

SUPREME COURT'S JUDGMENT

delivered in Stockholm on 21 June 2021

Case no.

B 5938-20

PARTIES

Appellant

Chancellor of Justice

Box 2308

103 17 Stockholm

Respondent

ML

Counsel and Public Defender: Attorney MW

THE MATTER

Freedom of expression offence of unlawful portrayal of an act of violence, etc.

RULING APPEALED

Judgment of the Göta Court of Appeal of 12 October 2020 in case B 3778-19

Doc.ID 206298

SUPREME COURT	Postal address	Telephone +46 8-561 666 00	Office hours
Riddarhustorget 8	Box 2066	Fax -	08:45 – 12:00
	103 12 Stockholm	E-mail: hogsta.domstolen@dom.se	13:15 – 15:00
		www.hogstodomstolen.se	

JUDGMENT

The Supreme Court affirms the judgment of the court of appeal.

The Supreme Court affirms the court of appeal's secrecy order.

The secrecy provision in Chapter 18, Section 15 of the Public Access to Information and Secrecy Act (2009:400) shall continue to apply to the film presented at the Supreme Court's hearing in private.

MW shall receive compensation from public funds for the defence of ML in the Supreme Court in the amount of SEK 8,016. Of the amount, SEK 6,412.50 relates to work and SEK 1,603.13 relates to value added tax. The state shall bear the cost.

CLAIMS IN THE SUPREME COURT

The Chancellor of Justice has claimed that the Supreme Court shall find ML guilty also of the freedom of expression offence of unlawful portrayal of an act of violence (charge 1) in accordance with Chapter 5, Articles 1 and 2 of the Fundamental Law on Freedom of Expression read in conjunction with Chapter 16, Section 10 c of the Criminal Code and that, in conjunction with a grant of the appeal on the issue of guilt, the sentence shall be determined to be a longer term of imprisonment than that imposed by the district court.

ML has opposed modification of the judgment of the court of appeal.

REASONS FOR THE JUDGMENT

Background

1. In May 2012, a certificate of no legal impediment to publication was issued for the Nordfront database. The database was provided on the nordfront.se website. During the period that is relevant in the case, ML was the publisher of the database.
2. On 15 March 2019, an act of terrorism was carried out in Christchurch, New Zealand. The perpetrator filmed the act as it unfolded. The recording was published the following day on nordfront.se as part of an article entitled "*BT Wanted to Avenge EA* –

Killed 49 in Mosque Attack". The article and film were posted on the website in any case during the period 16 March – 10 May 2019.

3. ML was prosecuted in the district court for the freedom of expression offence of unlawful portrayal of an act of violence committed through the publication, and thereby dissemination, of editorial material on the nordfront.se website. According to the Chancellor of Justice, by virtue of the moving pictures, intrusive, gross violence to people had been portrayed with the intent to disseminate the item. The Chancellor of Justice asserted that the publication was not justified and that ML was responsible for the publication in the capacity of publisher. He was also indicted for two counts of agitation against a population group.

4. ML contested liability for unlawful portrayal of an act of violence claiming that the publication had occurred within the context of news distribution and that, in this light, publication of the film was justifiable.

5. The district court, which decided the case with a jury, sentenced ML for unlawful portrayal of an act of violence and for one count of agitation against a population group to a term of imprisonment of four months. The court of appeal was of the opinion that the publication of the film was justifiable taking into account that such occurred within the context of news distribution and accordingly acquitted ML from the charge of unlawful portrayal of an act of violence. The court of appeal determined the sanction for agitation against a population group to probation.

What is at issue in the Supreme Court?

6. The case in the Supreme Court foremost pertains to whether the act meets the basic conditions for unlawful portrayal of an act of violence and whether it has been justifiable. In conjunction with the determination of justifiability, the issue regarding the circumstances which are to be ascribed significance when it is claimed that the publication took place within the context of news distribution arises in particular.

Generally regarding the Fundamental Law on Freedom of Expression

7. The Fundamental Law on Freedom of Expression is based on the notion that the protection afforded by the Freedom of the Press Act to the printed word shall, to the extent possible, also be granted to expressions in other media. Like the Freedom of the Press Act, the Fundamental Law on Freedom of Expression is based on a number of basic principles, *inter alia*, the exclusivity principle, the ban on censorship, freedom of establishment to the greatest extent possible, a special freedom of expression liability and a requirement of criminalisation both according to the relevant Fundamental Law as well as in law (the principle of double criminality).

8. Like the Freedom of the Press Act, the Fundamental Law on Freedom of Expression is formulated such that it protects only certain communications technologies. Historically, it has been deemed more efficient to grant protection to such technology rather than to the expression as such. This entails, *inter alia*, that the content of the expression as a main rule is not decisive to the application of the Fundamental Law on Freedom of Expression.

9. As a starting point, the Fundamental Law on Freedom of Expression applies to broadcasts of programmes which are directed to the public and intended to be received by technical means. Web broadcasts and satellite broadcasts of programmes are also covered by the regime. Furthermore, the Fundamental Law on Freedom of Expression is also applicable to published technical recordings. (See Chapter 1, Articles 3 and 8).

10. According to the so-called database rule in Chapter 1, Article 4 of the Fundamental Law on Freedom of Expression, the provisions of the Fundamental Law regarding broadcasts of programmes also applies when the information from a database, the content of which can only be modified by the person carrying on the activity, is provided to the public with the aid of electromagnetic waves by one of the means set forth in the article. One of these means is transmission by special request. One condition is that the party who provides the information belongs to some of the categories enumerated in the article.

11. The database rule has in view primarily various types of media companies, but also covers other parties provided that the relevant party possesses a certificate of no impediment to publication. This is commonly referred to as the voluntary constitutional

protection. As a consequence of the voluntary constitutional protection, it is in principle possible for anyone to, for example, distribute news subject to constitutional protection.

12. The special freedom of expression liability entails, as a main rule, that it is the publisher who is solely liable for any offence committed by virtue of the content of, for example, a database with a certificate of no impediment to publication. The liability for freedom of expression offences differs from that which follows from general rules, *inter alia*, such that a presumption of intent applies. The publisher or the party who otherwise bears liability for any freedom of expression offences may be deemed to both have had knowledge of the content in question and consented to the relevant broadcast or publication (see Chapter 6, Article 9 of the Fundamental Law on Freedom of Expression).

13. The issue of who bears liability in freedom of expression cases is to be determined prior to the main hearing. In the event the accused seeks to object that liability is to be borne by someone else, the objection must be brought during the preparatory phase of the case, otherwise the court may disregard it. (See Chapter 6, Article 8 of the Fundamental Law on Freedom of Expression).

The legal regulation of the freedom of expression offence of unlawful portrayal of an act of violence

14. Chapter 5 of the Fundamental Law on Freedom of Expression contains provisions regarding freedom of expression offences. The requirement that the acts are also punishable under law is also stated in Article 1. Furthermore, a condition for criminal liability according to the Fundamental Law on Freedom of Expression is that the act must be committed in a programme or a technical recording, or follow from the database rule (see paragraph 10) in a database.

15. The freedom of expression offence of unlawful portrayal of an act of violence entails that a person intrusively or protractedly portrays in moving pictures gross acts of violence against persons or animals with intent to disseminate the item unless the act is justifiable with regard to the circumstance (Chapter 5, Article 2 of the Fundamental Law on Freedom of Expression).

16. The penal provision regarding unlawful portrayals of an act of violence is found in Chapter 16, section 10 c of the Criminal Code. In so far as is now of interest, according to

the provision, a person who portrays in an intrusive or protracted way gross acts of violence to people or animals in moving pictures with the intent that the images will be disseminated or who disseminates such a portrayal is guilty of unlawful portrayal of an act of violence if the act is not justifiable in view of the circumstances. The sanction for unlawful portrayal of an act of violence is a fine or imprisonment of at most two years.

Background of the regime regarding unlawful portrayal of an act of violence

17. The criminal law regime regarding unlawful portrayal of an act of violence was implemented in the Criminal Code in 1989 and was subsequently supplemented with the penal provision in Chapter 5, Article 2 of the Fundamental Law on Freedom of Expression.

18. Before the provision in the Criminal Code was implemented, portrayals of an act of violence were regulated by the Prohibition Against Dissemination of Films and Videograms Containing Elements of Violence Act (the so-called Video Violence Act). The regime emerged as a reaction to the increase in public access to video films engendering portrayals of gross acts of violence, normally fictitious, in combination with the substantial expansion of the market for rentals and sales of video films. This development engendered a debate concerning the effects on, primarily, children and young persons in viewing portrayals of an act of violence. This resulted in legislation prohibiting dissemination of certain types of portrayals of an act of violence. Initially, the prohibition pertained only to dissemination to children with the limitation being removed after some years. (See Government Bill 1984/85:116, p. 9 and Swedish Government Official Reports 1983:70, p. 265 ff.)

19. No substantive changes occurred when the regime was transferred to the Criminal Code nor in conjunction with the emergence of the penal provision in the Fundamental Law on Freedom of Expression. The Video Violence Act thus covered portrayals of an act of violence of the same character as those covered by the current provisions. An exemption in the form of a justifiability requirement also applied in accordance with the older regime. Dissemination that was justifiable given the purpose and context of the portrayal and the circumstances in general was not addressed by the prohibition in the Act. (See Section 1 of the Video Violence Act).

20. In order to interpret the penal provisions regarding the freedom of expression offence of unlawful portrayal of an act of violence, against the stated background, guidance should be able to be obtained to a certain extent from the preparatory works for the Video Violence Act. However, caution is merited considering that it is now a question of a constitutional regime; the aforementioned exclusivity principle limits the possibility to take into account matters not supported in the Fundamental Law.

Specifically regarding the purpose underlying the penal provisions

21. The purpose of the Video Violence Act was to protect, above all, children and young persons from the negative effects of viewing portrayals of a gross act of violence. It was believed that portrayals of an act of violence which were sufficiently intrusive or protracted could lead to psychological disorders in the person who viewed them and that the risk was greatest for children and young persons. In addition, according to the preparatory works, it was necessary to consider the danger of the contribution of realistic elements of violence giving rise to more real violence in society. Viewers could learn certain methods for perpetrating violence or be directly inspired to behave aggressively. The range of descriptions of violence could, in the long term, contribute to legitimising violent acts or, in any case, gradually render an individual insensitive to violence. In addition, as regards the violence-inciting effect, children and young persons were regarded as being in the danger zone. (See Government Bill 1980/81:176, p. 32.)

22. When the regime was transferred to the Criminal Code, it was acknowledged that it was possible that there was no solid scientific support for the ability of portrayals of an act of violence to influence aggression, violence and intimidation, but that it could be readily assumed that, at least for certain groups or individuals, it must have had significant effects in these respects. Compelling reasons were deemed to exist to reserve to the state the possibility of intervening against the relevant type of portrayals of an act of violence. (See Government Bill 1986/87:151, p. 92)

23. It is abundantly clear from the original preparatory works that the legislative work focused primarily on fictitious portrayals of an act of violence. As regards the vast majority of the relevant types of portrayals of an act of violence, this was deemed to mean that there was scarcely any interest in defending the integrity of persons who participated

in such portrayal. Accordingly, this aspect was not considered in the formulation of the provisions. (See Government Bill 1980/81:176, p. 38)

Character of the violence

24. The criminalised area covers intrusive or protracted portrayals in moving pictures of gross acts of violence against persons or animals (see paragraphs 15 and 16). The notion is that the regime is to address what is referred to as extreme violence. It is not merely the gravity of the violence which is decisive. In order for a portrayal to be covered by the provision, it is also relevant how the violence is portrayed; it is necessary that it involves an intrusive or protracted portrayal.

25. In connection with an amendment of the Video Violence Act, it was stated that the same type of portrayals of an act of violence which could, at that time, give rise to censorship of a theatrical film could also be covered by the penal provision. Examples given were lengthy, raw fights with elements of cruelty and bloodshed, detailed or protracted portrayals of cruelty to humans or animals, various types of torture, intrusive portrayals of executions or advanced scenes of terror involving threats of death, murder, homicide or suicide. The term “protracted” in the provision is not intended to be perceived as purely temporal. (See Government Bill 1984/85:116, p. 18)

26. No special considerations relating to portrayals of an act of violence in the form of recordings of real violence have been given by the legislature. However, there is no doubt that the penal provisions also address such portrayals. A portrayal of real violence must, to a greater extent than a portrayal of fictitious violence, be deemed to be able to negatively affect someone who views the portrayal, and this applies in particular to children and young persons. In the determination of whether it is a matter of an intrusive or protracted portrayal of a gross act of violence, consideration should thus be able to be given as to whether the portrayal pertains to fictitious or real violence. Taking into account the fact that the elements of the crime are the same for both types of portrayals and that the elements have in view the manner in which the violence is portrayed, there is no support, however, for assessing actual violence and fictitious violence in wholly different ways. The determination must thus proceed on the basis of the manner in which the violence was actually portrayed.

27. The fact that the assessment is to have in view the portrayal of an act of violence as such also entails that reasons relating to the integrity of the persons who are subjected to the violence in a recording cannot be afforded any relevance in the assessment. This is already apparent from what was stated in respect of this in the original preparatory works for the Video Violence Act (see paragraph 23). Another matter is that the assessment of whether the portrayal of the act of violence is intrusive or protracted can be affected by the extent to which a portrayal shows the effects of the violence, e.g. whether it shows the manner in which various types of bodily injuries arise or how persons suffer.

The justifiability requirement

28. When the Video Violence Act was introduced, it was observed that there are cases in which disturbing portrayals of an act of violence are justifiable. This could apply to news distribution, other reporting of conditions within different cultures and political systems, features in social debate, documentation or re-creation of historical events or scientific presentations. In addition, in works with an artistic aim, the context could justify sequences of images of gross violence. It was deemed necessary that the regime left room for such portrayals. (See Government Bill 1980/81:176, p. 42.)

29. At its inception, the penal provision in the Video Violence Act was somewhat differently constructed. It was intended to make room for such cases involving portrayals of an act of gross violence as were deemed legitimate. After the provision had been in force some years, it was constructed to implement the current requirement of justifiability. The determination was that the provision as newly constructed would preserve the necessary room for news distribution and information transmission, the formation of opinion, artistic expression and other comparable interests. (See Government Bill 1984/85:116, p. 19.)

30. According to the current regime, when the act is justifiable taking into account the circumstances, the criminality exemption applies. The justifiability determination must be made taking into account all circumstances. Principally, it is a matter of balancing the public interest in allowing the portrayal of an act of violence to be shown against the interest forming the basis underlying criminalisation, i.e. to protect principally children and young persons from the damaging effects which may arise as a consequence of exposure to portrayals of a gross act of violence.

31. Within the context of news distribution, it is not infrequent that there is reason to publish moving images with portrayals of gross, real violence. It is a cornerstone of a democratic society that the media is able to freely report on essentially any event whatsoever. In conjunction with reporting from, for example, conflicts and terrorist attacks with the use of moving images, portrayals of gross act of violence are also normally justifiable. In the event a publication of a portrayal of an act of violence is for the purposes of news distribution, such accordingly speaks strongly against the notion that it is to be deemed punishable. This applies in particular if the newsworthiness of the relevant event is evident. However, in addition, as regards news distribution, there should be a limit for what may be deemed justifiable to show taking into account the character of the portrayal of an act of violence.

32. As regards traditional media forms, it is rarely unclear what is to be regarded as news distribution. Today, however, anyone is in principle free to distribute news subject to constitutional protection; at present, it is also not only the more traditional actors who reach out to broader groups. As a consequence, it may be more frequently necessary to make a determination of whether a certain publication is actually deemed to have taken place within the context of news distribution. The determination should be made objectively on the basis of the context relating to the relevant publication and the impression it conveys.

33. It is common also in traditional media that the person who provides news distribution is also to a greater or lesser extent engaged in the formation of public opinion, e.g. by means of an editorial page with articles which express views on various political issues. The fact that such features may be present in, for example, a web magazine does not affect whether news distribution is also being provided. In this context, it may be noted that, as stated, even the formation of public opinion has also been raised by the legislature as an area in which it may be justifiable to publish portrayals of a gross act of violence.

34. In addition, in the determination of whether news distribution is involved, there is otherwise no real room to take into account what is known regarding the opinions of the distributor of the news. The same also applies to any lack of distancing from the violence which appears in a published portrayal of an act of violence.

35. A justifiability determination becomes relevant only where it is discerned that the matter involves such violence as is referred to in the penal regime. Portrayals which per se satisfy the requirements following from the provision can, however, vary in gravity. Since the justifiability determination is based on a balancing between the interests of being able to portray an act of violence within the context of news distribution and the interest of protecting children and young persons from being exposed to the portrayal of an act of violence, the character of the portrayal must be able to be taken into account also in the determination of justifiability.

36. In principle, it is a matter for the prosecutor to show that such an exemption situation which is covered by the justifiability provision is not present (see Government Bill 1984/85:116, p. 19). In other words, it is incumbent upon the prosecutor to evince the factual circumstances on which the court's determination of justifiability is to be based. The evidentiary requirement should be that as normally applies in criminal matters.

37. In conjunction with the balancing to be carried out, consideration must be given to the fact that the examination made is in accordance with the Fundamental Law on the Freedom of Expression and that there is no room, following more general considerations, to infringe the right to publish portrayals of violence. In a determination of what is to be regarded as justifiable, consideration must also be given to the so-called instruction in Chapter 1, Article 15 of the Fundamental Law on Freedom of Expression.

The assessment in this case

The content of the film

38. The relevant film, which is just under 17 minutes in length, is comprised of the perpetrator's own recording of the act of terror in the mosque in Christchurch, New Zealand. The recording was made with some sort of action camera which was situated on the perpetrator. The film starts with a long sequence in which the perpetrator drives a car to get to the mosque. A number of weapons carried in the car are visible. Music is playing at a relatively high volume and the perpetrator also makes some statements.

39. When the car stops some distance from the mosque, the perpetrator approaches and enters the building. Just outside the entrance, he begins to consistently shoot the people he encountered along his route. It is apparent that a large number of persons are

shot and fall to the ground. The sound of people screaming and crying is heard. After the perpetrator has gone through several rooms in the mosque, *inter alia* a prayer room in which a large number of persons are gathered, and shot the people he encountered, he retreats to the car and changes weapons. He then makes another round through the mosque and then shoots the people he finds who are still moving. The perpetrator thereafter leaves the building and also discharges his weapon several times outside. He then sits in his car and departs. The concluding part of the film shows the car journey from the mosque.

40. In those parts which transpire inside the mosque, the film is blurry and the sound is muffled. No details are apparent and one cannot distinguish any facial expressions. From the context, it is nonetheless clear that it involves real people who are executed and collapse. The overall impression of the film is highly offensive to the viewer, not the least to someone who is aware of what is being shown.

Question of whether it has been an intrusive or protracted portrayal of a gross act of violence

41. In order for it to be a question of unlawful portrayal of an act of violence, the statute requires that the portrayal relates to intrusive or protracted violence against people or animals. There is every indication that the portrayal of an act of violence would not have been deemed sufficiently grave in order to fulfil these requirements if comparable scenes had appeared in a feature film. Furthermore, this is true notwithstanding that it involves a large number of intentional killings. Taking into account the fact that the portrayal pertains to real violence, however, the film may be deemed to constitute a portrayal of an act of violence of the type to which the penal provisions refer (*cf.* paragraph 26).

Question whether the act was justifiable

42. Punishability is conditional upon the act not being justifiable taking into account the circumstances. The case deals with determining whether the publication may be deemed to have been justifiable for the reason that it occurred within the context of news distribution.

43. The film has been published as a part of an article on the website. The article deals with the act of terror which was highly pertinent news at the time and is unambiguously

written as part of news coverage, even if in a somewhat tendentious way. From what ML has stated, it is apparent how the work with the website was organised and that there has been an effort to separate news distribution from other parts of the website.

44. In an overall assessment, the publication must be deemed to have occurred in connection with news distribution. In conjunction with the examination, no significance may be ascribed to the fact that, in addition to news articles, there have also been public opinion-forming articles and other materials on the website. In addition, no weight can be ascribed to what is otherwise known regarding the views of the organisation which is behind the website or that the article does not clearly distance itself from the violence in the film. (See paragraphs 33 and 34.)

45. Interest in the reporting of the event at the relevant time was very great. In this context, the newsworthiness of a film of the act recorded by the perpetrator is evident. It is a matter involving a lengthy and ghastly portrayal of real violence from which it is apparent how a large number of persons were executed. At the same time, the quality and style of the film is not such that the killing is portrayed in detail. Nor can any specific details be perceived.

46. Overall, the portrayal of an act of violence as it is communicated in the film cannot be deemed to be of the type that the interest in being able to publish it within the framework of news distribution must give way. Accordingly, the act has been justifiable. The charge regarding the freedom of expression offence of unlawful portrayal of an act of violence is accordingly dismissed and the judgment of the court of appeal is affirmed.

Justices of the Supreme Court Anders Eka, Ann-Christine Lindeblad, Johnny Herre (dissenting), Petter Asp (supplemental opinion) and Malin Bonthron (reporting Justice, dissenting) participated in the ruling.
Judge referee: Cecilia Andgren



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DISSENTING OPINION

Justice Johnny Herre and reporting Justice Malin Bonthron dissent and state the following.

We are of the opinion that ML is to be found guilty also for the freedom of expression offence of unlawful portrayal of an act of violence and that the reasons for the judgment are to read as follows commencing from and including paragraph 45.

45. It may be observed that the publication thus occurred in a context in which the latitude to also show portrayals of a gross act of violence must be very great. However, even in this area, there is a limit to what may be deemed to be justifiable taking into account the character of the portrayed violence balanced against the interest of being able to reproduce it within the context of news distribution.

46. In this case, it is a question of an intrusive portrayal of real violence in which it is clearly apparent how persons are mercilessly executed and in which a viewer is presented with a portrayal of great human suffering, dread and horror. For the viewer, viewing the film is immensely troubling. Indeed, interest in the news has been great, but it cannot be deemed to give rise to an entitlement to a publication of the film as a whole. Accordingly, in the context, the act cannot be deemed to be justifiable.

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SUPREME COURT	Postal address	Telephone +46 8-561 666 00	Office hours
Riddarhustorget 8	Box 2066	Fax -	08:45 – 12:00
	103 12 Stockholm	E-mail:	13:15 – 15:00
		hogsta.domstolen@dom.se	
		www.hogstodomstolen.se	

47. Nothing has come to light according to which ML, notwithstanding the presumption of intent in Chapter 6, Article 9 of the Fundamental Law on Freedom of Expression, is not to be deemed to have had knowledge of and consented to the publication. Accordingly, he is also to be found guilty of the freedom of expression offence of unlawful portrayal of an act of violence.

48. The penalty value of the additional crime, taking into account the fact that publication took place within the context of news distribution (*cf.* case NJA 2015, p. 45, paragraphs 26 and 27), amounts to a prison term of some months. It cannot be deemed to be a question of an offence for which there is a presumption of imprisonment (*cf.* “*The Chinese Ball Bearings*” case, case NJA 2014, p. 559, paragraph 31). Even taking into account the fact that ML has recidivated into similar criminality, the grounds for imprisonment are not so compelling that there are reasons to choose a sentence other than that chosen by the court of appeal, i.e. probation.



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SUPPLEMENTAL OPINION

Justice Petter Asp adds for his own part.

1. Chapter 5, Article 2 of the Fundamental Law on Freedom of Expression criminalises only one of the two forms of unlawful portrayals of an act of violence covered by Chapter 16, Section 10 c (1), second sentence of the Criminal Code, namely portrayals with intent that the portrayal will be disseminated. Accordingly, the part of Chapter 16, Section 10 c which reads “or who disseminates such a portrayal” is thus not covered by the criminalisation in the Fundamental Law on Freedom of Expression.

2. In the same way, for the period of time the crime of child pornography was covered by the Freedom of Press Act and the Fundamental Law on Freedom of Expression applied, the situation was such that only portrayals with the intent to disseminate (and not dissemination, which was the other type of act under the Criminal Code) was criminalised. Currently, the same applies in respect of such portrayals of sexual violence as are criminalised by Chapter 7 of the Freedom of the Press Act and in Chapter 5, Article 1 of the Fundamental Law on Freedom of Expression.

3. As regards unlawful portrayal of an act of violence in accordance with the Fundamental Law on Freedom of Expression, the aforementioned is particularly clear from the reference in Chapter 5, Article 2 of the Fundamental Law on Freedom of Expression to “even such [i.e. not another] unlawful portrayal of an act of violence whereby a person intrusively or proactively portrays in moving pictures gross acts of violence against persons or animals with intent to disseminate the item” being deemed to be a freedom of expression offence.

4. The aforementioned could be viewed by someone who reads the statute *a prima vista* to be regarded as a problem in so far as it may be questioned whether the dissemination of what someone else has portrayed is actually criminalised.

5. However, there can be no doubt that the provision in those respects now subject to discussion encompasses and is (and was) to be interpreted such that a party who reproduces another's portrayal thereby also provides a portrayal in such a way as is required for liability in accordance with both of the Fundamental Laws. A party who – during the period of time in which child pornography offences constituted a freedom of press offence – published in print a child pornographic image which was produced (e.g. photographed) by someone else was thus deemed to *portray* children in a pornographic image. In a comparable way, in the application of Chapter 5, Article 2 of the Fundamental Law on Freedom of Expression, someone who provides a link on a constitutionally protected website to, or otherwise publishes, someone else's portrayal of an act of violence must themselves be deemed to have *portrayed* the act of violence.

6. The explanation why only portrayal has been criminalised is that freedom of the press and freedom of expression offences are offences which are committed *in* a printed form or *in* a programme or a technical recording (*cf.* Chapter 7, Article 1 of the Freedom of the Press Act and Chapter 5, Article 1 of the Fundamental Law on Freedom of Expression). And, one portrays *in* a printed form, *in* a programme, etc. (also if one reproduces what someone else has produced). One may also express it such that criminalisation has in view the content itself of an expression, i.e. the content of the expression published in such a manner as is covered by either of both of the Fundamental Laws.¹ This means that the determination of the punishability takes place in another context when it takes place in accordance with the Freedom of the Press Act and the Fundamental Law on Freedom of Expression than when the issue of criminal liability arises outside the area of application of the Fundamental Laws; beyond the area of application of the Fundamental Laws, the determination of the content of an expression is only part of the determination of whether the elements of the description of the offence are fulfilled (which, *inter alia*, includes what the person has actually done: portrayed, disseminated, stored, possessed, etc.).

¹ It should be noted that the situation here – which may be most simply described such that only one of the Criminal Code's two forms of the offence has been criminalised in the relevant fundamental law – is one other than that which is discussed in case NJA 2007, p. 805 II, namely that criminalisation in the relevant fundamental law regarding agitation against a population group does not contain all of the requirements necessary in order for the offence to fall within Chapter 16, section 8 of the Criminal Code.

7. However, what is not at all important here is to establish the reason why criminalisation has been limited to the case of portrayal but, rather, it is to note that the aforementioned raises issues regarding the manner in which the relationship between portrayal and dissemination in the application of the provisions of the Criminal Code beyond the area of constitutional protection may be viewed more generally. Of particular weight in this context is that the legislature appears to have proceeded in the various reforms of the child pornography offence on the basis that the portrayal component of Chapter 16, Section 10 a of the Criminal Code has less weight – which may be said to be more in line with the day-to-day linguistic meaning of *portray* – than that inherent in what was just said regarding the application of the requirement in accordance with the Freedom of the Press Act and the Fundamental Law on Freedom of Expression (see paragraph 5 above).

8. For example, the legislature has built upon the difference between portrayal and other forms of offence in the delineation of the situations in which liability for child pornography offences may also arise when the sexual development of the person is complete and it is not otherwise apparent from the image or the circumstances surrounding it that the person is under the age of eighteen. The rationale underlying this delineation has been that the person who portrays normally has the possibility to determine whether the image is prohibited or not:

“In the absence of a requirement of punishability which proceeds on the basis that the age is to be apparent from the image and the circumstances surrounding it is in principle impossible for the person who, for example, disseminates or possesses a pornographic image of a fully sexually mature person to determine whether the picture is prohibited or not.

...

A person who portrays a minor and fully sexually developed person in a pornographic image will – as opposed to a person who, for example, disseminates or possesses such a picture – often have personal contact with the person portrayed. In such cases, the perpetrator has every possibility to question the young person regarding his or her age and in other ways make a determination on the issue.” (Government Bill 2009/10:70, p. 24 f.)

9. In a comparable way, the legislature has based the delineation for liability for negligence in child pornography offences on the boundary between portrayal and other forms of offence, and the justification has also been tied here to the portrayer’s possibilities to obtain clarity on the age of the person portrayed:

“According to the Government, the same guilt requirement applied to child pornography offences through portrayal as for sexual offences is justified in respect of the child’s age. A perpetrator should have the same possibility to obtain clarity regarding the age of the person he or she portrays as such person has who engages in sexual acts with someone.” (Government Bill 2019/20:69, p. 19f.)

10. The relationship between portrayal and dissemination (and other forms of offence) are certainly not really as simple as these statements suggest. The legislature has, for example, in connection with the provision regarding child pornography offences in the Criminal Code, stated that a portrayal may consist of reproduction of an existing image (see Government Bill 1997/98:43, p. 163). And, for this reason alone, some tension arises in relation to the text quoted above.

11. The fact that the boundary between portrayal and dissemination is not altogether uncomplicated cannot, however, be taken to mean that one should more generally apply the portrayal requirement in the Criminal Code in the same manner as is done (and has been done) when the issue is one of liability for the freedom of the press and freedom of expression offences which have now been discussed since it would entail that the view expressed in the statements in the preparatory works quoted in paragraphs 8 and 9 would be nearly wholly undermined. The interpretation required in order to reach the conclusion that the offence in cases of the type involved in this case is criminalised (i.e. that the person who makes available a portrayal of an act of violence which someone else has created thereby also portrays an act of violence) should, consequently, without more – i.e. without more in-depth considerations – be implemented in situations beyond the area of freedom of the press and freedom of expression offences.