture or ethnic group have been not only harmed in their bodily integrity, but are also denied an important way of influencing the ethical substance of society. Even had they been granted full political rights, their conception of the good would gradually fail to influence political priorities, as there would be no new generation sharing their perspective, or having the double perspective necessary for cultural integration. Even with full formal representation they would to a lesser degree than non-sterile Norwegians be participating as sources of the values informing politics.¹³³ The implications of making reproduction of values a legally regulated right would, however, be dramatic with respect to family control, and other illiberal measures.

The right to raise children does, however, have to be conditional upon evaluations of the quality of the upbringing. This is expressed in Norwegian child welfare legislation as the idea that the well-being of the child has priority over rights of other parties. Parents who fail to provide what is considered proper care of their children, may to different degrees lose their liberty to raise them. The child, a weak party in need of protection and guidance, suspends whatever claim parents have to recognition of a right to participate in the ethical reproduction of society. In this the case of children is special, not because adults do not differ in power and competence, but because the formal equality of adult citizens as authors of the law is the normative ideal a procedural democracy aspires to. Thus Kjuus ought to have the right to free speech in claiming that immigrants are a problem in our society, and that the solution is a sterilisation programme, because of the general justification of free speech. Only if he denies that other citizens, i.e. immigrants, are equally legitimate participants in politics, is his claim to free speech undermined. As for the questions of a right to conceive and raise children, this right should be dependent upon what is in the best interest of these children. What is the interest of children is, however, a matter on which opinions will differ. Without free speech on such matters, we have, on Mill's theory, no rational assurance of being right.

¹³³ In principle, Kjuus might of course avoid this form of politically relevant reproductive exclusion by having Norwegian orphans adopted by sterilised immigrants in Norway. Then they might participate fully in the primary socialisation part of the ethical reproduction of society, and be full - albeit sterilised - members of society, provided they have full formal political rights. In practice, however, this possibility is not relevant to the present case. Kjuus cannot be expected to let immigrants raise ethnically Norwegian children, and he does not intend to let immigrants enjoy full political rights.

The relevance of the Mutual Recognition Restriction to the Kjuus case

The relevance of the Mutual Recognition Restriction to the *Kjuus* case is dependent upon the merits of a certain reading and a certain perspective on the case. I have in this section discussed some points at which this reading and perspective may be controversial, both in order to clarify the perspective, and to examine it critically. In conclusion, I will sum up the most significant points. First, there is no explicit textual evidence that Kjuus in 1995 intended to exclude immigrants and adopted from political participation in every form, including forms of speech. The justification of the direct application of the Mutual Recognition Restriction thus rests upon

- (a) a normative hypothesis being part of the rationale for the Mutual Recognition Restriction that democratic legitimacy requires both the right to vote and to speak, and that exclusion from the one (i.e. voting) constitutes political exclusion. If so, the explicit denial of citizenship and voting rights in the programme in itself undermines Kjuus claim to free speech.
- (b) the report that Kjuus had such explicit intentions in the 1989 programme of Stop Immigration, provided this is accepted as a relevant context for the interpretation of the 1995 programme of what is nominally a different party, but probably under the same kind of strong authority of Kjuus himself.
- (c) the empirical hypothesis that repatriation would, as a matter of fact, diminish the possibility and motivation of most of the immigrants to participate by means of speech in Norwegian politics, even if modern communication and information technology makes this less a question of territorial jurisdiction.

The second point is that the call for forced sterilisation and abortion may in itself be a candidate for limiting free speech, in virtue of being a serious violation of bodily integrity. My claim, however, is that political exclusion is special in undermining the legitimacy of political discussion itself, while recommending forced sterilisation does not have these implications, and thus is protected by the right to free political speech. The fact that forced sterilisation is part of our recent history, and that the similar measure of chemical castration was discussed in Parliament at the time Kjuus was tried in court raises the question why Kjuus in particular should be denied free speech in making this suggestion. I admit, however, that reproductive exclusion in the sense of being denied the right to participate in the ethical reproduction of society through raising children has indirect political relevance. On the other hand, as being a parent involves another, weaker party, such reproductive exclusion may sometimes be called for, on criteria decided through political procedures requiring free speech.

LAW, JUSTICE, LEGISLATION

Transgressing the Mutual Recognition Restriction in speech is something that *may* be prohibited by law. Such speech is beyond what is required for democracy, and thus *not within* the scope of protected free speech. It should, however, be noted that nothing in the Mutual Recognition Restriction implies that what Kjuus did *should be* sanctioned by law. By exempting speech acts that do not recognise other citizen's free speech from the scope of free speech as required by justice I only claim that this question is to be decided by *the people* through ordinary channels of legislation, as part of positive law. We must distinguish between what we morally condemn - what we think is wrong - on the one hand, and what we think should be illegal on the other hand. This distinction protects a field of moral agency; to be moral agents we must be free, within some fairly broad constraints, to choose what is right, and to disagree about what constitutes acting morally rightly. Because of that, we cannot want everything we think morally wrong to be illegal. Among the things we think should be illegal, we should distinguish between what we allow because justice requires us to allow it, and what we allow because of a consideration of the pros and cons of doing it. We must consider legislating against justice as illegitimate, but legislating against our prudent judgement as only unwise, but still legitimate if legitimate procedures of legislation are followed. What I claim, then, is that convicting Kjuus is legitimate, but that does not in itself address the question of whether it is *prudent* to have such a law.

We should then distinguish properly between a constitutive level, consisting of the principles necessary for a just democratic constitution, as well as the written Constitution itself, and a legislative level, consisting of positive legislation based upon every other consideration, and mainly the balancing of conflicting interests and objectives. To this distinction corresponds one of competence between different institutions in a democratic political system. Legislation is the function of the Parliament, the decision being made by a simple majority.¹³⁴ The Courts, in addition to being part of the implementation of that legislation, have a special function in making sure that legislation takes place within the boundaries of the constitutive conditions of democracy, as expressed in the Constitution. The Mutual Recognition Restriction is a formulation of one such constitutive condition, which ought to be a principle of interpretation of Constitutional law when it comes to free speech.

The implication for the Kjuus case, was the Mutual Recognition Restriction to be applied as such a principle, would be that it is not necessary that statutory law (Article 135a of the Penal Code) is set aside because of constitutive conditions of this

¹³⁴Parliament legislates on the constitutional level as well, but by a larger majority and on other conditions. Given constitutive conditions of a constitutional democracy, however, not every such decision will be democratically legitimate.

political community, or of democratic political communities in general. The justification of the requirement that political expressions should not be limited, i.e. citizens' ability to participate in political life, does not extend to cases like *Kjuus*, because Kjuus himself does not recognise that right for citizens in general. For this principle to be legally valid, however, it would have to be enacted in some way, either by a Constitutional Amendment, or by being recognised by the Courts as relevant for the present written Constitution.

As a constitutive principle of a democratic constitution one should not forget that its focus is on protecting both the rights of citizens and the legitimacy of political decisions. The most important function of the Mutual Recognition Restriction in relation to free speech is that it allows maintaining a strong principle of free speech, by a relatively small limitation in scope. The implications of the opinion of the Supreme Court majority is that free speech is only one among many rights, being balanced against them in a way that in this case was relatively unprincipled or poorly accounted for. The Mutual Recognition Restriction defines a scope of free speech that is necessary to protect the central range of application of free speech, and particularly democratic legitimacy.

It is obvious, however, that the political conception of a people is not the only one at work in the *White Election Alliance* programme. Kjuus also invokes an *ethnic* conception of a people. He thinks the only real Norwegians are the ones who had at least three grandparents that were also Norwegians. Now it is not clear what this means. If the meaning of this criterion is to include everyone who had three grandparents that are or were Norwegian citizens, then ethnicity need not enter into settling the question of who is Norwegian at all. Then lots of Muslim immigrants could become Norwegians through family reunion programs through which their grandparents become citizens. I take it for granted that this is an option Kjuus would not accept. On the other hand, if we consider this criterion purely ethnic, it is in itself void. A criterion that decides who is Norwegian by asking who was Norwegian two generations earlier does nothing to sort out what made the people of this generation, our current grandparents, Norwegian, and thus does not operate as a criterion at all.

Whatever the deficiencies of Kjuus' concept of a Norwegian, however, we must recognise the fact that the political concept of a people is not the only one needed to understand Kjuus' point of view. Some kind of ethnic or cultural conception of a people is too deeply rooted in our cultural identity or conception of ourselves to be dismissed without discussion. Some ethnic or cultural conception of a people seems to affect the legitimacy of a political community, historically and in widespread opinion. Thus a discussion of the idea of protecting national culture or ethnicity is relevant to deciding the validity and scope of the mutual recognition restriction.

This discussion of the relevance of ethnicity or culture addresses one of two central presuppositions for the Mutual Recognition Restriction, i.e. the idea that what I have called a political people or community has normative priority before the ethnic people or community. The other presupposition is that the argument from an asymmetry between inclusion in and exclusion from citizenship shows such exclusion to be in principle illegitimate. These two presuppositions will be addressed in the remaining two chapters.

The purpose of the present inquiry is the explication and evaluation of a proposed limit to the scope of an institutionally situated strong right to free speech. The object of study is a conception of democratic legitimacy that is both situated within a system of law and within the procedures of government for a political community, and yet constitutes a critical perspective on that community. This critical perspective is immanent in the political and legal institutions as the constitutive rules that identify the institutions as a constitutional democracy. An interpretation of constitutive conditions or rules is one of constructing a normative model that is internally coherent, and which may account for central features of constitutional and formal law, as well as for actual historical choices between real options. To this integrated and interpretative approach both philosophical perspectives and historical examples will be relevant. This is already apparent through the purpose of the inquiry being both to contribute to a theory of free speech as a constitutive condition of democratic legitimacy, and to contribute to the normative assessment of *Kjuus* as historical and legal case. The interpretative approach now requires a wider philosophical and historical context, as the scope and validity of the Mutual Recognition Restriction depends on its ability to account for a wider range of philosophical problems and relevant historical cases.

5 Citizenship and culture

A central presupposition of the Mutual Recognition Restriction is that a political conception of a people or of community has normative priority over an ethnic conception. Such conflict is central to the Kjuus-case. Kjuus attempts to use the political system to achieve something beyond the system's competence, namely to exclude a part of its own constituency for a reason that is either alien to, or should be given lower priority than the constitution of the political system itself. This reason is the claim that ethnicity should be protected. And one may not dismiss this claim easily. As a matter of fact, ethnicity has been an important criterion in establishing the national states of Europe, and a contributing factor to conflicts within political communities. We recognise many claims made on behalf of ethnic groups as reasonable. And being Norwegian in more than a political sense is important to our mentality even today.

As Norwegians, we are brought up with a strong patriotism. This patriotism is in important ways linked to the constitution through the Constitution day, 17 May, which is a major national holiday. However, this patriotism is just as much linked to a sense of a common identity, which may be the core of Kjuus' idea of ethnicity, and to a common language, history, literature, music, art, to remarkable athletes and other public figures, to ways of eating and socialising, in other words to Norwegian culture. The main events in modern Norwegian history are all instances of shaking off the yoke of oppression - of getting the others out of here. The Constitution of 1814 not only marks the establishment of the new, democratic Norway, but also our liberation from Danish power. Another great year of Norwegian history is 1905, when the personal union¹³⁵ with Sweden ended. And finally, a formative experience of more than one generation of Norwegians was the German occupation (1940-45), and another successful liberation. A powerful image of a Norwegian hero is someone standing up to protect the fatherland against foreign powers or the power of foreigners.

However, Norway, being a relatively stable and ethnically homogeneous political community, does not make an exemplary case study for understanding the

¹³⁵The union was a *personal* one, as the kingdoms of Sweden and Norway had separate political institutions but had the same person as Head of State (king). Initially this also meant a common foreign service.

significance of ethnicity or culture in establishing and developing political communities¹³⁶. Introducing other cases and theoretical discussion originating in other contexts will be helpful in order to examine critically the scope and validity of the mutual recognition restriction. Canadian theorists like Will Kymlicka and Charles Taylor have made important contributions to the discussion of the relationship between rights and culture. The ethnic composition of Canada is complex, for it is a federation of provinces established by English and French settlers, with several native peoples¹³⁷ as well as immigrant groups retaining their cultural traits. Against the background of a modern liberal position modelled upon Rawls' political philosophy, Kymlicka recommends that culture should be protected as assiduously as individual rights. Cultural survival in the French-Canadian province of Quebec is an important issue to Charles Taylor, who articulates a strong defence for the need of cultural communities to have cultural survival as a constitutive political goal. We will discuss a possible resolution of the dilemma of rights vs. culture in conjunction with Jürgen Habermas's response to Taylor's argument.

The priority of the political is a thesis about the normative foundations of a constitutional democracy. The viability of such a political system is, however, dependent upon much more than its legitimacy. If minimal material conditions of economic, social and political stability are not satisfied, a community may be seriously dysfunctional, whether or not the formal media of participation that guarantee legitimacy are in place. If there is no sense of common identity or patriotism, this may undermine the stability of a political system as well. In an indirect sense, conditions that in this way affect the continued existence of society become material conditions of having a constitutional democracy. Circumstances in which ethnic composition is the source of conflicts threatening the stability or existence of society will thus be hard cases for delimiting the scope and examining the validity of the Mutual Recognition Restriction.

The Treaty of Lausanne, which established peace between Turkey¹³⁸ and its enemies after World War I, will be a focal point for addressing these issues. Massive exchange of people took place between Greece and Turkey, Orthodox Christians being deported to Greece and Muslims to Turkey. To establish stability in a turbulent area, religion as an aspect of culture was used to justify extensive forced relocation of people, without regard to membership in either linguistic or political communities.

¹³⁶Norway has a native national minority, the Sami people, as well as immigrants of different cultural background. However, the political sovereignty of the Norwegian government is not seriously challenged at present.

¹³⁷Inuits and different Indian peoples.

¹³⁸Properly speaking, not the enemies of Turkey, but of the now collapsed Ottoman Empire of which the newly formed state, Turkey, had been the core area.

A discussion of the need to protect national culture is to some degree a discussion of the substantial issues Kjuus is addressing, and sheds light on whether something like Kjuus' goal, if not his means, is a legitimate goal for a democracy. I could have claimed that purely formal arguments from the nature of democratic civil society, or arguments from the grammar of the language of rights, would suffice to establish the mutual recognition restriction. Thus the very idea of popular sovereignty could be sufficient to make the issues of cultural preservation illegitimate in themselves. This is not my view, however. If, as Will Kymlicka has claimed, a living cultural background is a condition for the possibility of living a meaningful human life, then at least some questions about the protection and nurturing of culture may be deep questions about rights that must be integrated into a coherent conception of a democratic civil society, including a conception of free political speech. Thus, the issue of cultural preservation is important, not only in this case, but also in general, for inquiring whether there is a Mutual Recognition Restriction, and what this means.

The Mutual Recognition Restriction is part of a perspective on the political and on rights that conceives of a people as a political entity. I conceive of a people as the citizens of a political community, who constitute the sovereign body of electors. The people as citizens does not necessarily include all the subjects of the law. As well as tourists and exchange students, many immigrants and refugees in Norway are not citizens of Norway. For as long as they stay here, they are still subjects of the Norwegian law. The main distinction relevant for counting the White Election Alliance programme outside the class of speech protected by the right to political protection is that between citizens and subjects of the law; but the distinction probably intended by Kjuus *in* this programme is between members of an ethnic group and outsiders. Kjuus seeks to protect not the citizenry, but the "ethnic" Norwegians.

Kjuus' intuition of the importance of protecting ethnicity or national culture points to an important problem for our political philosophy. A modern political community is designed to accommodate social, cultural and normative plurality. Separation of the moral from the political - the good from the right - facilitates peaceful co-existence between people who are at liberty to live according to different moral or religious beliefs, convictions or standards, and to associate with other people of similar mind. The idea of a political community of individual citizens may thus be considered a pragmatic solution to the problem of group conflicts. Still, strong and more or less permanent differentiation between individuals and groups will be a challenge to the basic political relation of an individual person or citizen to the political people as a whole.

The tension between political unity and social diversity is a difficult problem for modern political philosophy. Conceptions of justice constructed on the basis of the political and legal ideal of free and equal individual persons have to come to grips with a reality of socially and economically unequal groups differentiated along dimensions such as ethnicity, race, and religion. Politically, these different affiliations are relevant, because the system of law will be influenced through democratic channels by people and organised groups of different cultural backgrounds with different priorities and understandings of political matters. Not every such group will be modern, in the sense of accepting the division of the political and the moral, and disagreement may extend to the very basics of the political system, to important or fundamental rights, their interpretation and the sources of their validity.

Communitarian political philosophers have made us aware of the importance of tradition and cultural background to our identity and sense of purpose, to the possibility of finding a meaningful life. The map of Europe is a reminder that cultural and national unity have an important place in our history as a reason for territorial boundaries.¹³⁹ Having a cultural tradition and a common language creates a certain sense of unity that cannot be easily dismissed. We may thus recognise the importance of policies for the preservation and development of our cultural heritage and our language.

Still, the question of ethnic and political conceptions of a people is not a question of the legitimacy of cultural policies. Public education and sponsoring of cultural activities are not controversial undertakings in modern constitutional democracies, although limiting individual and corporate freedom in these endeavours may be controversial. The important question is whether there are reasons sufficient for us to set aside, or alter our understanding of, the constitutional rights of citizens for the sake of preserving national culture or ethnicity. In other words, can the cultural conception of a people be given *priority* over the political when the two conflict? If the political conception of a people is to be given strict priority, the Mutual Recognition Restriction is valid for all political matters, and repatriation measures like the one Kjuus recommends are illegitimate. If not, the scope of the Mutual Recognition Restriction is somehow limited, and some illiberal measures may be considered. In that case, by implication, suggesting such measures cannot be exempted from free political speech.

¹³⁹ This reason may, however, in many cases be retrospectively given. Even though many European countries like Norway today are nation-states, the medieval kingdoms from which the modern nationalities originate often had to create their unity by force, personal homage and other incentives.

RACE, ETHNICITY AND CULTURE

The *White Election Alliance* programme will not be of much help in defining what it means to be ethnically or culturally Norwegian, and why being ethnically Norwegian is politically important. Kjuus' family criterion is, as mentioned, trivially circular. If we do not know what made our grandparents Norwegian, knowing that three of that kind will make ourselves Norwegians will not help.¹⁴⁰ Ordinary usage of the concepts of ethnicity and culture is complex and differing in different circumstances. Rather than suggesting simple definitions, I will give an account of some aspects of concept history and usage, and some tentative guidelines for the use in this dissertation.

Racism and racial discrimination

Racism is a term commonly used in levelling accusations against members of the anti-immigration movement, and the legal provision by which Kjuus was indicted, Article 135a of the Penal Code, is generally referred to as the Racism Article. Unfavourable attitudes towards people of other races, cultures or ethnic groups are often referred to as racist. In this way, phenomena of considerably different significance are conflated. Criticism against people and social groups is an ordinary function of public communication, and the concept of racism should not be used to restrict it. A tentative definition is: racism is the idea that differences in inherited physical qualities are a sign of inferiority in some respect, and warrant differentiated treatment.

As a scientific theory, racism was in the 19th century professed by, among others, Joseph Arthur, Comte de Gobineau, and Huston Stewart Chamberlain. In their biological-sociological theories they maintained the superiority of *Aryans* or whites over other races, and that this race will lose its vitality if its blood is mixed with that of other races.¹⁴¹ Being discredited, both scientifically and by association with the German nazi movement and Adolf Hitler, who found inspiration in these theories for his political purposes, such explicit theories have more or less disappeared both from biology and political life. The accusations levelled against modern anti-immigrationists will not be of holding such a theory, but of having some of the attitudes toward other races that were expressed in these theories, or of advocating policies that will constitute racial discrimination, and thus be racist in effect.

As far as Article 135a of the Penal Code is concerned, the term "Racism Article" probably refers to the fact that this Article is central to the incorporation into

¹⁴⁰Pragmatically, the definition works to pick out the group Kjuus wants to repatriate. Third-world immigration to Norway has mainly happened during two generations. The definition is also used in Norwegian population statistics. For the question of the possibility of ethnicity outbalancing citizenship, however, a further analysis of the concept is necessary.

¹⁴¹See (Encyclopedia_Britannica_Online 1999a; Encyclopedia_Britannica_Online 1999b; Encyclopedia_Britannica_Online 1999c)

Norwegian Law of the obligations accepted in ratifying the UN convention on racial discrimination (*CERD*). Racial discrimination, according to CERD, includes not only discriminating actions and policies, but the expression of the ideas of racial superiority or hatred, as well. (*CERD*: Art 4)

As the plain racism of de Gobineau and Chamberlain is of almost no political significance today, the term racism is generally used to refer to other, related beliefs. Inferiority is mostly annexed to culture rather than to biology, and differences in culture are often taken to constitute an independent reason to avoid contact with other people. Race-oriented and culture-oriented beliefs are conceptually different, but are often confused - sometimes intentionally, as the political implications of such beliefs may often be similar. As we have seen, anti-immigrationists employ assumptions about the disadvantages coming from mixing people of different cultural or ethnic groups on the same territory. Of course, this may stem from beliefs in racial superiority, but it fits just as well with the belief that immigrant cultures are equally valuable in their own right, or even better than the domestic one. Believing that culturally different groups should be kept separate does not have to mean that they are of different value, but perhaps only that mixing may have negative consequences.

Ethnicity

Ethnicity and culture are rather evasive concepts. Ethnicity is the quality by which a social group is differentiated as a separate people. What constitutes a separate people, though, is a question with no clear-cut answer. A sense of common identity within the group will generally be the core. What the people within the group have in common, however, that which differentiates the ethnic group from others, will not always be clearly perceived. Culture, religion, language, and common ties through race or blood will often be central.

Rather than arriving at an essential definition of ethnicity, I will conceive of ethnicity as a family of concepts with similar and interrelated usage.¹⁴² Ethnicity is generally understood to refer to different aspects of common identity such as history, culture, religion, language, and common ancestry. What aspects of ethnicity are intended can only be sorted out in the particular cases where the term is used. Family resemblance or overlap also characterises the relation between usage of the concepts of ethnicity and culture. A general tendency, however, is that culture is more related to practice, action, habituation and education, ethnicity more related to kinship (blood) and history. Culture thus tends to be learned, while ethnicity tends to be inherited. What is important to this inquiry, is to separate the political concept of a

¹⁴² Cf. Wittgenstein's idea of family resemblance, *Familienähnlichkeit*. (Wittgenstein 1984: 67)

people from these others. A political people or community is partly a normative concept associated with an idea of a territory being ruled by the people living in that territory. But most important, it is a particular, positively existing political community with political and legal institutions, with a national register of people belonging to that community. An ethnic conception of a people, which defines an ethnic community, will then be any other basis for a claim of being a people with a particular identity or other form of belonging. In the case of Kjuus ethnicity may sometimes seem to be based on blood, on being the third generation living in Norway, elsewhere it seems that ways of life, customs or culture is essential.

Ethnicity is more of a relational quality, than an absolute. Ethnic belonging admits of degrees, and absolute criteria will probably fail to separate the population of the world into ethnic categories. Ethnicity is more important as a way of distinguishing groups, than as an independent characteristic of a community or group of people. Thus the appeal to ethnicity is often used primarily to substantiate a claim for recognition of forms of life other than those usual in a particular country. A dominant group will seldom show much awareness of its ethnicity. Within such a group common history, language and culture are taken for granted, and only the options available to people against the background of that cultural history are practically relevant. One should not be surprised that when Kjuus is celebrating the Norwegian people as an ethnic, rather than political community, a story of pressing dangers accompanies this conception.¹⁴³

Norwegian national identity is, however, coined upon myths of the nation that is throwing off the yoke of oppression. The Old Norse nation liberated itself from Denmark in 1814, from Sweden in 1905, from German occupation in 1945. A formative philological battle is the recurring one between the two forms of written Norwegian, essentially about whether the liberation of our language from the Danish should happen through reform or revolution.¹⁴⁴ Thus the idea of the Norwegian people as an ethnic minority that has had to fight for its independence as a people is present in the minds of at least the generations of people who experienced for themselves the last liberation, in 1945. This is the generation of Jack Erik Kjuus.

¹⁴³ The political programme of White Election Alliance is extensively reprinted in the opinion of the Oslo City Court. (*Kjuus* Oslo City Court: 4ff)

¹⁴⁴ In the late 19th century, Ivar Aasen developed a new standard of primarily written Norwegian based upon dialects from the parts of the country least influenced by Danish language. This standard, "landsmål" [country language], now known as "nynorsk" [New Norwegian], were opposed by others who wanted to continue using the Danish standard of writing, but with some modifications in the direction of the spoken Norwegian of the elite. This other standard, originally "riksmål" [national language], has gradually developed away from its Danish origin into the current "bokmål" [book language].

Culture

The term culture comes from the Latin *cultura*, which originally described the farming of the land, as well as the worship of a god or goddess.¹⁴⁵ Already in Roman literature culture is used to describe human education, as the cultivating of the intellectual and moral capacities of man. The Latin term referred to culture as an activity or a process. Only in modern times was the term culture used to describe the result of such activity, education as something people could possess or have as a characteristic trait. Further, the modern concept of culture refers to the achievements or ways of life of entire societies. It is part of the complexity of the concept of culture that one sometimes by culture refers to something of remarkable quality, but then at other times neutrally, of the qualities by which one community differ from another.

One aspect of the cultural, conceived of as education, or as an activity consisting in progress or improvement, is its contrast with nature. A culture, whether a process or a way of life, is acquired, and the fact that I belong to, think and act against the background provided for me by Norwegian culture probably has less to do with inherited natural capacities than with education and training that could have been different. Thus culture is open-ended in several ways. Members of one culture can, at least with a certain effort, and if not blinded by deeply internalised ways of thinking from their own culture, acquire the ability to take part in the practices that constitute another culture. The culture itself may be, to different degrees, open to transformation by contact with and inclusion of people with different ways of life. This can happen through increasing the variety of ways of life possible within the framework of the general culture, or through modifying some traditional practices. Further, a culture may resemble a language in having local varieties or dialects; the unity of the culture will probably never encompass all practices that constitute a human life, nor is this necessary for an individual to identify with the culture. Such variations are striking in modern societies, where the plurality of life forms is a virtue as well as a fact.

Because of the open-ended character of cultures as learned practices, culture probably could not be completely insulated from the pressures of modern communication, even if permanent migration did not take place. This may be part of the explanation of the desperate measures Kjuus finds necessary to preserve the Norwegian way of life. Cultures are vulnerable to the forces of change, from a positive point of view this is what gives a living culture its vitality. From a negative point of view, like Kjuus', this is what makes drastic measures necessary.

¹⁴⁵This discussion primarily follows my discussion of the concept of culture in my MA thesis. An important source for the analysis of the concept of culture was then a Danish anthology on "The cultural history of the concept of culture". (Hauge and Horstbøll 1988)

THE PRIORITY OF THE POLITICAL

The priority of the political is, within liberal theories, a special case of the general priority of basic individual rights over goods, i.e. rights limiting legitimate policies for promoting the common good. This question of priority is central to liberal thought. The liberal idea of justice or of right involves a considerable degree of liberty or freedom for all citizens in a civil society, under a rule of law - i.e. justice as equality. We find this essential idea of right or justice in Kant, as the idea that everyone has a right to the greatest degree of freedom that can co-exist with the same freedom for all.¹⁴⁶ This principle is also found as the first principle of justice in Rawls' political philosophy, where this principle of right has priority over his principle of distributive justice. Initially, in *A theory of justice* Rawls formulates the principle that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others". (Rawls 1978: 60), and in his later theory we find that

each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value. (Rawls 1993: 5)

To give this principle priority means that not only pure self-interest, but every conception of the good is subordinated to the formal idea of equal freedom. The principle of equal freedom generates *rights*. Individual rights protects individuals against political action motivated by utilitarian considerations of what gives the best possible result when all parties concerned are given equal value. Dworkin (Dworkin 1977: 90ff) distinguishes between *rights*, which are expressed in principles, and concern respect for individual citizens, and on the other hand *goals*, which are expressed in *policies* and concern the needs of the community at large. Free speech is such a right, while economic efficiency, military power and welfare are goals. Between goals there can be trade-offs balancing various pros and cons. An essential feature of a right is that it "cannot be outweighed by all social goals". (Dworkin 1977: 92) Recognising a particular right means acknowledging that it is to be protected for individuals at the expense of restricting the attainment of a public goal. A right carries a certain weight, defined by Dworkin as its power to withstand the pressure of urgent goals. Rights can be balanced against other rights, but there is a certain threshold against trading off rights for goals.

The basic rights to liberty that liberals consider necessary in a just civil society are freedoms that all rational beings, *i.e.* human persons, have reason to claim. These

¹⁴⁶ "Eine jede Handlung is *recht*, die oder nach deren Maxime die Freiheit der Willkür eines jeden mit jedermanns Freiheit nach einem allgemeinen Gesetze zusammen bestehen kann etc." (Kant 1991: 133; Kant 1983/1797: AB33)

freedoms are required no matter which idea of a good life people seek to realise, and whatever culturally based perspective on the purpose of his or her life a person believes in. The justification of the claim to basic freedoms is thus not dependent on a particular view of the good. Being derived from the dignity of persons as rational beings, these basic freedoms may not be violated even if there are good reasons to do so, from a consequentialist or teleological perspective. Some liberals thus claim that the government should not have a conception of the good life, for instance a certain religion. John Locke (Locke 1689) thus conceives of a restrictive scope for political authority. A government should, according to Locke, enforce laws in an impartial manner to ensure the people's and each citizen's "civil interests" - such as personal freedom, health, rest, and a right to property limited to objects like money, land, buildings, and furniture.

A government within these boundaries opens a realm of negative freedom, where one may pursue the private and individual realisation of individually and culturally different conceptions of the good life, as long as it does not conflict with norms valid within the more limited political sphere. According to a classical liberal such as Locke, but also according to modern liberals such as Rawls and Charles Larmore¹⁴⁷, people should be convinced to respect the political order, and to abstain from trying to pursue their moral projects by means of this order. On questions of the good life, of the goodness of certain religious beliefs or cultural forms of life, there may be "reasonable disagreement" (Larmore 1994), while the rights fundamental to civil society are to be considered rational for all persons.

Most liberal political philosophy conceives of the system of rights as a relation between the individual citizen and civil society. The citizen is conceived of as a person who chooses his values, his conception of the good, and who may revise or change his values freely. Further, in order to recognise the priority of rights and the importance of a separation between the political as public and the moral as private, the citizen must be able to take to see the public sphere not only through the lens of his or her own projects and interest, but also through the lens of the individual rights of all. A perspective of formal justice must take priority over our usual culturally and morally informed perspective. This is the foundation of Rawls idea of an "original position".

Whatever the importance of the rights of individual citizens, though, there is a problem whether liberalism can properly explain how people may even have a conception of the good, if not from belonging to a community with a special cultural tradition that can provide such conceptions, or the material from which one may construct such conceptions. Furthermore, a certain determinate cultural context may be necessary for developing the sense of procedural justice essential to understand

¹⁴⁷Larmore is Professor of Philosophy at Columbia University, and the author of *Patterns of Moral Complexity* (Larmore 1987) and *The Morals of Modernity*, Cambridge University Press 1996.

the concept of a citizen belonging to a people in the political sense, but who identifies with a national or ethnic cultural tradition in a different sense. If belonging to a cultural community is of vital importance to the possibility of people developing their abilities to reason about political and moral matters, it seems that liberalism must allow a more central place to the role of culture in the life of citizens.

The relevance of culture

In public life, we relate to each other as fellow citizens. We participate in a common political life, which has as its purpose regulating our equal liberties and duties - within the rule of law - and regulating the distribution of resources and opportunities. However, the political community is not the only one in which we participate. Kymlicka distinguishes between two different kinds, or aspects of community.

On the one hand, there is the political community, within which individuals exercise the rights and responsibilities entailed by the framework of liberal justice. People who reside within the same political community are fellow citizens. On the other hand, there is the cultural community, within which individuals form and revise their aims and ambitions. People within the same cultural community share a culture, a language and history which defines their cultural membership. (Kymlicka 1989: 135)

We belong to cultural communities as well as political, and these may or may not coincide. Political societies may be culturally homogeneous or have a plurality of cultures within them, as cultural communities may belong to different political communities. By implication, *White Election Alliance* seeks a homogeneous cultural community that is simultaneously the Norwegian political community. This can only be achieved through exclusion of Norwegians who belong to other cultural communities. By being culturally different, immigrants are already outside the Norwegian cultural community. By repatriation or sterilisation such outsiders will cease being a part of the political community. Kjuus considers this the only possibility, as the alternatives would be integration, or assimilation. Integration, or the co-existence of a plurality of cultural communities within the Norwegian political community, Kjuus opposes for prudential reasons:

Assimilasjon er et nøkkelord. Vi tror ikke på "integrasjon". Man kan ikke integrere ild og vann. Vi har ingen sans for folk som kommer til et fremmed land og holder seg til "sine egne" som et folk på siden av folket, i generasjoner. Enten får man gå opp i det folket man kommer til, eller man får dra tilbake dit man kom fra. USA og Balkan er områder som med tydelighet viser at "integrasjon" ikke fungerer. (*Kjuus Oslo City Court*: 5)

Assimilation is a key word. We do not believe in "integration". One cannot integrate fire and water. We do not think highly of people who come to a foreign country and stick to their own. Either you mix into the people of where you have come, or you

return to where you came from. The USA and the Balkans are areas that clearly show that "integration" does not work.

By example, Kjuus argues that ethnic tension and conflicts like those in the USA or in former Yugoslavia will be the consequence of attempting integration of different ethnic groups. Assimilation is, according to Kjuus, the only way to preserve a stable and peaceful community over time. This has been the case, he claims, with former immigrants to Norway. In this case, however, he does not believe that this will work.

Til det er de fremmede for mange, og de kommer dessuten ofte fra folk og raser som både kulturelt og etnisk står for langt unna det norske folk, slik at en assimilasjon ikke kan anses som ønskelig. Selv om de fremmede selv skulle ønske en assimilering, er dette ikke heldig fordi resultatet for all fremtid ville forandre etnisiteten i landet. (*Kjuus Oslo City Court: 5*)

The aliens are too many, and are of people and races that both culturally and ethnically stand too far from the Norwegian people, and thus assimilation is not desirable. Even if the aliens themselves should want assimilation, this would not be beneficial, as the consequences would alter the ethnicity of the country for all time to come.

The cultures of the present immigrants are too different for them to assimilate without tension, and without influencing the character of the Norwegian culture.¹⁴⁸ The present character of our culture would be lost forever, and we would change into something we do not want to be. These are the fears of Kjuus and the *White Election Alliance*. Of course the claim that a culturally plural society will have to end in city riots (such as occurred in Los Angeles a few years ago), or civil war, as in Yugoslavia, is empirically a complicated case to argue. How assimilation will or will not take place is difficult to predict. It is even likely that the idea of belonging to *one* ethnic community is simplistic. Kjuus himself distinguishes between the present immigrants and previous immigrants who mainly were ethnic Europeans (*Kjuus Oslo City Court: 5*), thus indicating that membership in an ethnic group is a phenomenon that admits of degrees. Our ethnicity is not only Norwegian, but European and Scandinavian, too; we are Urban or Rural; we share the culture of a West-Norwegian community of fruit-farmers, or of northern fishermen. The same goes for the immigrants, they may be non-Europeans, but also Pakistani or Vietnamese, or Moroccan, and from different Pakistani, Vietnamese or Moroccan regions and backgrounds - not to mention that they may belong to mixed ethnicities like Norwegian-Pakistani, and so on.

¹⁴⁸In the cited passage above Kjuus refers to race, people, culture and ethnicity. I focus upon cultural community in this discussion, but as the purpose is to explore the normative relation between the political community and otherwise constituted communities, not to distinguish between such other communities, the discussion anyhow applies to Kjuus' arguments here.

The concepts of culture and ethnicity have that inexact character. However, we recognise in practice a Norwegian culture, in relation to a common history, a literature in different forms of the Norwegian language, pride in leading athletes, and inventors of paper clips and cheese slicers. Thus, the concept of a cultural community of Norwegians makes sense as comprising the ways of language, symbols and personal bonds that constitute our identity. Ethnic peoples do claim recognition in political life, ethnic peoples lacking a common and independent political society do claim that they should have one, as Norway got in 1905. This is a part of political reality, and thus we should ask what kind of normative force this ethnic or cultural identity has in relation to the constitution of political communities. Why is having our cultural or ethnic identity important to us - and how important is it? The purpose of the following discussion will be to explore the importance of culture or ethnicity, and its relation to the political community of citizens.

Kymlicka's liberalism

Being Canadian, Will Kymlicka is familiar with multiethnic or multicultural society. Originally, Canada was formed as a federation of former French and British colonies. Several native peoples, Indian tribes and Inuits, are also part of the population, as well as immigrants from various European and Asian nations, to some degree settling in separate colonies.¹⁴⁹ In this context, Kymlicka argues for special rights for the Native and French minorities. Still, he conceives of himself as a liberal in the tradition including John Stuart Mill, John Rawls and Ronald Dworkin. However, to him central liberal concepts like equality and liberty are not the primary concern for a liberal. He finds in his predecessors a political morality that is based upon a basic claim about human interest. "Our essential interest is in leading a good life, in having those things that a good life contains." (Kymlicka 1989: 10) Kymlicka thus makes the surprising but quite plausible assumption, that liberalism is not a theory of the relative unimportance of the good, nor a theory about the individual relativity of the good. To Kymlicka, a condition for the meaningfulness of the idea of liberty and individual autonomy is that our basic human interest is the pursuit of the good life - and the good life as conceived from something close to a moral realist point of view. This is because the pursuit of the good life presupposes a distinction between the good life and one that is apparently good, a difference that cannot depend solely on our perception. There would be no point in pursuing a better form of life if the purpose of doing that could be fulfilled through a change of attitude towards the present. The tragic possibility of failure in living is necessary in order to have a

¹⁴⁹"Canada: The People",
(Encyclopedia_Britannica_Online)

<http://www.eb.com:180/bol/topic?eu=119746&scnt=1&pm=1>

meaningful life. Liberal autonomy does not, to Kymlicka, mean that the good is dependent upon our will, our preferences, or what we want to be good. Liberals deliberate about ends, not only about what means will be effective in reaching obvious ends. Liberals ought to question the value of their projects and commitments. How then is this a liberalism, or in other words how does liberty enter into all this teleology of finding the life that is actually good? Liberty, as well as the importance of community, to Kymlicka enters the scene through "two preconditions for the fulfilment of our essential interest in leading a life that is good":

One is that we lead our life from the inside, in accordance with our beliefs about what gives value to life; the other is that we be free to question those beliefs, to examine them in the light of whatever information and examples and arguments our culture can provide. Individuals must therefore have the resources and liberties needed to live their life in accordance with their beliefs about value, without being imprisoned or penalized for unorthodox religious or sexual practices etc. Hence the traditional liberal concern for civil and personal liberties. And individuals must have the cultural conditions conducive to acquiring an awareness of different views about the good life, and to acquiring an ability to intelligently examine and re-examine these views. Hence the equally traditional liberal concern for education, freedom of expression, freedom of the press, artistic freedom, etc. These liberties enable us to judge what is valuable in life in the only way we can judge such things - i.e. by exploring different aspects of our own collective cultural heritage. (Kymlicka 1989: 10)

That we choose a life we believe to be good is not a sufficient condition for that life actually to be good, but it is a necessary condition. No life will be good for us that we ourselves do not find to be good. The notion of living one's life from the inside can be understood in several ways, and it is not entirely clear which Kymlicka means, or if he differentiates between them. One point is one of human psychology, of the possibility of well being. A life that does not satisfy us cannot be completely good. Another aspect of living one's life from the inside concerns the modern, nominalist way of thinking about the nature of the good. There is a necessarily subjective element of individual evaluation in the dialectics of establishing that a life is a good one. Partly this derives from an academic scepticism about the possibility of establishing with intersubjective certainty that something is good.¹⁵⁰ There is no privileged position from where it can be decided which life is the good one. But even to the extent that it is possible to agree upon the goodness of something - and we do, at least locally, in fact agree on the goodness of a lot of things - there is no way of establishing what is the good life of someone without taking that person's perspective seriously. And now this is no more a purely emotional or hedonist matter of well being, it is a question of respect for the dignity of a being that has the capacity to form a perspective on the good. Even if a person in fact does not feel bad about living a life that is not consciously chosen or approved of, this cannot be considered a good

¹⁵⁰This scepticism is compatible with Kymlicka's belief that there are lives that are good and less good. Fallibility in human reasoning about the good does not entail that the good is completely arbitrary.

life for that person. This is the normative aspect of the need to live one's life from the inside. Living from the inside calls forth the whole complex of autonomy and authenticity, even if not described in these words in Kymlicka's book. A person has a right to autonomy, to form a particular conception of the good life, and a duty of authenticity, to find and develop the particular way of life that is one's own.¹⁵¹ What this excludes, is paternalism, the practice of making choices concerning the good life on behalf of someone else, because one takes oneself to have a more adequate perspective.

As Kymlicka formulates his view, the need for freedom is a separate precondition from the need to live life from the inside. As we have seen, however, these preconditions are intimately related. Being free to question one's beliefs is part of what it is to live one's life from the inside. However, Kymlicka proceeds to point out that the preconditions of living a good life includes positive freedom, the right to have available the means to carry out a proper examination of your own life. And here Kymlicka already makes the move needed to unfold his argument for the right to a cultural community. Civil and personal liberties are necessary in order to perform a critical examination of one's own values, and to live according to those values. But so is the substance of our culture, the "information and examples and arguments our culture can provide". The liberties, which are such a central concern to liberals, may only do the work we hope they will do if they are related to a particular culture that gives substantial choices and alternatives.

Autonomy or diversity

In considering Kymlicka's views on the relation between liberal rights and culture, it is worth remembering the history of liberalism. Liberalism originated partly as a response to the post-reformation religious conflicts in Europe. As William Galston has noticed (Galston 1995), the notion of the rights of autonomous individuals is not the only historical source of modern liberalism. In another tradition, diversity and tolerance are core notions. Considered in this way, liberalism arose as a way of living together peacefully for people with differing views on deep moral and religious questions. The liberal solution to this kind of problem will often consist in removing these questions from the scope of political discourse and power. This is an important strategy in Locke's "Letter Concerning Toleration" (Locke 1689), and is expressed by the political liberalist Charles Larmore as the idea that questions on which there might be "reasonable disagreement" cannot enter into the political deliberations that

¹⁵¹Charles Taylor considers Johann Gottfried Herder the "major early articulator" of the idea of authenticity, of there being a particular way of living that is my own way. "Being true to myself means being true to my own originality, which is something only I can articulate and discover. In articulating it, I'm also defining myself. I'm realising a potential that is properly my own." (Taylor 1992: 31)

shall define the terms of co-existence, *i.e.* politics. (Larmore 1994) The political order became a separate practice from the moral, the difference being conceived of as that of public to private. The public, political order is to liberals the one everyone should feel rationally compelled to enter into. The private societies, or associations, we participate in are voluntary. We are free to belong to a church or to live in different cultural communities. But this freedom certainly cannot mean that having a cultural background is optional; you do not enter into a culture or a church by a fundamentally open choice. The problem is that people have firm and differing beliefs, and the alternative to a division between the moral and the political seems only to be the brute use of force to compel "heathens" to subject themselves to the faith of the rulers. The right to have a particular religion, or a living cultural practice, is a liberty that protects something inherently human against government intervention.

The point of these historical observations is that Kymlicka's strategy of emphasising the equally derivative and equally important status of belonging to a culture and of having individual liberties, has precedent in liberal thinking. What was obvious to a 17th century liberal now has to be positively emphasised to be noticed. The reason for this obliviousness is that individual liberties have a double presence in 20th century western culture. Individual liberties are negative limits against government interference in the pursuit of happiness of individual people. But they are present in another way as well. Liberties are substantive parts of the purpose of life, and thus part of the good for individual citizens, no matter what associations and communities they enter into or leave. An early modern member of a church different from the king's needed guaranteed liberties so that he or she could stay member of that particular community. A modern liberal has a recognised claim to ordering his or her life according to choices and personal relations that at any time may be revoked and rearranged. This kind of general liberty in values and association is part of the character of our culture, influencing the way we go about our private life. People who originate in or belong to social cultures that do not have such a substantially liberal character, in effect opt out of the society of the majority. Furthermore, it is not easily said what they opt out of. Do they only, on perfectly political-liberal grounds, opt out of the substantial liberalism of social and private life - or do they opt out of the political liberal order of citizens as well?

We tend to forget that this liberal social and private life is a cultural characteristic of our community. It does constitute a particular form of life with rules of its own, where we have to learn the game of choosing options, of relating to people in different degrees as friend, colleague, associate, lover, father, client, and so on. The rules according to which we play are open, indeterminate, and success in establishing relationships depends partly on the not entirely predictable recognition of others. In

learning and practising these rules of the game, we depend on the community of others who share the same form of life, including certain points of reference in the form of individual and common history, art, literature and in our times film and television. These are the source of the options among which we choose, and which we then interpret and develop in our own ways. And these are not equally available to people living among us who conceive of themselves in terms of and in relation to an aboriginal culture, or the culture of the society the immigrants left behind. Because of this, the protection of cultures may be important to the meaningfulness of people's lives. To sum up, this probably was obvious to the early modern liberals, who devised liberties as a means to achieve this. But today, when liberties in major western societies are not merely means, but also part of our free and individual purposes, having a living cultural background needs to be affirmed as an equally important means to living a good life.

Culture as a primary good

No matter whether autonomy or diversity is considered the historical source of liberalism, autonomy seems to have justificatory priority. Even if what is protected is sometimes the right of different cultural groups to remain different, the justification for doing this will have to be the right of the individual members of the group to be autonomous sources of value. Unless there are people finding a particular form of life meaningful and choiceworthy, there is no reason to protect that form of life. There is no deeper source of the *legitimacy* of the form of life than the support of its practitioners. Hence culture is a good for people, not in or for itself.

Kymlicka relies on Rawls' notion of a primary good to explain how culture may be a means to providing the preconditions of the good life. To Rawls, primary goods are "things which it is supposed a rational man wants whatever else he wants". (Rawls 1978: 92) Among the primary goods Rawls mentions rights and liberties, opportunities and powers, income and wealth.¹⁵² Among the primary goods Rawls also counts self-respect:

First of all (...) it includes a person's sense of his own value, his secure conviction that his conception of his good, his plan of life, is worth carrying out. And second, self-respect implies a confidence in one's ability, so far as it is within one's power, to fulfil one's intentions. (Rawls 1978: 440)

Our self-respect involves a certain dependence on others. We need others' appreciation in order to find our own activities worthwhile, and thus we need those activities to be ones others will appreciate. We even need our companions to have self-respect, so that they may appreciate our activities without "grudging". "Putting

¹⁵²A more extensive list and discussion is found in "Social unity and primary goods". (Rawls 1982)

these remarks together", Rawls writes, "the conditions for people respecting themselves and one another would seem to require that their common plans be both rational and complementary." (Rawls 1978: 441) In other words, we need to belong to social groups that to a certain extent share our values, within which we may develop our talents and flourish as human beings.

So far this seems a strong defence for culture as a primary good. However, Rawls' idea of self-respect as a primary good falls short of what Kymlicka wants as a defence of the right to your own culture. To Kymlicka, culture is not only the groups and activities we enter into in order to realise our potential, but "patterns of activities" among which we choose who to be.

We learn about these patterns of activity through their presence in stories we've heard about the lives, real or imaginary, of others. They become potential models, and define potential roles, that we can adopt as our own. From childhood on, we become aware both that we are already participants in certain forms of life (familial, religious, sexual, educational, etc.), and that there are other ways of life which offer alternative models and roles that we may, in time, come to endorse. We decide how to lead our lives by situating ourselves in these cultural narratives, by adopting roles that have struck us as worthwhile ones, as ones worth living (which may, of course, include the roles we were brought up to occupy). (Kymlicka 1989: 165)

We "become aware" that we are participating in a form of life, and that there are other forms when we are already participating in them. First, we acquire a repertoire of roles within different patterns of activities, and only then does our form of life stand out as something particular in contrast to other particular forms of life. Granted that this is a correct description of the relationship between culture and autonomous choice, having a particular culture with a substantial content is at least genealogically prior to liberal autonomy. We cannot be the kind of agents liberalism holds us to be, unless we have already learned a form of life including different patterns of activities, and unless we have already have developed a sense of value in connection to these activities.

Kymlicka intends his argument on this point to be developed using resources from Rawls' theory of justice, and only with resources thus available. In order to account for the fact that Rawls do not list cultural membership on a par with liberty as primary goods, Kymlicka suggests that Rawls perhaps "implicitly assumes that the political community is culturally homogeneous." (Kymlicka 1989: 166) However, the difference between Rawls and Kymlicka here is probably deeper than such a factual error. Even if cultural membership were recognised as a primary good, as one could argue that Rawls does when he lists among the primary goods "the social bases of self-respect" (Rawls 1982: 162), this does not mean that the basic priorities of Rawls' theory are changed. Culture, if a social base of self-respect, may be a primary good, but there are priorities among primary goods, too, and Rawls do not claim that everything that is a primary good has to be equally distributed. It follows from the

priority of Rawls' first principle of justice that equal basic liberties and equal opportunity take priority over the lesser primary goods, such as the social bases of self-respect. Rawls cannot reverse that order, or view culture and liberties as equal, as that would compromise the entire structure of his theory of justice.

Rawls' theory, as well as his anthropology, rests on the possibility of rational abstraction. The principles of justice for a fair society are discovered in an imagined situation (behind the veil of ignorance) in which your knowledge of your own form of life is irrelevant.¹⁵³ This does not have to mean that people in the original position did not have an upbringing with a particular content. It does have to mean, however, that everyone is able to recognise justice as fairness as neutral between, and preconditions for, all culturally different forms of life. But neutral they cannot be, because they have a content, and do put real constraints on the possible forms of society. And Kymlicka should not accept without problems that this particular theory of justice based on the autonomy of the rational human being is one any human being could accept. This is because, if my reading is correct, Kymlicka's theory also rests on the communitarian premise that having a culture or a form of life is a precondition of the autonomous choice of a plan of life having any meaning at all. This is a contingent circumstance that might fail. Some people may be so alienated from their entire cultural background that none of their optional life plans is institutionally embedded in, and recognised as valuable by, the society in which they live. Such people will have no reason to accept as fair principles that would only have been fair in a society in which the options they value were as real as the options of other people. Thinking in this way requires, as Kymlicka points out, that both individual liberties and cultural background are necessary conditions for living a good life, and thus that one cannot always have priority over the other. This interdependence of liberties and culture is central to Kymlicka's theory. However, if this theory is correct, Kymlicka's argument cannot be based upon Rawls theory of justice, because the priority of basic liberties over specific forms of life is something Rawls cannot change without compromising the basic structure of his theory.

Now Kymlicka is no more prepared than Rawls to give cultural membership priority over liberties in cases of conflict. He generally opposes the right of a particular cultural group to restrict the liberties of its members, "internal restrictions", but allows that groups may be defended against pressures from the outside that threatens the stability of the culture. (Kymlicka 1995: s 35ff) It is thus not obviously clear how Kymlicka handles the problem of the importance of

¹⁵³In Rawls words, the original position, "a fair procedure so that any principles agreed to will be just" rests on the assumption that those participating are ignorant of e.g. "his conception of the good, the particulars of his rational plan of life" and "particular circumstances of their own society". (Rawls 1978: 136f) In other words, people do not know of the form of life in which their sense of value originated, and which things are of value to them.

protecting the culture of citizens in a just society. To Kymlicka both culture and liberties are important preconditions of living a good life, neither of which may be given up.

Taylor on recognition

In his paper on "The politics of recognition"¹⁵⁴, Charles Taylor addresses several aspects of the problem of cultural plurality. Among the topics covered is the problem of the legitimacy of policies that attempt to preserve a traditional culture under pressure from other cultural forces. French-Canadian culture is subject to such pressure, and thus the French-speaking majority of the province of Quebec has policies that preserve their French culture by privileging the use of the French language in several ways. Everyone except English-speaking Canadians should send their children to French schools. Businesses with more than fifty employees are obliged to use French as a working language. All commercial signs should be in French. In a bilingual society, these policies impose strict limits on personal liberty, and clearly protect the life of different cultural groups in unequal ways.

In his paper, Taylor uses the concept of recognition to develop an argument that there are important reasons to protect a language and a culture, even at the price of limiting individual rights to a choice of language and culture. The case of Quebec has important similarities to what we might imagine are the fears of Kjuus and his *White Election Alliance*. Quebec is a province with predominantly French linguistic and cultural traditions, but is part of a Canadian political community with a large English-speaking majority, located on a North-American continent where English is the language of business, culture and public life in general. The measures chosen give some indication of what the concern may be in this situation. The prohibition on French-Quebecians and immigrants sending their children to English-speaking schools, using English as a language at work, or putting up signs in any language other than French, indicates a fear that the French character of Quebecois society will otherwise be lost.¹⁵⁵ Similar fears are found in the programme of *White Election Alliance*:

¹⁵⁴ (Taylor 1992) Reprinted in his 1995 collection of papers, *Philosophical Arguments*. (Taylor 1995)

¹⁵⁵The case of Quebec became the centre of conflicts concerning individual liberties and culture after Canada adopted a Charter of Rights in 1992. Some of the regulations of culture and language in Quebec would have been disallowed in other Canadian provinces because of the Charter, and regulation of the language of commercial signs was forbidden by the Canadian Supreme Court. However, a clause in the charter allows provincial governments to uphold for a limited period of time legislation that is in conflict with the charter. A proposed constitutional amendment, the Meech lake amendment, recognises Quebec as a "distinct society", which means that the Charter may be interpreted in Quebec differently than in the rest of Canada. However, this amendment is controversial. (Taylor 1992: 52ff)

Og endringene har gått med ekspressfart: Mens det på 1960-tallet fantes svært få fremmedkulturelle mennesker i Norge, er situasjonen i Oslo i dag slik at _ av grunnskolens elever er fremmedkulturelle. Moderate anslag viser at de fremmede og deres etterkommere vil utgjøre _ av landets befolkning om 100 år. Når så norske barnekull er synkende, hvor lenge tror du Norge kommer til å tilhøre oss? Og hva slags kultur tror du kommer til å være fremherskende? (*Kjuus Oslo City Court*: 5)

And there has been rapid change. While in the sixties there were very few people of alien cultures in Norway, the situation in Oslo now is that one out of four pupils in elementary schools are of alien culture. Moderate estimates show that the aliens and their descendants will be one fourth of the population in 100 years. As the Norwegian fertility rate is declining, for how long do you expect that Norway will belong to us? And what kind of culture do you believe will be dominant?

A mistake has been made through what Kjuus considers a "gigantic demographic experiment"¹⁵⁶ - non-European immigration. As things stand, the situation may be corrected, through the measures Kjuus proposes, but later we will face a choice between civil war and the extinction of the Norwegian people. The policies of Quebec and those proposed by Kjuus are of course different in many ways. The *White Election Alliance* program does not allow for the assimilation of immigrants into the local culture, which is the objective of the Quebec legislation. In the party program, Kjuus implicitly indicates that blood or race may be an important criterion for selecting who may belong to the Norwegian people; and I have no reason to suspect anything like this in the Quebec case. And of course, the Quebec legislation does not recommend those severe violations of human dignity that Kjuus finds necessary. The reason to introduce Taylor's discussion of the problems of recognition in this context is to try to find a legitimate justification for the importance of working to prevent what Jack Erik Kjuus fears, even to the degree of imposing some limits on important liberties. This will contribute to an evaluation of whether some such fears may justify giving a cultural or ethnic conception of a people priority before the political in some cases. If so, this will constitute a reason to modify, or give up, the Mutual Recognition Restriction.

The dialogical character of human life

According to Taylor, our identity is not something given to us, as it was in pre-modern society. Still, the liberal focus upon the choice of a life plan is misguided. We do not, entirely on our own, form or revise a life plan, choose to belong to a certain religion or cultural group. We define ourselves in imitation of, in co-operation with or in opposition to other people around us - in Taylor's words human life has a "fundamentally dialogical character":

¹⁵⁶"gigantisk demografisk eksperiment". (*Kjuus Oslo City Court*)

We become full human agents, capable of understanding ourselves, and hence of defining our identity, through our acquisition of rich human languages of expression. For my purposes here, I want to take *language* in a broad sense, covering not only the words we speak, but also other modes of expression whereby we define ourselves, including the "languages" of art, of gesture, of love, and the like. But we learn these modes of expression through exchanges with others. People do not acquire the languages needed for self-definition on their own. Rather, we are introduced to them through interaction with others who matter to us - what George Herbert Mead called "significant others". The genesis of the human mind is in this sense not monological, not something each person accomplishes on his or her own, but dialogical.¹⁵⁷ (Taylor 1992: 32)

Instead of the concepts of culture or tradition, Taylor writes about languages. However, language in the sense here described emphasises the connection between having a language and our ways of expressing ourselves. But what are these ways of expressing ourselves, these ways of arguing, describing, ridiculing, praising, promising, flirting, cheating, greeting a friend, or an acquaintance, or a lover, expressing the dignity of our office, correcting a child, making our decision known, influencing, and so on? These practices of language in the wide sense are the core of our culture, or of our interpretation of, personal twist on, or opposition to that core.

The dialogical thus, according to Taylor, is a condition for the genesis of ourselves as human agents. We cannot choose our values, make plans for our life, or pursue a conception of the good, unless we develop a sense of value within some already existing cultural background. Culture is thus prior to the free human agency that is central to liberalism. Culture is prior with respect to the original formation or genesis of our values, but not only in that respect. The conversation about value and identity that began when we as children acquired these languages will continue to influence us, to some degree as long as we live.

While our identities originate within particular cultural dialogues, the languages in which we articulate ourselves are only part of our cultural situation. Modern identity is not, as in traditional societies, given by socially established roles, but is expected to be expressive of an individual authenticity. My life and identity are formed within languages that constitute my cultural background, but I have to express myself within those languages in ways that are creative, that take my potential beyond what is given. In this sense Taylor's conception of the self embodies the liberal idea of an autonomous agent that are the source of his own purposes or values. However, as cultural languages and dialogue are the ground upon which our identity-formation is based, the dialogue with others is also necessary in order to have our purposes confirmed or recognised. As we could not have become what we are without learning our languages of self-expression in dialogue with our friends and family, we are clearly vulnerable to social pressures. Our own attempts at

¹⁵⁷The reference to Mead is to his *Mind, Self and Society* (Chicago: University of Chicago Press, 1934).

"authenticity" are to a certain degree vulnerable to others' recognition or denial of recognition throughout our life.

The dialectics of recognition is a story of the relationship between ourselves as situated in a particular culture with particular languages of expression, and ourselves as creative agents defining and revising our purposes. Our beliefs, perspectives and purposes are initially grounded in the culture within which we grew up. Then we acquire our autonomy through transcending our pure situatedness and pursuing what we, subjectively, judge to be of worth. Our cultural background will be present in what we pursue as the material basis upon which we form ourselves. However, the problem with an agent only acting on his own principles and pursuing his own goals is that the substantial worth of what he is doing is objectively indeterminate. The agent may try to compensate for this lack of substance by satisfying certain formal requirements, such as Kantian universalisation. Another strategy would be to try to overcome the lack of substance by a passionate commitment to one's chosen way of life, like Kierkegaard. To some degree, both these ways of living with objective uncertainty of value may be elements of virtue in modern society, but without some further element of dialogue, recognition or confirmation, our principles and attitudes to life might just as well be empty ideas. Part of who I am consists in being recognised as what I am, as someone who acts on sound principles or has a commitment to an attractive view of life - as someone who pursues what is worth pursuing. The dialectics of recognition ensures a double grounding of my individuality. First, my cultural background gives me the conceptual resources from which I begin to create my authentic self. And then, the people I present myself to participate, through their recognition or denial of recognition, in ensuring that what I have made of myself is worth making - or pointing out to me that it is not.

Failure of identity-recognition as a moral issue

A few points should be made about the implications of Taylor's idea of a dialogical character of human life. In this context, the distinction between speech and action common in theories on free speech is difficult to maintain. As identities are developed in language, what we do with words becomes a pressing moral and political issue. Words may affect perceptions of reality, including evaluations of others and ourselves. Repeated uses of descriptive terms like 'mad', 'nigger', 'tart' will influence the ones thus described. The way such words influence us depends on the circumstances. Counter-strategies of self-affirmation are possible. One is to re-value the terms by affirming their content with pride. An example is blacks or homosexuals using in a neutral or humorous way the words levelled at them as invectives. Even though such counter-strategies are possible, they cannot always be expected to

succeed. Given Taylor's theory of the dialogical character of human life, such success requires recognition by others.

If this is the case, a Stoic strategy of changing one's attitude by mere personal will-power is insufficient. Such a strategy is attributed by Schauer to Judith Jarvis Thomson. According to this view, harm inflicted by speech is mediated by belief; as far as I myself *believe* that I am that low kind of person the term 'nigger' is supposed to refer to, I may be hurt by such verbal harassment, but not if I don't believe it. (Schauer 1993: 649) One should admit that the ability to rise above oneself, to assume a detached perspective on ones own beliefs, is an aspect of our cognition. Most people are able to ignore some insults. Still, there is a significant step from this plausible observation to the idea that people in general and at any time can be expected to exercise the ability to rise above the systematic failure of recognition often characteristic of situations in which verbal harassment takes place.

One point is that we have to be selves first, *i.e.* the history of our life, and the history of the groups to which we belong must have some content. This is because our realisation of a need to change our lives has to emerge from reflection upon our individual and collective histories of suffering and oppression. The drive to reflect upon our history will have to be, at least partly, experience of discontent with what our life is or has been, and our reflection will find its content in that history. Both the drive and the material require time to develop, not because of our deficient cognitive capacities, but for the practical reason that living takes time.

Furthermore, our beliefs about ourselves cannot be real and trustworthy unless confirmed by experience, and experience when it comes to my view of myself primarily means the explicit and implicit descriptions given and returned in communication between individuals, in the mass media and in the organisation of society. We are unable to distinguish between false and true descriptions of ourselves, unless confirmation or rejection of a candidate description is independent of whether I want it to be confirmed or rejected. (I cannot by re-describing myself be Caesar, no matter how much I want to.) Thus, rising above myself, I cannot know whether I am sane or completely mad, unless I do so as part of a process of dialogue and mutual recognition in which my claimed identity can be confirmed.

The politics of recognition

Recognition concerns the development of our individual selves, but also concerns politics. There is, in Taylor's words, a politics of recognition. Taylor distinguishes two basic movements within this politics of recognition, a politics of equal dignity and a politics of difference. Within the politics of equal dignity, which more or less encompasses different strands of liberalism, the idea of equal citizenship is a core principle. The main obstacles to political progress are unfair hierarchies in society,

and the means to overcoming those obstacles is universally applied rights. The politics of difference is also based upon opposition to unfair power or domination. However, while the politics of equal dignity seeks to end domination through universally applied rights, the politics of difference tends to see the system of rights as expressive of a particular, dominant point of view. Difference becomes a core concept, as any culture is a source of its own values, and should be respected in view of what it is, not as measured by criteria belonging to the dominant perspective (western, liberal).

From Taylor's rich and stimulating treatment of different aspects of the politics of recognition, we will here be concerned with his discussion of how liberal positions (politics of equal dignity) may accommodate the purposes of the Quebecois government. Taylor opposes the kind of liberalism he finds in Dworkin's writings, where the basis of society is thought to be the idea that people are to be treated fairly, with equal respect, rather than any particular substantive view of the good life. The basic political concept is the dignity of human beings,

consisting largely in autonomy, that is, in the ability of each person to determine for himself or herself a view of the good life. Dignity is associated less with any particular understanding of the good life, such that one's departure from this would detract from one's own dignity, than with the power to consider and espouse for oneself some view or other. We don't respect this power equally in all subjects, it is claimed, if we raise the outcome of some people's deliberations officially over that of others. A liberal society must remain neutral on the good life and restrict itself to ensuring that, however they see things, citizens deal fairly with one another and the state deals equally with all. (Taylor 1992: 57)

Liberal society is built around the idea of people considering and being free to adopt or reject any conception of the good life, any substantial view of what is good for people in that society. This might mean, as American liberals tend to take it to mean, that considerations of the good are not a proper concern for politics, beyond creating the fair legal structure that guarantees the right of everyone to pursue their good.

According to Taylor, this does not leave adequate room for the reasonable purposes of cultures under external pressures. French-speaking people in Quebec are struggling for recognition of a dignity that *is* 'associated with a particular understanding of the good life'. Recognising and respecting the people of Quebec for their ability to adopt or reject a conception of the good is a weak compensation for people who want their ways of life, related to a particular language and history, respected as worth protecting. To the government in Quebec, French culture is not only the one most of the people have chosen to adopt at this stage in history, but something the people and the government are committed to protecting and promoting. French culture in Quebec is not only a cultural and conceptual resource *on offer* to the people of the province, as one among many ways to achieve fulfilment in life. The purpose of cultural policies in Quebec is that French culture shall survive,

and in these policies French language and culture are put before - if not necessarily against - other options.

It is not just a matter of having the French language available for those who might choose it. This might be seen to be the goal of some of the measures of federal bilingualism over the last twenty years. But it also involves making sure that there is a community of people in the future that will want to avail itself of the opportunity to use the French language. Policies aimed at survival actively seek to *create* members of the community, for instance, in their assuring that future generations continue to identify as French speakers. There is no way that these policies could be seen as just providing a facility to already existing people. (Taylor 1992: 58f)

The survival of French Quebec is a goal not only derivatively (by being a good for the people currently living in Quebec), but something worth creating even for future generations. Cultural survival is a collective goal informing the choices of the provincial government. How can this be legitimate in democratic civil society where the will of the people is the primary source of political legitimacy? Taylor offers one major argument, which is that cultural survival is a collective goal, and one a community ought to be allowed to pursue collectively. "Where the nature of the good requires that it be sought in common, this is the reason for its being a matter of public policy." (Taylor 1992: 59) It does not make sense to adopt, practice, and advance a culture privately or individually, because the meaning and possible success of your ways of interpreting and practising the cultural ways depends on the dialectic of public recognition. It is not obvious that this recognition has to take place in the form of legal restrictions, but it is not implausible that the cultural ways have to be expressed in institutional structures in some way, and the legal system is probably one way of doing it. The people of Quebec may have a common interest in surviving as a French community, and legal restrictions may be needed to reach that goal.

Even those who do not accept the assumption that the legal system needs to be used to secure cultural survival, should be able to accept that even a society that has such policies may, to a considerable and possibly sufficient degree, be a liberal one. Taylor warns against considering putting up signs in the language you want a right that is fundamental and necessary in a liberal society. "One has to distinguish the fundamental liberties, those that should never be infringed and therefore ought to be unassailably entrenched, from privileges and immunities that are important but can be revoked and restricted for reasons of public policy - although one would need a strong reason to do so." (Taylor 1992: 59) A society can be liberal and democratic, and at the same time have a policy of promoting the flourishing of a particular culture that is not the culture of all its citizens, provided basic rights and respect are secured for those who do not share the goal of the major cultural policy.

On a moderate version of liberalism, then, a political society can assert and protect a particular cultural identity, while at the same time taking proper care of the

rights of both recognised minorities and dissenting individuals. However, even granted that this is possible - and it is, as almost any European country would fit that description to a significant degree - even then it is not obvious that the collective goal of cultural survival has any priority over the dignity of persons considered as autonomous. As both Kymlicka and Taylor recognise basic liberties as compatible with cultural recognition, it is still an open question whether cultural survival may sometimes take priority over the right of persons to conceive of and pursue their own good. At least, however, a liberal principle of right understood as requiring a *most extensive* set of liberties, or a political community that does not deliberate on or make priorities in culture, must be restricted according to the communitarian recognition of the need of culture. *Some* basic collective goals may outweigh some individual rights, but not all.

Two aspects of autonomy

In a response to Taylor's "Politics of recognition", Jürgen Habermas accuses Taylor of only considering one of two important aspects of the concept of autonomy in his description of procedural liberalism.

[Taylor's interpretation of liberalism] fails to consider that the addressees of the law can gain autonomy (in Kant's sense) only to the extent that they are able to think of themselves as the originators of the laws to which they are subject as private legal persons. Liberalism 1 fails to recognise the *equiprimordiality* of private and civic autonomy. And we have to do here not merely with a supplement which remains extrinsic to private autonomy, but with an internal relation between both of them. For, ultimately, the private legal persons cannot even gain equal civil liberties unless they themselves, by jointly exercising their autonomy as citizens, arrive at a clear understanding of the legitimate interests and standards involved and reach agreement on those aspects and criteria according to which equal things should be treated equally and different things differently. (Habermas 1993: 131)

Civil liberties do not begin to make sense, unless the subjects of the law, who are to enjoy those liberties, are already participating in the politics where the meaning and justification of the liberties are conceived. Quebec policies are not, as Taylor seems to think, legitimate because of serving a common interest of the French community. On the contrary, Quebec policies are legitimate because of being the outcome of political processes that citizens of Quebec, French-speaking or not, may use their autonomy as co-legislators to influence. It is not necessary to supplement the system of rights with rights of survival for the community itself, because a liberal theory of rights should not prevent autonomous citizens from recognising and protecting their own integrity as members of a cultural community. Community survival will generally be taken care of within normal democratic procedures, but cannot override the rules that constitute a legitimate democratic procedure. Autonomy must be realised as a necessary condition of legitimate legislation, but not primarily the autonomy of the

private person against the government, but the autonomy of the citizen participating in government.

According to Habermas, holding that a liberal society cannot have a legal system protecting a certain form of life is misconceiving the distinction between law and politics, rights and goals. The rule of law in a democratic society requires that certain rights be respected, among them the rights of citizens to participate in government. This puts certain restrictions on what policies may be legitimately pursued. However, there is no reason why working towards the realisation of collective goals that are particular to that society should not in general be possible - within the procedural rules of democracy.

Taking collective goals into consideration certainly must not be allowed to dissolve the *structure* of law; it must not destroy the *form* of law as such and thus eliminate the difference between law and politics. But it is in the concrete nature of matters in need of legal regulation that in the medium of law - unlike morality - setting normative rules for modes of behaviour is receptive to the goals set by the political will of a particular society. For this reason, every legal system is *also* the expression of a particular lifeform, and not merely a reflection of the Universalist features of basic rights. (Habermas 1993: 138)

Rights are important, but formal: they do not effectively determine the content of political programmes - in democracies this is done by the people, and the people among other things articulate and struggle for recognition of their collective identities.

What restrictions does the basic structure of a constitutional democracy put on these policies of protecting collective identities? Since cultural communities are not valuable or legitimate in themselves, but as the collective identities of autonomous citizens, they are vulnerable to changes in the composition of the political community of citizens. Ethnically motivated political decisions are the decisions of contingently composed communities, and should these communities change, so might the identity of the community, and its goals. This is the case in a situation of international migration.

Immigration and the protection of cultural identity

The movement for recognition of Quebec as a distinct society and the movement to deport and sterilise Norwegian immigrants - both in Kjuus' *White Election Alliance* and other more and less radical circles - have to justify the need for their measures to protect their culture against pressures that might change or dissolve them. Obviously the measures taken in Quebec will be easier to defend than Kjuus' more extreme ones, but it is the same elements of a normative interpretation of a constitutional democracy that enters into both justifications.

Habermas describes two "stages of assimilation" that are candidates for what can legitimately be demanded of immigrants as conditions of citizenship in a political community. The first stage is what we may call political assimilation, "agreement to the principles of the constitution within the scope of interpretation laid down by the citizens' ethico-political self-understanding and the country's political culture". (Habermas 1993: 147) This means assimilating to the politics of the country of immigration, in the way those politics are understood by the people already living in that country. Habermas thinks this is necessary, but does not find it legitimate to demand full cultural assimilation, or "a willingness to become acculturated, i.e. not only to conform externally, but to become familiar with, and adapt to the way of life, the practices and customs of the local culture." (*Ibid.*) One may demand compliance with the procedural rules regulating political participation in a constitutional democracy, in the actual way this is understood in that particular democracy - which is to safe-guard the autonomy of citizens as co-legislators. However, one may not revoke the right of persons to private autonomy, in demanding full internalisation of a culture that is alien to them.

As far as constitutive conditions of a constitutional democracy are concerned, Quebec might very well enact legislation protecting the French language of that community. Whether or not to do so should be decided in the legislative processes in Quebec and in Federal Canada. The Quebeckers must exercise their autonomy as citizens and co-legislators on both levels, and whatever arguments there may be for and against legislation about the working language of large businesses must be advanced in that process. What the political people cannot decide, however, is that the French community is to be protected forever. This would be empirically unsound, as the only thing that can ensure that the French culture is kept alive is the free and creative activities of the members of that cultural community. The vitality of the culture cannot be established by law, even if some pressures threatening that vitality may be controlled by the legal system. Moreover, the empirical question aside, the normative basis of legitimacy in constitutional democracy rules out the very idea of an unchanging cultural status as a premise for Quebec policies in the long run. The continued protection of French culture in Quebec depends on the current composition of the people of Quebec and the current sentiments of that people and of the people in Canada at large.

When it comes to the policies of *White Election Alliance*, the case is different. It should be clear from the discussion of the *White Election Alliance* program above that Kjuus and his party would demand both stages of assimilation as a precondition for living in Norway - not only assimilation into the political system, but into the culture or ethnic character of Norway as well. Even if we see good reasons to protect culture or ethnicity, these reasons cannot justify requiring the immigrants to give up

the autonomy they do have as any other citizens of Norway, to conceive of, adopt or reject a conception of the good life. And certainly protection of culture cannot justify revoking the autonomy as co-legislators of immigrant citizens, which would be the consequence of Kjuus' repatriation measures. It seems that a liberal society must accept - once immigrants have been welcomed in - that what is to be the national culture or ethnicity - both on the political and the social area - will have to be adjusted to the new situation.

Because the immigrants cannot be compelled to sacrifice their own traditions, with the advent of newly established lifeforms the horizon in which the citizens *henceforth* interpret their common constitutional principles may also expand. For, in that case, that mechanism is operative in which a change in the composition of the active citizenry also changes the context to which the nation's ethico-political conception of itself as a whole refers. (citation?)

The absorption of people with different cultural backgrounds into the political community will affect what Norwegian culture is, possibly in deep ways, because this absorption changes the very character of what it is to be Norwegian, by offering new varieties [of?] and taking a stand on the previous ones. It seems that the structure of a liberal constitutional democracy is incompatible with attempting to prevent this by law. What one may do, is enter into the political and social processes through which our culture is formed and institutionally embodied. Kjuus may legitimately identify those traits of the Norwegian ethnicity he wants to protect, and work towards keeping them as vital parts of Norwegian culture. What he, as well as the immigrants, has to do, is to recognise and respect the basic procedures of constitutional democracy, and whatever is needed to uphold these procedures.

My hypothesis is that a principle of mutual recognition of basic rights of participation, like free speech, is part of the rules of the game of constitutional democratic politics, in other words the procedures by which a democratic civil society does politics. Preservation of ethnicity and culture will have to take place against the background of such mutual recognition. The *political* thus takes priority over the ethnic or cultural, as liberal theories argue, but not to the degree of requiring a *most extensive* set of rights to liberty. Basic rights to public autonomy or political participation, however, take priority within a constitutional democracy.¹⁵⁸

¹⁵⁸ This is probably recognised by the philosophers discussed here. Kymlicka requires that members of minority communities have the rights necessary for meaningful individual choice. (Kymlicka 1989: 196f) Taylor argues that fundamental liberties are not threatened in recognising the constitutive goal of preserving culture. (Taylor 1992: 59) Even Rawls has modified his First Principle of Justice from claiming a "most extensive basic liberty" in *A Theory of Justice* (Rawls 1978: 60) to the more modest "a fully adequate scheme of equal basic liberties" in *Political liberalism*. (Rawls 1993: 291)

A VIABLE COMMUNITY

The priority of the political is related to a model of a political community in which subjects of the law are also citizens – authors of the law - through their possible participation in politics. The status of citizens within such a political community founded on metaphysical commitments, but is a project to be realised politically. There have to be public democratic processes facilitating participation for democratic legitimacy to obtain. As the normative ideal of a political community of citizens is a project, failure is always a possibility. Failure in this sense is relevant to the issue of the normative priority of the political. The normative priority of the political has to be secured through establishing conditions under which political participation is possible and meaningful. Perhaps some aspects of culture or ethnicity enter into such considerations in ways that make them material conditions of democratic legitimacy as well?

According to Richard Rorty, *national pride* has the function of self-respect on a public level, being a "necessary condition for self-improvement". (Rorty 1998: 1) Rorty argues that emotional involvement like pride or shame in relation to historic events and persons is necessary "if political deliberation is to be imaginative and productive". (Rorty 1998: 1) Progress takes place within a "civic religion" involving ideas that lead the community in a certain direction, e.g. social justice, and realistic strategies for improvement. Habermas in a 1998 speech to the "Kulturforums der Sozialdemokratie" likewise connects democratic legitimacy to the solidarity expressed in social policy. (Habermas 1998) Legitimacy depends upon the possibility of participation, but this participation has to have a purpose, connected to the way interests are processed into rights.

Nur ein demokratischer Prozess, der für die angemessene Ausstattung mit, und eine faire Verteilung von Rechten sorgt, kann Solidarität stiften. Der Staatsbürgerstatus muss einen Gebrauchswert haben und sich in der Münze sozialer, ökologischer und kultureller Rechte *auszahlen*. Insofern hat die sozialstaatliche Politik eine nicht unerhebliche Legitimitätsfunktion übernommen. (Habermas 1998)

The political process must be able to integrate society, to create the solidarity necessary to gain acceptance for equal rights to common life conditions. The welfare state with common rights going beyond the formal right to political participation is a condition for political participation making sense.

National pride or constitutional patriotism¹⁵⁹ is necessary for solidarity, and thus for social improvement, being one of the cornerstones in the value of a right to political participation. Habermas confirms the normative priority of the political in

¹⁵⁹Constitutional patriotism, *Verfassungspatriotismus*, is the Habermasian equivalent to Rorty's national pride.

the sense that he rejects the idea of a necessary pre-political basis of trust.¹⁶⁰ National consciousness is a cultural phenomenon. Since national integration is achieved through a "learning process", a political community could, in principle, establish the solidarity necessary for legitimate institutions with no original common identity.¹⁶¹

In modern society, the learning process involved in achieving the minimum of common identity needed for basic solidarity is a process of integration of a plurality of identities, a plurality that will to some degree be maintained outside the political sphere. These identities should in principle allow political integration, but may not do so without painful adaptation or compromise. Ethnic and cultural difference do not *justify* failures in integration, but might however, in empirically hard cases, *cause* failures in political integration. The implications of such actual failures in creating the common solidarity necessary for democratic politics to work are ambiguous. One might insist on the ideal of a common political community as the right normative ideal, and that the only viable solution is to continue working towards integration. Or one could accept that integration does not always succeed, and that even separation – probably meaning political exclusion of some people – may be a solution. The scope of the Mutual Recognition Restriction depends on what the right response to this challenge could be. History may not lend legitimacy to forced exclusion of citizens from the political community on ethnic or cultural criteria. Still, history might foster situations in which pragmatic considerations are thought to recommend separation, or situations in which issues of rights need to be settled after forced separation of ethnic or cultural groups has already taken place. Normatively, the question may be whether the priority of the political is *absolute*, or rather can be overridden by cultural or ethnic considerations, but only in the most extreme circumstances.

Stability through ethnic or cultural separation

The examples referred to so far have been from relatively stable constitutional democracies. Even though the Quebec issue may be a serious problem for the Canadian Federation, the struggles take place within the legal and political system that guarantees the rights of the individual parties involved. In the Norwegian case, the problems most pressing in the view of the White Election Alliance are future consequences of current policies. Immigration is no serious threat to the stability and existence of Norwegian society today, nor is this claimed by Kjuus. Maintaining the priority of the political has an affordable cost under such circumstances. Still, historical experience shows that one cannot dismiss without consideration the

¹⁶⁰ "vorpolitischen Vertrauensbasis"

¹⁶¹The subject of Habermas paper is the possibility of new trans-national forms of democratic politics, a question that grows more pressing as the significance of the nation-state decreases because of globalisation. The discussion is, however, generally relevant for the issue of legitimacy residing primarily in political participation, or in other aspects of society as well.

possibility of our society facing situations, in which the legal and political structure may be disrupted, no matter how well legitimate procedural government is working. Situations in which the stability of civil society seems to depend upon non-individual solutions to ethnic conflicts, challenge the priority of the political and the priority of citizenship. Comparison with such situations will provide perspectives that are relevant to the question of the scope and validity of the Mutual Recognition Restriction. Of particular relevance are situations in which prudence seems strongly to recommend giving up strict adherence to the priority of citizenship over ethnic or cultural membership.

According to Dworkin, the greater the importance of a particular right, the higher the threshold past which it might be outweighed by collective goals; and if a right is absolute, goals can never outweigh it. (Dworkin 1977: 92) Granting the possibility of protection of culture or ethnicity being a constitutive goal in the sense of Taylor, as Kjuus does, we may ask whether the costs with respect to cultural or ethnical existence could be so high as to surpass the threshold protecting the right to political participation. These costs may be related to states of emergency, and be relevant only in such situations, as is recognised by emergency laws of different civil societies. With respect to avoiding such emergencies, however, arguably issues relevant to stability may be recognised as material conditions for a viable society, with a claim to being equally fundamental as normative constitutive conditions of legitimacy. If ethnic homogeneity is not such a condition, as Kjuus seems to think, some degree of consensus on immigration, e.g., might be.

There might be situations in which meeting conditions of democratic legitimacy has high probability of undermining the stability and continued existence of the society in question. In other words, is it possible that the Mutual Recognition Restriction and the implicated asymmetry of inclusion and exclusion presuppose political stability, and thus may have to yield to empirical factors like ethnic conflict?

In the final settlement of World War I between Turkey as representative of the former Ottoman Empire and the Entente Powers, forced exchange of populations between Greece and Turkey was part of the Treaty.¹⁶² 1.3 Million Orthodox immigrants came to Greece, 400 000 Muslims to Turkey. Border disputes as well as enmity between the religious groups, were thus alleviated through the creation of religiously or ethnically pure nation-states. Even linguistically integrated members of religious minorities were deported, and thus excluded from the political communities in which they lived as religious minorities. Religion being the criterion, Greek Muslims and Turkish Orthodox were deported as well. Exchanging populations

¹⁶²Treaty of Lausanne, signed 24 July 1923. Source of the account of the Greek-Turkish settlement is Encyclopedia Britannica Online, <http://www.eb.co.uk:180/bol/topic?idxref=298010>, <http://www.eb.co.uk:180/bol/topic?eu=109179&sctn=16&pm=1>, <http://www.eb.co.uk:180/bol/topic?idxref=298011&pm=1>.

generally proved a successful measure. Although a small country, Greece absorbed its 1.3 million immigrants remarkably well.

In view of the current conflict in the Balkans, the choice of separation of peoples is understandable as a way to establish internally stable societies in this region, even though the current political relations between Greece and Turkey can hardly be considered peaceful. In view of the Mutual Recognition Restriction, however, this understandable policy fails to recognise the right of political participation of the deported in the political community they originally were part of. Those who disagreed with the deportation policies has lost the *future* right to participate by raising the issue from within the community they left. Thus the post World War I exchange of people clearly violates the Mutual Recognition Restriction. Consequently, three options are open in evaluating these events. Either the Mutual Recognition Restriction is considered absolute, and the deportations illegitimate. Or the Mutual Recognition Restriction is less than absolute, in which case the overall evaluation will be either that there was sufficient reason to bypass the Mutual Recognition Restriction, or not. In any case, violation of the restriction constitutes deviation from perfect democratic legitimacy, if the restriction is less than absolute this deviation is accepted as a cost.¹⁶³

Temporary failures to meet the requirement of Mutual Recognition might be pardoned. This, however, does not necessarily mean that the Restriction is less than absolute, if those excluded obtain full participation rights in their original community at a later date, with authority to work toward correcting the wrongs. Deportations in the case of Turkey and Greece, however, were permanent. Accepting these governments' agreement on mutual exchange of citizens, however, would seem to mean accepting that the Mutual Recognition Restriction is less than absolute. As in the case of the Baltic republics, it is not difficult to understand their strategy, especially in light of recent events in the Balkans, another conflict that goes back at least to the former Ottoman Empire.

I will draw no conclusion about whether the deportations were, overall, worth carrying out. Moreover, I have reason to doubt that this case would constitute a clear argument against the validity of the Mutual Recognition Restriction. The main reason is that citizenship must have been an issue of general confusion in 1923. The Orthodox immigrants to Greece had been citizens of a state no longer in existence, i.e. the Ottoman Empire, and probably had no sense of belonging to the emerging Turkish state, whose territory was not formally recognised by the major European powers until the 1923 Treaty. On a reasonable interpretation there was no existing

¹⁶³To choose the least of available evils is not to choose what is right, in the sense of perfectly just, but it is to make the right choice, in the sense that any other choice would have been worse. In the latter case, there are wrongs to be considered with respect to e.g. correction or compensation.

political community that the Orthodox minority of the old Ottoman Empire belonged to until the peace settlement.¹⁶⁴ Exclusion from Greece was more problematic in this respect, as there was continuity in the Greek political community, although the system of government was disputed, and political regimes changed rapidly in the period.

Even though the Greek-Turkish issue is no strong argument against the *validity* of an absolute interpretation of the Mutual Recognition Restriction, a limit to the *scope* of the Restriction becomes evident. Although valid as a constitutive condition of a constitutional democracy, application of the restriction seems to require a relatively stable political system of that kind. The architects of the settlement between Greece and Turkey were operating more or less in a state of nature. Within the normative model considered here, there were no democratically legitimate options. Upon the collapse of the Ottoman government, the political community to which both Greeks and Turks belonged had no political institutions competent to make legitimate decisions.

Sources of legitimacy

Preservation of culture and tradition may be an important political goal that could be advanced through the institutions of a political community. The degree of public support of cultural heritage and development may be different, possibly related to the degree of cultural homogeneity in a particular society. Still, on a normative political theory in which political participation is crucial, such policies cannot be *legitimate*, unless they are the outcome of political processes in which every citizen has had a right to participation. Proponents of cultural preservation need to gain public recognition of that political goal by participating in politics, whether the claim for recognition is made on behalf of the dominant culture, national minorities or immigrant groups. Granted the legitimising role of politics, there can be no *pre-political* cultural foundation of a political community or a system of law that has the force of *suspending* the need for legitimacy established through procedures that are designed to ensure popular participation in government.

Even though equal political participation of citizens is required for democratic legitimacy, given the normative model of the Mutual Recognition Restriction, more than legitimacy may be needed in order that a political community exist. Deep conflicts may destabilise a political community and undermine the *political* culture needed for co-operation on a common economic policy and a fair system of law. The source of or symbolic distinction operative in these conflicts may be ethnic or cultural

¹⁶⁴Injustice may have been committed through the deportations, of course, but not in the form of exclusion from a political community, as the political community the deported belonged to had already ceased to exist.

antagonism, but also economic or social inequalities not related to ethnicity. Anyhow, this does not contradict the idea that the possibility of popular participation in politics is a condition for the legitimacy of government and law. Nevertheless, the legitimacy established through political procedures might not be *operative*, unless the material conditions of a stable political community with a minimal sense of common purpose or interest is generally in place.

Against the background of these considerations, a preliminary conclusion may be drawn with respect to the relevance of culture or ethnicity to legitimacy, and thus to the Mutual Recognition Restriction. The priority of the political community for democratic legitimacy is confirmed, but the ability of political community to fulfil its role in government might require that the political community be generally recognised as a community. Deep and unresolved cultural or ethnic antagonism might undermine or prevent such recognition. Having political procedures that formally guarantee the possibility of political participation for every adult citizen might thus be *insufficient* for legitimacy. On the other hand, such opportunities for participation are *necessary* for legitimacy. This means that although establishing political stability and a minimal sense of community may be necessary to achieve democratically legitimate government and law, *failure to* secure the material conditions of an operative political community does not by implication give legitimacy to political measures taken for the sake of preserving ethnicity or culture. Problem-solving in the style of Lausanne cannot be considered normatively *right*, even though real options satisfying the Mutual Recognition Restriction were, perhaps, not available in that historical situation. Whether such options could have been found given time and consideration, we will never know.

In the next chapter, we will expand our focus from the relationship between political and other bases of community, to further issues related to the possibility of legitimate exclusion from a political community. In that context, we will finally return to the question of the foundations of a viable community, and the question whether the reciprocity of *Mutual Recognition* might justify considering someone to be *self-excluded* from a political community.

6 The legitimacy of exclusion

The Mutual Recognition Restriction implies that there is no legitimate ground on which a representative assembly of a political people can exclude an already accepted member of the political people, i.e. of the electorate of that representative assembly. Thus there is no such thing as a majority sufficient to pass a statute saying that some of the people, because of having such and such characteristics, should no longer be part of that people. I have argued that this is in effect what Kjuus is working towards, by campaigning on a platform that all people in Norway of non-Norwegian origin should be repatriated. The core of the argument supporting this conclusion was the idea that legitimate legislation presupposes that citizens can participate in the political processes by which such legislation is enacted, by means of voting and speech. I also claimed that such participation should be an opportunity not only in the time leading up to the election, but during the time when the citizens as subjects of the law have a duty to obey it. This means that subjects of the law, in order to be autonomous citizens, have to be able to work towards changing laws they disagree with, both by means of speech and by voting in the next election. There are then no legitimate way of cutting off these participation rights, as would be the effect of Kjuus' policies if put into effect.

From the point of view of the citizen, the legitimacy of legislation depends upon having reason to support the social contract. This is different from actually supporting the contract. People may, for a variety of reasons, feel no allegiance for the present government; a considerable minority of almost any body of voters in a democratic state participates neither by voting nor by other forms of political expression. The crucial point when it comes to legitimacy is whether doing so is open to them. If so, it might be said that they have a minimal reason for considering themselves authors of the law in their capacity as citizens, and consequently will retain their autonomy while at the same time being subjects of the law who have a duty to comply with it. Removing this option, as would be the consequence of revoking certain people's citizenship rights and removing them from the territory of the political community, would effectively remove those people's reasons to comply with that regulation. Thus, repatriating immigrant citizens against their voluntary consent is an act of oppression for which there is no legitimate legal ground.

Exclusion, punishment and qualifications to vote

The Mutual Recognition Restriction states that there are no legitimate grounds for denying future political participation to any group of citizens. On the other hand, one may claim that limiting liberty is essential to law. The law of a civil society limits the free use of one's powers, but on the other hand opens a space of unimpeded or regulated agency within the law, where the subjects of the law may pursue their own interests. On the other hand, as a citizen, one participates in defining this space of free agency, and thus remains the author of the rules by which one lives. To investigate further the general validity of the Mutual Recognition Restriction, I will look into two other examples of limiting the rights and possibilities of citizens to participate in political life. First, I will consider punishment as a means of limiting the liberty of people, and second, the case of age and other factors as qualifications to vote.

Punishment for serious crimes often involves limits to liberty. One's rights to participate on equal terms with other citizens may be limited by the courts, e.g. when a businessman with a history of frequent bankruptcy may be denied the right to establish new businesses for a certain time. Drunken drivers may forfeit their right to drive a car for some time, and may even serve prison time. Imprisonment is a special form of limit to liberty, by which people are excluded from most aspects of community life. Certainly people serving time in prison are barred from pursuing their interests on equal terms with others in society, and even if political participation need not be denied to prisoners, there will probably always be practical and legal limits to what kind of political activity is possible from within a cell.

Even if it constitutes some measure of exclusion from society, imprisonment, because of its temporary character, is not the kind of exclusion the Mutual Recognition Restriction is concerned with. Imprisonment is temporary; at least in Norway where life imprisonment is only a technical term, in practice meaning 15-16 years. Thus, if the prisoner disputes the legal grounds of his imprisonment, he or she can return to society to work freely towards changing the law. Furthermore, imprisonment clearly depends upon personal responsibility, i.e. upon voluntary action. Repatriation, as Kjuus considers it, will not be temporary, and does not take place because of something the immigrants have done. Arguably, immigration laws might change once again, allowing the immigrants to return to Norway. However, the immigrants themselves will have no formal authority or right to influence the issue of their return. Prisoners, however, return to society with full rights. There is of course an element of choice in what the immigrants have done. Immigrants voluntarily chose to leave their country of origin to seek employment or refuge in Norway. Still, this is not comparable to committing a crime, even if Kjuus thinks mixing culture is a great evil. Legal immigrants have been admitted according to, not in violation of,

Norwegian law.¹⁶⁵ Neither was there any condition of returning made upon their admission, as has been the case for guest workers in Switzerland.

Regarding punishment, repatriation of immigrants is comparable rather with capital punishment. While capital punishment is a final and incorrigible exclusion from life and all possible agency, repatriation of immigrant citizens is, or is at least intended to be, a final and incorrigible exclusion from political life. In practice repatriation is less final than capital punishment. It is of course possible through future legislation to have repatriated immigrants return. Neither does repatriation close every opportunity for immigrants to influence public opinion in Norway and address the Norwegian government. Communication through writing, electronic mail or telephone is not geographically limited. Of normative significance, however, is the lack of formal authority with respect to the decision regarding readmission. Lacking formal authority; immigrant ex-citizens would be left with submissive means like applying, appealing or begging to be able to return.

The issue of finality is also decisive in another possible scenario involving political participation, which is revocation of the right to vote. The right to vote is a major sanction of government, and, besides speech, one of the main means of political expression. Expansion of voting rights has been one of the main issues in struggles for political recognition by various groups in society. When the Norwegian constitution was established, certain conditions were connected to the right to vote. Some conditions were related to the independence of the prospective voter. The economically dependent, *i.e.* servants and other employees, were not necessarily considered qualified to vote. Women were excluded, and an age-limit was set. During the next 100 years the right to vote was expanded to include workers, women, and younger people. The present age limit, eighteen, is relatively recent.

Let us imagine that some such expansion was made, and proved to be a mistake. For instance, suppose children of school age were given the vote, after a campaign for children's rights. Later, it was established that children did not possess the necessary independence of mind to resist illegitimate influence. Suppose certain children, e.g. gang leaders paid by political parties, controlled children's votes through harassment. Surveys established that practically none in the age group under 12 understood anything of what was going on in election campaigns or in politics. Strange election results were shown to follow, and the least ethical campaigns proved to attract most of the children's votes. A majority in Parliament sufficient to change the constitution decided that the age limit should be set back to eighteen.

Although this scenario would mean exclusion of children once admitted from the electorate, there would be no final exclusion violating the Mutual recognition restriction. No personal violation would take place of the rights of the children below

¹⁶⁵ Illegal immigrants are generally not given residence permit when discovered.

school age. You cannot violate the rights of an age category, only of actual people. Even if a right had been postponed from the age of six until eighteen, pre-school children would not be politically excluded. The current representatives of the people would be authorised to decide the terms of admission for those yet to be admitted. Children between six and eighteen would be excluded if denied the right once acquired to continue to vote. Exclusion might nevertheless have been avoided through transitional measures, by gradually increasing the age limit to the new level. But even if exclusion did take place, it would only have been temporary. Affected children would eventually have reached the new age limit, and would then be able to work politically towards amendments to legislation. Repatriated immigrants, on the other hand, will not, merely through passage of time, become eligible to re-enter Norway. Revoking a right to vote for some years is a temporary measure that is bound to end, while revoking citizenship rights from immigrant citizens will not be reversed automatically.

The right to citizenship

The Mutual Recognition Restriction is based upon an asymmetry between admitting and excluding, due to different bodies of citizens operating in the two cases. In cases of exclusion, the excluded are supposed to be among the people authorising the decision. In cases of admission, there is a group of people independent of the applicants for citizenship setting the terms for admission. Another approach to these questions is possible, though, according to which there is symmetry between conditions of admission and exclusion. This approach would be to ask what conditions of citizenship are valid *per se*, conditions on which someone has a right to citizenship. In this section I will be explicating the differences between and different implications of the two models, with regard to evaluating the Mutual Recognition Restriction.

There is a moral question, as well as a legal question, of who is or is not entitled to citizenship. The moral question is to some degree independent of the composition of the people currently in place in any political community. Morally speaking, Kjuus could have claimed that everyone had the right to citizenship in an ethnically pure society, and thus ethnicity or Norwegian blood should be a condition of being a Norwegian citizen. Germany has traditionally had a blood condition of citizenship, although modifications of German citizenship law are currently underway. On the other hand, one could claim that all residents should have full political rights in virtue of being subjects of the law. This comes close to the conditions for local elections in Norway, where immigrants, after a period of residence in Norway, are allowed to vote. In between a blood requirement and full inclusion of all residents come current Norwegian provisions on political rights connected to citizenship. To

acquire permission to vote, a resident alien must make an application, after having lived in Norway the requisite time. One could also set other qualifications as a condition for citizenship, such as language and knowledge of the history of that community, even if this is not done in Norway today. The choice between these alternatives, or others, may be made according to moral arguments about who should be entitled to citizenship, independent of who makes the decision. From a moral point of view it does not matter whether we are discussing admission or exclusion. Those having the sufficient characteristics should be citizens, the others not.

The legal question, however, cannot be made independently of the actual body of electors and the actual admission being made. The moral question becomes politically and legally relevant as raised, discussed and decided upon by the procedures of legislation in that political community.¹⁶⁶ It is only by democratic processes that moral principles can be applied in legislation. Those who have legislative authority are those who now constitute the political community. Thus the asymmetry arises. The political community can decide what principles should be followed in granting citizenship, but cannot legitimately enforce principles that are such that members of the community are excluded. Once admission has been made into the political community on legal grounds, a change in conditions of citizenship cannot affect those already admitted - even if the terms for those coming later may be different. The legal and moral contexts yield different results in this case.

Referendum, representativity and the popular will

It would be a special case, however, if someone were admitted on illegal or illegitimate terms. Kjuus repeatedly argues that the people have not properly approved of immigration, and that this constitutes a fraud by the politicians, which must be set right by a referendum. It is, however, a question of what this allegation of fraud means. Kjuus may mean that too many *exceptions* are made to the general stopping immigration. This would, however, rest on the misunderstanding that the law is *only* the general rules and not the exceptions. The law is the total body of rules and regulations, including the exceptions admitting refugees and families of immigrants. As long as Kjuus cannot establish that the officials go beyond their authority in their application of the rules, he has no valid case. Probably what Kjuus means is rather that the decisions made are not in harmony with the actual will of the people, because Norwegian politics fails to let the people be heard by the politicians. This is, of course, possible, as general elections involve only a few parties, each of which presents a complete program. Since electoral choice is between complete programs, widespread views on a particular problem may not be accounted for.

¹⁶⁶Which will also include international human rights instruments the community has recognised.

Public discussion in its turn may be formally open, but generally takes place among a rather limited group of the population. Actual participants in public discourse may very well have a spectrum of beliefs and perspectives that differ considerably from the general population. With a possible exception for sport, Norwegians are anti-elitist and generally sceptical of what is said by intellectuals and people in positions of authority. One way of making the will of the people directly known to the government is then of course by a referendum. This is only used in very serious matters. In 1905, the people decided by referendum the secession from the union between Norway and Sweden, and further on a monarchy instead of a republic. When Kjuus started his party the referendum on the European Economic Community in 1972 was recent history, and he recommended a referendum to take place even on immigration. He believed, and many feared around 1990, that this would show that the immigrants were admitted contrary to the will of the people, and thus had no real right to be here.

However, the real will of the people has to be procedurally mediated in some way or another. If the government is appointed by the people, according to the procedures established by the Constitution and in procedurally valid legislation, its decisions must be accepted as the will of the people until changed by those same procedures. There is no other constitutionally and democratically sound way of establishing the will of the people than through the constitutive political institutions of the community. The decision that some extraordinary measure, such as a referendum, is necessary is to be made by the same democratically appointed government.¹⁶⁷ There might well be a case in which a government misrepresents the will of its electors. However, the only way the electors can attempt to correct such a discrepancy, is through public expression, or by voting differently in the next election.

The admission of immigrants to Norway was valid if and only if it was in accord with decisions made by a legitimate government, appointed by the right procedures. It is valid not because of being the morally right or truly wise decision, but by being the outcome of the constitutionally established procedures of democratic politics.

Once again we find an asymmetry. While the *de facto* admission is valid because of being the outcome of the right procedure, a *de facto* exclusion would be invalid because it does not satisfy a basic condition of legitimacy of such a procedure. This basic condition is that the entire people be able to consider themselves authors of the law. Kjuus might feel that he would not have written the rules on immigration in Norway, but as a participant both as a voter and prospective politician he is part of the writing process, both in past, present and as long as he lives, and should be able to recognise that. If he should have the power to *de facto* exclude someone, they

¹⁶⁷ Unless another procedure, such as a number of signatures of voters, is established in a procedurally valid way.

would not enjoy the participating ability in the future, and would not be proper authors of that decision.

Despite there being strong reasons to accept a decision to admit someone as a citizen as *de facto* valid and incorrigible, there is still a question whether such a decision by a legitimate government will *always* be legitimate. If proper democratic decision procedures are followed, this does not guarantee a morally right or prudential decision. But is it sufficient even to guarantee a valid or legitimate decision? The purpose of the procedure, which is the measure of its success, is to allow the will of the people to be expressed in law and policies. This is the purpose that democratic systems of government ought to be designed to achieve. However, the degree to which a particular system of government reaches that goal in practice may vary considerably. First, it is likely that other interests and purposes than facilitating democratic sovereignty have been considered in designing the system.¹⁶⁸ Second, even though the system would provide efficient channels of influence if ideally implemented, inequalities in the material bases of access to the channels of influence increase the possibility that the system might fail seriously in expressing the will of the people. Such material bases of influence might be education, access to major public media, as well as a minimum of welfare providing time to participate in politics. And finally, even though a certain design of the system was appropriate at the time it was instituted, later modifications as well as changes in society may have changed its actual legitimacy.

When Stop Immigration was established in the late eighties, one of the main problems perceived by Kjuus and his fellows was the failure of politicians to represent the electors properly. The conflict between the government policy on immigration (or the actual practice) and what was alleged to be the general opinion was described by Stop Immigration as a “constitutional problem”. (*Aftenposten* 30 April 1988) This conflict was considered a symptom that the Norwegian democracy had failed in the immigration issue. To confirm this diagnosis, the anti-immigrationists demanded that a referendum should be held on the issue of immigration.

The diagnosis of a discrepancy between the outcome of the democratic procedures and the real popular will, as well as the call for referendum as a means of identifying and correcting the discrepancy, provides a challenge to the idea of procedural legitimacy. Supposing that the will of the people was substantially different from the outcome of the procedure, are we justified in considering this

¹⁶⁸ Most notably, democracy, in order not to be the tyranny of the majority, has to be implemented within a rule of law securing predictability and some protection of the integrity of the subjects of the law. The procedures of a constitutional democracy may also be designed so as to provide a thorough analysis of problems leading to more rational decisions. More specific interests may also be expressed in the design of a political system.

outcome legitimate? Would not procedural legitimacy depend upon the degree to which the actual procedure succeeds in integrating the will of people into the will of *the people*?

The challenge of a possible discrepancy between the government and the people should not be ignored. Not *any* decision procedure can count as democratic. Even a decision procedure involving the channels of voting and speech may be questionable, depending on whether these channels are only formally guaranteed, or in practice generally accessible as well. If Kjuus could show that the Norwegian political system comes seriously short of expressing the popular will, the White Election Alliance may have a *moral* claim to correction of this fault. Advancing such a claim is what Stop Immigration was doing, a claim comprising the demand of a referendum, changing the Government immigration policy, as well as correcting former mistakes.

A referendum may be considered a test of the popular legitimacy of particular policies. The outcome of the indirect expression of the popular will through elections and free public speech may be compared to the outcome of a direct vote on a particular question. However, the significance of this test does not have to be what Kjuus wants it to be. There is reason to question the claim that the result of a referendum is a direct representation of the popular will, and that the decisions of the regular institutions of our political system express the popular will to the degree that they conform to the result of the referendum. Rather, this view is only one of the possible theories of how the will of the people is expressed. Another possible, but less simple, theory is that the will of the people is what is established through the workings of the procedures laid down in our constitution and carried out by the representatives appointed by the people through general elections. The main reason in favour of such a theory would be the need for time and good judgement to make an informed decision. Elected and paid representatives will in general have more time to do this job than the average citizen will, and electors are free to choose representatives whose judgement they generally respect.

Provided that the direct democratic procedure of referendum is based upon one theory of what constitutes a correct expression of the will of the people, and the indirect procedures of election and free public speech is based upon another, a referendum cannot be a test of the validity of the outcome of the indirect procedures. At most it could be indicative of a lack of public support of the issues in question. This is also in accord with Norwegian practice, as Norwegian referendums are generally *advisory*, leaving the final decision to be made by the regular political system. Actually, neither the claims of Stop Immigration nor of the White Election Alliance have questioned the legitimacy of the current political system, but rather appealed to the electors to replace their governors through ordinary elections.

The political strategy of Kjuus' struggle against immigration reveals a certain confidence in the Norwegian political institutions. Aside from the prediction that civil war may at some point in history be the outcome of accepting immigration, there is no indication that Kjuus would go beyond ordinary democratic practice in his struggle. Kjuus thus expresses no deep distrust in the system as such, only in the current representatives, and has no claim beyond wanting to participate in elections and public discussion. The system has failed to express the will of the people, but the remedy is not fighting the system, but fighting within the system – also in the case of calling for a referendum.

What implications would a failure in substantial democratic legitimacy have had for the validity of previously granted citizenship? There is a general legal principle that legislation cannot be enacted that means punishing someone for actions legal at the time they were committed.¹⁶⁹ Thus no one may be held personally responsible for any wrongdoing, unless they failed to respect actual Norwegian law. Now Kjuus' point is probably not that the lenient immigration practice was criminal, but that it failed to protect the long-term interests of the Norwegian people. Thus a change in the composition of the Norwegian people had to be imposed through new legislation that excluded citizens, but on the theory of legitimacy underpinning the Mutual Recognition Restriction, there can be no legitimate basis for enacting such legislation. Kjuus may believe that what he considers general views about immigration are not properly represented by the politicians, but this is a consequence of indirect or representative democracy that may from time to time occur, and which may only be corrected within the system.

Initial conditions of the social contract

The integrity of the social contract, i.e. civil society, requires that the decisions of the government are considered *valid* until changed by the system. Excluding some parties from that contract is in a sense returning to the state of nature, and imposing by force what cannot be legitimately enacted as law. This is why the White Election Alliance programme could never be legitimately enacted. However, the case of exclusion shows a more general point as well. This point is that sometimes government action constitutes breach of the social contract (cf. the American Civil Rights Movement?). In principle then, Kjuus might claim that the Norwegian government was acting out of competence in granting citizenship to non-European immigrants. To evaluate such a claim, a similar analysis to the one made in the case of exclusion of immigrants will have to be made. What the consequences might be of

¹⁶⁹ The treason-legislation of World War Two was an exception to this general rule of Norwegian law.

such a breach of contract, e.g. whether there are a right of revolt, will not be dealt with in detail here.

Now the illegitimacy of excluding immigrant citizens is accounted for through the model of the Mutual Recognition Restriction. In order to evaluate a hypothetical claim of a breach of contract from the anti-immigrationists, we can try to work out how such a claim could be most strongly defended. No such claim, and consequently no defence, is found in the White Election Alliance programme. Examining this theoretical possibility is, however, important in order to explore whether the idea of an asymmetry that makes exclusion illegitimate is sound, or should be modified.

The White Election Alliance would have to make a case that initial conditions of the social contract are inconsistent with giving citizenship to considerable groups of non-European immigrants. Such initial conditions could be part of the written constitution, which is not the case here, or part of conditions of justice necessary to democratic legitimacy.¹⁷⁰ The list of possible justifications of initial conditions of the social contract ought to be limited to these two. The written constitution should be included on the list because the constitution is positively enacted law that constitutes the fabric of the political system. Necessary conditions of democratic legitimacy should be included for reasons of coherence. Any other claims to initial conditions seems to conflict with the general idea of sovereignty, as no one should be more competent than the legitimately elected legislators in deciding how substantial matters of justice should be implemented in positive law.

Even though the right to citizenship arguably may depend upon ethnicity, as has been discussed elsewhere, the general issue of democratic legitimacy does not. Democratic legitimacy may not depend upon a specific ethnicity in itself. An initial condition of the social contract probably cannot address the issue of ethnicity directly at all, unless in the written constitution, as multiethnic democracies are both possible and often found. On the other hand, there might be a general problem in the issue of admission. Changing the burden of justification, the anti-immigrationists might argue that the inclusion of other parties to the contract, at least in greater numbers, is something representative government is only competent to regulate if granted this authority in the written constitution. The reason why this may be necessary for democratic legitimacy is that granting citizenship could be a strategy for a certain government in creating a popular majority for legislation that would not otherwise have been passed. Should the government be at complete liberty in granting admission to the body of citizens, the political people, such abuse is possible. Thus the general asymmetry of admission and exclusion seems to admit of an exception, as admission cannot be abused for particular political purposes.

¹⁷⁰ Originally, the Norwegian constitution had a provision that Jews and Jesuits should not be admitted to the territory. This provision has been removed.

There are no indications, nor have there been any accusations, of the Norwegian government's having a particular strategy in admitting immigrants as citizens. The anti-immigrationists rather seem to consider the present policy to be one of negligence. Negligence is, however, not necessarily a breach of the social contract. To constitute such a breach of contract, we would have to assume a general limit in the power of government against granting admission, and not only an exception in the case of the government having abusive intent. Leaving the question of intent aside, an initial condition of the social contract could be that admitting more than a certain number of immigrants as citizens required the consent of the contracting parties, e.g. a certain majority in a referendum. To be relevant to the question of democratic legitimacy, however, the number must have substantial political significance. What is a significant number is in itself a difficult question. Here it will suffice to note that the not even the White Election Alliance seems to feel threatened by the number of immigrants presently residing in Norway. The alliance looks to the different reproduction rate between ethnic Norwegians and third world immigrants in order to give substance to a claim of dangerous cultural and political influence in the future. The White Election Alliance expresses fears that, because of a difference in reproduction rate between the ethnic Norwegian and the immigrant population, in a 100 years 1/4 of the population will be of immigrant origin. (*Kjuus* Oslo City Court: 5) The immigrant population would then be a considerable political (and cultural) force. For the question of democratic legitimacy, however, it is the number of immigrants admitted that is relevant. Provided admitting this considerably lower number was legitimate, their choice in family size after being admitted ought not to change this. Their admittance could have been an issue, because this is regulated by the government on the authority of the people. Had their admittance been illegitimate, one could question its validity. Once no reason is given for not recognising the legitimacy of their admittance, however, immigrants have a right to be treated as individuals in their capacity as citizens, regardless of their belonging to a demographic category with an above average rate of reproduction.

In order to justify a claim that the citizenship of immigrants is invalid, because of being beyond the competence of the government, it seems that *Kjuus* would have to claim that the government is never entitled to admit immigrants into the polity without the explicit consent of the current citizens. Arguably, the very risk of abuse of a right to grant citizenship would then have to be considered sufficient for not having such a right. This would undermine the asymmetry protecting already admitted citizens from exclusion, as the citizenship granted by the government would be considered null and void. The implication of this, however, would be that every expansion of citizenship made without constitutional licence, a referendum or similar

direct and explicit consent by the citizens may at all times be considered null and void, as no explicit referendum on immigration has ever been held.

Compensation

So far, the discussion has concerned whether or not immigrants, once granted citizenship rights, may legitimately be deprived of these rights. There are, of course, alternatives other than keeping an acquired right and losing it altogether. If you acquire a right that someone later disputes the legitimacy of, you may lose your right, but receive some compensation. If two parties are entitled to the disputed good, which cannot be enjoyed by both, a solution may be to return the good to its original owner, while compensating the other for his loss. If the right to Norwegian citizenship were such a good, one could imagine that it was withdrawn from the immigrants and reserved for ethnic Norwegians, while the agent responsible for the wrongful acquisition, namely the Norwegian government, compensated the immigrants economically for their loss of citizenship. Some anti-immigrationists have suggested economic support for the repatriated, as a way of transferring government spending to third-world development. A similar suggestion is letting immigrants who are sent back have the money that would otherwise have been used for receiving and settling new refugees or immigrants in Norway. Provided the immigrant did not have any problem with the authorities in his country of origin, such money invested in a third world country could give the returning immigrants a social and economic standing just as good as they enjoy in Norway.

Whatever the merits of such compensation as part of a voluntary repatriation policy, this idea fails to make sense in connection with compulsory repatriation. First, citizenship is not a scarce good that cannot be shared by people with two and three Norwegian grandparents. And second, even if one could imagine people voluntarily bargaining over their citizenship until they settled on a market price for which they would sell it, this does not remove the violation of the autonomy of a person as citizen in setting the terms of such a compensation against his will. The legitimacy of setting the terms of such a repatriation programme presupposes that all citizens have reasons to accept the competence of the Government to enforce such a programme. However, the point of the theory of legitimacy underpinning the Mutual recognition restriction is that the Government is not entitled to such competence. Had Kjuus instead suggested a programme for voluntary redemption of citizenships by compensation in hard currency, which may have been the idea in the early days of Stop Immigration, this would have been quite another case.

SELF-EXCLUSION

Even if there is an asymmetry between conditions of admission and conditions of exclusion, another possible reason for exclusion must be considered. Provided that membership in a political community may be considered a contract, it is reasonable to assume that there has to be at least a minimal reciprocity in the relationship between the contracting parties. The party consisting of either the Government or the majority is barred by the constitutive terms of such a contract from excluding the minority or some individual from the community. However, there is at least a reasonable presumption that the other party, the individual or the minority, has obligation after the contract, too. Failing to fulfil these obligations may then, at least on some points, be a breach of contract that frees the other party from its obligations. In other words, may one consider some identifiable act or failure to act a *self-exclusion* from the political community that the community at large are justified in enforcing?

Different answers to this question are possible. One may think that this is a real possibility with real criteria that might be formulated. But on the other hand, it could be that self-exclusion is impossible, because your rights as a citizen do not depend on your actual participation, but upon your having an option to participate whenever you want. Something you do, then, could not alter the fact that the political community is justified in penalising you only because of your own opportunity to participate in governance in the future. At least this seems to be the case with respect to negative breaches of the contract, i.e. failing to do something actually required. If Kjuus by presenting his party programme actually fails to positively recognise the participating rights of immigrant citizens, even if this may be in violation of a constitutive condition of the legitimacy of his programme, this should probably not be accepted a reason to consider Kjuus self-excluded. Positive acts destructive of the community itself may be another case, as we will see.

However, self-exclusion may be a theoretical possibility, not identifiable for legal purposes, because no authority other than the people itself could decide the question in any particular case. Then we would be back where we started, with the people or their representatives lacking the competence to reach such a verdict. In order to examine this case we will discuss the issue of whether the right to citizenship requires a minimal duty of allegiance to the political community. The first issue will be the case of treason, approached in relation to Second World War Norway.

Quisling and his Norwegian Government

When German troops occupied Norway in the spring of 1940, the Norwegian King and Government went into exile. From its London offices, it continued to act as the

legitimate Norwegian Government throughout the war. However, when the Government left the Norwegian Capital in April 1940, the leader of the nationalist party *Nasjonal Samling* [National Coalition] Vidkun Quisling more or less appointed himself leader of the Government administration. The Quisling regime was accepted by the occupational force as a cornerstone in the civil administration of the occupied territory.

From the point of view of the National Coalition, the King and Government had, by leaving the country, resigned, and Quisling had prevented a foreign military administration of Norwegian society. To some degree, he had. When it comes to actual ability to govern the Norwegian territory, the London Exile Government was impotent. In retrospect, however, the Exile government was legitimate. The Exile Government was appointed by a lawfully elected Parliament, while Quisling by quick manoeuvring managed to get himself accepted to some degree by the German authorities. Formally, this was a coup d'état, but the Quisling regime was to some degree recognised as the Norwegian government, in Norway as well as abroad. According to Olav Riste,¹⁷¹ the Swedish government considered the London-based Norwegian government a “constitutional fiction” at least until 1943, and had expected the Quisling regime to be established “formelt og reelt som Norges regjering”, [formally and actually as Norwegian government]. (Riste 1989: 5)

To some degree everyone had to accept the Quisling regime. Whether one protested against or supported the National Coalition government had to be a matter of degree. A few partisans went underground, some left the country to enlist in Allied forces, and others were engaged in underground work while keeping an innocent facade. Most people had to accept the decisions of the Quisling administration in their daily lives. One could do this with or without approving of the government, but generally citizens abided by the Civil laws, both those enacted before the war, and the decrees of the new administration. There was, however, a difference between the passive obedience of the masses, often paired with readiness to aid the resistance movement when necessary, and the active participation particularly of the leaders and members of Quisling's party. These active participants were tried by Norwegian courts after the war, and frequently part of their sentence was the revocation of civil rights. In effect, exclusion from the political community was the penalty.

According to the Mutual recognition restriction, there is no way a people can legitimately exclude a part of itself. However, we may ask if this may be an example of a legitimate exclusion, of a special kind: people excluding themselves by violating the social contract. Structurally, such self-exclusion would be similar to the limit on free speech set by the Mutual Recognition Restriction, which makes political

¹⁷¹ Riste is Research Director of the Norwegian Institute for Defence Studies and Professor of history at the University of Bergen.

recognition of other citizens a condition for having political rights. Self-exclusion could be conceived of as a way of revoking the social contract by failing to recognise the political institutions established through constitutionally valid procedures. If the right to free speech as political participation requires that you recognise the right of other citizens to political participation, then arguably the right to be a citizen and take part in elections to Parliament requires that you respect the equal right of other citizens to take part in these elections, and by implication that you refrain from taking part in replacing the government with another in contradiction to these procedures. Provided there is some such kind of self-exclusion, this might constitute a principle as fundamental as the Mutual Recognition Restriction, a principle that might outweigh the right not be excluded. On the other hand, legally instituting the idea of the self-exclusion of traitors would create the problems of illegitimacy that led to my previous conclusion that there was an asymmetry between exclusion and inclusion. Even though traitors in principle and morally have forfeited their right to citizenship, and deserve to be excluded, their legal exclusion would require a legitimate court decision. Since the legitimacy of court decisions derives from the authority of the entire people as potential participants in political life, and the very possibility of continuous participation is undermined by exclusion, it would be irrational to consider the excluded themselves to be part of the people authorising exclusion.

Self-exclusion through treason as revocation of the social contract cannot be legally confirmed by the authority of a mere majority of the people. Self-exclusion thus would have to be institutionally provided for in some other way. For instance, the traitors themselves might see some event or course of as the institutional confirmation of the traitors' self-exclusion. By participating in the Quisling administration, one supported the establishment of another regime in replacement of the old one. A sign that another regime was in place was that Quisling did not seek popular support from the people in general elections according to the Norwegian Constitution. In effect, the Constitution was suspended, and a new order came in its place. Such a change of regimes is in some sense beyond the theory of legitimate political action, as it obviously is in violation of the old political order, while being the constitutive moment of the new one. People supporting the new order could be considered to act in accordance with a new social contract establishing a new foundation for government. Whatever the problems in setting this self-appointed regime on a par with a democratically elected one, there is a theoretical possibility of considering the members of National Coalition as citizens of another political community. What is problematic about viewing the Quisling regime as another community is, of course, that there is a discrepancy between those supposed by its leaders to be part of that community, i.e. all Norwegians in Norway, and those who

would themselves recognise such a community. But if we, for the sake of argument, consider the possibility of such an alternative community, we have a clear-cut case of self-exclusion. In that case, by recognising the Quisling regime, members of the National Coalitions and other collaborators alienated themselves from the Exile government, changed citizenship and thus voluntarily lost their rights by their own actions. When the war ended and the Exile Government returned to continue its work on Norwegian soil, and new general elections took place according to the pre-war Constitution, those who had changed teams, so to speak, had already resigned from the political community. The people consisted only of those who never actively resigned, and only those people should be authorised to decide the question of citizen rights of traitors. This amounts to considering the case of the traitors as one of resident aliens having to apply for citizenship.

However, the analogy is weak. There is little more than the theoretical possibility to establish the existence of two separate communities. The members of National Coalition, a political party that existed before the war, would rather consider themselves members of the same political community who took responsibility when the other political parties failed to do so. In this way, there was probably a shared understanding between those who supported the Quisling regime and those who supported the Exile government, that they belong to the same political community. From the perspective of the Exile government then, there would be one legitimate government temporarily without territorial control and one of usurpers, while the perspective of the National Coalition members would have been similar to that of the Swedes' that there was one *de facto* government that eventually would gain international recognition, and one fictitious government in exile. In this situation, however, conceiving of the political exclusion made by the Norwegian courts after the war as legitimate by reason of self-exclusion is problematic, as discussed above.

A duty of allegiance

Citizenship gives certain rights, among these rights of political participation and of residence. In the previous section, we discussed whether action intended to be destructive of the political community, treason, could justify political exclusion. We will now raise this question on a more general and positive ground, asking whether the right to citizenship is correlative with a general duty of allegiance to the political community. If such duty is recognised, we will have to address the question whether that duty is merely a moral one, sanctioned by praise and blame, or one that may be legally sanctioned. If we conclude that there is no such duty, we will have to consider the implications of this for the Mutual Recognition Restriction.

The correlation of rights and duties is recognised in the international human rights instruments. The Universal Declaration of Human Rights ends with

declarations that “Everyone has duties to the community in which alone the free and full development of his personality is possible” (UDHR Art 29.1) and that there are no right to destruction of rights and freedoms. (Art 30) In the preamble of the International Covenant on Civil and Political Rights, the individual is considered to have duties to other individuals and the community, and a responsibility to “strive for the promotion and observance of the rights recognised in the present Covenant”. (CCPR) In the European Convention, duties and responsibilities are specially mentioned in the article on Free Speech. (ECHR Art 10)

Our task in exploring the question of duties to one’s political community is limited. We are looking for a minimal conception of duty to the community, parallel to the minimal conception of recognition expressed in the Mutual Recognition Restriction. Assigning rights and duties to citizens is in general partly a political task, partly a moral one. According to the Mutual Recognition Restriction, a condition of having a right to political participation is that you recognise the same right for other citizens of the political community, it being a factual question who the citizens actually are. Thus a specific relation between a right and a duty is already presupposed. A duty of recognising ones fellow citizens as citizens, i.e. in their capacity as political participators, is held to be a condition of claiming a right derived from oneself being a citizen; a right to political participation. The issue that is now being raised, is whether a lack of allegiance to the political community may count as self-exclusion from the right to political recognition. If so, it is possible that the failure of political recognition expressed through repatriation and revocation of citizenship rights is correlated with another failure of recognition; a failure of allegiance to the political community. Given a sound account of the need for a minimal allegiance to the political community *as a democracy*, there might be cases where someone forfeits his or her valid right to citizenship. In these cases, the duty to recognise someone as a citizen of the political community may be undermined if the person in question fails to observe his or her duty of minimal allegiance to the political community *as a democracy*. Such a case may arguably be an exception to the general rule of a Mutual Recognition Restriction.

Objects of allegiance

The liberal conception of political life does not presuppose a certain cultural, religious or in other ways substantial and complete view of the good, i.e. of morality or personal ideals. This is what is expressed in Rawls' notion of a *comprehensive* view. In a politically liberal society, people differ in their comprehensive views. In any political community tolerant of different comprehensive views of life, there will anyhow have to be a *political* liberalism, according to Rawls, observing certain minimum requirements of a culturally plural society being fair. (Rawls 1993)

A modern constitutional democracy thus requires a division between, on the one hand, spheres that are culturally diverse like religions and comprehensive moralities, in which difference is mutually tolerated, and, on the other, spheres that are common, like politics, law and economy. This division of spheres requires to some degree that people are capable of acting within this common political community, even though they belong to different religious, ethnic or other communities or groups. It is futile to require that comprehensive views not inform or enter into political discussion, as some liberals do.¹⁷² Our comprehensive views, i.e. our conceptions of the good, do in fact inform our priorities, and enter into our conception of our substantial interests, and it is purifying rather than distorting of politics for the real reasons behind our priorities to be out in the open.

There is, however, in a liberal democracy a limit to the role of allegiance to comprehensive views and to the communities and groups we belong to. This role is delimited through the model of a hypothetical social contract through which there is a transfer of power from each individual person to another acting as representative of the popular will. Through this transfer of power a political community is constituted, and with that a rule of law regulating the equal liberty of each and every citizen. The theory of the social contract does not explain the actual constitution of any society in detail; neither does it comprise every normative perspective on the constitution of societies. What it does, however, is show how everyone to a minimal degree must consider themselves subjects of the law with a duty to live their lives within the limits of liberty set by the law. A necessary precondition of there being a liberal democratic society is that every member of the society accepts such a minimal condition. This could be conceived of as refusing to sign the social contract. But as what is transferred to the political community is the power to give laws, not only in the sense of recommending a rule, but also in the sense of enforcing the rule, a limit is set also to the comprehensive views that may be held by individual community members. People within a political community may have different views, ways of life and allegiances, but the rule of law requires that these differences do not go beyond the equal liberty given every individual citizen in and through the law. Consequently, the political community has priority, in the sense that every individual member of society has to have a conception of him or her self as subject of the law, as well as its author. Within the constraints of law, the subjects of the law are at liberty to pursue different conceptions of the good, but only those that are compatible with being an individual subject of the law.

Even if comprehensive views will influence one's political participation as citizen, i.e. author of the law, a minimal conception of citizens as individual subjects of the

¹⁷² Charles Larmore requires neutral justifications of political decisions, neutral with respect to views of the good. (Larmore 1987: Ch 3)

law with equal rights under the law seems to be necessary in political participation. I have argued that exclusion of citizens is not legitimate in a constitutional democracy. Such exclusion cannot be legitimate, for it implies a denial of political recognition of someone as contributors to the popular will, which is what democratic legitimacy is about. Now, if some comprehensive views fail to take into consideration, and adjust to, the processes constituting the popular will, or if they recommend undermining the political, or subordinating the political under another goal, may this not be a similar denial of recognition of the people belonging to the political community?

Our comprehensive views comprise different allegiances. There is a loyalty to family and friends, to our colleagues or the firm or institution we work for. Religion may involve a commitment to certain duties or personal projects, loyalty to the religious community, and sometimes obedience to religious authority. Politically oriented fundamentalists may give religious or moral commitments priority over adapting to the law of the territory. Organised crime will sometimes be organised according to ethnicity; and thus constitute a brotherhood considered more authoritative than the law. Ethnic differences can work against establishing the common purpose necessary for establishing a common system of liberties under a rule of law. Such differences contribute considerably to the difficulty of establishing working democracies in former African colonies, where the territorial borders of states were drawn without consideration of ethnic composition. What is intended to be a modern constitutional democracy can then turn into a means for each person to enrich himself and his family, tribe or people. This may be a sign of procedures failing to work properly due to insufficient allegiance to the political community.

Probably quite a few of us have allegiances that in principle take priority over our allegiance to the political system, as well as moral convictions that set a limit to what we would do in obedience of the law. This is necessary for character, for having a personal moral substance, and even though some duty of allegiance to the political community and obedience to its laws takes priority over other allegiances, a political community failing in their laws in allowing space for other deep commitments and allegiances of their citizens will be both morally deficient and unstable. It may be wise to have a provision protecting people against having to testify against their husband or wife. It would also have been wise if the USA had a provision against making a President and one of his employees testify in public on matters of their sexual relation as consenting adults. In general, it is wise if the laws make room for acting or refraining from acting on strong moral convictions and in relation to strong personal allegiances. The legislators ought to adapt the law to structures of personal relations and allow a sufficient scope for acting out comprehensive views. However, both processes may be unsuccessful, both because a majority may be insensitive to the interests of minorities, and because some groups or individuals do not attempt to

advance their interests politically. The failure to do so can be due to lack of opportunity or access, in which case the remedy is to provide more opportunities or easier access. But the failure can also be due to a lack of will to participate, to a lack of allegiance to the particular political community, or to the idea of a constitutional democracy in itself. It is such lack of allegiance, which may constitute a failure of or a denial of recognition of the other citizens of that political community, that may have consequences for the right to participation or citizenship of those groups or individuals.

According to the White Election Alliance programme, there is a tendency to among immigrants to “[holde] seg til “sine egne” som et folk på siden av folket”. (*Kjuus* Oslo City Court: 5) [keep to “their own” as a people besides the people] Now this is not the only reason why Kjuus and his party wants the immigrants out, and he explicitly states that he would not like the immigrants to assimilate into the Norwegian society, as this would change “the ethnicity of the country”. (*Kjuus* Oslo City Court: 5) Probably Kjuus is more concerned about the failure of ethnic assimilation than about the failure to adapt to the political institutions and processes of the Norwegian democracy. However, to explore the possible implications of the Mutual Recognition Restriction, it is relevant to ask whether a failure of allegiance to the political community could justify exclusion of immigrant citizens, provided the fact of such a failure can be established.

A Trojan Horse

The account of the mentality of immigrants in Norway that is found in the White Election Alliance programme does not leave much room for successful integration or assimilation. The alternatives to the Alliance programme are either the downfall of the Norwegian people as ethnic Norwegians become a minority, or a civil war to throw the aliens out sometimes in the future. Of course, there are other possibilities; integration or assimilation cannot be dismissed that easily.¹⁷³ Integration will have to take the form of immigrant groups re-conceiving of themselves as interests groups or adapting themselves in another way to the workings of the Norwegian democracy. This is already taking place in Norway, as groups like *Islamsk råd* [Islamic Council] take part in politics as representatives of Moslems in Norway. Assimilation to some degree is difficult to avoid, as immigrant children and youth attend ordinary Norwegian schools and socialise with “ethnic Norwegian” youth, under the influence of an international youth culture that is increasingly multicultural. Also important is

¹⁷³ *Integration* takes place when immigrants come to participate in the political and economic practice of society on fairly equal terms, while still retaining the character of a distinct cultural group in society. *Assimilation* takes place when immigrants merge into the original culture, in such a way that the result is cultural homogeneity. Both are of course gradual phenomena, allowing of variations in degree, and of varying combinations of both integration and assimilation.

the fact that, to the extent that immigrants take part in the Norwegian economy either as employees, employers or consumers, they willy-nilly adapt to the structure of duties and liberties given in Norwegian law.

In order to give credibility to the scenarios presented by the White Election Alliance for a future Norway with partly immigrant population, we would have to assume not only ordinary problems in facilitating integration or assimilation. It may be a serious problem for the society at large if immigrants lack opportunities for full social, political and economical participation. From this perspective, however, immigrants are partly a weak party, partly a resource not fully utilised. No matter which description is relevant, neither gives reason to fear the *necessity* of civil war or a hostile immigrant take-over of political power. Such situations might arise, of course, but not without further cause. It is partly a question of political action, partly of moral attitudes, whether immigrants are allowed to integrate or assimilate into Norwegian society.

The assumption made in the programme of White Election Alliance that the immigrant groups in question are too different for assimilation or integration to take place, needs substantial underpinning. The *difference* between ethnicities, which here probably refers to modes of thinking or behaviour rather than to blood, can account for difficulties in achieving integration or assimilation, but not for the impossibility. Culture are acquirable in principle, and what is more, cultures are plastic, because of being historically constituted. Growing up within a homogeneous culture, Muslim or Norwegian, people may identify with their culture to the extent that they become blind to even conceiving of the possibility of internalising other culturally embedded perspectives. If someone is confronted with the fact of cultural differences on a daily basis, however, he cannot easily immunise his culture against influence for several generations. Consequently, the scenarios presented by the White Election Alliance are unlikely, unless it could be established that strong motivation to withdraw from or take over the dominant position in Norwegian society is a general trait of the culture of immigrants in Norway.

The image of a Trojan Horse may be expressive of the way non-European immigrants are perceived by the anti-immigrationists. Muslims especially are perceived as coming under false pretences. They might seem to be intent on making a life for themselves and their families in Norway, contributing to social, political and cultural life in a positive manner. What the Trojan Horse of immigration hides in its belly, however, might be a subversive force trying either to establish a society alongside society, or to change society according to their own standards. If one presupposes a conspiracy theory, one can easily find signs of subversive intent. Immigrants tend to marry among themselves, and even marry other foreigners so as to increase immigration. It is probably the case that many practising Muslims are

highly suspicious of the moral standard of the Norwegian society. Directly relevant to the case of subversion is the issue whether Muslims, whose religion most Norwegians know very little of, will recognise Norwegian law when it conflicts with their religious commandments.

The possibility that Islam may pose a threat to Norwegian (and other Western) society was actualised in the controversy over Salman Rushdie's novel *The Satanic Verses*.¹⁷⁴ Rushdie's novel was published in 1988, and the conflict accelerated throughout 1989, the year Stop Immigration participated in their first general elections. The controversy may be interpreted in various ways. On the one hand, this was probably the first major occasion when Muslims entered into western politics as a group, and received considerable public attention. Public demonstrations, petitions to the authorities and the publishers, the symbolic destruction of the book, as well as complaints to the courts were all used to express the outrage felt at the publishing of a book perceived as ridiculing central elements and authorities of the Islamic religion. In other words, Muslims constituted themselves as a political pressure group, and demanded recognition as such, and of issues important to them.

The Rushdie controversy was not the beginning of a wave of Islamic influence within a modern political context. One important reason was, of course, the step taken by the Iranian religious leader Ayatollah Khomeiny. Khomeiny issued a *fatwa*, an authoritative opinion on Islamic law, stating that the author and publishers of *The Satanic Verses* had been sentenced to death, and asking that Muslims take action to execute the sentence. Muslim immigrants in Norway faced the question whether to give precedence to the law of the territory (Norwegian law) or the religious law (*sharia*). The answers given to Norwegian news media were diverse, and did not reassure those anti-immigrationists who feared that the immigrants were a potential threat to Norwegian society, a Trojan Horse. Most notably, a Labour party immigrant politician, Syed Bokhari, had to resign from a Municipal Council after declaring that he would not hesitate to kill Rushdie if given the opportunity.¹⁷⁵

Against this background, the question whether lack of allegiance is a failure to recognise the political community of Norway may arise. If Muslim immigrants resist secularisation of their religion, i.e. do not recognise the distinction between religion and politics in modern society, might this be an exception to the rule that political exclusion is illegitimate? Supporting the private execution of the *fatwa* against Salman Rushdie is clearly a sign of failing to adapt one's religiosity to a modern, secular state. On the other hand, not every action by Muslims against the author of *The Satanic Verses* is incompatible with a modern secular state. As long as there is a

¹⁷⁴ The subject of my Master Degree Thesis was the controversy over the *Satanic Verses* as an example of a cross cultural moral conflict. (Lundeby 1994)

¹⁷⁵ The case of Bokhari is referred to in *Dagbladet* 23 Feb 1989. Other Muslim voices, however, expressed anger, but also the intention to respect Norwegian law. (*Dagbladet* 16 Feb 1989)

provision on Blasphemy in Norwegian law, Muslims might make a complaint to the police according to that provision.¹⁷⁶ Even if no legal protection of the honour of Prophet and the Koran were found in Norwegian law, a claim for protection of the sentiments and honour of practising Muslims is not necessarily incompatible with modern liberal democracy. In any case, minimal duty of allegiance to the political community might require willingness to express one's interests in terms compatible with a constitutional democracy. In the case of the Muslim protests against *The Satanic Verses*, this might mean acting on one's rage not through executing the *fatwa*, which is vigilantism as far as the political community is concerned, but rather through legal action or legitimate political action.

Whatever the controversy over *The Satanic Verses* shows about the willingness of individual Muslims to subordinate Norwegian law to Islamic, it does not suffice to establish that Muslim immigrants are a potential Trojan Horse that might destroy the Norwegian political community. As I argued above, being prepared to disobey the political authorities in extreme cases for strong moral reasons is a sign of character, of moral substance. Further, civil disobedience may be expressive of commitment or allegiance to the political community as well. Provided the motivation is *political*, i.e. to influence legislation or governmental decisions, or to prevent the government from making a mistake because of lack of appreciation of the consequences, civil disobedience is not subversive. A citizen may, temporarily, suspend his or her duty to obey the law, provided he or she is prepared to accept the legal consequences of his or her acts. The significance of, e.g. a civilly disobedient citizen being prepared to pay a fine if sentenced to do so, is that the citizen implicitly recognises the judgement of the institutions of the political community as valid, *even though* this legal or political judgement differs from his own moral judgement.

Executing Salman Rushdie would not fall under the conception of civil disobedience described here. The motive is religious, and such execution would not be a political act in the sense just described (although there might be a political response). Still, even being prepared to act illegally in exceptional circumstances will not in itself threaten the stability of a political community, provided the exceptions are rare and of a certain seriousness. On the other hand, *what if* we did have positive indications that a significant group of non-European immigrants were a potential Trojan Horse threatening the stability and integrity of the Norwegian political community. Would we then be justified in revoking the citizenship of members of this group of immigrants?

¹⁷⁶ The status of the provision on Blasphemy (Penal Code Art. 142) is disputed. The Governmental Commission on Freedom of Expression has proposed that the provision be repealed, as the necessary protection against violations of religious sentiments may be had through the legislation on defamation. Representatives of the Church of Norway have opposed removing the article. No one has been indicted according to the provision since 1933.

Fear of cultural extinction

The fear of cultural extinction that motivates the formation of *White Election Alliance* is somehow paradoxical. Obviously, the members of the *Alliance* consider themselves avant-garde, and thus different from the majority, but at the same time they pose as the real representatives of the people at large, of the ethnic majority in Norway. As the courts have recognised, the weak party in this case is obviously not the culturally, economically and socially dominant majority of "ethnic Norwegians". Those who cannot find their culture embodied in everyday life in Norway obviously are not people with "three ethnically Norwegian grandparents", but certainly some of the immigrants Kjuus seeks to repatriate. So, in order to believe in their platform, the *White Election Alliance* has to see Norwegian policies on immigration, refugees and integration as already sliding down a slippery slope. Kjuus invites us to conceive of Norwegians as a potential weak minority without ability to influence the cultural development of Norway.

There is a point to this argument. A majority in one context may be a minority in another; a dominant group at one point in history may be weak some other time. The ethnically Norwegian majority in Norway is of insignificant number if we count the population of the world, and the Norwegian national state is comparatively young in European history. When the *White Election Alliance* observes that a global process of erasing cultural differences is underway (*Kjuus Oslo City Court: 5*), there is a point even to that, notwithstanding that American commercial culture probably is a more important factor in that process than immigration to Europe.

It is difficult to accept Kjuus' judgement on the acute threat from immigrants to Norwegian culture and ethnicity, for several reasons. Relations of power change over time, but so does the character of ethnic groups. It is unlikely that immigrant cultures will be immune to influence from the dominant Norwegian culture, and probably a transformation of the original culture of the immigrants has already taken place when the immigrant culture constitutes itself as an *immigrant* culture in opposition to the Norwegian. So it is already unlikely that there will exist a fixed entity over time that is the Norwegian ethnicity, and it is just as unlikely that there will ever be a fixed unity of the multiple immigrant ethnicities that can replace the Norwegian.

What might of course happen, is that immigrant groups will establish ghettos, attempt to retain a social life reminiscent of home. There are, however, reasons not to fear that this will be a threat to Norwegian ethnic identity. First, such ghetto cultures cannot immunise themselves against change. As long as these ghettos are not separate legal communities, their social and economic life will to some degree be influenced by that aspect of the Norwegian culture that is expressed through law and public policies. For that reason alone, the immigrant ghetto is distinct from the culture of their origin, which is what Kymlicka has called a "societal culture" - a fully

institutionalised culture providing its members with "meaningful ways of life across the full range of human activities". (Kymlicka 1995: 76) Immigrant culture is to some degree uprooted, and even if they have a culture in the meaning of 'shared vocabularies of convention and tradition'¹⁷⁷, these cultures will tend to change their character. The force behind this change is the lack of ability to establish a full societal culture. Immigrants have "uprooted themselves from the social practices which this vocabulary originally referred to and made sense of", (Kymlicka 1995: 77) and stand little chance of recreating institutionally complete societies in their new country. Second, even if a ghetto culture can retain a significant degree of separate practices, they will be likely to respond differently to new challenges, and thus develop differently from their culture of origin. Their ghetto identity might lead to a conservative attitude to change, as their difference from the major society will be a central part of what they need to protect in order to uphold a separate culture. On the other hand, people living in a ghetto will have more interrelations with the major culture of their country than they had in their country of origin, and this will be an impetus towards change. Geographical separation will in time give the immigrant culture a different character from their culture of their country of origin. Moreover, there is reason to believe that isolation in ghettos will weaken rather than strengthen the immigrant cultures' ability to influence mainstream society. Political influence is brought to bear by constituting strong pressure groups, but it is a condition that these groups enter into the major political processes that make a difference to the institutional design of the Norwegian society. This will involve willingness to compromise, acquisition of vocabularies and understanding necessary for participating in the practice of Norwegian politics, and thus probably tend to integrate - and change the cultural character of - these groups. Consequently, on reasonable assumptions, the entities 'the Norwegian culture' and 'the Other culture', will not be fixed over time, as would be necessary for them to constitute comprehensive and incompatible competitors for cultural hegemony in Norway.

This is not to say that myths of such entities do not exist, will not exist, and will not have consequences. As we will discuss below, interrelated phenomena like language, history, literature and other artistic forms, heroes and scapegoats, virtues and duties constitute important parts of our identities, and it is probably uncontroversial that such common points of reference create bonds - sometimes strong, sometimes weak - between people. So even if we do not share Kjuus' fears, or find his future scenario plausible, we may try to ask the counter-factual question *what if* the Norwegian language, customs and literary traditions were under threat. Could there have been circumstances in which we would accept that the protection of

¹⁷⁷This is the idea of a culture Kymlicka finds in Dworkin, which he finds "abstract and ethereal". (Kymlicka 1995: 76)

the national or ethnic character of the Norwegian political community could call for measures that effectively undermines the rights of political citizenship?

Extinction of Baltic national cultures

An extinction scenario is described by several participants in the public debates on the citizenship problem in the Baltic countries after the dissolution of the Soviet Union.¹⁷⁸

Den enkleste måten å få nordmenn til å forstå situasjonen på, er å være med på følgende tankeeksperiment: I Norge er det ikke fire millioner innbyggere som nå, men åtte millioner. Av disse er fem millioner kolonister fra det landet som tidligere okkuperte Norge, og i Oslo er kolonistene i flertall i forhold til nordmenn. La oss også ta med at det er gått ett år siden Norge frigjorde seg fra okkupasjonsmakten, og at det like før frigjøringen var en folkeavstemning der flesteparten av kolonistene stemte mot uavhengighet. (Raivo Vetik¹⁷⁹, *Aftenposten* 23 Feb 1993)

The simplest way of explaining the situation to Norwegians is a thought experiment: In Norway there are not four million people, as now, but eight million. Among these, five millions are colonists from the country that used to occupy Norway, and in Oslo the colonists are in majority. Let us also include that it is one year since Norway liberated itself from the occupying power, and that, before the liberation, there was a referendum in which most of the colonists voted against independence.

The leader of the *Norway-Baltic Society* (*Foreningen Norge Baltikum*), Magnar H. Enebakk stressed the connection between culture and citizenship in another comparison between the situation in the Baltic and a counter-factual situation about Norway: "Hvem ville godta at utlendinger som har bodd i Norge i to generasjoner uten å lære seg norsk og uten å ha skaffet seg en minimums innsikt i norsk historie og kultur, er like norske som alle oss andre?" (*Aftenposten* 18 May 1998) ["Who would accept that foreigners who have been living in Norway for two generations without learning Norwegian, and without having acquired a minimum knowledge of Norwegian history and culture, are just as Norwegian as the rest of us?"] Both Vetik and Enebakk here answer accusations that Latvia and Estonia violate the human rights to political participation of their Russian-speaking inhabitants. They both use - among other arguments - analogies to a possible situation in Norway in order to explain the actual withdrawal of voting rights from a considerable part of the inhabitants in the two Baltic countries. By implication, the claim of these arguments from analogy is that, given the historical situation of the Baltic countries, protecting

¹⁷⁸ My introduction to the case of citizenship in Latvia and Estonia is based upon the "A-tekst"-archives of the newspaper *Aftenposten*, and on papers in the journal *Mennesker og rettigheter* 16:3. (Lundberg 1998; Steen 1998; Tsilevich 1998)

¹⁷⁹Vetik is a university teacher in Tartu, Estonia, and has been working at the Department of political science at the University of Oslo.

Baltic culture is more important than equal voting rights - and it would have been in Norway, in a similar situation, too.

When the three Baltic countries gained independence from the Soviet Union in 1990, they chose different policies on citizenship. Lithuania granted citizenship to all permanent inhabitants, while the others took measures to exclude their considerable Russian (and other) cultural minorities. The justification given for this was that the independence was only the end of Soviet occupation, and the reinstatement of the pre-war republics. Thus only citizenship in pre-war Latvia or Estonia were a legitimate ground for citizenship. Russians who had been citizens before the Soviet occupation and their descendants were granted citizenship. The rest of the Russian populations were in principle considered illegitimate colonists and part of the occupation forces. Consequently, they were held to have no citizenship rights.

In Latvia, the Soviet political system was taken over by the independent republic, and the Russian part of the population accordingly took part in the first election. As new institutions were established, 1940 citizenship became a condition of keeping current citizenship, and of the right to vote in the 1993-elections. Only pre-war citizens and their descendants were now full citizens of Latvia. Non-citizens were allowed to apply for citizenship, but quotas that regulated which age groups could apply made this a limited possibility. Non-Latvians who wanted citizenship had to pass tests in Latvian language and history. Russian had been the official language in the Soviet period, and consequently few Russians had learned local languages. New citizenship legislation of October 1998 allowed all permanent residents to apply for citizenship. The language and history conditions remained.¹⁸⁰

In Estonia, initial post-independence policy was to repatriate Russians who did not learn Estonian within two years. The language condition was, however, a demand very few Russians could actually meet. Courses were expensive, and the number of teachers fell far short of demand. Living in more or less purely Russian cities and communities, most Russians had few opportunities to practice Estonian. In 1993, repatriation policies were abandoned. The conditions for citizenship now are three years of permanent residence and language skills. *Vetik (Aftenposten 23 Feb 1993)* claims that these citizenship laws are actually a reasonable compromise between extreme policy alternatives. Given the attitudes to independence among the Russians, automatically granting citizenship to all permanent citizens would lead to attempts to change the political status of Estonia - and to a conflict similar to the one in Northern Ireland. On the other hand, denying the Russians the chance to qualify for citizenship would also increase political tension. A large part of the population,

¹⁸⁰Children born after the independence were guaranteed the right to citizenship, if their parents wanted them to be Latvian citizens. .

those who were denied access to the ordinary political processes, would tend to use "street politics" in order to be heard.

Protecting national culture and language is thus to some degree a constitutive goal for the young Latvian and Estonian democracies. Membership in the sovereign peoples of these countries requires the mastering of the national languages. At least in the case of Latvia, the Russian population arguably had voting rights revoked, after those rights were active during the first years of the independent republic. It might be claimed that these rights were rights to vote in institutions not yet reformed - and that really belonged to the Soviet occupation administration. However, granted that at least in practice, some revocation of voting rights has taken place - are there any reasons why this case is relevantly different to the Kjuus case in this respect? As I have argued, Kjuus is through his programme implicitly denying political participation to other legitimate citizens, and consequently cannot use the right to free speech to protect himself from legal prosecution and conviction. I further claimed that there was an asymmetry of citizenship, so that a sovereign people cannot limit the sovereignty to only a part of itself - *i.e.* the majority. That premise was important in establishing that Kjuus went beyond the scope of protected political speech. On a certain description - one recognising the Soviet republic of Latvia - this is exactly what has happened in the Baltic case. Latvia withdrew from the Soviet Union by authority of the people - including the Russian "colonists" - and replaces that "people" with a people constituted by descent from an earlier period in history. This new "people" then sets the terms for the re-inclusion of the rest of the old one. What differences can justify, from the perspective of justice, a different judgement of the Baltic case?

What is obviously the case in Estonia and Latvia, is that the minorities are of sufficient size to pose a real threat to the Estonian and Latvian character of the republics. Out of a population of 2.6 million in Latvia, 700 000 became non-citizens after the independence - a total of 46% of the territory's residents. In Estonia, 560 000 of 1,6 million are non-Estonians, and 200 000 of them were without any (even Russian?) citizenship after the independence. The majority of these are Russians. The Russians used their own language during the Soviet period, both because this was the language of administration, and because the Russian minorities tended to live in ethnically "pure" Russian communities. One cannot, of course, be guaranteed the continued existence of ethnic republics if these considerable minorities were given proportionate influence without cultural integration.

Even though such prudential considerations may be empirically correct, normative justification for revocation of citizen rights still has to be provided. A possible justification, as already mentioned, is the idea that no such revocation has taken place, because the Soviet republic of Latvia was never a legitimate political

community, and thus could not grant citizenship. The period of the Soviet republics is considered a time of occupation and cultural imperialism, which cannot serve as basis of legitimate rights.

Historical sources of legitimacy

Let us look at some basic facts of Baltic history.¹⁸¹ When the Baltic republics became independent in 1918, they had been under Russian rule for 200 years. Estonia and Latvia had then not been independent states since the 13th century. In 1939 a secret agreement between Germany and the Soviet Union opened the way for Soviet interference in the Baltic countries, and under Soviet occupation new elections were arranged and the new Baltic governments applied for membership in the union. Between 1941 and 1944 the Baltic countries were under German occupation. Under Soviet rule Estonia and Latvia were industrialised, using massive import of workers, mainly from Russia. While Estonia before the war had a 10% Russian population, the non-Estonian population after nearly 50 years of Soviet rule was 35%. Latvia had a Russian population of 200 000 before the war, but when the Soviet rule ended only 54% of the population were Latvians.

There is hardly reason to believe that the elections in 1940 that authorised the membership of the Baltic countries in the Soviet Union were free and independent. From that comes the position of the current Baltic authorities that the Baltic countries in that period were under military occupation, and that the Russian migration into the Baltic in that period were illegitimate colonisation of occupied land. This claim may well be correct. Even so, it is not obvious what is an appropriate contemporary response to that past injustice.

Historical origins as justification of legitimate government is generally problematic. The facts are difficult to establish. Probably very few existing countries are established in ways that according to our present standards are legitimate. The current republics in Latvia and Estonia claim to continue the independent 1918-40-republics. Because of that, they claim to have a legitimate criterion for differentiating between their own inhabitants when it comes to citizenship. But what makes the 1918-republic legitimate? If we claim that it was established by the democratic authority of the people living in Latvia and Estonia at that time, as a social contract from scratch, there will be difficult to argue that this should not have been done in 1990, too. In both cases, the independent republic took over after imperial rule. If the historical origin theory of legitimate citizenship were to be used, one would have to go all the way back to the 13th century to find an original population from which the people of 1918 descended. Establishing empirically who is descended from that

¹⁸¹Mainly based upon *Aftenposten* 1 Nov 1988.

population would be nearly impossible. Thus the authority to approve of the citizenship of the 1918-Republic is equally questionable. And even if one could find historical records showing something like that, why should we not investigate the legitimacy of that monarchy - and so on. Origins being empirically uncertain, searching for an original social contract or state of affairs that concretely, in earlier history, established legitimate government would not be likely to yield firm foundations for normative claims.

Baltic governments might fear that the large Russian minority is a potential subversive force threatening the stability of their liberated republics. But the strategy of political exclusion is an ambiguous response to this threat. By legally alienating a considerable part of the population, the governments risk fostering continuous tension between the groups. Self-conscious ethnicity is a phenomenon that is relative and antagonistic, and legally enacting a hierarchy of ethnicities with respect to citizenship does not exhibit an intention to relieve the tensions. The claim of the present Estonians and Latvians to independent republics may be just and fair. General normative arguments toward the right of secession for these national or ethnic groups might be given. Still, a solution to such national problems would have to take other ethnic groups established in the same territory into consideration. What is excluded, I believe, is the idea of historical rights of ethnic groups as independent reason for political exclusion.

How then is this normative model to deal with correcting former wrongs? The Mutual Recognition Restriction accounts for why Estonians and Latvians cannot exclude Russians because of a claim to restoring former political communities with different ethnic composition. If former ethnic composition of communities is irrelevant in this case, why is not *any de facto change in ethnic composition* to be accepted, even the exclusion of Russians? Probably, this question points to a limit in the scope of the Mutual Recognition Restriction. The Restriction does not give a criterion for which political communities have been justly established, but points to a constitutive condition of the legitimacy of a community already in existence. To this extent it is correct to say that the Mutual Recognition Restriction applies to *de facto* existing democratic communities, no matter their history of establishment. On the other hand, what the Mutual Recognition Restriction implies, as applied to the Baltic republics, is that in so far as, on a reasonable interpretation, the Baltic republics continued the government of former Baltic Soviet Republics, they started out as multiethnic communities. Excluding other ethnic groups based upon historic claims to legitimacy does not satisfy the constitutive condition of democratic legitimacy set out in the Mutual Recognition Restriction. This constitutes an independent reason why the exclusion of Russians, if that was what took place, was a misuse of the political authority of the people of Latvia and Estonia. This wrong ought to be

corrected. Still, the Mutual Recognition Restriction does not, generally require that former injustice be corrected.

The way in which popular authority is the source of legitimate government has been, throughout this dissertation, figured by the metaphor of a social contract. Central to my use of this metaphor, however, is the idea that the social contract is a hypothetical and normative notion, not an actual historical event. A political community is in itself historically and legally situated. What constitutes the *legitimacy* of the political community, however, is not primarily some particular historical event. Events like enacting of constitutions have an important symbolic and legislative function. Enacting a constitution expresses an intention to establish legitimate government, and defines a legal framework within which such government may take place.

My argument for an asymmetry of citizenship was that no political community had the right to enact legislation that excludes some of its own citizens, because the legitimacy of legislation depends on all citizens having the opportunity for continuous participation in government. Thus I argued that a political community could expand its membership, as that is compatible with continuous participation for all former citizens. Excluding members, i.e. citizens, in effect withdraws the contribution that their continuous right to participation makes to the legitimacy of legislation. A legitimate Exclusion Act thus would be a self-contradiction.¹⁸² The initial policies of Estonia and Latvia suggest that rights to citizenship depend upon rightful acquisition of such rights, as well. In both Latvia and Estonia, however, the Russian population may still be on its way into full citizenship. The terms may not be completely fair from the perspective of Russians, but they are not impossible to meet. Once accepted as citizens, we must assume that the Russians can participate fully in political life, and claim the rights for themselves to use their own language, if they want to. As physical repatriation will probably never be realised here, and no irreparable damage has been done.

In this way, Estonia and Latvia seem to embrace general citizenship as an ideal, and the exclusion of Russians as a temporary response to pressing threats in a vulnerable situation. Permanent exclusion clearly violates mutual recognition of participation rights as a constitutive condition of democratic legitimacy, but emergency measures might be pardonable, if not right. Still, the language condition has problematic implication in this case. It would be reasonable to require language

¹⁸²In applying this principle of asymmetry one should bear in mind that political participation neither in practice nor in formal Norwegian Law is limited *exclusively* to citizens. The practical effect of political exclusion on the ability to exercise political influence may thus vary considerably in actual cases. The right of citizens to such participation, however, is a constitutive condition of the legitimacy of government and legislation in a constitutional democracy. The self-contradiction arises because denying this right *to a citizen* through revoking citizenship cannot be part of a system of law with democratic legitimacy.

skills of immigrants applying for citizenship, and it would be reasonable for the Baltic republics to take as a political goal improving language skills in the population at large. Given that the Russian population are not immigrants, but citizens of republics that withdrew from the Soviet Union, it may well be considered unjust *to require* Russians to qualify for re-inclusion.

The challenge posed by Enebakk and Vetik above may be answered similarly. A considerable minority of citizens cannot be excluded for historical reasons, even though they may fail to learn Norwegian, and care less about Norwegian independence. The improvement of the language skills of this group would then be a *political goal* to be pursued politically, not a *condition of* participating politically. Forming a new people, consisting only of those speaking Norwegians, is not an option. Descending from members of *former* political communities in Norway is not a sufficient reason for excluding our once *de facto* co-citizens from *this* community.

A liberal response

I have argued that democratic legitimacy does not require that Kjuus be granted Free Speech protection for advocating his policies, as long as these policies implicitly deny the recognition of other citizens of the political community. A similar claim would be that democratic legitimacy does not require that immigrant citizens be protected against exclusion from the political community, as long as their policies implicitly deny the recognition of other citizens of the political community. Thus it seems to be a minimal duty of allegiance that is not satisfied in case the immigrant population constitute a Trojan Horse with a hidden agenda of seceding from, destroying or taking over this political community.

To prove that an immigrant group has such an agenda is of course difficult. However, this is not the only reason why this will not suffice as legitimating exclusion of citizens. Carefully considering the significance of both arguments, one should notice that neither the Mutual Recognition Restriction nor the argument from a duty of allegiance provides sufficient grounds for positive action. The Mutual Recognition Restriction establishes that the White Election Alliance programme is beyond the free speech protection it apparently would be entitled to because of democratic legitimacy. What the court is acting on, however, is not this failure of free speech protection in itself, but positive law protecting the interests of adopted children and immigrants. Similarly, even if it could be established that some immigrant group did not fulfil their minimal duty of allegiance, this would perhaps provide an exception to the strong protection against exclusion from the political community that the theory of democratic legitimacy related to the Mutual Recognition Restriction provides. Still, the positive justification of political exclusion is not given by this possible exception. This is because the decision on how to respond to such lack of allegiance,

and in fact whether to respond to it at all, is still a question to be decided politically. Exclusion is not the only possible solution, or the one most compatible with liberal democracy.

A democratic and liberal political society is entitled to defend itself against subversive action. Democratic legitimacy requires that you are entitled to participate in influencing the decisions of the legislature and the government. Liberalism requires that individuals be treated with equal concern and respect. Neither entails a right to secede from the political community, or to put an end to the community being democratic and liberal.

As we have seen, it may be possible for citizens to exclude themselves from the right to their citizenship through failing to observe a minimal duty of allegiance to the political community. However, even though the political community is justified in acting on such failure, it is not obvious that the right course of action would be to enforce such an exclusion from citizenship. Liberal democracies are based upon the equal liberty of subjects of the law, subjects who are also citizens participating in defining the scope of such equal liberty. It is neither a necessary truth nor an indisputable fact that people have this double role as subject of the law *and* citizen, i.e. author of the law. Rather this concept of the person as member of political society is a normative one, a project to be realised through politics itself. Thus the inclusion of individual people, once formally established through citizenship, is a government task requiring regular attention. This implies that a liberal democratic government that, upon deciding that some citizens have forfeited their right to citizenship, chooses to revoke the citizenship of those citizens, in a sense gives up the project of realising the idea of the individual subject *and* author of the law. Excluding citizens is never merely a defence of liberal democracy, but always to some degree a corruption of it, or a sign of its partial failure. If there are alternative ways of correcting the failure of some citizens to observe their minimal duty of allegiance, ways that maintain the possibility of realising the project of liberal democracy in the future, these ought to be preferred.

The project of realising a community of individual subjects *and* authors of the law gives preference to a policy by which the government treats citizens as such, and does not enforce a decision that cannot be the choice of the people in its entirety. I have argued that exclusion of citizens cannot be such a choice, as the excluded are denied their equal part of the authority to change that decision in the future. On the other hand, if granted the equal right to participate in influencing political decisions, citizens may be corrected by means of law enforcement, as long as that does not affect their right to political participation in the future. In other words, a liberal democracy may provide legislation against subversive activity, and prosecute individual subjects of the law for violations of such legislation. Had a Norwegian

Muslim citizen been found guilty of the attempted assassination of Salman Rushdie's Norwegian publisher William Nygaard, he would have been sentenced to imprisonment. Similarly, had it been proved in a court of law that a group of immigrants conspired to overturn the Norwegian government by extra-parliamentary means, they would be sentenced to imprisonment as well - as individual subjects of the law, and pertaining to the degree of their participation. In this way, liberal democratic government defends itself without corrupting its source of legitimacy.

I have argued that law enforcement in the form of criminal prosecution is preferable to political exclusion as strategy for a liberal democracy defending itself against subversion. Two further remarks are called for in this respect. The first is that a liberal democratic government ought to be restrictive in classifying behaviour as subversive; changing representatives, governments, legislation and policies is a legitimate political goal in a liberal democracy. It would not suffice that immigrant political groups recommended considerable changes in legislation. Only the use of illegitimate means, or acting to end liberal democracy itself, justifies criminal charges. The other remark is that, even though liberal democracy ought to choose means to defend itself that are compatible with itself, this does not mean that a duty of allegiance has no significance for the stability and realisation of liberal democracy. On the contrary, succeeding in establishing such minimal allegiance is probably critical to liberal democracy. It is, e.g. important that citizens are able to consider themselves as individuals in their capacity as authors of the law. People must be able to show some independence of mind, some ability to see the interest of people in general, and not only the interest of one's own group. A political system consistently divided along ethnic lines would probably have difficulties even coming close to establishing a stable system of legislation that everyone may recognise as expressive of the will of the people. This may be what the anti-immigrationists fear. The means most compatible with liberal democracy of avoiding this problem, however, would be a better policy of integration or assimilation into the political community.

7 Conclusion

The point of departure for this inquiry was the case of the Prosecution Vs Jack Erik Kjuus, regarding the content of the White Election Alliance general election programme. My focus was upon the relation between the right of Kjuus to free speech on the one hand, and the Racism Article, which protected immigrants and adopted children against Kjuus' public declaration of his opinion. I argued that the Supreme Court majority, their opinion read by Justice Gussgaard, failed to account for the significance of free speech in this case. Their method was consequentialist and sentimentalist, and so their reasons for judgement were not perspicuous. The dissenting judges, whose opinion was written by Justice Lund, gave a more principled account of the role of free speech as *lex superior* and as necessary for democracy. The minority account, however, ended in the paradox that democracy has no right to limit the advocacy of policies that are clearly incompatible with constitutional democracy.

Although free speech has been to some degree a disputed right, we found strong strategies of justification, two of which were explored in some detail. As a condition of rational, yet fallible persons being able to improve knowledge, the right to free speech as a right protecting inter-subjective communication proved important on a fundamental level. For political speech within a situated constitutional democracy, however, both rationality and autonomy are redeemed in the processes that secure democratic legitimacy. Democratic legitimacy was a key concept in the justification of free speech on the political field. Free speech - the right held by citizens as constituents of a political community to exercise public autonomy through political participation - should have very strong protection within its central range of application. I argued that free speech as a constitutive condition of democratic legitimacy cannot be *outweighed* by other rights within its central range of application, as free speech for a political programme is a condition for these or any other rights *having weight at all* in a constitutional democracy. An argument towards the possibility of limiting free speech must because of that proceed through and reflect the justification of free speech and its background theory.

Proceeding in this way, we formulated a principle defining a constitutive condition of legitimate political speech or political participation in general. The

Mutual Recognition Restriction excludes from protection by free speech speech acts that are incompatible with the same or related rights of others who have the relevant characteristics in virtue of which the speaker has free speech. In general, political exclusion was found to be incompatible with democratic legitimacy. A temporal asymmetry of citizenship was accounted for, showing that a political community is entitled to set terms for admission to the community, but not to exclude current members. The arguments given in defence of the model of the Mutual Recognition Restriction as well as the asymmetry of citizenship have some similarities with Apel's notion of a performative self-contradiction, but has another background. Primarily the Mutual Recognition Restriction is concerned with *institutional consistency* of the system of government and law, of which Kjuus was a subject.

By focusing upon free speech in relation to political exclusion this inquiry goes beyond the Bill of Indictment in Kjuus. The relevance of the Mutual Recognition Restriction to the case was shown to find some confirmation in the White Election Alliance programme, in the political history of Kjuus and in general considerations based upon the significance of the repatriation and revocation of citizenship suggested in the programme. By focusing upon political exclusion instead of sterilisation, the other serious violation of integrity recommended in the programme, a stronger case for limiting free speech may be made. Political exclusion is special in undermining the legitimacy of political discussion itself. Suggesting sterilisation does not have these implications, and is thus protected by the right to free political speech. The Mutual Recognition Restriction supports the right to enact legislation that limits free speech against claims of political exclusion as *legitimate*. However, this does not amount to *recommending* that such legislation be enacted, as this also depends upon the difficult empirical question of whether limiting free speech serves the purpose or goal of protecting the integrity of immigrants and adopted children.

Important issues concerning the scope and validity of the Mutual Recognition Restriction were discussed in relation to two basic presuppositions, considered part of the background theory of the Restriction. One is the idea that what I have called a political people or community has normative priority over other collectives, such as an ethnic people or community. The other presupposition is that the argument from an asymmetry between inclusion in and exclusion from citizenship shows such exclusion to be in principle illegitimate.

Through discussions primarily of the Quebec case, we established that issues involving culture and tradition may very well be considered constitutive goals of a political community. However, culture and tradition are not deeper than the rights of individual citizens essential to the legal and political system, and may only be legitimately nurtured on the authority of citizens as expressed in political participation. The possibility of political stability and the necessary emotional

involvement and solidarity for the political system to integrate a plurality of people and groups within a common public was put up against the Mutual Recognition Restriction and the asymmetry of citizenship, as other constitutive conditions of legitimacy. Because political community is a project as well as a historical fact, the opposition between the Mutual Recognition Restriction as an institutional requirement and the other material conditions of community existence and flourishing is mediated through their being part of the same project. The material conditions are constitutive goals needed in order to realise a legitimate political community. The possibility of conflict between the institutional and the material was addressed in relation to the case of Greek-Turkish mutual deportations after World War I, but clear-cut answers were difficult to reach in relation to this case.

Analysing counter-examples and arguments related to the issue of political exclusion, an aspect of the scope of the Mutual Recognition Restriction as well as the asymmetry of citizenship generally provided a possible solution to application problems. The fact that the legitimate political community is a project for continuous improvement rather than an always already satisfied condition, does not make the normative model less valid as an ideal, even if some temporary or emergency measures are accepted. In the cases of imprisonment, qualifications to vote and the case of Baltic citizenship, going in the direction of fulfilling the normative requirement constitutes a less than perfect, but some times pardonable or understandable situation. Cases concerning wrongful admission to the political community were more difficult to handle. A general point in relation to this is that there is no legally valid way of holding procedurally valid government action to be illegitimate, although one cannot dismiss failures of the political system to let the will of people be integrated into the will of the people. In conclusion, I argued that the priority of the political and the illegitimacy of exclusion should be recognised as a project and ideal never to be given up as long as other solutions to problems of stability and commitment may be found.

Implications of this inquiry

The concept of a Mutual Recognition Restriction has been introduced and explicated as a constitutive condition of having a claim to free speech. As a contribution to a theory of free political speech, this restriction constitutes a limit to free speech; a legitimate justification for the right of the legislature to restrict free speech within its central range of application. On the other hand, if the minimal requirement of the Mutual Recognition Restriction is satisfied, a strong right of free speech in addressing political issues is maintained. This is preferable to accepting the idea of free speech being balanced against other rights and goals at the discretion of the

courts of law, a model not easily reconciled with an idea of free political participation as a constitutive condition of the legitimacy of the authority of the law and the courts.

With respect to democratic legitimacy, the Mutual Recognition Restriction offers an explanation why such legitimacy requires free political participation, but on certain minimal conditions. In order to be legitimate, a system of law need not allow proposals of legislation that fails to be compatible with *all* citizens having full rights to political participation. One should also note the fact that only *constitutive* conditions of free speech are recognised as limits to free speech on this model. Beyond such constitutive conditions, there is no right to limit free speech. Consequently, there is little risk that accepting the Mutual Recognition Restriction is the first step on a slippery slope towards undermining the strong right to free speech.

The main implications of the Mutual Recognition Restriction for Norwegian Law is an account of why prohibiting a specific kind of political programme, i.e. a programme that fails to recognise the participation rights of other citizens, need not be incompatible with strong constitutional protection of free speech. The Mutual Recognition Restriction shows that enacting legislation that limits the right to propose the exclusion of co-citizens might be democratically legitimate from a free speech perspective. Nevertheless, no special recommendations with respect to restrictive legislation are given, and such legislation would need to be supported by other positive reasons in order to be sufficiently justified.

This means that the Mutual Recognition Restriction does not provide complete and direct justification of either the Supreme Court judgement in *Kjuus* or current Norwegian hate speech law, i.e. Article 135a of the Penal Code. While the Mutual Recognition Restriction helps justify convicting *Kjuus*, it yields a different justification from the one given by the court, which focused on the threat of sterilisation and a balancing of rights. Concerning Article 135a of the Penal Code, my argument lends support to the general idea that not every verbal attack on groups of citizens need be allowed in a constitutional democracy. More specifically, however, my argument focuses upon political exclusion in general. This is another approach than regular hate speech law, which in Norway lists features that are illegal as reasons for verbal public discrimination, i.e. faith, race, skin colour, national or ethnic origin, and sexual orientation. The relation between these perspectives could be a topic for further elaboration at a later date.

With respect to constitutional law, the Mutual Recognition Restriction might be relevant in different ways. I have argued that free speech is a constitutive condition of democratic legitimacy, but as such limited by the Mutual Recognition Restriction. The requirement of mutual recognition is thus equally basic, and likewise a constitutive condition of democratic legitimacy. Ideally, a written constitution should at least be compatible with, but probably also explicitly include such constitutive

conditions. The Mutual Recognition Restriction could be explicitly included in the form of a general constitutional provision limiting constitutionally guaranteed rights and liberties. The provision found in some Human Rights Instruments that rights are not to be interpreted as implying rights to act towards destroying human rights (e.g. CCPR, art 5) is a way of legalising a similar principle. Recognising the Mutual Recognition as a constitutive condition of democratic legitimacy, explicating this condition in a constitutional provision would be justified.

The Mutual Recognition Restriction should probably be considered a reason against expanding free speech to speech incompatible with Mutual Recognition. Ideally, the constitutional protection of free speech should allow space for legal restrictions on speech in violation of the Mutual Recognition Restriction. Still, the general state of law may, at the discretion of the legislators, be such that a wider protection of free speech is actually in place. The legislators need not prohibit the exercise of liberties other than those that are constitutionally protected. However, from the perspective developed here, barring the legislators from deciding whether or not such expansion of the right to free speech is prudent may prove to undermine rather than support democracy in some circumstances.

In view of the Mutual Recognition Restriction, the U.S. First Amendment probably goes beyond what is properly a constitutive condition of constitutional democracy. Article 100 of the Norwegian Constitution is generally interpreted as allowing a wide range of legal limitations, and may not for that reason provide sufficient protection of free speech as a constitutive condition of democracy. Recently a Government Commission has recommended that the philosophical justification of free speech be included in the constitutional provision on free speech. (NOU 1999:27) Provided the Mutual Recognition Restriction could be recognised at least as an interpretative principle of the justification of free speech, this move might give the right delimitation of free speech on a constitutional level. A proper discussion of these matters would, however, require more space, and should perhaps rather be undertaken by a legal expert.

The validity and scope of the Mutual Recognition Restriction

Provided the Mutual Recognition Restriction is valid, certain acts of speech do not contribute to democracy, and thus cannot be protected because of the general argument that free speech is a constitutive condition of democracy. If the restriction is not a valid principle of constitutional democracies, or only a principle under certain conditions, this has certain implications. One is that exclusion of citizens *might in some cases* legitimately take place. Cultural or ethnic belonging *might then in some cases* be a reason for exclusion. In this case, the reasons provided here for

limiting free speech would be undermined, and the strong right to free speech will protect exclusion claims like the one Kjuus was convicted for making.

For this reason the topic of the legitimacy of political exclusion was highly relevant for discussing the scope and validity of the Mutual Recognition Restriction, and by implication the scope of the strong right to free speech. The relation between political and ethnic communities as well as the general issue of the legitimacy of exclusion was approached partly through theoretical discussions and partly through discussion of relevant cases. This approach means that the study will never be perfectly complete. If we recognise the relevance of understanding historical situations to a philosophical enquiry, then we must accept that there could probably always be other cases shedding light upon other aspects of the object of study. It is important to choose the cases that are most critical to delimiting the scope and testing the validity of the Mutual Recognition Restriction. The present work expresses my priorities in that respect. However, due to limited time and space, other cases have been left out that could have provided important insights had they been discussed.

One point that would have been discussed further had there been time is that there are minority and other national claims of rights that are broadly accepted, but for which Mutual Recognition Restriction does not provide justification. To establish political privileges for native peoples in a certain geographical area, like Indian reservations, may violate rights against political exclusion of non-native residents in the same area. Likewise, pre-modern forms of government might be considered to be freely chosen by some peoples, but fail to meet the requirements of a model of popular sovereignty like the Mutual Recognition Restriction. Should the Tibetans be given independence and choose to establish a theocracy in Tibet with the Dalai Lama as ruler, this could be considered to be a withdrawal of a right to political participation from the Chinese population that probably would not want Tibetan theocracy. Such a regime would not find justification in a model of political justice based upon a modern conception of popular sovereignty. I refrain from drawing any preliminary conclusion with respect to the validity or scope of the Mutual Recognition Restriction as applied to such cases. These cases require careful deliberation that might be conducted by others or myself at a later date.

Because of the endless nature of doing philosophy by interweaving general perspectives and historically situated cases, less than complete treatment of the issues will have to be considered sufficient. From such a philosophical perspective, however, one cannot expect final conclusions, only the conception and explication of more or less illuminating ideas. The measure of success of a philosophical text is not, or is not exclusively, its ability to settle issues once and for all, but its ability to inspire others to reflect upon the issue, raise new questions and continue the process

towards a richer understanding. I hope that my discussion of free speech and the Mutual Recognition Restriction has achieved this more modest goal.

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