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Publications based on crimes

Vilhelm Persson

1. Introduction

People sometimes go to great lengths to get hold of sensational material to publish. Occasionally, this even includes criminal conduct. Information could be procured illegally or crimes could be showed in pictures. This may be a good thing. Now and then, it is necessary to use radical means in order to expose important information on misconduct in public administration or in other parts of society. In Sweden, some acts are, therefore, legal to a greater extent than otherwise when connected to publishing. However, it is a delicate question as to what acts should or should not be tolerated. This article discusses how the Swedish Supreme Court has dealt with this.

On the one hand, it is obvious that valuable journalistic work should be protected, even regarding controversial topics. On the other hand, abuse must be prevented. Taken to the extreme, there could otherwise be a risk that offenders use connection to publishing to plea for immunity for conduct that is quite distant from what is worth protecting. One example of clearly unacceptable conduct is the concept of happy slapping, which refers to an attack on a victim for the purpose of recording the violence. Sometimes even serious crimes are committed.[1] Another example is the Getaway in Stockholm film series, which shows drivers disregarding traffic regulations massively and spectacularly.[2]

The choice of what acts should be tolerated in relation to publication is a question of the extent of the freedoms of expression, information and the press. Most legal systems deal with this by using general provisions and principles of proportionality. Swedish law, however, depends on rather

[1] Cf. Stephanie Chan, et.al.: Understanding "Happy Slapping", International Journal of Police Science & Management, Vol. 14 Issue 1 (2012) pp. 42–57.

[2] Cf. Glen Fuller: The Getaway, M/C Journal 8.6 (2005). Retrieved 26 Jan. 2017 from http://journal.media-culture.org.au/0512/07-fuller.php.

technical and detailed concepts determining application or non-application of the special constitutional laws on freedom of publications.

A brief overview of those laws, therefore, provides a background for this article (section 2). Thereafter, the freedom to procure information (section 3) and the freedom to communicate information (section 4) are examined in more depth. The Swedish legal materials available on the application of these freedoms are remarkably scarce, but there are four Supreme Court cases to discuss here. One of these cases was also brought to the European Court of Human Rights. Therefore, a brief European perspective should be of interest (section 5). Finally, some concluding remarks are made (section 6).

2. Brief overview of Swedish constitutional law

Sweden's main constitutional law, the Instrument of Government (IoG) (*regeringsformen*), provides general protection of the freedoms of expression and information (Chapter 2, Article 1). This protection is supplemented by detailed provisions in two special constitutional laws. The Freedom of the Press Act (FPA) (*tryckfrihetsförordningen*) is applicable to printed media, such as newspapers, magazines and books. The Fundamental Law on Freedom of Expression (FLFE) (*yttrandefrihetsgrundlagen*) is applicable to certain other forms of media, selected for resembling printed media in important ways. It covers electromagnetic transmissions – including radio and television programs – and recordings – such as DVDs and CDs. The FLFE is also applicable on expressions on Internet websites for which a "certificate of no legal impediment to publication" has been issued (Chapter 1, Article 9 FLFE).

To some degree, the scope of the special constitutional laws are limited as to the content of the expressions published. The laws make some explicit exceptions in relation to, amongst others, intellectual property law, professional credit information activities and child pornography. Further, although the material scope is very wide, expressions not considered to relate to free exchange of opinion are excluded. This excludes, for example, messages used to commit fraud or to promote solely commercial interests. It could be difficult to determine the material scope of the special constitutional laws, but that is not the aim of this article. It focuses on crimes connected to publication but not committed through publication.

Naturally, the special constitutional laws have precedence over ordinary penal and procedural laws. The so-called principle of exclusivity expresses the fact that no liability arises for acts within the scope of the special constitutional laws, unless specifically provided for in those laws.

The content of the constitutional laws differ considerably from that of the regular laws. One fundamental difference is that the constitutional laws are built on the principle of sole responsibility, which means that only one single person can be held responsible for expressions when the special constitutional laws are applicable. For example, it is mandatory for newspapers and many other media types to assign a responsible editor. Normally, only that person is liable for offences committed through publication. From this follows that other people involved in the process of publishing, such as journalists, sources, technical staff and bookstore owners, are immune. Excepted from this principle are some grave crimes against national security – such as espionage and treason – and, to some extent, publication of confidential information. The responsible editor is liable for 18 specified criminal acts, called offences against the freedom of the press (in the FPA) or freedom of expression offences (in the FLFE). Such offences are, amongst others, espionage, agitation against a national or ethnic group and defamation.

Besides having immunity, there is even more extensive protection of people who communicate information for the purpose of publication in media covered by the special constitutional laws, including journalists and people taking part in programs or recordings. They have a right to anonymity, media employees may not reveal who they are and public authorities may not investigate their identity. Excepted from this protection are investigations of the abovementioned grave crimes that they remain liable for, such as espionage.

The special constitutional laws also contain provisions on court procedures. The Chancellor of Justice is the sole prosecutor, cases are only tried by selected district courts and they are the only type of cases in Sweden where a jury takes part in the trial.

3. Protection of procurement of information

A fundamental part of the publishing process is to make sure that there is material to publish. Therefore, Swedish law protects the procurement

of information (section 3.1). In 2015 the Swedish Supreme Court had the opportunity in two cases to elaborate on the content of this protection in relation to regular penal law (sections 3.2 and 3.3).

3.1 The Constitution

The special constitutional laws expressly protects a right to procure information for publication (Chapter 1, Article 1 FPA and Chapter 1, Article 2 FLFE). Except for a few grave crimes against national security (Chapter 7, Article 3 FPA and Chapter 5, Article 3 FLFE), no one is liable for merely gathering information that one intends to publish oneself or to communicate to a person that is in a position to publish.

These provisions were a response to a much noticed case. In 1973, two journalists used magazine articles and a book to expose information on a secret security service (IB). The Chancellor of Justice decided not to prosecute the persons that were assigned as solely responsible for offences against the freedom of the press. However, courts decided that the act of procuring the background material was separate from the act of publishing the articles. Therefore, the principle of sole responsibility did not prevent the journalists from being held liable for the initial procurement. The journalists were convicted for espionage since that crime includes the mere procurement of information.[3]

A few years later, the FPA was amended to include a right to procure information. The committee of inquiry that proposed the amendment seems to have seen this mainly as a question of court procedures. In the IB case, crimes connected to procurement of information were handled separately from crimes connected to publication. The aim of the proposal was now to bring court procedures together as much as possible.[4] However, in the discussions that followed the proposal, doubts were raised as to whether the proposed protection of procurement would add any content or value to the law.[5] Still, the Government considered it to be an important

[3] NJA 1973 C 295 and SvJT 1974 rf p. 84.

[4] Swedish Government Official Reports 1975:49 pp. 138 and 199. See also Government bill 1975/76:204 pp. 114 and 117, and Gunnar Persson: Exklusivitetsfrågan. Om förhållandet mellan tryckfrihet, yttrandefrihet och annan rätt, Stockholm 2002, pp. 224 and 227.

[5] Government bill 1975/76:204 pp. 50 ff. See also Persson (n 4) pp. 224 and 227, and Hans-Gunnar Axberger: Tryckfrihetens gränser, Stockholm 1984, pp. 313 f.

matter of principle to use this amendment to strengthen the right to communicate information.[6]

The parties involved in the legislative process recognized that the protection could not be unlimited. One restriction was that only people that procure information with the intent of publishing the information or the intent of communicating information to publishers should be protected.[7] People without such close connection to publishing should be liable. Further, the intention was not that journalists or communicators should enjoy privileges compared to other citizens; freedom of expression aspects were seen as mitigating circumstances that could be considered within the regular penal law system.[8] Therefore, this exception was introduced:

> "The provisions of this Act notwithstanding, rules laid down in law shall govern: […] liability under penal law and liability for damages relating to the manner in which an item of information or intelligence has been procured"[9]

Thus, the manner of the procurement is not included in the constitutional protection and if crimes are committed, they are treated as any other crimes. Burglary is the example most mentioned; a person who commits burglary to obtain a paper document is liable even if the document was intended to be used as background material to an article.[10] Other examples of situations where liability occur, mentioned in the preparatory works, are intrusion into a safe depository, eavesdropping, unlawful dispossession, breach of domiciliary peace, unlawful coercion, unlawful threat, bribery and breach of postal or telecommunication secrecy.[11] However, according to the Government bill, aid or instigation of breach of professional confidentiality should not be included, and thus be covered by the protection of procurement.[12] In accordance with this, it has also been suggested that

[6] Government bill 1975/76:204 p. 98, cf. p. 128.
[7] Government bill 1975/76:204 pp. 79, 114 and 128 f.
[8] Government bill 1975/76:204 p. 98 and Swedish Government Official Reports 1975:49 p. 139.
[9] Chapter 1, Article 9 FPA. See also Chapter 1, Article 12 FLFE. Translation into English according to Sveriges Riksdag (ed.): The Constitution of Sweden. The fundamental laws and the riksdag act. With an introduction by Magnus Isberg, Available on the Internet: http://www.riksdagen.se/en/SysSiteAssets/07.-dokument--lagar/the-constitution-of-sweden-160628.pdf/.
[10] Government bill 1975/76:204 pp. 98 and 131, and Swedish Government Official Reports 1975:49 pp. 139, 198, 263 and 266.
[11] Government bill 1975/76:204 pp. 98 and 131.
[12] Government bill 1975/76:204 p. 98, cf. p. 161.

bribery with the intent of compelling someone to breach a duty of professional confidentiality should also be protected.[13]

Some preparatory works to subsequent laws related to gathering of information, have elaborated on a distinction between the *manner* of procurement and the *content* of obtained information. The protection of procurement has prevented provisions aimed at the content of the information, but not prohibitions against the manner of procurement. This distinction between manner and content has been subject to rather complex reasoning by the Council on Legislation, the Government and committees of the Parliament. In the end, the Government and the Parliament have held that prohibitions against taking photos in military exclusion zones[14] or through windows into homes, toilets, locker room, etc.[15] do not aim at any specific kind of information and therefore are in accordance with the FPA and FLFE. The protection of procurement of information has, though, led to the conclusion that the mere gathering of trade secrets material cannot be prosecuted if committed by someone who intends to publish the material.[16] To me, it seems somewhat doubtful whether it is a rewarding approach to focus on the distinction between manner and content. It also seems to stand in contrast to the fact that the preparatory works mentioned eavesdropping as an example of situations when liability should occur.

3.2 Pistol purchase – NJA 2015 p. 45

The Supreme Court has in one case dealt with the freedom of procurement of information in relation to illegal possession of a pistol. In order to demonstrate how easy it was to get hold of illegal firearms in a Swedish city, a newspaper journalist purchased a pistol. He immediately took it to a safe deposit box in his hotel room. He then contacted the police and a police officer soon arrived to take care of the pistol. The journalist was in contact with two editors throughout and the story was published the same day.

[13] Hans-Gunnar Axberger: Yttrandefrihetsgrundlagarna, 2. ed., Stockholm 2014 s. 152. Cf. Axberger (n 5) p. 314.

[14] Government bill 1986/87:151 pp. 161 f., Government bill 1989/90:54 pp. 56 f. and 64 f., Committee report 1989/90:FöU6 p. 24, Committee opinion 1989/90:KU4y pp. 7 f. and Government bill 2009/10:87 pp. 25 and 56 f. Cf. JO 1985/86 s 224 and JO 1987/88 s. 86.

[15] Government bill 2012/13:69 pp. 16 ff. Cf. Swedish Government Official Reports 2008:3 pp. 124 and 301 ff.

[16] Committee report 1989/90:LU37 pp. 11 and 36 ff. Cf. Swedish Government Official Reports 2008:63 pp. 81 and 100 f.

Despite their intention to publish, the journalist was prosecuted for illegal possession of a weapon and the editors were prosecuted as accessories.

The Supreme Court pointed to the liability regarding the manner of the procurement of information (Chapter 1, Article 9 FPA). Without further reasoning, it concluded that the possession of the weapon was a manner of procurement that fell outside the scope of the FPA. Therefore, the journalist and the editors were not immune.

The court then moved on to the general protection of freedom of expression in the IoG and in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The court acknowledged that this protection was important and that it could lead to exceptions from liability for acts committed in the process of journalistic research. The court recognized that the question of availability of illegal firearms was indeed of public interest. However, the court considered that the question could have been dealt with in other ways and that the journalistic interest, therefore, did not justify the purchase. As a result, the journalist and the editors were convicted.[17]

3.3 Exclusion zone photos – NJA 2015 p. 298

Another Supreme Court case concerned photos taken in a military exclusion zone. A newspaper sent a photographer to cover a navy operation involving what was suspected to be a foreign submarine. The photographer was caught taking pictures in an exclusion zone and the camera's memory card was impounded. The newspaper argued that the impoundment was illegal; since the pictures were intended to be published, the protection of procurement of information should have been applicable.

The Supreme Court first recalled that the FPA allowed restrictions as to the manner of the procurement of information. However, the court then stressed that such restrictions must not be aimed at the content of the information. According to the court, the prohibition on taking photos was in fact aimed at the content of the information, namely the military base in the exclusion zone. The prohibition could, therefore, not be legally upheld and the impoundment of the camera's memory card was, thus, not legal.

[17] The prosecuted drew attention to some previous situations where firearms had been handled for journalistic purposes without legal repercussions, but the Supreme Court did not go into further reasoning on that point.

In sum, according to the Supreme Court, when conducting journalistic research, one may take pictures in restricted areas, but one may not purchase pistols. Yet, to me the exact difference is not distinct. It is true that the prohibition on taking photos prevents gathering of information specifically on the restricted area. The prohibition on buying pistols, however, prevents gathering of information specifically on how to buy firearms. Of course, one could argue that the latter prohibition covers far more situations than journalists' purchases. Perhaps this is also the decisive reason for the court. However, the prohibition on taking photos is not applicable only to journalists. Supposedly, the main object of the prohibition is not to hinder journalists but spies.

The Supreme Court held that there were other ways to gather information on firearm purchases than to actually buy a pistol, but there are also other ways of getting information on exclusive zones. One could, for example, study documents or ask people who know about the exclusive zones. Perhaps the Supreme Court should be interpreted to having separated photography from other activities of inquiry.

In connection to this, one would wonder how to handle the photographer's act of intrusion into the military exclusion zone. This was not part of the Supreme Court case, but she has subsequently been prosecuted for the intrusion.[18] In at least a couple of other cases, courts have not looked upon intrusion into exclusion zones as protected procurement of information.[19] Yet, as I see it, a prohibition against entering into an area in order to protect military information has an aim very similar to that of a prohibition against taking photos in the area.

As mentioned above, the purpose of the constitutional protection of procurement of information was not to introduce privileges to journalists compared to other citizens, but the Supreme Court comes close to doing so. As an example of situations where liability should occur, the preparatory works also mention eavesdropping, which seems to be a crime rather similar to taking photos unlawfully.

Further, in the pistol purchase case, the Supreme Court showed that it is necessary to make sure that penal law is applied in a way that is in com-

[18] Södertörn district court, case no Ö 338-15. At the time of writing, the court procedures are in an initial phase.

[19] The Supreme Court judgement 2 December 2004, case no B 823/03 (the district court and the court of appeal) and the Örebro district court judgement 8 March 2016, case no B 5132-15.

pliance with the protection of the freedoms of expression and information in the IoG and the ECHR. Thus, there would still have been substantial protection of the freedom of the press, even if the FPA protection of procurement of information had not been applicable.

4. Protection of communication of information

It would lessen the value of the right to freedom of expression and the protection of procurement of information if it were not possible to publish the procured information or to pass it on to journalists and other publishers. Communication of information is, therefore, protected by Swedish law (section 4.1). The Supreme Court and the Chancellor of Justice have in a few cases dealt with conflicts between this protection and penal law (sections 4.2 and 4.3).

4.1 The Constitution

The special constitutional laws states that all persons shall be free to communicate information and intelligence on any subject, for the purpose of publication in print, to authors, editors, editorial offices or news corporations (Chapter 1, Article 1 FPA and Chapter 1, Article 2 FLFE). Excepted from this protection are investigations regarding the above mentioned grave crimes that communicators are liable for, such as espionage.

This closely connects to the principle of sole responsibility. Since only one person – typically the editor – is liable, all others are usually immune. Not only sources of information are protected, but also persons that take part in film or radio recordings.

The strongly protected right to be anonymous (above section 2) provides persons who communicate information with an even more comprehensive protection than persons who procure information. In contrast to the protection of procurement of information, there is no restriction regarding the protection of communication of information as to the means of communication. It is also difficult, perhaps, to think of a situation where the means of communication as such would be illegal.[20]

[20] In theory, it is possible that someone choose to communicate information by wrapping a paper document around a brick and throw it through a window into a newspaper office, but this is hardly a realistic scenario.

The principle of exclusivity does, however, create a potential uncertainty regarding crimes that are not listed among the offences against the freedom of the press in the FPA and freedom of expression offences in the FLFE. To what extent are people immune when they commit crimes that are not listed there, but are still related in some way to communication of information intended to be published?

4.2 Threatening photos – NJA 1999 p. 275

One Supreme Court case has dealt with a situation where a newspaper journalist had payed neo-Nazis for photos of them expressing serious threats against some well-known people. The journalist showed the photos to the threatened people to get their comments and then published the story in the newspaper. This caused the two neo-Nazis as well as the journalist to be prosecuted for unlawful threats, which at that time was not part of the FPE list of offences against the freedom of the press.

The Supreme Court noted that it may occur that printed media is used as a means to commit criminal acts, which do not relate to the objectives of the FPA. Fraud, swindling and dishonest conduct committed by messages in print, were mentioned as examples. The FPA does not prevent ordinary penal law to be applied to such acts. The court stressed, however, that the journalist had intended all along to let the pictures illustrate an article on the organization to which the neo-Nazis belonged. This intention was well known to them. Therefore, the court considered the photos to be part of the journalist's journalistic activities and thus belonging to the area intended to be protected by the FPA. This meant that the process of taking photos and giving them to the journalist was protected by the freedom of communicating information. The fact that the journalist showed the pictures to the threatened people previous to publication did not alter this.

In relation to the freedoms of procurement and communication of information,[21] one could perhaps draw parallels to the pistol purchase case mentioned above. In that case, a journalist also payed problematic sources to get hold of information to publish. One could perhaps also draw paral-

[21] It has been a matter of some debate, whether the threats should have been excluded from the material scope of the FPA, but that question is not directly connected to the subject of this article. Cf. Gunnar Persson: Tryckfrihet på villovägar. Om Aftonbladsmålet och dess följder, Stockholm 2003 and Madeleine Leijonhufvud: Aftonbladsmålet, Juridisk Tidskrift 1999/00 pp. 160–162.

lels to the exclusion zone photos, since they too were photos with potentially illegal content. The Supreme Court framed both of those cases as being related to the procurement of information, not the communication of information. Should the court have framed the threatening photos case in the same way?

I believe that it was rational for the Supreme Court to focus on the communication of information, given the character of the crime, unlawful threat. The threat must be communicated to the threatened persons. True, the journalist did show the pictures to those persons prior to their publication, but – as pointed out by the Supreme Court – that was closely related to the journalistic activities. It was difficult to separate the acts constituting the crime from the publication process.

Suppose, however, that the threatened people had observed the photo sessions outside their houses and had already felt intimidated at that point. I think it would be strange if the police would not be able to interrupt such acts without being hindered by the FPA or FLFE. It would be reasonable to deem the threats taking place outside the houses of the victims as separate crimes, unrelated to possible intentions to publish. I would then argue that the situation could be seen as an example of illegal means of procurement of information. However, given the following Supreme Court case examined below, the court would perhaps reason differently.

4.3 Hate speech lecture – NJA 2000 p. 355

Another Supreme Court case concerned a guest lecture at a university. The lecturer made statements which caused him to be prosecuted for agitation against national and ethnic groups (hate speech). This was an act criminalized by both the Penal Code and the FLFE. In his defence, he raised the fact that he had had the lecture filmed and that a video recording had been published. Therefore, he claimed to be protected by the freedom of communication of information.

The Supreme Court, however, noted that the guest lecturer had discussed the filming of the lecture only briefly with the host professor and that the audience to the lecture had not been informed. The court concluded that in relation to the audience at the site, the lecture was not considered as a part of the publishing activities related to the video recording and that the lecturer's statements, therefore, did not enjoy immunity. By

contrast, the court seems to have regarded the freedom of communicating information to be applicable in relation to the recording of the lecture.

This case has been followed by a couple of decisions by the Chancellor of Justice. One case dealt with a participant in a TV show who appeared naked in a fountain and spoke to, amongst others, a child. Complaints were filed for sexual molestation and disorderly conduct (not listed as freedom of expression offences in the FLFE). The Chancellor noted that it was clear that the objective had been to record a TV program sequence that partially followed a script. Therefore, the recording was included as a natural part of publishing activities. Thus, the TV crew members were not liable for simply having taken part in the show or communicating information directed to the camera. However, the complaints concerned the relationship between the TV crew and bystanders at the site. The latter saw the program participant's actions, but they were unaware of the recording in progress. In relation to these individuals, the TV crew was not protected by the freedom of communicating information.[22]

In some other cases, the Chancellor of Justice had to deal with complaints against a man who phoned people merely to verbally harass them while broadcasting it live on the Internet. Only parts of the harassments could amount to freedom of expression offences according to the FLFE. Initially, the Chancellor deemed the FLFE to be applicable. The caller, therefore, enjoyed immunity for all acts not constituting freedom of expression offences. However, in 2010 the Chancellor changed positions in a case where a girl had been sexually harassed (not a freedom of expression offence). The Chancellor stressed that the girl had filed a report regarding what occurred during the telephone call as such, i.e. the caller's actions in relation to her by direct contact during the call. She was not aware that the conversation was recorded and broadcasted and she could therefore not be considered to have participated in the program. Thus, the Chancellor concluded that the caller should not enjoy immunity for his expressions in relation to the girl.[23] Svea Court of Appeal agreed with the Chancellor's

[22] Decision 25 March 2004, doc no 1080-04-32.

[23] Decision 8 October 2010, doc no 5866-10-31. Conversely, the Chancellor of Justice has in another case come to the conclusion that politicians exposed by hidden cameras was not protected by the freedom of communicating information, since they actually did not intend that their expressions should be published. See decision 8 October 2002, doc no 2616-02-31.

view regarding the non-applicability of the constitutional protection.[24]

I find it easy to agree with the Supreme Court and the Chancellor of Justice in substance. If recording a crime would make anyone immune, then prohibitions against all sorts of inappropriate behaviour would be most ineffective.

Still, I would probably have preferred a different line of reasoning. To me, the wording becomes strained when discussions focus on whether an act has been part of activities relating to publishing. If someone wants to film a lecture and publish the film, it is crucial that the lecture actually takes place. If someone wants to broadcast harassing phone calls, it is necessary to call a victim. The acts are closely related to the publication and could easily be considered to be parts of the activities to publish.

Perhaps, the reasoning of the Chancellor of Justice is somewhat less connected to what is part of activities to publish. The Chancellor of Justice seems to focus more on the separation of publication of expressions and actions that occur within a group of people who willingly work with the publishing, and acts relating to unknowing bystanders. This seems to be a reasonable interpretation of the hate speech lecture case and it is perhaps a somewhat more viable line of reasoning.

However, at least when dealing with crimes that are not closely related to individual victims, I believe that the reasoning becomes overly strained. Suppose, for example that one, with consent from the seller, records the events when one purchases a pistol. In that case, and regarding other recordings of criminal activities arranged by oneself, I think that it would be a clearer line of reasoning to see it as illegal means of purchase of information.

It would still be necessary to make case-by-case assessments in complex situations, for example regarding recordings in front of live studio audiences.[25] However, it would be possible to use penal law concepts, such as intent and consent, in order to reach a reasonable solution. Further, as the Supreme Court showed in the pistol purchase case, a proportionality test should also be conducted according to the IoG and the ECHR.

[24] The Svea Court of Appeal judgement 22 November 2012, case no B 2164-12. However, given the Chancellor's previous decision, the court found that there was an excusable misapprehension concerning the permissibility of the act.

[25] Cf. Gunnar Persson: Meddelarfrihet vid filmad föreläsning, Juridisk Tidskrift 2000/01 pp. 417–422, on pp. 419 f.

5. European perspective

In *Salihu and others v. Sweden*, the first case mentioned above – the pistol purchase case (NJA 2015 p. 45) – was brought to the European Court of Human Rights. The convicted persons complained under Article 10 of the ECHR that their right to freedom of expression had been violated. The court, however, decided that their application was manifestly ill-founded and therefore inadmissible.[26] The reasons that the court gave illustrate its approach to criminal conduct as a basis for publications.

The court found it clear that the conviction interfered with their freedom of expression, even though the actual publishing was not under consideration.[27] The same conclusion has been reached when states have taken measures against journalists that have violated general provisions on compliance with police orders during demonstrations[28], police radio communication[29], purchase of fireworks[30] and weapons on airplanes[31].

However, the Court's approach to journalists has two sides. On the one hand the important role of "public watchdog" is highlighted and journalistic activities therefore enjoy a special position. On the other hand, it is only responsible journalism that enjoys this position. If a journalist has breached the law, that indicates that he or she has not acted responsibly.[32]

> "[A] journalist cannot claim an exclusive immunity from criminal liability for the sole reason that, unlike other individuals exercising the right to freedom of expression, the offence in question was committed during the performance of his or her journalistic functions."[33]

[26] Salihu and Others v. Sweden (dec.), no. 33628/15, 10 May 2016. The applicants also complained under Article 7 of the ECHR.

[27] Salihu and Others (n 26) § 49. Cf. Trine Baumbach: Are Journalists to be Punished for Doing their Job?, Bergen Journal of Criminal Law and Criminal Justice 2016 pp. 102–124, on pp. 109 f.

[28] Pentikäinen v. Finland [GC], no. 11882/10, § 82, ECHR 2015.

[29] Sascha Adamek v. Germany (dec.), no. 22107/05, 25 March 2008. Cf. Brambilla and Others v. Italy, no 22567/09, § 49–50, 23 June 2016.

[30] Mikkelsen and Christensen v. Denmark (dec.), no. 22918/08, 24 May 2011.

[31] Erdtmann v. Germany (dec.), no. 56328/10, § 16, 5 January 2016.

[32] Pentikäinen v. Finland (n 28) § 88–90 and Salihu and Others (n 26) § 52–53. Cf. on the special role of journalists as public watchdogs and on related duties and responsibilities Baumbach (n 27) pp. 104 ff. with further references.

[33] Pentikäinen v. Finland (n 28) § 91 and Salihu and Others (n 26) § 53.

Like other interferences with the freedom of expression, criminal liability must fulfil the requirements of Article 10 (2) ECHR. The Court thus examines measures taken against journalists "to determine whether the impugned interference, seen as a whole, was supported by relevant and sufficient reasons and was proportionate to the legitimate aims pursued".[34] The Court thereby takes into account the public interest of the topic, whether it could have been illustrated in other ways, and the nature and severity of the penalty imposed. The Court also considers whether national courts have tried and argued on the rights under Article 10 and whether sentences have been reduced due to genuine journalistic intentions. In addition, states are afforded a margin of appreciation.[35]

In the *Salihu* case and in all other cases referred to here, the Court concluded that the measures taken have struck a fair balance between the competing interests at stake. Perhaps, this indicates that many European legal systems have rather similar views on these situations. This also corresponds to Danish and Norwegian case law.[36] The special importance of journalistic activities are recognized, but journalists are not immune if they breach the law.

This is a holistic approach that works well in relation to the Swedish Supreme Court's judgement in the pistol purchase case. Swedish courts of appeal also seem to have taken similar approaches in some cases.[37] The focus on purpose, content and context does, however, contrast to the other Supreme Court cases and to the more technical applicability tests of the FPA and the FLFE.

6. Concluding remarks

When someone behaves criminally in order to get material to publish, complex situations are created. They are difficult to handle in fully consistent and predictable ways in relation to the FPA and the FLFE. The Supreme

[34] Pentikäinen v. Finland (n 28) § 94 and Salihu and Others (n 26) § 54.

[35] Salihu and Others (n 26) § 54–60.

[36] As to Danish law, many cases are referred to in Baumbach (n 27) pp. 108 ff. As to Norwegian law see Rt. 1998 p. 652 and Rt. 2001 p. 1379.

[37] Cf. RH 1986:16, RH 1988:62, Skåne and Blekinge Court of Appeal judgement 27 January 2003 case no B 1061-02, Svea Court of Appeal judgement 5 February 2016 case no B 9096-15 and the situations, mentioned in the pistol purchase case, where firearms had been handled for journalistic purposes without legal repercussions.

Court cases mentioned above are therefore complex, and could perhaps be interpreted in other ways than those presented above. However, as starting points for further discussions, I conclude the arguments above with three suggestions.

First, it seems reasonable to separate, as far as is possible, crimes committed by dissemination of messages through protected media from other crimes. The media included in the FPA and the FLFE protection are all characterized by a distinct element of publication. Those constitutional laws should exclusively determine liability for crimes committed by such publication. In accordance with the principle of sole responsibility, persons procuring or communicating information should not be liable for the following publication. It would of course also be unfortunate, should persons sourcing information end up in situations similar to the IB case (which caused the introduction of the protection of procurement [see section 3.1 above]). Rules not aimed at publishing should not in practice be exploited as an indirect secondary route to discipline publishers.

On the other hand, the circumstances in the IB case were quite unique and amendments to court procedural laws have probably blocked the possibilities to improperly use rules not aimed at publishing. There is, therefore, no need to give publishers a wide-ranging immunity from such rules. Further, the intention of the protection of procurement of information was not to create privileges for journalists compared to other citizens. The constitution must not be interpreted in a way that invites people to misuse the protection. All sorts of extremist activism may use media and claim FPA and FLFE protection, and there are no guarantees that all intend to act correctly and sensibly.

Second, when distinguishing crimes committed through publishing from other crimes, it seems reasonable to pay more attention to the fact that the constitutional protection does not include the manner of the procurement of information. The Supreme Court and – perhaps to a lesser degree – the Chancellor of Justice seem to have focused on the freedom of communication of information and on whether acts have been parts of publishing activities. This may, however, strain the wordings of the reasoning unnecessarily, especially regarding crimes with no immediate effects on witnesses. Further, an expansion of the concept of communication may risk blurring the distinction to the procurement of information. It seems to me that a clearer line of reasoning would be to argue that if a person

records crimes that he or she has arranged, that person uses illegal means of procuring information and is therefore liable.

However, regarding liability for procurement of information, the Supreme Court and some preparatory works have focused on whether restrictions are aimed at the means of procurement or the content of the information. It seems uncertain whether this is the most fruitful approach. In the exclusion zone photos case (NJA 2015 p. 298), the Supreme Court concluded that the prohibition on photos in such zones was aimed at the content, but one could argue that any restriction is aimed at some kind of content of information. Further, to me, photos seem to be just one of several means to procure information on exclusive zones. Therefore, I do not think that the reasoning of the court gives very specific guidance. It does not convince me that it is possible to make meaningful distinctions between photos taken in exclusion zones on the one hand and for example intrusions into such zones or photos taken through windows of homes on the other. Most of all, I do not find it apparent how such distinctions contribute to securing free exchange of opinions. The original intent seems to have been that the right to procure information would constitute only a very modest – if any – real expansion of the protection of publishers. Therefore, I think it would be reasonable to argue that only obvious restrictions against gathering of material should be prevented by the protection of procurement of information.

In certain situations, it may be difficult to make sharp distinctions between crimes that are committed by the publication and other crimes. For example, the Swedish Ethical Review Act (2003:460) makes it mandatory to apply for ethical vetting for research projects that involve processing of certain kinds of personal data. Violations are criminalized but not included in the list of FPA and FLFE offences. The relation to the FPA and the FLFE is particularly complex regarding research on public information. Due to the Swedish principle on transparency, some kinds of personal data listed in the Ethical Review Act are in fact public. Within the boundaries of the FPA and the FLFE, such data are free for everyone to procure and to publish. This begs the question, whether the rules on the processing of data in the Ethical Review Act are compatible with the FPA and the FLFE. True, it may be theoretically possible to separate the act of processing information from the acts of procuring or publishing it. However, in practice, it seems rather unrealistic to draw clear lines. In such complex situations,

I find it more suitable to use the Supreme Court test as to whether events are part of the activities to publish and to draw parallels to the threatening photos case. The result seems to be, that if someone process public information when writing a text intended to be published, restrictions regarding such processing cannot be imposed in lack of support in the FPA and the FLFE.

Third, it is commendable that the Supreme Court in the pistol purchase case (NJA 2015 p. 45) showed the importance of the IoG and ECHR protection of the freedoms of expression and information. These instruments are valuable to guarantee the proper protection of unusual and unforeseen situations that are worth protecting but fall outside of the scope of the FPA and the FLFE. In such atypical situations, it is probably better to use the more wide-ranging proportionality test of IoG and ECHR than the more technical applicability tests of the FPA and the FLFE.[38] I would therefore welcome if future case law built more on this case than, for example, the somewhat subsequent exclusion zone photos case. In line with the European Court, it seems reasonable to pay attention to the topic's importance to society, the necessity of the conduct and the importance of journalistic exposure.[39]

The suggestions above relate to the general question of the extent of the freedoms of expression, information and the press. It follows that I am reluctant to promote expansion of protection for media as such. As new technologies continue to make it less clear how to define media, it becomes increasingly difficult to use that definition to grant special protection. It is probably more relevant to let the courts conduct a broader assessment of when crimes should or should not be accepted as a means of sourcing material to publish.

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[38] Cf. Madeleine Leijonhufvud: Svensk tryckfrihet och svenska konventionsåtaganden – ett olöst dilemma, in: Göran Regner – Marianne Eliason – Hans-Heinrich Vogel (ed.): Festskrift till Hans Ragnemalm, Lund 2005, pp. 197–204.

[39] Cf. Baumbach (n 27) p. 111.