



NORWEGIAN MINISTRY
OF EDUCATION AND RESEARCH

Briefing

Academic freedom

Individual rights and institutional management needs

- Background for Norway's work on academic freedom
- Excerpts from Official Norwegian Reports (NOU) 2006 No. 19
- Follow-up by the Ministry





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Ministry of Education and Research, December 2006

Original title of the report referred to:

NOU 2006: 19

”Akademisk frihet – individuelle rettigheter og institusjonelle styringsbehov”

Translated from Norwegian by Søren Munch

Background for Norway's work on academic freedom

The Government Commission

On 14 October 2005 a Commission was appointed by the Norwegian Ministry of Education and Research to consider statutory regulation of individual academic freedom.

The Commission consisted of the following members: Professor Arild Underdal (chair), Oslo; Rector Christina Ullenius, Karlstad; Professor Johan P. Olsen, Oslo; Professor Rigmor Austgulen, Trondheim; Professor Jan Fridthjof Bernt, Bergen; Secretary-General Kari Kjenndalen, Oslo; Professor Gunhild Hagesæther, Bergen; Associate professor Tanja Storsul, Oslo; Professor Johan Giertsen, Bergen. All members are from Norway except Ullenius, who is from Sweden.

The assignment given by the Storting

The Commission was appointed after the Storting (the Norwegian Parliament) had discussed the Government's proposition of a new Act relating to universities and university colleges in the spring of 2005. In that context the Storting asked the Ministry of Education and Research to assess the need and the possibility of statutory regulation of individual academic freedom for academic personnel.

In their recommendation to the Storting, the Standing Committee on Education, Research and Church Affairs referred to a letter from the Ministry concerning a possible statutory regulation of academic freedom. The Ministry wrote: "Nevertheless, it seems clear that university and university college staff today have individual academic rights, although it is difficult to define the actual limits of each employee's individual academic freedom. In that context the Ministry would like to point out that currently there is no clear or universal definition of what is implied by the term academic freedom." In the same letter, the Ministry also wrote: "The fact that each staff member possesses such an academic freedom does not imply any automatic rights regarding the funding of individual research activities." The Standing Committee stated that "a great degree of academic autonomy for individual staff members is an important premise for the independence and legitimacy of research." The Committee concluded by urging "the Ministry to start the work to consider present questions surrounding the need for and the possibility of statutory regulation of individual academic freedom for academic staff and to report back to the Storting by any appropriate means (...)."

The position of the Government at the time of the appointment of the Commission

In its report to the Storting ("White Paper") on Research from the spring of 2005 the Government restated that university and university college staff today do have considerable academic autonomy, and it supported the Standing Committee's conclusion that this is an important premise for the independence and legitimacy of research. Furthermore, it held that "the autonomy of each employee is important to enable universities and university colleges to fulfil the objectives of the Act and serve their purpose in society." The White Paper pointed

out that the common practice at universities and university colleges is one where the individual researcher himself chooses the research subjects and methods, as long as this is within the boundaries provided by the researcher's employment contract (i.e. subject area, research speciality and teaching required). The financial framework conditions and the overall tasks of the institution, as well as the need to compete for research funds from the EU and research council programmes may, according to the White Paper, require internal decision making by senior academic staff and coordination in research groups, causing tensions between the wishes of the individual researcher and the demands of the institutions. The White Paper on Research concluded that "the institutions must have freedom of research that in some areas goes beyond that of the individual researcher. The researcher must have the freedom to choose methods, practices and subjects within the strategic framework of the institution in the field of study he or she has been appointed to carry out. The individual researcher must stand free to publish his or her research findings."

In relation to the appointment of the Commission, the Ministry of Education and Research pointed out that each institution is responsible for how it organises its academic activity. However, the institution may be obliged by special goals set by the authorities and the conditions following from the allocation of resources to the institution. How the institution exercises its responsibility will be reflected in the way the resources are distributed among the staff and in the organisation and management of research activity, for instance in research teams. The Ministry therefore concluded that there is some tension between the academic freedom of individual employees and the institution's responsibility to manage its resources in accordance with institutional goals (at all levels) which set the framework for the academic activity of each individual.

The terms of reference of the Commission

The Ministry gave the Commission the following terms of reference:

- The Commission must shed further light on the relationship between the institutions' right and need to manage its resources in accordance with institutional goals (further: rights as an employer) and the individual rights of academic personnel.
- The Commission shall examine whether statutory regulation of individual academic freedom is useful, and how to codify and clarify this freedom in accordance with generally accepted norms and current practice, within the powers that the law assigns to the institution itself.
- The consequences of codifying individual academic freedom must be considered in relation to the Civil Service Act and the Working Environment Act, as well as both the regulations on temporary employment and on the institution's rights as an employer exercised in the preparation of individual working plans as laid out in the Act relating to universities and university colleges.
- A European Charter for Researchers and Code of Conduct for the Recruitment of Researchers has been developed and a recommendation from the European Commission

concerning these documents is available. These must be considered in the work of the Commission.

- The Commission shall consider potential economic and administrative consequences as it must according to the rules for Commission reports to the Government.

The work of the Commission

The Commission was to submit its report (“Green Paper”) by 1 October 2006. The Ministry of Education and Research supplied the secretariat for the Commission, which was staffed by Anne Grøholt and Finn-Hugo Markussen. The Commission obtained a study of international literature on the subject from NIFU STEP. The study is available on the Internet.¹

The Commission submitted their report to the Minister of Education and Research on 2 October 2006. The report was unanimous.

¹ Egil Kallerud, *Akademisk frihet: en oversikt over spørsmål drøftet i internasjonal litteratur*, NIFU STEP arbeidsnotat 18/2006. <http://www.nifustep.no>. The report is in Norwegian but has an appendix in English with six declarations on academic freedom: Two UNESCO declarations, one from the American Association of University Professors (AAUP), two African declarations and *The Magna Charta of European Universities*.

The report – summary and draft legislation

What was translated?

The report carries the same title as this brief: *Academic freedom – individual rights and institutional management needs*. The report is available on the Internet.²

We have translated the summary which is in chapter 1.3 of the report. Chapter 6 of the report includes the Commission's recommendation. The recommendation consists of an introduction discussing the possibilities of protecting academic freedom and the need for legislation. We have translated this introduction. The draft legislation has also been translated. The last part of the Commission's recommendation, which consists of detailed legal commentaries to the draft, has not been translated.

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The Commission's summary of the report

The terms of reference of the Commission

Academic freedom is a well-established collective term which designates a set of closely related ideas that emphasise freedom of thought and freedom of speech as fundamental in the search for true knowledge and understanding. This freedom is on the one side applied to individual institutions, and is understood as the autonomy of the university or university college in academic matters. In Norway this right is established in the Act relating to universities and university colleges section 1-5. However, there is also a wider interpretation of the ideal, which protects the academic integrity of individual researchers and teachers. Currently, the Act relating to universities and university colleges does not include a specific regulation of this *individual* freedom. The Commission was given the task of "examining whether statutory regulation of individual academic freedom is useful, and how to codify it and clarify it in accordance with generally accepted norms and current practice, within the powers which the law assigns to the institution itself."

The term "academic freedom"

The Commission uses the term "academic freedom" inclusively, so that it covers all the tasks the law ascribes to universities and university colleges, and at the same time leaves room for – and for some purposes also presupposes – a more precise differentiation of the exact content according to the nature of the institutions' activities. This use of academic freedom as a collective term to cover both research and academic and artistic development activity, implies more specifically that where artistic development activity takes the form or carries elements of performing artistic activity, the term will include that which in other contexts is referred to as "*artistic freedom*."

² http://odin.dep.no/kd/norsk/dok/andre_dok/nou/070001-020003/dok-bn.html

The Commission relates the more detailed discussion of academic freedom to the roles as researcher, teacher and communicator (communication in a broad sense ranging from popularisation to technology transfer). With regard to the role as researcher, the Commission assumes that academic freedom implies:

1. A freedom to question – also to question what authorities consider to be established knowledge and understanding, and to question issues and assumptions to which strong interests or emotions are tied.
2. A freedom to decide what material and which methods to use in the search for answers; more precisely a true or valid answer.
3. A freedom to publish hypotheses, results and arguments.

Furthermore, the Commission distinguishes between freedom as a formal right of self-determination and freedom as an actual freedom of choice (supported by the availability of resources). The right of self-determination is a necessary, but not a sufficient condition for academic freedom as a practical reality.

Academic freedom is based on, but also limited by, the fundamental objectives of academic activity and basic principles of scientific thought. These are institutional standards which make strict demands on competence, commitment and quality. Hence, the standards not only protect the individual researcher/teacher from illegitimate interventions, but also justify demands for competence and commitment as well as measures to counteract behaviour which breaks with the fundamental norms of the institution's activity or fails to meet the established standards of quality.

The Commission has evaluated how the principle of academic freedom should be understood when the nature of the tasks at hand requires coordinated cooperation. The Commission has found that in these cases individual freedom must be understood as freedom to take personal initiatives, make arguments based on one's own professional opinions and – if consistent with the duties appurtenant to the position – a right to refrain from participating. In the Commission's opinion, the need to coordinate work tasks may under no circumstances justify demands that the individual researcher/teacher should compromise his or her professional conviction. And vice versa, the principle does not validate any claim to be a freestanding participant in a collective project that requires coordination.

The justification and limitations of academic freedom

In chapter 3 the Commission takes a closer look at the arguments for the principle of academic freedom and discusses what may be regarded as legitimate limitations of this freedom.³ The Commission finds that the principle essentially has a *functional* justification; moreover it is based on the presumption that it provides the most suitable framework for seeking and communicating true knowledge and understanding, and for artistic development activity. This justification builds on premises and arguments that are subject to discussion. The Commission examines four of the most important objections and concludes that none of

³ The chapters referred to are the ones found in the Official Norwegian Report.

them undermines the basic thesis that intellectual freedom is fundamentally important for truth-seeking and artistically creative activity. However, the objections demonstrate the need to clarify and differentiate both the thesis itself and its justification.

The Commission bases its further argument on the presupposition that universities and university colleges may fulfil their mission in society *only* by ensuring that the basic principles of truth-seeking activity mark the daily work, and that the protection of the academic integrity of each employee is one such basic principle. At the same time the Commission states that the freedom of each researcher or teacher cannot be unlimited. Hence, a clarification of what limitations may be regarded as *legitimate* is needed.

There is a first set of legitimate limitations inherent in the obligations pursuant to the fundamental objectives and basic norms of the academic activity. Furthermore, limitations may be necessary out of consideration for other activities in society, or for objects of investigation and other parties that may suffer harm. At the same time the Commission points out that in many cases the justification for such interventions will only apply to certain parts of the activity – for instance a specific procedure, but not the freedom to formulate problems for discussion, the freedom to follow the basic rules of scientific thought or to publish results. For the staff at universities and university colleges, the conditions of employment also constitute a framework and guidelines for individual employees concerning for instance the field of research and their duties.

The Commission finds that the current regulations protecting the considerations mentioned above are largely compatible with the principle of individual academic freedom. Recent investigations suggest that the majority of staff members at universities and university colleges consider lack of key resources – especially time and research funds – to be a greater impediment to individual academic development than limitations in the form of general regulations or direct encroachment of one's own academic work.

Challenges

Although the fundamental idea of academic freedom appears to be strong in our society, the Commission finds that *in practice* this freedom is being challenged from many sides – often as an (unintentional) side-effect of general social or political conditions. In chapter 4 the Commission takes a closer look at three types of challenges: One has to do with the wider policy context that research and higher education are part of today, both nationally and internationally. The emphasis on the utility value of knowledge to other areas of society is especially important. Another set of challenges has to do with the changes in the management of universities and university colleges by national authorities which have gradually taken place over the last 10–15 years. The key words here are extended powers combined with greater responsibilities, and new financing schemes where a larger portion of the public allocations is tied to specific results and more of the external research funding is focused on large projects and programmes. Finally the Commission discusses challenges related to changes in the internal organisation, administration and management of each institution. One

of the main objectives of these reforms has been to improve and strengthen universities and university colleges as *organisations*.

Taken together, these development traits represent a significant change in the framework conditions for research, artistic development activity and higher education. The consequences for individual academic freedom are not clear-cut. This is partly because several measures reduce the opportunities for some, but increase the opportunities for others, and partly because the effect in many cases will depend on what local practices these measures lead to.

Furthermore, the knowledge about the effect of these developments is still insufficient. The Commission finds that this insecurity is a reason in itself for considering measures that may strengthen the defence of academic freedom. A clearer legal foundation of the principle would be such a measure.

Current law

In Chapter 5 the Commission gives an overview of the current law, with particular emphasis on the regulations of the Act relating to universities and university colleges, the statutory provisions concerning freedom of speech, and employment law. The Commission finds that even though specific regulations on individual academic freedom have not been included in the Act relating to universities and university colleges, the principle must be considered a non-statutory right. This conclusion is based on the following: Firstly, such a freedom is necessary if the universities and university colleges are to fulfil their objective and tasks. Secondly, the principle is a long-standing and well-established practice. Thirdly, the existence of the rule is implied in the legislative history of the Act relating to universities and university colleges. However, since the rule is non-statutory, its content does not have a precise formulation and thus there is wide room for interpretation. It is the opinion of the Commission that a specific statutory regulation will be important to clarify the rights and duties of institutions and individual employees. In that context, the Commission also emphasises the fact that non-statutory regulations to some extent are founded on custom. Since custom is subject to constant change, it represents a more uncertain basis than a specific statutory regulation. Finally, the Commission points to the fact that several countries have chosen to establish the principle of individual academic freedom by national law and that the European Commission and the Council of Europe recently made recommendations with the objective of promoting a clarification and formalisation of the rights and duties of both individual researchers and the institutions they are part of.

The recommendation of the Commission

In the conclusion of chapter 6 the Commission recommends a reformulation of the Act relating to universities and university colleges, section 1-5, which would clarify the principle and provide a firmer legal foundation. In short, it is proposed that: (1) universities and university colleges will have a duty to promote and defend academic freedom, which includes a duty to ensure that academic activities are carried out in accordance with accepted ethical principles, (2) the current provisions concerning institutional academic autonomy remain in

place, and (3) the rights and duties of individual staff members (researchers and teachers) are codified.

* * *

The statutory regulation proposed in chapter six of the report

Introduction to chapter six:

Possibilities of protection and the need for statutory regulation

The analysis in chapter 4 concluded that the principle of individual academic freedom – especially the right of every researcher to select what problem to address in their own work – today meets challenges both from the outside and the inside. Furthermore, we concluded that the limitations facing individual researchers lie first and foremost in framework conditions that limit *actual opportunities*. With the exception of contract research, illegitimate forms of overruling seem to be less of a problem. This understanding of the current situation has at least two important implications when we consider measures to strengthen the legal status of this principle. One is that while it is relatively easy to counteract direct overruling through statutory provisions and the enforcement of these, statutory regulation is less suited to provide a precise and effective remedy for the limitations to opportunity, as opportunity is determined by available time and resources, amongst other things. The Swedish report mentioned in chapter 2.3.2 illustrates this. It is simpler and more meaningful to ban a specific *action* (such as direct instruction) than to ban a *condition* (such as limited resources), especially when a combination of several different factors has caused the condition. The more complex the challenge, the more difficult it becomes to meet it with an advanced set of rules, and the more there is which points towards selecting an approach that states and confirms the principle in a more general form.

There is another implication following this chain of argument. The current main provision concerning institutional autonomy in section 1-5 of the Act relating to universities and university colleges is formulated “negatively”, as a prohibition: “Universities and university colleges may not be instructed regarding...” The more complex the challenge is, the more appropriate it is to select a “positive” approach, that is, a formulation which lays upon the authorities and institutions a *general obligation* to uphold a certain value or to govern according to a certain principle. A statutory provision formulated according to this principle will have a wide range of application and at the same time allow for solutions that vary due to differences in the nature of the institution’s activity and the conditions under which it operates.

The Commission proposes a reformulation of section 1-5 of the Act relating to universities and university colleges. In short, it is proposed that: (1) universities and university colleges will have a positive duty to promote and defend academic freedom, which includes a duty to ensure that the activities are carried out in accordance with generally accepted ethical principles, (2) the current provision on institutional academic autonomy remains in place, and (3) individual rights and duties are codified.

The essence of the Commission's proposed statutory regulation of individual academic rights – that those appointed to an academic post “shall be entitled to choose subjects and methods of their research or artistic activity themselves within the framework determined by their conditions of employment or by special agreement” – (Draft legislation section 1-5, fourth paragraph) is essentially a codification of rules which today are non-statutory rights, cf. Chapter 5.1.

Although for all intents and purposes the suggested formulation of individual rights made in the draft corresponds to current non-statutory rights, it is the opinion of the Commission that codification presents a number of advantages. First of all, the current non-statutory rights are not clear. Legislation will clarify the rights of those appointed to academic posts. Secondly, it is not a given fact that the administrative bodies, the management and the university and university college staff know and willingly accept the fact that there is a non-statutory basis for academic freedom in the employment contracts of academic staff. Legislation will remove the grounds for any doubts concerning the existence of these rights. Thirdly, the content of the non-statutory principles will to some degree depend on custom at universities and university colleges, and since custom is subject to continuous development, there is a certain risk that the principles will cease to be fully acknowledged and hence be watered down. Legislation may prevent such a risk. Fourthly, legislation will increase awareness of the fact that individual academic rights are one of the fundamental values underlying the activities at universities and university colleges, and it will increase the knowledge about the content of these regulations. Fifthly, legislation will align the Act relating to universities and university colleges with the corresponding legislation of several other countries and demonstrate Norway's will to fulfil and maintain its international duties to protect this freedom, cf. *The Charter of Fundamental Rights of the European Union* (2000), article 13: “The arts and scientific research shall be free of constraint. Academic freedom shall be respected”, and *UNESCO – Recommendation concerning the Status of Higher-Education Teaching Personnel* (1997), which expresses universal expectations to the countries' legislation and practices associated with academic freedom, employment protection and the like. Sixthly, legislation will fulfil the recent recommendation of the Council of Europe concerning statutory protection of academic freedom, and hence contribute to a stronger legal founding of the principle and greater political acceptance in European countries where it has a more ambiguous status today.

The proposal involves taking a new and clear position in an area which today has an unclear legal status, i.e. the rights and duties of the researcher in externally financed research activity and agreements to collaborate on research projects. This concerns the question of the extent to which such an agreement may imply that the researcher is barred from communicating his or her results through academic or professional channels or to the general public (Draft legislation section 1-5, fifth paragraph).

The individual rights and duties that the Commission proposes to legislate, apply to those appointed to academic posts at institutions governed by the Act relating to universities and university colleges. The provisions primarily apply to the relationship between the institution and these employees, but the Commission also proposes to regulate the relationship between an employee and an external sponsor or between internal and external partners.

The provisions proposed may serve five main functions:

1. Firstly, regulation of the employee's academic freedom will state the main principles that the Storting as a legislative power presupposes to be at the basis of the relationship between people appointed to academic posts on the one side, and the academic and administrative management of the institutions on the other side. Management has an obligation to create an environment in which the employees can perform research, communicate their results and teach in accordance with the terms of their employment, within the framework of academic freedom and responsibility defined in the proposed new section 1-5.
2. Secondly, these provisions will form a framework for the contractual relationship pursuant to employment law between each employee and the institution as an employer. The employer's rights as an employer do not entitle him or her to interfere with the employee's exercise of the rights and duties covered by the draft legislation. A situation where an employee does not comply with the instructions of the employer in relation to academic activity which is protected by the law, does not give grounds for initiation of sanctions based on the contract of employment, such as reprimands, transfer, dismissal or discharge, cf. the Civil Service Act for employees in state higher education institutions and the Working Environment Act for employees in private institutions. The employer is also precluded from making use of other, more indirect sanctions, such as entirely or partially excluding an employee from the relevant academic community at the institution, or denying him or her access to the necessary research resources on these grounds. The rights pursuant to the draft legislation may not be waived in individual or collective employment contracts.
3. Thirdly, the provisions have been drafted in such a way as to clarify the relationship between the rights and duties of each employee and the rights and duties of the institution. This has been done by specifically defining the *boundaries* of the individual employee's academic freedom. Cf. the draft legislation section 1-5, paragraphs four to six.
4. Fourthly, the provision concerning the academic freedom of the individual employee may have indirect but important effects on public or private institutions that fund projects. The provision expresses an ideal which all academic activity must relate to, including activity based on external funding, and it limits how far the institution or the employee may go towards waiving these basic academic rights.
5. Finally, statutory regulation of the core principles of academic freedom and scientific activity will have an important symbolic function, also beyond the scope of the Act relating to universities and university colleges. The proposed regulation of academic freedom and responsibilities will not apply directly to the private and public research institutions outside the scope of this Act. Typically, the conditions of employment in most of these institutions give the employee little influence on what he or she will work on, or in deciding whether the results shall be published, and if so, in what way. However, the basic academic and ethical ideals also apply to those working in these types of

institutions; employees carrying out this kind of research or investigative work shall not contribute to, or lend their name to research which does not meet the basic demands of integrity, truthfulness and scientific reliability, neither should he or she contribute to, or remain silent in the face of an untruthful or misleading presentation of the results of a study he or she has been a part of. By formulating the fundamental legal framework for academic freedom in institutions governed by the Act relating to universities and university colleges, the legislative power calls attention to the ethical and scientific principles which must be respected by all those who wish to be perceived as legitimate members of a greater scientific community.

The proposal of the Commission for a new statutory provision in the Act relating to universities and university colleges

Section 1-5. Academic freedom and responsibility

- (1) Universities and university colleges shall promote and protect academic freedom. The institutions have a responsibility to ensure that teaching, research and academic and artistic development activity are of high academic quality and are carried out in accordance with recognised scientific, artistic, pedagogical and ethical principles.
- (2) Universities and university colleges shall otherwise be entitled to shape their own academic and ethical basis within the boundaries provided by law or pursuant to law.
- (3) Universities and university colleges may not be instructed regarding:
 - a) The academic content of their teaching and the content of research or artistic or academic development activity;
 - b) Individual appointments.
- (4) A person appointed to a post which involves research or academic or artistic development activity, has the right to choose the subject and method of his or her research or development activity within the boundaries defined by the conditions of appointment or by special agreement.
- (5) A person appointed to such a post as mentioned in paragraph four, has the right and the duty to publish his or her results and make the relevant research data available, in ways consistent with good practice in the field of study concerned. The board may give their consent to delay publication if this is necessary to protect legitimate interests related to patent rights or competitive advantages, or out of consideration for ongoing research. No permanent limitations of the right to publish research results may be agreed upon or fixed, beyond what is determined by law, or pursuant to law.
- (6) A person who teaches at an institution governed by this act, has an independent academic responsibility for the content and organisation of the teaching within the boundaries set by the institution.

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An English translation of the current Act relating to universities and university colleges is available on the Internet.⁴

⁴ www.bologna-bergen2005.no/Docs/Norway/050401_Higher_Education_Act_Norway.pdf

Follow-up by the Ministry

Public consultation

When the Minister of Education and Research received the report, he expressed general support for the proposals put forward by the Commission. In the beginning of October the Ministry sent the report out for public consultation.

The consultation includes several organisations outside the higher education sector. The Ministry has included them partly because many of them collaborate closely with the universities and university colleges, and also because the Commission believed that statutory regulation of individual academic freedom may have significance beyond the scope of the Act relating to universities and university colleges.

The organisations consulted are mostly universities and university colleges and other research institutions such as public and private research institutes and university hospitals. Stakeholders such as employees', employers' and student organisations are also among the organisations consulted.

Those consulted have been asked to give their response according to the following template:

1. General comments, including comments on whether or not there is a need for statutory regulation of individual academic freedom.
2. Comments to the draft legislation. Comments must indicate clearly which paragraph of the proposed provision they refer to, and must follow the order of the paragraphs in the provision.
3. Other comments.

The process ahead

When the Minister of Education and Research received the report, he stated his intention to present the matter to the Storting before the summer of 2007. The deadline for the public consultation is 5 February 2007. Based on the comments received, the Ministry will decide whether or not to propose an amendment to the Storting.⁵ A possible amendment will come into force in the course of the year 2008.

⁵ All comments will be published in their original language at the official website: http://odin.dep.no/kd/norsk/dok/hoering/paa_hoering/070041-080009/dok-bn.html

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