



Limits on Freedom of Expression

Argentina • Brazil • Canada • China • France
Germany • Israel • Japan • Netherlands
New Zealand • Sweden • Ukraine
United Kingdom

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Comparative Summary

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This report examines the scope of protection extended to freedom of speech in thirteen selected countries. In particular, the report focuses on the limits of protection that may apply to the right to interrupt or affect in any other way public speech. The report also addresses the availability of mechanisms to control foreign broadcasters working on behalf of foreign governments.

The report consists of individual surveys for the following countries: Argentina, Brazil, Canada, China, Israel, Japan, Germany, France, New Zealand, Sweden, the Netherlands, the United Kingdom, and Ukraine. The surveys were prepared by foreign law specialists and analysts at the Global Legal Research Directorate of the Law Library of Congress. Countries surveyed were selected from various continents based on relevance as well as on available staff's expertise.

The terms "freedom of speech" and "freedom of expression" as used in this report are interchangeable. Quotations in this summary were taken from the relevant country surveys.

I. Limits on Public Speech

All countries surveyed appear to expressly recognize the right to freedom of speech as a constitutional or fundamental right. Freedom of speech, however, is not absolute; all of the countries apply limitations to it at varied levels.

A. Geopolitical Content Restrictions

Broad restrictions on speech were found in **China** and **Ukraine**.

Although the **Chinese** Constitution declares that citizens enjoy freedom of speech and freedom of the press, these freedoms are tightly restricted by specific laws and regulations. For example, China's Cybersecurity Law prohibits the use of the internet to "endanger the sovereignty, overturn the socialist system, incite separatism, break national unity, advocate terrorism or extremism, advocate ethnic hatred and ethnic discrimination, . . . [and] create or disseminate false information to disrupt the economic or social order." Similar prohibited expressions apply under China's Regulation on the Administration of Publishing, including a prohibition on the destruction of "public order or . . . public stability." Other restrictions apply under China's Regulation on Radio and Television Administration, which prohibits endangerment of "state . . . honour and interests; . . . [as well as the instigation of] nationality separation or . . . [disruption of] nationality solidarity."

Restrictions on speech in **Ukraine** may be viewed in the context of the Euromaidan Revolution in 2014 and conflict with the **Russian Federation**. In addition to censorship, **Ukrainian** law contains restrictions in the form of language quotas for broadcasting, print, and publishing media in languages other than Ukrainian. Accordingly, only 10% of the total screenings of films in

Ukraine can be in a language other than Ukrainian, and at least 50% of books published and distributed in Ukraine must be in Ukrainian.

Ukrainian legislation further authorizes the banning of “films containing the propaganda of an ‘aggressor state,’ including positive images of the workers of the aggressor state, Soviet state security bodies, and films justifying violation of the territorial integrity of Ukraine.” The ban applies to films produced by individuals and entities of the aggressor state, and to movies with the above mentioned content produced after August 1, 1991, regardless of country of origin. The ban also applies to movies and films produced after January 1, 2014, by individuals or legal entities of the ‘aggressor state’ “in the absence of propaganda”. Restrictions also apply to the import and distribution of print media from the territory of the aggressor state.”

B. Specific Prohibitions on Disruption of Public Speech and Deliberations

Some surveyed countries were found to have specific rules prohibiting disruption of public speech and deliberations. For example, the **Brazilian** Internal Rules of the National Congress as well as the Internal Rules of the Chamber of Deputies and Federal Senate do not allow the interruption of parliamentary speech. During the joint sessions of the Congress, the galleries are made available to the public. No manifestation of support or disapproval to what happens in the plenary or the practice of acts that can disturb the work is allowed. Similarly, all persons are allowed to attend the public sessions in the Federal Senate from a reserved seat provided that they are silent and give no sign of applause or disapproval of what happens there.

Japan specifically recognizes an offense of disruption of public speech for public election campaigns, an offense punishable by imprisonment or a fine.

Sweden prohibits noise disruptions of public gatherings such as religious services, marriages, funerals, court proceedings, state or municipal meetings, or public deliberations. For example, disruption caused by hecklers at the Swedish Parliament is punishable with a fine or imprisonment. Swedish law further prohibits disorderly conduct that is aimed at aggravating people. Heckling a political group, according to the Swedish country survey, is likely to fall within the constraints of this offense even if it does not specifically meet the requirements to be deemed disruption of public deliberations and gatherings.

Unreasonable disruption in a public place of “any meeting, congregation, or audience” is specifically prohibited under **New Zealand** law.

In addition to a general prohibition on acting in a disorderly manner at a public meeting in order to “prevent . . . the transaction of the business for which the meeting was called together,” the **United Kingdom** has specific provisions prohibiting incitement to disrupt meetings that are part of an electoral campaign during a campaign period.

C. Indirect Limitations on Public Speech

Limitations on the right of expression exist in all the surveyed countries and are recognized under the International Covenant on Civil and Political Rights and the European Convention on Human Rights. Such limitations are designed to secure a variety of objectives that may include the

protection of national security, territorial integrity, public safety, health, morals, the integrity of public service, a person's dignity and good name, religious feelings, etc. Protection of these and additional objectives are provided under the countries' constitutional provisions as well as under statutory and case law, as relevant.

Limitations on speech that might be relevant in the context of interruption of public speech such as heckling include prohibitions on disturbance of public order or safety, defamation, hate speech, insult and violation of human dignity in a number of the countries surveyed. A prohibition on disrespecting the **French** national anthem or the French flag has been highlighted as a recognized limitation on speech under French law.

Germany, Israel, and the **Netherlands** specifically recognize limits on speech that constitutes a denial or praise for atrocities committed during the Holocaust, with **German** law prohibiting disturbance of "the public peace in a manner that violates the dignity of the victims [of the Nazi regime] by approving of, glorifying, or justifying the National Socialist rule of arbitrary force." In **France** the denial or minimization of recognized crimes against humanity, in particular the Holocaust, are considered prohibited hate speech.

Other types of restrictions that may affect public speech apply to limits "based on political, religious, cultural or other beliefs in **Sweden**, incitement to religious hatred and discrimination in the **Netherlands**, and insults to religious feelings in **Israel**.

The implementation of limits on speech in many countries is interpreted in a restrictive way, however, especially with regard to public speech. Recognizing the importance of free expression in democratic societies, the **European Court of Human Rights** has declared that freedom of speech "is applicable not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population."

The courts in **Canada, France, Germany,** and **Israel** have similarly extended the scope of free speech protection to harsh and exaggerated statements, as well as to political expressions that may not please the government. Protection of speech, however, does not apply in the same way to the deliberate assertion of untrue facts.

D. Balancing the Right to Free Speech against Other Protected Rights

Recognizing the importance of protecting freedom of speech, the European Convention on Human Rights provides that any limitation of freedom of expression must be prescribed by law, "necessary in a democratic society," and aimed at certain enumerated objectives, one of which could be the prevention of disorder or crime. A determination as to whether a restriction on freedom of expression is necessary "requires the existence of a pressing social need, and . . . the restrictions should be no more than is proportionate." Feelings or even outrage, in the absence of intimidation, however, was held by the European Court of Human Rights as insufficient for limiting freedom of expression: "To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler's veto."

A similar approach is expressed by the **International Covenant on Civil and Political Rights**, which recognizes that freedom of expression may only be restricted as provided by law and to the extent necessary: “(a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order... or of public health or morals.”

The need to interpret limitations on freedom of expression restrictively has been recognized by the **Argentinian** Supreme Court. A narrow interpretation of the scope of limitations on speech was similarly applied by the **New Zealand** Supreme Court. One of the justices defined prohibited “offensive behavior” within the meaning of that country’s law as behavior “capable of wounding feelings or arousing real anger, resentment, disgust or outrage, objectively assessed, provided that it is to an extent which impacts on public order and is more than those subjected to it should have to tolerate.” In determining whether the limitation on freedom of expression is justified, a balancing of the conflicting interests must be undertaken, the Court held.

Attempting to find a balance between freedom of speech and the prohibitions against defamation and insult, **French** law determines that publication of a true statement that concerns a person’s private life may nonetheless be defamatory for the purpose of criminal liability.

An expansive protection of publication of even false information has been recognized by the **Israeli** Supreme Court based on a “defense of responsible journalism.” This defense applies in defamation suits where the publication was made in good faith, even if the information it contained ultimately turned out to be false. The defense is restricted to cases where there was an obligation to publish; no malicious intent; the publication complied with standards of responsible, cautious, and fair journalism; and the publisher took steps to prevent unnecessary harm to the object of the publication.

French law similarly exempts good-faith reporting of parliamentary or judicial proceedings from prosecution for defamation. The French Cour de cassation has declared that criticism of the manner in which institutions function is a valid exercise of freedom of expression. Nevertheless, the country survey for France notes that defamation prosecutions do occur in France and are often difficult to defend against.

Interpreting the wide scope of protection that should apply to political expression in **Israel**, that country’s Supreme Court has narrowly interpreted the elements of the offense of insult to a public servant under Israel’s criminal law. The Court held that the prohibition would apply only in rare cases where the expression “harm[s] the core of human dignity and involve[s] a substantive and severe violation of the value-moral nucleus from which the public servant draws the source of his/her power and authority. “The prohibition was similarly held to be applicable only where it is almost certain that the anticipated harm will harm the public employee as an individual as well as the public service system and the public’s trust in it.

II. Mechanism to Control Foreign Broadcasters Working on Behalf of Foreign Governments

The issuance of foreign correspondent's certificates to foreign journalists is common among the countries surveyed. A number of countries similarly require licensing for radio and television broadcasting operations. Licensing in some countries surveyed requires legal residence or registration, or a commitment to adhere to broadcasting standards.

A. Rules Specific to Broadcasters Controlled by Foreign States

Under **French** legislation adopted in December 2018 the French regulatory agency for radio and television broadcasting may, after a first warning, withdraw the broadcasting authorization of an operator controlled by or under the influence of a foreign state if that state broadcasts content that harms a fundamental national interest of France. The law explicitly states that the propagation of false information to interfere with the proper functioning of institutions should be considered harmful to a fundamental national interest.

Explicit blockage of access to Russian media and social networks, as well as search engines and electronic mail services and domains, was implemented in 2017 in **Ukraine** based on a presidential order. The same order also blocked individual journalists or broadcasters (foreign and domestic) who were deemed to be a threat to national security.

B. Broadcasting Pluralism Standards

The **French** regulatory agency for radio and television applies criteria for granting broadcasting permits that include, in addition to technical considerations, the promotion of "the public interest and the respect of pluralism." Although the agency does not practice censorship prior to broadcasting, it may apply sanctions after broadcasting if a program violates French law.

Foreign broadcasters operating in the **United Kingdom** and broadcasting to UK audiences must similarly be licensed by the UK's communication regulator, Ofcom. In order to obtain a license, the broadcaster must agree to the license conditions and to comply with the Broadcasting Code. Among broadcasting standards to which licensees must commit in the **UK** is the requirement that, in dealing with matters of major political and industrial controversy and matters relating to current public policy, an appropriately wide range of significant views (respect for pluralism) must be included and given due weight in each program. Failing to abide by the license's conditions or the Code and laws may result in Ofcom issuing its findings publicly, imposing a financial penalty, or suspending or revoking the broadcaster's license in the UK.

A violation of the requirement of respect for pluralism resulted in the closing of an Iranian-funded television channel held by Ofcom to have failed to air alternative viewpoints on controversial issues in one case. The broadcasting of a news item with a two-minute video filmed by a terrorist prior to him conducting a terrorist attack resulted in a fine for the broadcast channel, which originated in Afghanistan but broadcast in the UK. According to Ofcom, "the programme contained hate speech and was likely to encourage or to incite the commission of crime or to lead to disorder . . . with no surrounding content that sought to challenge, rebut or otherwise contextualise . . . highly extreme views."

The investigation of a TV channel that is financed by the Russian Federation and determined by Ofcom to have been controlled by the Russian government is ongoing in connection with an influx of programs broadcast on the channel after the poisoning of two Russian nationals in the **UK**.

C. Requirements Regarding Broadcasters' National Identity or Financial Backing

Foreign media organizations operating in **China** must seek approval from China's Ministry of Foreign Affairs and submit required documents in order to establish offices in China and send resident journalists to the country.

The **Netherlands** limits the participation of foreign broadcasters by applying quotas for European and Dutch-Frisian programming of public and private broadcasters, thereby excluding or limiting the participation of foreign, non-EU broadcasters.

Residence or seat requirements in Germany, in another EU Member State, or another Member State of the European Economic Area (EEA) apply to private broadcasters in **Germany**. A license will not be granted to legal persons under public law or to entities that are government funded. This prohibition also applies to foreign public or state institutions. The German Commission on Licensing and Supervision reportedly revoked the radio license of a broadcasting company because it allegedly uses too much content that is financed by the Russian government, thereby making it a de facto state organization.

Under **Israeli** law, television and radio broadcasters are required to have a license. License applicants must, among other requirements, be a corporation registered in Israel. The Law requires that a certain percentage of the means of control to direct the corporation's operation be held by Israeli citizens and residents of Israel, or by registered corporations in Israel. Applicants may be disqualified based on a determination that granting them a license is contrary to the public interest or constitutes a risk to state security. Broadcasters must disclose any foreign contributions received from "foreign political entities" as defined by law.

It should be noted that some surveyed countries have expressed concerns for foreign broadcasting activities. With regard to Russian Television (RT), the **Canadian** Radio-television and Telecommunications Commission (CRTC) recently commented that at this time "it is not reviewing the presence on Canadian TVs of RT." **Sweden** has similarly recognized that foreign media has the potential to become a threat to its national security.

Argentina

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SUMMARY Freedom of expression is protected in Argentina's National Constitution. Its exercise is restricted by certain actions that the Penal Code considers crimes, such as crimes against the public order or crimes against honor. No specific limits on speech aimed at undermining another speaker's freedom of expression were found.

I. Constitutional Protection

In Argentina the right to freedom of expression is protected at the constitutional level by proclaiming that all the inhabitants of the nation are entitled to a number of rights, in accordance with the laws that regulate their exercise, including the right to express their ideas in the press with no pre-publication censorship.¹ The Constitution further provides that Congress may not enact laws restricting freedom of the press or establishing federal jurisdiction over the press.²

II. Criminal Sanctions on Violations of Freedom of Expression

The Penal Code describes a number of crimes related to freedom of expression.³ The chapter on crimes against the public order provides for the crime of public intimidation, penalizing with two to six years of imprisonment anyone who, in order to spread general fear or cause a riot or disorder, makes any sign, sounds an alarm, threatens to commit any crime of common danger, or uses any other physical means that would normally produce any such result.⁴ This penalty is increased to imprisonment for three to ten years if explosives or chemical substances were used in the perpetration of the crime.⁵

Anyone who publicly incites collective violence against groups of persons or institutions is sanctioned with imprisonment for three to six years for the incitement alone.⁶

¹ CONSTITUCIÓN NACIONAL [CONST. NAC.] art. 14, BOLETÍN OFICIAL [B.O.], Jan. 3, 1995, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/804/norma.htm>, archived at <https://perma.cc/S3BN-9NA3>.

² *Id.* art. 32.

³ CÓDIGO PENAL DE LA REPÚBLICA ARGENTINA [CÓD. PEN.] [PENAL CODE], Ley 11.179, B.O., Nov. 3, 1921 (revised 1984), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/15000-19999/16546/texact.htm#22>, archived at <https://perma.cc/S3XE-9JTQ>.

⁴ *Id.* art. 211.

⁵ *Id.* art. 211, para. 2.

⁶ *Id.*

In addition the Penal Code contains an entire chapter on the protection of the right to honor.⁷ It sanctions with a fine of 3,000 to 30,000 pesos (about US\$67 to \$670) anyone who slanders or falsely accuses another of a crime.⁸ Anyone who intentionally dishonors or discredits another is subject to a fine of 1,500 to 20,000 pesos (about US\$34 to \$454). However, the sanction does not apply to expressions concerning matters of public interest or those that are not assertive.⁹

III. Limitations of Freedom of Expression

The constitutional right to freedom of expression is not an absolute right and, according to Supreme Court decisions, may be limited if the limitation (1) is established by law, (2) has a legal purpose, and (3) meets the needs of a democratic society and is proportionate to that need.¹⁰ In addition the Supreme Court has unequivocally established that limitations on freedom of expression must always be interpreted restrictively.¹¹

No specific limits on speech aimed at undermining another speaker's freedom of expression were found.¹²

⁷ *Id.* arts. 109-117 bis.

⁸ *Id.* art. 109.

⁹ *Id.* art. 110.

¹⁰ CENTRO DE ESTUDIOS EN LIBERTAD DE EXPRESIÓN Y ACCESO A LA INFORMACIÓN, TENDENCIAS EN LA LIBERTAD DE EXPRESIÓN EN ARGENTINA 3 (Mar. 2018), https://www.palermo.edu/cele/pdf/Libertad_de_expresion_en_Argentina.pdf, archived at <https://perma.cc/V43L-B3KX>.

¹¹ *Id.* at 4.

¹² Anecdotaly, it may be worth noting that disruption of speeches by hecklers is not uncommon in Argentina. A recent example occurred at an event held by the head of the National Library at which the speaker was disrupted by protests while he was speaking; the protesters were removed from the room by security guards but apparently not arrested. *Silbaron e Increparon a Avelluto en el Acto Inaugural de la Feria del Libro*, TN NOTICIAS (Apr. 24, 2019), https://tn.com.ar/sociedad/silbidos-e-incidentes-durante-el-discurso-de-pablo-avelluto-en-la-inauguracion-de-la-feria-del-libro_957726, archived at <https://perma.cc/V43L-B3KX>.

Brazil

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SUMMARY Freedom of speech is protected under the Constitution. The Internal Rules of the National Congress as well as the Internal Rules of the Chamber of Deputies and Federal Senate do not allow the interruption of parliamentary speech. In addition to freedom of speech generally, the Constitution also specifically provides for freedom of the press.

I. Scope of Protection of Freedom of Speech

According to article 5 of the Brazilian Constitution, everyone is equal before the law, with no distinction whatsoever, guaranteeing to Brazilians and foreigners residing in the country the inviolability of the rights to life, liberty, equality, security, and property, on the following terms:

II - no one shall be compelled to do or refrain from doing something except by force of law;

IV - manifestation of thought is free, but anonymity is forbidden;

V - the right of reply is assured, in proportion to the offense, as well as compensation for pecuniary or moral damages² or damages to reputation;

IX - expression of intellectual, artistic, scientific, and communication activity is free, independent of any censorship or license;

X - personal intimacy, private life, honor and reputation are inviolable, guaranteeing the right to compensation for pecuniary or moral damages resulting from the violation thereof;

XIII - exercise of any job, trade or profession is free, observing the professional qualifications that the law establishes;

XIV - access to information is assured to everyone, protecting the confidentiality of sources when necessary for professional activity.¹

Article 220 further determines that the expression of thoughts, creation, speech, and information, through whatever form, process or vehicle, must not be subject to any restrictions, observing the provisions of the Constitution.²

¹ CONSTITUIÇÃO FEDERAL [C.F.], art. 5, http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm, archived at <https://perma.cc/RK8F-EPVZ>.

² *Id.* art. 220.

II. Right to Interrupt Public Speech (e.g., by hecklers)

No information on a general right of hecklers as a form of free speech was located. Specific rules against the interruption of parliamentary speech in the National Congress are discussed below.

A. Common Rules of the National Congress

The Common Rules of the National Congress (Regimento Comun do Congresso Nacional) determine that on the floor, only legislators, officials in service to the plenary, and, in their respective benches, representatives of the press accredited by the legislature will be admitted.³

During the joint sessions of the Congress, the galleries will be made available to the public. No manifestation of support or disapproval of what happens in the plenary or actions that can disturb the work is allowed.⁴

B. Internal Rules of the Federal Senate

In public sessions, in addition to the senators, only alternate senators, federal deputies, former senators, including alternate senators who have exercised their mandate, and ministers of state when they appear for the purposes set forth in the Internal Rules of the Federal Senate, and Senate officials who are on duty will be admitted to the plenary.⁵ During public sessions, the bench designated for the press cannot hold people other than press professionals.⁶

All persons are allowed to attend the public sessions, in the galleries, provided they are unarmed and keep silent, without giving any sign of applause or disapproval of what happens there.⁷

C. Internal Rules of the Chamber of Deputies

Article 73 of the Internal Rules of the Chamber of Deputies determines, among other things, that for the maintenance of order, respect, and austerity of the sessions, the following rules must be observed:

II - conversation that disturbs the reading of documents, calls for voting, communications from the bureau, speeches and debates will not be allowed;

VI - no Deputy will be allowed to speak without asking the floor and without the President granting it, and only after this concession will the reporter begin the taking of the speech;

³ REGIMENTO COMUM DO CONGRESSO NACIONAL, 3rd ed. (2017), art. 26, https://www2.camara.leg.br/deputados/pesquisa/56a-legislatura/regimento_comum_3ed_rev.pdf, archived at <https://perma.cc/W5G5-D7XV>.

⁴ *Id.* art. 146.

⁵ REGIMENTO INTERNO DO SENADO FEDERAL (2019), art. 182, <https://www25.senado.leg.br/documents/12427/45868/RISF+2018+Volume+1.pdf/cd5769c8-46c5-4c8a-9af7-99be436b89c4>, archived at <https://perma.cc/2S7F-MX3X>.

⁶ *Id.* art. 183.

⁷ *Id.* art. 184.

VII - if a Deputy intends to speak or remain in the podium against the internal rules, the President will warn him or her; if, despite this warning, the Member persists in speaking, the President must end his or her speech;

IX - if a Deputy disturbs the order or the procedural progress of the session, the President may censure him or her orally or, according to the gravity, promote the application of the sanctions provided for in the Internal Rules;

XIII - the speaker may not be interrupted, except with his or her special permission, and in the case of a relevant communication that the President has to make;⁸

A Deputy may only speak in accordance with the express terms of article 74 of the Internal Rules.⁹

On the floor, during the sessions, only deputies and senators, former parliamentarians, staff of the Chamber and accredited journalists will be admitted.¹⁰ The public will be allowed access to the surrounding galleries to attend the sessions, without communicating with the plenary.¹¹

Print, radio, and television outlets may obtain accreditation of their correspondents, including foreign correspondents, for the exercise of reportage concerning the Chamber of Deputies and its members.¹² Only journalists and accredited press professionals will have access to the private premises of the Chamber of Deputies, other than the exceptions provided in the regulation.¹³

III. Availability of Mechanism to Control Foreign Broadcasters Working on Behalf of Foreign Governments

Article 220 (§ 1) of the Constitution determines that no law shall contain any provision that may constitute an impediment to full freedom of the press, in any medium of social communication, observing the provisions of art. 5 (§§ IV, V, X, XIII, and XIV).¹⁴ Brazilian courts have upheld freedom of the press as an essential tool for the effective functioning of democracy.¹⁵ No legislation or case law was found specifically addressing foreign broadcasters.

⁸ REGIMENTO INTERNO DA CÂMARA DOS DEPUTADOS, Resolução No. 17, de 1989, art. 73, https://www2.camara.leg.br/atividade-legislativa/legislacao/regimento-interno-da-camara-dos-deputados/arquivos-1/RICD_atualizado_ate_RCD_6-2019.pdf, archived at <https://perma.cc/BU7Z-N8KT>.

⁹ *Id.* art. 74.

¹⁰ *Id.* art. 77.

¹¹ *Id.* art. 77, § 4.

¹² *Id.* art. 260.

¹³ *Id.* art. 260, § 1.

¹⁴ C.F. art. 220, § 1.

¹⁵ See OFFICE OF THE SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, NATIONAL CASE LAW ON FREEDOM OF EXPRESSION 13 (2017), http://www.oas.org/en/iachr/expression/docs/publications/JURISPRUDENCIA_ENG.pdf (citing cases upholding freedom of the press by Brazilian courts, including the Federal Supreme Court), archived at <https://perma.cc/X9YN-VG2P>.

Canada

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SUMMARY Section 2(b) of the Canadian Charter of Rights and Freedoms establishes the right to freedom of expression, and the Supreme Court of Canada has interpreted this right in a very broad fashion. However, section 1 of the Charter establishes that reasonable limits can be placed on the right if those limits are prescribed by law and can be demonstrably justified in a free and democratic society.

Television broadcasting in Canada is governed by the Broadcasting Act and regulations made under the Act by the Canadian Radio-television and Telecommunications Commission. Federal regulations prohibit television broadcasters from “broadcasting false or misleading news and abusive comments that are likely to expose persons to hatred based on listed grounds.” Subject to a public hearing under section 18 of the Act, the Commission has the power to suspend or revoke the license of a licensed broadcaster for contravention of or failure to comply with any condition of the license or mandatory orders, or any regulation made under the Act.

I. Constitutional Protection of Free Speech

Section 2 of the Canadian Charter of Rights and Freedoms,¹ which is part of Canada’s Constitution, stipulates that everyone is entitled to certain fundamental freedoms, including “freedom of thought, belief, opinion and expression,” which encompasses “freedom of the press and other media of communication.”²

The purpose of the section has been outlined on a number of occasions by the Supreme Court of Canada:

The protection of freedom of expression is premised upon fundamental principles and values that promote the search for and attainment of truth, participation in social and political decision-making and the opportunity for individual self-fulfillment through expression (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 976; *Ford v. Quebec*, [1988] 2 S.C.R. 712 at 765-766). The Supreme Court of Canada has maintained that the connection between freedom of expression and the political process is “perhaps the linchpin” of section 2(b) protection (*R. v. Keegstra*, [1990] 3 S.C.R. 697; *Thomson Newspapers Co. v. Canada (A.G.)*, [1998] 1 S.C.R. 877; *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827). Free expression is valued above all as being instrumental to democratic governance. The two other rationales for protecting freedom of expression – encouraging the search for truth through the open exchange of ideas, and fostering

¹ Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Part 1, <https://laws-lois.justice.gc.ca/eng/const/page-15.html>, archived at <https://perma.cc/TM58-2844>.

² *Id.* § 2(b).

individual self-actualization, thus directly engaging individual human dignity – are also key values that animate section 2(b) analysis.³

The Supreme Court has adopted the following three-part test for analyzing freedom of expression cases under section 2(b) of the Charter:

- 1) Does the activity in question have expressive content, thereby bringing it within section 2(b) protection?;
- 2) Does the method or location of this expression remove that protection?; and
- 3) If the expression is protected by section 2(b), does the government action in question infringe that protection, either in purpose or effect? (Canadian Broadcasting Corp. v. Canada (Attorney General), 2011 SCC 2 (“Canadian Broadcasting Corp.”); Montréal (City) v. 2952-1366 Québec Inc., [2005] 3 S.C.R. 141; Irwin Toy Ltd., supra.)⁴

II. Scope of Protection

The Supreme Court has interpreted freedom of expression “in a very broad fashion.”⁵ According to Constitutional Law Professors Kent Roach and David Schneiderman, “[t]he Supreme Court’s purposive approach and “large and liberal” orientation to Charter guarantees ensured that all manner of expressive activities qualified for constitutional protection.”⁶ Therefore Canadian courts often found “a *prima facie* breach easily” due to its broad interpretative approach to section 2(b).⁷ According to the Department of Justice’s Charterpedia, “[e]xpression protected by section 2(b) has been defined as “any activity or communication that conveys or attempts to convey meaning.”⁸

A. Content Neutrality

According to the Charterpedia, “[t]he courts have applied the principle of content neutrality in defining the scope of section 2(b), such that the content of expression, no matter how offensive, unpopular or disturbing, cannot deprive it of section 2(b) protection.”⁹ The Charter also protects

³ Department of Justice, *Charterpedia: Section 2(b) – Freedom of Expression*, <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccd1/check/art2b.html> (last updated Apr. 10, 2019), archived at <https://perma.cc/BAZ8-FCYS>.

⁴ *Id.*

⁵ Kent Roach & David Schneiderman, *Freedom of Expression in Canada*, 61 SUP. CT. L. REV. (2D) 429, 439 (2013), https://www.law.utoronto.ca/utfl_file/count/documents/Schneiderman/Chapter%2010%20Roach%20Schneiderman.pdf, archived at <https://perma.cc/EA43-KZ5L>.

⁶ *Id.* at 433.

⁷ *Charterpedia: Section 2(b) – Freedom of Expression*, supra note 3.

⁸ *Id.*

⁹ *Id.*

the “expression of both truths and falsehoods.”¹⁰ In *R v. Zundel* (1992),¹¹ Canada’s Supreme Court held that section 181 of Canada’s Criminal Code, which prohibits the spreading of false news, is unconstitutional as it violates section 2(b) (freedom of expression) of the Canadian Charter of Rights and Freedoms.¹²

B. Expression in the Form of Violence

Expression that takes the form of violence does not qualify for section 2(b) protection.¹³ The Supreme Court has held that “whether or not physical violence is expressive, it will not be protected by section 2(b).”¹⁴ Though the Court did protect threats of violence as protected speech in a subsequent decision it found that such threats also falls outside the scope of section 2(b) protection.¹⁵

C. Location

Location can also play a part in the determination of whether protection is removed from an expression as the right does not extend on all places. For example, private property “will fall outside the protected sphere of section 2(b) absent state-imposed limits on expression, since state action is necessary to implicate the Charter”:¹⁶

The application of section 2(b) is not automatic by the mere fact of government ownership of the place in question. There must be a further enquiry to determine if this is the *type* of public property which attracts section 2(b) protection In *Montréal (City)*, the majority of the Supreme Court set out the current test for the application of section 2(b) to public property)). The onus of satisfying this test rests on the claimant(paragraph 73). The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which section 2(b) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment. To answer this question, the following factors should be considered:

- i. The historical or actual function of the place; and
- ii. Whether other aspects of the place suggest that expression within it would undermine the values underlying free expression. (*Montréal (City)*, paragraphs 73, 74).

¹⁰ *Id.*

¹¹ *R. v. Zundel* [1992] 2 SCR 731, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/904/index.do>, archived at <https://perma.cc/7LJS-GCDA>.

¹² *R. v. Zundel: Case Analysis*, GLOBAL FREEDOM OF EXPRESSION, COLUMBIA UNIVERSITY, <https://globalfreedomofexpression.columbia.edu/cases/r-v-zundel/> (last visited Mar. 18, 2019), archived at <https://perma.cc/R99Q-SWCW>.

¹³ Roach & Schneiderman, *supra* note 7, at 433.

¹⁴ *Charterpedia: Section 2(b) – Freedom of Expression*, *supra* note 3.

¹⁵ Roach & Schneiderman, *supra* note 7, at 434.

¹⁶ *Charterpedia: Section 2(b) – Freedom of Expression*, *supra* note 3.

The Supreme Court has highlighted that the ultimate question is the second factor. In *Canadian Broadcasting Corp, supra*, the court added that analysis of the second factor should focus on the essential expressive activity as opposed to the “excesses” that would be incidental to this activity. In that particular case, the essential expressive activity, a journalist’s ability to gather news at a courthouse to inform the public about court proceedings, was held to engage section 2(b), despite the incidental excesses of this expression (“ . . . crowds, pushing and shoving, and pursuing possible subjects in order to interview, film or photograph them . . .”).

Other relevant questions that may guide the analysis of whether expression in a particular location is protected under 2(b) are: whether the space is one in which free expression has traditionally occurred; whether the space is in fact essentially private, despite being government-owned, or public; whether the function of the space is compatible with open public expression, or whether the activity is one that requires privacy and limited access; whether an open right to intrude and present one’s message by word or action would be consistent with what is done in the space, or whether it would hamper the activity. There is some flexibility in the analysis and allowing public expression in a particular government-property location does not commit the government to such use indefinitely.¹⁷

D. Limitations on Free Speech and Hate Speech Laws

Fundamental rights, including freedom of expression, are subject to section 1, which allows “reasonable” limits to be placed on those rights:¹⁸ “[t]he Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”¹⁹ This means that “once an infringement of a Charter right has been established, the courts must decide whether the violation by the government or other institution to which the Charter applies can be considered justified.”²⁰

As part of the section 1 analysis, courts must determine whether the limit on the right is “prescribed by law,” “reasonable,” and “demonstrably justified” (applying the test the Supreme Court established in *R. v. Oakes*²¹), and the law must have a pressing and substantial objective.²² Section 1 considerations have been described as follows:

The broad scope of section 2(b) means that in most cases the constitutionality of the legislation or the government action will depend on the section 1 analysis. Generally

¹⁷ *Charterpedia: Section 2(b) – Freedom of Expression, supra* note 3 (citations in original omitted).

¹⁸ JULIAN WALKER, LIBRARY OF PARLIAMENT, LEGAL AND SOCIAL AFFAIRS DIVISION, HATE SPEECH AND FREEDOM OF EXPRESSION: LEGAL BOUNDARIES IN CANADA 3 (June 29, 2018), https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201825E, archived at <https://perma.cc/WW6J-6CWT>.

¹⁹ Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Part 1, § 1.

²⁰ *Charterpedia: Section 2(b) – Freedom of Expression, supra* note 3.

²¹ *R. v. Oakes*, [1986] 1 S.C.R. 103, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/117/index.do>, archived at <https://perma.cc/33SB-8LYW>.

²² Department of Justice, *Charterpedia: Section 1 – Reasonable Limits*, <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art1.html> (last updated Apr. 25, 2019), archived at <https://perma.cc/RL54-3T89>.

speaking, because of the importance of the right to free expression, “any attempt to restrict the right must be subjected to the most careful scrutiny”. However, the “degree of constitutional protection may vary depending on the nature of the expression at issue . . . the low value of the expression may be more easily outweighed by the government objective”. For example, limits are easier to justify where the expressive activity only tenuously furthers section 2(b) values, such as in the case of hate speech, pornography or marketing of a harmful product. Limits on political speech will generally be the most difficult to justify. Restrictions will also be more difficult to justify where they capture expression that furthers artistic, scientific, educational or other useful social purposes (Butler, *supra*). Whether the limit minimally impairs the right to freedom of expression is often the deciding factor in section 2(b) cases. A total prohibition on a form of expression will be more difficult to justify than a partial prohibition. A restriction on expression backed by a civil penalty rather than a criminal sanction such as imprisonment will be considered a less impairing alternative. Where the limit on freedom of expression is minimal, the court may, in certain circumstances like elections advertising, accept section 1 justifications for this limit based on logic and reason without supporting social science evidence.²³

Canada’s Criminal Code²⁴ specifies three distinct hatred-related offenses: section 318 (advocating genocide), section 319(1) (publicly inciting hatred likely to lead to a breach of the peace), and section 319(2) (willfully promoting hatred). In the landmark decision *R v. Keegstra*,²⁵ the Supreme Court decided that section 319(1) was a breach of section 2(b) but held in a section 1 analysis that the infringement was justified as “a reasonable limit prescribed by law in a free and democratic society” and furthered “an immensely important objective and directed at expression distant from the core of free expression values.”²⁶

In addition, provincial human rights laws “further keep a tight grip on hate speech activity through its broad targeting of fundamentally discriminatory behaviors.”²⁷

III. Interrupting Public Speech

Heckling that involves actual threats or hate speech might violate Canada’s Criminal Code, including the Code’s hate-crime provisions. If the speech is in a public space and the heckling involves “screaming, shouting, swearing, singing or using insulting or obscene language” it

²³ *Charterpedia: Section 2(b) – Freedom of Expression*, *supra* note 3 (citations in original omitted).

²⁴ Criminal Code (R.S.C., 1985, c. C-46), <https://laws-lois.justice.gc.ca/eng/acts/c-46/>, archived at <https://perma.cc/W5ME-NH39>.

²⁵ *R. v. Keegstra*, [1990] 3 SCR 697, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/695/index.do>, archived at <https://perma.cc/NLB5-8MT8>.

²⁶ *Id.*

²⁷ Pyeng Hwa Kang, *Constitutional Treatment of Hate Speech and Freedom of Expression: A Canada – U.S. Perspective*, LA REVUE DES DROITS DE L’HOMME [EN LIGNE] 14 | 2018, mis en ligne le 14 juin 2018, consulté le 13 juin 2019, <http://journals.openedition.org/revdh/4109>, archived at <https://perma.cc/3QF6-SET2>.

might constitute a violation of section 175(1) (“Causing disturbance”) Municipal bylaws or city regulations may also come into play depending on the situation.²⁸

Whether heckling would be protected under section 2(b) would depend on the factual circumstances under the section 2(b) and 1 analyses above. The Supreme Court of Canada is currently considering a case on appeal from the Court of Appeal for Ontario²⁹ that will partly look at the discretionary common law police power to arrest to prevent a breach of peace during a political demonstration where an individual was preventatively arrested even though the individual was not committing or even suspected of committing a crime. The Court is expected to look at whether such arrest would breach section 2(b) of the Charter.³⁰

IV. Restriction on Foreign Government Broadcasters

Television broadcasting in Canada is governed by the Broadcasting Act³¹ (S.C. 1991, c. 11) and regulations made under the Act by the Canadian Radio-television and Telecommunications Commission (CRTC). Federal regulations prohibit television broadcasters from “broadcasting false or misleading news and abusive comments that are likely to expose persons to hatred based on listed grounds.”³²

Federal broadcasting regulations that deal with false or misleading news include

- section 8(1)(d) of the *Broadcasting Distribution Regulations*; [and]
- section 5(1)(d) of the *Television Broadcasting Regulations, 1987*.[.]

Subject to a public hearing under section 18 of the Act, the Commission has the power to suspend or revoke the license³³ of a broadcaster where the licensee has contravened or failed to comply with any condition of the license or mandatory orders, or any regulation made under the Act.

²⁸ *Legal No Man’s Land: The Law Ill-equipped to Deal with FHRITP Hecklers*, NATIONAL POST (May 15, 2015), <https://nationalpost.com/news/canada/legal-no-mans-land-the-law-ill-equipped-to-deal-with-fhritp-hecklers>, archived at <https://perma.cc/HT86-FRCU>.

²⁹ *Fleming v. Ontario*, 2018 ONCA 160, <http://www.ontariocourts.ca/decisions/2018/2018ONCA0160.pdf>, archived at <https://perma.cc/5FXT-BVLE>.

³⁰ Steph Brown, *Breach of the Peace: ONCA Addresses Police Power to Arrest in Fleming v Ontario*, THECOURT.CA (Mar. 1, 2019), <http://www.thecourt.ca/fleming-v-ontario/>, archived at <https://perma.cc/RX86-FEQY>; *Freedom of Expression: Fleming v. Ontario*, CANADIAN CONSTITUTION FOUNDATION (Feb. 15, 2019), <https://theccf.ca/freedom-of-expression-fleming-v-ontario/>, archived at <https://perma.cc/FW2J-C2WV>.

³¹ Broadcasting Act, S.C. 1991, c. 11, <https://laws-lois.justice.gc.ca/eng/acts/b-9.01/>.

³² *Questions and Answers – An Act to Amend the Criminal Code (Removing Unconstitutional Portions or Provisions)*, DEPARTMENT OF JUSTICE, <https://www.justice.gc.ca/eng/csj-sjc/pl/cuol-mgnl/qa-qr.html> (last updated Mar. 9, 2017), archived at <https://perma.cc/7D69-Z62H>.

³³ Broadcasting Act, S.C. 1991, § 9(1)(e).

According to a report by Politifact,

[a]ny network that wants to broadcast in Canada must get approved by the Canadian Radio-television and Telecommunications Commission. And Canadians who take issue with the truthfulness of their programming can file complaints to the commission. If a network amasses enough complaints and is found to have knowingly and deliberately broadcasted false news, its license can be limited or revoked. But that has never happened before, commission spokesperson Eric Rancourt said “Based on the history of these kind of complaints, it would have be very, very egregious for the commission (to revoke or deny a license). That’s all speculative, since it hasn’t happened before,” Rancourt said. The commission has only taken serious action a couple of times in its history, and not against Fox News, but Al Jazeera, according to commission regulator Sheehan Carter. The commission approved the Arabic-language news channel in 2004, with the condition that distributors must edit out abusive content. The condition doesn’t apply to Al Jazeera English.³⁴

According to news reports CRTC says “it is not reviewing the presence on Canadian TVs of RT,” a channel that has been “labelled a propaganda tool of the Russian government by US intelligence agencies and accused of spreading disinformation by French president Emmanuel Macron.”³⁵ Eric Rancourt, a spokesperson for the CRTC, reportedly said

RT “is not currently under review, nor has it ever been under review.” Asked whether its use as a propaganda tool as outlined in the US intelligence report would contravene the conditions for its distribution in Canada, he said the CRTC “cannot speculate on what might happen in the future,” noting that the agency makes decisions “based on the public record.”³⁶

More recently, partly in an effort to counter foreign influence in Canada’s federal general elections, the government passed the Elections Modernization Act,³⁷ which amended the Canada Elections Act³⁸ to include a prohibition on the use of broadcasting stations outside Canada to influence elections:

³⁴ Linda Qiu, *Is Fox News Banned in Canada?*, POLITIFACT (July 14, 2014), <https://www.politifact.com/punditfact/statements/2014/jul/14/facebook-posts/fox-news-banned-canada/>, archived at <https://perma.cc/2PLD-737D> (click “See the Screenshot View”).

³⁵ Murad Hemmadi, *Russia’s ‘Propaganda Outlet’ Will Remain on Canadian TV*, MACLEAN’S (Sept. 19, 2017), <https://www.macleans.ca/politics/ottawa/russias-propaganda-outlet-will-remain-on-canadian-tv/>, <https://perma.cc/8YKX-VNXA>.

³⁶ *Id.*

³⁷ News Release, Government of Canada, Government of Canada Passes Elections Modernization Act (Dec. 14, 2018), <https://www.canada.ca/en/democratic-institutions/news/2018/12/government-of-canada-passes-elections-modernization-act.html>, archived at <https://perma.cc/7RZE-CSXE>.

³⁸ Canada Elections Act, S.C. 2000, c. 9, <http://laws-lois.justice.gc.ca/eng/acts/E-2.01/FullText.html>, archived at <https://perma.cc/5J92-5QSH>.

Broadcasting outside Canada

Prohibition – use of broadcasting station outside Canada

330 (1) No person shall, with intent to influence persons to vote or refrain from voting, or to vote or refrain from voting for a particular candidate or registered party, at an election, use a broadcasting station outside Canada, or aid, abet, counsel or procure the use of a broadcasting station outside Canada, during an election period, for the broadcasting of any matter having reference to an election.

Exception

(1.1) Subsection (1) does not apply in respect of any matter that is broadcast if the broadcasting signals originated in Canada.

Prohibition – broadcasting outside Canada

(2) During an election period, no person shall broadcast, outside Canada, election advertising with respect to an election.³⁹

³⁹ Elections Modernization Act, S.C. 2018, c. 31, https://laws-lois.justice.gc.ca/eng/annualstatutes/2018_31/page-1.html, archived at <https://perma.cc/G33K-BGFY>.

China

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SUMMARY Although the Chinese Constitution declares that citizens enjoy freedom of speech and freedom of the press, these freedoms are tightly restricted by specific laws and regulations. Typically, the laws and regulations governing cyberspace, the press, and the media contain a list of prohibited content, which includes but is not limited to matters concerning national security, terrorism, ethnic hatred, violence, and obscenity.

Foreign media organizations and their journalists must be approved by and register with the Chinese foreign affairs authority and obtain relevant certificates. Compared with journalists working for China's state-controlled media, foreign journalists appear to have less opportunities to be called on and raise questions at press conferences of the National People's Congress meetings.

I. Introduction

The Constitution of the People's Republic of China (PRC or China) declares that citizens enjoy freedom of speech and freedom of the press. In practice, however, these freedoms are not institutionally protected. Public speeches of wide impact on forbidden subjects could result in punishment, including criminal sentences.¹

According to the Freedom House's 2019 *Freedom in the World* report, China has become "home to one of the world's most restrictive media environments and its most sophisticated system of censorship, particularly online." The Freedom House report observes that the government's ability to monitor online and offline communications "has increased dramatically in recent years."²

II. Limits on Freedom of Speech

A. Constitution

Article 35 of the PRC Constitution provides that "[c]itizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration."³ Meanwhile, article 51 states that citizens, "in exercising their freedoms and

¹ QIANFAN ZHANG, THE CONSTITUTION OF CHINA: A CONTEXTUAL ANALYSIS 225 (2012).

² FREEDOM HOUSE, FREEDOM IN THE WORLD 2019: CHINA COUNTRY REPORT, <https://freedomhouse.org/report/freedom-world/2019/china>, archived at <https://perma.cc/GXC4-6NT6>.

³ XIANFA (Dec. 4, 1982, last revised Mar. 11, 2018) art. 35, http://www.npc.gov.cn/npc/xinwen/2018-03/22/content_2052489.htm (in Chinese), archived at <https://perma.cc/QF3J-FVU8>, English translation of 2004 version available at http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm, archived at <https://perma.cc/S24S-9GVT>.

rights, may not infringe upon the interests of the State, of society or of the collective, or upon the lawful freedoms and rights of other citizens.”⁴

B. Laws

Freedom of speech and freedom of the press are tightly restricted by specific laws and regulations.⁵ Typically, laws and regulations governing cyberspace, the press, and the media contain a list of prohibited content and penalties for violations. Such prohibited content includes but is not limited to matters concerning national security, terrorism, ethnic hatred, violence, and obscenity.

1. Cybersecurity Law

The PRC Cybersecurity Law, which took effect on June 1, 2017, provides that the state protects the rights of citizens, legal persons, and other organizations to use networks “in accordance with the law,” and prescribes a series of prohibited activities when using networks.⁶ Paragraph 2 of article 12 of the Law states as follows:

Any person and organization using networks shall abide by the Constitution and laws, observe public order, and respect social morality; they must not endanger cybersecurity, and must not use the Internet to engage in activities endangering national security, national honor, and national interests; they must not incite subversion of national sovereignty, overturn the socialist system, incite separatism, break national unity, advocate terrorism or extremism, advocate ethnic hatred and ethnic discrimination, disseminate violent, obscene, or sexual information, create or disseminate false information to disrupt the economic or social order, or information that infringes on the reputation, privacy, intellectual property or other lawful rights and interests of others, and other such acts.⁷

Article 70 of the Law further provides that the publication or transmission of any information specified under paragraph 2 of article 12 of this Law or other laws or administrative regulations is subject to penalties prescribed by relevant laws and regulations.⁸

⁴ *Id.* art. 51.

⁵ ZHANG, *supra* note 1.

⁶ PRC Cybersecurity Law (adopted by the NPC Standing Committee on Nov. 7, 2016, effective June 1, 2017) art. 12, http://www.npc.gov.cn/npc/xinwen/2016-11/07/content_2001605.htm (in Chinese), archived at <https://perma.cc/3HAP-D6MZ>, English translation available at <https://www.newamerica.org/cybersecurity-initiative/digichina/blog/translation-cybersecurity-law-peoples-republic-china/>, archived at <https://www.newamerica.org/cybersecurity-initiative/digichina/blog/translation-cybersecurity-law-peoples-republic-china/>.

⁷ *Id.*

⁸ *Id.* art. 70.

2. Regulation on the Administration of Publishing

Publishing activities in China are governed by the Regulation on the Administration of Publishing, which was first promulgated by the State Council in 2001 and most recently amended in 2016.⁹ According to article 25 of the Regulation, no publication may contain content on any of the following matters:

- (1) Those opposing the basic principles established in the Constitution;
- (2) Those endangering the unification, sovereignty and territorial integrity of the State;
- (3) Those which divulge secrets of the State, endanger national security or damage the honor or benefits of the State;
- (4) Those which incite the national hatred or discrimination, undermine the solidarity of the nations, or infringe upon national customs and habits;
- (5) Those which propagate evil cults or superstition;
- (6) Those which disturb the public order or destroy the public stability;
- (7) Those which propagate obscenity, gambling, violence or instigate crimes;
- (8) Those which insult or slander others, or infringe upon the lawful rights or interests of others;
- (9) Those which endanger public ethics or the fine national cultural traditions;
- (10) Other contents prohibited by laws, administrative regulations or provisions of the State.¹⁰

Persons publishing or importing publications containing such content may be criminally prosecuted or subject to administrative penalties, according to article 62 of the Regulation.¹¹

3. Regulation on Radio and Television Administration

Similarly, the Regulation on Radio and Television Administration, which was first promulgated by the State Council in 1997 and has not been majorly revised since then, prohibits radio and television stations from producing or broadcasting programs containing the following content:

- (1) that which endangers the unity, sovereignty and territorial integrity of the country;
- (2) that which endangers state security, honour and interests;
- (3) that which instigates nationality separation or disrupts nationality solidarity;
- (4) that which divulges state secrets;

⁹ Regulation on the Administration of Publishing (promulgated by the State Council on Dec. 25, 2001, revised Mar. 19, 2011, last amended Feb. 6, 2016), http://www.gov.cn/gongbao/content/2016/content_5139389.htm, archived at <https://perma.cc/P9HD-FGHH>, English translation of 2006 version available at <https://www.cecc.gov/resources/legal-provisions/regulation-on-the-administration-of-publishing-chinese-and-english-text>, archived at <https://perma.cc/EN8P-6AH7>.

¹⁰ *Id.* art. 25.

¹¹ *Id.* art. 62.

- (5) that which slanders or insults others;
- (6) that which propagates obscenity, superstition or plays up violence; and
- (7) other contents prohibited under provisions of laws and regulations.¹²

Those who produce, broadcast, or provide to overseas users programs containing such content may be criminally prosecuted or subject to administrative penalties, according to article 49 of the Regulation.¹³

III. Mechanism to Control Foreign Broadcasters Working on Behalf of Foreign Governments

The reporting activities of foreign media organizations and foreign journalists in China are governed by the Regulation on Reporting Activities of Permanent Offices of Foreign Media Organizations and Foreign Journalists, which was issued by the State Council in 2008.¹⁴ Under the Regulation, foreign media organizations must seek approval from China's Ministry of Foreign Affairs and submit required documents in order to establish offices in China and send resident journalists.¹⁵ After being approved, such foreign media offices and resident journalists must register with the Chinese foreign affairs authority and obtain relevant certificates.¹⁶ The Regulation does not appear to differentiate broadcasters working on behalf of foreign governments from other foreign media and journalists.

Foreign journalists also need "foreign journalist cards" in order to report China's "Two Sessions" – the meetings of the National People's Congress and the Chinese People's Political Consultative Conference.¹⁷ Compared with journalists working for China's state-controlled media, foreign journalists appear to have less opportunities to be called on at the press conferences of the Two Sessions.¹⁸

¹² Regulation on Radio and Television Administration (promulgated by the State Council on Aug. 1, 1997, effective Sept. 1, 1997) art. 32, http://www.gov.cn/banshi/2005-08/21/content_25111.htm (in Chinese), archived at <https://perma.cc/AS2J-LES6>, English translation available at <http://www.asianlii.org/cn/legis/cen/laws/robata546/>, archived at <https://perma.cc/3F8C-GXG4>.

¹³ *Id.* art. 49.

¹⁴ Regulations on Reporting Activities of Permanent Offices of Foreign Media Organizations and Foreign Journalists (promulgated by the State Council on Oct. 17, 2008, effective on the same day), http://www.gov.cn/zwqk/2008-10/17/content_1124261.htm, archived at <https://perma.cc/IC5E-R3YL>, English translation available at <https://www.cecc.gov/resources/legal-provisions/regulations-of-the-people%E2%80%99s-republic-of-china-concerning-reporting>, archived at <https://perma.cc/Z7AJ-6586>.

¹⁵ *Id.* arts. 6, 7 & 9.

¹⁶ *Id.* arts 8 & 10.

¹⁷ Ministry of Foreign Affairs International Press Center, 关于领取 2019 年全国两会外国记者证、外国驻华使馆新闻官旁听证和车证的通知 (Feb. 28, 2019), <http://ipc.fmprc.gov.cn/chn/gdxw/t1641680.htm>, archived at <https://perma.cc/V2JF-ZYS6>.

¹⁸ Rose Yu & Olivia Geng, *Will the Real Foreign Reporter Please Stand Up?*, WALL ST. J. (Mar. 11, 2014), <https://blogs.wsj.com/chinarealtime/2014/03/11/will-the-real-foreign-reporter-please-stand-up/>, archived at <https://perma.cc/6X6Q-STZP>.

France

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SUMMARY Freedom of speech is considered an “essential freedom” in France. It is protected by the 1789 Declaration of Human and Civic Rights, which is incorporated by reference into the French Constitution. It is also protected by the European Convention on Human Rights, to which France is a party. Yet, while French law considers free speech to be an essential component of a democratic society, it is not seen as absolute. French legislators, and French courts, seek to balance freedom of speech with other imperatives, such as other freedoms and rights, and public order. Thus, freedom of expression may be limited for the sake of protecting privacy, protecting the presumption of innocence, and preventing defamation and insults. Freedom of expression may also be limited for the sake of protecting public order. It is therefore illegal to incite others to commit a crime, even when no crime ends up being actually committed. French law also prohibits hate speech, and speech denying or justifying the Holocaust and other crimes against humanity. Additionally, French law prohibits defamation against government institutions and office-holders, as well as disrespecting the national anthem and flag in the context of public events organized or regulated by public authorities.

Television and radio broadcasting used to be state monopolies, but were liberalized in the 1980s. Freedom of broadcasting is the main legal principle for television and radio. Nevertheless, broadcasters must abide by laws that protect and promote human dignity, freedom, the property of others, pluralism of views and opinions, children and adolescents, public order, and national defense. Furthermore, broadcasters that rely on radio waves must be authorized by the Conseil supérieur de l’audiovisuel (CSA) (Superior Council on Audiovisual) to use specific bandwidths. The CSA attributes bandwidths on the basis of technical criteria and also with the goal of promoting the public interest and pluralism. Additionally, the CSA monitors broadcasts to ensure respect for French laws. The CSA does not censure broadcasts beforehand, but may sanction broadcasters engaging in illegal speech after the fact. First offenses lead to an order to cease and desist, but subsequent offenses may lead to fines and even the suspension or withdrawal of broadcasting authorizations. Recent legislation also allows the CSA to withdraw the broadcasting authorization of an operator controlled by a foreign state if it broadcasts content that harms a fundamental national interest of France. This legislation specifically mentions the dissemination of false information to interfere with the proper functioning of institutions as an example of a broadcast harmful to a fundamental national interest.

I. Freedom of Speech

A. An Essential Freedom

Freedom of expression is considered an “essential freedom” in France.¹ It is protected by the French Constitution, which incorporates the Declaration of Human and Civic Rights of 1789.² Articles 10 and 11 of the Declaration protect freedoms of opinion and expression, describing the “free communication of ideas and of opinions” as “one of the most precious rights of man.”³ Similarly, the European Convention on Human Rights, by which France is bound, provides that “[e]veryone has the right to freedom of expression,” including “freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”⁴

Consequently, courts have repeatedly recognized freedom of speech as a foundational right. The Constitutional Council, which judges the constitutionality of French legislation, considers that “the freedom of expression and of communication is that much more precious because its exercise is a condition of democracy and among the guarantees that other rights and freedoms will be respected.”⁵ Consequently, the right to free speech should apply broadly. The European Court of Human Rights declared that freedom of speech “is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.”⁶

B. Freedom of Speech Is Not Absolute

Despite its foundational importance, freedom of speech was never intended to be absolute. In contrast to the First Amendment of the United States Constitution, the 1789 Declaration of Human and Civic Rights provided limits to freedom of expression in its very definition. Article 10 declares that “[n]o one may be disturbed on account of his opinions, even religious ones, as long

¹ XAVIER DUPRÉ DE BOULOIS, *DROIT DES LIBERTÉS FONDAMENTALES* [LAW OF FUNDAMENTAL RIGHTS] 360 (2018).

² CONSTITUTION DU 4 OCTOBRE 1958 [CONSTITUTION OF 4 OCTOBER 1958] (2009), *Preamble*, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006071194>, archived at <https://perma.cc/95S6-F4KX>, English translation available at <https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958>, archived at <https://perma.cc/MPL8-K9PA>.

³ DÉCLARATION DES DROITS DE L’HOMME ET DU CITOYEN DE 1789 [DECLARATION OF HUMAN AND CIVIC RIGHTS OF 1789], art. 11, <https://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789>, archived at <https://perma.cc/G3K5-CBGQ>, English translation available at https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/cst2.pdf, archived at <https://perma.cc/K6FB-WUUQ>.

⁴ European Convention on Human Rights art. 10, Nov. 4, 1950, https://www.echr.coe.int/Documents/Convention_ENG.pdf, archived at <https://perma.cc/BFR2-WU6M>.

⁵ Conseil constitutionnel [Constitutional Council], 10 June 2009, Décision n° 2009-580 DC, <https://www.conseil-constitutionnel.fr/decision/2009/2009580DC.htm>, archived at <https://perma.cc/7D2K-SK5T>.

⁶ Case of Handyside v. United Kingdom, App. No. 5493/72 (Eur. Ct. H.R., Dec. 7, 1976), <http://hudoc.echr.coe.int/eng?i=001-57499>, archived at <https://perma.cc/4UPF-94RF>.

as the manifestation of such opinions does not interfere with the established Law and Order.”⁷ Article 11 provides that “[a]ny citizen may therefore speak, write and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by Law.”⁸ Similarly, the European Convention on Human Rights declares that

[t]he exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁹

Thus, French law seeks to balance freedom of speech with other imperatives, as shown by extensive jurisprudence on this topic. The Cour de cassation, France’s highest court for civil and criminal matters, established the general principle that “restrictions to freedom of expression should be interpreted narrowly.”¹⁰ They must also be proportional to the expected harm, as shown by a 1933 decision by the Council of State, which is the highest French jurisdiction for matters of administrative law. In that case, the mayor of the City of Nevers prohibited the plaintiff from holding a public meeting, in response to protests from teachers’ unions (the plaintiff had a history of mocking teachers in his speeches).¹¹ The Council of State struck down the mayor’s order prohibiting the meeting on the grounds that it was disproportional to the risk of public disorder that the meeting presented.¹² While this decision was, strictly speaking, a freedom of assembly case, its principle of proportionality applies to freedom of expression as well. For example, it was cited in a 2014 decision in which the Council of State upheld the prohibition of a public performance by controversial comedian Dieudonné M’bala M’bala, because it was justified by the high risk that he would disturb public order by engaging in illegal hate speech.¹³

⁷ DÉCLARATION DES DROITS DE L’HOMME ET DU CITOYEN DE 1789 art. 10.

⁸ *Id.* art. 11.

⁹ *Id.*

¹⁰ Cour de Cassation, Crim., Feb. 14, 2006, No. 05-81932, <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007069481>, archived at <https://perma.cc/NJE9-HEEK>.

¹¹ Conseil d’Etat [Council of State], *Conseil d’Etat, 19 mai 1933, Benjamin* [Council of State, 19 May 1933, Benjamin], *Contrôle des atteintes portées par le pouvoir de police à la liberté de réunion* [Controls on Violations of Freedom of Assembly by Police Powers] (May 19, 2017), <https://www.conseil-etat.fr/ressources/decisions-contentieuses/les-grandes-decisions-du-conseil-d-etat/conseil-d-etat-19-mai-1933-benjamin>, archived at <https://perma.cc/AE3H-V7SX>.

¹² Conseil d’Etat, 19 May 1933, No. 17413, 17520, *Arrêt Benjamin* [Benjamin Decision], <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000007636694>, archived at <https://perma.cc/8MYJ-2FWJ>.

¹³ Conseil d’Etat 9 Jan. 2014, No. 374508, <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000028460200>, archived at <https://perma.cc/G7JK-L55C>.

The balance that French courts seek between freedom of expression and other imperatives is very fact-dependent. Nonetheless, it appears that proper limits on speech can be separated into two broad categories: limits related to the rights of others, and limits related to public order.¹⁴

II. Limits Related to the Rights of Others

The 1789 Declaration of Human and Civic Rights defines freedom in general as “being able to do anything that does not harm others.”¹⁵ Consistent with that definition, freedom of speech in France is limited by the right to privacy, the presumption of innocence, the right to “human dignity,” and by rules prohibiting defamation and insult.¹⁶

The right to privacy is protected by the Penal Code,¹⁷ the Civil Code,¹⁸ and the European Convention on Human Rights.¹⁹ Additionally, the Civil Code aims to protect the presumption of innocence of criminal defendants by prohibiting the media from presenting a person who has not yet been convicted of a crime as being guilty of that crime.²⁰

Furthermore, the Law of 29 July 1881 on Freedom of the Press, which is still in force (although it has been amended numerous times since its original adoption), prohibits defamation and insults, both written and verbal. The Law of 29 July 1881 defines “defamation” as “any allegation or imputation of a fact which harms the honor or consideration of the person or group to which the fact is imputed.”²¹ The same provision defines “insult” as “any offensive expression, term of contempt, or invective which does not contain the imputation of any fact.”²² The legislators have tried to find a balance between freedom of speech and the prohibitions against defamation and insult. Thus, speech may not be considered defamation if it can be shown to have been expressed in good faith, or if it is true—although the “exception of truth” is itself limited by the right to

¹⁴ Patrick Wachsmann, *La liberté d'expression [Freedom of Expression]*, in LIBERTÉS ET DROITS FONDAMENTAUX [FREEDOMS AND FUNDAMENTAL RIGHTS] 496, 506 (Rémy Cabrillac ed., 2013), *bibliographical information at* <https://lccn.loc.gov/2013479325>.

¹⁵ DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN DE 1789 art. 4.

¹⁶ Wachsmann, *supra* note 14, at 497; DUPRÉ DE BOULOIS, *supra* note 1, at 363-66.

¹⁷ CODE PÉNAL [C. PÉNAL] [PENAL CODE] arts. 226-1 to 226-2-1, https://www.legifrance.gouv.fr/affichCode.do?sessionId=C50ABCA9B7BF412A2B73E353FBED9BE2.tplgfr23s_3?idSectionTA=LEGISCTA000006165309&cidTexte=LEGITEXT000006070719&dateTexte=20190607, archived at <https://perma.cc/Q597-7BYC>.

¹⁸ CODE CIVIL [C. CIV.] [CIVIL CODE] art. 9, https://www.legifrance.gouv.fr/affichCode.do?sessionId=C50ABCA9B7BF412A2B73E353FBED9BE2.tplgfr23s_3?idSectionTA=LEGISCTA000006117610&cidTexte=LEGITEXT000006070721&dateTexte=20190607, archived at <https://perma.cc/G9KA-Q99G>.

¹⁹ European Convention on Human Rights, *supra* note 4, art. 8.

²⁰ C. CIV. art. 9-1.

²¹ Loi du 29 juillet 1881 sur la liberté de la presse [Law of 29 July 1881 on Freedom of the Press] art. 29, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722>, archived at <https://perma.cc/SG4X-A4LJ>.

²² *Id.*

privacy, meaning that a true statement may still be considered defaming if it concerns a person's private life.²³

III. Limits Related to Public Order

A. Prohibitions on Inciting Criminal Acts

Speech may be limited to protect the community in general. Thus, speech that incites the commission of a criminal offense can be prosecuted as complicity in that offense.²⁴ Incitation of homicide, physical or sexual assault, theft, extortion, destruction of property, and other intentional degradations that put others in danger is punishable by up to five years in prison and a fine of €45,000 (approximately US\$50,500) even if the crime in question was never actually committed.²⁵ The same punishment applies to inciting criminal offenses against a fundamental national interest, and defending or justifying slavery, war crimes, or crimes against humanity.²⁶ Inciting or justifying acts of terrorism is punishable by up to five years in prison and a fine of €75,000 (approximately US\$84,160).²⁷ These sanctions are increased to seven years in prison and a fine of €100,000 (approximately US\$112,200) if the incitation or justification was done via a public online service.²⁸

B. Prohibitions on Hate Speech and Denial of Crimes against Humanity

Similarly, French law prohibits "hate speech," defined as "inciting discrimination, hatred or violence against a person or group of persons because of their origins or because they belong or do not belong to a certain ethnicity, nation, race or religion," as well as "inciting hatred or violence against a person or group of persons because of their sex, sexual orientation, gender identity, or disability."²⁹ Hate speech is punishable by up to a year in prison and a fine of €45,000, as is the denial or minimization of recognized crimes against humanity, in particular the Holocaust.³⁰ In the case of these prohibitions against hate speech and denial of crimes against humanity, freedom of speech is limited for the sake of protecting human dignity.³¹

²³ Wachsmann, *supra* note 14, at 498-49.

²⁴ Loi du 29 juillet 1881 sur la liberté de la presse art. 23.

²⁵ *Id.* art. 24.

²⁶ *Id.*

²⁷ C. PÉNAL art. 421-2-5, <https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000029755573&cidTexte=LEGITEXT000006070719>, archived at <https://perma.cc/GS3X-3ECE>.

²⁸ *Id.*

²⁹ Loi du 29 juillet 1881 sur la liberté de la presse art. 24.

³⁰ *Id.* arts. 24, 24 bis.

³¹ DUPRÉ DE BOULOIS, *supra* note 1, at 363-65.

C. Limits on Speech against Institutions and Officeholders

Speech may also be limited to protect, to a certain extent, the country's institutions. The Law of 29 July 1881 provides that "defamation . . . against the courts, the tribunals, the army, navy or air force, the state bodies and public administrations, shall be punished by a fine of 45,000 Euros."³² The same sanction applies to defamation against government officials in their official capacity, from the President and members of Parliament all the way to local officials.³³ Jurors and witnesses at trials are also protected by the same provision.³⁴ The Law of 29 July 1881 explicitly exempts good-faith reporting of parliamentary or judicial proceedings from prosecution for defamation.³⁵ Furthermore, the Cour de cassation has declared that criticism of the manner in which institutions function is a valid exercise of freedom of expression.³⁶ Nevertheless, defamation prosecutions do occur, and are often difficult to defend against.³⁷

Another limit to free speech that is worth noting is that disrespecting the French national anthem or the French flag, in the context of an event organized or regulated by public authorities (such as a commemorative ceremony or certain sports events), is punishable by a fine of up to €7,500 (approximately US\$8,400).³⁸ The same act is punishable by a fine of €7,500 and up to six months in jail if it is committed by a group of people.³⁹

IV. Regulation of Radio and Television Broadcasting

A. General Overview

Radio and television broadcasting were a state monopoly from 1945 to 1981.⁴⁰ Private radio stations were allowed in 1981, and a 1982 law established the principle of broadcasting freedom for radio and television.⁴¹ This 1982 law was repealed in 1986 to be replaced by the Law of 30 September 1986 Regarding Freedom of Communication, often referred to as the *Loi Léotard* (after

³² Loi du 29 juillet 1881 sur la liberté de la presse art. 30.

³³ *Id.* art. 31.

³⁴ *Id.*

³⁵ *Id.* art. 41.

³⁶ Cour de cassation, Crim. Mar. 23, 1978, No. 77-90339, <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007060809>, archived at <https://perma.cc/ZF2K-FRDG>.

³⁷ Wachsmann, *supra* note 14, at 497-501.

³⁸ C. PÉNAL art. 433-5-1, https://www.legifrance.gouv.fr/affichCode.do?sessionId=4757158D1318F552A0FDF5F30DFC62D6.tplgfr38s_2?idSectionTA=LEGISCTA000006165369&cidTexte=LEGITEXT000006070719&dateTexte=20190618, archived at <https://perma.cc/U386-WVT2>.

³⁹ *Id.*

⁴⁰ Wachsmann, *supra* note 14, at 492-93.

⁴¹ *Id.*; Loi n°82-652 du 29 juillet 1982 sur la communication audiovisuelle [Law No. 82-652 of 29 July 1982 on Audiovisual Communication] art. 1, https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT00000880222&pageCourante=02431, archived at <https://perma.cc/9BBV-DD9E>.

the name of the law's main sponsor, Minister of Culture and Communication François Léotard).⁴² The Loi Léotard, which was amended several times but remains one of the principal texts governing broadcasting in France, retained the general principle of freedom of audiovisual broadcasting.⁴³ In its current wording, the Loi Léotard governs "communication to the public via electronic means," which it defines as "broadcasts, transmission or reception of signs, signals, written words, images, or sounds, by electromagnetic means," that do not have the nature of private correspondence.⁴⁴ Freedom of broadcasting

may not be limited except to the extent necessary . . . to protect human dignity, freedom, the property of others, and the pluralistic character of the expression of trends of thought and opinions, . . . the protection of children and adolescents, the preservation of public order, the necessities of national defense, public service requirements, technical constraints inherent to the means of communication, as well as the necessity for audiovisual services to develop audiovisual production.⁴⁵

B. Enforcement

The main regulatory agency for radio and television broadcasting is the Conseil supérieur de l'audiovisuel (CSA) (Superior Council on Audiovisual), an independent agency that was created in a 1989 amendment to the Loi Léotard.⁴⁶

One of the CSA's missions is to manage the attribution of radio frequencies.⁴⁷ The criteria by which the CSA accepts or denies the applications of private broadcasters include, in addition to technical considerations, the promotion of "the public interest and the respect of pluralism."⁴⁸ Broadcasters who do not rely on radio waves, such as cable television, are not subject to authorization.⁴⁹ However, the CSA is also tasked with monitoring broadcasters to ensure that they respect French law.⁵⁰ The CSA does not practice censorship prior to broadcasting, but may

⁴² Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard) [Law No. 86-1067 of 30 September 1986 Regarding Freedom of Communication (Léotard Law)] <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000512205&dateTexte=20190617>, archived at <https://perma.cc/67FR-KBF6>.

⁴³ *Id.* art. 1.

⁴⁴ *Id.* art. 2.

⁴⁵ *Id.* art. 1.

⁴⁶ *Id.* art. 3-1; *Qu'est-ce que le CSA? [What Is the CSA ?]*, CONSEIL SUPÉRIEUR DE L'AUDIOVISUEL [SUPERIOR COUNCIL ON AUDIOVISUAL], <https://www.csa.fr/Informer/Qu-est-ce-que-le-CSA> (last visited June 17, 2019), archived at <https://perma.cc/3WZW-FM8N>.

⁴⁷ *Les missions de la régulation audiovisuelle [Missions of Audiovisual Regulation]*, CONSEIL SUPÉRIEUR DE L'AUDIOVISUEL [SUPERIOR COUNCIL ON AUDIOVISUAL], <https://www.csa.fr/Informer/Qu-est-ce-que-le-CSA/Les-missions-de-la-regulation-audiovisuelle> (last visited June 17, 2019), archived at <https://perma.cc/TK3N-Y5R8>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Loi n° 86-1067 du 30 septembre 1986, art. 3-1; *La déontologie des programmes [Ethics of Programming]*, CONSEIL SUPÉRIEUR DE L'AUDIOVISUEL [SUPERIOR COUNCIL ON AUDIOVISUAL], <https://www.csa.fr/Protger/Garantie-des->

apply sanctions after broadcasting if a program violates French law.⁵¹ Applicable sanctions range from an order to cease and desist, to a fine of up to 3% of the broadcaster's revenue over the previous year, or 5% of the broadcaster's revenue in the case of recidivism.⁵² The CSA may also suspend or withdraw an authorization to broadcast.⁵³ Additionally, the CSA may require operators to broadcast a communiqué, under terms and conditions dictated by the CSA itself, as part of a sanction for illegal speech.⁵⁴

C. Rule Specific to Broadcasters Controlled by Foreign States

In addition to the enforcement authority mentioned above, an amendment to the Loi Léotard adopted in December 2018 specifically addresses the case of media controlled by foreign states. Article 42-6 provides that the CSA may, after a first warning, withdraw the broadcasting authorization of an operator controlled by or under the influence of a foreign state, if it broadcasts content that harms a fundamental national interest of France.⁵⁵ This provision explicitly states that the propagation of false information to interfere with the proper functioning of institutions should be considered as harmful to a fundamental national interest.⁵⁶ This provision also states that the CSA may, in deciding to withdraw an authorization, consider content that the broadcaster, or its subsidiary or parent organization, published on other communication services, but the CSA may not base its decision entirely on that.⁵⁷

droits-et-libertes/La-deontologie-des-programmes (last visited June 17, 2019), archived at <https://perma.cc/CSK2-RU6L>.

⁵¹ *La déontologie des programmes*, *supra* note 50; Loi n° 86-1067 du 30 septembre 1986, arts. 42 to 42-6.

⁵² Loi n° 86-1067 du 30 septembre 1986, arts. 42, 42-1, 42-2.

⁵³ *Id.* art. 42-1.

⁵⁴ *Id.* art. 42-4.

⁵⁵ *Id.* art. 42-6.

⁵⁶ *Id.*

⁵⁷ *Id.*

Germany

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SUMMARY The German Constitution guarantees freedom of expression, freedom of the press, and freedom to receive information, among other enumerated communication rights, to every person. Disseminating untrue facts or “abusive criticism,” defined as statements that are not primarily made to debate a topic, but to defame a person, fall outside the scope of protection.

The communication rights may only be limited by general laws. In the context of heckling, such general laws could be criminal law provisions protecting personal honor or civil law norms on undisturbed enjoyment of premises, or other basic rights. However, these limitations have to be examined in light of the constitutional significance of the basic right they are restricting, meaning the limitations must themselves be restricted.

I. Overview of Freedom of Speech and Freedom of the Press

Article 5 of the German Basic Law, the country’s constitution, guarantees freedom of speech and freedom of the press, among other enumerated communication rights.¹ The communication rights are not restricted to Germans; they are applicable to “every person.” In addition to all natural persons, domestic legal persons may invoke it.² This also applies to foreign legal persons domiciled in the European Union (EU) due to the bans on discrimination under Union law.³

Article 5 states that

- (1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures . . . Freedom of the press . . . shall be guaranteed. There shall be no censorship.
- (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.

¹ Grundgesetz [GG] [Basic Law], May 23, 1949, BUNDESGESETZBLATT [BGBl.] [FEDERAL LAW GAZETTE] I at 1, as amended, art. 5, paras. 1 & 2, <http://www.gesetze-im-internet.de/gg/GG.pdf>, archived at <https://perma.cc/8UJX-HC4T>, unofficial English translation available at http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf, archived at <https://perma.cc/R94W-YBZ3>.

² *Id.* art. 19, para. 3; BUNDESVERFASSUNGSGERICHT [BVERFG] [FEDERAL CONSTITUTIONAL COURT], Apr. 4, 1967, docket no. 1 BvR 414/64, para. 34, <https://openjur.de/u/194306.html>, archived at <https://perma.cc/Y6GZ-2875>.

³ BVerfG, July 19, 2011, docket no. 1 BvR 1916/09, ECLI:DE:BVerfG:2011:rs20110719.1bvr191609, paras. 56 & 57, http://www.bverfg.de/e/rs20110719_1bvr191609.html, archived at <https://perma.cc/U4BD-MCW4>, English translation available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/07/rs20110719_1bvr191609en.html, archived at <https://perma.cc/ZNW4-3AYT>.

Unlike the US Constitution, which codifies a prohibition for Congress to make laws abridging free speech, the rights codified in the German Basic Law additionally have a “radiating effect” on private law, meaning that private parties are indirectly bound by them.⁴

II. Scope of Protection

A. Freedom of Speech

The Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) in its landmark Lüth decision stated that

freedom of opinion, as the most immediate expression of the human personality living in society, is one of the noblest of human rights (*un des droits les plus précieux de l'homme* according to article 11 of the Declaration of the Rights of Man and the Citizen of 1789). It is absolutely essential to a liberal-democratic constitutional order, because it alone makes possible the constant intellectual exchange and the contest among opinions that form the lifeblood of such an order; indeed, it is ‘the matrix, the indispensable condition of nearly every other form of freedom’ (Cardozo).⁵

Freedom of speech covers value judgments and statements of facts, if those statements of facts form the basis for an opinion. The term “opinion” is understood broadly. Expressions of a viewpoint, the taking of a position, or the holding of an opinion within the framework of intellectual dispute fall within its scope. If the statement “contributes to the intellectual battle of opinions on an issue of public concern,” there is a presumption in favor of its admissibility. Untrue facts fall outside the scope of freedom of expression. The Federal Constitutional Court held that

this basic right [freedom of opinion] guarantees to all persons the right to freedom of expression without expressly distinguishing between a value judgement and a statement of facts. Everyone is at liberty to speak his or her mind freely whether or not he or she is able to furnish verifiable reasons for his or her judgement. (42 BVerfGE 163, 170 et seq.); at the same time, the purpose of free speech is to form opinions, persuade, and exert an intellectual influence over other persons. This is why value judgements, always meant to convince others, are protected by article 5, para. 1, sentence 1 of the Basic Law. The basic right is primarily designed to protect the speaker’s personal opinion. (7 BVerfGE 198, 210). It is irrelevant whether an opinion is valuable or worthless, correct or false, or justified emotionally or rationally. (33 BVerfGE 1, 14 et seq.). If the opinion in question contributes to the intellectual battle of opinions on an issue of public concern, there is a presumption in favor of the admissibility of that free speech. (7 BVerfGE 198, 212). Even harsh and exaggerated statements, in particular in the political battle of opinion, generally fall within the scope of Article 5, paragraph 1, first sentence of the Basic Law (54 BVerfGE 129, 139); the question can only be whether and to what extent the provisions of the general laws and the right to personal honor (article 5, para. 2 Basic Law) may draw limits here.

⁴ BVerfG, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] [DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT] 198 (Lüth decision), para. 31, <http://www.servat.unibe.ch/dfr/bv007198.html>, archived at <https://perma.cc/2QZ5-5AWS>, unofficial English translation available at <https://germanlawarchive.iuscomp.org/?p=51>, archived at <https://perma.cc/5M6Y-GRVX>.

⁵ *Id.* at 33 (citing *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (Cardozo, J.)).

This does not apply in the same way to assertions of facts. False information is not an object worthy of protection from the viewpoint of freedom of opinion (54 BVerfGE 208, 219). The deliberate assertion of untrue facts is not protected by article 5, paragraph 1 of the Basic Law; the same applies to wrong quotations (BVerfG, loc.cit.). . . . The communication of a fact is protected by freedom of opinion because and insofar as it forms the basis for an opinion. . . . From all this, the term “opinion” in article 5, paragraph 1, first sentence of the Basic Law must in principle be understood broadly: where an utterance is characterized as an expression of a viewpoint, the taking of a position, or the holding of an opinion within the framework of intellectual dispute, it falls within the scope protected by the fundamental right.⁶

Asking questions is also protected by freedom of speech, because questions play “an important role in the process of opinion formation.”⁷ They are treated like value judgments.⁸ Rhetorical questions, on the other hand, are not actually questions as they do not require an answer. The Federal Constitutional Court therefore treats them like value judgments or assertions of facts, depending on the content.⁹ However, the overall context always has to be taken into account, so that something that at first sight looks like a question, actually qualifies as a false assertion of a fact.¹⁰

Not protected by freedom of opinion is “abusive criticism” (*Schmähkritik*). The Federal Constitutional Court defines abusive criticism as statements that are “no longer primarily aimed at addressing a debate in a matter-of-fact way, but at the defamation of a person. In addition to polemical and exaggerated criticism, it must include a degradation of the person.”¹¹ Such abusive criticism is not included in the scope of protection.

B. Freedom of the Press

Freedom of the press is not just a subcategory of freedom of expression; it is an independent and separate freedom under article 5 of the Basic Law. In addition to expressing and disseminating an opinion using the press, the basic right guarantees the “institutional independence of the press that extends from the acquisition of information to the dissemination of news and opinion; [...]

⁶ BVerfG, 61 BVerfGE 1, paras. 13-16, <http://www.servat.unibe.ch/dfr/bv061001.html>, archived at <https://perma.cc/7B2V-44EQ>, unofficial English translation available at <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=639>, archived at <https://perma.cc/JU43-L7BC>.

⁷ BVerfG, 85 BVerfGE 23, para. 43, https://www.jurion.de/urteile/bverfg/1991-10-09/1-bvr-221_90/, archived at <https://perma.cc/ARE9-5EDD>, unofficial English translation available at <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=624>, archived at <https://perma.cc/8N8G-CTXW>.

⁸ *Id.* at 44.

⁹ *Id.* at 45.

¹⁰ BUNDESGERICHTSHOF [BGH] [FEDERAL COURT OF JUSTICE], Dec. 9, 2003, docket no. VI ZR 38/03, at 6, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=28184&pos=0&anz=1>, archived at <https://perma.cc/5Y6M-B73R>.

¹¹ BVerfG, 82 BVerfGE 272, para. 41, <http://www.servat.unibe.ch/dfr/bv082272.html>, archived at <https://perma.cc/H9AU-SXVK>, unofficial English translation available at <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=629>, archived at <https://perma.cc/GVJ4-43LX>.

this includes the right of persons working for the press to express their opinion as freely and unrestricted as every other citizen.”¹²

III. Limits on Freedom of Speech and Freedom of the Press

Freedom of speech and freedom of the press are limited by general laws, provisions for the protection of young persons, and the right to personal honor.¹³ The last two categories are generally seen as included in the category “general laws.”¹⁴ The Federal Constitutional Court defines “general laws” as laws that “do not prohibit or target the expression of an opinion as such”, but rather “aim to protect a legal interest per se without regard to a specific opinion.”¹⁵ Examples of general laws that might be relevant in the context of heckling are, among others, the Criminal Code, in particular the provisions on insult or on the dissemination of ideas that violate human dignity,¹⁶ police law, and civil law provisions. However, these general laws have to be examined in light of the constitutional significance of the basic right they are restricting, meaning the limitations must themselves be interpreted restrictively in order to preserve the substance of the basic right (balancing of interests).¹⁷

With regard to heckling and confronting speakers, the Federal Constitutional Court has held that, for example, the right of the owner to undisturbed enjoyment of the premises that derives from section 903, sentence one and section 1004 of the German Civil Code is a general law that may limit the communication rights codified in article 5, paragraph 1 of the Basic Law.¹⁸ Restrictions to prevent disturbances are not generally excluded. However, the state, unlike private citizens, may not use such a right to enforce its own interests and may only use it to prevent expressions of opinion if this serves the public interest.¹⁹ The Court stated that

¹² BVerfG, 10 BVerfGE 118, para. 14, <http://www.servat.unibe.ch/dfr/bv010118.html>, archived at <https://perma.cc/MM74-37DA>.

¹³ Basic Law, art. 5, para. 2.

¹⁴ BVerfG, Nov. 4, 2009, docket no. 1 BvR 2150/08, ECLI:DE:BVerfG:2009:rs20091104.1bvr215008, para. 63, http://www.bverfg.de/e/rs20091104_1bvr215008.html, archived at <https://perma.cc/TXA9-4V97>, English translation (extract only) available at http://www.bverfg.de/e/rs20091104_1bvr215008en.html, archived at <https://perma.cc/K5TL-D3DN>.

¹⁵ BVerfG, *supra* note 4, para. 36.

¹⁶ STRAFGESETZBUCH [STGB] [CRIMINAL CODE], Nov. 13, 1998, BGBl. I at 3322, as amended, §§ 185 et seq., § 130, <http://www.gesetze-im-internet.de/stgb/StGB.pdf>, archived at <https://perma.cc/PA8M-E2ZU>, unofficial English translation available at http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.pdf (English version updated through Oct. 10, 2013), archived at <https://perma.cc/RQ57-7ALQ>.

¹⁷ BVerfG, *supra* note 4, para. 34.

¹⁸ Bürgerliches Gesetzbuch [BGB] [Civil Code], Jan. 2, 2002, BGBl. I at 42, 2909; corrected in BGBl. 2003 I at 738, as amended, §§ 903, sentence 1, § 1004, <http://www.gesetze-im-internet.de/bgb/BGB.pdf>, archived at <https://perma.cc/BRN4-P7U4> unofficial English translation available at http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf, (English version updated through Oct. 1, 2013), archived at <https://perma.cc/77EX-38MM>.

¹⁹ BVerfG, Feb. 22, 2011, docket no. 1 BvR 699/06, ECLI:DE:BVerfG:2011:rs20110222.1bvr069906, para. 102, http://www.bverfg.de/e/rs20110222_1bvr069906.html, archived at <https://perma.cc/8Z22-76ZH>, English

Therefore, in particular the wish to create a “feel-good atmosphere” in a sphere which is strictly reserved for consumer purposes and which remains free from political discussions and social conflicts cannot be used as the basis for prohibiting the distribution of leaflets. The state may not restrict fundamental rights in order to ensure that the carefree mood of citizens is not disturbed by the misery of the world (see BVerfGE 102, 347 <364>). Consequently, the fact that third parties are annoyed by being confronted with topics which they find unpleasant is irrelevant. What is particularly out of the question are bans which serve the purpose of preventing certain expressions of opinion for the sole reason that the defendant does not share them, disapproves of their content or regards them as discrediting the business of an enterprise because of the critical statements it contains.

On the other hand, the defendant is not prevented from using its right as the owner of premises to undisturbed possession to restrict the distribution of leaflets and other forms of expression of opinion to the extent necessary to guarantee the safety and functioning of airport operations. . . . [T]his is . . . an important common interest which can justify encroachment on fundamental rights.

The restrictions on freedom of expression must be suitable, necessary and appropriate for achieving the purpose. This excludes in any event the possibility of a general ban. . . . On the other hand, restrictions which relate to certain types of expressions of opinion or places or times for expressions of opinion in order to prevent disturbances are not excluded in principle.²⁰

As an exception to the rule that communications rights may only be restricted by general laws, the Federal Constitutional Court allows a restriction of freedom of speech by section 130, paragraph 4 of the Criminal Code, which criminalizes “disturb[ing] the public peace in a manner that violates the dignity of the victims [of the Nazi regime] by approving of, glorifying, or justifying the National Socialist rule of arbitrary force.”²¹ Even though the provision targets specific statements in relation to National Socialism and is not a general law, the Federal Constitutional Court held that the restriction is justified by “the injustice and the horror which National Socialist rule inflicted on Europe and large parts of the world, defying general categories, and of the establishment of the Federal Republic of Germany which was understood as an antithesis of this”²² However, such an exception “does not justify a general ban on the dissemination of right-wing radical or indeed National Socialist ideas.”²³

In addition to general laws, freedom of speech and freedom of the press can also be limited by other basic rights inherent in the German Basic Law. However, expressions of an opinion cannot be prohibited simply because they violate the constitutional order.²⁴ The constitutional restrictions inherent in the Basic Law must be defined by the legislature. The public order

translation available at http://www.bverfg.de/e/rs20110222_1bvr069906en.html, archived at <https://perma.cc/5A5S-S9DC>.

²⁰ *Id.* paras. 103-105.

²¹ BVerfG, *supra* note 14; Criminal Code, § 130, para. 4.

²² BVerfG, *supra* note 14, para. 52.

²³ *Id.* at 67.

²⁴ *Id.* para. 50.

reservation of section 15 of the Act on Assemblies as defined by the courts, for example, is insufficient to limit freedom of speech.²⁵

IV. Availability of Mechanism to Control Foreign Broadcasters Working on Behalf of Foreign Governments

Article 5 of the Basic Law also protects the right of every person to receive information from generally accessible sources.²⁶ The right to receive information has to be seen in light of the experiences of the National Socialist Regime where access to information was restricted, the state controlled opinions, and state prohibitions on the reception of foreign radio broadcasts and literature and art were in place.²⁷

All types of sources are included in the right as long as they are generally accessible. The Federal Constitutional Court defines “generally accessible sources” as such that “are suitable and intended to inform the general public, understood as an indeterminate group of persons.”²⁸ This includes mass communication, in particular radio and TV broadcasts. It is irrelevant whether the source is located in Germany or abroad.²⁹ The Basic Law does not differentiate between national and foreign sources.³⁰ In particular, foreign nationals who permanently reside in Germany have a right to receive information from sources from their home country to keep abreast of current events and to maintain a cultural and linguistic connection.³¹ The right to receive information includes the decision from which type of generally accessible source a person would like to get information.³²

The Federal Constitutional Court has stated that

[a]rticle 5 paragraph 1, sentence one of the Basic Law GG protects not only the active process of procuring information but also the simple receipt of information. The Basic Law seeks to guarantee that the individual is informed as comprehensively as possible. An individual can also be ‘informed’ from sources that come to his or her attention without the participation of the recipient. Only the possession of information enables an

²⁵ BVerfG, June 23, 2004, docket no. 1 BvQ 19/04, ECLI:DE:BVerfG:2004:qs20040623a.1bvq001904, paras. 24 & 26, http://www.bverfg.de/e/qs20040623a_1bvq001904.html, archived at <https://perma.cc/L8UH-BY9E>; Versammlungsgesetz [VersG] [Act on Assemblies], Nov. 15, 1978, BGBl. I at 1789, as amended, § 15, <http://www.gesetze-im-internet.de/versammlg/VersammlG.pdf>, archived at <https://perma.cc/Q2P3-U2V6>.

²⁶ Basic Law, art. 5, para. 1, sentence 1.

²⁷ BVerfG, 27 BVerfGE 71, para. 35, <https://openjur.de/u/193099.html>, archived at <https://perma.cc/YUV3-VBXN>, unofficial English translation available at <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=649>, archived at <https://perma.cc/9NTV-5W3P>.

²⁸ BVerfG, Feb. 9, 1994, docket no. 1 BvR 1687/92, ECLI:DE:BVerfG:1994:rs19940209.1bvr168792, para. 13, http://www.bverfg.de/e/rs19940209_1bvr168792.html, archived at <https://perma.cc/85PQ-LY2T>, providing further references.

²⁹ *Id.* para. 14.

³⁰ *Id.*

³¹ *Id.* para. 27.

³² *Id.* para. 34.

independent selection. Being able to select between sources is the fundamental definitional element of every piece of information. If freedom of information did not guarantee that sources of information reach the individual, then he or she would be prevented from selecting among them through active participation. 'To inform himself' therefore also means the purely intellectual process of taking information in.³³

In addition, as already mentioned, the right to free speech applies to every person, meaning that persons working for foreign broadcasters located in Germany can invoke it.³⁴

However, all communications rights, including the right to receive information, are limited by general laws as outlined above.³⁵ If information from generally accessible sources from foreign broadcasters violates criminal law norms for example, it can be restricted.

Another limitation can be found in the Interstate Treaty on Broadcasting.³⁶ It provides that private broadcasters in Germany need a license to operate.³⁷ No license is needed for internet radio.³⁸ A license will only be granted if several enumerated requirements are fulfilled, among them, residence or seat in Germany, another EU Member State, or another Member State of the European Economic Area (EEA). Foreign broadcasters must therefore establish a seat in Germany, the EU, or the EEA. A license will not be granted to legal persons under public law or institutions that are government funded. This prohibition also applies to foreign public or state institutions.³⁹ It was reported that the German Commission on Licensing and Supervision revoked the radio license of Megaradio SNA because it allegedly uses too much content that is financed by the Russian government, thereby making it a de facto state organization.⁴⁰ The broadcaster has lodged a complaint with the Administrative Court of Kassel.⁴¹

³³ BVerfG, *supra* note 27, para. 42.

³⁴ Basic Law, art. 5, para. 1.

³⁵ Basic Law, art. 5, para. 2.

³⁶ Staatsvertrag für Rundfunk und Telemedien [Rundfunkstaatsvertrag] [RStV] [Interstate Treaty on Broadcasting and Telemedia] [Interstate Broadcasting Treaty], Aug. 31, 1991, in the version in force since May 1, 2019, https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Rundfunkstaatsvertrag_RStV.pdf, archived at <https://perma.cc/L42Q-KDMU>, English translation available at https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/RStV_22_english_version_clean.pdf, archived at <https://perma.cc/WP62-5KGS>.

³⁷ *Id.* § 20, para. 1.

³⁸ *Id.* § 20b.

³⁹ *Id.* § 20a, para. 3.

⁴⁰ Ludger Fittkau, *Wer darf senden, wer nicht?* [Who can broadcast, who cannot?], Deutschlandfunk, June 5, 2018, https://www.deutschlandfunk.de/aufsicht-der-landesmedienanstalten-wer-darf-senden-wer-nicht.2907.de.html?dram:article_id=419672, archived at <https://perma.cc/PWA7-B6BX>.

⁴¹ *Id.*

Israel

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SUMMARY Israeli law recognizes protection of freedom of speech as a constitutional principle. Protection extends to all forms and content of expression including freedom of the press and freedom to make a political speech. Freedom of speech, however, is not absolute and may be restricted under limited circumstances where there is “near certainty” that an expression would cause “real harm” to public safety.

The right to freedom of speech may also be limited in circumstances where it conflicts with the right to human dignity protected under a basic law. Speech may also be restricted based on statutory law containing prohibitions on incitement for racism; terrorism and violence; denial of the Holocaust and praise for atrocities committed by the Nazis; as well as insult to a public servant and defamation; among others.

In balancing freedom of speech against other principles recognized under the legal system, the courts have applied relevant balancing formulas. Recognizing the significance of protecting speech, the Supreme Court applied a narrow interpretation to restrictions that may limit it. The Supreme Court has further determined that freedom of political expression should enjoy a particularly broad protection as compared with other types of expression. Such protection, however, does not extend to false factual expressions made maliciously against a public figure, as they do not constitute protected expressions of opinion or criticism.

To extend broad protection to speech, the Court has also applied a narrow interpretation to the elements of the offense of insult to a public servant. The offense, the Court held, exists only in rare cases where the expression “harm[s] the core of human dignity and involve[s] a substantive and severe violation of the value-moral nucleus from which the public servant draws the source of his/her power and authority.” Moreover, the prohibition will only apply where it is almost certain that the anticipated harm will harm the public employee as an individual as well as the public service system and the public trust in it.

Recognizing a “defense of responsible journalism” against defamation suits, the Court extended the defense to circumstances where the publication was made in good faith, even if the information it contained ultimately turned out false. This defense will apply when there was an obligation to publish, no malicious intent, and when the publication complied with standards of responsible, cautious and fair journalism, and the publisher took steps to prevent unnecessary harm to the object of the publication.

There appears to be no control of content disseminated by foreign broadcasters, including television, radio and social media, working on behalf of foreign governments. Television and radio broadcasting companies, however, are required to be registered in Israel. Broadcasters that receive funding directly or indirectly from foreign governments are subject to disclosure requirements.

I. Introduction

This report addresses limits to freedom of speech that may apply under Israeli law in situations where the speech is perceived to purposely undermine the right of a public servant or a politician for free speech. This includes circumstances where individuals, the press, including a blogger or group of individual bloggers, “harass” a speaker or “misinform” the public on issues of public interest.

The report further discusses the availability of a mechanism to control foreign broadcasters working on behalf of foreign governments, to enable dissemination of misinformation thereby impacting public opinion in Israel.

The terms “freedom of speech” and “freedom of expression” in this report are interchangeable.

II. Scope of Protection of Freedom of Speech and the Right to Interrupt Public Speech

A. Normative Status of Protection of Freedom of Speech

Freedom of expression had been recognized by Israel’s Supreme Court as a basic constitutional right since the early days of the State. Judicial recognition of the constitutional protection of speech in Israel derived from the Declaration of Independence that provides for the democratic character of the state.¹

Although freedom of speech has not been expressly guaranteed under a basic law, it has been opined that its normative status has been elevated following the adoption of Basic Law: Human Dignity and Liberty in 1992, as “freedom of speech is an essential component of human’s dignity and liberty.”²

B. General Scope of Protection

Israeli courts have recognized the principle of freedom of speech as applying to all forms of expression as well as types of content. It therefore applies to freedom of the press and freedom to make a political speech.³ The courts determined that freedom of speech includes the right to receive information and to react to it; the right to speak and to listen as well as to demonstrate. Freedom of expression, it was held, is not only the freedom to express accepted opinions, it is also the freedom to express divergent opinions that are disliked by the majority; the freedom to praise but also to criticize the government.⁴

¹ 2 AMNON RUBINSTEIN, THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL 1001 (5th ed., 1996) (in Hebrew).

² *Id.* at 1010.

³ *Id.* at 1002.

⁴ 2 AHARON BARAK, INTERPRETATION IN LAW 461-62 (1993) (in Hebrew).

Although freedom of expression extends to a wide range of contents and formats, Israeli courts have recognized that an expression may be restricted under circumstances where there is “near certainty” that it would cause “real harm” to public safety.⁵

C. Balancing Freedom of Expression with Other Competing Principles

Israeli law recognizes additional protections that may conflict with the right to free speech. Basic Law: Human Dignity and Liberty, e.g., expressly prohibits harm to human dignity.⁶ The Basic Law provides that

[t]here shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required. . . .⁷

A number of laws include provisions that authorize restrictions on freedom of speech by criminalizing, among others, speech that constitutes incitement for racism, terrorism and violence; outrage to religious feelings; publication of false news causing fear and alarm; as well as expression of denial of the holocaust and praise for atrocities committed by the Nazis.⁸

When evaluating the right to freedom of expression against competing interests reflected under legislation authorizing limitations on such freedom, Israeli courts have applied various balancing formulas, including by limiting the scope of freedom of expression “by time, space, frequency, etc., to achieve proper balancing, without having one of the [protected] interests completely withdrawn.”⁹

Israel’s Supreme Court has balanced competing interests in a number of cases including when freedom of expression conflicted with public safety, judicial ethics, public morality, and a person’s right to a good name.¹⁰

D. Implementation of Statutory Limits on Freedom of Speech Relating to Public Servants, Journalists and Political Speech

Speech by a public servant or by a political figure may be limited under legislation prohibiting inflicting an insult to a public servant and under defamation law. The extent to which freedom of

⁵ RUBINSTEIN, *supra* note 1, at 1005.

⁶ Basic Law: Human Dignity and Liberty § 4, SEFER HAHUKIM [SH] [BOOK OF LAWS] (official gazette) 5752 No. 1391 p. 150, as amended, unofficial translation available on the Knesset Website at https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm (last visited June 11, 2019), archived at <https://perma.cc/AXJ4-QETK>.

⁷ *Id.* § 8.

⁸ Counterterrorism Law, 5776-2016, § 24, SH 5776 No. 2556 p. 898; Penal Law, 5737-1977, §§ 144, 159 & 173, SH 5737 No. 864 p. 226; Prohibition on Denial of the Holocaust Law, 5746-1986, SH 5746 No. 1187, p. 196; all as amended.

⁹ RUBINSTEIN, *supra* note 1.

¹⁰ *Id.* at 1005-06; BARAK, *supra* note 4, at 462 (including citations to a number of court decisions).

speech will be restricted in relevant cases has been defined by Israeli courts. The following is a discussion of the application of balancing formulas that apply when the legislative objective in prohibiting insult and defamation under the laws conflicts with the constitutional principle of freedom of speech.

1. *Insult to Public Servant and Freedom of Speech*

In accordance with the Penal Law, 5737-1977,

[a] person who by gestures, words or acts insults a public servant or a Judge or officer of a religious court or a member of a commission of inquiry under the Commissions of Inquiry Law, 5729-1968, whilst engaged in the discharge of his duties or in connection with the same is liable to imprisonment for six months.¹¹

a. Balancing of Freedom of Speech and Proper Functioning of Government

A 2011 decision of the Supreme Court in the Ungarfeld case by an extended bench of nine justices analyzed the scope of the offense in view of its impact on the principle of freedom of expression.¹² The petitioner in the case was convicted of the offense of insult to public servant (insult offense) for hanging a poster across from the police station, stating that a named police officer should be fired “because [he had] cooperated with criminals against those who complained against them, [and that] the police did not need ‘rotten apples’.”¹³

Rejecting the request for an additional hearing in the case, Justice Ayala Procaccia for the majority recognized the significance of freedom of expression in a democratic regime. The criminal prohibition on insulting a public servant, however, was intended to protect the proper functioning of public service in the state as an important foundation of a democratic government. According to Procaccia, a proper balance should be identified to achieve the objective of the criminal offense while inflicting a minimal negative impact on the constitutional right to freedom of expression. This requires a narrow interpretation of the insult offense, she opined. To constitute an “insult” in the meaning of the offense, the expression must pass a high bar composed of a “qualitative test” as well as a “probability test.” According to the former, the expression must “harm the core of human dignity and involve a substantive and severe violation of the value-moral nucleus from which the public servant draws the source of his/her power and authority.”¹⁴

Commenting on the probability test, Procaccia stated,

“[i]nsulting” within the normative meaning of the prohibition will therefore be devoted to irregular and extreme cases in which it is almost certain that the anticipated harm derived from it will not only harm the public employee as an individual, but also cause serious and

¹¹ Penal Law, 5737-1977, §288, LAWS OF THE STATE OF ISRAEL, Special Volume (1977).

¹² Additional Hearing, Crim 7383/08 Ungarfeld v. State of Israel (July 11, 2011), https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\08\830\073\p12&fileName=08073830_p12.txt&type=4 (in Hebrew), archived at <https://perma.cc/67CR-HPND>.

¹³ *Id.*, Decision by Justice Eliezer Rivlin, ¶ 2.

¹⁴ *Id.*, Decision by Justice Ayala Procaccia, ¶ 26.

severe harm to the fulfillment of his public function, thereby harming the public service system and the public trust in it.¹⁵

The Court rejected the request for an additional hearing and confirmed the petitioner's conviction in the offense of insulting a public servant.¹⁶

b. Political Expression

Further narrowing down the tests established in the Ungarfeld decision, the Supreme Court reached a different conclusion in a 2017 decision accepting an appeal of a conviction for the insult offense. The petitioner in that case was an editor of an internet site who had published an article criticizing the job performance of a former military rabbi, in view of the military's alleged handling of issues including joint military service of women and men and violation of the Sabbath and the Jewish dietary laws in military bases.¹⁷

Restating the high bar set under the Ungarfeld decision, Justice Miriam Naor, writing the majority opinion, held that implementation of the insult offense must be restricted only to cases where the insult may result in a serious and severe injury to a public servant's dignity. In cases involving a "political expression," she opined, the bar will be even higher.¹⁸ Accordingly,

[p]olitical expression is a means of realizing the individual's liberty and virtues, and incorporates a significant social value. It allows, perhaps more than any other expression, to fulfill the democratic component of freedom of expression. Political expression is a necessary condition for the exchange of ideas, the flow of information and the existence of a free discourse without which it is not possible to formulate a position on issues that are on the public agenda and to take part in the democratic process. Without political expression it will not be possible to have an effective oversight over the government . . . Because of all these political expression may not please the government, and therefore it needs a special protection against harassment on its [government] part

Moreover, the political expression is important not only as a right of an independent value, but also as a means of securing additional basic rights. Against this background, a series of judgments determined that freedom of political expression should enjoy a particularly broad protection as compared with other types of expressions.¹⁹

The decision whether a particular statement constitutes "a political expression" should be made according to the relevant circumstances and context. The distinction between a political expression and a commercial one, according to Naor, depends primarily on the content of the

¹⁵ *Id.* ¶ 32.

¹⁶ *Id.*, verdict, p. 01.

¹⁷ CrimA 5991/13 Segal v. State of Israel (Nov. 2, 2017), <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\13\910\059\c14&fileName=13059910.c14&type=4>, archived at <https://perma.cc/B2P5-JVNC>.

¹⁸ *Id.* ¶ 32.

¹⁹ *Id.* ¶ 34.

expression, but also on the identity of its maker, and objectives.²⁰ The more the expression deals with a public matter, such as a political or social issue, or with a public figure, the higher the tendency to classify it as a political expression. The Court has previously held in other cases that criticism of public officials, for example, criticism of the police commissioner due to the conduct of the police, will be considered a political expression.²¹

Naor determined that,

[s]ince political expression stands at the top of the pyramid of expressions and fulfills the objectives of freedom of expression to the highest degree, it should be provided with the maximum possible protection . . . Accordingly, I believe that expressions should almost always be protected from the application of the insult offense . . . This means that in the vast majority of cases, if not in all of them, protection of political expression will be preferred over the protected value at the basis of the insult offense. At the same time, and for the sake of caution, I am prepared to leave a very narrow opening for the application of the offense in the rarest of cases, in which there is a disproportional and exceptional harm to the dignity of the public servant and at the moral nucleus from which . . . [the public servant] draws his/her power and authority . . .²²

Addressing the “probability test” established in the Ungarfeld decision, Naor made some additional determinations. In her view the higher the position of the public servant the higher the level of tolerance expected from him/her for offensive expressions.²³ Other considerations for recognizing liability for the insult offense include the extent of public exposure enjoyed by the offensive publication.²⁴

2. Defamation Law and the “Defense of Responsible Journalism”

Freedom of expression may be restricted when a publication constitutes defamation. A defamatory publication is one that may

- (1) Humiliate a person or make that person a target of hatred, contempt or ridicule;
- (2) Degrade a person for acts, behavior or traits attributed to that person;
- (3) Harms a person’s position, whether public office or other position, business, occupation, or profession; [or]
- (4) Degrade a person because of race, origin, religion, place of residence, age, sex, sexual orientation or disability, including permanent or temporary physical or mental impairment.²⁵

²⁰ *Id.* ¶ 35.

²¹ *Id.* ¶ 36.

²² *Id.* ¶ 38.

²³ *Id.* ¶ 48.

²⁴ *Id.* ¶ 52.

²⁵ Prohibition of Defamation Law, 5725-1965, §1, SH 5725 No. 464, p. 240, as amended (translated by author).

Under section 15 of the Defamation Law, 5725-1965 (Defamation Law) it would be a good defense from criminal prosecution or a civil suit if the defendant or respondent made the publication in good faith circumstances including that

(1) . . . what was published was true and that the publication was of public interest . . . ;
[or when]

(2) [t]he relationship between him/her and the person to whom the advertisement is directed has placed upon him/her a legal, moral or social duty to make such publication.²⁶

a. Defense of Responsible Journalism

A 2014 decision by nine justices of the Supreme Court centered on the application defenses under the Defamation Law to a journalist for a report regarding the responsibility of a commander of a unit that manned an Israel Defense Force post for the death of a girl from shooting. The petitioner sued the journalist and the broadcaster for defamation after he had been exonerated. The petition centers on the determination that the report dealt with an issue of significant public interest, and that the conditions of good faith were fulfilled, including meeting the criteria of responsible and cautious journalism.²⁷

The main decision was given by Court President Asher Grunis. Rejecting the petition, Grunis determined that the publication was defamatory and did not reflect truth based on the evidence presented. Based on section 15(2) of the Law, however, Grunis recognized a defense of “protection of responsible journalism.” This protection will only apply to publications made in good faith, based on an obligation to publish, without malicious intent, and in accordance with the standard of responsible, cautious and fair journalism. In order to meet this standard, Grunis determined, the publisher will be required to take steps to prevent unnecessary harm to the publication object.²⁸

The defense of protection of responsible journalism, according to Grunis, is not limited to professional journalists. He notes as follows:

From a practical point of view, it is difficult to define the term “journalist” in a sweeping and exhaustive manner, especially in the present era, in which the characteristics and the spheres of activity of journalism have expanded beyond the traditional media. As stated, it is doubtful whether it is desirable to do so in the context before us.²⁹

²⁶ *Id.* § 15(2).

²⁷ Additional Hearing Civil 2121/12 Anonymous v. Ilana Dayan, 67(1) PISKE DIN [PD] [DECISIONS OF THE SUPREME COURT] 667 (Sept. 18, 2014), also available at https://supremedecisions.court.gov.il/Home/Download?path=PediVerdicts\67\1&fileName=SZ1_11_2121-12.pdf&type=4, archived at <https://perma.cc/87SA-FQ2Y>.

²⁸ *Id.* ¶ 81.

²⁹ *Id.*, Grunis Opinion ¶ 62.

b. Journalism Silencing Law Defense

A 2018 decision by the Tel Aviv District Court rejected a lower court decision in a defamation suit filed by Prime Minister Netanyahu and his wife against the appellant, a journalist and novelist, in connection with publication of two posts on his Facebook page. In the first post the appellant described as “an event that happened” an event where the prime minister’s convoy which included “four black vehicles and more and more security guards and vehicles” stopped and the Prime Minister supposedly exited shouting because of his wife’s demands. The second post contained a demeaning caricature of the Prime Minister in the middle of the road.³⁰

Rejecting the appeal District Court Judge Avigail Cohen held that Israeli law did not recognize the term “silencing suit.” Previous attempts to pass legislation in this regard, she noted, have failed (one bill’s explanatory notes stated that it was inspired by the US ANTI SLAPP [Strategic Lawsuit against Public Participation] legislation adopted in 25 states). The circumstances of the case, however, she noted, would not qualify for a silencing suit defense, even if such a defense were recognized. This is because it centered on a publication that purported to be factual, not an expression of criticism or an opinion.

Under the Defamation Law, proving that a publication was true or that it was made in good faith may serve as a defense against liability. In this case, however, the truthfulness of the publication had not been proved. As the content that was the subject of the suit was factual rather than an expression of opinion or criticism, the judge determined, the appellant could not enjoy a defense of good faith.³¹

The Court held as follows:

In the notice of appeal, the Appellant stated that he wishes to end the tenure of the Plaintiff as Prime Minister of Israel and that this wish cannot be an "intent to harm" . . . Except that for the purpose of awarding compensation . . . , we are definitely dealing with a wish that shows that there is a desire to harm the plaintiff - in his public office . . .

It is a democratic country and one can criticize a prime minister. It is also possible to want to change the government and the court does not serve as a thoughts police.

However, when we deal with defamation, we examine for the purpose of determining compensation whether the publication was intended to harm the subject of the publication, and indeed, on the basis of the language of the publication and the testimonies of the parties, the factual conclusion that there is intent to harm is the correct conclusion.³²

³⁰ CA (TA) 15267-09-17 Serna v. Binyamin & Sara Netanyahu (decision by Judge Avigail Cohen, Jan. 16, 2019), available by subscription in the Nevo Legal Database, <http://www.nevo.co.il> (in Hebrew; last visited June 4, 2019).

³¹ *Id.* ¶ 15.

³² *Id.* ¶ 16(3).

III. Availability of Mechanism to Control Foreign Broadcasters Working on Behalf of Foreign Governments

Israeli law requires television and radio broadcasting companies to be registered in Israel and subjects their operations to licensing requirements. Israeli television and radio broadcasters working on behalf of or who receive funding from foreign governments are subject to disclosure requirements.

There appear to be no restrictions on content disseminated by social media such as Yahoo, Facebook, Twitter, etc.

A. Registration Requirements for Television and Radio Broadcasting Corporations

In accordance with the Law for the Second Authority for TV and Radio (Authority), 5790-1990, broadcasters are required to obtain a license.³³ The Authority is a corporate body that is subject to audit by the State Comptroller.³⁴ A license will be granted in a public tender published by the Authority.³⁵ Applicants must, among other requirements, be a corporation registered in Israel. The Law requires that the ability to direct the corporation's operation and at least twenty-six percent of all the means of its control should be with Israeli citizens and residents of Israel or by registered corporations in Israel.³⁶

The Authority may disqualify an applicant if, in its opinion, granting the applicant a license may be contrary to the public interest or constitute a risk to state security. An applicant may also be disqualified if, in the Authority's opinion, the applicant is a party or a representative of a party or of another body that may use the broadcasts to promote the special objectives of such a party or body.³⁷

B. Duty to Disclose Support by a Foreign Political Entity

Under the Duty of Disclosure [for a Body] Supported by a Foreign Political Entity 5771-2011 Law (Disclosure Law), foreign political entities (FPEs) are subject to disclosure requirements. FPEs consist of the Palestinian Authority and foreign countries and organizations.³⁸

The Disclosure requirements also apply to a corporation established by an FPEs law or one in which an FPE has more than half of a certain type of control in the corporation or which was

³³ Second Authority for TV and Radio, 5790-1990, SH 5770 No. 1304 p. 59, as amended.

³⁴ *Id.* § 3.

³⁵ *Id.* § 38.

³⁶ *Id.* § 41(a)(1).

³⁷ *Id.* § 42(a).

³⁸ Duty of Disclosure [for a Body] Supported by a Foreign Political Entity, 5771-2011, SH 5771 No. 2279, p. 362; Amutot [Non-Profit Organizations] Law, 5740-1980, SH 5740 No. 983 p. 210 (Amutot Law), both as amended; see also RUTH LEVUSH, *Israel: Disclosure Requirements for Organizations Funded by Foreign Political Entities*, GLOBAL LEGAL MONITOR (July 19, 2016), <http://loc.gov/law/foreign-news/article/israel-disclosure-requirements-for-organizations-funded-by-foreign-political-entities/>, archived at <https://perma.cc/AYA9-C2XW>.

appointed by the FPE to act on its behalf. A foreign corporation whose financial report for the last fiscal year indicates it was funded mainly by bodies specified above is also subject to disclosure requirements.³⁹

Any media company receiving funding directly from FPEs, or indirectly from *amutot* (nonprofit organizations) paid by FPEs, will be subject to quarterly financial reporting requirements as to the identity of donors, the amount and objectives of the donations, and the conditions for their receipt.⁴⁰ The information submitted to the registrar of *amutot* will be published on the website of the Ministry of Justice and by the funded body if it has a website, and in any other way selected by the Registrar. Additionally, an *amuta* that received a donation from a foreign entity for the purpose of funding a special advertising campaign must publish, as part of its campaign, the fact that it has received the donation.⁴¹

Violation of the disclosure requirements provided under the Disclosure Law carry a fine of ILS 29,200 (about US\$8,067).⁴²

³⁹ Disclosure Law § 1; Amutot Law § 36A(a).

⁴⁰ Disclosure Law § 2.

⁴¹ *Id.* §§ 4-5.

⁴² *Id.* § 5(2 (b)); Amutot Law § 64A(a)(9).

Japan

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SUMMARY The Constitution of Japan guarantees freedom of expression and the Supreme Court has stated that freedom of expression is particularly important in a democratic nation such as Japan. However, this freedom may be restricted for the sake of public welfare to a reasonable and unavoidably necessary extent.

The issue of interrupting general public speech has not yet been discussed in Japan, but disrupting campaign speeches is a criminal offense.

There is no mechanism to specifically control broadcasters working on behalf of foreign governments. All broadcasters are required by the Broadcasting Act to be politically fair and not distort the facts.

I. Protection of Freedom of Speech

The Constitution of Japan guarantees freedom of assembly and association as well as freedom of speech, the press, and all other forms of expression.¹ Freedom of expression relating to public matters is regarded “as a particularly important constitutional right in a democratic nation” because it is critical to form a majority opinion of the constituents.² However, the Constitution also states that people “shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.”³

While constitutionally protected, the Supreme Court has repeatedly stated that freedom of expression has limits and may be restricted. For example, the Court explained in dicta as follows:

[F]reedom of expression under Article 21, paragraph (1) of the Constitution is not guaranteed without restriction but it may be restricted for the sake of public welfare to a reasonable and unavoidably necessary extent. Whether or not a restriction on a particular type of freedom is acceptable within such extent should be determined by comparing various factors including the degree of necessity to restrict the freedom, the content and nature of the freedom to be restricted, and the manner and level of the specific restriction imposed on the freedom.⁴

¹ CONSTITUTION OF JAPAN, 1946, art. 21, para. 1.

² Sup. Ct., June 11, 1986, 1981 (O) 609, 40 MINSHU 872, summary in English available at http://www.courts.go.jp/app/hanrei_en/detail?id=82, archived at <https://perma.cc/6YEG-R8T3>.

³ *Id.* art. 12.

⁴ Sup. Ct., Mar. 6, 1993, 1986 (O) 1428, 47 MINSHU 3483, summary in English available at http://www.courts.go.jp/app/hanrei_en/detail?id=1434, archived at <https://perma.cc/2FT3-PLQ4>.

There are criminal provisions that punish acts of expression that harm another, such as defamation, insult, and intimidation.⁵ In addition, if an expression constitutes a tort, civil remedies are available.⁶

Other than interruptions of political campaign speeches, the interruption of public speech has not become an issue in Japan. The interruption of political campaign speeches is prohibited by the Public Office Election Act and is punishable by imprisonment for not more than four years or a fine of not more than one million yen (approximately US\$9,000).⁷ In 1948, the Supreme Court stated that, even if the campaign speech continued after the disruption, the person who disrupted the speech by heckling and arguing with and hitting a campaign staffer could be punished.⁸ The Court also stated that actions to make it impossible or difficult for other members of the audience to hear a speech could constitute actionable disruption of a campaign speech.⁹

When Prime Minister Shinzo Abe's campaign speech on behalf of a candidate in the Tokyo metropolitan government election was greatly interrupted by a group of people in July 2017, the problem of interruption of campaign speeches by heckling gained people's attention.¹⁰ At the following election campaign for the House of Representatives in October 2018, some attendees of a campaign speech voluntarily started to scold hecklers.¹¹ Some observers claim that hecklers infringe other attendees' right to know.¹²

II. Foreign Broadcasters Control

There is no mechanism to specifically control foreign broadcasters working on behalf of foreign governments. However, when any broadcaster edits a domestic or domestic and international broadcast program, it must comply with the following:

⁵ PENAL CODE, Act No. 45 of 1907, amended by Act No. 72 of 2017, arts. 222, 230 & 231.

⁶ CIVIL CODE, Act No. 89 of 1896, amended by Act No. 72 of 2018, arts. 709 & 723.

⁷ Public Office Election Act, Act No. 100 of 1950, amended by Act No. 75 of 2018, art. 225.

⁸ Sup. Ct., Dec. 24, 1948, 1948 (re) 1324, 2 KEISHU 1910, http://www.courts.go.jp/app/hanrei_jp/detail?id=55281, archived at <https://perma.cc/89CE-5LAA>.

⁹ *Id.*

¹⁰ Abe 'Immature' to Raise Voice against Protesting Voters in Akihabara: Expert, MAINICHI NEWSPAPER (July 4, 2017), <https://mainichi.jp/english/articles/20170704/p2a/00m/0na/016000c>, archived at <https://perma.cc/9F8L-REW6>.

¹¹ [安倍政権考] 街頭演説とヤジ [[Observing Abe Administration] Street Speeches and Hecklings], SANKEI (Oct. 31, 2017), <https://www.sankei.com/premium/photos/171031/prm1710310006-p2.html>, archived at <https://perma.cc/T8X6-MZ5S>.

¹² 演説にヤジ・抗議だめ？ メディアは首相演説をどう報じたか [Heckling & Demonstration at Campaign Speech, Not Okay? How Media Reported Prime Minister's Speech], ASAHI SHIMBUN (Oct. 18, 2017), <https://www.asahi.com/articles/DA3S13185064.html>, archived at <https://perma.cc/U59E-F8UN>.

- The program must not negatively influence public safety or good morals;
- The program must be politically fair;
- Reporting must not distort the facts; and
- The program must clarify the points at issue from as many angles as possible where there are conflicting opinions concerning an issue.¹³

Under the Radio Act, when a broadcaster who is a licensee of a radio station has violated the Radio Act or the Broadcast Act, the Minister of Internal Affairs and Communications may order suspension of operations of the radio station for a specified period not exceeding three months or impose a limitation on the permitted operating hours, frequencies, or antenna power for a specified period.¹⁴

¹³ 放送法 [Broadcasting Act], Act No. 132 of 1950, amended by Act No. 96 of 2014, art. 4, para. 1 (translation by author).

¹⁴ 電波法 [Radio Act], Act No. 131 of 1950, amended by Act No. 27 of 2017, art. 76, para. 1.

Netherlands

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SUMMARY Freedom of expression in the Netherlands is protected by article 7 of the Dutch Constitution and article 10 of the European Convention on Human Rights (ECHR). The scope of protection generally covers every type of expression from any individual, group, or type of media, notwithstanding its content, with the exception of expressions that negate the fundamental values of the ECHR or hate speech. Limitations of freedom of expression in the ECHR must be prescribed by law, be necessary in a democratic society, and be for one of the enumerated legitimate aims. Freedom of expression in the Dutch Constitution can only be limited by a formal law or regulation. In the context of heckling, relevant limitations in the Dutch Criminal Code are defamation, slander, and insult; *lèse-majesté*; and the prohibition against incitement to religious hatred and discrimination (“hate speech”).

The Dutch Media Act 2008 contains quotas for European and Dutch-Frisian programming of public and private broadcasters, thereby excluding or limiting the participation of foreign, non-European Union broadcasters. Under the ECHR, states are free to regulate broadcasting with a licensing system, but they may not impose any restriction on the means of reception.

I. Overview of Freedom of Expression

Freedom of expression in the Netherlands is protected by article 7 of the Dutch Constitution (*Grondwet*) and article 10 of the European Convention on Human Rights (ECHR).¹ The Netherlands follows the doctrine of monism, meaning that rights contained in international treaties like the ECHR are automatically incorporated into national law without the need for a domestic implementing law and can be invoked by everyone.² All the case law of the European Court of Human Rights (ECtHR) on a certain article of the ECHR must be taken into account by the Dutch judges when they apply the respective ECHR provision (incorporation theory), not

* At present there are no Law Library of Congress research staff members versed in Dutch. This report of the law of the Netherlands has been prepared by the author’s reliance on practiced legal research methods and on the basis of relevant legal resources, chiefly in English, currently available in the Law Library and online.

¹ *Grondwet* [Constitution], Aug. 24, 1815, STAATSBLAD VAN HET KONINKRIJK DER NEDERLANDEN [STB.] [OFFICIAL GAZETTE OF THE KINGDOM OF THE NETHERLANDS] 1815, No. 45, <https://wetten.overheid.nl/BWBR0001840/2018-12-21>, archived at <https://perma.cc/M7FU-84AW>, English translation available at <https://www.government.nl/binaries/government/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008/the-constitution-of-the-kingdom-of-the-netherlands-2008.pdf>, archived at <https://perma.cc/WQ43-BGCG>; European Convention on Human Rights [ECHR], Nov. 4, 1950, 213 U.N.T.S. 221, http://www.echr.coe.int/Documents/Convention_ENG.pdf, archived at <https://perma.cc/Z23F-RW5C>.

² Constitution, art. 93; HOGE RAAD [HR] [DUTCH SUPREME COURT], Mar. 3, 1919, NEDERLANDSE JURISPRUDENTIE [NJ] 1919, No. 371 (Grenstracstaat Aken).

only from cases that involved the Netherlands.³ It should also be noted that international law norms that are binding on everyone prevail over constitutional provisions and statutes.⁴ Freedom of expression is among those rights.⁵ Lastly, the legislature interprets the Constitution as the courts are prohibited from reviewing the constitutionality of acts of Parliament and treaties.⁶ Some authors have pointed out that, due to that system, referring to the fundamental rights codified in the Dutch Constitution has become obsolete, and that it makes more sense to refer to the rights codified in the ECHR.⁷

Article 7 of the Dutch Constitution states that

1. No one shall require prior permission to publish thoughts or opinions through the press, without prejudice to the responsibility of every person under the law.
2. Rules concerning radio and television shall be laid down by Act of Parliament. There shall be no prior supervision of the content of a radio or television broadcast.
3. No one shall be required to submit thoughts or opinions for prior approval in order to disseminate them by means other than those mentioned in the preceding paragraphs, without prejudice to the responsibility of every person under the law. The holding of performances open to persons younger than sixteen years of age may be regulated by Act of Parliament in order to protect good morals.
4. The preceding paragraphs do not apply to commercial advertising.

Article 10 of the ECHR reads

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

³ HR, Nov. 10, 1989, NJ 1990, No. 628.

⁴ Constitution, art. 94.

⁵ CONSTITUTIONAL LAW OF THE NETHERLANDS 149 (LEONARD BESSELINK ED., 2004).

⁶ *Id.* art. 120.

⁷ See, for example, Ingrid Leitjen, *A Hole in the Dike? Dignity, Rights and the Dutch Constitution*, in *THE DUTCH CONSTITUTION BEYOND 200 YEARS* 127, 136 (GIUSEPPE FRANCE FERRARI ET AL. EDS. 2018).

II. Scope of Protection

A. ECHR

Freedom of expression protects natural and legal persons.⁸ It encompasses the freedom to hold opinions, the freedom to receive information and ideas, and the freedom to impart information and ideas. In general, every type of expression from any individual, group, or type of media is included in the scope of protection, notwithstanding its content. The ECtHR has stated that the protection of article 10 is “applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”⁹ However, if an expression negates the fundamental values of the ECHR, such as a denial of the Holocaust or hate speech, it is excluded from the scope of protection.¹⁰

B. Dutch Constitution

The Dutch Constitution divides freedom of expression into several categories: freedom of the press, freedom of the media, and freedom of expression by other means. Freedom of expression by other means includes, among others, speeches, theater, music, film, video, CD and CD-ROM, and expressions or communication via the internet.¹¹

Dutch courts in their description of the scope of freedom of expression oftentimes use language similar or identical to the language used by the ECtHR. In a recent widely-reported case against the politician Geert Wilders for statements on race that were found to be hate speech, the Hague Court of First Instance in its preliminary remarks stated that “freedom of expression is one of the foundations of our democratic society . . . [which] is characterized by pluralism, tolerance and open-mindedness and therefore requires that there is room for the dissemination of information, ideas and views that shock, hurt or disturb the State or a large part of the population. However, restrictions may be imposed on the exercise of this freedom, including to protect the rights and freedoms of others.”¹² It further held that “even a democratically elected representative such as the defendant is not above the law . . . [a]nd for him too, freedom of expression is limited. When

⁸ *Autronic AG v. Switzerland*, App. No. 12726/87 (Eur. Ct. H.R. 1990), para. 47, <http://hudoc.echr.coe.int/eng?i=001-57630>, archived at <https://perma.cc/2FW6-CDKN>.

⁹ *Handyside v. the United Kingdom*, App. No.5493/72, (Eur. Ct. H.R. 1976), para. 49, <http://hudoc.echr.coe.int/eng?i=001-57499>, archived at <https://perma.cc/U5T9-3JUR>.

¹⁰ ECHR, art. 17; *Garaudy v. France*, App. No. 65831/01, (Eur. Ct. H.R. 2003), <http://hudoc.echr.coe.int/eng?i=001-44357>, archived at <https://perma.cc/TW29-EM37>, English extract available at <http://hudoc.echr.coe.int/eng?i=001-23829>, archived at <https://perma.cc/SZ39-K93R>; *Erbakan v. Turkey*, App. No.59405/00 (Eur. Ct. H.R. 2006), para. 56, <http://hudoc.echr.coe.int/eng?i=001-76232>, archived at <https://perma.cc/B3AF-5YVS>.

¹¹ D.E. Bunschoten, *Hoofdstuk 1. Article 7 [Chapter 1. Article 7]*, in *GRONDWET EN STATUUT : TEKST & COMMENTAAR [CONSTITUTION AND STATUTE. TEXT AND COMMENTARY]* 29, 31 (P.P.T. BOVEND'EERT ET AL. 2018).

¹² *Rechtbank Den Haag [The Hague Court of First Instance]*, Dec. 9, 2016, docket no. 09/837304-15, ECLI:NL:RBDHA:2016:15014, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:15014>, archived at <https://perma.cc/XDC7-U8A4>.

. . . he makes statements that go beyond that boundary, in the sense that his behavior constitutes a criminal offense . . . These are statements that have not been protected by freedom of expression from the outset.”¹³ Like the ECtHR, the Dutch courts generally exclude hate speech from the scope of protection of freedom of expression. The decision in the Wilders case has been appealed by the defendant.¹⁴ A ruling is expected in October 2019.¹⁵

III. Limits on Freedom of Expression

A. Dutch Constitution

The Dutch Constitution does not contain a general limitations clause; instead, every right sets out whether and how it can be limited, either by an act of parliament or pursuant to an act of parliament (delegated authority) and occasionally just for specific purposes, such as public safety or protection of morals. Freedom of expression in the Dutch Constitution can only be limited by an act of parliament (“without prejudice to the responsibility of every person under the law”). The Dutch Constitution varies the level of protection and possibilities to limit the different components of freedom of expression. Whereas the prohibition of censure for freedom of the press is absolute (paragraph 1), performances open to persons younger than sixteen years of age that fall under freedom of expression by other means can be regulated by act of Parliament in order to protect good morals (paragraph 3). The Dutch Criminal Code contains several provisions that limit freedom of expression and are relevant in the context of heckling, among them defamation, slander, and insult;¹⁶ *lèse-majesté*;¹⁷ and the prohibition against incitement to religious hatred and discrimination (“hate speech”).¹⁸

¹³ *Id.*

¹⁴ *Strafzaak Wilders. De stand van zaken [Criminal Case Wilders. State of Affairs]*, Het Rechtspraak Servicecentrum [Netherlands Council for the Judiciary], <https://www.rechtspraak.nl/Bekende-rechtszaken/Strafzaak-Wilders/Paginas/default.aspx> (last visited June 7, 2019), archived at <https://perma.cc/X4FK-9CPM>.

¹⁵ *Id.*

¹⁶ Wetboek van Strafrecht [Criminal Code], Mar. 3, 1881, Stb. 1881, No. 35, as amended, art. 261, <https://wetten.overheid.nl/BWBR0001854/2019-04-01>, unofficial English translation available at http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafrecht_ENG_PV.pdf (updated through Jan. 1, 2012), archived at <https://perma.cc/KZK3-LE8V>.

¹⁷ *Id.* arts.111-113, 118. It should be noted that there is a proposal pending in Parliament to abolish these provisions from the Criminal Code, *see* Initiatiefvoorstel-Verhoeven. Vervallen enkele bijzondere bepalingen over belediging staatshoofden en andere publieke personen en instellingen, Kamerstukken no. 34456, https://www.eerstekamer.nl/wetsvoorstel/34456_initiatiefvoorstel_verhoeven, archived at <https://perma.cc/GR4U-2HYF>.

¹⁸ *Id.* arts. 137c, 137d.

B. ECHR

Article 10 of the ECHR provides that any limitation of freedom of expression must be prescribed by law. Furthermore, the interference must be “necessary in a democratic society” and be aimed at certain enumerated objectives.¹⁹ The legitimate aims are “interests of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, the prevention of the disclosure of information received in confidence, or the maintenance of the authority and impartiality of the judiciary.” The term “law,” however, is much broader than in the Dutch Constitution and must not be a formal act of parliament; instead, it can refer to any rule of law that is accessible and foreseeable.²⁰

Relevant in the context of heckling is the prevention of disorder or crime. The ECtHR has held, however, that “ill feelings or even outrage, in the absence of intimidation, cannot represent a pressing social need [for limiting freedom of expression] . . . To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler’s veto.”²¹

IV. Availability of Mechanism to Control Foreign Broadcasters Working on Behalf of Foreign Governments

As mentioned, article 7, paragraph 2 of the Dutch Constitution provides that there is no prior censure of broadcasting and that the freedom of broadcasting may only be limited by an act of parliament. In 2008, the Dutch parliament passed the Media Act 2008 (*Mediawet 2008*), which sets out rules for public and commercial broadcasters, short-term broadcasters, and commercial on-demand media service providers.²² The Media Act 2008 replaced the outdated Media Act from 1987.²³ The Dutch Media Authority (*Commissariaat voor de Media*) supervises the media service providers; for example, it grants broadcasting licenses, monitors compliance with the rules of the Media Act 2008, and imposes penalties for non-compliance.²⁴ However, the Media Act also states that the government does not interfere with the form and content of the programming of the public and private broadcasters.²⁵

There are, however, rules in the Media Act 2008 that limit the participation of foreign broadcasters to a certain extent. The Media Act 2008 contains quotas for European and Dutch-Frisian

¹⁹ ECHR, art. 10, para. 2.

²⁰ Constitutional Law of the Netherlands, *supra* note 5, at 157.

²¹ *Fáber v. Hungary*, App. No.40721/08 (Eur. Ct. H.R. 2012), paras. 56 & 57, <http://hudoc.echr.coe.int/eng?i=001-112446>, archived at <https://perma.cc/N2TD-5ZHF>.

²² *Mediawet 2008* [Media Act 2008], Dec. 29, 2008, STB. 2008, No. 583, as amended, <https://wetten.overheid.nl/BWBR0025028/2018-05-30>, archived at <https://perma.cc/N6SC-8PC3>.

²³ *Mediawet* [Media Act], Apr. 21, 1987, STB. 1987, No. 249, <https://wetten.overheid.nl/BWBR0004149/2007-07-01>, archived at <https://perma.cc/DR4M-TPAT>.

²⁴ *Home*, COMMISSARIAAT VOOR DE MEDIA [DUTCH MEDIA AUTHORITY], <https://www.cvdm.nl/english/> (last visited June 4, 2019), archived at <https://perma.cc/3XA3-XB5W>.

²⁵ Media Act 2008, art. 2.88, para. 1; art. 3.5, para. 1.

programming of public and private broadcasters, thereby excluding foreign, non-European Union (EU) broadcasters. Fifty percent of the programming of public media corporations must consist of European works as defined in the EU Audiovisual Media Services Directive.²⁶ Another 50% must consist of Dutch-Frisian programming.²⁷ For private broadcasters, there is also a requirement that 50% of the programming consist of European works; however, the Dutch Media Authority can lower that percentage to 10% in special cases.²⁸ With regard to Dutch-Frisian programming, the Media Act 2008 requires a 40% quota, but the Dutch Media Authority may partially or fully exempt a private broadcaster from that requirement in special cases.²⁹ Special cases may include broadcasters that are focused on a specific group of people, for example foreigners.³⁰

Under the ECHR, as mentioned above, freedom of expression also covers the freedom to receive information. States are free to regulate broadcasting with a licensing system, but they may only exercise that power for technical purposes.³¹ The ECtHR has held that “any restriction imposed on the means [of reception] necessarily interferes with the right to receive and impart information.”³²

²⁶ *Id.* art. 2.115; Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive, art. 1, 2010 O.J. (L 95) 1, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0013&from=EN>, archived at <https://perma.cc/KR7V-HHX9>.

²⁷ Media Act 2008, art. 2.122, para. 1.

²⁸ *Id.* art. 3.20.

²⁹ *Id.* art. 3.24.

³⁰ Beleidsregel programmaquota 2019 [Policy Rule for Program Quota 2019], STAATSCOURANT VAN HET KONINKRIJK DER NEDERLANDEN [STCRT.] [GOVERNMENT GAZETTE] 2019, p. 10657, <https://wetten.overheid.nl/BWBR0041959/2019-02-28>, archived at <https://perma.cc/5TA5-BSJL>.

³¹ ECHR, art. 10, para. 1, sentence 3; *Groppera Radio AG and Others v. Switzerland*, App. No. 10890/8 (Eur.Ct.H.R. 1990), para. 61, <http://hudoc.echr.coe.int/eng?i=001-57623>, archived at <https://perma.cc/82CM-VML8>.

³² *Autronic AG v. Switzerland*, *supra* note 8, para. 47.

New Zealand

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SUMMARY The right to freedom of expression, as enshrined in the New Zealand Bill of Rights Act 1990, may be subject to reasonable limits, prescribed by law, that can be “demonstrably justified in a free and just society.” The courts do not have the ability to strike down legislative provisions that unduly limit the right to freedom of expression. Limitations on the right can be found in several statutes, with some of the provisions potentially relevant to situations involving “heckling” or to the broadcasting of foreign propaganda. These include certain offenses against public order in the Summary Offences Act 1981; provisions related to racist “hate speech” in the Human Rights Act 1993; standards and complaint processes established under the Broadcasting Act 1989; prohibitions on possessing or dealing with “objectionable” publications under the Films, Videos and Publications Classification Act 2003; and the availability of procedures to address harmful information posted online under the Harmful Digital Communications Act 2015. In addition, media entities and advertising are subject to complaint processes in accordance with established systems of self-regulation.

The issue of legal restrictions on “hate speech” has emerged in public debate related to various events over the past two years. The government is currently undertaking a review of existing provisions, including those in the Human Rights Act and the Harmful Digital Communications Act.

I. Right to Freedom of Expression under the New Zealand Bill of Rights Act 1990

The New Zealand Bill of Rights Act 1990 (NZBORA) is one of several statutes that form part of New Zealand’s constitution; the country does not have a single, codified constitutional document.¹ It applies to any acts done by the legislative, executive, or judicial branches of the New Zealand government, or “by any person or body in the performance of any public function, power, or duty” conferred or imposed on it by law.² Section 14 provides protection for “freedom of expression,” stating that “[e]veryone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind.”³

The rights contained in the NZBORA may be subject to “justified limitations.” The relevant provision states that “the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and

¹ See Kenneth Keith, *On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government* (1990, updated 2008 & 2017), <https://dpmc.govt.nz/our-business-units/cabinet-office/supporting-work-cabinet/cabinet-manual/introduction>, archived at <https://perma.cc/GE6A-MQYW>.

² New Zealand Bill of Rights Act 1990 s 3, <http://www.legislation.govt.nz/act/public/1990/0109/latest/whole.html>, archived at <https://perma.cc/X4PE-HA24>.

³ *Id.* s 14.

democratic society.”⁴ The legislation does not allow the courts to strike down or otherwise decide not to apply a provision of another law by reason only of its inconsistency with any provision in the NZBORA.⁵ However, the courts must, whenever possible, interpret any law in a manner that is consistent with the rights and freedoms contained in the NZBORA.⁶

When new legislation is introduced in the Parliament, the Attorney-General must “bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms” contained in the NZBORA.⁷

II. Legislative Limitations on the Right to Freedom of Expression

In addition to the civil defamation law⁸ and various criminal law provisions (e.g., provisions on threats and intimate visual recordings in the Crimes Act 1961⁹), the following legislative provisions contain limits on the right to freedom of expression in New Zealand, including potentially where “heckling” or broadcasting of foreign propaganda rise to the level of breaching the relevant provisions.

A. Summary Offences Act 1981

The Summary Offences Act 1981 contains several offenses under the heading “offences against public order,” including the following:

3 Disorderly behaviour

Every person is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding \$2,000 who, in or within view of any public place, behaves, or incites or encourages any person to behave, in a riotous, offensive, threatening, insulting, or disorderly manner that is likely in the circumstances to cause violence against persons or property to start or continue.

4 Offensive behaviour or language

- (1) Every person is liable to a fine not exceeding \$1,000 who,—
 - (a) In or within view of any public place, behaves in an offensive or disorderly manner; or
 - (b) In any public place, addresses any words to any person intending to threaten, alarm, insult, or offend that person; or
 - (c) In or within hearing of a public place,—

⁴ *Id.* s 5.

⁵ *Id.* s 4.

⁶ *Id.* s 6.

⁷ *Id.* s 7.

⁸ Defamation Act 1992, <http://www.legislation.govt.nz/act/public/1992/0105/latest/whole.html>, archived at <https://perma.cc/29UA-VXHU>.

⁹ Crimes Act 1961 ss 216G–216N, 306–308, <http://www.legislation.govt.nz/act/public/1961/0043/latest/whole.html>, archived at <https://perma.cc/BZ6T-WCAT>.

- (i) Uses any threatening or insulting words and is reckless whether any person is alarmed or insulted by those words; or
 - (ii) Addresses any indecent or obscene words to any person.
- (2) Every person is liable to a fine not exceeding \$500 who, in or within hearing of any public place, uses any indecent or obscene words.
- (3) In determining for the purposes of a prosecution under this section whether any words were indecent or obscene, the Court shall have regard to all the circumstances pertaining at the material time, including whether the defendant had reasonable grounds for believing that the person to whom the words were addressed, or any person by whom they might be overheard, would not be offended.
- (4) It is a defence in a prosecution under subsection (2) of this section if the defendant proves that he had reasonable grounds for believing that his words would not be overheard.
- (5) Nothing in this section shall apply with respect to any publication within the meaning of the Films, Videos, and Publications Classification Act 1993, whether the publication is objectionable within the meaning of that Act or not.¹⁰

Other offences in this part of the Act include “disorderly behaviour on private premises” and “disorderly assembly.”¹¹ A further offence, under the category of “offences resembling nuisance,” provides that “[e]very person is liable to a fine not exceeding \$200 who, in any public place, unreasonably disrupts any meeting, congregation, or audience.”¹²

In a 2011 decision, the Supreme Court of New Zealand overturned a woman’s conviction under section 4(1)(a) of the Summary Offences Act 1981 that had arisen from her burning a New Zealand flag at a protest during an annual ceremony to commemorate servicemen and servicewomen.¹³ A summary of the decision released by the Court states that

[t]he Court has held, unanimously, that offensive behaviour within the meaning of s 4(1)(a) must be behaviour which gives rise to a disturbance of public order. Although agreed that disturbance of public order is a necessary element of offensive behaviour under s 4(1)(a), the Judges differed as to the meaning of “offensive” behaviour. The majority (with the Chief Justice dissenting and Justice Anderson not entirely concurring on this point) considered that offensive behaviour must be capable of wounding feelings or arousing real anger, resentment, disgust or outrage, objectively assessed, provided that it is to an extent

¹⁰ Summary Offences Act 1981 ss 3 & 4, <http://www.legislation.govt.nz/act/public/1981/0113/latest/whole.html>, archived at <https://perma.cc/4DBB-WTEK>.

¹¹ *Id.* ss 5 & 5A.

¹² *Id.* s 37.

¹³ *Morse v Police* [2011] NZSC 45, <https://www.courtsofnz.govt.nz/cases/valerie-morse-v-the-queen/@images/fileDecision>, archived at <https://perma.cc/MZ2D-PV8R>.

which impacts on public order and is more than those subjected to it should have to tolerate.¹⁴

In his judgment, Tipping J. held that

[f]or me the word “offensive”, in context, means that to contravene s 4(1)(a) a person must behave in a manner that causes offence to those affected to such an extent, or in such a manner, as disturbs public order. It cannot, however, be right that the unreasonable reactions of those who are affected by the behaviour can be invoked as indicative of a threat to public order. Hence those affected by the behaviour must be prepared to tolerate some degree of offence on account of the rights and freedoms being exercised by those responsible for the behaviour. It is only when the behaviour of those charged under s 4(1)(a) causes greater offence than those affected can be expected to tolerate that an offence under s 4(1)(a) will have been committed. And it is always necessary for the prosecution to demonstrate a sufficient disturbance of public order.

In this context public order is sufficiently disturbed if the behaviour in question causes offence of such a kind or to such an extent that those affected are substantially inhibited in carrying out the purpose of their presence at the place where the impugned behaviour is taking place. Only if the effect of the behaviour reaches that level of interference with the activity in which those affected are engaged is it appropriate for the law to hold that their rights and interests should prevail over the right to freedom of expression of those whose behaviour is in contention. That is the appropriate touchstone.¹⁵

McGrath J. also considered that the rights of those affected should be taken into account, holding that

[i]t must be borne in mind that under s 5 of the Bill of Rights Act, all rights and freedoms may be made subject to such reasonable limits prescribed by law as can be justified in a free and democratic society. In order to be such a limit on freedom of expression, proscribed offensive behaviour must be confined to sufficiently serious and reprehensible interferences with rights of others. Such conduct is objectively intolerable. The court’s analysis must assess the impact of the exercise of the right in the circumstances, as well as the importance of other interests affected. Consideration must also be given to whether there are other methods of addressing the conflict with free speech rights than the offence provision in question or its ordinary meaning.

To this end, a balancing of the conflicting interests must be undertaken by the court as a basis for reaching a reasoned conclusion on whether the summary offence of offensive behaviour is a justified limitation on freedom of speech.¹⁶

¹⁴ Press Release, Supreme Court of New Zealand, *Valerie Morse v The Police* (SC 10/2010; [2011] NZSC 45: Press Summary (May 6, 2011), https://www.courtsofnz.govt.nz/cases/valerie-morse-v-the-queen/at_download/fileMediaNotes, archived at <https://perma.cc/678Z-W2P2>).

¹⁵ *Morse v Police* [2011] NZSC 45, paras. 71-72 (per Tipping J).

¹⁶ *Id.* paras. 106-107 (per McGrath J).

B. Human Rights Act 1993

Section 61 of the Human Rights Act 1993 makes it unlawful for any person

- (a) to publish or distribute written matter which is threatening, abusive, or insulting, or to broadcast by means of radio or television or other electronic communication words which are threatening, abusive, or insulting; or
- (b) to use in any public place as defined in section 2(1) of the Summary Offences Act 1981, or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting; or
- (c) to use in any place words which are threatening, abusive, or insulting if the person using the words knew or ought to have known that the words were reasonably likely to be published in a newspaper, magazine, or periodical or broadcast by means of radio or television, —
being matter or words likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.¹⁷

Racial and sexual harassment are also unlawful under the Act, including when the use of relevant language or other behavior takes place in the context of a person's "participation in fora for the exchange of ideas and information."¹⁸

The Act establishes dispute resolution procedures through which persons can make complaints about breaches of the above provisions and other provisions in part 2 of the Act, and also provides for civil proceedings arising from such complaints.¹⁹

In addition, the Act contains an offense of inciting racial disharmony, providing as follows:

- Every person commits an offence and is liable on conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding \$7,000 who, with intent to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons, —
- (a) publishes or distributes written matter which is threatening, abusive, or insulting, or broadcasts by means of radio or television words which are threatening, abusive, or insulting; or
 - (b) uses in any public place (as defined in section 2(1) of the Summary Offences Act 1981), or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting, —

¹⁷ Human Rights Act 1993 s 61, <http://www.legislation.govt.nz/act/public/1993/0082/63.0/whole.html>, archived at <https://perma.cc/22BU-FNCP>.

¹⁸ *Id.* ss 62(3)(k) & 63(2)(k).

¹⁹ *Id.* pt. 3.

being matter or words likely to excite hostility or ill-will against, or bring into contempt or ridicule, any such group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.²⁰

It is also an offense under the Act to refuse to allow any other person access to or use of any place or vehicle which members of the public are entitled or allowed to enter or use, where that refusal is a breach of any of the provisions related to unlawful discrimination under part 2 of the Act.²¹

Section 61 of the Act was considered by the High Court for the first time in February 2018 in the context of an appeal from a determination of the Human Rights Review Tribunal dismissing a complaint about two cartoons published in newspapers that featured negative depictions of Māori and Pasifika people. The High Court dismissed the appeal, agreeing with the Tribunal that section 61 “established a high threshold and was targeted to racist speech at the serious end of the spectrum.”²² It found that, while the parties agreed that the cartoons met the first part of the test in section 61 (in that they were “insulting”), they did not meet the second limb of the test (being likely to “excite hostility” against or “bring into contempt” a group of people based on their race or ethnicity).²³

C. Broadcasting Act 1989

The Broadcasting Act 1989 establishes the responsibility of every New Zealand television and radio broadcaster for “maintaining in its programmes and their presentation, standards that are consistent with” the following:

- (a) the observance of good taste and decency; and
- (b) the maintenance of law and order; and
- (c) the privacy of the individual; and
- (d) the principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interest; and
- (e) any approved code of broadcasting practice applying to the programmes.²⁴

The Act sets out principles and processes applicable to complaints about programs²⁵ and establishes the Broadcasting Standards Authority, an independent Crown entity with

²⁰ *Id.* s 131(1).

²¹ *Id.* s 134.

²² *Wall v Fairfax New Zealand Ltd* [2018] NZHC 104, paras. 42, 52, <http://www.nzlii.org/nz/cases/NZHC/2018/104.html>, archived at <https://perma.cc/V3TM-829K>.

²³ See Jessica Wotton, *Human Rights Case Summaries: New Zealand High Court Finds Insulting Cartoons Did Not Breach Hate Speech Legislation*, HUMAN RIGHTS LAW CENTRE (Feb. 12, 2018), <https://www.hrlc.org.au/human-rights-case-summaries/2018/6/1/new-zealand-high-court-finds-insulting-cartoons-did-not-breach-hate-speech-legislation>, archived at <https://perma.cc/4WM9-8ZTH>.

²⁴ Broadcasting Act 1989 s 4(1), <http://www.legislation.govt.nz/act/public/1989/0025/latest/whole.html>, archived at <https://perma.cc/QZ4F-DYRZ>.

²⁵ *Id.* pt. 2.

responsibility for receiving and determining complaints “from persons who are dissatisfied with the outcomes of complaints made to broadcasters,” among other functions.²⁶ Its other functions include encouraging the development by broadcasters of, or issuing its own, codes of broadcasting practice relating to

- (i) the protection of children:
- (ii) the portrayal of violence:
- (iii) fair and accurate programmes and procedures for correcting factual errors and redressing unfairness:
- (iv) safeguards against the portrayal of persons in programmes in a manner that encourages denigration of, or discrimination against, sections of the community on account of sex, race, age, disability, or occupational status or as a consequence of legitimate expression of religious, cultural, or political beliefs:
- (v) restrictions on the promotion of alcohol:
- (vi) presentation of appropriate warnings in respect of programmes, including programmes that have been classified as suitable only for particular audiences:
- (vii) the privacy of the individual:²⁷

The Broadcasting Standards Authority has issued codes of practice related to radio, free-to-air television, and pay television, as well as a code on election programs.²⁸ With respect to foreign channels, the Authority notes that

pay television broadcasters may offer channels over which they have no (or little) editorial control (for example, foreign pass-through channels). This limited control of the broadcaster will be an important consideration when assessing whether a programme has breached standards. However, it is expected that generally a pay television broadcaster will be mindful of the standards and exercise appropriate discretion and judgement when determining which channels should be allowed to pass through its platform.²⁹

D. Films, Videos and Publications Classification Act 1993

New Zealand’s censorship legislation, the Films, Videos and Publications Classification Act 1993, enables the Chief Censor and Deputy Chief Censor to classify a publication as unrestricted, restricted, or objectionable.³⁰ It is an offense under the Act to make, copy, import, supply or

²⁶ *Id.* s 21.

²⁷ *Id.* s 21(1)(e) & (f).

²⁸ *Broadcasting Standards*, BROADCASTING STANDARDS AUTHORITY, <https://bsa.govt.nz/broadcasting-standards/> (last visited May 16, 2019), archived at <https://perma.cc/K8D9-XVZ9>.

²⁹ BROADCASTING STANDARDS AUTHORITY, BROADCASTING STANDARDS IN NEW ZEALAND: CODEBOOK FOR RADIO, FREE-TO-AIR TELEVISION & PAY TELEVISION 8 (Apr. 2016), https://bsa.govt.nz/assets/Broadcasting-Standards/Broadcasting-Standards-Codebook/15bed03633/160304_12_BSA_CODE_OF_CONDUCT_BOOK_FINAL.pdf, archived at <https://perma.cc/92WZ-EJYR>.

³⁰ Films, Videos and Publication Act 1993 s 23, <http://www.legislation.govt.nz/act/public/1993/0094/latest/whole.html>, archived at <https://perma.cc/9E6T-7K6Q>. “Publication” is defined in section 2 of the Act as meaning

- (a) any film, book, sound recording, picture, newspaper, photograph, photographic negative, photographic plate, or photographic slide:

distribute, or display or exhibit an objectionable publication.³¹ It is also an offense to possess such a publication.³² A publication is “objectionable” if it “describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good.”³³

Recent examples of publications deemed objectionable under the Act are the video footage and “manifesto” produced by the man accused of attacking two mosques in Christchurch on March 15, 2019.³⁴

E. Harmful Digital Communications Act 2015

The purpose of the Harmful Digital Communications Act 2015 is to

- (a) deter, prevent, and mitigate harm caused to individuals by digital communications; and
- (b) provide victims of harmful digital communications with a quick and efficient means of redress.³⁵

The Act sets out a list of ten “communication principles” that must be taken into account by the agency designated to receive complaints under the Act and by the courts.³⁶ These entities must also act consistently with the rights and freedoms contained in the NZBORA.³⁷ In addition to complaint procedures, the Act establishes an ability for an affected individual or other relevant people to bring civil proceedings in relation to alleged harm resulting from a digital communication, and sets out the procedures applicable in such proceedings.³⁸ It also creates an offense of causing harm by posting a digital communication. The relevant provision states that

(b) any print or writing:

(c) a paper or other thing that has printed or impressed upon it, or otherwise shown upon it, 1 or more (or a combination of 1 or more) images, representations, signs, statements, or words:

(d) a thing (including, but not limited to, a disc, or an electronic or computer file) on which is recorded or stored information that, by the use of a computer or other electronic device, is capable of being reproduced or shown as 1 or more (or a combination of 1 or more) images, representations, signs, statements, or words

³¹ *Id.* ss 123, 124, 127 & 129.

³² *Id.* ss 131 & 131A.

³³ *Id.* s 3(1).

³⁴ See *Christchurch Attacks Classification Information*, OFFICE OF FILM & LITERATURE CLASSIFICATION (Mar. 23, 2019), <https://www.classificationoffice.govt.nz/news/latest-news/christchurch-attacks-press-releases/>, archived at <https://perma.cc/GU8D-D4T8>.

³⁵ Harmful Digital Communications Act 2015 s 3, <http://www.legislation.govt.nz/act/public/2015/0063/latest/whole.html>, archived at <https://perma.cc/9BJX-NXC5>.

³⁶ *Id.* s 6.

³⁷ *Id.* s 6(2)(b).

³⁸ *Id.* ss 11–20.

- (1) [a] person commits an offence if –
 - (a) the person posts a digital communication with the intention that it cause harm to a victim; and
 - (b) posting the communication would cause harm to an ordinary reasonable person in the position of the victim; and
 - (c) posting the communication causes harm to the victim.
- (2) In determining whether a post would cause harm, the court may take into account any factors it considers relevant, including –
 - (a) the extremity of the language used;
 - (b) the age and characteristics of the victim;
 - (c) whether the digital communication was anonymous;
 - (d) whether the digital communication was repeated;
 - (e) the extent of circulation of the digital communication;
 - (f) whether the digital communication is true or false;
 - (g) the context in which the digital communication appeared.
- (3) A person who commits an offence against this section is liable on conviction to, –
 - (a) in the case of a natural person, imprisonment for a term not exceeding 2 years or a fine not exceeding \$50,000;
 - (b) in the case of a body corporate, a fine not exceeding \$200,000.
- (4) In this section, **victim** means the individual who is the target of a posted digital communication.³⁹

III. Industry Self-Regulation

A. New Zealand Media Council

The New Zealand Media Council (formerly the New Zealand Press Council) is a self-regulatory, industry-funded body that provides an independent forum for resolving complaints related to “published material in newspapers, magazines and their websites, including audio and video streams, as well as to digital sites with news content, or blogs characterised by their new commentary.”⁴⁰ It has published a list of principles that complainants may use as the basis for their complaints, and lists the organizations and publications that have agreed to abide by these principles. These include organizations that provide video-on-demand services and broadcasters that provide online news content.⁴¹

³⁹ *Id.* s 22. For more information on this legislation, see KELLY BUCHANAN, ERASURE OF ONLINE INFORMATION: NEW ZEALAND (Law Library of Congress, Nov. 2017), <https://www.loc.gov/law/help/erasure-online-info/newzealand.php>; Kelly Buchanan, *New Zealand: Legislation Aimed at Preventing and Punishing Cyber Bullying Passed*, GLOBAL LEGAL MONITOR (July 6, 2015), <http://www.loc.gov/law/foreign-news/article/new-zealand-legislation-aimed-at-preventing-and-punishing-cyberbullying-passed/>.

⁴⁰ *Statement of Principles*, NEW ZEALAND MEDIA COUNCIL, <https://www.mediacouncil.org.nz/principles> (last visited May 16, 2019), archived at <https://perma.cc/5ABN-3PJJ>.

⁴¹ *Id.*

B. Advertising Standards Authority

The Advertising Standards Authority has established advertising codes⁴² and complaint processes regarding the content and placement of advertisements.⁴³ It works within the legal framework provided by various laws that restrict advertising in New Zealand, which provide “a legal backstop to deal with more serious advertising breaches.”⁴⁴ The three main objectives of the Authority are as follows:

1. To seek to maintain at all times and in all media a proper and generally acceptable standard of advertising and to ensure that advertising is not misleading or deceptive, either by statement or by implication.
2. To establish and promote an effective system of voluntary self-regulation in respect to advertising standards.
3. To establish and fund an Advertising Standards Complaints Board.⁴⁵

IV. Debate Regarding Regulation of “Hate Speech”

There is currently debate in New Zealand regarding the regulation of “hate speech” and the implications for freedom of expression.⁴⁶ This follows various events, including two “alt-right” figures from Canada being denied access to council-owned speaking venues in Auckland in 2018,⁴⁷ ongoing discussions about freedom of speech at universities,⁴⁸ as well as discussions

⁴² *Codes*, ADVERTISING STANDARDS AUTHORITY, <https://www.asa.co.nz/codes/codes/> (last visited May 16, 2019), archived at <https://perma.cc/8RBR-TPPY>.

⁴³ *Complaints*, ADVERTISING STANDARDS AUTHORITY, <https://www.asa.co.nz/complaints/> (last visited May 16, 2019), archived at <https://perma.cc/UV86-MT43>.

⁴⁴ *Our Jurisdiction*, ADVERTISING STANDARDS AUTHORITY, <https://www.asa.co.nz/about-us/our-jurisdiction/> (last visited May 16, 2019), archived at <https://perma.cc/2PB8-FJP5>.

⁴⁵ *About Us*, ADVERTISING STANDARDS AUTHORITY, <https://www.asa.co.nz/about-us/> (last visited May 20, 2019), archived at <https://perma.cc/6ZD7-48U4>.

⁴⁶ See Thomas Coughlan, *What Will Happen to Our Hate Speech Laws?*, NEWSROOM (Apr. 8, 2019), <https://www.newsroom.co.nz/2019/04/08/524142/what-will-happen-to-hate-speech-laws>, archived at <https://perma.cc/EAY9-EXZ3>; Graham Adams, *Religion the Flashpoint in Free Speech Debate*, NOTED (Apr. 9, 2019), <https://www.noted.co.nz/currently/politics/religion-the-flashpoint-in-free-speech-debate/>, archived at <https://perma.cc/9BCY-QU5S>; Moana Jackson, *Moana Jackson: No One’s Exercise of Free Speech Should Make Another Feel Less Free*, E-TANGATA (May 6, 2018), <https://e-tangata.co.nz/comment-and-analysis/moana-jackson-no-ones-exercise-of-free-speech-should-make-another-feel-less-free/>, archived at <https://perma.cc/KE89-JLMT>.

⁴⁷ See, e.g., Anna Bracewell-Worrall, *Auckland ‘Alt-Right’ Event Cancelled Due to ‘Health and Safety’*, NEWSHUB (July 6, 2018), <https://www.newshub.co.nz/home/politics/2018/07/group-urges-govt-to-refuse-entry-to-alt-right-speakers.html>, archived at <https://perma.cc/W6CG-2AE2>; *Auckland Council Faces Legal Action: Free Speech Campaign Raises \$50k After Ban of Far-Right Speakers*, NZ HERALD (July 10, 2018), https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12086540, archived at <https://perma.cc/L5ZL-WXMI>.

⁴⁸ See, e.g., *Analysis: NZ Politics Daily: Freedom of Speech v PC Culture*, NATIONAL BUSINESS REVIEW (Apr. 13, 2017), <https://www.nbr.co.nz/opinion/nz-politics-daily-freedom-speech-v-pc-culture>, archived at <https://perma.cc/PC5B-SLLZ>.

relating to white supremacy and Islamophobia following the Christchurch mosque attacks,⁴⁹ and homophobia in relation to comments made by a prominent sports player.⁵⁰

The Minister of Justice, Andrew Little, stated in March 2019 that the government would fast-track a review of existing legislative provisions related to hate speech, particularly those in the Human Rights Act and the Harmful Digital Communications Act, as well as sections of the Crimes Act.⁵¹ He also did not rule out the establishment of “hate crime” as a separate offense.⁵² There is currently no specific “hate crime” offense in New Zealand, but the Sentencing Act 2002 includes hostility towards groups of people “who have an enduring common characteristic” as an aggravating factor to be taken into account when sentencing offenders.⁵³

⁴⁹ Saziah Bashir, *Words Matter: It's Time to Rethink Hate Speech Laws*, RADIO NEW ZEALAND (Apr. 2, 2019), <https://www.rnz.co.nz/news/on-the-inside/386174/words-matter-it-s-time-to-rethink-hate-speech-laws>, archived at <https://perma.cc/EQD3-DQP2>; Scott Palmer, *Free Speech Debate Reignites After Christchurch Terror Attack*, NEWSHUB (Apr. 17, 2019), <https://www.newshub.co.nz/home/new-zealand/2019/04/free-speech-debate-reignites-after-christchurch-terror-attack.html>, archived at <https://perma.cc/KU37-QJVE>.

⁵⁰ See, e.g., *MPs David Seymour and Louisa Wall Clash Over Israel Folau Case During Hate Speech Debate*, 1NEWSNOW (May 20, 2019), <https://www.tvnz.co.nz/one-news/new-zealand/mps-david-seymour-and-louisa-wall-clash-over-israel-folau-case-during-hate-speech-debate>, archived at <https://perma.cc/CPW2-7FHP>; Dan Satherley, *Israel Folau Fallout: No Need for Stronger Hate Speech Laws – Paula Bennet*, NEWSHUB (Apr. 23, 2014), <https://www.newshub.co.nz/home/politics/2018/04/israel-folau-fallout-no-need-for-stronger-hate-speech-laws-paula-bennett.html>, archived at <https://perma.cc/E5F6-KUFX>.

⁵¹ Sam Hurley, *Concerns Raised Over Protection from Hate Speech in NZ's Legislation*, NZ HERALD (June 3, 2018), https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12062311, archived at <https://perma.cc/CM3C-53T7>.

⁵² Michelle Duff, *Criminalising Hate Speech: New Zealand Considers Policing Hateful Expression*, STUFF (Apr. 28, 2019), <https://www.stuff.co.nz/national/christchurch-shooting/112264302/criminalising-hate-speech-new-zealand-considers-policing-hateful-expression>, archived at <https://perma.cc/H3T4-GMVR>.

⁵³ Sentencing Act 2002 s 9(1)(h), <http://www.legislation.govt.nz/act/public/2002/0009/latest/whole.html>, archived at <https://perma.cc/Q8TT-KWVN>.

Sweden

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SUMMARY Sweden protects free speech in its Constitution. However, freedom of the press and freedom of expression may be limited by law. For example, Sweden criminalizes a number of behaviors aimed at groups and individuals, including hate speech (racial agitation), enticement, and defamation.

Disruption of certain public gatherings, such as public deliberations in the Swedish Parliament and religious ceremonies, is also criminalized. In addition, disorderly conduct aimed at aggravating others is criminalized.

Public speech (such as at town halls and demonstrations) may be limited by law. Demonstrations require a prior permit. Police may break up public speeches or other groupings of people if there is a risk to human life or of a disruption to traffic or the immediate surroundings.

All Swedish broadcasters must apply for a permit to broadcast in Sweden. Broadcaster licenses may be revoked and broadcasters may be fined for violating regulations applicable to them. While foreign media may operate in Sweden, Sweden does not oversee foreign broadcasters that broadcast from abroad to a Swedish audience. For instance, several channels are offered to Swedish viewers from the United Kingdom.

Foreign journalists may receive accreditation from individual institutions and events and may have the same accreditations revoked for misuse.

I. Scope of Protection of Freedom of Speech and the Right to Interrupt Public Speech

A. Constitutional Protection of Free Speech

Sweden protects freedom of speech in its Constitution (Instrument of Government).¹ Freedom of speech is further protected and regulated in two separate constitutional acts – the Freedom of the Press Act and the Fundamental Law on Freedom of Expression.² In addition, freedom of speech

¹ REGERINGSFORMEN [RF] [INSTRUMENT OF GOVERNMENT] (Svensk författningssamling (SFS) 1974:152), https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/kungorelse-1974152-om-beslutad-ny-regeringsform_sfs-1974-152, archived at <https://perma.cc/2L66-LWKR>.

² TRYCKFRIHETSGRUNDLAG [TF] [FREEDOM OF THE PRESS ACT] [CONSTITUTION] (SFS 1949:105), https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/tryckfrihetsforordning-1949105_sfs-1949-105, archived at <https://perma.cc/63C5-89AU>; YTTRANDEFRIHETSGRUNDLAGEN [YGL] [FUNDAMENTAL LAW ON FREEDOM OF EXPRESSION] (SFS 1991:1469), https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/yttrandefrihetsgrundlag-19911469_sfs-1991-1469, archived at <https://perma.cc/GB6Q-DLKC>.

is protected in the European Convention on Human Rights.³ Sweden introduced its first freedom of the press legislation in 1766.⁴ The document was adopted by Royal acclamation, and removed the need for publishers to attain preapproval from the King prior to publication.⁵ A special Fundamental Law on Freedom of Expression covering non-print media was adopted in 1991.⁶

While Swedish law generally protects freedom of expression, there are limits that may be imposed. For example, the Freedom of the Press Act allows the legislature to regulate press freedom, such as by adopting laws that limit the use of advertisements and criminalize child pornography.⁷

B. Civil Ordinance Rules and Use of Freedom of Speech at Public Gatherings

Peace and order in public places is regulated in the Swedish Civil Ordinance Act.⁸ The Civil Ordinance Act applies to public gatherings and seeks to guarantee the safety and security of those present.⁹ Public gatherings may not be held in Sweden without a prior permit.¹⁰ In addition, certain gatherings may be prohibited, either based on the gathering's geographical location or content.¹¹ Public gatherings may be dissolved if they are disruptive.¹² Previous disruptions at similar events may also be a reason to deny the issuance of a permit for a public event.¹³

³ European Convention on Human Rights [ECHR], Nov. 4, 1950, 213 U.N.T.S. 221, http://www.echr.coe.int/Documents/Convention_ENG.pdf, archived at <https://perma.cc/Y584-N9KT>.

⁴ Kongl. Maj:ts Nådige Förordning, Angående Skrif- och Tryck-friheten. Gifwen Stockholm i Råd-Cammaren then 2. December 1766 [Royal Acclamation Regarding the Freedom of the Press. Delivered in Stockholm in the Council on December 2, 1766], available at <http://weburn.kb.se/eod/2840/NLS12A002840.pdf>.

⁵ *Id.* 1 §. For more information on the 1766 law see Elin Hofverberg, *250 Years of Press Freedom in Sweden*, IN CUSTODIA LEGIS (Dec. 19, 2016), <https://blogs.loc.gov/law/2016/12/250-years-of-press-freedom-in-sweden/>.

⁶ For legislative background see Proposition [Prop.] 1990/91:64 om yttrandefrihetsgrundlag m.m. [on Freedom of Expression etc.], <https://data.riksdagen.se/fil/0D68E9CF-62E1-4DD8-A184-6ECB103081D0>, archived at <https://perma.cc/X878-7W3X>.

⁷ 1 kap. 12-14 §§ TF.

⁸ ORDNINGSLAG [CIVIL ORDINANCE ACT] (SFS 1993:1617), https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/ordningslag-19931617_sfs-1993-1617, archived at <https://perma.cc/SP3Z-ETHK>.

⁹ *Id.* 1 kap. 1 §.

¹⁰ *Id.* 2 kap. 4 §.

¹¹ *Id.* 2 kap. 14-15 §§. For example, pornographic displays (content), or at military locations (geographical locations).

¹² *Id.* 2 kap. 23 §.

¹³ *Id.* 2 kap. 25 §.

1. *Application and Permit Requirement*

Public gatherings may not be held in Sweden without a prior permit.¹⁴ Applications must be made to the Swedish police.¹⁵ The Police may request that the applicant provide additional information with regard to the event before issuing a permit.¹⁶

2. *Police Rights to Break Up Public Speech Events*

The police may dissolve gatherings held without a permit¹⁷ or that are disruptive.¹⁸ The fact that a specific gathering was previously disruptive may be a reason to refuse a permit for a public event.¹⁹ In addition, a public gathering to perform an artistic production or a public event may be dissolved “if the gathering [in itself, or by] the use of sound or in any other way entails considerable disruption of the public order in its immediate surroundings. This does not, however, apply when the gathering is conducted in accordance with an issued permit.”²⁰ Public gatherings may only be dissolved if a less invasive measure is found ineffective.²¹

C. Criminalized Speech

1. *Disruption of Public Deliberation or Public Gatherings*

Noise disruption (such as heckling) at a “religious service, marital ceremony, funeral, court proceeding, or other state or municipal meeting, or public deliberation” is a separate crime in Sweden.²² An example of a disruption of a public deliberation includes hecklers at the Swedish Parliament. Such disruptions are punishable with a fine (*böter*) or up to six months of imprisonment.²³

2. *Disorderly Conduct*

In addition, disorderly conduct (*förargelseväckande beteende*) intended to aggravate (*förarga*) people is also criminalized, and punishable with monetary fines.²⁴ The disorderly conduct provision

¹⁴ *Id.* 2 kap. 4 §.

¹⁵ 2 kap. 6 §. Public gatherings include demonstrations, meetings with a public or political agenda, religious meetings, lectures, cinematic events, concerts, or events where artistic performances are displayed, and all other meetings where the freedom of assembly is exercised. *Id.* 2 kap. 1 §.

¹⁶ *Id.* 2 kap. 9 §.

¹⁷ *Id.* 2 kap. 22 §.

¹⁸ *Id.* 2 kap. 23 §.

¹⁹ *Id.* 2 kap. 25 §.

²⁰ *Id.* 2 kap. 23 § 2 st. (all translations by author).

²¹ 2 kap. 21 § RF.

²² 16 kap. 4 § BrB.

²³ *Id.*

²⁴ *Id.* 16 kap. 16 § (in Swedish, *Förargelseväckande beteende*).

explicitly includes noise disruptions.²⁵ To be punishable the person must “make noise in a public place or behave in public in a way that is intended to arouse public anger.”²⁶

Disorderly conduct may include expressive conduct like waving a flag with offensive symbols.²⁷ The crime has a long history and was included in the Criminal Code as early as 1734.²⁸ As recently as the early 1900s it was also used to sentence persons who voiced opinions that were controversial.²⁹ This changed when an explicit prohibition on punishing opinions in the 1940s was included in the legislative history to the amendment of the Penal Code, where the legislators explained that it was the *behavior* not the *content* of what was said that should be punished.³⁰ Examples of behavior that has led to convictions include a person who sang and played music in his private home with the windows open in order to disrupt a political meeting that was being held outside his property.³¹ Thus, heckling a political group is likely to fall within the constraints of disorderly conduct even if it does not specifically meet the requirements to be deemed disruption of public deliberations and gatherings mentioned above.

3. Racial Agitation

Sweden has criminalized “hate speech” when it amounts to “racial agitation” (*hets mot folkgrupp*), defined as “a statement or other message that is spread and disseminated that threatens, or expresses condescension against, an ethnic group or another group of persons based on race, skin color, national or ethnic origin, faith, sexual orientation, gender, or gender identity or expression.”³² The provision only protects the enumerated groups of people, and publication of untrue statements in itself is not considered hate speech. It was first introduced in a government bill in 1944 as a response to racial agitation against Jews.³³

²⁵ *Id.*

²⁶ *Id.*

²⁷ Hovrätten för Övre Norrland [Appeals Court for Northern Norrland] RH 1997:24, available at <https://lagen.nu/dom/rh/1997:24>, archived at <https://perma.cc/Y3CD-R2WF>; Nytt Juridiskt Arkiv [Supreme Court Reporter] [NJA] 1981:1010, available at <https://lagen.nu/dom/nja/1981s1010>, archived at <https://perma.cc/759B-KCFG>. See also Thomas Bull & Anders Heiborn, *Förargelseväckande yttrandefrihet?*, SVJT 1999/568, <https://svjt.se/svjt/1999/568>, archived at <https://perma.cc/8SAE-WCKR>.

²⁸ Bull & Heiborn, *supra* note 27.

²⁹ *Id.* at 568.

³⁰ *Id.* at 569; Statens Offentliga Utredningar [SOU] [Government Official Report] 1944:69, Lagstiftning om brott mot staten och allmänheten [Crimes against the State and the Public] at 235 f, available at <https://lagen.nu/sou/1944:69?attachment=index.pdf&repo=soukb&dir=downloaded>.

³¹ NJA 1935 s. 409 (discussed in SOU 1944:69 at 235).

³² 16 kap. 8 § BrB.

³³ SOU 1944:69, *supra* note 30, at 228.

4. *Enticement*

Sweden criminalizes enticement (*Uppvoigling*), defined as “orally in front of a public gathering, [or by other means in writing], [trying] to entice others to commit a criminal act, betray a citizenship duty, or disobey a government agency.”³⁴

5. *Offenses against Individuals*

In addition to the specific crimes mentioned above, which target behavior against groups of people, crimes directed at individuals, such as threats (*hot*),³⁵ defamation (*förtal*),³⁶ and insults (*förolämpning*)³⁷ are also criminalized.

The truthfulness or accuracy of an insulting or defamatory statement is generally not a legitimate defense against prosecution for such crimes under Swedish law.³⁸ Thus, if a truthful statement (e.g., person A has been convicted of rape) is spread with the intent of causing that person harm, or harming his or her standing in society, it is still defamation.³⁹ However, statements made by the press without the intent to cause another person harm may be excused because they are true if the publication (for instance, of the person’s name) was necessary.⁴⁰ These crimes are punishable with a fine or imprisonment of up to six months for insults, and two years for defamatory statements.⁴¹ These crimes can also be committed against a deceased person, provided that it is hurtful to his or her family, or because of the short period of the time that has elapsed since the person’s death.⁴²

II. Control of Foreign Broadcasters Working on Behalf of Foreign Governments

A. Regulation of Broadcasts from and to Sweden

1. *Swedish Broadcasters*

Swedish TV and radio broadcasters are subject to different rules compared to the printed press (including information published on the internet). Whereas the printed press is governed by the Freedom of the Press Act, broadcasters are covered by the Fundamental Law on Freedom of Expression.⁴³ According to the Fundamental Law every Swedish citizen has the right to broadcast

³⁴ 16 kap. 5 § BrB.

³⁵ 7 kap. 2 § TF; 4 kap. 5 § BrB.

³⁶ 7 kap. 3 § TF; 5 kap. 1 § BrB.

³⁷ 7 kap. 4 § TF; 5 kap. 3 § BrB.

³⁸ 5 kap. 1. § BrB.

³⁹ 5 kap. 3 § BrB.

⁴⁰ 7 kap. 3 § 3 st TF.

⁴¹ 7 kap. 2-4 §§ TF; 5 kap. 1-3 §§ BrB.

⁴² 7 kap. 3 § 2 st. TF; 5 kap. 4 § BrB.

⁴³ 1 kap. 1 § YGL.

and that right may only be limited as further provided for in the Law.⁴⁴ The Constitution further provides that such limits may not go beyond what is necessary in a democratic society, and “may never exceed what is necessary in relation to the purpose” nor “extend so far that it constitutes a threat to the free formation of opinion (*åsiktsbildningen*),” nor may it be “based on political, religious, cultural or other beliefs.”⁴⁵

Radio and TV broadcasts are further regulated in the Radio and TV Act.⁴⁶ All broadcasters in Sweden must be registered⁴⁷ and those who do not register are subject to a fine.⁴⁸ The Swedish Government must approve any sound recording (radio) that wants to be sent abroad.⁴⁹

Compliance with the Radio and TV Act is overseen by the Swedish Press and Broadcasting Authority (Myndigheten för Press, TV, och Radio, MPTR).⁵⁰ The MPTR does not regulate broadcasts made from abroad. The current allocation of permits to broadcast in Sweden using the Swedish ground network will expire on March 31, 2020; new application procedures are expected to be announced in the fall of 2019.⁵¹

2. EU Broadcasters

In accordance with the EU Audiovisual Media Services Directive,⁵² broadcasters located in another EU Member State may broadcast programs to Swedish viewers.⁵³ Broadcasts made from another EU Member State are not covered by the Swedish regulations on broadcasting, but the

⁴⁴ 1 kap. 1 § YGL.

⁴⁵ 2 kap. 21 § RF.

⁴⁶ RADIO- OCH TV-LAG [RADIO AND TV ACT] (SFS 2010:696), https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/radio--och-tv-lag-2010696_sfs-2010-696, archived at <https://perma.cc/K2EK-7LVY>.

⁴⁷ 1 kap 2 § RADIO-OCH TV-LAGEN.

⁴⁸ *Id.* 17 kap. 3 §.

⁴⁹ *Id.* 11 kap. 1 §.

⁵⁰ *Id.* 16 kap. 3 §.

⁵¹ MYNDIGHETEN FÖR PRESS RADIO OCH TV (MPRT), MEDIEUTVECKLING MEDIEPOLITIK [MEDIA DEVELOPMENT MEDIA POLITICS] (2019), <https://www.mprt.se/Documents/Publikationer/Medieutveckling/Mediepolitik/Mediepolitik%202019.pdf>, archived at <https://perma.cc/DJM4-H678>.

⁵² Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services (Audiovisual Media Services [AMS] Directive), 2010 O.J. (L 95) 1, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0013&from=EN>, archived at <https://perma.cc/S97F-TT9X>. Sweden is currently reviewing implementation of the amendments to the Audiovisual Media Services Directive. Kommittédirektiv [Committee Directive] 2018:55, Genomförande av ändringar i AV-direktivet och översyn av radio- och tv-lagen i vissa andra delar [Implementation of the Amendments to the AMS Directive and Review of the Radio-and TV Act in Certain Other Respects], https://www.riksdagen.se/sv/dokument-lagar/dokument/kommittedirektiv/genomforande-av-andringar-i-av-direktivet-och_H6B155, archived at <https://perma.cc/7GOY-M3Z6>.

⁵³ *Id.* (transposed into Swedish law through 1 kap. 2 § RADIO- OCH TV-LAGEN).

laws of the country in which the broadcast originated.⁵⁴ There are in total six channels in Sweden that are broadcast from abroad (all from the UK), and any complaints against these channels should therefore be lodged with the UK authority Ofcom (Office of Communication).⁵⁵

In addition to EU broadcasts mentioned above, other international broadcasts may be viewed in Sweden using satellite services.⁵⁶ The content of these shows is likewise not regulated by the Swedish authorities.⁵⁷ Within the EU framework Sweden has been pushing for a change in the regulation that would give it the right to regulate and oversee programs that are sent from another EU country but are meant for a Swedish audience (for example, when broadcast in the Swedish language).⁵⁸ However, under current legislation, programs that are filmed in Sweden and then sent to another EU country for broadcast from that EU country are not considered broadcast from Sweden.⁵⁹ Thus, the determinative factor is not the location where a program is filmed, but “where the regulation of the broadcast” is conducted.⁶⁰ For programs broadcast from abroad, the regulation of the broadcast occurs where the editorial decisions regarding the programs are made, as well as where the broadcaster is headquartered.⁶¹

3. European Content Quotas

The Swedish Radio and TV Act requires at least 50% of the content broadcast in Sweden to be produced in Europe.⁶² In addition, at least 10% of the content should be self-produced by the broadcaster in Europe.⁶³ Moreover, a significant part of the programs broadcast should be produced in the Swedish language.⁶⁴ “Significant part” is not defined.

⁵⁴ 1 kap. 3 & 5 §§ RADIO- OCH TV-LAGEN.

⁵⁵ *Vad kan anmälas*, MPRT (Nov. 14, 2018), <https://www.mpri.se/att-anmala/anmal-program/vad-kan-anmalas/>, archived at <https://perma.cc/5ASD-SWP2>; see also Prop. 2013/14:47 Några ändringar på tryck-och yttrandefrihetens område [Some Amendments to the Press Freedoms and Fundamental Freedoms of Expression], <https://www.regeringen.se/49bb7d/contentassets/9be090884fa4439f87ef5ea956452b5e/nagra-andringar-pa-tryck--och-yttrandefrihetens-omrade-prop.-20131447>, archived at <https://perma.cc/S89Q-F55V>. For more information on regulation of UK broadcasters see the UK survey contained in this report.

⁵⁶ MPRT, *supra* note 56.

⁵⁷ *Id.*

⁵⁸ SOU 2006:92 Ett nytt grundlagsskydd för tryck- och yttrandefriheten? [A New Constitutional Protection for Press Freedoms and the Freedom of Expression?] at 82, <https://www.regeringen.se/49bb90/contentassets/e577d9a2fca749df9f03deda75b5b0f2/ett-nytt-grundlagsskydd-for-tryck--och-yttrandefriheten-del-1-av-2-sou-200696>, archived at <https://perma.cc/L72M-CPAG>.

⁵⁹ NJA 2002 s. 314, <https://lagen.nu/dom/nja/2002s314>, archived at <https://perma.cc/X2GK-D4AJ>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² 5 kap. 7 § RADIO- OCH TV-LAGEN.

⁶³ *Id.*

⁶⁴ *Id.*

4. List of Foreign Journalists Operating in Sweden

Sweden keeps a list of foreign journalists and broadcasters that work in Sweden.⁶⁵ To be listed a journalist must provide contact information and work samples to his or her publisher.⁶⁶

5. Issuance of Press Credentials in Sweden

Individual events or public institutions may have special rules for media accreditation. For example the Stockholmsmässan (Sweden's largest exhibition center) requires that foreign journalists must have international press credentials, present a current letter or certificate from their employer or principal, and provide three articles or posts on the relevant topic from the prior year to be granted press access to their event.⁶⁷ Also, the Swedish Parliament requires press credentials to be applied for directly with the Parliament.⁶⁸ Only persons who are devoting at least 50% of their full-time employment to journalism may be issued credentials.⁶⁹

Press credentials may be revoked if they were obtained using false or misleading information, the journalistic assignment has ended, the journalist has not complied with Swedish rules and regulations, or other extraordinary circumstances warrant revocation.⁷⁰

6. Fines against Broadcasters

Broadcasters who violate the Radio and TV Act may be criminally fined (*böter*), imprisoned, or receive monetary sanctions (*särskilda avgifter*).⁷¹ Fines and prison sentences may be imposed for either broadcasting without a permit or not meeting the registration requirement.⁷² Monetary sanctions are issued for other violations of the Radio and TV Act – for instance, violating the rules on advertisements for public media or on broadcasting sponsored content outside of advertisements for private broadcasters.⁷³ In addition, programs that are broadcast via satellite in Sweden may be sanctioned in certain cases, including when they contain sponsored,

⁶⁵ UTRIKESDEPARTEMENTET, URIKESKORRESPONDENTER VERKSAMMA I SVERIGE (2018), <https://www.regeringen.se/4a6c92/contentassets/448fc913587c40cda4a584c7a7e0e97d/utrikeskorrespondenter-verksamma-i-sverige.pdf>, archived at <https://perma.cc/LJ6J-YKT5>.

⁶⁶ *Id.* at 2.

⁶⁷ Press Service, STOCKHOLMSMÄSSAN, https://www.stockholmsmassan.se/press/press-services?sc_lang=en#press-accreditation (last visited June 10, 2019), archived at <https://perma.cc/RW3R-SYRJ>.

⁶⁸ Accreditation, SVERIGES RIKSDAG (May 29, 2019), <https://www.riksdagen.se/en/media/accreditation/>, archived at <https://perma.cc/AJR6-FK5M>.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ 17 kap. 1, 3, 5 §§ RADIO- OCH TV-LAGEN.

⁷² *Id.* 17 kap. 1 & 3 §§.

⁷³ *Id.* 17 kap. 5 §.

pornographic, or violent content.⁷⁴ In these cases it is the satellite entrepreneur or its principal that is sanctioned.⁷⁵ All fines and sanctions are paid to the Swedish state.⁷⁶

7. *Revocation of Broadcasting Permits*

The MPRT or the Swedish courts may revoke permits for gross violations of the Radio and TV Act.⁷⁷ The Swedish Parliamentary Ombudsman (Justitieombudsmannen, JO) may request revocation of a broadcaster's permit by lodging a complaint in Swedish court for violations with regard to the content of the broadcast program—for instance, in cases of violations of the prohibition and limitation on pornography and violence applicable to all broadcasters, or for bias or undemocratic content broadcast by public media.⁷⁸ The MPRT determines revocations based on all other violations.⁷⁹

B. Threat from Foreign Media

Sweden recognizes that foreign media has the potential to become a threat to its national security.⁸⁰ For example, Sweden's Defense Policy Strategy notes with concern that Sweden, as well as its neighbor countries, are already subject to information campaigns from individuals and foreign sources, with the goal of influencing its security policy.⁸¹

⁷⁴ *Id.* 17 kap. 14 §.

⁷⁵ *Id.* 17 kap. 14 § 2 st.

⁷⁶ *Id.* 17 kap. 5 § 3 st.

⁷⁷ *Id.* 18 kap. 2 § and 19 kap. 1 §.

⁷⁸ *Id.* 19 kap. 1 §.

⁷⁹ *Id.*

⁸⁰ Prop. 2014/2015:109 Försvarspolitisk inriktning—Sveriges försvar 2016–2020 [Defense Policy Strategy 2016–2020] at 25, 40, and 41, <https://data.riksdagen.se/fil/D7F6A914-0016-4DA6-9C1D-7FA559F67F17>, archived at <https://perma.cc/B8MK-ALZZ>.

⁸¹ *Id.* at 40.

Ukraine

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SUMMARY Article 34 of the Constitution of Ukraine guarantees freedom of speech and expression. The main international instruments to which Ukraine is signatory guaranteeing freedom of speech and expression are the European Convention on Human Rights and the International Covenant on Civil and Political Rights. Limitations of freedom of speech and expression are found in the Constitution, Civil Code, Criminal Code, and the Law on Recognizing Ukrainian as a State Language.

The Euromaidan Revolution in 2014 and conflict with the Russian Federation impacted Ukraine's legal and regulatory framework for freedom of speech and freedom of expression. The Russian Federation and Ukraine have been engaged in information warfare. In order to protect its information security, Ukraine adopted several laws aimed at countering foreign interference in broadcasting and securing the information sovereignty of Ukraine. The Ministry of Information Policy (created in 2014) is the main government body responsible for policymaking and implementation in the field of information sovereignty.

I. Overview

The Euromaidan Revolution in 2014 and subsequent conflict with the Russian Federation over its annexation of Crimea and support of the separatists in the Eastern regions of Ukraine impacted Ukraine's legal and regulatory framework for freedom of speech and freedom of expression. Hybrid information warfare between the two countries resulted in Ukraine's adoption of legislation aimed at protecting Ukraine's information security and guarding its information dissemination space from the outside influences.¹

These laws, which are discussed in more detail below, are as follows:

- Law of Ukraine on Amending Certain Laws of Ukraine Concerning Restricted Access of Anti-Ukrainian Content to the Ukrainian Market for Foreign Printed Products.²

¹ Michael Kofman & Matthew Rojanski, *A Closer Look at Russia's "Hybrid War,"* KENNAN CABLE, WILSON CENTER, (Apr. 2015), <https://www.files.ethz.ch/isn/190090/5-KENNAN%20CABLE-ROJANSKY%20KOFMAN.pdf>, archived at <https://perma.cc/F4XN-7AGE>.

² Law of Ukraine on Amending Certain Laws of Ukraine Concerning Restricted Access of Anti-Ukrainian Content to the Ukrainian Market for Foreign Printed Products, 2016, <https://zakon.rada.gov.ua/laws/show/1780-19>, archived at <https://perma.cc/5GRV-TJ8Z>.

- Law of Ukraine on Amending Some Laws of Ukraine on the Protection of the Information Television and Radio Broadcasting of Ukraine.³
- Law of Ukraine on Amending Article 15-1 of the Law of Ukraine “On Cinematography.”⁴

Enforcement of these laws faced criticism, as they are viewed by nongovernmental organizations as imposing restrictions on freedom of expression and speech.⁵

Ukraine ranks 102nd in the 2019 World Press Freedom Index, generated by Reporters Without Borders.⁶ According to human rights organizations, 235 cases of violations of freedom of speech were reported in nonoccupied territories of Ukraine in 2018.⁷ The majority of these cases (175) were physical attacks against journalists, which remains the main challenge in the area of freedom of speech.⁸

Censorship and self-censorship pose another major constraint on freedom of speech and press. The Law on Transparency of Ownership of Mass Media, adopted in 2015, mandates disclosure of information about end-beneficiary owners (controllers), and in their absence - about all owners and participants of the broadcasting organization or service provider.”⁹ Enforcement of this law remains weak, as documented by observers.¹⁰ According to a 2018 State Department report, “privately owned media, the most successful of which is owned by wealthy and influential oligarchs, often presents readers and viewers with a ‘biased pluralism,’ representing the views of their owners, favorable coverage of their allies, and criticism of political and business rivals.”¹¹ A

³ Law of Ukraine on Amending Some Laws of Ukraine on the Protection of the Information Television and Radio Broadcasting of Ukraine, 2015, <https://zakon.rada.gov.ua/laws/show/159-19?lang=en>, archived at <https://perma.cc/2DPM-CLCC>.

⁴ Law of Ukraine on Amending Article 15-1 of the Law of Ukraine “On Cinematography”, 2019, <https://zakon.rada.gov.ua/laws/show/1046-viii>, archived at <https://perma.cc/WS6K-4BPT>.

⁵ USPISHNA VARTA (UKRAINIAN HUMAN RIGHTS PLATFORM), THE RIGHT TO FREEDOM OF SPEECH AND OPINION IN UKRAINE: THREATS AND OPPORTUNITIES (Sept. 11, 2018) (report prepared for the Organization for Security and Cooperation in Europe), <https://www.osce.org/odihr/393431?download=true>, archived at <https://perma.cc/L6ML-8F9K>.

⁶ 2019 World Press Freedom Index, REPORTERS WITHOUT BORDERS, <https://rsf.org/en/ranking>, archived at <https://perma.cc/V3RS-L829>.

⁷ 235 Violations of Freedom of Press Were Registered in Ukraine in 2018 – IMI Research, INSTITUTE OF MASS INFORMATION (Jan. 22, 2019), <https://imi.org.ua/en/monitorings/235-violations-of-freedom-of-press-were-registered-in-ukraine-in-2018-imi-research/>, archived at <https://perma.cc/CM38-8N69>.

⁸ *Id.*

⁹ Law on Amending Certain Laws of Ukraine on Transparency of Ownership of the Mass Media and Implementation of the Principles of State Policy in the Sphere of Television and Radio Broadcasting, 2015, <https://zakon4.rada.gov.ua/laws/show/674-viii>, archived at <https://perma.cc/N8VX-LDKS>.

¹⁰ *Media Ownership Monitor, Ukraine*, REPORTERS WITHOUT BORDERS, <https://www.mom-rsf.org/en/countries/ukraine/> (last modified Nov. 21, 2018), archived at <https://perma.cc/ZY4W-5878>.

¹¹ U.S. DEPARTMENT OF STATE, 2018 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: UKRAINE 21, <https://www.state.gov/wp-content/uploads/2019/03/UKRAINE-2018-HUMAN-RIGHTS-REPORT.pdf>, archived at <https://perma.cc/66NV-63VG>.

practice of producing favorable and (or) one-sided news coverage for monetary reward is widespread in Ukraine.¹²

Ukraine's legislation does not contain specific anti-heckling provisions.

II. Legislative Framework

The Constitution of Ukraine contains guarantees for free speech and freedom of expression.¹³ As stated in Article 3 of the Constitution, "human rights and freedoms, and guarantees shall determine the essence and course of activities of the State."¹⁴ Article 34 of the Constitution provides that

[e]veryone shall be guaranteed the right to freedom of thought and speech, and to free expression of his views and beliefs.
Everyone shall have the right to freely collect, store, use, and disseminate information by oral, written, or other means at his discretion.¹⁵

Article 300 of the Civil Code provides for the right to "freely collect, store, use and disseminate information." According to same article, a physical person, who distributes information is responsible for the verification of authenticity (except in the cases when the information is obtained from the official sources).¹⁶

Ukraine is a signatory to the European Convention on Human Rights. Article 10 of the Convention guarantees freedom of expression.¹⁷ Additionally, Ukraine ratified the International Covenant on Civil and Political Rights, which guarantees freedom of speech and expression.¹⁸

¹² *Id.* at 22.

¹³ CONSTITUTION OF UKRAINE, 1996, <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>, archived at <https://perma.cc/8DY9-FA3R>.

¹⁴ *Id.* art. 3.

¹⁵ *Id.* art. 34.

¹⁶ CIVIL CODE OF UKRAINE, 2004, art. 300. <https://zakon.rada.gov.ua/laws/show/435-15>, archived at <https://perma.cc/QPL3-BVAF>.

¹⁷ Council of Europe, European Convention on Human Rights, Nov. 4, 1950, https://www.echr.coe.int/Documents/Convention_ENG.pdf, archived at <https://perma.cc/YU4B-TUYX>.

¹⁸ International Covenant on Civil and Political Rights art. 19, Dec. 19, 1966, https://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch_IV_04.pdf, archived at <https://perma.cc/9F9V-MGVK>.

III. Limits on Freedom of Speech and Freedom of the Press

The Constitution prescribes the following instances where the right of freedom of expression and speech can be limited:

- in the interest of national security, territorial integrity, or public order,
- for the purposes of preventing disturbances or crimes,
- for protecting the health of the population,
- for protecting the reputation or rights of other persons,
- for preventing the publication of information received confidentially, or
- for supporting the authority and impartiality of justice.¹⁹

The Civil Code of Ukraine contains provisions providing for a ban on publishing or broadcasting information that violates personal non-property rights.²⁰

In 2019, Ukraine passed a law on strengthening the role of the Ukrainian language as the state language, which contains language quotas for broadcast, print, and publishing media.²¹ According to the Language Law, only 10% of total film screenings can be in a language other than Ukrainian.²² Additionally, the Language Law requires that at least 50% of books published and distributed in Ukraine should be in Ukrainian.²³ According to assessments, the linguistic quota system presents a considerable challenge for freedom of expression and speech for the segment of the population that does not speak Ukrainian and for media outlets that publish or broadcast in languages other than Ukrainian.²⁴

Several provisions of the Criminal Code punish incitement of hate speech.²⁵ Thus, Article 161 of the Criminal Code states that

[i]ntentional acts aimed at incitement to national, racial or religious hatred or to humiliate national honor and dignity or the image of feelings of citizens in connection with their religious beliefs, as well as the direct or indirect restriction of rights or the establishment of direct or indirect privileges for citizens on the grounds of race, color, political, religious and other beliefs, sex, disability, ethnic or social origin, property status, place of residence, language or other characteristics - shall be punishable by a fine of two hundred to five hundred times the tax-free minimum incomes, or restraint of liberty for a term up to five

¹⁹ CONSTITUTION OF UKRAINE art. 34.

²⁰ CIVIL CODE OF UKRAINE, 2004, art. 278,,

²¹ Law on Ensuring the Functioning of the Ukrainian Language as a State Language, 2019, <https://zakon.rada.gov.ua/laws/show/2704-viii>, archived at <https://perma.cc/N5MN-YZ5S>.

²² *Id.* art. 23.

²³ *Id.* art. 26.

²⁴ Josh Cohen, *Ukraine's Language Bill Misses the Point*, ATLANTIC COUNCIL (Nov. 6, 2018), <https://www.atlanticcouncil.org/blogs/ukrainealert/ukraine-s-language-law-misses-the-point>, archived at <https://perma.cc/X4N4-T8DK>.

²⁵ CRIMINAL CODE OF UKRAINE, as amended, <https://zakon.rada.gov.ua/laws/show/2341-14>, archived at <https://perma.cc/FG22-J5P3>.

years, with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years or without such.²⁶

Article 300 of the Criminal Code provides for punishment for importing into, manufacturing, and distributing in Ukraine works (including film and video products) promoting a “cult of violence and cruelty, racial, national or religious intolerance and discrimination.”²⁷ Article 300 stipulates fees and deprivation of liberty as a punishment for these offenses.²⁸

IV. Laws Restricting Foreign Broadcasters Working on Behalf of Foreign Governments

Ukraine adopted several laws in the information management sphere in order to counter foreign influence and propaganda. These laws are discussed below.

A. The Law of Ukraine Amends Ukrainian Law on the Protection of Information in Ukrainian Television and Radio Broadcasting

The Law established that an executive body can refuse issuance of a state certificate for distribution and showing of materials if the materials (statements, actions, etc.)

promote war, violence, cruelty, fascism and neo-fascism, aimed at the elimination of Ukraine’s independence, incitement to interethnic, racial, religious hatred, humiliation of the nation, disrespect for national and religious shrines, humiliation of the individual, propagandizing ignorance, disrespect for parents, as well as drug addiction, substance abuse, alcoholism and other harmful habits; films of a pornographic nature, confirmed by the conclusion of the expert commission on distribution and demonstration of films.²⁹

The Law prohibits copying and showing films containing the propaganda of an “aggressor state,” including positive images of the workers of an aggressor state, Soviet state security bodies, films justifying violation of the territorial integrity of Ukraine. The ban also includes films produced by individuals and entities of an aggressor state.³⁰ The ban applies to any films with the above-described content produced after August 1, 1991, regardless of country of origin. The ban on movies produced by individuals or legal entities of the aggressor state in the absence of propaganda applies to movies and films produced after January 1, 2014.³¹

²⁶ *Id.* art. 161.

²⁷ *Id.* art. 300.

²⁸ *Id.*

²⁹ *Id.* art. 1, § 3.

³⁰ *Id.* art. 1, § 4.

³¹ *Id.*

B. The Law of Ukraine Amends Certain Laws Concerning Restricted Access of Anti-Ukrainian Content to the Ukrainian Market for Foreign Printed Products

In 2016, Verkhovna Rada adopted a law aimed at limiting access to the Ukrainian market of foreign printed products with certain content. The definition of the restricted content provided for in the Law was similar to that of the Law on Protecting Information in Television and Radio Broadcasting of Ukraine.³²

According to the Law, importing of the print media products to the Ukrainian market from the territory of an aggressor state is subject to obtaining a permit, with the exception of up to 10 copies of products imported by individuals in their personal luggage.³³ The Law provides for the expert assessment and analysis of the printed products subject to the importation ban.³⁴ In order to obtain a permit, a distributor of printed and publishing goods should submit an exhaustive list of documents (including linguistic evaluation of the products) to the central executive body. Based on the recommendations of an expert, the central executive body can choose to issue, refuse, or renew a permit.³⁵ The central executive body also has a right to revoke a permit. Revocation of a permit can be appealed in court.³⁶

The state executive body responsible for implementing the policy in the information sphere maintains on its website a registry of the publishing and printing products from the territory of an aggressor state or “occupied territories” of Ukraine that were granted a permit.³⁷

Distributing printed products and publishing products in Ukraine without a permit are subject to a fine between ten to fifty times the minimum monthly wage, with ensuing removal from circulation of said products.³⁸

According to an Organization for Security and Cooperation in Europe report, during the period from January 1, 2017, to February 14, 2018, the State Committee banned 30 books published in the Russian Federation.³⁹

³² Law of Ukraine on Amending Certain Laws of Ukraine Concerning Restricted Access of Anti-Ukrainian Content to the Ukrainian Market for Foreign Printed Products art. 1.

³³ *Id.* art. 1, § 2.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ THE RIGHT TO FREEDOM OF SPEECH AND OPINION IN UKRAINE, *supra* note 5, at 5.

C. Law of Ukraine on Amending Article 15-1 of the Law of Ukraine on Cinematography

The Law established content-specific restrictions for distributing and showing films

- that contain promotion or propaganda of the aggressor state, regardless of the country of origin, that were produced after August 1, 1999; and
- that were produced by individuals and legal entities of an aggressor state that do not contain the promotion or propaganda of the aggressor state and its legal entities and were produced or released after January 1, 2014.⁴⁰

According to monitoring reports, around five hundred films were banned from 2015 to 2018.⁴¹

D. Government Policies

In 2014, Verkhovna Rada approved composition of the new Government of Ukraine, which also included the Ministry of Information Policy.⁴² The Government of Ukraine subsequently issued a Regulation on the Ministry of Information Policy.⁴³ According to the regulation, the Ministry of Information Policy is a central executive body authorized to “ensure Ukraine’s informational sovereignty, in particular regarding the dissemination of publicly important information in Ukraine and beyond, as well as ensuring the functioning of state information resources.”⁴⁴

The Ministry of Information Security was also tasked with carrying out the implementation of mass media reforms concerning the dissemination of publicly important information.⁴⁵ Enforcement of the legislation in the information management sphere is also in the purview of the Ministry of Information Security.

According to a 2018 progress report issued by the Ministry of Information Policy, the Ministry was engaged in the following areas of information policy:

- Developing the information space of Ukraine, which includes deregulation, de-monopolization and de-oligarchization of the regulatory framework.
- Establishing the system of state strategic communications, which includes reforms of government and strategic communications, as well as providing communication support for the carrying out of the reforms.

⁴⁰ Law of Ukraine on Amending art. 15-1 of the Law of Ukraine “On Cinematography”.

⁴¹ THE RIGHT TO FREEDOM OF SPEECH AND OPINION IN UKRAINE, *supra* note 5, at 5.

⁴² Resolution of the Verkhovna Rada of Ukraine “On the Formation of the Cabinet of Ministers of Ukraine,” Dec. 2, 2014, <http://mip.gov.ua/en/documents/11.html>, archived at <https://perma.cc/TC4F-X3PA>.

⁴³ Regulation on the Ministry of Information Policy of Ukraine, Jan. 14, 2015, <http://mip.gov.ua/en/documents/7.html>, archived at <https://perma.cc/XBM7-8UCE>.

⁴⁴ *Id.* art. 3, § 1.

⁴⁵ *Id.* art. 3, § 2.

- Information reintegration of the temporarily occupied territory of Crimea and uncontrolled territories of Luhansk and Donetsk regions.⁴⁶

In 2017, the President of Ukraine signed an order imposing sanctions on legal and physical persons, which included blocking access to Russian media and social networks, as well as search engines and electronic mail services and domains.⁴⁷ The same order also blocked individual journalists or broadcasters (foreign and domestic) who were deemed to be a threat to national security.⁴⁸ Among the affected social networks were VKontakte and Odnoklassniki, internet search engine Yandex and email service provider Mail.ru.⁴⁹ According to estimates, banned social medial networks (Odnoklassniki and VKontakte) have twenty-five million subscribers in Ukraine.⁵⁰ Nongovernmental organizations see these sanctions as restrictive of the freedom of press and speech.⁵¹

⁴⁶ *January-June 2018 Progress Report*, MINISTRY OF INFORMATION POLICY OF UKRAINE, https://mip.gov.ua/files/pdf/MIP_zvit_2018_web_ENG.pdf, archived at <https://perma.cc/RC4B-7RSQ>.

⁴⁷ Decree of the President of Ukraine No. 139/3017 On the Decision of the National Security and Defense Council of Ukraine dated April 28, 2017, “On the Application of Personal Special Economic and Other Restrictive Measures (Sanctions),” <https://www.president.gov.ua/documents/1332017-21850>, archived at <https://perma.cc/8D2N-VQN5>.

⁴⁸ *Id.*

⁴⁹ *Id.*; see also *Legal Persons Who Are Subject to Restrictive Measures (Sanctions)*, Annex to the Decree of the President of Ukraine No 139/3017 on the Decision of the National Security and Defense Council of Ukraine, from April 28, 2017, https://www.president.gov.ua/storage/j-files-storage/00/40/30/6f76b8df9d0716da74bb4ae6a900d483_1494864914.pdf (in Russian), archived at <https://perma.cc/V3H5-S7AF>.

⁵⁰ THE RIGHT TO FREEDOM OF SPEECH AND OPINION IN UKRAINE, *supra* note 5.

⁵¹ *Id.*

United Kingdom

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SUMMARY The UK provides for freedom of expression as a qualified right that may be restricted in certain circumstances as prescribed by law. For any law restricting an individual's freedom of expression, various criteria must be met. The UK has laws in place that operate to prevent people from heckling speakers, but these are not frequently implemented. The main laws that appear to be used against hecklers are those aimed to preserve public order.

Foreign broadcasters operating in the UK and broadcasting to UK audiences must be licensed by the UK's communication regulator, Ofcom. In order to obtain a license, the broadcaster must agree to license conditions and to comply with the Broadcasting Code. If a broadcaster fails to abide by these conditions or the Code and laws, Ofcom may take action, including issuing its findings publicly, imposing a financial penalty, or suspending or revoking the broadcaster's license in the UK.

I. Introduction

A number of laws protect freedom of expression across the UK. While freedom of expression is protected, it is a qualified right, meaning that there are certain circumstances in which it may be overridden, provided a defined set of criteria are met.

The UK has a number of criminal laws that can be used to stop individuals from heckling speakers if the behavior is disruptive, but these do not provide an absolute prohibition on heckling and operate in balance with the need to ensure people have the right to express themselves.

Broadcasters that provide services across the UK, including foreign broadcasters, must be licensed by Ofcom, the UK's regulator for broadcast media. There are a number of criteria that must be met by the broadcaster prior to Ofcom issuing a license and, once a license is issued, the broadcaster must continue to abide by the conditions of that license. If the broadcaster fails to meet these criteria, Ofcom has a number of steps that it may take, including revoking the license and thus the ability of the broadcaster to operate across the UK.

II. Heckling

A. Freedom of Expression

The European Convention on Human Rights was incorporated into the national law of the United Kingdom by the Human Rights Act 1998.¹ Article 10 of the European Convention on Human

¹ Human Rights Act 1998, c. 42, <https://www.legislation.gov.uk/ukpga/1998/42>, archived at <https://perma.cc/ZKN8-XVNC>.

Rights provides for freedom of expression and grants individuals the right to hold opinions, and to receive and share ideas, without state interference. It specifically includes politics and matters of public interest:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.²

Freedom of expression is a qualified right, which means that it may be restricted in certain circumstances provided it is prescribed by law and necessary in a democratic society to protect a legitimate aim. Article 10(2) specifies as follows:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, and for maintaining the authority and impartiality of the judiciary.³

The European Court of Human Rights has determined that whether the restriction on freedom of expression is necessary “requires the existence of a pressing social need, and that the restrictions should be no more than is proportionate.”⁴

B. Criminal Legislation

A number of criminal laws may be used to prevent hecklers if the behavior is disruptive and meets additional criteria. The Public Meeting Act 1908⁵ provides that it is an offense to act in a disorderly manner at a public meeting if the purpose of the disorderly behavior is “preventing the transaction of the business for which the meeting was called together.”⁶ The Act does not define “meeting” or “public meeting,” and much of the case law is focused on whether or not the meeting is lawful.⁷ The offense is punishable by up to six months of imprisonment and/or an unlimited fine. In cases where the meeting is part of an electoral campaign during the campaign period, it is unlawful under the Representation of People Act 1983 for a person to act, or incite others to act, in a disorderly manner to prevent the purpose of the meeting from occurring.⁸

² *Id.* sched. 1 art. 10(1).

³ *Id.* sched. 1, art. 10(2).

⁴ URSULA SMARTT, *MEDIA & ENTERTAINMENT LAW* 64 (3d ed. 2017).

⁵ Public Meeting Act 1908, Edw. 7 & 8 c. 66 § 1(1), <http://www.legislation.gov.uk/ukpga/Edw7/8/66/enacted/data.pdf>, archived at <https://perma.cc/XY5P-UZWR>.

⁶ BLACKSTONE'S CRIMINAL PRACTICE ¶ B11.126 (David Ormerod et al. eds., 2019).

⁷ *Id.* ¶ B11.126.

⁸ Representation of People Act 1983, c. 2 § 97(1), <http://www.legislation.gov.uk/ukpga/1983/2/data.pdf>, archived at <https://perma.cc/3HVZ-8ERK>.

“Lawful meeting” in this instance is “a political meeting held in any constituency between the date of the issue of the writ for the return of a Member of Parliament for the constituency and the date at which a return to the writ is made, or a meeting held with reference to a [specified period for a] local government election.”⁹ This offense is punishable with an unlimited fine.

Section 5 of the Public Order Act 1986 provides it is a criminal offense to “use[] threatening or abusive words or behaviour, or disorderly behaviour . . . within the hearing . . . of a person likely to be caused harassment, alarm or distress thereby.”¹⁰ This offense is punishable by a fine of up to £1,000 (approximately US\$1,300). Any of the following three circumstances may constitute a defense to this crime, however:

- The accused did not have any reason to believe there was any person within hearing distance that would likely be caused harassment, alarm, or distress;
- The accused was inside a home and did not believe anyone outside that home could hear; or
- The conduct was reasonable.¹¹

The law previously included using insulting words as part of the offense but after a campaign to repeal this law¹² and a government review, the word “insulting” was removed from the offense in 2013.¹³ During the review, campaigners argued that the section inhibited the public from speaking openly, and that “[i]n a free and democratic society, insults should not be a criminal offence.”¹⁴

The common law offense of breach of the peace may also apply in circumstances where hecklers cause harm, or are likely to cause harm, to a person or the person’s property in his or her presence, or where the behavior causes the person to be “in fear of being harmed through an assault, affray, riot, unlawful assembly or other disturbance.”¹⁵ This offense has been used against hecklers – for example, an individual received a deferred sentence for breaching the peace by heckling at a memorial service.¹⁶

⁹ *Id.* § 97(2); BLACKSTONE’S CRIMINAL PRACTICE, *supra* note 6, ¶ B11.128.

¹⁰ Public Order Act 1986, c. 64 § 5, <https://www.legislation.gov.uk/ukpga/1986/64/data.pdf>, archived at <https://perma.cc/C47Q-S55C>.

¹¹ *Id.* § 5(3).

¹² Jon Kelly, *How Do You Insult Someone Legally*, BBC NEWS (May 18, 2012), <https://www.bbc.com/news/magazine-18102815>, archived at <https://perma.cc/6NG5-Y7CA>.

¹³ Crime and Courts Act 2013, c. 22 § 57, <https://www.legislation.gov.uk/ukpga/2013/22/data.pdf>, archived at <https://perma.cc/CGJ2-QZHS>.

¹⁴ Kelly, *supra* note 12.

¹⁵ BLACKSTONE’S CRIMINAL PRACTICE, *supra* note 6, ¶ D1.33.

¹⁶ *Chhokar Heckler Waits for Sentence*, BBC NEWS (Nov. 29, 2002), http://news.bbc.co.uk/2/hi/uk_news/scotland/2527169.stm, archived at <https://perma.cc/457E-H2AN>.

Additional laws that could feasibly be used against hecklers who are particularly disruptive include the Protection from Harassment Act 1997.¹⁷ This Act was enacted to protect individuals from harassment from stalkers, but it has been argued that it might in some cases be “applied against demonstrators whose acts cause harassment to particular individuals.”¹⁸ Section 1 of the Act prohibits individuals from acting in a manner that amounts to harassment of another person, where the perpetrator knows, or ought to know, that the action amounts to harassment. This offense is punishable with up to six months of imprisonment.¹⁹

An individual was ejected from a conference held by government ministers due to heckling and then prevented from re-entering, reportedly pursuant to powers under section 44 of the Terrorism Act,²⁰ which at the time provided the police with the ability to stop and search individuals in certain scenarios. This incident later resulted in an apology from the political party, which noted the way the individual had been treated was “inappropriate.”²¹

III. Foreign Broadcasters Working on Behalf of Foreign Governments

Foreign broadcasters working on behalf of foreign governments may be covered under EU and UK legislation if they are uploading content to a satellite in the UK, or are broadcasting content in the UK from other EU Member States. The EU Audiovisual Media Services Directive provides that broadcasters located in other EU states may broadcast into the UK and are covered under the laws of the country the broadcast originates from, or the state where the content is uploaded to the satellite.²²

¹⁷ Protection from Harassment Act 1997, c. 40 <https://www.legislation.gov.uk/ukpga/1997/40/data.pdf>, archived at <https://perma.cc/CWP4-QY5P>.

¹⁸ STEVE FOSTER, HUMAN RIGHTS AND CIVIL LIBERTIES 545 (3d ed. 2011).

¹⁹ Protection from Harassment Act 1997, c. 40 §§ 1-2.

²⁰ Terrorism Act 2000, c. 11 § 44 (repealed), https://www.legislation.gov.uk/ukpga/2000/11/pdfs/ukpga_20000011_en.pdf, archived at <https://perma.cc/8VE6-W2QR>.

²¹ Andrew Sparrow, *Heckler, 82, Who Dared Called Straw a Liar Is Held under Terrorist Law*, TELEGRAPH (London) (Sept. 29, 2005), <https://www.telegraph.co.uk/news/uknews/1499466/Heckler-82-who-dared-called-Straw-a-liar-is-held-under-terrorist-law.html>, archived at <https://perma.cc/MZV2-WBSN>.

²² Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services (Audiovisual Media Services [AMS] Directive), 2010 O.J. (L 95) 1, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0013&from=EN>, archived at <https://perma.cc/S97F-TT9X>.

The Communications Act 2003²³ and Broadcasting Acts of 1990²⁴ and 1996²⁵ provide the legislative framework within which broadcasters operating in the UK must operate.²⁶ Ofcom was established under the Communications Act 2003 and has a number of roles, including enforcing content standards across television and radio broadcasters and the UK's media and telecommunications companies.²⁷ When carrying out its statutory functions, Ofcom has a duty to ensure that television and radio services have

... standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services [and that] provide adequate protection to members of the public and all other persons from both:

- (i) unfair treatment in programmes included in such services; and
- (ii) unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.²⁸

In order to provide television, radio, or on-demand video services in the UK, broadcasters must obtain a license from Ofcom under the Broadcasting Act 1990 and Broadcasting Act 1996. In order to grant a license, Ofcom examines the application to determine whether the applicant and the proposed programming are "fit and proper."²⁹ If it considers that these criteria are met it may grant the license for a set duration, which may be renewed.³⁰ State-controlled broadcasters that are licensed by Ofcom are required along with other broadcasters to comply with the Broadcasting Code.³¹ When granting licenses to state-controlled broadcasters, Ofcom has stated the consideration of whether such a broadcaster is fit and proper involves different considerations:

17. . . . States have a unique range of activities, both domestically and internationally, that are undertaken within a legal and conventional framework that is intrinsically different from that which applies to individual and corporate licensees.

18. States whose services Ofcom has licensed vary greatly in the extent to which they accept and conduct themselves according to UK and generally accepted international values.

²³ Communications Act 2003, c. 21, <https://www.legislation.gov.uk/ukpga/2003/21>, archived at <https://perma.cc/5NAX-VJH7>.

²⁴ Broadcasting Act 1990, c. 42 <https://www.legislation.gov.uk/ukpga/1990/42/data.pdf>, archived at <https://perma.cc/M4B2-RXVP>.

²⁵ Broadcasting Act 1996, c. 55 <http://www.legislation.gov.uk/ukpga/1996/55/data.pdf>, archived at <https://perma.cc/R9VN-8ER2>.

²⁶ Web content, even when provided on broadcasters' websites, is not regulated by Ofcom. MIKE DODD & MARK HANNA, *ESSENTIAL LAW FOR JOURNALISTS* ¶ 3.3 (23rd ed. 2016).

²⁷ *Id.*

²⁸ *Id.* § 3(2).

²⁹ Broadcasting Act 1990, c. 42 § 3(3); Broadcasting Act 1996, c. 55 § 3(3).

³⁰ DODD & HANNA, *supra* note 26, ¶ 3.3.

³¹ Ofcom, *Update on the Rt Service – New Broadcasting Investigations and Approach to Fit & Proper*, ¶ 16, https://www.ofcom.org.uk/_data/assets/pdf_file/0012/113043/rt-investigations.pdf, archived at <https://perma.cc/X9WV-CKM7>.

States sometimes commit, or will have committed, acts which are contrary to these values. In our judgment, it would be inappropriate for Ofcom always to place decisive weight on such matters in determining whether state-funded broadcasters were fit and proper to hold broadcast licences, independently of their broadcasting record. If we did, many state-funded broadcasters (mostly those from states which may not share UK values) would be potentially not fit and proper. This would be a poorer outcome for UK audiences in light of our duties on plurality, diversity and freedom of expression.³²

Section 3(4)(g) of the Communications Act 2003 requires Ofcom to protect audiences against harmful and offensive material “in the manner that best guarantees an appropriate level of freedom of expression.”³³ Working together, the Communications Act 2003 and the Broadcasting Act 1996 place a duty on Ofcom to establish the standards for broadcasts, and compliance with these standards is part of the license conditions imposed on broadcasters.³⁴

The Broadcasting Code contains various rules, including those

- protecting children under the age of eighteen years of age;³⁵
- prohibiting the broadcast of materials likely to incite crime or disorder;³⁶
- ensuring that news reports are provided with due accuracy and due impartiality,³⁷ with the Broadcasting Code notably specifying that, “[i]n dealing with matters of major political and industrial controversy and major matters relating to current public policy an appropriately wide range of significant views must be included and given due weight in each programme or in clearly linked and timely programmes. Views and facts must not be misrepresented”;³⁸
- avoiding unfair or unjust treatment of individuals or organizations within programming;³⁹ and
- ensuring broadcasters maintain editorial independence and control over programming, that there is a clear distinction between content and advertising, and that unsuitable sponsorship is not permitted.⁴⁰

There have been instances where the government used licensing conditions to prohibit the voices of specific members of a political group from being broadcast across the UK during “the

³² *Id.* ¶¶ 17-18.

³³ Communications Act 2003, c. 21 § 3(4)(g).

³⁴ OFCOM, THE OFCOM BROADCASTING CODE (Apr. 2017), https://www.ofcom.org.uk/_data/assets/pdf_file/0005/100103/broadcast-code-april-2017.pdf, archived at <https://perma.cc/7UAS-MA84>.

³⁵ Communications Act 2003, c. 21 § 319(2)(a).

³⁶ THE OFCOM BROADCASTING CODE, *supra* note 34, at 21; Communications Act 2003, c. 21 § 319(2)(b).

³⁷ THE OFCOM BROADCASTING CODE, *supra* note 34, at 28; Communications Act 2003, c. 21 §§ 319(2)(c)-(d), 319(8), 320.

³⁸ THE OFCOM BROADCASTING CODE, *supra* note 34, ¶ 5.12.

³⁹ *Id.* ¶ 7.1.

⁴⁰ *Id.* ¶ 9.1; Communications Act 2003, c. 21 § 319(2)(j).

Troubles” in Northern Ireland. The aim of this was to deny terrorists “the oxygen of publicity”⁴¹ and it was deemed in the public interest to issue such a ban. On October 19, 1988, the then Home Secretary, Douglas Hurd, issued a notice⁴² under clause 13(4) of the BBC Licence and Agreement to the BBC and under section 29(3) of the Broadcasting Act 1981 to the Independent Broadcasting Authority prohibiting the broadcast of direct statements by representatives or supporters of eleven Irish political and military organizations.⁴³ The statements made by these individuals could still be broadcast, just not the individuals’ voices.

If a broadcaster breaches the Code, Ofcom publishes its findings explaining why the broadcaster breached the Code and may direct that the program not be repeated or order the broadcaster to air a correction or statement of its findings.⁴⁴ If a broadcaster breaches the Code in a serious, deliberate, or repeated manner, Ofcom may impose statutory sanctions against the broadcaster, including fines of up to £250,000 (approximately US\$318,000) or 5% of the broadcaster’s revenue, and it may shorten, suspend, or revoke the broadcaster’s license.⁴⁵ Examples of Ofcom findings over television shows that it has deemed to breach the Broadcasting Code, and investigations, include the following:

- Fox News Broadcasts, which were found during the 2016 US presidential elections to be “largely pro-Trump and did not sufficiently reflect alternative viewpoints,”⁴⁶ and thus violated the Code for not being impartial.⁴⁷ Fox News ceased broadcasting in the UK prior to this decision being published, stating its decision was due to low audience figures making the show commercially unviable.⁴⁸
- TV Novosti – which is financed by the Russian Federation and was determined by Ofcom to be thus controlled by the Russian government – was investigated by Ofcom after the poisoning by a nerve agent of two Russian nationals in England saw an influx of programs broadcast on the channel that potentially violated the due impartiality requirement of the license. As a result, in April 2018, Ofcom opened several investigations into whether news programs violated the terms of the license, and these remain ongoing.⁴⁹

⁴¹ URSULA SMARTT, *MEDIA & ENTERTAINMENT LAW* 55 (3d ed. 2017).

⁴² 138 PARL. DEB., H.C. (6th ser.) (1988) 893-903, <https://api.parliament.uk/historic-hansard/commons/1988/oct/19/broadcasting-and-terrorism>, archived at <https://perma.cc/N49Q-6W2N>.

⁴³ Broadcasting Act 1981, c. 68, <https://www.legislation.gov.uk/ukpga/1981/68/data.pdf>, archived at <https://perma.cc/V9TW-VTNY>.

⁴⁴ DODD & HANNA, *supra* note 26, ¶ 3.3.

⁴⁵ *Id.*

⁴⁶ *Fox News Broke the UK’s Broadcasting Rules*, BBC NEWS (Nov. 6, 2017), <https://www.bbc.com/news/entertainment-arts-41887613>, archived at <https://perma.cc/2TPI-HDX8>.

⁴⁷ Ofcom Broadcast Bulletin, No. 317 (Nov. 21, 2016), cited in DODD & HANNA, *supra* note 26, ¶ 3.4.11.

⁴⁸ *Sky Stops Broadcasting Fox News in UK*, BBC NEWS (Aug. 29, 2017), <https://www.bbc.com/news/business-41087659>, archived at <https://perma.cc/T8Z4-CW7V>.

⁴⁹ *Update on the Rt Service – New Broadcasting Investigations and Approach to Fit & Proper*, OFCOM.ORG.UK, https://www.ofcom.org.uk/_data/assets/pdf_file/0012/113043/rt-investigations.pdf (last visited June 12, 2019), archived at <https://perma.cc/B4MG-RXW5>.

- Press TV, an Iranian-funded television channel, broadcast shows featuring a British politician. Ofcom determined the shows violated the broadcasting code by failing to air alternative viewpoints on controversial issues. The content of the show was comprised mainly of pro-Palestinian viewpoints, with very limited input from individuals with pro-Israeli viewpoints. In this case, Ofcom noted that, “where a matter of major political controversy is being discussed, as here, the broadcaster must ensure that an appropriately wide range of significant views must be included and given due weight in each programme or in clearly linked and timely programmes.”⁵⁰ It determined that Press TV did not control its editorial content and Ofcom used its powers to close the channel.
- Ariana International, a channel originating in Afghanistan but broadcasting in the UK that broadcast a news item with a two-minute video filmed by a terrorist prior to him conducting a terrorist attack. Ofcom determined “the programme contained hate speech and was likely to encourage or to incite the commission of crime or to lead to disorder . . . with no surrounding content that sought to challenge, rebut or otherwise contextualise Muhammad Riyad’s highly extreme views.”⁵¹ It imposed a penalty of £200,000 (approximately US\$250,000) on the channel.
- News channels BBC World News and CNN International aired programs funded by foreign governments, charities, and other bodies without informing viewers the shows were sponsored content. BBC World News stated it obtained some of these programs for low fees and Ofcom stated that complex funding arrangements posed an “inherent risk to independence and editorial integrity,”⁵² but determined that the broadcasters had not compromised editorial independence.

Ofcom has the ability to issue an order to proscribe a foreign satellite service⁵³ if it deems the service to be of an “unacceptable quality”⁵⁴ and it is in the public interest to proscribe the service.⁵⁵ The offensive subject matter must be “repeatedly contained in programmes included in the service” and must offend “good taste or decency or [be] likely to encourage or incite to crime or to lead to disorder or to be offensive to public feeling.”⁵⁶

⁵⁰ *Galloway TV Shows ‘Broke Rules’*, BBC NEWS (Aug. 3, 2009), http://news.bbc.co.uk/2/hi/uk_news/politics/8182361.stm, archived at <https://perma.cc/8UPU-GEUG>.

⁵¹ Ofcom Broadcast and on Demand Bulletin, No. 333, at 6-7 (July 17, 2017), https://www.ofcom.org.uk/data/assets/pdf_file/0021/104637/Issue-333-of-Ofcoms-Broadcast-and-On-Demand-Bulletin.pdf, archived at <https://perma.cc/4NBE-Y73V>.

⁵² *News Channels Broke Sponsorship Rules, Ofcom Says*, BBC NEWS (Aug. 18, 2015), <https://www.bbc.com/news/entertainment-arts-33971919>, archived at <https://perma.cc/3XW5-6RAM>.

⁵³ “ ‘Foreign satellite service’ means – (a) a service which is provided by a person who is not for the purposes of [the Audiovisual Media Services Directive] under the jurisdiction of the United Kingdom and which consists wholly or mainly in the transmission by satellite of television programmes which are capable of being received in the United Kingdom, or (b) a service which consists wholly or mainly in the transmission by satellite from a place outside the United Kingdom of sound programmes which are capable of being received in the United Kingdom.” Broadcasting Act 1990, c. 42 § 177(6) (as amended).

⁵⁴ MEDIA LAW AND PRACTICE 453 (David Goldberg, Gavin Sutter & Ian Walden eds., 2009).

⁵⁵ Broadcasting Act 1990, c. 42, § 177(4).

⁵⁶ *Id.* § 177(3).

Once a service has been proscribed, it is an offense for a person to engage in conduct in support of the foreign satellite service.⁵⁷ Such actions include supplying program material to be included in the service, or arranging or inviting others to do so. Such offenses are punishable with up to two years of imprisonment.

⁵⁷ *Id.* § 178(2).