

ON THE NORMATIVE FOUNDATION
OF THE FREEDOM OF EXPRESSION:
THE SAME FREEDOM FOR ALL EXPRESSIONS?

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ARGUMENTATIVE UTTERANCES

We could briefly reconstruct John Stuart Mills's line of reasoning in this manner: The freedom of expression is *not only a value*, but a *necessary condition* so that we may be able to form reasonable judgments about the complicated issues facing us in modern societies. It is only by knowing the *counter-arguments* against one's own point of view that one can be able to find out that one really has good reasons for holding on to those beliefs — or, if the counter-arguments prove to be stronger than the arguments that one proposes, that one can change one's earlier point of view in accordance with the better arguments. Everyone therefore has an enlightened self-interest in defending the freedom of expression. Censorship of other people's opinions is in this sense a self-destructive strategy. We could say: liberality is a condition for rationality.

The principle of the freedom of expression, in cases of rational argumentation concerning complex issues, has thus a strong normative foundation.

This line of reasoning primarily refers to *argumentative* utterances. It does not deal with *emotional* utterances *without* cognitive content.

Emotional utterances *with* cognitive content can probably come in two forms: either (i) when the cognitive content is converted into opinions with validity claims which in principle *can be tested out* or (ii) when emotional utterances can play a «pre-rational», provocative role by allowing us to «open our eyes» to something that we have not seen until now. In the latter case we are dealing with a pedagogical or therapeutic effect. In this case the decisive point will be whether we, *afterwards*, are able to *reconstruct* the changes *as a learning process* and consequently acquire *better* insight than we had earlier.

It is self-referentially inconsistent to claim: «I believe that P is true, but I do not want to be informed about any alternative points of view or counter-arguments, because it might be the case that P does not stand up to open debate when faced with these alternative views and counter-arguments.» This does not work: if one believes that P is true, then one must also believe that P will tolerate relevant counter-arguments (in theory: all relevant counter-arguments). If one figures out (to oneself) that P will not pass such an impartial test after all, then one does no longer hold that P is true (or the best founded point of view); then one is already about to reject P as a presumably true utterance.

The *validity* of a statement has nothing to do with the question whether it is «mine», as if it were a personal property. The validity of a statement is something that is demonstrated in confrontations with reasonable (counter-)arguments. Thus we need the help of other people in order to present *so many relevant and good* (counter-)arguments *as possible*.

We are all, each one of us, *finite and fallible* (and not omniscient, like the gods on Olympus). Yet, at the same time we are rational enough to be able *to learn from each other* (we are not ignorant, like nonspeaking creatures). In short we need each other in order to get criticism of our own point of view, so that we can obtain an «outside view» on our own perceptions.

Many considerations are involved in what we now have said: for instance, we have the recognition of *other people* (qua co-discussants) as being rational and *fallible* — just as

one recognizes oneself as being the same. Hence there is a *mutual* recognition between the discussants, as being *both* rational and fallible at the same time.

Furthermore, we have to recognize that one does not «own» the truth, or a specific truth (since validity is not one's personal and stable property), but that we, each one of us, in a dynamic sense *are committed to the better argument*. That which we, to the best of our ability, after serious discussion (and by actively seeking evidence to prove or disprove it) end up seeing as «our» (my) *right and correct point of view*, will only be so until (perhaps) an even better argument comes along (a still better argument that will make it necessary to change our point of view once again). Viewed in this way, validity is something that «overrides» the individual, at the same time we as individuals are obliged to change our point of view when faced with a better argument.

Inasmuch as we are finite and infallible when it comes to abilities, experience and background, and inasmuch as language (especially everyday language) is always ambiguous and needs to be interpreted (and can always be interpreted differently), and inasmuch as there is often discussion about different (professional) perspectives of the cases we discuss (something which requires interpretive translation and a deliberative balancing between perspectives), we will often have to live in unresolvable uncertainty.

Under such conditions we cannot really claim that we come «closer» to the correct answer. But it is important (in such instances) to try to *avoid* that which is *less* well-founded. In this way we may speak of a «gradualist fallibility» and a «negatively oriented meliorism», that is to say: we as fallible beings try the best we can *to avoid that which is worse* — without needing to assume that we will (in the end) reach the true conclusion (which all rational individuals should agree upon.)¹

We may add: in such cases we can speak of a *legitimate plurality*,² i.e. of the various points of view that are equally acceptable in a rational sense. This is a strong argument for tolerance in such cases.

That to which we are obliged is thus not a fixed (or definite) point of view, but that which (at any time) reveals itself as «the better argument.» We are, in a «melioristic» sense, obliged to be open to that which proves to be «even better», and to avoid that which is «worse». We could say: that to which we are more deeply obliged is not any definite point of view, but a fallible, argumentative procedure.

We are right now in the middle of the discourse theory of validity, as we find it in Habermas, Apel *et al* In this theory there is certainly a lot to comment upon, as well as to criticize.³ In this connection I shall limit myself to a comment on a few key points.

We have mentioned that validity is not someone's personal property, at the same time as we are *bound* by such validities as soon as we recognize them. Why is that? With Mills's argument as a starting point we could say: one who realizes that an argument is valid *cannot* deny this to oneself. In the presence of others one can in principle try to deny that which one

1 Cp. Gunnar Skirbekk, *Rationality and Modernity*, Oslo/Oxford 1993.

2 This is my response to Rawls's thesis on «overlapping consensus» (compare John Rawls, *Political Liberalism*, N.Y. 1993, lecture iv). I acknowledge the hermeneutical point about «the burdens of judgment» (Rawls) and about «reasonable disagreement», but I will at the same time avoid Rawls's distinction between private and public discourse: in a modern society a free and informed discourse ought to be able to function without self-imposed censorship motivated by an apriori interest in public stability; discourse in a modern society ought to be able to function so that an overlapping consensus can be actively formed by means of a discursive exchange of opinion.

3 I am referring again to *Rationality and Modernity*.

believes is valid, *but one cannot lie to oneself*. To illustrate this point we can take a simple mathematical statement such as «2 plus 2 equals 4». Those who understand what this mathematical concept means, know that this statement is valid. It is impossible both to believe this *and* to deny it to oneself.⁴ But to *others* — for example to people who have not yet learned mathematics (if we keep to this example) one can both assert and deny that which one believes to be true or valid. *To others* one can both lie and tell the truth.

Lying is a parasitic activity which is possible only because in principle we assume that people try to speak truthfully. We could go further (with Habermas and Apel, in their universal pragmatics) and try to reconstruct ideal-type speech-acts in order to demonstrate that in such speech-acts we rely on basic competencies and validity claims. However, we cannot here enter into a discussion of the speech-act theory of universal pragmatic. Thematically we limit ourselves to rational argumentation, i.e. to argumentative utterances as we ideally know them in scientific and scholarly activities. When it comes to *this* type of argumentation, we do claim that it is relatively easy to justify the freedom of expression, since the right to express oneself, free from (biased) pressure, is a part of the constituting norms for rational argumentation.

But it is not just the *right* to express oneself which is at stake. Here we have a number of rights *and obligations*. One has the *right* to express oneself, but one is also *obliged* to pursue *the better argument*, for example by paying close attention to what is said by the others, by keeping oneself adequately up-to-date in the field under discussion, by making oneself clearly understood, by not asserting something for which one does not have reasonable backing, and so on.

Obligations, as well as rights, are both determined by the goal of promoting argumentation, i.e. of trying to put forward and pursue the best argument (for the time being). Rights and obligations are in this way centered around «the power of the better *argument*».

Since arguments are presented and discussed *by persons*, who are both rational and fallible, the rights and obligations of rational argumentation also involve the interrelationship to the *participants* — at first the *actual* participants, but in the next phase also the *potential* ones. In this way rights and obligations are also centered around «the others» in an extensive sense.

For participants in rational argumentation there are requirements for a *special attitude* or *identity*: One should on the one hand be *flexible* in regard to the arguments which arise, on the other hand one must at the same time be firm opposite social pressures. This is a kind of *reflexive and non-centered identity* which demands special socialization, we should say: a special socialization into *cultural modernity*, (in addition to mental health).

Those who deliberately break the norms for argumentation — e.g. by plagiarizing or by fraud — will be met with sanctions of different sorts. Those who cannot or who will not comply with the obligatory norms for argumentation, will be faced with sanctions and possibly by exclusion.

Thus, in order to participate in argumentation, one must have a certain competence in the form of having both a firm and flexible identity and in the form of having sufficient insight into the cases being dealt with. Negatively expressed this means that those who do not have sufficient competence, cannot participate. In such circumstances it may be necessary to

4 Except in a Freudian sense. Compare Knut Erik Tranøy's important article on «basic cognitive acts», where he discusses a distinction between «acquisition» terms, i.e. «acceptance», «rejection» and «suspending judgment», and «communication» terms, i.e. «assertion», «denial» and «keeping quiet»: «Norms of Inquiry: Methodology as Normative Systems» in *Contemporary Aspects of Philosophy*, edited by Gilbert Ryle, London 1976, pp. 1-13; reprint in *Philosophy Beyond Borders*, eds. R. Fjelland, N. Gilje, H. Grimen, G. Skirbekk and S. Tong, Bergen (SVT Press) 1997.

have an «*advocatory representation*» so that the interests of those who cannot participate in the discussion themselves can nevertheless be considered by those who do participate.

All in all this means that the *freedom of expression* is an *basic norm in open and rational argumentation*. But why should we concern ourselves about rational argumentation? There are rules for chess and there are rules for rational argumentation. But it is never a necessity to play chess; we can always abstain from playing chess, abstain forever. However, it is different when it comes to argumentation. As reasonable and fallible, we, as modern persons, must often fall back on argumentation in order to try to find answers to complex questions. In many such complex cases we have, for instance, to pay attention to the intricate interrelationships between different scientific disciplines. In such cases we are confronted with interdisciplinary contexts where we to the best of our ability must try to harmonize or balance the different professional perspectives of a case (as in cases of large construction projects). In such cases a mutual hermeneutic reflection over different disciplines is the fallible way which remains open for us — as when we wonder whether a certain conceptual perspective is more adequate than another — or if a certain *conceptual perspective* may prove to be *less* adequate than another one. And since values and norms are conceived and formed by *concepts*, impartial argumentation may, also for this reason, be necessary in many *normative* conflicts and disputes.

Furthermore we have the question of whether certain basic norms for interaction may be considered right and valid when those concerned, by open and informed discussions, have reached an impartial agreement on their behalf; in that case normative validity becomes primarily tied to *autonomy*:⁵ autonomous persons give rules to themselves, by voluntary consent.

But we can in principle always expect that even *more* reasonable and just opinions will be formed in a future discussion and exchange of views, also concerning normative questions of the kind that are up for debate in modern societies. Or, to put it the other way around: with such a public and rational exchange of opinions we may hope that we will arrive at somewhat *less one-sided and unjust* opinions. From a fallibilist and gradualist point of view we can thus hope that our opinions through ongoing inquiry and discussion will become *less inadequate* than they otherwise would have been. This is a reasonable, negatively oriented «meliorism», i.e. a belief which we primarily should defend and apply against what is worse, in order to improve our opinions.

What I am asserting is that not only does argumentation belong in the scientific and scholarly activities, it also belongs in many other contexts in modern societies — and where there is argumentation, there is also the right to free expression, i.e. the right to express oneself argumentatively — yet always with a set of rights and obligations involved (also obligations).

ARTISTIC UTTERANCES

What about artistic expressions? Can they, too, form a part of some kind of argumentation, and by so doing, take part in the principle of the freedom of expression?

When it comes to artistic utterances, it is useful to distinguish between utterances *about* artistic works (as in scholarly discussions of literary works) and utterances *in* artistic works (as in utterances, implicit and explicit, in a literary work like those made by *Nora* in Ibsen's play *A Doll's House*).

Utterances *about* artistic works, as in literary studies, generally make claims that they are intelligible and factually correct, well-founded and competently interpreted. Poor

⁵ Personally I am critical of Habermas in this point. See my article «The Discourse Principle and Those Affected», *Inquiry*, 40, 63-72.

empirical or textual foundations, visibly insufficient knowledge of what one is speaking about, incoherent interpretations and documented plagiarizing of other commentators are all considered to be blameworthy. In short scholarly disciplines, even when they enter into the esthetic evaluation of art and literature, have certain characteristics in common with other academic disciplines.

One method of characterizing the validity claims which are part of such expressions *about* artistic works consists in comparing them with *value judgments in ethics*:⁶ we could say that such ethical value-judgments are tied to a type of contextualism, but a contextualism which does not rule out that we can try to discuss these ethical values in an objective manner. We could say: ethical values like esthetic judgments of good taste, are tied to contexts by the way of cultures or traditions; *within* the existing context we *can discuss* the different ethical and esthetic values — with changing success when it becomes the question of whether we can arrive at a concurrent point of view. To the degree that we also in these cases have rational argumentation, we can also in such cases talk about rights and duties tied to the possibility of argumentatively reached agreements.

One might ask whether esthetic discussions (of different sorts) are *as urgent* as basic moral and scientific discussions. In connection with scientific and political institutions it is often urgent that we reach some rational or reasonable solution regarding some validity claims (of truth or rightness). It is not excluded that we also in esthetic discussions could be able to come closer to some kind of solution in, terms of a reasonable consensus, but when it comes to esthetic validity claims it is probably *less urgent* to find a common answer (about what is better or worse in an esthetic sense, within a given tradition). And in many cases it is probably not easy to arrive at an answer with general *support* among *all* competent persons in the culture in question.

So far, about utterances *about* artistic utterances. Utterances *in* esthetic presentations, *in* artistic works, are generally fairly different from the utterances about artistic utterances, when it comes to validity claims. The validity claims can be explicit or implicit, like in literary works (for example in Dostojevskij or Shakespeare), where a lot is said about persons and their lives, about how things are and ought to be, and how things can best be practically approached — whether it is the author or fictional characters in literary works who could be said to express these views. Or it can be in *music* or *nonfigurative art*, where it is not easy to identify any distinct validity claims — for example on how life is or ought to be, or how it should be approached — but where it is, perhaps, more adequate to talk about validity claims in terms of the *authenticity* of the artist, or in terms of *esthetic qualities* of some sort.

We cannot here go into the different forms of such artistic expressions. Here it is enough that we emphasize the *variations* of the validity claims involved, centered around some more central esthetic validity claims: a work of art which is presented as a work of art (for example because it is sent to an art exhibition), makes a certain claim for a certain type of *esthetic* validity claim.

But when this is said, neither should it be denied that some forms of art are also a sign or signal that *certain life values and ethical perspectives* are more central or important than others: Edvard Grieg and Heavy Metal Rock pass on, without a doubt, *different attitudes towards life* (even though it is difficult to precisely and unambiguously interpret *what* this implies, in one case or the other).

In spite of the basic differences between *esthetic* and *other validity claims*, and between esthetic and other *institutions*, it thus cannot be ruled out that artistic utterances can be seen as being constructive or destructive, as being illusion-making or as filled with social realism, as being psychologically insightful or spiritually visionary. Therefore it is perhaps not always fair to reject the notion that artistic utterances in principle can be criticized or

6 In contrast to both deontological norms and utilitarian preferences.

applauded through impartial argumentation, with regard to other validity claims, such as truth and rightness and conceptual adequacy, or functionality or sustainability.

When this is said it should be added that it is far from certain that this point would be very helpful (i.e. if we, in artistic utterances, seek validity claims of a more universal and argumentative nature). If it will not lead us that far, it is equally difficult to justify the freedom of expression for artistic utterances by using the type of reasoning we apply in connection to the freedom of expression for scientific and scholarly argumentation.

We could certainly look in other places (than in such forms of argumentation) in trying to justify the freedom of expression for artistic utterances. We could, for example, argue in this way, as a kind of an indirect strategy: to the extent that artistic utterances are rooted in our emotions, and to the extent that those emotions are important for our mental balance, and thereby for our intellectual balance, we could indirectly argue that it is useful and good for rational argumentation that we have an untwisted relationship with our emotions, and that artistic utterances (or esthetic expressions) could be of help to us in this way. (Compare Aristotle on art and spiritual harmony).

But here there are many unwarranted suppositions; many things must «fall in place» before this line of reasoning could work out. And the different elements will almost certainly appear as being quite different in different circumstances, with different people and different artistic utterances. But roughly and tentatively, as a first hypothesis, we could assume that emotional blockage and distortions are unfortunate in this respect. Such blockage and distortions (among other things) make it difficult for us to change our perspective and see an issue from the other person's point of view — i.e. the kind of change of perspective (or role taking) which is essential in practical discussions.⁷

But these are nevertheless ambiguous reasonings, based on fallible empirical hypotheses and considerable interpretive difficulties.

If we were to anchor the right to the freedom of expression for artistic utterances in an argument of this kind (say, that such expressions are good for our emotional life, something which again is good for our impartial discussions), then we will (among other things) have problems when we are confronted with the objection that some artistic utterances (e.g. those with strong emotional contents) *on the contrary* could have *negative* consequences in this respect, rather than positive ones. Such counter-arguments could (with changing empirical evidence) for instance refer to the various forms of possibly negative influences from modern audiovisual media, such as television and video.

The point is that there is a lot to be empirically established, concerning the different forms of artistic utterances — and expression *fora* — before we (possibly) could assert (with scientific authority) that all artistic utterances ought to be protected by the right to the freedom of expression, *because* artistic utterances are redeeming for our emotions in a way that is important (or required) if we should be able to participate in rational discussions. It *could* happen that in some cases this line of reasoning could turn in the other direction — not as a defense of, but as a criticism of artistic utterances and their right of expression.⁸

⁷ An example could be Albert Speer, who did not or would not see, and who probably had a «frosty» emotional life when it came to the question of feeling empathy with other persons and their suffering. Compare Gitta Sereny, *Albert Speer: His Battle with Truth*, N.Y., 1995. Also compare the report by Ian Buruma, «Spandau Ballet», *The New Republic*, 13. Nov. 1995, pp. 33-37.

⁸ I have argued that there is a distinction to be made between the validity claims in argumentation and those in artistic utterances. But I have also argued that there can be an interrelation between artistic (and emotional) utterances and important requirements for argumentative activities. This interrelationship might explain why this distinction is not

DIFFERENT FORA

At this point, I would like to emphasize the importance of the question of the different *arenas* of expression, of the *fora* of expression, in relation to the presentation of artistic utterances: there is a question about the *form* of expression and there is a question about the *forum* of expression. Hence, certain *fora* are such that they who become exposed to esthetic expressions, are exposed to these expressions by their own choice and effort — such as in the case when we go to an art exhibit or buy or loan a book we feel like reading. The situation is another when the form of artistic presentation is a *public* forum, whether they are city bill-board advertisements or television commercials, or they are television programs sent during the best viewing times, when children and teenagers are watching. In the latter cases we witness a type of intervention exposed to people without their choice or own effort. These cases are by far worse to defend than esthetic expressions in «milder» *fora*, such as books and exhibits.

An example may illustrate where we stand.⁹ 1) If a researcher believes that it can be empirically proven that the Prophet had frequent sexual intercourse with female sheep, this researcher would be protected by the freedom of expression when he discusses this hypothesis in an objective manner, in a scientific forum. (Then he must, at the same time, be willing to *change* his point of view if there are stronger counter-arguments.) 2) But if some tv-journalist gets the idea that he should expose everyone, young and old, to this same hypothesis by producing a *live show*, zooming in on the Prophet *in flagranti* taking part such sexual activities with a female sheep, to be shown on television during the prime viewing time, then the situation is another. Here we do not have a situation where arguments are examined by free and open discussion. Here we do not have a forum where people come and leave on their own free will. In this case it is therefore not unreasonable to uphold that the right to expression must be balanced in respect to other rights and values, for example the right to protect children and young people from witnessing what they might experience as obscenities. 3) If a writer figures out that he wants to write about the same thing, this will not collide so strongly against other values (as in the case of the television program). But if it is a purely literary book, without attaching importance to the argumentative side (where one must be willing to take counter-arguments seriously), so neither is there in this case a direct support to be obtained from the more strict (truth-related) argument in favor of the freedom of expression in argumentative contexts. Then, other and more indirect arguments must be used, arguments which rather take as their starting point the value of having a *tolerant culture*. The Rushdie case can be said to be such a case.

CONCLUSION

Let us gather up the threads: The freedom of expression is easy to justify using the norms for (scientific and scholarly) argumentation (for which it is easy to argue in a modern scientifically based society). Moreover, such (scientific and scholarly) arguing takes place in forms and *fora* which are not challenged by other values. The freedom of expression which is justified in this way, is a right closely tied to certain obligations: those who break the norms of discursive reasoning, for example by ignoring strong counter-arguments against that which one first proposed, will be met with sanctions, not with tolerance.

always recognized.

⁹This example is a good one for a Muslim, but not for a liberal and secularized Westerner. For the latter a good case would be for instance be an excellent and popular novel with a militantly fascist and racist message.

Then we can try to analyze utterances about art work by extending that which has just been said about scientific and scholarly argumentation, but with a certain weakening as to the universality of the validity claims. Artistic utterances (esthetic expressions) can themselves only be indirectly tied to this kind of justification for the freedom of expression (for scientific or scholarly argumentation). When it comes to artistic utterances indirect argumentation could be applied — for example related to the need for a cultivation of our emotions — and furthermore, we could take into consideration other arguments, such as the value of living in a society which is tolerant towards different forms of artistic utterances (something which must be balanced opposite the value of being able to live in a society with order and unity, also in the artistic field). In short, in such cases a suitable argumentation seems to require a kind of a *balancing between different values*. An important aspect of this kind of deliberative evaluation of artistic utterances is the nature of the *fora* in which these utterances occur.

Here we have discussed the question about the freedom of expression for argumentative utterances and artistic utterances from a philosophical perspective, e.g. from the perspective of universal pragmatics (and J. S. Mills). In an extension of this approach, more explicitly referring to the judicial and political systems, demands will be made to discuss how this extended argument could change law making and law enforcement. The contents of this discussion must be interdisciplinary, in that it must not only take esthetic views into consideration, but also insights from psychology (around different kinds of influence, for example from different age groups) and insights from sociology (concerning societal implications of different solutions).

Here I am not out to contribute anything to these discussions. My purpose is limited to pointing out that it is necessary to think through the relation between, argumentative utterances and artistic utterances, in different *forms and fora*, when we discuss the norms inherent in the principle of the freedom of expression. It is necessary, but it is not always done, neither by lawyers nor by writers (for example in their defense of Rushdie). Therefore I have presented this contribution to the debate, a contribution which shows that the case is even more complex than many people tend to think — but, at the same time, a contribution which makes it possible to sort out the different kinds of problems in a manner which is theoretically clear and practically useful.

Translated by Judith Larsen