THE FUTURE OF FREE SPEECH

REBUILDING THE BULWARK OF LIBERTY

# The Free Speech Recession Hits Home

## Mapping Laws and Regulations Affecting Free Speech in 22 Open Democracies

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**WHO WE ARE**

THE FUTURE OF FREE SPEECH

**The Future of Free Speech Project**
The Future of Free Speech is a collaboration between the global judicial think tank Justitia, Vanderbilt University, and researchers from Aarhus University's Department of Political Science.



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# Executive Summary

The global landscape for freedom of expression has faced severe challenges in 2023. Even open democracies have implemented restrictive measures. The European Union's Digital Services Act (DSA) exemplifies this trend, the European Commission's aggressive enforcement of which has raised concerns among rights groups. The Commission demands the removal of content classified as "hate speech," "terrorist content," or "disinformation" from major social media platforms, threatening significant fines for non-compliance. This approach has sparked accusations of overreach and violation of international human rights standards.

Similarly, the UK's Online Safety Act, made law in October 2023, has raised alarms about potential censorship. The Act's stringent regulations and substantial financial penalties for not removing illegal content could inadvertently lead to the suppression of lawful speech.

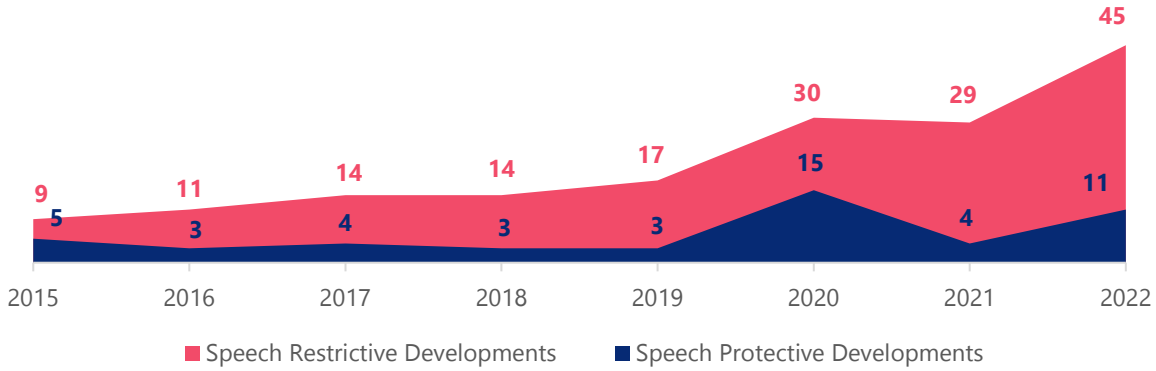
In the realm of journalism, criminal defamation laws pose a significant threat. Cases like Italian reporter Roberto Saviano, penalized for criticizing Prime Minister Giorgia Meloni, and Chilean editor Felipe Soto, reprimanded for an article criticizing a public official, highlight the risks for journalists and critics in democratic states. Denmark's reintroduction of a blasphemy ban, unenforced since 1946 and abolished in 2017, is another stark reminder that citizens of open democracies cannot take well established speech protections for granted.

The right to protest has also been curtailed in the context of the Israeli-Palestinian conflict. France and Germany have imposed broad bans on pro-Palestinian demonstrations, citing hate speech and public order concerns. Laws against hatred and offense have been significantly expanded in many democracies. In England a British-Asian woman was pursued and interviewed by police for holding a placard satirically depicting the Prime Minister and Home Secretary as coconuts – a black, liberal councilor was previously convicted of a race hate crime for the term's use. In Ireland a new hate speech bill is set to criminalize the mere possession of "hateful" material, which could include memes or gifs downloaded on mobile phones or laptops. Artistic freedom is not immune either, as seen in South Korea, where a government body cancelled a sensitive exhibition in the National Parliament due to an unflattering portrayal of the country's president. The concerns over mis- and disinformation have prompted the Australian government to propose a sweeping misinformation bill that critics say will have far-reaching consequences for freedom of expression Down Under.

But these dramatic erosions of freedom of expression in democracies are not isolated events. They are part of a broader and global free speech recession that has afflicted the heartland of free expression in open democracies, and which threatens to roll back hard-won freedoms.

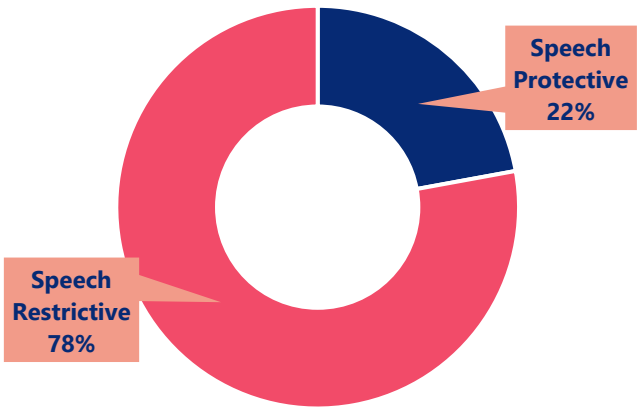
## Developments 2015-2022

(217 developments)



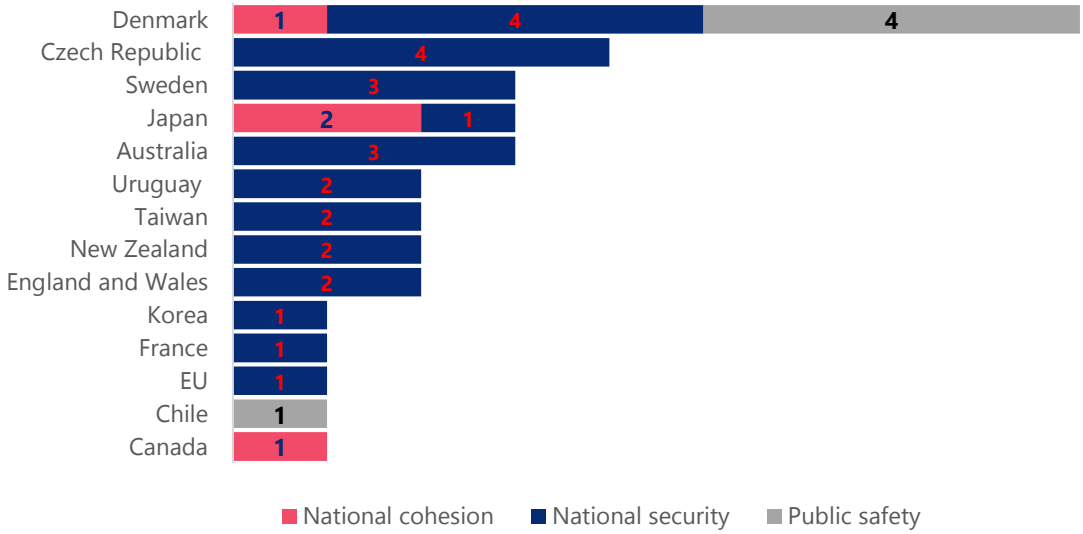

## Restrictive vs Protective developments

(total 217 developments)



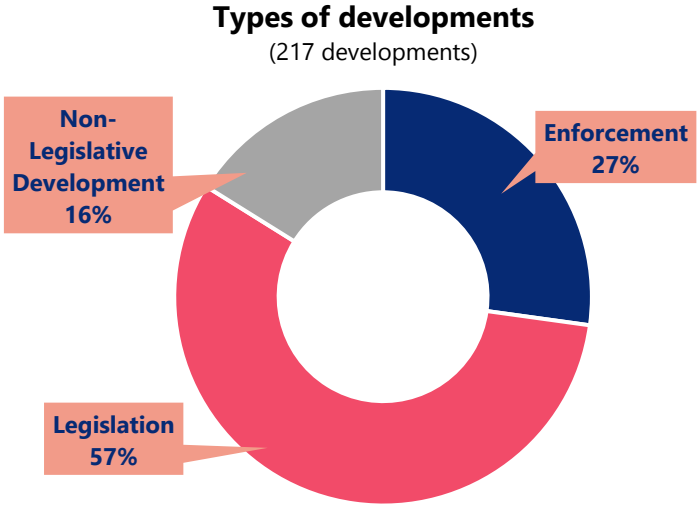

## National security, National Cohesion, Public Safety as grounds for speech restriction in different countries

(2015-2022)



## Scope and Importance:

Spanning from 2015 to 2022, this report analyzes free speech trends across 22 open democracies across the globe as identified by national experts in the surveyed countries. The contributors´ input allows us to investigate how the world's most free and democratic nations have protected or restricted freedom of expression amidst pivotal global events including devastating terrorist attacks, the COVID-19 pandemic, the war in Ukraine and disinformation campaigns by authoritarian states like Russia and China. The scale of speech restrictions documented in this report suggests that while democracies face serious challenges, the cure has become worse than the disease and that open societies must look to alternative and non-restrictive measures if they are to protect democracy without sacrificing freedom of expression—without which democracy is meaningless—in the process.




## Key Findings:

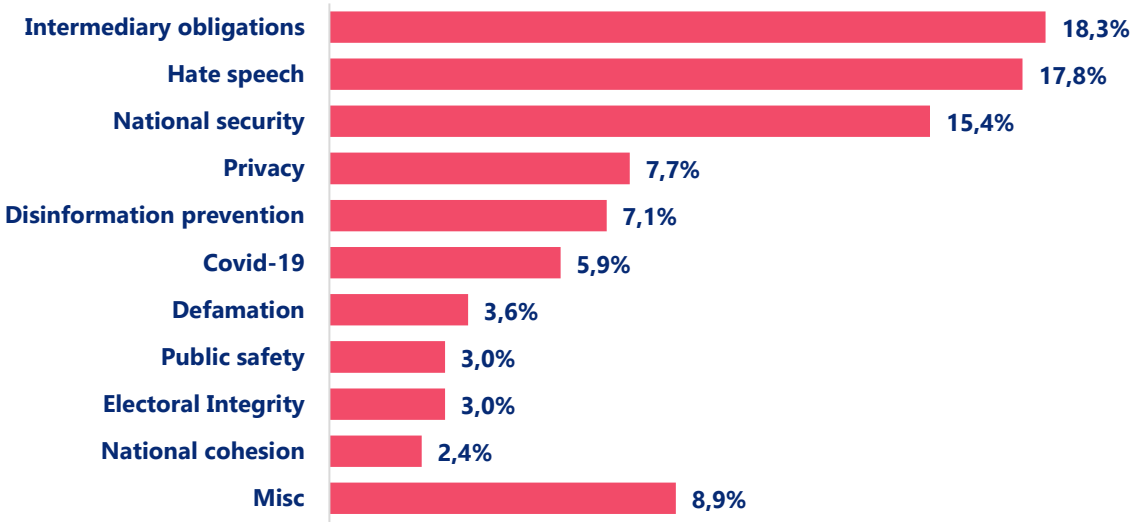
Our analysis reveals alarming trends:

- A majority (78%) of reported developments from our contributing experts point to increased speech restrictions.
- Except for 2015, every year witnessed a majority of developments limiting expression, with a noticeable upsurge in 2022.
- The predominant form of restrictive developments were legislative actions (57%), followed by enforcement/caselaw (27%) and non-legislative measures (16%).
- National security, national cohesion and public safety were the most cited reasons for limiting expression, with Denmark leading in this category.

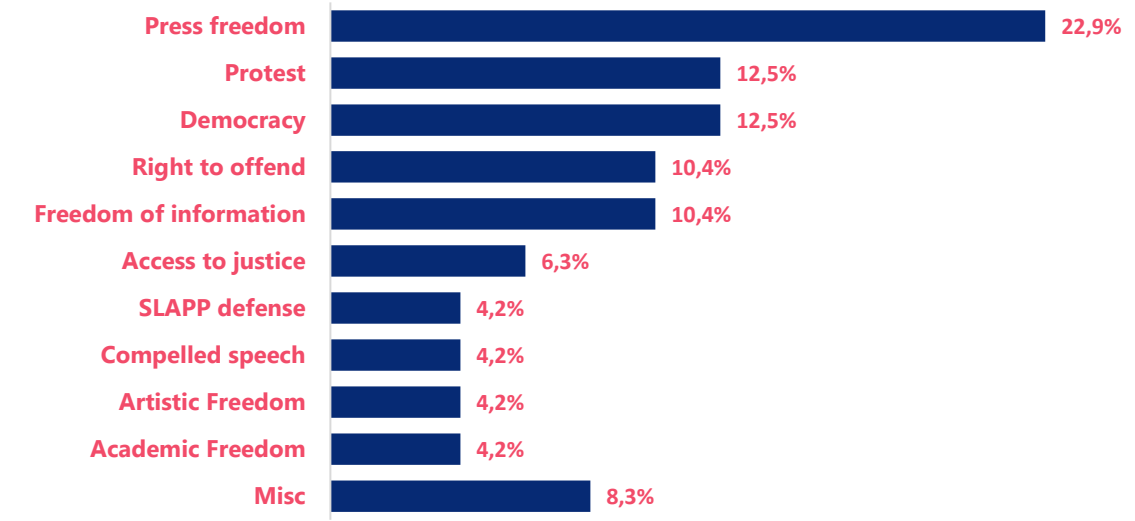
- Intermediary obligations and hate speech laws accounted for 18.3% and 17.8% of restrictions, respectively, with notable implications in countries like Norway, Denmark, and Spain.

- On the brighter side, protection trends focused on press freedom (23%), protest rights (13%), and democracy (13%).

**10 most common grounds for speech restrictive developments**
(Percentage of 169 identifed developments)




**10 most common grounds for speech protective developments**
(Percentage of 48 developments)



# Recommendations

The scope creep of **hate speech laws** covering ever more categories and protected characteristics threatens to erode free speech and the commitment to solve difficult and controversial debates through dialogue and debate. Moreover, there is growing evidence that free speech is more likely to limit than to fan violent conflict – including terrorism – in open democracies. We recommend that democracies reconsider the usefulness of hate speech laws and that such restrictions on freedom of expression should map more closely to the strict requirements under Article 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR). This includes taking inspiration from the so-called Rabat Plan of Action's six-part test, which emphasizes, among other things, that even hateful speech should only be restricted if based on the intent to create imminent harm. This would also include scrapping laws against "offensive" and "insulting" speech that frequently serve to protect those in power, rather than the powerless. To combat genuine hatred and racism states should increasingly focus on non-restrictive methods to counter hate speech including education, dialogue, fostering counterspeech (online and offline) and offering support to and solidarity with communities targeted.

"Illegal content" should be narrowly defined under **intermediary obligations** on online platforms. As alluded to in the discussion of the DSA and OSA above, these laws incentivize platforms to err on the side of censoring "awful but lawful" content to avoid punitive fines. Political bodies such as the European Commission should not be given regulatory powers over online speech.

A limited application of **privacy laws** such as the Right to Be Forgotten ensures that legitimate and public interest-related content is not unjustifiably removed, preserving the transparency of historical events and safeguarding the public's right to know. Overly broad implementation could inadvertently lead to censorship, inhibiting the free flow of information, and hinder the public's ability to engage with diverse perspectives. While child online safety advocates highlight important risks, a lack of end-to-end encryption poses a major threat to free speech by compromising the privacy of online communication, leading to potential self-censorship due to fears of surveillance.

Strategic lawsuits against public participation (SLAPPs), a form of **defamation** suit, are a problem blighting several countries. SLAPPs are most corrosive when they are used to censor public interest criticism of wealthy and powerful people and corporations, by burdening the critic with eyewatering legal costs. We support attempts by lawmakers and judges to prevent SLAPPs from being filed through anti-SLAPP measures. In the case of 'David and Goliath' defamation claims, it is important that there is legal aid available to support public interest criticism. Criminal defamation laws are outdated and a disproportionate sanction for speech, they have no place in a modern democracy and should be repealed.

**Disinformation** is not in and of itself illegal under international human rights law. Accordingly, disinformation should not be conflated with illegal content under content regulations of online platforms, such as the DSA. Any powers given to state bodies to regulate disinformation should be narrowed to very concrete and imminent harms so as to limit the chances of governments becoming arbiters of truth or labelling inconvenient information and opinions as illegal disinformation. Alternative and non-restrictive means such as media literacy, prebunking, and increasing trust in media, political and cultural institutions are also more likely to foster resilience against disinformation.

When it comes to emergency measures adopted during the **Covid-19**, governments should repeal these. Lessons should also be learnt from mistakes in how governments disproportionately censored dissent, in order to avoid overly broad and draconian measures affecting the freedoms of expression and assembly when democratic societies are next confronted with new emergencies.

Society benefits from a culture of **academic freedom and free enquiry at universities**, which is increasingly challenged. If it appears that certain lawful speech is being routinely censored, there could be a limited role for government in protecting this expression. However, governments should tread very carefully when intervening in speech on campus, as the risk of politization and imposing censorship in the name of fighting censorship is real.

# Content



# Introduction

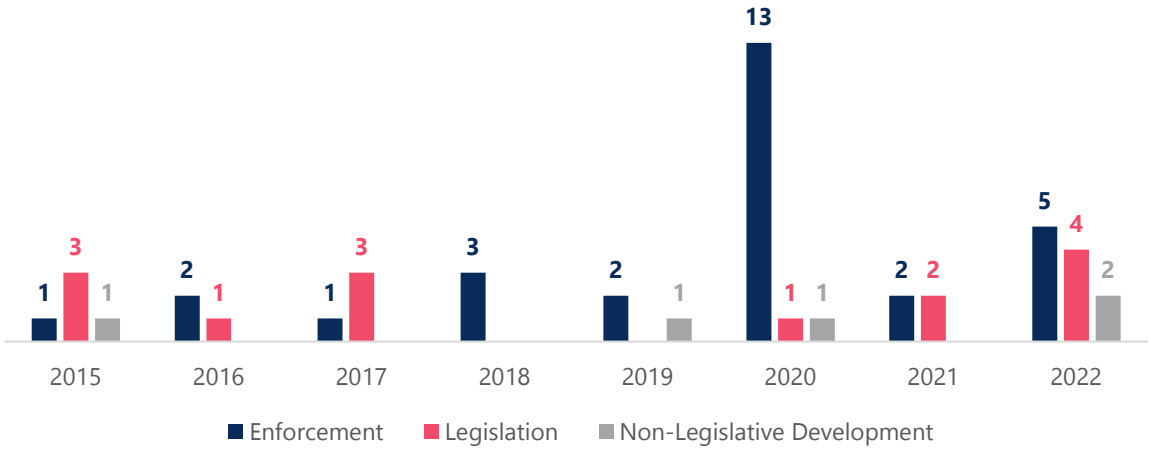
Overview of Report

The report is composed of contributions from subject matter experts covering 22 democracies across North America, Latin America, Europe, Africa, Asia and Oceania. Each country report is written by country experts, bringing local knowledge of their jurisdictions. Authors comment on legislative developments, non-legislative developments and enforcement (or lack thereof) in the countries they discuss. Developments cited reflect major geopolitical events across the 2015-22 period as well as the specific cultural dynamics playing out in particular countries. The authors include legal practitioners, lawmakers and scholars, which in part accounts for the difference in emphasis and style across the reports. Country experts were given freedom to make their assessment of the developments identified – which do not necessarily reflect the stance of The Future of Free Speech. The report is accompanied by an interactive map of restrictive and protective laws on free speech in the 22 countries (including the European Union) which were examined.

Threats from terrorism, hostile states, Covid-19, and greater regulation of online platforms are reflected in many of the countries' developments reported upon. A more comprehensive analysis of major themes can be found in the trends analysis that follows.

The report illustrates that free speech restrictions are not just on the rise in authoritarian and semi-authoritarian states, but also in the liberal democracies discussed below: over 75% of the developments discussed are speech restrictive.

**Speech protective developments by year**
(2015-2022)



**Speech restrictive developments by year**
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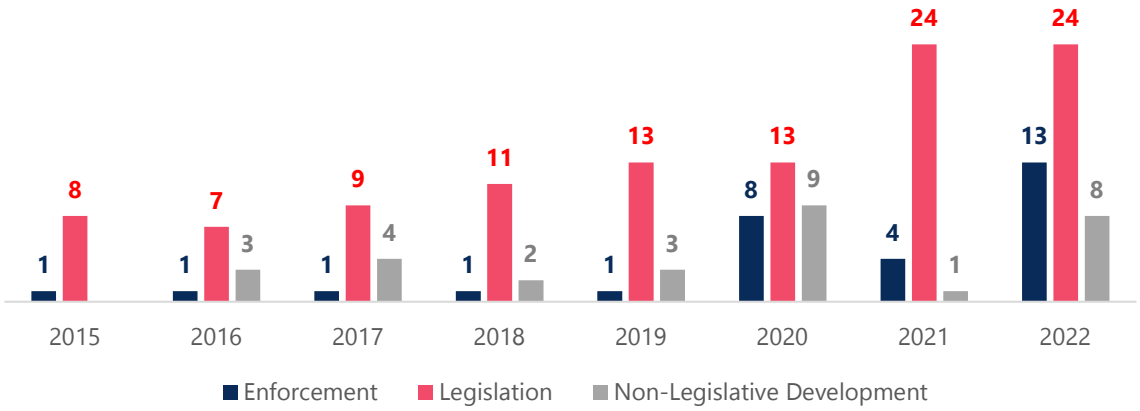



# Trends

## Methodology

Trend analysis was divided into three stages: (i) data collection, (ii) data curation, (iii) data analysis. By data, we mean the body of developments identified and discussed by contributors across the 22 country reports in the period between 2015-2022. Whilst some important developments that occurred during 2023 are mentioned, these are not subsequently quantified so as to ensure cohesion of infographics across countries.

Data curation: once the developments were collected, we categorized them. Firstly, by type of development: legislation includes draft and enacted laws; non-legislative developments include administrative steps that have an impact on freedom of expression and relevant assorted social movements and events; enforcement developments include key cases from senior courts and decisions by regulatory bodies in each country. Especially with enforcement developments, contributors have exercised their discretion to select only the most important cases. Consequently, this data cannot claim to be an exhaustive account of the state of enforcement within their jurisdictions. For example, in 2022 the New York Times found that since 2018 more than 1,000 people had been charged or punished with online-speech related crimes, and the authorities had investigated more than 8,500 cases overall.[1] Many of these cases would have been dealt with in lower courts and therefore would be outside the scope of our trend statistics. However, the scale of these cases suggests a much wider use of laws against hate speech, offense, terrorism etc. than captured in contributors' country reports.

Secondly, we determined whether the identified developments (broadly speaking) restricted or protected freedom of expression (and on what grounds). There were some hard cases, which

[1] https://www.nytimes.com/2022/09/23/technology/germany-internet-speech-arrest.html

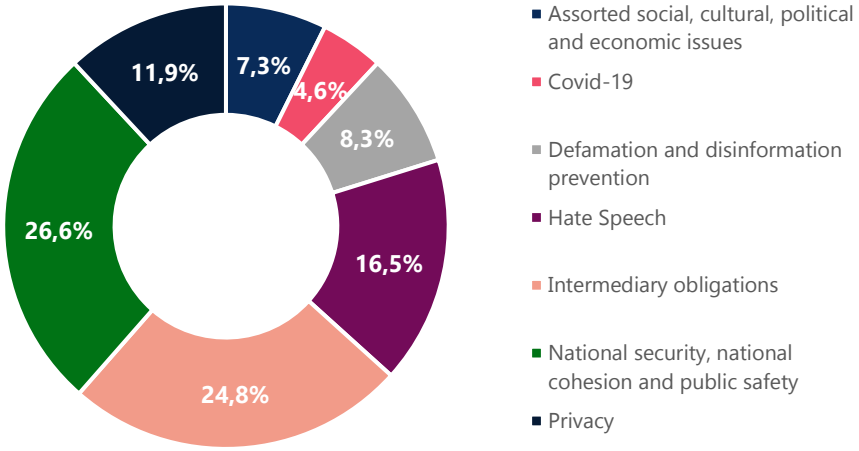
did not neatly fall within this binary. This included particularly controversial legislation, such as laws relating to academic freedom in England and Wales which could prove to be speech protective or could, arguably, give more discretion to government to intervene on campus.

We have excluded certain types of speech restrictions, such as on "revenge porn" and Child Sexual Abuse Material (CSAM), from trend quantification, since these are categories – unlike hate speech bans – that are universally recognized as falling outside the protection of freedom of expression. We have also excluded decisions of regional and international courts/bodies from our trend quantification, as these are not decisions taken by national legislatures or courts, which are the main focus of this report.

At times, the subcategories themselves within the speech restricting/protecting binary were not simple to designate, as discussed below. The distinction between speech restrictions based on national security or hate speech, for example, is slightly fluid. Once developments had been categorized, it was possible to filter thematically by type of development, which generated the trend analysis below and assisted with visualizing data. Some secondary reading assisted with contextualizing wider trend narratives.

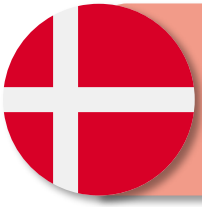
To get a flavor of the kinds of developments in each trend, we provide some pithy snapshots.

## Speech Restrictive Legislation Developments



## I. National security, national cohesion and public safety

**Australia (2018)** – Espionage and Foreign Interference Act – the Act can criminalize journalism and has been associated with the criminalization of leaking or sharing information in the national interest.



**Denmark (2016)** – Aliens Act amended – under the change, selected religious preachers are banned from entering Denmark based on their potential threat to national security and the nebulous term, Danish values.

The largest category of legislative developments between 2015-22 include efforts to restrict expression on national security, cohesion and public safety grounds. Often these laws purportedly seek to restrict incitement to violence against the state and the country's democracy. This speaks to the dilemma of when and how democracies should react to movements that threaten to overthrow democracy. This dilemma is reflected in the ability to qualify, or derogate from, expressive rights in nearly all the major constitutional and human rights instruments in the world, including under the US First Amendment.[2]

There are, of course, legitimate limits to the kind of speech that must be protected. Incitement to imminent violence and terrorism should be prosecuted. However, it is important to be vigilant against broadly framed categories, such as "extremists", which can result in legitimate dissent being suppressed, discussed further in the hate speech section.

All regions are represented in this category of legislation. National security restrictions generally break down into addressing threats from either terrorists or hostile states. Responding to Islamist terrorist and Far Right attacks in 2015-22, several countries passed laws aimed at these perceived threats. For example, the Counter-Terrorism and Security Act 2015 in England and Wales created a 'Prevent' Duty, a legal obligation for specified authorities to take measures aimed at preventing individuals from being drawn into terrorism or supporting extremist ideologies. The duty has received much criticism from civil society organizations for its perceived surveillance of certain communities and chilling effect on free speech, due in part to its broad framing.[3] Regions with authoritarian and semi-authoritarian regimes, such as Europe and East Asia especially, seem to have produced national security restrictions aimed at limiting the influence of hostile states.

[2] https://www.thefire.org/research-learn/unprotected-speech-synopsis
[3] https://www.preventwatch.org/about/

Where legislation becomes even more contentious is in the grey zone between national security and national cohesion. The latter category features heavily in multiculturalism debates. In Germany, debates have raged about how to have a dominant, shared values system, around which an increasingly diverse country can cohere. This idea is often referred to by politicians and the media as *Leitkultur.*[4] Legislation in Denmark, for example, aims to create barriers for economic transactions from organizations undermining Danish values. Laws which move further away from incitement to violence narrowly defined and, instead, fall disproportionately on cultural practices of minorities can be seen in developments such as so-called "burqa bans" and moves to ban the teaching of critical race theory in the US. Attempts to quash the aspirations of separatist movements are also hinted at in legislation.

## II. Intermediary obligations

**EU (2022)** – Digital Services Act – establishes a regulatory framework for digital platforms, imposing obligations on online intermediaries to tackle illegal content and enhance transparency, accountability, and user protection.

**Germany (2017)** – Network Enforcement Act (NetzDG) – mandates platforms to act quickly to remove illegal content, arguably with collateral impacts on lawful speech.

**UK – Online Safety Bill (Act, 2023)** – affecting England and Wales, it imposes proactive duties on platforms for illegal content, marking a break from previous intermediary liability regime in the UK. The evidentiary bar to find content as illegal is relatively low – 'reasonable grounds to infer' – raising fears that companies will be incentivized to censor lawful speech.

We label this kind of legislative development 'intermediary obligations,' as it accounts for a broad range of liability and enhanced duties that have been imposed on online intermediaries such as Internet Service Providers, websites, and social media platforms that host user-generated content. Whether and when they are held liable for users' online activities has important impacts on free speech, as the risk of enforcement action incentivizes platforms to moderate users' speech. Content regulation of online platforms to counter illegal online content, a much-studied development by intermediary liability experts, is a common trend across most regions in 2015-22. The EU has chosen to leave the liability

[4]https://www.theguardian.com/world/2017/may/05/german-minister-resurrects-wary-debate-over-countrys-values

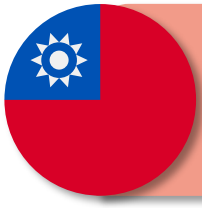
regime of the e-Commerce Directive untouched and instead decided to regulate how online platforms are to remove illegal content.[5] A "Brussels effect"[6] (referring to the increasing harmonizing of regulations and companies' policies globally with EU standards) in content regulation of online platforms is discernible. Both Taiwan and Costa Rica have legislation pending that is consciously inspired by the EU's DSA. However, it is worth questioning the extent to which this legislation actually reflects what the DSA says, or whether it alludes to the DSA to lend legitimacy to the adoption of potentially overly censorious legislation, as Joan Barata has highlighted[7].

Germany's Network Enforcement Act (NetzDG) is perhaps the most widely debated initiative enacted by a liberal democracy to counter illegal online content. The Act (set to be repealed due to the adoption of the DSA) obliges platforms to remove or disable access to manifestly illegal content within 24 hours of having been notified of the content. Where content is not manifestly illegal, social media providers must remove the post in question within seven days. Non-compliance can lead to significant fines. Critics argued the emphasis on speedy removal could lead to censorship of lawful speech, of which there is some evidence[8]. NetzDG's international influence[9] can be seen in Austria's Communication Platforms Act. While different to the NetzDG in some ways, the UK's Online Safety Bill reinforces the trend towards greater responsibilities on platforms to proactively moderate content in Europe – both inside and out of the EU. The motivation behind and impact of the Christchurch Call to Action Summit (though itself not hard law) is evident in further regulation around terrorist content, [10]such as the EU regulation addressing the dissemination of terrorist content online that became applicable across the bloc in June 2022.

[5] https://www.jipitec.eu/issues/jipitec-12-5-2021/5491
[6] Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (New York, 2020; online edn, Oxford Academic, 19 Dec. 2019), https://doi.org/10.1093/oso/9780190088583.001.0001
[7] https://techpolicy.press/regulating-online-platforms-beyond-the-marco-civil-in-brazil-the-controversial-fake-news-bill/
[8] https://www.reporter-ohne-grenzen.de/pressemitteilungen/meldung/netzdg-fuehrt-offenbar-zu-overblocking/
[9] https://futurefreespeech.com/wp-content/uploads/2020/09/Analyse_Cross-fertilizing-Online-Censorship-The-Global-Impact-of-Germanys-Network-Enforcement-Act-Part-two_Final.pdf
[10] https://eucrim.eu/news/rules-on-removing-terrorist-content-online-now-applicable/

## III. Hate Speech

**Norway (2021)** – Amendments to The Penal Code Section 185 (Hate Speech) – Section 185 of the Norwegian penal code, which criminalizes hate speech, was amended several times. In January 2021, it was expanded to include hate speech against gender expression and gender identity.



**Taiwan (2016/19)** – Criminal Code and Civil Servants Election and Recall Act – provisions for criminal punishment of various speech-related offenses, such as insulting public officials, incitement, defamation, public insult, and obscene speech.

A common theme is attempts to address hate speech on grounds of gender or sexuality. In Scandinavia in 2015-22, there was a flurry of legislation passed which seeks to tackle hate speech against transgender people and the wider LGBT+ community, which led to worries about legal uncertainty and competing claims under hate speech bans between, for instance, LGBT activists, radical feminists and conservative religious groups. Even more concerning Denmark and Taiwan also brought in legislation around offensive and hateful speech towards public servants, an issue that received judicial treatment at the ECtHR in the period under review.

Canada also passed Holocaust denial legislation, making it a crime to condone, deny or downplay the Holocaust in public.[11] This well-intentioned Canadian law arguably illustrates the diffusion of the 'militant democracy'[12] approach (the legal restriction of democratic freedoms for the purpose of shielding democratic regimes from the threat of being overthrown by legal means) of some European democracies towards Holocaust denial legislation, the merits and efficacy of which are debatable[13]. Convictions under these laws can make antisemites into supposedly persecuted "free speech martyrs" and can become publicity stunts[14] for their hatred and lies[15].

Combatting incitement to hatred is a desirable aim mandated by international human rights standards and pursued by most open democracies. However, hate speech laws are not uncontroversial or cost free. They are vulnerable to abuse and very hard to implement without collateral impact on legitimate discourse. The presence of hate speech laws on the statute

[11] https://www.timesofisrael.com/canada-set-to-outlaw-holocaust-denial/
[12] Carlo Invernizzi Accetti and Ian Zuckerman, 'What's Wrong with Militant Democracy?' *Political Studies* Vol. 65 (2017) https://journals.sagepub.com/doi/pdf/10.1177/0032321715614849
[13] https://www.theguardian.com/commentisfree/2007/jan/18/comment.secondworldwar; https://www.gresham.ac.uk/watch-now/free-speech-and-holocaust-denial
[14] https://www.theguardian.com/world/2006/feb/20/austria.thefarright
[15] https://www.youtube.com/watch?v=Ui1vmS9Yz5M

books can open the door to scope creep of speech restrictions, far beyond the requirements under Article 19 and 20 ICCPR[16], which can put governments in paradoxical situations. For example, in 2023 UK government officials suggested broadening the definition of extremism to include anyone who "undermines" the country's institutions and its values.[17] Boris Johnson's government (2019-22) illegally suspended Parliament for five weeks and he was found to have lied to Parliament about illegal Covid lockdown parties.[18] Many people saw these actions as showing contempt towards British institutions and democratic values. With sweeping legislative proposals like these, governments run the risk of being hoisted by their own petards – being accused of the very thing their restrictions claim to guard against.[19] There is an element of the absurd to this British example, but casually branding dissenters as "extremists" whose speech must be suppressed can have far more sinister consequences.

Broad hate speech laws can also have unintended effects when it comes to race, sexual orientation and other protected characteristics. Bans on incitement to hate speech were first introduced in many countries with the admirable aim of protecting discriminated against minorities. Recent examples such as "Coconutgate" in London,[20] which some would view as a legitimate political critique of those who support racist policies, and the fining of the leader of a French LGBTQ rights organization in 2016 for calling the president of an organization that defends "traditional" family values and is against same-sex marriage a "homophobe",[21] could have a big chilling effect on political speech. When some ethnic minorities are disproportionately overrepresented in Western criminal justice systems, it is especially worth considering the merits of sweeping hate speech laws, to avoid "the silly policing of inner-group language and culture".[22]

[16] https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights#article-19

[17] https://www.theguardian.com/uk-news/2023/nov/04/plans-to-redefine-extremism-would-include-undermining-uk-values

[18] *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] https://www.supremecourt.uk/cases/docs/uksc-2019-0192-judgment.pdf; https://www.instituteforgovernment.org.uk/explainer/privileges-committee-investigation-boris-johnson

[19] https://www.theguardian.com/commentisfree/2023/nov/10/michael-gove-extremists-british-values-morale-democracy-hatred

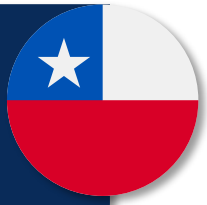
[20] https://www.eventbrite.com/e/uppity-the-intellectual-playground-tickets-765704612107?aff=oddtdtcreator; https://twitter.com/nelsabbey/status/1724381902524592171

[21] https://www.salon.com/2016/11/07/french-hate-crime-ruling-sets-a-dangerous-precedent-for-lgbt-people-it-is-now-illegal-to-call-someone-a-homophobe-in-france/

[22] https://twitter.com/nelsabbey/status/1724341605870481784

## IV. Privacy

**Chile (2021)** – Proposed Bill for Digital Platforms Regulation – codifies the "right to be forgotten", allowing people to have their personal data erased from the internet and other databases, limiting internet users' access to information. This right could create grounds for censorship of information online if it were enforced disproportionately.



The EU's General Data Protection Regulation (GDPR) came into force in May 2018, about halfway through the period under review. Evidence of its extraterritorial effect can be seen in a Chilean bill codifying the "right to be forgotten." The right allows individuals to have their personal data erased from the internet and other databases, which some would argue impinges upon access to information and free speech. In the landmark *Google v Spain*[23] decision, which established the right later codified under the GDPR, the European Court of Justice ruled it was for search engines (private companies) to apply erasure rights. We must question whether it is desirable to have these companies carrying out this delicate balancing of privacy and expressive rights. Free speech advocates have sounded the alarm about the negative impact of the GDPR's right to erasure (Article 17), especially if copied by authoritarian regimes.[24] In the time period examined, strengthened data protection and privacy acts and bills can be seen in Australia, Japan and South Africa.

## V. Disinformation and defamation

**Korea** – defamation law – criminal punishment remains in place for defamation and insult in the Korean Criminal Code after many decades. This disproportionate sanction can have a big chilling effect on speech. Criminal – as opposed to civil – defamation is now rare in liberal democracies. The UN Human Rights Committee has called for its repeal.

**France (2018)** – law on manipulation of information – enacted to counter disinformation during electoral periods, under which a judge can decide within 48 hours on the depublication of widely distributed fake news that disrupts electoral processes. The law also allowed the media regulator to impose sanctions on foreign-controlled media that broadcast disinformation. There is the risk of state authorities overreaching and becoming arbiters of truth.

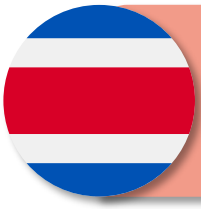
[23] https://globalfreedomofexpression.columbia.edu/cases/google-spain-sl-v-agencia-espanola-de-proteccion-de-datos-aepd/
[24] https://www.accessnow.org/wp-content/uploads/2017/09/RTBF_Sep_2016.pdf

While disinformation and defamation have been grouped together for analytical reasons, it is important to emphasize that they are legally distinct concepts – the former is often not illegal and much more difficult to define legally[25]. They both, however, deal with the distortion of "truth".

A recurrent issue, which is dealt with further in case law cited in this report, is the issue of wealthy individuals' and/or corporations' forum shopping to use favorable defamation laws to silence public interest criticism. It is hinted at in Korean and Australian legislative discussion. The fear of online fake news distributed by malicious actors in recent elections is echoed in France's 2018 law on manipulation of information to counter disinformation during electoral periods, which authorizes judges to order false and misleading online content blocked and removed.

### VI. Assorted social, cultural, political and economic issues

**EU (2019)** – Copyright Directive – harmonizes EU copyright law, requiring internet service providers to make "best efforts" to prevent access to copyrighted material, raising concerns about freedom of expression due to automated filters.



**Costa Rica (2022)** – Law 9808 – Labor Code amended, introducing restrictions on the rights of unions and workers to associate, peacefully assemble, and express themselves through strikes, especially in essential public services, posing threats to freedom of expression, association, and peaceful assembly.

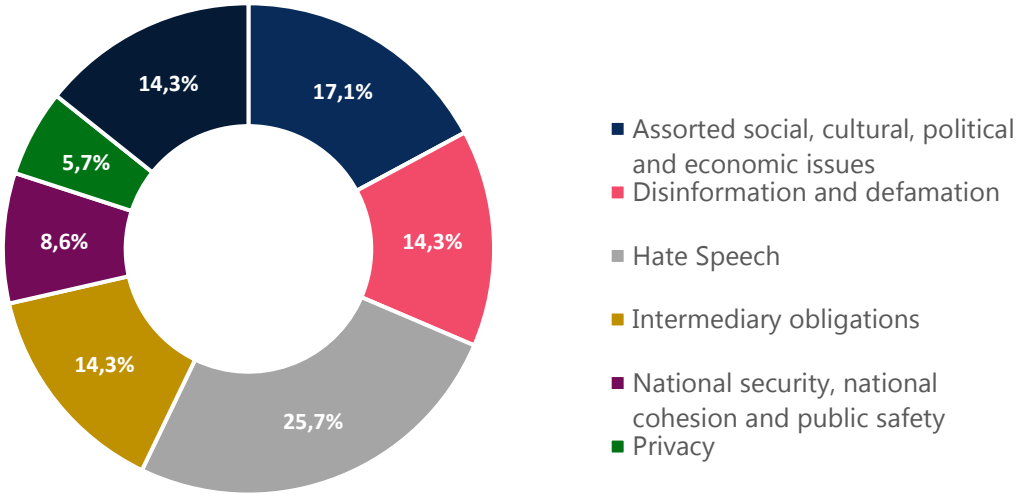
These measures include slightly more esoteric speech restrictive measures. For example, legislative proposals to chip away at the US Supreme Court decision in *Citizens United*[26], recognizing political donations as a form of speech. Other issues covered here include copyright protections in the EU and Uruguay, and speech restrictions relating to sharing information about legal proceedings (i.e., contempt of court) in Australia and New Zealand.

### VII. Covid-19

Covid-19-related legislation was passed in several jurisdictions. In South Africa, Sweden and Canada, such legislation prohibited gatherings. In South Africa, it criminalized publishing deceptive statements about the pandemic.

[25] Ó Fathaigh, R. & Helberger, N. & Appelman, N. (2021). The perils of legally defining disinformation. *Internet Policy Review*, 10(4). https://doi.org/10.14763/2021.4.1584
[26] https://www.oyez.org/cases/2008/08-205

## Speech Restrictive Non-Legislative Developments




### I. Hate Speech

**Czech Republic (2018)** – The Czech human rights Ombudsman – tasked with protecting citizens' rights warned about the rise in hate speech online by "ordinary" citizens (not extremists known to the authorities) in a communique. She urged the state to clamp down on online speech and act proportionately when doing so. This was followed up two years later by official recommendations from the Ombudsman, which advocated the use of automated tools for detecting hateful comments. The use of such tools often has implications for lawful speech.

**Canada (2019)** - The Canadian government adopted the International Holocaust Remembrance Alliance's (IHRA) definition of antisemitism, which was later used by several provinces. This broad definition has attracted criticism that it can be misused to protect Israel from legitimate criticism. NGOs, including Israel's largest human rights group B'Tselem, argue the IHRA definition has been used to suppress non-violent protest and speech critiquing Israel and/or Zionism, posing a big risk to lawful expression.

Around a quarter of all speech restrictive non-legislative developments identified in this report related to hate speech. The safety of journalists in the face of in-person and online abuse also become an issue of national debate in South Africa and England and Wales. In this context, the UK government published the county's first national action plan to protect journalists from abuse and harassment, affecting England and Wales. Political satire in South Korea once again

got on the nerves of government officials – the culture ministry reprimanded the Korean Cartoon and Video Agency for a cartoon satirizing the Korean President.

## II. Intermediary obligations

**USA (2020/1)** – Congressional Hearings and criticism of social media companies – Big Tech CEOs of companies like Facebook, Twitter, and Google were bought before Congress to face questions on how they police disinformation online. While Section 230 Communication Decency Act 1996 (CDA) has been a target for legislators, comprehensive legislative reform at the federal level has not happened.

Debates concerning intermediaries' obligations featured in high-profile social and political developments in many countries covered in the report. Developments included Congressional grilling of social media company CEOs in the US. Lawmakers from both sides[27] of the aisle called for reform of Section 230 of the CDA. The section shields tech platforms from liability for content users post on their sites, and it allows platforms to moderate such content with immunity. Some lawmakers argue that Section 230(c)(1) encourages the spread of harmful content while Big Tech can avoid responsibility. However, others claim that Section 230(c)(2) allows Big Tech to unfairly censor conservative opinions which violates free speech. The shift towards greater obligations on platforms at the EU level can also be seen in the EU Code of Conduct on Countering Illegal Hate Speech Online, published in 2016 as well as the DSA (discussed above) and several standoffs between European Commissioners and social media companies.

[27] Bipartisan Policy Center, 'Summarising the Section 230 Debate: Pro-Content Moderation vs Anti-Censorship' (2022) https://bipartisanpolicy.org/blog/summarizing-the-section-230-debate-pro-content-moderation-vs-anti-censorship/

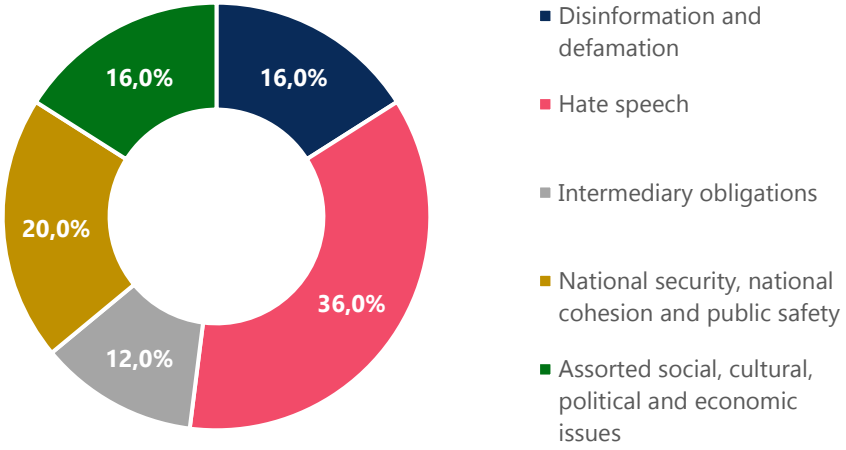
## III. Disinformation and defamation

**Spain (2022)** – Establishment of a "Procedure for intervention against Disinformation" by the Department of National Security. Members of the government, with loosely defined powers, are in charge of its implementation and decide what does and does not constitute disinformation. Critics also argued journalists and civil society were not properly consulted. Though intended for use against hostile foreign states, some argued its drafting meant it could be used domestically.

**European Union (2022)** – Code of Practice on Disinformation – it aims to empower industry to adhere to self-regulatory standards to combat disinformation. Critics say it blurs the limits between illegal and harmful speech and so may also create added difficulties for users to dispute platforms' interpretations of content and defend their rights.

Several European countries developed codes of practice on defamation and the EU adopted the 2022 Code of Practice on Disinformation, a version of which was first introduced in 2018.

## Speech Restrictive Enforcement Developments




## I. Hate Speech

**Japan (2022)** – The Supreme Court ruled on whether local laws in Osaka, which sought to implement a 2016 national anti-hate speech law, breached the Japanese Constitution's free speech protections. The court ruled that the Osaka ordinance did not violate freedom of expression under the Constitution by disclosing the username of an individual who uploaded a hateful online video.

**Norway (2022)** – the Norwegian Supreme Court convicted a man for hate speech about a person's gender identity. The defendant called the trans woman a "perverted male pig with sick fantasies" amongst other slurs against her parenting abilities. This case illustrates the application of the criminal code dealing with trans hate, showing what is sufficiently offensive to attract punishment.

**Spain (2018)** – *Jose Miguel Arenas (Valtonyc)* case – Spanish Supreme Court held a rapper's lyrics constituted criminal offenses because they created an atmosphere of fear and anxiety and that it was irrelevant that the rapper did not intend to harm any person. Lyrics included: "I want to send a message of hope to Spaniards: Eta is a great nation," in a reference to the Basque militant group. "The king has a rendezvous at the village square, with a noose around his neck," he says in another song.

Hate speech is the biggest category of speech restrictive case law cited in the reports, the vast majority of which emanated from European jurisdictions. In the past few decades, the ECtHR has exempted many controversial forms of expression from the protection of Article 10 of the European Convention on Human Rights (ECHR) (right to freedom of expression and access to information), and adopted a broader understanding of impermissible hate speech.[28] Speech targeting minorities (racial, religious and sexual) are all represented in the enforcement of hate speech laws by courts in Austria, Norway and Spain. The Japanese Supreme Court too ruled that recently instituted hate speech ordinances in Osaka were constitutional. Osaka City became the first local government in Japan to enact a hate speech ordinance in 2016. These ordinances were applied to speakers at a gathering who called for ethnic Koreans to be "killed" and "driven out of Japan". The Supreme Court ruled that the ordinance did not contravene the right to freedom of expression under the Japanese constitution, as the hate speech restrictions were "only limited to extremely and maliciously discriminatory words and deeds."[29]

The speech prohibited in the Japanese example seems to incite violence and as such is in line with international human rights standards. This can be contrasted with the Spanish case involving the rapper, Valtonyc. He was sentenced to three-and-a-half years in prison on charges of glorifying terror, insulting the Spanish monarchy and making threats in his lyrics. The Spanish Supreme Court cited ECHR case law as authority to rule the artist's free speech was not being infringed by his conviction. Fellow ECHR signatory, Belgium, where Valtonyc fled, refused to extradite him after multiple Belgium courts found none of his three charges were crimes in Belgium.[30] In October 2023, his convictions having lapsed, Valtonyc returned to Spain. This difference in approach towards Valtonyc's alleged speech crimes between two European democracies throws into sharp relief the vague and arbitrary nature of these Spanish speech laws.

Valtonyc's case is not an isolated incident. Catalan rapper, writer and political activist Pablo Hasel received a nine-month jail term for glorifying terrorism and slandering the crown and state institutions in lyrics and tweets that attacked the monarchy and police.[31] This sparked violent protests, illustrating how draconian hate speech laws can create pressure cooker

[28] https://futurefreespeech.com/wp-content/uploads/2022/05/Article_South-Africa-the-Model-A-comparative-Analysis-of-Hate-Speech-Jurisprudence-of-South-Africa-and-The-European-Court-of-Human-Rights.pdf; https://futurefreespeech.com/wp-content/uploads/2023/07/Community-Guidelines-Report_Latest-Version_Formated-002.pdf

[29] https://www.asahi.com/ajw/articles/14550113#:~:text=The%20Supreme%20Court%2C%20in%20its,guarantee%20of%20freedom%20of%20expression.

[30] https://www.dw.com/en/valtonyc-belgium-refuses-extradition-of-spanish-rapper/a-60276667; https://apnews.com/article/entertainment-government-and-politics-spain-extradition-e0d6da4a212b79b1540767d698485dcb

[31] https://www.bbc.co.uk/news/world-europe-56082117

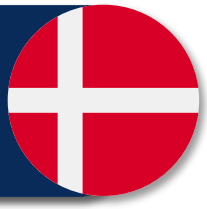
situations. These cases also highlight the persistence of lèse majesté[32] (defaming a ruling head of state) in a liberal, constitutional monarchy bound by the ECHR. In Spain, any example of justifying a terrorist act, even if it took place decades ago, can lead to a conviction – including a joke on X/Twitter about the assassination of a senior figure in Franco's fascist dictatorship some fifty years ago.[33]

### II. National security, national cohesion and public safety

**England and Wales (2022)** – *Pwr v Director of Public Prosecutions* – UK Supreme Court ruled that protestors' conviction under the anti-terror legislation was compatible with article 10 ECHR – national security concerns meant this was a proportionate interference with the right to freedom of expression. This decision came at a time when public order law reforms tightened restrictions on protestors.

**Spain (2019)** – several Catalan politicians and activists were convicted over the 2017 independence referendum. The conviction in part rested on sedition charges. Civil society leaders argued these decisions stifled legitimate protest rights. Criminal sedition provisions were later repealed from the Criminal Code.

**Denmark (2021)** – the Supreme Court ruled to dissolve and ban the gang "Loyal to Familia" – an association can be banned if it works towards an illegal aim (organized crime), impacting freedom of association and the freedom of speech among the gang's associates.



There were several significant court decisions on national security (broadly understood) grounds, which limited expression in the period under review. Terrorism-related restrictions were deemed to be ECHR-compliant by the UK Supreme Court and the French courts. Terrorism-related content was also prosecuted by New Zealand's Chief Censor relating to the Christchurch Terror attacks. Regarding electoral integrity, in Asia, the Korean National Election Commission deleted, blocked and investigated many posts around the 2020 general election.

[32] https://www.article19.org/resources/spain-sentencing-of-rapper-highlights-urgent-need-to-reform-penal-code/
[33] https://www.theguardian.com/world/2017/mar/30/spanish-woman-given-jail-term-for-tweeting-jokes-about-franco-era-assassination

### III. Disinformation and defamation

National security concerns are evident in the blocking of websites concerning Russian disinformation and propaganda in the Czech Republic.

### IV. Intermediary obligations

**Australia (2021)** – *Voller* case – news organizations were held liable by the High Court for comments posted by readers on their Facebook pages, highlighting the complexities of regulating online speech and the responsibility of media outlets.

**EU (2019)** – *Glawischnig-Piesczek v. Facebook Ireland Limited* – this advisory opinion states that social media platforms can be compelled to remove illegal content globally, emphasizing their responsibility to actively monitor and regulate harmful or defamatory material.

With the shift to more legislation around regulation of different aspects of the activity of online platforms, courts are also showing a general trend towards being more assertive in their treatment of online platforms. A 2019 landmark decision of the Court of Justice of the European Union (CJEU) means that the rule against general monitoring obligations (Article 15 of the E-Commerce Directive) does not stop EU member states' national courts from ordering hosting platforms like Facebook to take down illegal user-generated content. Article 15 of the E-Commerce Directive sets out the principle that EU Member States cannot impose a general obligation on internet intermediaries to monitor what people say online. A cornerstone of European internet law for many years, it is the "stent that keeps the arteries of the internet open" in Europe, as it prevents states from making internet gateways into checkpoints to police speech.[34] Significantly, courts can order the take down of content which is identical, equivalent to the content or information which was previously declared to be unlawful. German online content regulation was implicated in a 2022 Federal Constitutional Court (abbreviated in German as BVerfG) decision concerning longtime online hate speech campaigner, Renate Künast. Users had called her a "brain amputee", a "sick woman" and "paedo-filth" among other insults, according to the BVerfG judgment, all of which it found to be criminal. The BVerfG told Facebook it must divulge the personal data of users who insulted her.

User-generated comments also were at the crux of the *Voller* litigation in Australia. This involved a report focused on the treatment of inmate Dylan Voller who, as an eleven-year-old at the facility, was restrained by the neck, stripped naked, thrown into a cell, isolated, and tear-gassed. After the report aired, other media outlets published stories on Voller that were also

[34] https://www.cyberleagle.com/2017/05/time-to-speak-up-for-article-15.html

shared across the respective media organizations' social media. Many of the ensuing comments on the posts vilified Voller and defamation proceedings took place. The High Court controversially held in September 2021 that media outlets could be held liable for comments by third parties on their Facebook pages, causing much concern amongst media companies in Australia which consequently either turned off comments or moderated more. User-generated comments recently received judicial treatment at the ECtHR in the *Sanchez v France* litigation, which received a final judgment[35] from the Grand Chamber in May 2023. The court ruled that prosecuting a local councilor for failure to delete comments posted by third parties on his Facebook wall did not violate his right to freedom of expression. This decision could open the door to greater content moderation obligations on prominent individuals on their social media accounts and chill speech online. Prominent individuals – including elected politicians – might start to turn off comments as a precautionary measure, which severely limits the ability for the public to comment, criticize and communicate with politicians and public officials.

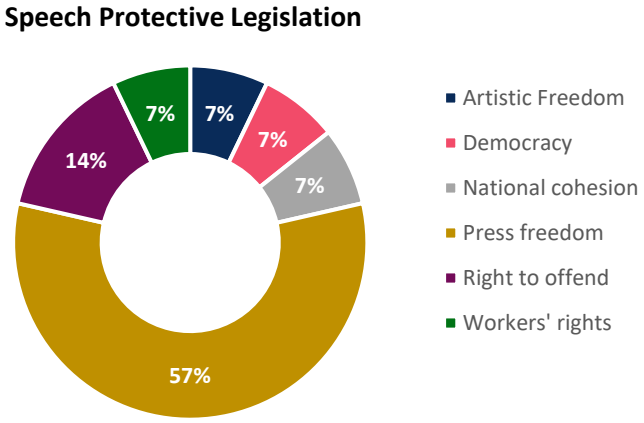
## V. Covid-19

**Canada (2022)** – Declaration of Public Order Emergency – the federal government invoked the Emergencies Act for the first time in Canadian history, which allowed the government to prohibit public assembly, amongst other interventions.

Countries in Europe, Asia and Africa enforced legislation prohibiting gatherings and disinformation during the pandemic.

[35] *Sanchez v France* (2023) https://www.mediadefence.org/wp-content/uploads/2023/05/CASE-OF-SANCHEZ-v.-FRANCE.pdf

## Speech Protective Legislation Developments




**England and Wales (Bill in 2021/2)** – Higher Education (Freedom of Speech) Bill (Act, as of 2023) – after two years of debate, this Act was adopted to protect freedom of speech within universities and student unions. Some argue this kind of speech oversight, notionally to protect speech, will have the opposite effect.

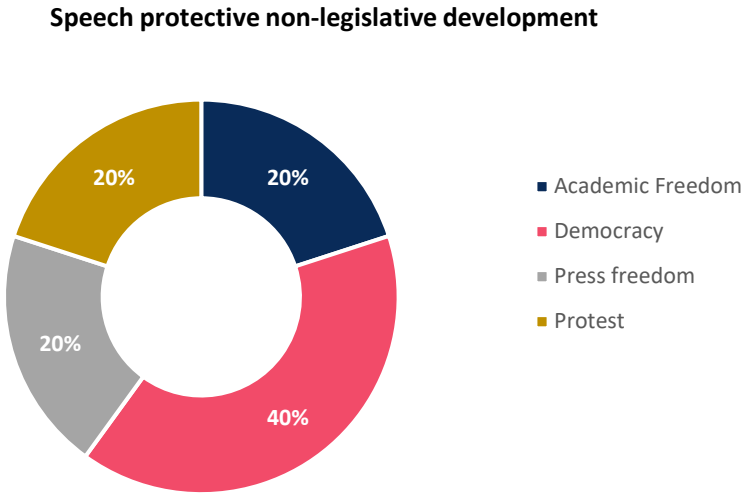
**Norway (2015)** – New Penal Code – Norway implemented a new penal code, resulting in several changes affecting free speech. It included significant modifications to rules on blasphemy (decriminalized), defamation (decriminalized), and privacy.

**Spain (2022)** – Repeal of criminal sedition provisions and introduction of 'aggravated public disorder' offense (Organic Law 14/2022). This reform was prompted by criticism of the Spanish Supreme Court's decision of 2019 sentencing a series of Catalan politicians and activists to imprisonment terms.

Legislative reform on the grounds of academic freedom, press freedom, national cohesion, protection of democracy, whistleblower protection and the removal of criminal sedition protected expressive rights around Europe and in New Zealand. Notwithstanding bipartisan political pressure,[36] Section 230 CDA in the US remains on the statute books.

[36] https://futurefreespeech.com/scope-creep/

## Speech Protective Non-Legislative Developments

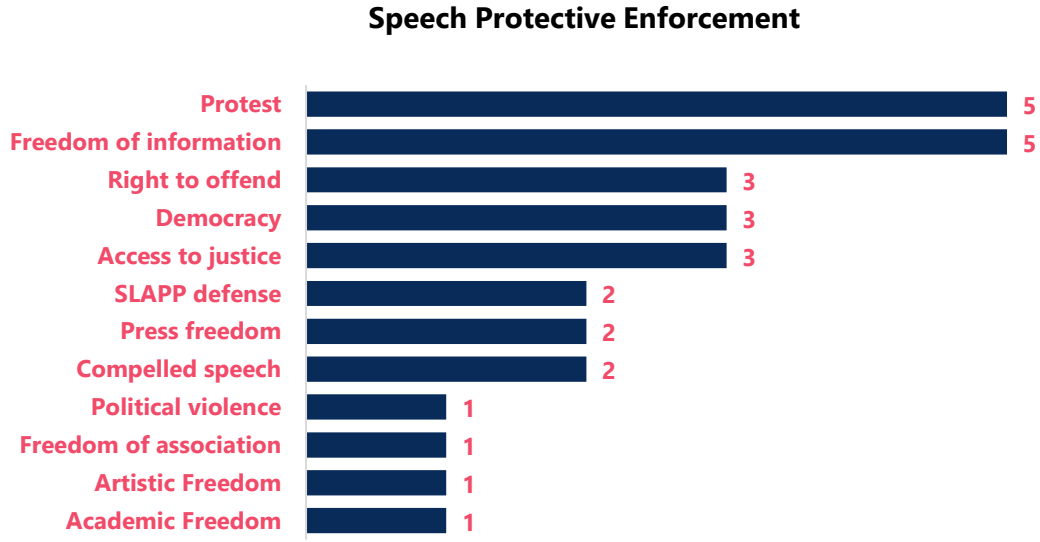



Various non-legislative developments, including the Tibet Commission in Denmark, reaffirmed the importance of free speech protections. The Commission was set up by the Danish government to investigate how the authorities policed Chinese state visits from the 1990s through to the 2010s and if there were any rights violations. The Tibet Commission concluded the Danish government had violated the constitutionally protected rights to freedom of expression and assembly in its policing of protestors who wanted to make their pro-Tibet views known to the Chinese delegation during recent Chinese state visits. Promoting free speech on campus is reported as a key non-legislative development in Canada, aligning with similar debates in other Anglophone democracies in the period under review (these debates also play out in Norway).

## Speech Protective Enforcement Developments

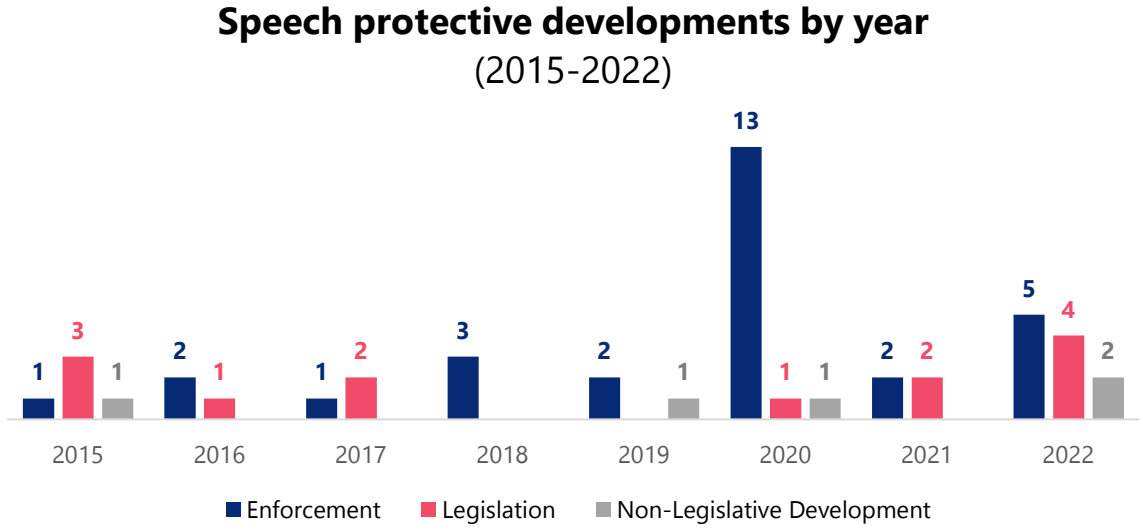
**South Africa (2019)** – Constitutional Court decision in *Moyo v. Minister of Police; Sonti v. Minister of Police* – the court held that an apartheid-era law, the Intimidation Act, was unconstitutional because it criminalized intimidatory statements.

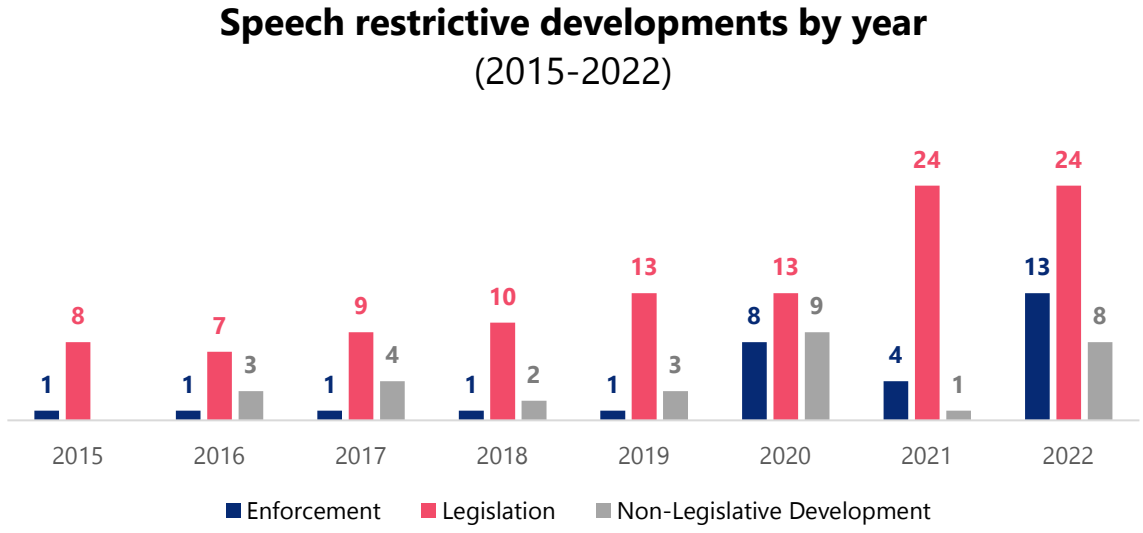
**France (2022)** – Constitutional Council decision – the "Avia law" was judged unconstitutional by the Constitutional Council. The law targeted hate speech, placing onerous obligations on online intermediaries, including tight deadlines, which some feared would have a collateral impact on perfectly legal speech. This decision reiterated the importance of the online sphere for participation in public life and the expression of ideas and opinion.




Courts are where some of the most noteworthy expressive rights protection happened in 2015-22. The South Africa Constitutional Court delivered some robust judgments in defense of free speech, reinforcing its position as a sophisticated and influential supreme court on expression matters. France's Constitutional Council struck down a proposed intermediary obligation law (the Loi Avia, analogous to the NetzDG) in 2020 on freedom of expression grounds, applying legality, necessity and proportionality tests to this legislative shift. The ECtHR ruled on several cases, including from Portugal regarding satire and freedom of expression infringements. Satirical expression was also protected by the Danish Supreme Court in a case about the famous Copenhagen Little Mermaid statue. The court protected the parody principle (i.e., copyrighted works may be subject to parodies) in Danish copyright law, by ruling

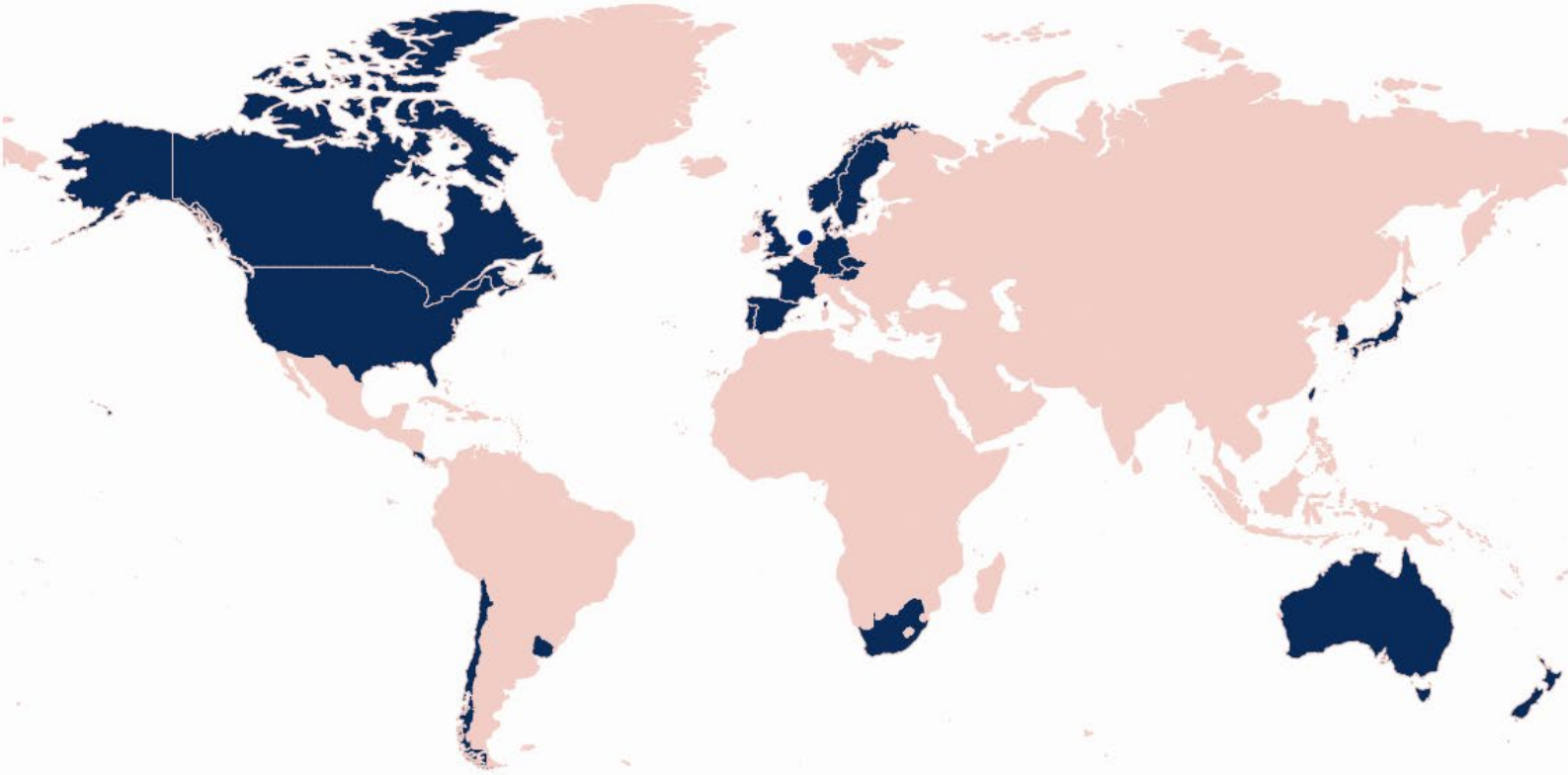
that an image parodying the famous Copenhagen statue and its publication in the press did not violate the law. The originality of the satirical image and ECHR Article 10 considerations supported this ruling. Notably, a 2015 Norwegian Supreme Court decision, which afforded a broad protection against exposure of journalistic sources even in the context of a government anti-terror investigation, won Columbia University Global Freedom of Expression's most significant legal ruling prize in 2016[37].




[37] https://globalfreedomofexpression.columbia.edu/prizewinners2016/

# Country Analyses




# Australia

**Author:** Richard Murray, University of Queensland

Richard Murray is a Lecturer of Digital Journalism and the Director of Journalism Studies at The University of Queensland in Australia. His research focuses on the interaction between journalists, media lawyers, and the law. Before coming to the University of Queensland, he worked as a journalist across the Asia-Pacific.

**Country Summary**

Australia lacks explicit constitutional protection for freedom of expression, relying on an implied right linked to representative government. Advocates call for constitutional recognition due to concerns over laws restricting free speech. Defamation law poses a significant challenge for media, with dwindling resources making defense against claims difficult, while the decline of mainstream media has led to increased legal action, impacting press freedom. Online defamation and trolling issues have sparked discussions about online speech regulation. 3 pieces of legislation implemented between 2015 and 2022 have raised concerns about stifling speech and criminalizing journalism: The Racial Discrimination Act's section 18c, the Espionage Act (2018), and the Data Retention Act (2015). The 2019 Australian Federal Police (AFP) raids on journalists highlighted worries about press freedom and whistleblower safeguards. Opaque national security and counter-terrorism laws have fueled anxiety, potentially expanding their application beyond their intent. Suppression orders at state and federal levels affect open justice and expression, sometimes being used to expedite cases, or protect defendants. Proposed Privacy Act amendments raise further concerns about privacy outweighing public interest, potentially impacting investigative journalism and information sharing. Balancing free speech against other societal interests remains contentious in Australia's intricate legal landscape.

## Introduction

The Australian Constitution[38] does not expressly protect freedom of expression. Instead, the Australian high courts at both state and federal levels hold that an implied freedom of expression exists as an indispensable part of representative government enshrined in the Australia Constitution. This implied protection is not always ensured and has led free speech advocates to call for freedom of expression to be enshrined in the Australian constitution. These calls have been especially loud from press freedom advocates, academics, and activists, who argue press freedom has been under attack by successive Australian state and federal governments through the imposition of laws that, in some cases, have the capacity to criminalize journalism, journalists, and the sources journalists rely upon. This will be discussed later in this analysis.

Australia has not yet reached the upper echelons of free speech indexes. Across organizations that evaluate freedom of expression, freedom of speech, and press freedom, Australia lags behind Scandinavian countries, the United States of America, Canada, and its closest neighbor, New Zealand. For example, in the Reporters Without Borders 2023 World Press Freedom Index, Australia ranked 27 out of 180 countries;[39] 11th out of 33 countries on Justitia's 2021 Free Speech Index on the public's support for free speech with a score of 69;[40] 31st out of 161 countries on Article 19's 2022 Global Expression report[41] and 10th out of 70 countries on the 2022 Freedom House Freedom on the Net report.[42]

Traditionally, legal threats to the concept of freedom of expression in Australia have been based on the following:

1. Defamation law;
2. Discrimination and anti-vilification laws;
3. Classification and censorship of obscenity and offensive behavior;
4. The treason and urging violence (formerly, sedition) offenses;
5. Defenses to treason and urging violence offenses;
6. Current debate surrounding the treason and urging violence legislation;
7. Disclosure of sensitive government information;
8. Whistleblowing and disclosures in the public interest;
9. Disclosures of confidential information in the public interest; and
10. Contempt of court and non-publication or suppression orders.

[38] https://www.aph.gov.au/constitution
[39] https://rsf.org/en/index
[40] https://justitia-int.org/report-who-cares-about-free-speech-findings-from-a-global-survey-of-free-speech/
[41] https://www.article19.org/wp-content/uploads/2022/06/A19-GxR-Report-22.pdf
[42] https://freedomhouse.org/sites/default/files/2022-10/FOTN2022Digital.pdf

Not all of the above have made an impact during the 2015-2022 period, and not all of the categories saw additional laws added. It is important to note that the COVID-19 period did not see additional laws that impinged on freedom of expression.

## I. Legislation

Defamation

Defamation continued to be a thorny issue for news organizations and journalists with defamation claims often being viewed as undefendable by the press, especially when these kinds of suits are launched by those for whom money is not an issue. The decline of Australia's mainstream news media over the past decade in terms of money, influence and power has seen an increase in the number of lawsuits brought against these organizations. It is widely held both within journalism as well as across the Australian public that defamation is a tool that can be employed to stop or derail a story in the media. It is important to note that in the Australian context, defamation is a civil matter. This is different to places like the Republic of Korea where defamation can be both a civil and criminal matter.

The apparent inequities to Australia's defamation regime have prompted the sitting federal government to review these laws. At the time of writing, a review into defamation laws as well as a review into whistleblower protections were underway.

Despite the perception that Australia's defamation laws privilege the rich and powerful, the recent case of *Ben Roberts-Smith v Fairfax Media Publications Pty Ltd*[43] bucked this trend. Fairfax Media journalists Nick McKenzie and Chris Masters published a series of articles revealing the alleged war crimes of former Special Air Service (SAS) trooper special forces soldier, and Medal of Gallantry and Victoria Cross recipient, Ben Roberts-Smith. The articles implicated Roberts-Smith in war crimes during two of his deployments to Afghanistan. During one of these deployments, Roberts-Smith had been awarded Australia's highest military honor, the Victoria Cross. After leaving the SAS, Roberts-Smith had been lionized as the embodiment of the ANZAC (Australian and New Army Corps) spirit as well as being awarded Australian father of the year. In exposing Roberts-Smith, McKenzie and Masters were also challenging public perceptions of the values and conduct of the Australian military which was at first wildly unpopular. However, in winning this trial, McKenzie and Masters forced the Australian military, government, and society to confront the excesses of overseas military expeditions. Also, the unlikely result of this matter, reminded the Australian public of the value of a free press and free expression.

Another area that deserves consideration here is online trolling and defamation. As is the case in many other countries, Australia has struggled to legislate the limits and freedoms of online

[43] https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files/ben-roberts-smith

communication in the face of a push to regulate online speech. This issue came to prominence in Australia in 2016 after the Australian Broadcasting Corporation (ABC) broadcasted a report entitled "Australia's Shame" that exposed the abuse of Indigenous youth inmates at the Don Dale Youth Detention Centre in Darwin in the Northern Territory. The report focused on the treatment of inmate Dylan Voller who, as an eleven-year-old at the facility, was restrained by the neck, stripped naked, thrown into a cell, isolated, and tear-gassed. After the report aired, other media outlets published stories on Voller that were also shared across the respective media organization's social media. Many of the ensuing comments on the posts vilified Voller and defamation proceedings took place. In *Voller v. Nationwide News Pty Ltd, Fairfax Media Publications Pty Ltd*, *and Australian News Channel Pty Ltd,* the Court of Appeal of the Supreme Court of New South Wales ruled in 2019 that the news organizations were liable for the comments readers posted on news organizations' Facebook pages.[44] The High Court of Australia dismissed the appeal made by the news organizations, concurring with the judgment of the lower court. [45]

The *Voller* case inspired a royal commission into the treatment of Australia's Indigenous youth in detention. The case also forced online and social media communication into the national spotlight. In response, the former Federal Government led by conservative Scott Morrison, introduced the Social Media (Anti-Trolling) Bill (2022) in the Australian House of Representatives in March 2022, where it stalled and was not passed. The bill established a framework relating to "potentially defamatory content posted on social media." [46]The bill was widely viewed as a cynical attempt by former Prime Minister Morrison and his colleagues to stifle online freedom of expression. It was also heavily criticized for widening the scope of defamation in Australia as well as not respecting the privacy and anonymity of those communicating online.

National Security

When it comes to the codification of laws that impinge on concepts and ideas of freedom of speech and freedom of expression, these laws seldom fit into simple and clear categories. A good example of this can be seen in Australian national security and counter-terror laws that are as opaque as they are complex. Australia has more national security and counter-terrors than any other country with, at the time of writing, 92 codified federal laws of this type since 2001. What makes this perplexing is there has yet to be a terror attack on Australian soil.

At first blush, the link between the freedoms that this piece focuses on and national security and counter-terror laws may not be obvious. However, the opaque nature of many of these laws has fueled significant anxiety among some academics, journalists, activists, policy

[44] https://globalfreedomofexpression.columbia.edu/cases/voller-v-nationwide-news-pty-ltd-fairfax-media-publications-pty-ltd-and-australian-news-channel-pty-ltd/
[45] https://www.hcourt.gov.au/cases/case_s236-2020
[46] https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6831

analysts, and other observers as to the possible application of these laws beyond their stated aims. Indeed, these laws constitute part of a suite of laws Swedish-Australian journalism researcher Johan Lidberg has termed "lawfare"[47] the slow and sustained creep of Australian laws (also including defamation laws, privacy laws, contempt and suppression orders) at the cost of press freedom and freedom of expression.

Since 2015, in the national security law space, the laws that have caused the most concern have been clause 35p of the Australian Security Intelligence Organisation Act (ASIO) Act (1979), the Espionage and Foreign Interference Act (2018) and a cluster of laws related to meta-data surveillance enacted under the auspices of national security. These include the Data Retention Act (2015), the Assistance and Access Act (2018), the Identify and Disrupt Act (2021), and the International Production Orders Act (2020).

The Data Retention Act (2015) signaled a sea change in the way the Australian Federal Government was to deal with surveillance. For the first time, the Australian Government was focusing on association over content through meta-data. Meta-data is the information that surrounds communication content. This includes the time a communication took place, the length of the communication, the location of the actors involved in the communication exchange, and, most importantly, who the actors involved in the communication are. The actual contents of an electronic communication exchange are not of interest here.

The Espionage Act (2018) has also been seen to have had a chilling effect on Australian speech freedoms again. "Chilling effect" refers to a cultural shift within journalism whereby journalists, and the organizations they work for, suppress or change a story out of fear they will face repercussions from the government or, sometimes corporate, agents of the day. This has resulted in high risk aversion on the part of journalists and the organizations they serve. The Espionage Act (2018) has been singled out for criticism because it has the capacity to criminalize journalism, with those found guilty of leaking or sharing information in the national interest facing up to 25 years in prison. The National Security Legislation Amendment (Espionage and Foreign Interference) Bill (2018) updated secrecy laws and placed them in the Criminal Code Act (1995).

Group Characteristics and Protected Characteristics

Although issues of press freedom loom large, there have been other, more visible, infringements of freedom of expression. Briefly, although it falls outside of the temporal scope of this report, the Queensland Vicious Lawless Association and Disestablishment (VLAD) Act (2013) is an interesting example. After a string of very well publicized brawls between rival "bikie gangs" at the Surfers Paradise party precinct in Gold Coast City in Southeast Queensland, the Queensland State Government rushed through the VLAD laws. While touted by the

[47] https://www.crikey.com.au/2023/05/03/public-interest-journalism-victim-lawfare-globally/

Queensland Government to get tough on motorcycle gang organized crime, the laws were opaque, raising concerns about their potential application. As well as targeting association, the act made the display of gang insignia on clothing and skin (tattoos) a crime. In passing the VLAD laws, the Queensland Government restricted freedom of expression, and while very popular with the public of the time, these laws set a dangerous precedent on how members of a targeted group could be imprisoned for associating with one another and expressing themselves within broader society.

The Racial Discrimination Act (1975) Section 18c continues to be a lightning rod for those on all sides of the freedom of expression argument in Australia. 18c stipulates, "it is unlawful for a person to do an act, otherwise than in private, if: (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people." Under the former conservative federal government, there was considerable desire to change this act as it was seen to restrict freedom of expression and free speech. However, under the current federal government, calls for change to 18c have diminished.

In relation to discrimination, the Australian Capital Territory amended The Discrimination Act 1991 in 2016 to include a proscription of actions inciting hatred toward, revulsion of, serious contempt for, or severe ridicule of a person or group of people on the ground of any of the following(a) disability; (b) gender identity; (c) HIV/AIDS status; (d) race; (e) religious conviction; (f) sexuality. In New South Wales, in 2018 amendments to the Anti-Discrimination Act 1977 (Crimes Amendment (Publicly Threatening and Inciting Violence 2018) were rushed through parliament, to repeal vilification laws within the act and replace them with a term of up to three years imprisonment under the act.

## II. Non-Legislative Developments

Suppression orders continue to impede freedom of expression and open justice in Australia at both the state and federal levels. Although still germinal, research findings suggest that suppression orders in some Australian courts are being applied outside their intended spirit.[48] This includes the application of suppression orders to ensure systemic expedience. By shifting the media and public glare away from certain cases, the courts can process more cases. In addition, there has been a cynical application of suppression orders to protect the reputation of some defendants in some cases.

Further, across the Australian states and territories, as well as at the federal level, there has been widespread and sustained abuse of freedom of information and right to information regimes on the part of local, state and federal governments. This has contributed to what Henninger[49] called a "culture of secrecy" within the Australian government. This abuse involves

[48] Murray, R. & Ananian-Welsh, R., (forthcoming) *Chilling Effect: Australian Journalists, Lawyers, and the Law*, The University of Queensland Press (UQP), Brisbane.
[49] https://www.sciencedirect.com/science/article/abs/pii/S0740624X17303763

redacting all requested information as well as slowing down processing times to the point that if timeliness is a factor in the utility of the requested information, the information becomes useless. The government's culture of secrecy is further enhanced by non-disclosure agreements built into bureaucrats' contracts making disclosures of any government related information perilous.

## III. Enforcement

The most visceral act of enforcement and application of the Espionage Act (2018) in conjunction with the Data Retention Act (2015) came in 2019. First, the AFP executed a search warrant on the home of News Corp journalist Annika Smethurst after an April 2018 report in which she exposed government intentions to spy on citizens. The following day, AFP officers executed a warrant at the ABC's Sydney office over a 2017 article on military misconduct. These events are referred to as the AFP raids. In both cases, it was later revealed that warrantless searches of the journalists involved meta-data under the Data Retention Act (2015) had taken place to establish who the journalists had been communicating with and to ultimately identify who was leaking information to the journalists.

The case of the ABC AFP raids: the AFP were most interested in the identifying who was the source of information about Australian military misconduct in Afghanistan, including unlawful killings, that formed the basis of an ABC report broadcast in 2017 entitled "The Afghan Files". The AFP were able to identify Australian military lawyer, David McBride, as the source of the disclosures. McBride has pleaded not guilty to five charges, including the unauthorized disclosure of information, theft of commonwealth property and breaching the Defense Act. McBride has subsequently become Australia's most high-profile whistleblower with his case refocusing public attention on the lack of whistleblower protections in Australia. At the time of writing, McBride is awaiting trial, and the Federal Labor Government is conducting a review of whistleblower laws in Australia.

## Conclusion

Turning to the future, there is growing concern over the impact mooted privacy laws could have on freedom of expression. Proposed amendments to the Privacy Act (1988) have alarmed press freedom and freedom of speech advocates who argue some of the amendments will result in an environment similar to the UK where concerns for privacy outweigh the public interest and create an environment where stories and information in the public interest will be further degraded. Australia is experiencing sustained legislative change that impacts its citizens. At the same time, concerns over freedom of expression in the framework of the Racial Discrimination Act have been diluted by the current government. Further, 2016 and 2018 marked developments in the prohibition of, amongst others, several ridicule of protected characteristics on a state level. As Australia's middling rankings across different freedom of expression, speech, internet, and press indices suggest, the nation's law makers and law

enforcers could do more to respect these fundamental freedoms. However, given the erosion of these freedoms globally and an increasingly entrenched culture of secrecy at the highest levels of Australian society, this appears unlikely.


# Austria

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**Country Summary**

Although Austria has consistently been ranked highly in media freedom indexes, concerns are being raised over attempts by politicians to influence the media as well as attacks against journalists, especially against the backdrop of the Covid-19 pandemic. A significant rise in online hate speech was recorded during the pandemic: in one federal state, while 1822 posts were reported in 2019, the number rose to 3215 in 2020 and 2817 in 2021. As a result, a set of legislative acts aimed at combatting all forms of online hate was introduced in 2021 and 2022,

including the Communication Platforms Act (KoPI-G). The KoPI-G brought forward concerns over its broad applicability, putting obligations on smaller platforms, the requirement for platforms to delete certain content deemed illegal within 24 hours, as well as the compatibility of the Kopl-G with European Union Law. The Federal Act on Measures to Combat Online Hate (Hass-im-Netz-Bekämpfungs-Gesetz or HiNBG) was part of a bigger legislative process known as the "Hass-im-Netz-Gesetzespaket," a set of legislative acts against all forms of online hate. It was implemented in Austria with the aim of addressing the growing problem of hate speech and other forms of online abuse. One notable non-legislative development was the implementation, in 2019, of a project addressing authors of inflammatory posts, offered by a probation-service association, and aiming to raise awareness on discrimination and to encourage reflection on inflammatory behavior. In a 2019 case referred by the Austrian Supreme Court, the Court of Justice of the European Union held that it does not violate EU law if national courts order online platforms such as Facebook to remove unlawful content worldwide, and Member States may also impose an obligation on hosting providers to remove or block access to illegal content.

**Introduction**

Austria has a strong democratic system that includes guarantees of political rights such as freedom of expression. This is reflected in the Freedom House country report, where Austria reached 93/100 points on the Global Freedom Score. However, the report shows concern about corruption in the country which also touched on media and freedom of media companies. In addition, nationalist and xenophobic statements by politicians have raised concern.[50] A broader focus on the state of freedom of expression and especially freedom of the press is shown by the indexing provided by Reporters Without Borders, where Austria held place 31 out of 180 in 2022, with a score of 76.74 out of 100.[51] The main points of criticism were the occurrence of attempts by politicians to influence media as well as attacks of politicians against journalists. As in other countries around the world, the Covid-19-pandemic has led to the spread of disinformation on online platforms. Threats to and assault of journalists reporting about Covid-19-related demonstrations has led to concerns about restrictions on freedom of the press.[52] Another debate relates to the public broadcasting service (ORF), where reforms have been frequently demanded. A proposal for major legislative changes in Austria's broadcasting system was put forth in April / May 2023 and as such no further details are included in this report.

Within the reporting period (2015-2022), Austria has seen major legislative changes in regard to hate speech online. Online Hate Speech was widely discussed by Austrian society, especially after an incident around the Austrian politician Sigrid Maurer and a craft beer shop owner

[50] https://freedomhouse.org/country/austria/freedom-world/2022
[51] https://rsf.org/en/country/austria
[52] Ibid.

known as the "Bierwirt" became public in 2018. Sigrid Maurer received sexist messages via private message but could not take legal action against them due to an obligation under Austrian law not to publicize the shop owner's message. She made the incident public and asked people not to visit the craft beer shop. The shop owner, however, took legal action. As a result, Sigrid Maurer had to defend herself in court against an accusation of defamation. The process lasted for over two years and ended when the shop owner withdrew his complaint and the case against Sigrid Maurer was discontinued. When the incident occurred, a large crowdfunding campaign was started in order to provide financial support for Sigrid Maurer as well as for a civil society organization working with victims of hate speech and discrimination online. The public debate around it led to a strong urge to implement legal changes to tackle online hate.

Information on the amount of online hate speech, removal rates, and government requests are not centrally available. However, some information is provided by civil society organizations, regional anti-discrimination offices, and online platforms themselves: The Anti-Discrimination office of Styria (a federal state of Austria) runs an app where online hate can be reported easily. Their report shows a significant rise in online hate during the pandemic. While in 2019, 1822 posts were reported via the app, the number rose to 3215 in 2020 and 2817 in 2021. ZARA, an Austrian NGO tasked with providing support for victims of online hate, reported 7839 incidents in the first four years since the establishment of their counseling service (#GegenHassimNetz) in 2017.

While a smaller legislative act introduced a provision against Cyber-Mobbing already in 2016, an extensive legislative framework against hate online (known as the "Hass-im-Netz-Gesetzespaket") entered into force in 2021, consisting of a legislative act (KoPl-G) imposing obligations on platforms, and another legislative act (HiNBG) that changed already established provisions in order to make them a better fit for hate speech in digital spheres. The new legislative acts have led to mixed reactions. While it was seen as a positive step that new legislation regarding hate speech online has been introduced, concerns were raised about the legislation going too far and resulting in restrictions on freedom of expression.[53]

## I. Legislation

KoPl-G (Kommunikationsplattformen-Gesetz) – Communication Platforms Act[54]

The Communication Platforms Act (Kommunikationsplattformen-Gesetz, KoPl-G) was part of a bigger legislative process known as the "Hass-im-Netz-Gesetzespaket" (Laws on Hate Online), a set of legislative acts against all forms of online hate. It entered into force on 1st January 2021. This Federal Act aims at providing safe and transparent online communication

[53] https://www.article19.org/resources/austria-draft-communication-platforms-act-fails-freedom-of-expression/; https://en.epicenter.works/content/first-analysis-of-the-austrian-anti-hate-speech-law-netdgkoplg.
[54] https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20011415

on platforms through promoting responsible and transparent handling of user reports on allegedly illegal content on communication platforms and the expeditious handling of such reports as well as posing transparency obligations on platforms. This kind of speech regulation can also be seen in the German NetzDG (Netzwerkdurchsetzungsgesetz; Network Enforcement Act) and the European Union's Digital Services Act (DSA). The NetzDG entered into force prior to the Austrian KoPl-G and served as a source of inspiration for the Austrian regulation. The DSA will require amendments of the KoPl-G. It applies to domestic and foreign service providers which provide communication platforms on a profit-oriented basis. Subject to the provisions of the KoPl-G are platforms with more than 100.000 registrations in the previous year or a sales revenue achieved through the operation of the communication platform in Austria above EUR 500.000 during the previous year. The supervisory authority (KommAustria) keeps a publicly available list of the service providers covered by the Act, which currently includes 11 platforms.[55]

The KoPl-G introduces a reporting system for communication platforms. Service providers have to set up an effective and transparent procedure for handling and processing reports on allegedly illegal content available on the communication platform. Such a procedure shall be easy to find, permanently available, and easy to use. Users have to be able to report content, including the information required for an assessment, to the service provider and receive an explanation of how their report will be dealt with and what the result of the procedure in question was, including information on the main reasons for the decision made and the possibility to file an application for a review procedure. The KoPl-G also introduces a complaint procedure, allowing major concerns about reporting systems to be brought to the supervisory authority (KommAustria). Service providers are obliged to prepare a transparency report on the handling of reports of allegedly illegal content on an annual basis, or on a half-yearly basis for communication platforms with over one million registered users. The report shall be submitted to the supervisory authority no later than one month after the end of the period covered in the report and shall simultaneously be made permanently and easily accessible on the service provider's own website. If the supervisory authority finds that the obligations set out in KoPl-G are being violated, it shall initiate a supervisory procedure which can result in fines up to EUR 10 million.

The enactment of the law has led to mixed reactions: While several provisions such as the transparency requirements were received positively, civil society organizations such as Article 19 or the local NGO, epicenter.works, raised concerns about the Act.[56] The main reasons of concern were the broad applicability of the law, putting obligations on smaller platforms as

[55] https://www.rtr.at/medien/service/verzeichnisse/plattformen/Verzeichnis_Kommunikationsplattform.de.html
[56] https://www.article19.org/resources/austria-draft-communication-platforms-act-fails-freedom-of-expression/; https://en.epicenter.works/content/first-analysis-of-the-austrian-anti-hate-speech-law-netdgkoplg

well and the short timeframes put into place, which requires platforms to delete certain content deemed illegal within 24 hours.

Another cause for concern was the compatibility of the KopI-G with European Union Law. Three internet platforms applied to KommAustria for a ruling legally declaring that they did not fall within the scope of the KoPl-G. The providers essentially argued that the provisions of the KoPl-G were not compatible with EU law, in particular with the Country-of-Origin Principle of the E-Commerce Directive and the Audiovisual Media Services Directive (AVMSD). The supervisory authority considered the KoPl-G applicable to the three platforms, which was later confirmed by the BVwG (Bundesverwaltungsgericht; Federal Administrative Court). Following an appeal by the platforms, the VwGH (Verwaltungsgerichtshof; High Administrative Court) has now dealt with the case and decided to bring the case to the Court of Justice of the European Union (CJEU) for a preliminary ruling. There is no final decision on the case yet.

Introduction of a New Provision against Cyberbullying (§ 107c StGB)[57]

An amendment of the Austrian Criminal Code (Strafgesetzbuch, StGB) came into force on January 1st, 2016. It introduced a new provision against "Continued harassment by means of a telecommunications or computer system" (Fortdauernde Belästigung im Wege einer Telekommunikation oder eines Computersystems), targeting several forms of Cyberbullying. The provision applies to cases in which information or pictures relating to the most personal living sphere is made public without the prior consent of the person. For the provision to be applicable, it is required that a person's honor is violated, and a larger group of people can perceive the act of cyberbullying. A violation of the provision can lead to imprisonment of up to one year or a monetary fine, or up to three years if the cyberbullying lasts longer than a year or leads to the suicide of the victim.

After the enactment of the provision, it showed that the number of incidents this provision could be applied to was limited due to the provision of "continued harassment," which was interpreted as a large number of individual acts. This was the subject of an amendment that entered into force in 2021. It now suffices that only one single action has been taken but can be available online for a longer period of time. This amendment was part of a larger legislative framework (see below: Federal Act on Measures to Combat Online Hate (Hass-im-Netz-Bekämpfungs-Gesetz, HiNBG))

Implementation of the DSM Directive: Amendment of the UrhG (Umsetzung der DSM-Richtlinie: Änderung des UrhG)[58]

The implementation of the DSM Directive in Austria has led to an amendment of the Copyright Act (Urheberrechtsgesetz 1936) in order to adapt the regulations to meet European

[57] https://www.ris.bka.gv.at/eli/bgbl/1974/60/P107c/NOR40229319
[58] https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2021_I_244/BGBLA_2021_I_244.html

requirements. The DSM Directive is intended to update copyright provisions in the digital age, thus creating a uniform framework for the use of protected material on the Internet. The comprehensive amendment to copyright law clarifies, among other things, the responsibility of large platforms for the uploading of protected works by their users, according to which a license from the author is to be obtained in the future. In any case, measures taken by the platforms should not lead to permitted uses being prevented. Therefore, content is to be made accessible there for which the users have already declared that it is permitted when uploading it ("pre-flagging"). Small parts of works, for example, 15-second excerpts of films or music - should not be automatically blocked. If platforms systematically implement excessive protective measures that lead to permitted uses on the platform being prevented, KommAustria, as the supervisory authority, would have to initiate supervisory proceedings.

The Federal Act on Measures to Combat Online Hate – (Bundesgesetz, mit dem Maßnahmen zur Bekämpfung von Hass im Netz getroffen werden (Hass-im-Netz-Bekämpfungs-Gesetz – HiNBG)[59]

The Federal Act on Measures to Combat Online Hate (Hass-im-Netz-Bekämpfungs-Gesetz or HiNBG) was part of a bigger legislative process known as the "Hass-im-Netz-Gesetzespaket", a set of legislative acts against all forms of online hate. It was implemented in Austria with the aim of addressing the growing problem of hate speech and other forms of online abuse.

The Act pursues the goal of remedying this unsatisfactory situation through several measures in the field of private law, criminal law, and media law. While some measures included small adaptations of already existing law in order to make them easier applicable in digital spheres, other measures were new to the Austrian legal system. While it is not possible to include all measures in this report, some of the most important ones are listed here:

*Introduction of a new simplified injunction procedure*: The aim was to provide a fast and cost-efficient remedy to victims of online hate, with the goal of establishing a legally enforceable obligation for content to be taken down (§ 549 ZPO). While this measure was highly welcomed in the first place, it has not yet proven to work sufficiently, with only a very limited number of cases where the procedure was used effectively.

*Introduction of a possibility for employers to act against online hate directed against one of their employees* (§ 20 ABGB).

*Amendment of the criminal provision against cyberbullying to make it more easily applicable* (see above, Introduction of a new provision against Cyberbullying (§ 107c StGB))

Introduction of a *new criminal law provision against unauthorized image recording* ("unbefugte Bildaufnahmen,"§ 120a StGB), which forbids taking pictures of genitals, the pubic

[59] https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2020_I_148/BGBLA_2020_I_148.html

area, buttocks, or female breasts. The act is criminally punishable without the images being made public. However, if done so, there is a higher penalty.

Amendments in media law include the restructuring of the provisions aiming *at compensation for media law violations*. In addition, the legal status of witnesses and family members was improved, allowing them to take legal action if their legal interests are violated through media.

It is now possible for *victims of online hate to request psychological and legal support* throughout the court proceedings in order to reduce the emotional burden that might come with such proceedings.

COVID-19 Legislation (COVID-19-Maßnahmengesetz[60])

The COVID-19 pandemic brought about unprecedented changes to daily life in many countries, including Austria. In an effort to contain the spread of the virus, the Austrian government implemented measures such as lockdowns, curfews, and restrictions on public gatherings. The first lockdown was introduced with the Ordinance of the Federal Minister for Social Affairs, Health, Care and pursuant to § 2 no. 1 of the COVID 19 Measures Act (Verordnung des Bundesministers für Soziales, Gesundheit, Pflege und Konsumentenschutz gemäß § 2 Z 1 des COVID-19-Maßnahmengesetzes). While the measures of the government varied throughout the pandemic, the main aim was to restrict people from meeting up in person. There were no measures relating explicitly to freedom of expression such as any legal action against disinformation about Covid vaccines.

## II. Non-legislative Developments

Universal Periodic Review[61]

The Third Austrian State Report focuses on the implementation of recommendations adopted in the second Universal Periodic Review. It was adopted by the Ministerial Council on 7th October 2020 and submitted to the Office of the United Nations High Commissioner for Human Rights (OHCHR) in mid-October 2020. Before submission, draft reports had been widely distributed to civil society organizations with a request for comments. The review of Austria before the Human Rights Council in Geneva took place on the 22nd January 2021.

The national report points out that internet discussion forums make an important contribution to open discussion in a pluralistic, democratic public sphere but notes that the right to freedom of expression ends where its exercise endangers public peace and harms others. In order to deal with the issue, the Austrian Government Program developed a package of measures. (these were the above-mentioned laws regarding hate online). Specific trainings for public

[60] https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20011073
[61] https://www.ohchr.org/en/hr-bodies/upr/at-index

prosecutors and judges were planned and police officers would participate and provide presentations. In 2019, a project addressing authors of inflammatory posts was transformed from trial to regular operation. This project offered by a probation-service association aims to raise awareness of discrimination and to encourage reflection on inflammatory behaviour.

### III. Enforcement

E.S., an Austrian politician, gave a speech in 2009 in which she criticized Islam and made statements that were considered as promoting hatred against Muslims. She was convicted under Austrian criminal law for violating the prohibition of hate speech. The case reached the national Supreme Court which, in 2014 decided that the measures taken against her were proportionate. E.S took her case to Strasbourg, arguing before the European Court of Human Rights (ECtHR) that her right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR) had been violated. She claimed that she did not intend to incite hatred against Muslims, but rather to express her opinion on a matter of public interest, namely the integration of Muslim immigrants into Austrian society. In 2018, the ECtHR acknowledged that the case involved a delicate balancing exercise between the protection of freedom of expression and the need to prevent hate speech. The ECtHR considered various aspects, mainly the protection of political speech on the one hand and the protection of religious groups on the other hand. The speech of E.S. was considered as going beyond the permissible limits of an objective debate, ultimately leading to the Court finding no violation of Art 10 ECHR. The conviction of E.S. in Austria was therefore not declared unlawful.

The judgment of the European Court of Justice (CJEU) of 3 October 2019 in *Glawischnig-Piesczek v Facebook Ireland Limited*[62] has far-reaching consequences for the liability of online platforms in relation to illegal content. The case revolved around a Facebook post that contained insulting and defamatory statements about the former Austrian politician Eva Glawischnig-Piesczek. After Ms Glawischnig-Piesczek had tried in vain to have the post deleted, she filed a lawsuit against Facebook Ireland Limited at the Vienna Commercial Court. She demanded that Facebook remove the post as well as identical posts or posts with equivalent meaning worldwide. The Vienna Commercial Court granted Ms Glawischnig-Piesczek's request, but Facebook appealed to the Austrian Supreme Court, which eventually referred the case to the CJEU for a preliminary ruling.

The CJEU's decision clarified that it does not violate EU law if national courts order online platforms such as Facebook to remove unlawful content worldwide, including materially identical content. The CJEU emphasized that while the EU Directive on Electronic Commerce (EC Directive) states that hosting providers are not responsible for content uploaded by users on their platforms, they are obliged to remove illegal content as soon as they become aware

[62]https://curia.europa.eu/juris/document/document.jsf;jsessionid=F609219264F7D9C1D4CCA24C49E0AB05?text=&docid=218621&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4928846

of it. In addition, Member States may also impose an obligation on hosting providers to remove or block access to illegal content. However, in this case, the Austrian Supreme Court did not touch on the question of worldwide applicability again as it was not brought up in the subsequent proceedings.

**Conclusion**

Austria's democratic system encompasses robust safeguards for political rights, including freedom of expression. A significant legal advancement in the realm of freedom of expression occurred in 2015 with the introduction of the Communication Platforms Act (Kommunikationsplattformen-Gesetz, KoPl-G). This act was part of the comprehensive legislative process known as the "Hass-im-Netz-Gesetzespaket" (Laws on Hate Online), which aimed to address various forms of online hate. Effective from January 1, 2021, the Communication Platforms Act sought to foster secure and transparent online communication on platforms by promoting responsible and transparent handling of user reports concerning potentially illegal content. Notably, recent rulings by the CJEU and ECtHR with regard to Austria have upheld the legality and legitimacy of Austria’s approach to combatting hate speech and slander on online platforms.


# Canada

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**Country Summary**

From 2015 to 2022, the governments of Canada and of ten Canadian provinces introduced at least 8 laws that restricted expressive rights. While Canada has consistently been ranked highly in human rights indexes, concern was raised over the government's decision to invoke the Emergencies Act for the first time in Canadian history to end protests in 2022. Other restrictive laws included: one restricting religious expression by prohibiting public servants in Quebec from wearing religious symbols in their place of work; two limiting political discourse through election-related laws and one adopted in Quebec in 2022 which tightens French language requirements on businesses and professional services, restricts access to education in languages other than French, and provides a new private right of action for all Québec residents to seek injunctive relief or damages against those who do not comply. In 2021 and 2022, 5 Canadian provinces adopted laws prohibiting demonstrations and protests around health service facilities where Covid-19-related services were being performed. Four non-legislative developments related to antisemitism, academic freedom, students' expression, and compelled speech were also introduced. Canadian courts blocked speech restrictive legislation, including Ontario's extreme limit on pre-election political advertising and Canada's attempt to criminalize making false statements about political candidates, even if they were

not done knowingly. Two provincial governments – Ontario in 2015 and British Columbia in 2019 – introduced anti-SLAPP (Strategic Lawsuits against Public Participation) laws that are the most speech protective in the world in providing an effective means for dismissal of strategic lawsuits against public participation (SLAPPs) – legal actions launched to stop discussion and critical commentary on issues of public interest.

**Introduction**

From 2015 to 2022, the governments of Canada and of the ten Canadian provinces introduced a good deal of legislation that restricted expressive rights. Most of the legislation was in response to disparate issues and political pressures. The exception was a pattern of legislative actions responding to protests against COVID public health measures. The most serious was not new legislation but the 2022 invocation by the federal government of the Emergencies Act for the first time in Canadian history. The Act gives the federal government broad powers in the event of "emergencies" that affect public welfare (natural disasters, disease outbreaks), public order (civil unrest), international emergencies or war emergencies. It allows the federal cabinet to "take special temporary measures that may not be appropriate in normal times" to cope with an "urgent and critical situation." Those powers were used to end widespread protests and blockades in cities and at borders against the vaccine and mask mandates. While Canada has consistently been ranked highly in freedom of expression indexes (see Reporters without Borders, ranking ) 15th out of 180 countries, and 19th out of 161 countries in Article 19's Global Expression Report 2023) grave concern was raised with the government's decision to invoke the Emergencies Act to end the protests (Canadian Civil Liberties Association[63] and Amnesty International[64]).

**1. Legislation**

Restricting Religious Expression

The government of Quebec adopted Bill 21 in 2019. Titled "An Act Respecting the Laicity of the State,"[65] the law prohibits public servants in Quebec from wearing religious symbols, including head coverings such as a hijab, turban, or kippah, in their place of work. The bill applies to public employees at all levels, including public transit operators, teachers, prosecutors, police officers, health care providers, and judges. Because the law clearly violated the Canadian Charter of Rights and Freedoms'[66] provisions on freedom of expression, conscience, and religion, the Quebec government pre-emptively invoked the Charter's "notwithstanding clause,"[67] a provision unique among the constitutions of countries with

[63] https://ccla.org/major-cases-and-reports/emergencies-act/
[64] https://www.amnesty.ca/human-rights-news/amnesty-statement-on-emergencies-act-inquiry/
[65] https://canlii.ca/t/53mgl
[66] https://www.laws-lois.justice.gc.ca/eng/Const/page-12.html
[67] https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art33.html

constitutional democracies, which gives the Canadian parliament and provincial legislatures the power to override certain sections of the Charter when passing legislation which violates constitutional protection of freedom of expression and other rights. The law was strongly criticized by UN human rights monitors,[68] but legal challenges by the Canadian Civil Liberties Association and the National Council of Canadian Muslims[69] were largely unsuccessful because of the government's invocation of the notwithstanding clause.

Limiting Political Discourse

Ontario adopted several election-related laws that limited public discourse. In 2016, it amended[70] the Ontario Election Finances Act to impose a $600,000 limit on third-party advertising during the six months before the issuance of a writ of election. The law also broadened the Act's scope by changing the restriction on "third party election advertising" to one on "third party political advertising." In 2021, the subsequent government of Ontario passed Bill 254,[71] which extended the pre-election political advertising ban to twelve months while keeping the maximum that could be spent at $600,000. Challenged as an excessive limitation on freedom of expression,[72] the Ontario Superior Court ruled the law unconstitutional. The Ontario government then adopted Bill 307[73] which invoked the notwithstanding clause to override the Charter. This was challenged in court as, while the Charter section on freedom of expression can be overridden, Section 3 on democratic rights cannot. The Ontario Court of Appeal struck down the law.[74] Ontario has been granted leave to appeal this decision to Canada's Supreme Court.[75]

In 2018, the Ontario government passed Bill 5[76] reducing the number of electoral districts from 47 to 25 in the middle of Toronto's municipal election. The mid-campaign changes denied candidates their platforms and obstructed their political expression. It also obstructed Torontonians' ability to make informed voting decisions. The Ontario Superior Court ruled the law unconstitutional[77] as it violated both the municipal candidates' and voters' freedom of expression. Ontario quickly appealed and the Ontario Court of Appeal reversed[78] the lower court decision, upholding the constitutionality of legislation. The City of Toronto appealed this

[68] https://www.cbc.ca/news/canada/montreal/bill-21-united-nations-human-rights-concerns-1.5145344
[69] https://canliiconnects.org/en/summaries/70246
[70]https://www.ola.org/sites/default/files/node-files/bill/document/pdf/2016/2016-12/bill---text-41-2-en-b002ra.pdf
[71] https://www.ontario.ca/laws/statute/s21005
[72] https://democracywatch.ca/wp-content/uploads/OntCtRulingWorking-Families-v-Ontario-judgment.pdf
[73] https://www.ontario.ca/laws/statute/s21031peee
[74] https://www.canlii.org/en/on/onca/doc/2023/2023onca139/2023onca139.html?resultIndex=1
[75] https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=40725
[76] https://www.ontario.ca/laws/statute/s18011
[77] https://www.canlii.org/en/on/onsc/doc/2018/2018onsc5151/2018onsc5151.html?resultIndex=1
[78] https://www.canlii.org/en/on/onca/doc/2018/2018onca761/2018onca761.html?resultIndex=1

decision to the Supreme Court of Canada. In a 5-4 decision, the Court dismissed the appeal,[79] allowing Ontario's law to stand.

That same year, the federal government amended[80] the Canada Election Act which prohibited, during federal elections, knowingly making false statements about political candidates with the intention of affecting the outcome of the election. The amendment deleted the word "knowingly" thereby removing the *mens rea* element from the offense and effectively creating a strict liability offense for certain kinds of speech. The Ontario Superior Court ruled the Act unconstitutional.[81]

Ag-Gag Laws

In yet further restrictions on expressive freedom, Alberta [2019],[82] Ontario [2020],[83] Prince Edward Island [2020],[84]and Manitoba [2021][85] introduced "Ag-Gag" laws. Under the guise of animal protection and disease prevention, these laws seek to silence, or "gag," whistleblowers, journalists, and other concerned citizens by restricting their ability to have access to farms, animal processing facilities, and animal transport vehicles thus preventing documentation and reporting on any animal abuse or threats to animal welfare. The Ontario law is currently being challenged in court.

Limiting Protests

In 2022, the government of Canada, as mentioned above, took the unprecedented step of issuing a proclamation invoking the Emergencies Act[86] for the first time in Canadian history. The proclamation declared a public order emergency existed throughout Canada that necessitated taking special temporary measures to end truck and protest blockades across Canada. The invocation of the Emergencies Act allowed the government to prohibit public assembly, remove vehicles, prohibit use of property to support or fund the blockade, and authorized the Royal Canadian Mounted Police to enforce municipal and provincial laws. It was revoked after ten days in which the police ended the blockades and protests.

[79] https://www.canlii.org/en/ca/scc/doc/2021/2021scc34/2021scc34.html?resultIndex=1
[80] https://laws-lois.justice.gc.ca/eng/annualstatutes/2018_31/page-1.html
[81]https://www.canlii.org/en/on/onsc/doc/2021/2021onsc1224/2021onsc1224.html?searchUrlHash=AAAAAQAOQ1YtMTktMDA2MjczODAAAAAAAQ&resultIndex=1
[82] https://canlii.ca/t/5443x
[83] https://www.ontario.ca/laws/statute/20s09
[84] https://canlii.ca/t/55x22
[85] https://web2.gov.mb.ca/laws/statutes/2021/pdf/c05321.pdf
[86] https://www.justice.gc.ca/eng/csj-sjc/section58.html

Concerned about aggressive protests during the pandemic against vaccine mandates and mask mandates, Quebec [2021],[87] British Columbia [2021],[88] Saskatchewan [2021],[89] Nova Scotia [2021],[90] and Newfoundland and Labrador [2022][91] adopted laws prohibiting demonstrations and protests around health service facilities where Covid-19-related services were being performed. The Quebec Bill 105[92] prohibited demonstration, "in any manner," within 50 meters of Covid-19 testing and vaccination centers, health or social services, childcare, or educational facilities. The British Columbia Access to Services (COVID-19) Act[93] made it illegal to interfere with or disrupt the provisions or services or intimidate anyone or "otherwise do or say anything that could reasonably be expected to cause an individual concern for the individual's physical or mental safety."

These acts tracked earlier legislation that created "protected zones" around abortion clinics and health service providers' homes to prevent interference and intimidation of women seeking abortions and of medical staff providing those health services. Within these zones, the laws prohibit communication intended to discourage women from proceeding with their planned abortions as well as communication to dissuade service providers from performing abortions. Such acts were passed in Newfoundland and Labrador [2016],[94] Quebec [2016],[95] Ontario [2017],[96] Alberta [2018],[97]and Nova Scotia [2020].[98]

Protests

Alberta adopted a broader law against protests. The Critical Infrastructure Defence Act[99] prohibits willfully entering, damaging, obstructing, interrupting, or interfering with "critical infrastructure." This includes highways, railways, oil sands sites, or mines. It extends to "[t]he land on which critical infrastructure is located, and any land used in connection with the essential infrastructure." On September 28, 2021, Alberta announced it was expanding the reach of the Act to include hospitals and other health facilities.

[87]https://www.publicationsduquebec.gouv.qc.ca/fileadmin/Fichiers_client/lois_et_reglements/LoisAnnuelles/en/2021/2021C26A.PDF
[88] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/21033
[89] https://pubsaskdev.blob.core.windows.net/pubsask-prod/131550/Chap-36-2021.pdf
[90] https://nslegislature.ca/legc/bills/64th_1st/3rd_read/b011.htm
[91] https://nslegislature.ca/legc/bills/64th_1st/3rd_read/b011.htm
[92]https://www.publicationsduquebec.gouv.qc.ca/fileadmin/Fichiers_client/lois_et_reglements/LoisAnnuelles/en/2021/2021C26A.PDF
[93] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/21033
[94] https://www.canlii.org/en/nl/laws/stat/snl-2016-c-a-1.02/127342/snl-2016-c-a-1.02.html
[95]https://www.publicationsduquebec.gouv.qc.ca/fileadmin/Fichiers_client/lois_et_reglements/LoisAnnuelles/fr/2016/2016C28F.PDF
[96] https://www.ontario.ca/laws/statute/17s19
[97] https://kings-printer.alberta.ca/documents/Acts/P26P83.pdf
[98] https://nslegislature.ca/sites/default/files/legc/PDFs/annual%20statutes/2020%20Spring/c005.pdf
[99] https://kings-printer.alberta.ca/1266.cfm?page=c32p7.cfm&leg_type=Acts&isbncln=9780779817672

Intimidation and Health Services

Canada passed Bill C-3,[100] a Criminal Code amendment adding a new offense, "intimidation - health services." The offense includes intimidating or "engag[ing] in any conduct with the intent to provoke a state of fear in" people obtaining health services, health professionals, or other staff supporting health workers. It also criminalized intentionally obstructing or interfering with another person's lawful access to health services. The law applies to any place in Canada that provides healthcare, and to any place that healthcare workers might be, including their homes (i.e., it is not restricted to certain protected zones). The penalties include up to 10 years in prison.

Restricting Online Content

That same year, as part of its effort to restrict harmful content online, the Canadian government introduced Bill C-36[101] making it possible for individuals to lay information before a provincial court judge if the individual feared, on reasonable grounds, that another person may engage in hate speech or commit mischief or other offense **"**motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, gender identity or expression, or any other similar factor." The proposed legislation authorized a judge to order a defendant to enter into a recognizance or peace bond to keep the peace and be of good behavior for a period that can extend up to two years. The order allows restrictions of defendant's movement or behavior to reduce the risk of them committing an offense in future. The legislation also reintroduced a provision to the Canadian Human Rights Code prohibiting hate speech – a provision which had been removed by Parliament in 2013, leaving hate speech to be dealt with under the Criminal Code. The Bill died when a writ was issued for a federal election. During the election, the Prime Minister announced that a top priority of the government, should his party be re-elected was to introduce legislation within the first one hundred days that would regulate online harms. Almost two years later, the legislation has not been tabled.

Criminalizing Holocaust Denial and More

In its 2022 Budget Implementation Act,[102] the Canadian government amended the Criminal Code to prohibit the communication of statements not only "denying" the Holocaust but also "condoning" or "downplaying" it.

[100] https://www.parl.ca/DocumentViewer/en/44-1/bill/C-3/royal-assent
[101] https://www.parl.ca/DocumentViewer/en/43-2/bill/C-36/first-reading
[102] https://laws-lois.justice.gc.ca/eng/AnnualStatutes/2022_10/page-24.html#h-121

Regulating Campus Speech

In 2022, Quebec gave royal assent to Bill 105[103] requiring universities to adopt academic freedom policies and create committees to oversee their enforcement. Considerable concern has been expressed[104] that the legislation sets a dangerous precedent by giving the Minister authority to rewrite university policies, violating fundamental freedom from political interference in research and teaching.

Compelled Speech

As part of Bill 100, it's 2019 Budget Act, Ontario introduced the Federal Carbon Tax Transparency Act[105] requiring gasoline retailers to affix stickers to their pumps reading, "The Federal Carbon Tax will cost you." The retailers were required to ensure the stickers were prominently displayed "within the top two-thirds of the side of the gasoline pump that faces motor vehicles when the pump is used to put gasoline into their fuel tanks." This compelled speech was widely seen as retaliation by the Ontario government against the federal carbon tax. The Ontario Superior Court[106] ruled the Act unconstitutional and of no force or effect.

Restricting the Use of Languages Other than French in Business, Services, and Education

In 2022, Quebec adopted Bill 96[107] which tightened French language requirements on businesses, including professional services, such as medicine, in their provision of services, their communication, and their hiring practices, prohibiting the use of English in numerous settings. It also restricts access to education in languages other than French and provides a new private right of action for all Québec residents to seek injunctive relief or damages against those which do not comply.

## II. Non-Legislative Developments

Addressing Antisemitism

To deal with concern about antisemitism in Canada, the Canadian government developed its Anti-Racism Strategy[108] in 2019 which adopted the International Holocaust Remembrance

[103]https://www.publicationsduquebec.gouv.qc.ca/fileadmin/Fichiers_client/lois_et_reglements/LoisAnnuelles/en/2022/2022C21A.PDF
[104] https://montreal.ctvnews.ca/is-bill-32-the-real-threat-to-academic-freedom-130-quebec-professors-speak-out-in-open-letter-1.5878266
[105] https://www.ontario.ca/laws/statute/19f07a
[106] https://www.canlii.org/en/on/onsc/doc/2020/2020onsc4838/2020onsc4838.html?resultIndex=1
[107]https://www.publicationsduquebec.gouv.qc.ca/fileadmin/Fichiers_client/lois_et_reglements/LoisAnnuelles/en/2022/2022C14A.PDF
[108] https://www.canada.ca/en/canadian-heritage/campaigns/anti-racism-engagement/anti-racism-strategy.html

Alliance [IHRA] definition of antisemitism,[109] controversial because it allows criticism of the state of Israel to be considered as antisemitism.

The governments of Ontario [2020],[110] Quebec [2021],[111] British Columbia [2022[112]], Alberta [2022],[113] New Brunswick [2022],[114] Manitoba [2022],[115] and Saskatchewan [2022][116] subsequently passed orders-in-council or issued directives declaring their adoption of the IHRA definition.

Protecting Academic Freedom

In response to allegations of restrictions on campus speech, Ontario and Alberta took actions designed to promote freedom of expression on campus. Ontario directed[117] all colleges and universities to develop a free speech policy based on the University of Chicago Statement on Principles of Free Expression,[118] threatening reductions to the institutions' operating grant funding if they failed to comply. The Ontario directive also required institutions to consider student groups' compliance with the policy as a condition for ongoing financial support or recognition. The directive was criticized by the Canadian Association of University Teachers[119] which pointed out that the vagueness in the government's guidelines of what constitutes an interference with free speech may result in the prohibition of legitimate protests. Alberta issued a similar directive in 2019.[120]

Restricting Students Expression

In its 2019 Student Choice Initiative,[121] Ontario made the majority of post-secondary student fees optional, including fees paid to student unions, which are frequent critics of the government. This puts continued viability of student unions and their campus publications and

[109]https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism
[110] https://www.ontario.ca/orders-in-council/oc-14502020
[111] https://canadadocs.org/government-of-quebec-adopts-ihra-non-binding-definition-of-antisemitism/
[112] https://www.jns.org/british-columbia-latest-canadian-province-to-adopt-ihra-definition/
[113] https://www.alberta.ca/release.cfm?xID=846463A33CF98-9844-D486-05E25E1323BADFE0
[114] https://www.bnaibrith.ca/new-brunswick-latest-canadian-province-to-adopt-ihra-definition/
[115] https://news.gov.mb.ca/news/index.html?item=56745
[116]https://www.saskatchewan.ca/government/news-and-media/2022/december/19/saskatchewan-adopts-definition-of-antisemitism
[117]https://news.ontario.ca/en/backgrounder/49950/upholding-free-speech-on-ontarios-university-and-college-campuses
[118] https://freeexpression.uchicago.edu/
[119] https://www.caut.ca/latest/2018/08/ontario-free-speech-requirements-universities-and-colleges-cause-concern
[120]https://edmontonjournal.com/news/politics/advanced-education-minister-promises-chicago-principles-details-coming-soon-as-students-academics-concerned-for-september-deadline
[121]https://news.ontario.ca/en/release/50954/government-for-the-people-to-lower-student-tuition-burden-by-10-per-cent

other student media at serious risk. The Ontario Court of Appeal[122] ruled the policy was inconsistent with university acts and could not be imposed on universities by executive action.

Compelled Speech

The Canadian government's 2018 Canada Summer Jobs Program[123] limited organizational eligibility for funding to those with policies affirming respect for individual human rights including reproductive rights, thereby disallowing funding for groups with pro-life policies even when the funded student placement would have nothing to do with this issue.

### III. Enforcement

As described above, enforcement of restrictions on constitutionally protected rights and freedoms was made possible by the "notwithstanding" clause in the Canadian Charter of Rights and Freedoms which allows the federal parliament and provincial parliaments to override the Charter. In a few importance instances, as noted above, Canadian courts blocked speech restrictive legislation, including Ontario's extreme limit on pre-election political advertising,[124] Canada's attempt to criminalize making false statements about political candidates even if that was not done knowingly,[125] and Ontario's attempt to require retailers to post anti-federal government stickers on their gasoline pumps.[126]

### Conclusion

During the period under consideration, governments in Canada used legislation and policy directives to limit freedom of expression, often deliberately but sometime inadvertently. In some instances, Canadian courts found the measures contrary to the Canada's Charters of Rights and Freedoms and struck them down. But many others were not challenged, survived court challenges, or were rendered exempt from constitutional oversight by Canada's constitutional provision that allows sections, including the section of freedom of expression, by government invocation of the "notwithstanding"[127] clause. There was a notable instance during this period of legislative enhancement of expressive rights. Two provincial governments – Ontario in 2015[128] and British Columbia in 2019[129] introduced anti-SLAPP laws that are the

[122] https://www.ontariocourts.ca/decisions/2021/2021ONCA0553.htm
[123] https://policyoptions.irpp.org/magazines/january-2018/canada-summer-jobs-and-the-charter-problem/
[124] https://www.canlii.org/en/on/onca/doc/2023/2023onca139/2023onca139.html?resultIndex=1
[125]https://www.canlii.org/en/on/onsc/doc/2021/2021onsc1224/2021onsc1224.html?searchUrlHash=AAAAAQAOQ1YtMTktMDA2MjczODAAAAAAAQ&resultIndex=1
[126] https://www.canlii.org/en/on/onsc/doc/2020/2020onsc4838/2020onsc4838.html?resultIndex=1
[127] https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art33.html
[128] https://www.ontario.ca/laws/statute/s15023
[129] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/19003

most speech protective in the world[130] in providing an effective means for dismissal of strategic lawsuits against public participation (SLAPPs).

[130] https://cfe.torontomu.ca/publications/global-anti-slapp-ratings-assessing-strength-anti-slapp-laws


# Chile

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**Country Summary**

On the path towards constitutional reform following unprecedented social unrest in 2019, Chile has passed three speech restrictive laws between 2020 and 2022: one establishing the prohibition of disclosing information related to debts incurred to finance education at any level, as well as health services and actions, in order to prevent them from being included in the registry of delinquent or unpaid commercial debt systems, possibly hindering access to such information as debts for public officials. One law punishes anyone who, without legal or regulatory authorization, enters, attempts to enter, or allows the entry of intercoms, telephones, phone chips, or other technological elements into a penitentiary facility that allow inmates to communicate with the outside world. One law amending the law on Cybercrimes criminalizes unauthorized access to computer systems without establishing clear public interest protections that encourage security researchers to inform vulnerabilities they detect. A draft bill introduced in the Chilean Senate in 2021, aimed at regulating digital platforms, is

raising concerns over flagging false information by the provider of the digital platform, and the obligation for platforms to remove or de-index content for lack of consent, which could limit or restrict the circulation of information of public interest, concerning officials or public figures, or candidates in the exercise of their functions, or that involves human rights violations.

**Introduction**

The period covered in this report was turbulent for Chile. In October 2019, an unprecedented social outbreak brought chaos and discontent to Santiago, in a protest wave that seemed to emerge from the profound malaise that has affected Chilean society, combined with deep and pervasive inequalities and a system that relied almost exclusively on free-market mechanisms to allocate basic goods and services, including housing, education, and health services. The protest cycle prompted Chile's Freedom House score to drop from 95/100 in 2015 to 90/100 in 2020[131] and ushered in two significant political changes. This went up to 93/100 in 2021[132]and 94/100 in 2022.[133] As a way of finding an institutional channel for the social discontent, major political parties agreed upon a path towards constitutional reform—including a plebiscite that widely supported changing a text that was seen, by many, as the source of the political gridlock in which many reform initiatives have found themselves in for years. Within the context of a Constitutional Convention under way, President Gabriel Boric was elected through a new coalition of left-of-center groupings that largely left behind the traditional parties that have controlled Chilean politics since the return to democracy in 1990.

## I. Legislation

Laws 21.214 and 21.594

It is in this context that some of the laws identified can be better explained. On February 24, 2020, the Chilean Congress passed Law 21.214[134] and on November 4, it passed Law 21.504.[135] Both aim to limit disclosure of information related to debts incurred to finance education at any level, as well as health services and actions. This is to prevent these debts from being included in the registry of delinquent or unpaid commercial debt systems. Social unrest explains these laws: both health and educational services are highly dependent on market mechanisms that force lower-class and middle-class families to get into debt in order to access those vital services. The law serves a social function, but it may have a detrimental effect on freedom of expression, for it blocks access to information that may be—under certain conditions—in the public interest to be public. Debts by public officials, for instance, may be relevant for public debate in the context of an electoral campaign.

[131] https://freedomhouse.org/country/chile/freedom-world/2020
[132] https://freedomhouse.org/country/chile/freedom-world/2021
[133] https://freedomhouse.org/country/chile/freedom-world/2022
[134] https://www.bcn.cl/leychile/navegar?idNorma=1142880
[135] https://www.bcn.cl/leychile/navegar?idNorma=1184083

Law 21.494

A law that more clearly restricts freedom of expression is Law 21.494,[136] passed on November 4, 2022. The law creates Article 304 bis of the Criminal Code, that establishes the penalty of imprisonment, from its minimum to medium degree, for anyone who, without legal or regulatory authorization, enters, attempts to enter, or allows the entry of intercoms, telephones, parts thereof, phone chips, or other technological elements into a penitentiary facility that allow inmates to communicate with the outside world. The new article proposes an aggravating circumstance. If the conduct referred to in the previous paragraph is committed by a lawyer, prosecutor, or public employee, the penalty will not apply in its minimum degree and will entail, in addition, suspension in its minimum degree or temporary absolute disqualification in any of its degrees for the exercise of the profession or office, respectively.

The law is excessively restrictive and hardly passes the Inter-American Court three-pronged test to scrutinize restrictions on freedom of expression. While established by law and pursuing a legitimate state interest—presumably, limiting the possibility of inmates to conduct criminal activities from prison by, for example, exercising power through a criminal network outside the prison—the law does not seem "necessary in a democratic society". Every person deprived of liberty is equal before the law and is entitled to equal protection by the law. The execution of a criminal sentence should not go beyond the scope of the imposed penalty, and therefore, prisoners, in principle, retain all other rights from which they have not been expressly deprived,[137] which includes the human rights and fundamental freedoms enshrined in international human rights instruments, except for limitations that are clearly necessary due to imprisonment.

While common, a blatant prohibition such as the one established in Law No. 21.494 does not seem to be the kind of "narrow" restriction demanded by the three-prong test. Even if there is a clear and compelling necessity to impose the limitation due to security issues, there is an obligation to ensure the use of the less restrictive means available. When faced with various possible measures, the one that imposes the least restriction on the protected right should be chosen,[138] aiming to ensure the exercise of the right to freedom of expression. The measures taken must also be strictly proportional[139] to the legitimate purpose pursued. In today's society, the use of mobile phones is a substantial part of the way in which information is shared and received. Hence, prohibiting imprisoned people from having access to cellphones and any other means to communicate with the outside world, imposing harsh penalties to those who

[136] https://www.bcn.cl/leychile/navegar?idNorma=1184364
[137] https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-treatment-prisoners
[138] http://www.oas.org/es/cidh/expresion/docs/cd/sistema_interamericano_de_derechos_humanos/index_MJIAS.html
[139] http://www.oas.org/es/cidh/expresion/docs/cd/sistema_interamericano_de_derechos_humanos/index_MJIAS.html

enter them into penitentiary facilities without legal or regulatory authorization, fails to provide a proportionate legislative solution.

Law 21.459

Another law that is problematic is Law 21.459[140] enacted on June 9, 2022. The law updated Chilean law on cyber-crimes, aligning it with the requirements of the Budapest Convention, of which Chile is a party. It criminalizes the following acts as cyber-crimes: attacks against the integrity of a computer system, unauthorized accesses, unlawful interceptions, attacks against the integrity of computer data, computer forgery, receipts of computer data, computer fraud, and misuse of devices. Penalties for these offenses, according to their severity, can be either imprisonment or fines.

Regarding the offense of unauthorized access, Article 2 establishes that anyone who, without authorization or exceeding their authorization and bypassing technical barriers or technological security measures, accesses a computer system shall be punished with a penalty of minor imprisonment or a fine of eleven to twenty monthly tax units. If the access is carried out with the intention of appropriating or using the information contained in the computer system, the penalty of minor imprisonment to medium imprisonment shall apply. The same penalty shall apply to anyone who discloses the information that was accessed unlawfully if it was not obtained by them. If the same person obtained and disclosed the information, the penalty of medium imprisonment to maximum imprisonment shall apply.

These laws do not include a public interest exception that would safeguard the work of coders and other professionals who work on the cyber-security business. Indeed, ethical hackers who venture into other peoples' systems in order to find vulnerabilities should be encouraged and protected, not punished. As the Electronic Frontiers Foundation has argued,[141] coders who engage in security research are exercising the freedom of expression—writing code is, after all, writing. Laws such as this one, whose purpose is to protect the integrity of computer systems, should eliminate uncertainty by establishing clear public interest protections that encourage security researchers to inform vulnerabilities they detect. Without clear legal protection, a security researcher may be hesitant to report bugs or other weaknesses in computer systems. Because of this absence, the law defeats the interest it is supposed to pursue. The law discourages the development of certain tools that could be useful for security research—for it could be considered that these tools aid those willing to break into other people's computer systems. As the Electronic Frontiers Foundation has put it, "security tools that could crack a system are also vital for testing computer and network security (with authorization from the target but simulating an attack without authorization) in order to detect security flaws often called penetration testing or 'pen testing.' Thus, the creation, possession,

[140] https://www.bcn.cl/leychile/navegar?idNorma=1177743
[141] https://www.eff.org/wp/protecting-security-researchers-rights-americas

or distribution of security tools should not be criminalized, because such programs are not inherently bad. Rather, they can be used for both good and bad purposes. However, the prohibition on communicating or selling computers or computer programs with the intent of allowing the access is sufficiently ambiguous to undermine legitimate activities needed for independent security research, academic study, and other good-faith activities that ultimately make the public safer."[142]

Draft bill to regulate social media

Finally, a draft bill[143] introduced in the Chilean Senate in 2021 shows a regional trend of drafting bills aimed at regulating digital platforms. The proposed bill would do many things: it would protect freedom of expression (somewhat redundantly), it would establish the principle of network neutrality, and would provide certain guarantees to intermediaries for the content produced by third parties. It would also regulate "fake news" and the so-called "right to be forgotten." Four issues appear as especially problematic from the standpoint of Inter-American human rights standards.

First, while the inclusion of obligations to treat data traffic fairly and without discrimination is valuable, the obligation of neutrality imposed by the article, referring to the obligation not to impose any 'restriction' or 'interference' on content, is inadequate. Digital platforms are precisely characterized by managing content, engaging in its indexing, organization, and provision. While it is necessary to establish criteria for content moderation to prevent arbitrary interference, the intervention in content traffic carried out by major digital platforms is acceptable, if it complies with the principles of international law regarding freedom of expression and the consistent and coherent application of rules, without discriminating on illegitimate and private grounds.

Second, Article 6 establishes that manifestly false information may be clarified or rectified by the provider of the digital platform by attaching notes to the questioned content. While the authority to provide more context itself poses little risk from the perspective of freedom of expression, it could be problematic,[144] if such labeling had effects on how information circulates; for example, if the content recommendation algorithm negatively considers those labels. It is worth mentioning that companies have shaped their moderation policies as a result of their own economic interests and external pressures.

Third, Article 7 establishes the right to rectification and the right to be forgotten. The project recognizes that every digital consumer has the right to have content published through digital platforms rectified if they undermine their image, personal and family privacy on the Internet.

[142] https://www.eff.org/wp/protecting-security-researchers-rights-americas
[143]https://www.senado.cl/appsenado/index.php?mo=tramitacion&ac=getDocto&iddocto=15047&tipodoc=mensaje_mocion
[144] http://www.oas.org/es/cidh/expresion/docs/publicaciones/internet_2016_esp.pdf

They also have the right to request, with proper justification, the inclusion of an update notice alongside news that concerns them when the information contained therein does not reflect their current situation, causing harm to them. The bill is somewhat consistent with cases decided by the Supreme Court in 2019[145] and 2021,[146] where the Supreme Court considered and rejected a broad construction of the "right to be forgotten" but accepted that updating information that became inaccurate because of the passing of time is a sound remedy.

According to the proposed legislation, platforms must remove or de-index content posted by another user (including from media accounts and journalists), without grounds or prior due process, because it "circulates without their consent," based solely on their request, "by indicating so." This provision is particularly problematic as it does not make distinctions regarding the type of content or the individuals requesting its removal. While the protection of personal data is a legitimate goal, it should never be invoked to limit or restrict[147] the circulation of information of public interest, concerning officials or public figures, or candidates in the exercise of their functions, or that involves human rights violations. The creation of the right to rectification and erasure, as outlined in the project under consideration, constitutes a disproportionate and incompatible measure with international standards.

## II. Non-Legislative Developments

From 2015 to 2022 there were no major non-legislative developments concerning freedom of expression.

## III. Enforcement

No relevant case law.

## Conclusion

Chile ranks well[148] in indexes that measure, among other things, freedom of expression. In the Freedom House score, Chile scored 95 in 2015 and 94 in 2022 (even though it dropped to 90 after the social unrest of 2019). It has also been a pioneer in Latin America in issues such as freedom of information[149] and net neutrality.[150] However, problems remain. The laws that have been discussed in the report are common in many Latin American countries, but problematic, nevertheless. On the other hand, the bill on platform regulation would incorporate into Chile's

[145] https://globalfreedomofexpression.columbia.edu/cases/surgeon-v-court-of-appeals-of-santiago/
[146] https://globalfreedomofexpression.columbia.edu/cases/maureira-alvarez-v-google/
[147]https://www.palermo.edu/Archivos_content/2021/cele/papers/Desinformacion-y-acciones-de-plataformas-2021.pdf
[148] https://freedomhouse.org/country/chile
[149] https://www.bcn.cl/leychile/navegar?idNorma=276363
[150] https://www.bcn.cl/leychile/navegar?idNorma=1016570

legal landscape proposals that are being made elsewhere and that are deeply problematic from a freedom of expression standpoint.


# Costa Rica

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**Country Summary**

While ranking well in global human rights indexes, Costa Rica has issued several speech restrictive laws between 2015 and 2022: one law issued during Covid punishes defiling and disrespecting the flag, coat of arms, or national symbols. One law sought to prevent, sanction, and eradicate violence against women in politics, and used extremely broad and vague terms to criminalize speech that would harm "the reputation, prestige, and public image to hinder the free exercise of political rights" and actions carried out "with the aim of undermining the political exercise of a woman or group of women by disqualifying them or reducing them to a subordinate condition based on gender." Another law amending the Labor Code toughens the requirements to consider strikes legal and limits the right to strike in "essential" public services and restricts possibilities for workers to protest labor policies.

## Introduction

Costa Rica is one of the most stable democracies in Latin America. Praised for its institutional culture, the country often ranks well in democracy and rule-of-law indexes around the globe.[151] In the Freedom House index, Costa Rica has consistently scored 90-91 between 2015 and 2022, making it one of the top-ranked countries in Latin America. It does, however, have a handful of laws that can be found problematic from a freedom of expression standpoint. Freedom of expression is protected in Costa Rica's Political Constitution. Specifically, Article 29 states that everyone can communicate their thoughts orally or in writing and publish them without prior censorship; but they will be responsible for the abuses they commit in the exercise of this right, in the cases and in the manner established by law.

## I. Legislation

Law No. 10178 – The Flag

Law No. 10.178[152] regulates the use of the *pabellón* or *bandera* (both synonyms of flag), and coat of arms of the Republic. Enacted on April 25, 2022, the law is a typical example of national regulations seeking to defend national symbols from being defaced. In its first paragraph, the law states that the flag "will always be used with respect towards the country and should never be defiled, disparaged, trampled, mistreated, or in any other way disrespected." It may not have slogans placed on it, be dragged on the ground, or even touch the ground. According to the regulation, when it is used, it will always occupy a prominent, visible, and honorable place. Article 20 prohibits the display of national symbols in poor conditions or with any other sign that shows contempt for these patriotic symbols. Article 21 also prohibits their use as a trademark or political badge. Article 22 of the Criminal Code[153] was reformed, imposing a penalty of imprisonment for one month to two years and a fine of thirty to ninety days on anyone who publicly disparages or vilifies the *pabellón*, the *bandera*, coat of arms, or national anthem.

Law. No 10.236 – Women

Law No. 10.236[154] was sanctioned by the Legislative Assembly of Costa Rica on May 3, 2022. According to its first article, the law seeks to prevent, address, sanction, and eradicate violence

[151] https://freedomhouse.org/country/costa-rica
[152]http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&param2=12&nValor1=1&nValor2=96896&nValor3=130039&strTipM=TC&lResultado=117&nValor4=1&strSelect=sel&cmd=redirect&arubalp=12345
[153]http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?nValor1=1&nValor2=5027
[154]http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&param2=11&nValor1=1&nValor2=96947&nValor3=130207&strTipM=TC&lResultado=106&nValor4=1&strSelect=sel

against women in politics as a discriminatory practice based on gender, which is contrary to the effective exercise of women's political rights.

The law defines violence against women in politics in several ways. These include disclosing or revealing private information that "undermine … her credibility or political capacity based on her gender, through insults, shouting, threats, humiliating epithets, and mockery in private or in public," attack women based on their gender, through comments, gestures, epithets, or other sexual connotations, in private or in public, including virtual media, that affect the exercise of their political rights; use language, images, symbols, or electoral propaganda that reproduce stereotypes and traditional roles with the aim of undermining the political exercise of a woman or group of women by disqualifying them or reducing them to a subordinate condition based on gender. Chapter VIII establishes various political, ethical, and administrative sanctions for those who perpetrate violence against women in politics. And, finally, Chapter VII introduces a series of reforms to other laws. In the case of the Electoral Code, a third paragraph is added to Article 136 concerning propaganda. It is stated that all propaganda against the political rights of women and any promotion of hatred based on gender or sex that incites violence against women in political life, or any similar illegal action against women or a group of women participating in political life, on the grounds of sex or gender, is prohibited.

This is an important topic that deserves careful consideration. Violence against women in social media is worrisome in and of itself,[155] but also because of the chilling effect it may have on a collective that has been traditionally discriminated against. However, legislatures seeking to fight online violence against women in politics should do so in ways that are respectful of human rights standards.

The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has acknowledged that as misogyny spreads on social media platforms, there is a growing demand to ban or criminalize hate speech based on gender and other harmful and offensive discourses. But the topic must be approached cautiously to avoid the risk of censoring legitimate speech.[156] In that sense, protecting women who participate in politics from vitriolic attacks clashes with the principle according to which expression, information, ideas, and opinions about public officials in the performance of their duties and about candidates for public office enjoy a special level of protection under the American Convention.

One of the most problematic sides of the law is its use of broad and vague language that fails to pass the legality analysis of the three-prong test. This is the case for Article 4.a.4., as it talks about the act of "harming the reputation, prestige, and public image to hinder the free exercise of political rights" as being a form of violence against women, as well as Article 5, sections h,

[155] https://www.unwomen.org/sites/default/files/2022-10/Accelerating-efforts-to-tackle-online-and-technology-facilitated-violence-against-women-and-girls-en_0.pdf
[156] http://www.cidh.org/pdf%20files/marco%20juridico%20interamericano%20estandares.pdf

j, k and m. Furthermore, the incorporation of the assessment of a subjective element in the legislation is problematic. For example, in Article 2, subsections *h* and *m*, the law reproaches actions carried out "in order to limit or nullify their political rights by damaging their reputation, prestige, or public image" or "with the aim of undermining the political exercise of a woman or group of women by disqualifying them or reducing them to a subordinate condition based on gender". It is easy to imagine different examples that would show that these broad and vague definitions will be hard to administer. To distinguish acts that constitute valid criticism from illegal discrimination will be hard, and the law—through its broad wording—will not help enforcers in that task.

Law 9808 - Unions

Through Law No. 9808,[157] Congress modified the Labor Code in ways that include various direct and indirect restrictions on the rights of unions and their members to exercise their rights to association, freedom of peaceful assembly, and expression through the exercise of their labor rights, particularly the right to strike. The law strengthens the requirements to consider strikes legal and limits the possibilities of workers protesting public policies. The law also limits the right to strike in "essential" public services (Article 376).

This law presents problematic elements in light of international standards on freedom of expression, freedom of association, and freedom of peaceful assembly, with regards to labor rights. The relationship between these rights is evident, as the protection of those who participate in peaceful assemblies is only possible when their rights related to political freedoms, particularly freedom of expression, are protected. In this sense, a strike is a form of peaceful assembly, and without proper protection of their rights to assembly and association, workers have little power to change the conditions that perpetuate poverty, fuel inequality, and limit democracy.[158]

The law suffers from some ambiguities. For instance, Article 371 does not clarify what is meant by a 'political strike,' which the law deems illegal. Additionally, the law, in Article 661 bis, imposes temporal limitations on the right to strike in the context of non-essential services when it causes "severe damage to the public that is difficult or impossible to repair." However, this concept is not specified, allowing for significant judicial discretion to declare the suspension of the strike.

As the tripartite test establishes, the restriction must also be necessary to achieve the compelling purposes being pursued. This means that there must be a clear and compelling necessity to impose the limitation, without any other less restrictive means available. The law makes a handful of strict distinctions that fail to allow for the kind of nuance the international

[157]http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&param2=49&nValor1=1&nValor2=90459&nValor3=119158&strTipM=TC&lResultado=489&nValor4=1&strSelect=sel
[158] https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24888

standards demand. For instance, the prohibition of "political strikes", or of conducting strikes for the same reasons as a previous strike, impose absolute prohibitions without considering the reasonableness or proportionality of the strike in a specific case. The sacrifice to freedom of expression resulting from the legislative policy on the matter is disproportionate to the benefits obtained through it, thus failing to meet the proportionality criterion established in the tripartite test.

Bill No. 23.184 – Online Content

Finally, Bill No. 23.184[159] was presented in Costa Rica's Congress in June 2022. The bill shares significant similarities with the European Union Digital Services Act (DSA), which was approved on July 5, 2022. As the bill presented in Chile,[160] it shows an emerging trend of copying European regulation, that may be emerging as a model that Latin American countries will follow. This is problematic for two reasons. First, the DSA is a regional regulation that will change in the process of being implemented by nation states, but in Latin America the DSA is being imitated in ready-to-be-enforced national laws. This is a significant and consequential difference. Second, the DSA was drafted against a backdrop of certain institutional infrastructure of participation and accountability, that in many Latin American countries is lacking.

## II. Non-Legislative Developments

From 2015 to 2022 there were no major non-legislative developments concerning freedom of expression.

## III. Enforcement

No case-law

## Conclusion

Laws that protect national symbols are problematic from a freedom of expression standpoint, especially when they include criminal sanctions. These laws limit freedom of expression by isolating certain symbols from critical readings and usages. On the other hand, the other laws discussed in this report are newer but also usual in many Latin American countries: laws that aim to fight violence against women or those that restrict the right to protest (including to strike in the context of labor and industrial relations) must be subjected to a careful freedom of expression scrutiny, because of the potential for abuse they present. Whilst no legislative or non-legislative developments occurred in the sphere of the press or journalism during the

[159] https://d1qqtien6gys07.cloudfront.net/wp-content/uploads/2022/06/23184.pdf
[160] https://www.senado.cl/appsenado/index.php?mo=tramitacion&ac=getDocto&iddocto=15047&tipodoc=mensaje_mocion

time period, it should also be noted that in the case of *Moya Chacón v. Costa Rica,*[161] the Inter-American Court of Human Rights found that a civil penalty imposed by Costa Rican judges on two journalists for publishing "inaccurate" information was disproportionate and unnecessary in a democratic society. The case is interesting because it limits civil liability in a way that follows the Court's long case-law on limiting criminal liability.

[161] https://globalfreedomofexpression.columbia.edu/cases/moya-chacon-v-costa-rica/


# Czech Republic

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**Country Summary**

The Covid-19 pandemic and the war in Ukraine ushered in a legislative movement on hate speech and misinformation. Three restrictive laws were introduced: two amending the Criminal Code, the first introduced the offense of publicly approving of a terrorist offense or publicly praising its perpetrators for it, doing so through the press, film, radio, television, publicly accessible computer network, and the second, issued during the pandemic, criminalized the distribution of materials promoting movements aimed at the suppression of human rights and freedoms, without the need to prove the intention to promote such movements. A third law, also issued during Covid, allows the police to order the removal of terrorist content or to prevent access to it. In non-legislative developments, the government's Analysis of the Czech Republic's Preparedness to Counter a Serious Wave of Disinformation concluded that the personal as well as the organizational and technical capacities of the Czech Republic to face a serious disinformation wave are insufficient. Both during the Covid pandemic and the war in Ukraine, online material has been blocked for containing unverified information about alternative treatments for Covid-19 infection, disinformation and spreading propaganda of the Russian Federation justifying aggression against Ukraine. With the lack of legal basis to block websites containing disinformation, a draft bill on restricting the dissemination of content that threatens national security online has been under discussion since 2022.

## Introduction

According to Justitia's Free Speech Index,[162] the Czech Republic belongs to the group of countries with medium public support for free speech (12th out of the 33 countries ranked).[163] It falls into the "free" category with a 92/100 rating by Freedom House in 2022 (32nd out of 195 countries); ranked 20th out of 180 countries in the 2022 World Press Freedom Index by Reporters Without Borders[164] and 31st out of 179 countries in the Liberal Democracy Index according to V-Dem Democracy Report 2022.[165]

The first half of the time period from 2015 to 2022 in the Czech Republic was characterized by few restrictions on hate speech and disinformation; instead the fight against hate speech and the spread of disinformation was discussed more on a social rather than a political level, without the state considering it necessary to adopt new legislation. However, this has changed in light of two major crises in recent years: the Covid-19 pandemic and then the aggression of the Russian Federation against Ukraine, a topic that, due to Russia's considerable geographical proximity and direct impact on the domestic economy, resonates strongly in Czech society, across its ideological and political spectrum.

However, even before these major crises of our time, various non-legislative documents and legislative amendments were put in place, which had speech restrictive consequences. They have had a significant impact on the lives of affected individuals (such as the crime of condoning terrorist attacks in internet discussions), as described below. The following sections describe new legislation, non-legislative developments, and the most significant cases of their enforcement and state interventions in general. The laws, non-legislative documents, and individual cases are listed chronologically, from 2015 to 2022.

## I. Legislation

In criminal law practice, the provision[166] of Section 312e paragraph 1, 4 letter a) of Act No. 40/2009 Coll., the Criminal Code (hereinafter Criminal Code), appears to be the most problematic. This provision is, among other things, applied to cases in which the perpetrator publicly approves of a terrorist offense committed or publicly praises its perpetrators for it, doing so through the press, film, radio, television, publicly accessible computer network (i.e., on the Internet in discussions under articles, blogs, social networks, etc.) or other similarly effective means, for which the offender is liable to imprisonment of 5 to 15 years. This provision is then applied in practice, among other things, to the approval of terrorist attacks in internet discussions, where this provision falls very heavily on the authors of such posts. This provision

[162] https://justitia-int.org/report-who-cares-about-free-speech-findings-from-a-global-survey-of-free-speech/
[163] https://freedomhouse.org/explore-the-map?type=fiw&year=2023&country=CZE
[164] https://rsf.org/en/index?year=2022
[165] https://v-dem.net/media/publications/dr_2022.pdf
[166] https://www.zakonyprolidi.cz/cs/2009-40

was introduced into the Criminal Code by Amendment No. 455/2016 Coll.,[167] effective as of 1 February 2017, as part of a broader anti-terrorism amendment that also introduced crimes such as the financing of terrorism, participation in terrorist groups, and also criminalized recruitment activities. This amendment was introduced in response to the dramatic rise of the so-called Islamic State (ISIS), whose activities, particularly in the years 2014-2019, resulted in a large number of deaths, the devastation of a large territory, and abuse of thousands of women and children. The adoption of the amendment was intended to enable more effective punishment of activities related to and supporting terrorism.

However, in practice, there have already been cases in which the authors of posts online who, for example, have been prosecuted under this provision and faced a possibility of imprisonment for between 5 and 15 years purely for their expression. Fortunately, the Czech courts imposed suspended sentences (i.e., without incarceration, "only" with the imposition of several years of probation). However, this does not change the fact that the threat of such a severe sentence for mere Internet postings (regardless of their improper, hateful, or despicable nature) is grossly disproportionate. Ironically, this provision of the Criminal Code was intended to prevent the dissemination of material such as terrorist propaganda and terrorist recruitment videos but, in practice, may impact those participating in Internet discussions who had no previous criminal record. We can only hope that this provision will soon be amended so that it actually serves its intended purpose and does not cause more (presumably originally unintended) harm in the future.

In 2022, a new criminal offense was inserted into the Criminal Code: section 403a Dissemination of works promoting movements aimed at suppressing human rights and freedoms,[168] based on Amendment No. 220/2021 Coll.,[169] effective from 1 January 2022. This new offense represents an enhancement of the fight against extremism, as until now only the active promotion of movements aimed at the suppression of human rights and freedoms was punishable, but now the mere distribution of such materials (including, for example, uniforms, badges, depictions of representatives of such movements) is also punishable, without the need to prove the existence of an intention to promote such movements. However, it should be noted that under section 403b of the Criminal Code,[170] such conduct is not punishable if the items are disseminated for education, research, art, reporting on current or historical events, or similar purposes.

Considerable attention has been drawn to the recent draft of the Law on Restricting the Dissemination of Content that Threatens National Security Online[171] from 27 September 2022. This bill would allow the Ministry of the Interior to disable access to content posted online if

[167] https://www.zakonyprolidi.cz/cs/2016-455
[168] https://www.zakonyprolidi.cz/cs/2009-40
[169] https://www.zakonyprolidi.cz/cs/2021-220
[170] https://www.zakonyprolidi.cz/cs/2009-40
[171] https://www.mvcr.cz/clanek/poskytnuti-informace-zakon-dezinformace.aspx

the information "would be able to threaten the sovereignty, territorial integrity, or democratic foundations of the Czech Republic or to significantly endanger the internal order and security of the Czech Republic, especially if it is created or disseminated by a person or state to which international sanctions apply under a special legal regulation, or by an entity under the control of such a person or state, or if it substantially corresponds with such content." The possibility of blocking a website also applies to cases where the website in question contains content defined as prohibited by the Criminal Code. However, it is currently only a draft of a law that has not been voted on in Parliament and it is not certain whether it will be ever voted on or what its final wording will be.

Last but not least, there is a Czech implementation of Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021, on addressing the dissemination of terrorist content online.[172] This is Law No. 67/2023 Coll., on Certain Measures against the Dissemination of Terrorist Content Online,[173] which allows the police to order the removal of terrorist content or to prevent access to it. Although this law might seem to be politically neutral and aiming to reach a legitimate target (i.e., to prevent dissemination of terrorist propaganda and prevent radicalization of individuals), it cannot be entirely ruled out that it may potentially be misused in the future.

## II. Non-Legislative Developments

The issue of hate speech on the internet was addressed in 2018 by the former Ombudsperson Šabatová, in a press release dated 3rd April 2018.[174] In this press release, she stated, among other things, that she "finds it alarming that the number of hate speeches on the internet by "ordinary" citizens who are not in any way associated with extremist groups is increasing", adding that she would appreciate "if the State made it clear in the future that hate speech of the most serious nature on the internet is illegal and that the State authorities have the tools to punish it within a reasonable time and within the limits set by law."

This press release was followed up two years later with the Ombudsperson's Recommendation on hate speech on the Internet of January 27th 2020,[175] in which the following is recommended to state authorities: unify crime databases and conduct analyses of related case law, ensure the same level of protection of vulnerable groups from hate crimes under the Criminal Code, organize a national campaign on online hate speech with a target group of primary and secondary school students, strengthen the education of law enforcement authorities on hate crime issues, support the development of an automatized tool for detecting hateful comments

[172] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32021R0784
[173] https://www.zakonyprolidi.cz/cs/2023-67. Although this law was not adopted until 2023, it is based on an earlier EU regulation and was already in the preparation stage in 2022 and therefore falls within the 2015-2022 timeframe.
[174] https://www.ochrance.cz/aktualne/jak-branit-sireni-nenavisti-na-internetu/
[175] https://www.ochrance.cz/uploads-import/ESO/67-2018-DIS-JV-doporuceni.pdf

on the networks, promote the use of the online form for filing criminal complaints, and modify the Ministry of the Interior's website in its sections related to extremism and prejudicial hatred so that it is more broadly focused on the issue of prejudicial hatred.

The Action Plan to Counter Disinformation of 15 November 2022,[176] prepared by the Government Commissioner for Media and Disinformation, contains, amongst others, the following recommendations: to establish specialized positions focused on countering disinformation in the Government Office, strengthen capacities for monitoring disinformation, strengthen strategic communication aimed at reducing the impact of disinformation on society, organize exercises aimed at defending against a coordinated disinformation wave, and increase funding for NGOs focused on countering disinformation and for independent media, prepare a methodology for the demonetization of disinformation websites, submit a law proposal to allow blocking of disinformation websites, and define a new criminal offense punishing the deliberate dissemination of disinformation aimed at undermining the democratic character of the state or the security interests of the state.

As can be concluded from the enumeration above, the Action Plan recommends the adoption of several new measures, including the possible criminalization of the dissemination of certain types of disinformation and the introduction of legislation to enable the blocking of websites - and such a bill already exists, as mentioned above.

On February 15th 2023, the Czech Government approved the Analysis of the Czech Republic's Preparedness to Counter a Serious Wave of Disinformation.[177] This analysis was prepared in response to the crises of the previous years, and according to its conclusions, the organizational, personnel, and technical capacities of the Czech Republic to face a serious disinformation wave are insufficient, and in the future, the Analysis recommends measures in the field of prevention and defense. Prevention should be about strengthening the natural defense mechanisms of society through the rigorous protection of fundamental rights and freedoms and transparency of democratic processes, promoting media literacy in the population, involvement of civil society in political processes, etc. In the area of defense, the analysis recommends, in general terms, strengthening organizational, personnel, procedural, legal, and other instruments and capacities that would be effective in responding to an attack against the Czech Republic led by a serious wave of disinformation.

## III. Enforcement

[176]https://uploads-ssl.webflow.com/62a501ab7c276f020734e677/64c8f2e65093ceb4f791af74_akcni_plan_dezinfo.pdf
[177]https://www.mvcr.cz/chh/clanek/analyza-pripravenosti-ceske-republiky-celit-zavazne-dezinformacni-vlne.aspx. Considering the fact that work commenced as early as 2022 we consider this document to fall within the 2015-2022 timeframe.

In March 2020, the Centre against Terrorism and Hybrid Threats (subordinate to the Ministry of the Interior) alerted several websites to a recording of a program[178] featuring the well-known Czech actor and promoter of alternative medicine Jaroslav Dušek. The reason for this was that the performance "Malá vizita" ("Morning Rounds") contained unverified information about alternative treatments for Covid-19. From a formal point of view, this was not an order or an administrative decision, however, YouTube promptly complied with this request, as did the Czech servers Uložto.cz and Seznam.cz, where the video was also available.

This situation was repeated on a larger scale after the Russian invasion of Ukraine at the end of February 2022, when several websites were suddenly blocked. On February 25th 2022, the National Cyber-Force Center National Cyber Measures Centre sent a letter to CZ.NIC,[179] the administrator of the national supreme domain for the Czech Republic and operator of the domain name registry. This letter included a request to block several websites that were identified as disinformation and spreading propaganda of the Russian Federation justifying aggression against Ukraine. These sites were subsequently blocked, and in response, two NGOs, Institute H21[180] and Open Society,[181] went to court to have the blocking of the websites declared illegal, as no existing law allows the state to block websites. However, the Municipal Court in Prague did not uphold their claim on basically formal grounds - in the court's opinion, the letter containing the request could not be considered an (illegal) action of the state authority, since the letter was formulated only as a request and its addressees were not forced to do anything, and the letter itself did not contain any binding order. Not satisfied with this judgment, the plaintiffs appealed to the Supreme Administrative Court, which has not yet ruled on the case.

**Conclusion**

As can be seen from the examples above, the topic of hate speech and disinformation, in particular, has received increased attention in the Czech Republic in recent years, which has so far been manifested especially in non-legislative documents and policy papers, however, the adoption of a law allowing the blocking of "disinformation websites" is under discussion, while at the same time the blocking of certain websites has already occurred, although, from a formal point of view presented by the Municipal Court in Prague, it is not an action of state power. In addition, legislation has also been passed within the years 2015-2022 which, while not necessarily intended to restrict freedom of expression, might have the potential to do so.

[178] https://www.irozhlas.cz/zpravy-domov/dusek-video-cthh-koronavirus-sarlatanstvi_2005300604_cib
[179] https://www.irozhlas.cz/zpravy-domov/dezinformace-weby-blokace-zaloba-neuspech_2301231500_pik
[180] https://www.ih21.org/en/home
[181] https://www.otevrenaspolecnost.cz/en


# Denmark

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Oline Nyegaard Grothen is currently studying a master's degree in law at the University of Copenhagen. She possesses a particular interest and capability in the field of international law and international criminal justice alongside safeguarding human rights. Besides studying Oline has served as a full-time intern for the permanent mission of Estonia to the UN for the second half of 2022, where she primarily covered the 6th committee on counter-terrorism, law of the sea and the crime of aggression. Presently she is working part time at a Danish law firm and as a project employee for Justitia on top of her board work, at a Danish student association.

**Country Summary**

Despite consistently ranking highly in free speech indexes such as Justitia's free speech index (2nd out of 33 countries) and Freedom House's Freedom in the world report (97/100 global

freedom score), an unprecedented number of speech restrictive laws have been enacted between 2015 and 2022. Five laws provide for restrictions on religious speech, known as the anti-radicalization bill (one on religious preaching, one aimed to limit the funding of mosques and Islamic communities, one imposing a ban on the burqa and one prohibiting certain religious preachers from entering the country). Two laws related to gang violence restricted freedom of movement and expression of suspected gang members. One law criminalized cooperation with foreign intelligence services to modify and affect the public formation of opinions or political decision making. In 2018 a major revision of the Danish penal code´s provisions on defamation tripled the fines for libel and introduced a fivefold increase of the fine for libel applicable to managing editors of mass media outlets and made it easier for the Danish prosecution service to initiate defamations cases on behalf of potential victims. The law was criticized as having a potential chilling effect on the public debate and press freedom. In 2021 the Danish criminal prohibition on hate speech (section 266b of the penal code) was extended to include gender identity, expression or characteristics. In 2023, the Supreme Court ruled that the satirical drawing of the Little Mermaid sculpture was not in violation of the sculptor's copyright and is protected by free speech.

**Introduction**

The beginning of the period was characterized by political discussions stemming from a violent terrorist attack in February 2015 causing two deaths: one at an event celebrating the freedom of speech and another at a young person's party at the synagogue of Copenhagen. The attack sparked a debate about how to safeguard Danish democracy and values including the freedom of speech. This debate was further inflamed by the actions of right-wing politician, Rasmus Paludan, who pushed the boundaries of free speech with various provocative acts, including burning of the Koran and covering of it in bacon.

It is worth noting that in 2023 (outside the temporal scope of the report but significant in terms of its content), the Danish government has proposed a ban on burning the Koran after a series of burnings caused uproar in Muslim communities. The law will make "improper treatment" of "sacred writings" (such as the Bible and the Koran) a criminal offense punishable by a fine and jail sentence of up to two years.[182]

The Covid-19 pandemic had a major impact on the Danish legislative scheme from 2020-2022 making obstacles for both the freedom of assembly and the freedom of expression.

The findings of the so-called Tibet Commission in 2022 that the Danish Ministry of Foreign Affairs and the Danish Police Service during Chinese state visits in 2012 and 2013 had acted

[182] https://www.bbc.com/news/world-europe-66602814; https://reason.com/2023/08/30/denmark-may-ban-burning-the-Koran/; https://time.com/6302649/denmark-swedens-Koran-burnings-commitment-to-free-speech/

illegally by hindering anti-China protesters in voicing their discontent also influenced the debate.

At the end of the period, a book by a former employee of the Danish Security and Intelligence Service, disclosing so far undisclosed facts about the secret service and a criminal case against a former Minister of Defence accused of disclosing state secrets, sparked much debate. Discussions concerned how to weigh the need in a democracy for transparency and openness against the interest of the country's secret services and national security and in connection with that also the freedom of speech.

As in other countries the debate on free speech in Denmark has of course also been influenced by international debates about Russia's interference in other countries' elections and misinformation concerning covid, wars etc. The question of how to regulate social media has also played out in Denmark.

## I. Legislation

*Religious practice*

In 2016 religious preachers were prohibited by law[183] from entering Denmark if the preacher has been listed as being a threat to national security in Denmark – e.g., by having earlier made statements that could lead to the belief that he or she would encourage the undermining of democracy and social order in Denmark. The legislation was passed together with multiple other laws aimed at ensuring that preachers who are believed to undermine Danish culture and values and/or support parallel legal systems (e.g., Sharia law) will not be able to preach in Denmark. At present 30 preachers are on the public list[184], which is renewed every other year. In addition to the public list, there is a list of an unknown number of people whom the authorities are keeping an extra eye on. This list is not public.

Also in 2016, a law was enacted[185] making it is an offense, as a religious preacher, to try to undermine Danish democracy and values in religious sermons, by explicitly condoning certain criminal acts. In 2021,[186] statements that promote child marriage or amount to "psychological violence" were included in the law. A legislative proposal from the government that all sermons preached in Denmark should be translated into Danish was abandoned after three years of negotiation. The proposal was met with huge protests not only from the Danish state church, but also many other congregations and religious organisations.

[183] https://www.retsinformation.dk/eli/lta/2016/1743
[184] https://www.nyidanmark.dk/en-GB/Words and Concepts Front Page/US/Religious workers/Religious publishers with a ban on entry
[185] https://www.retsinformation.dk/eli/lta/2016/1723
[186] https://www.retsinformation.dk/eli/lta/2021/415

*Protection of public officials*

In 2016 the Danish parliament also passed a revision of section 121 of the Danish penal code which criminalizes subjecting public officials (including elected politicians) to mockery, abuse or insult. The revision increased the maximum penalty from six months to one year in prison leading to criticism that public officials and politicians were protected at the expense of ordinary citizens engaging in robust criticism and political debate.[187]

Legislation was adopted in 2021 to reduce the possibilities of funding mosques and Islamic communities in Denmark[188] by states, organizations or persons who seek to undermine Danish core values and human rights. The law does this by creating barriers for economic transactions.

Following much debate and protest, a law was adopted during the period under review banning the wearing of any form of garment in public which covers the face totally,[189] except if the garment is worn for justified purposes, e.g., as protection from cold weather or doing sports that require facial protection. Headscarves and turbans can be worn, but not burqas or niqabs. The law entered into force on August 1st, 2018. According to the Danish newspaper "Berlingske",[190] 60 people were charge under the law over the following two years, two thirds of which were citizens wearing a burqa or niqab.

*Blasphemy*

In 2017, the Danish Parliament repealed the blasphemy provision in the Danish Penal Code (Section 140). The section stated that anyone who publicly mocks the religious teachings or worship of religious communities legally existing in this country is punished by a fine or imprisonment for up to 4 months. The section had not been in use for more than 40 years when charges in the spring of 2017 were brought charges against a man who had posted a video on the internet showing the burning of a Koran. This initiated a political debate that led to Section 140 being repealed.

*Defamation*

In 2018 a major revision of the Danish penal code´s provisions on defamation tripled the fines for libel and introduced a fivefold increase of the fine for libel applicable to managing editors of mass media outlets and made it easier for the Danish prosecution service to initiate defamations cases on behalf of potential victims in particularly serious cases.[191]

[187] https://www.ft.dk/ripdf/samling/20161/lovforslag/l73/20161_l73_som_fremsat.pdf
[188] https://www.retsinformation.dk/eli/lta/2021/414
[189] https://www.retsinformation.dk/eli/lta/2018/717
[190] https://www.berlingske.dk/samfund/tildaekningsforbuddet-er-blevet-overtradt-60-gange-pa-to-ar-og-langtfra
[191] https://www.ft.dk/ripdf/samling/20181/lovforslag/l20/20181_l20_som_fremsat.pdf

*Communications*

A law allowing the blocking of certain websites was adopted in 2017[192]. A website can be blocked, if there is reason to believe that certain crimes are committed on the website. The original legislative proposal included all criminal offenses, but during the legislative process, the number of offenses was limited substantially due to protests from, *inter alia*, Justitia. The final law, however, allows the blocking not only of websites used to commit acts of terrorism, but also of websites used to threaten civil servants and to commit certain economic crimes.

In 2017, the administration of a secured institution was given the right to deny residents internet access[193] throughout the institution. The legislation unfortunately does not provide any guidelines on how and when the rules are applicable.

Due to several gang related shootings in Copenhagen, in 2018 the government adopted laws restricting the right to privacy relating to leading gang members' access to mail and phone calls[194] while serving a prison sentence. In addition, persons convicted of gang related crimes can be banned from moving, staying, or taking up residence in the area where the crime was committed.

In 2019, a law was also passed criminalizing cooperation with foreign intelligence services to modify and influence the public formation of opinions, political decision making and elections in Denmark.[195]

At the end of the period, in 2021, hate speech concerning a person's gender identity, gender expression or gender characteristics was included in section 266 b of the criminal code,[196] making it a criminal offense to publicly insult and threaten people due to their gender identity, gender expression or gender characteristics.

## II. Non-Legislative Developments

*The Freedom of Speech Commission*

The Freedom of Speech Commission[197] was formed by the government in 2017. The commission was chaired by the former head of the Central Bank of Denmark, who is not a lawyer. Several other members of the Commission were, however, skilled lawyers. The Commission published a comprehensive report in 2020 with findings regarding the condition of the freedom of free speech in Denmark, political trends, public opinion, and future recommendations. A significant, worrying finding was that Danes eagerly support freedom of

[192] https://www.retsinformation.dk/eli/lta/2017/674
[193] https://www.retsinformation.dk/eli/lta/2018/221
[194] https://www.retsinformation.dk/eli/lta/2017/672
[195] https://www.retsinformation.dk/eli/lta/2019/269
[196] https://www.retsinformation.dk/eli/lta/2021/2591
[197] https://www.regeringen.dk/nyheder/2020/ytringsfrihedskommissionen-afleverer-betaenkning/

speech in general, but are more reluctant in their support if a statement has negative consequences for others or society. The Commission called on the government to be more cautious in adopting new laws that could affect the freedom of speech negatively and to ensure that laws that do affect freedom of speech are clear and precise, to minimize the negative effects of such regulation.

*The Tibet Commission*

In 2022, a commission chaired by a high court judge[198] concluded that the Danish Ministry of Foreign Affairs and Danish Police acted illegally by: (i) restricting protesters in voicing their discontent with Chinese authorities, (ii) removing Tibetan flags which the protesters hoisted and (iii) barring protesters behind buses, to ensure that the Chinese delegation would not be faced with the protests during Chinese state visits in 2012 and 2013.

### III. Enforcement

Dissolving and Banning of the Gang "Loyal to Familia" by the Supreme Court

Over several years there has been political pressure on the police to dissolve and ban specific criminal gangs. As it had been considered unconstitutional, the police however did not act until 2018. The decision of the police was brought before the Supreme Court, which in 2021[199] decided that the banning and dissolving of the gang was in accordance with the constitution. The ban means that is illegal for the gang to carry on its activities, and to possess or use the "coat of arms" of the gang in public.

*The Covid-19 Cases*

In the early days of the pandemic, a law was passed[200] stating that criminal offenses committed to take advantage of the pandemic should be punished more severely than other similar offenses. This led to, for example, a case against a person who – in connection with protests regarding the government's handling of the pandemic – had not followed orders from the police. The prosecution service, referring to the above-mentioned law, called for a more severe punishment than under normal circumstances, but the high court rejected the plea, stating that this would be an infringement of the right to demonstrate.

In another case three men were charged with threatening the prime minister of Denmark during a demonstration, by putting up a doll in a tree with the face of the prime minister and a note saying, "she must and will be exterminated". The men pleaded that they were paraphrasing an earlier statement made by the prime minister during a press conference, and that they had no other intention than criticizing the government's handling of the pandemic,

[198] https://www.justitsministeriet.dk/pressemeddelelse/tibetkommissionen-ii-har-afgivet-sin-beretning/
[199] https://domstol.dk/hoejesteret/aktuelt/2021/9/ulovlig-forening-oploest/#loyal
[200] https://www.retsinformation.dk/eli/lta/2020/349

including the government´s unconstitutional order to cull all Danish minks. The were acquitted by the district court, but the case has been appealed to the high court by the prosecution service[201]. The three men were under custody for several weeks in connection with the case, initially indicted for attempting to overthrow the constitutional order. A woman protesting the arrest of the three men was herself arrested, and her telephone and PC confiscated and searched after she had posted a picture of the doll on social media with a petition to release the arrested men. The prosecution service ultimately decided not to charge the woman.

The Case of the Satirical Drawing of the Little Mermaid Sculpture

Another interesting case concerned a large Danish newspaper who had printed a satirical drawing of a famous Danish sculpture "The Little Mermaid". Up until this point, it had been considered legal under Danish law to make satirical drawings of copyright protected pieces of art. However, in 2022, the Eastern High Court found that this principle did not have the necessary foundation and ruled that such drawings were in violation of Danish copyright law. In 2023, the case was brought to the Danish Supreme Court. The reasoning behind this was that various lawyers and professors, amongst others, spoke up about this ruling, which they deemed to be in violation with what the law prescribes. Ultimately, the Supreme Court ruled in 2023 that the satirical drawing was not a violation of the intellectual property of the heirs of the artist.[202]

**Conclusion**

National security and cohesion concerns loom large in the expression restrictions enacted in Denmark in the period under review. How to respond to a potential erosion of Denmark's largely secular and liberal culture in the face of immigration partially explains some of the more monoculturalist legislative developments relating to religious practice. This theme was picked up on in UN Human Rights Committee reviews. These issues, of course, both predate the 2015-22 period (e.g., with the Muhammed cartoon furor) and continue to rumble on in 2023 (with the religious object desecration legislative proposals). Danish traditional tolerance of intolerance when it comes to free speech seems to be evolving – as evidenced by the inclusion of hate speech against gender identity, gender expression or gender characteristics in the criminal code. The enforcement examples cited show the courts can act as a forum for robust speech protection. However, public safety concerns, in the case of the "Loyal to Familia" gang, trumped expressive rights.

[201] https://anklagemyndigheden.dk/da/anklagemyndigheden-anker-dukkesagen
[202] https://domstol.dk/hoejesteret/aktuelt/2023/5/karikaturtegning-og-foto-af-den-lille-havfrue-kraenkede-ikke-ophavsretten/#havfrue


# England and Wales

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*We thank Ian Turner for his review of this piece.*

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**Country Summary**

The United Kingdom's freedom of expression framework is governed by the Human Rights Act 1998 (HRA), incorporating the European Convention on Human Rights (ECHR). The Brexit campaign led to hate speech concerns. The COVID-19 pandemic saw journalists blacklisted and prompted safety concerns for journalists due to online abuse. Between 2015 and 2022, three notable legislative developments included the Higher Education (Freedom of Speech) Act of 2023, aiming to protect free speech and academic freedom in universities and student unions, the Counterterrorism and Security Act of 2015, focusing on preventing extremism and radicalization while ensuring freedom of speech and academic freedom, and the Online Safety

Bill (since 2023 - the Online Safety Act) introducing responsibilities on online platforms and internet service providers to mitigate harmful content as well as an advisory committee on disinformation. Notable court cases include a Supreme Court decision on terrorism-related expression. Where 2023 legislative developments are mentioned, their passage towards becoming Acts of Parliament began in the 2015-22 period under review.

## Introduction

The Freedom of Expression – Common Law and Statutory Protection

The right to freedom of expression has been codified into law by the HRA,[203] which gives further effect to the articles of the European Convention on Human Rights (ECHR). Before ECHR rights were incorporated by the HRA, this right had been developed and protected by common law[204] (with no equivalent statutory protection prior to 1998). The United Kingdom finds itself consistently on the higher levels of free speech scoring charts, not reaching, however, the points gained by its Scandinavian counterparts. The United Kingdom came 6th out of 33 countries on Justitia's 2021 Free Speech Index on the public's support for free speech with a score of 74.[205] The country ranks 35 out of 161 countries in Article 19's 2022 Global Expression Report.[206] In its 2022 Freedom on the Net report, Freedom House ranks the United Kingdom 6th out of 60 countries with a score of 79 on internet freedom.[207] The 2022 World Press Freedom Index of Reporters without Borders places it at number 24 out of 180 countries.[208]

Exiting the European Union

On 1st February 2020 (00:00 Central European Time), the United Kingdom left the European Union. This followed a long Euroskeptic campaign and a referendum. The campaign and its result contributed to a heightening in a phenomenon discussed in this report, specifically hate speech. As noted by several stakeholders including enforcement agencies but also civil society organizations, hate speech was intertwined with the Brexit campaign.[209] Further, due to Brexit, Regulations such as the Digital Services Act which will bring a major overhaul to platform liability in the EU no longer affect the country directly. However, as discussed in the section on

[203] https://www.legislation.gov.uk/ukpga/1998/42/contents
[204] For example, Lord Reid in Brutus v Cozens, where the Court did not punish the use of offensive language during an anti-apartheid demonstration at Wimbledon to, amongst others, protect the freedom of expression and the freedom of assembly. Brutus v Cozens UKHL 6, [1973] A.C. 853
[205] https://futurefreespeech.com/interactive-map/
[206] https://www.article19.org/wp-content/uploads/2022/06/A19-GxR-Report-22.pdf
[207] https://freedomhouse.org/sites/default/files/2022-10/FOTN2022Digital.pdf
[208] https://rsf.org/en/index?year=2022
[209] http://www.enareu.org/Alarming-post-Brexit-racist-incidents-require-action>

legislation, the country is steering towards enhancing platform liability through the Online Safety Act.

The Covid-19 Pandemic

During the pandemic period, journalists faced blacklisting from the government, an issue which was criticized by the Council of Europe. For example, in May 2020, the Prime Minister's Office banned a journalist of OpenDemocracy from taking part in the daily press conferences after the outlet issued a report on COVID-19 testing failures.[210] In relation to the safety of journalists, the 2019 National Action Plan on the safety of journalists notes that one of the most pressing safety challenges confronting journalists is online abuse. This type of abuse encompasses a broad spectrum, ranging from offensive messages to death and rape threats. Women and BAME (Black, Asian and Ethnic Minorities) journalists are often the primary targets of such abuse.[211]

Academic Freedom

Academic Freedom is a theme that has been an important issue during the reporting period, with the most significant being the passing of a 2023 law on academic freedom which will be discussed below. Note that although Royal Assent was only given in 2023 (after our reporting period closes), the parliamentary discussions took two years. Given the significance of this piece of legislation to our current report we have therefore decided to include it in the narrative but not in the infographics. Recent events include a statement made in 2020 by Women and Equalities Minister that teaching "elements of political race theory as fact" or "promot[ing] partisan political views...without offering a balance treatment of opposing views"[212] is illegal. In the same time period, the Department of Education issued guidance which referred to anti-capitalism as "an extreme political stance."[213] In May 2023,[214] hundreds of people gathered to protest against a talk by academic Kathleen Stock at Oxford University (at the Oxford Union). In 2021, Professor Stock left her employment at the University of Sussex after being at the center of a dispute over her position on gender identity and trans rights.[215] The British Prime Minister even commented on the matter saying that her talk should continue

[210] https://www.opendemocracy.net/en/downing-street-has-banned-me-asking-questions-why/
[211]https://www.gov.uk/government/publications/national-action-plan-for-the-safety-of-journalists/national-action-plan-for-the-safety-of-journalists#objective
[212]https://www.theguardian.com/world/2020/oct/20/teaching-white-privilege-is-a-fact-breaks-the-law-minister-says
[213]https://www.theguardian.com/education/2020/sep/27/uk-schools-told-not-to-use-anti-capitalist-material-in-teaching
[214] https://www.bbc.com/news/education-65714821
[215]https://www.theguardian.com/education/2021/nov/03/kathleen-stock-says-she-quit-university-post-over-medieval-ostracism

and that "agree or disagree with her, Professor Stock is an important figure in this argument. Students should be allowed to hear and debate her views."[216]

## I. Legislation

Before looking at national legislation, it is important to note that the UK has not ratified the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) which allows individuals to take their cases to the monitoring body of the Covenant, namely the Human Rights Committee. As such, individuals cannot make complaints on the grounds of Article 20(2) on the prohibition of advocacy for hatred. On a European level (EU and Council of Europe), the country did not sign or ratify the Additional Protocol to the Convention on Cybercrime concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed through Computer Systems. When member of the EU, the UK did not pass or amend legislation for purposes of adopting the Framework Decision on Racism and Xenophobia on the grounds that it already had provisions which meet the document's objectives. In fact, in comparison to other countries, this country has been effective in achieving the purpose of this Framework Decision. For example, it has a high criminal penalty for stirring up hate (its form of hate speech) when compared to EU countries,[217] and had provided the EU with case-law and detailed statistics which demonstrate that racist and xenophobic motivation is taken into consideration.

The Higher Education (Freedom of Speech) Act[218]

After two years of debate, the Higher Education (Freedom of Speech) Act was adopted in May 2023. The Bill created much debate and controversy in both Houses of Parliament but also within the wider academic community. The Act seeks to protect freedom of speech, making provisions related to freedom of speech and academic freedom in universities and students' unions. Whilst the existing Education (No.2) Act of 1986 requires that Higher Education Institutions "take such steps as are reasonable to uphold free speech' for employees, students and visiting speakers" the 2023 Act also includes other frameworks. For example, student unions are now part of the equation and not only universities. Under the 2023 Act, Student Unions are required to take "reasonably practicable" steps to secure freedom of speech within the law for its members/students/staff/staff of constituent institutions and visiting speakers. Universities and student unions which fail to comply with the law may receive sanctions,

[216] https://www.bbc.com/news/education-65714821
[217] The maximum penalty in relation to hate speech ranges from 1 year (BE) to 7 years (UK, in the case of a conviction on indictment): Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, COM/2014/027 final, para. 3.1.3
[218] https://www.legislation.gov.uk/ukpga/2023/16/enacted

including financial ones.[219] In June, Professor Arif Ahmed was appointed as the first director for freedom of speech and academic freedom at the Office for Students, claiming he will ensure that free speech within the law will be upheld "for all views and approaches – post-colonial theory as much as gender-critical feminism."[220] Whilst the Department for Education says that the Act will help protect the reputation of universities as centers of academic freedom, there is concern that the Law "would potentially allow the government to define acceptable speech at universities."[221] As there is not yet any evidence of this Act's application, it is unclear whether the potentially restrictive aspect of it will materialize.

Counter-Terrorism and Security Act of 2015[222]

The Counter-Terrorism and Security Act of 2015 imposes, amongst others, a duty on a range of organizations to prevent people from being drawn into terrorism by monitoring and reporting signs of extremism and radicalization. The Act builds on the Prevent strategy published by the government in 2011[223] as part of its overall counter-terrorism strategy CONTEST. The aim of Prevent is to reduce the threat to the UK from terrorism by "stopping people becoming terrorists or supporting terrorism."[224] Specifically, it requires "specified authorities" such as local government, school, child carers trusts/boards of the National Health System and universities to "prevent people from being drawn into terrorism." In relation to universities, the Act provides that when carrying out its duties imposed under the law "it must have particular regard to the duty to ensure freedom of speech" and have "particular regard to the importance of academic freedom." The Prevent strategy which forms the basis of the above provisions has been staunchly criticized by civil society. For example, the NGO Liberty notes that due to this strategy "the government is forcing teachers, doctors, social workers and others to monitor and report people they consider vulnerable to extremism, embedding discrimination in public services. Thousands have been swept up by it, including entirely innocent children. It must end."[225] The government launched an independent review of Prevent, mentioned in the section on non-legislative developments further down.

Online Safety Bill (Online Safety Act as of 2023)[226]

[219] For critique, see https://blogs.lse.ac.uk/impactofsocialsciences/2021/09/21/in-legislating-for-freedom-of-speech-on-university-campuses-whose-opinions-will-the-government-protect/
[220] https://www.thetimes.co.uk/article/arif-ahmed-seeking-the-truth-is-something-worth-fighting-for-9tw639blc
[221] https://freedomhouse.org/country/united-kingdom/freedom-world/2022
[222] https://www.legislation.gov.uk/ukpga/2015/6/contents/enacted
[223]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/97976/prevent-strategy-review.pdf
[224] https://www.legislation.gov.uk/ukdsi/2015/9780111133309/pdfs/ukdsiod_9780111133309_en.pdf
[225] https://www.libertyhumanrights.org.uk/fundamental/prevent/
[226] https://bills.parliament.uk/bills/3137

The Online Safety Bill (Act, as of October 2023) provides for a new regulatory framework which has the purpose of "making the use of internet services regulated by this Act safer for individuals in the United Kingdom." To achieve this purpose, the proposed Act imposes duties on the providers such as social media platforms to "identify, mitigate and manage the risk of harm from illegal content and activities and content and activity that is harmful to children." Amongst other duties, providers must "swiftly take down" any illegal content or prevent it from appearing and provide public risk assessments. The Communications Regulator (Ofcom will have the power to fine companies which do not follow the new rules with up to 18 million or 10% of their global turnover (whichever is greater). Criminal proceedings can be instigated against senior staff who do not follow information requests from Ofcom.

In terms of hateful content which is one strand of the illegal content referred to in the Online Safety Act, legislation has existed but not legislation particular to the online world. Specifically, the 2006 Racial and Religious Hatred Act makes it illegal to incite religious or racial hatred or violence. Engaging in threatening behavior, using intimidating language, or disseminating alarming material with the intention of inciting religious hatred is deemed an offense under this law. The Online Safety Act is a significant development from this in terms of imposing an obligation on private companies (IT companies) to remove not only content which is illegal (such as that which may fall under the Racial and Religious Hatred Act) but also that which is harmful. Initially the concept of harmful content extended to adults as well but now, after public pressure, this has been reserved only in terms of content viewed by children.

In terms of disinformation, the Bill provides for the appointment (by Ofcom) of an advisory committee on disinformation and misinformation. The duty of the Committee is to provide advice to Ofcom about how providers of regulated services should deal with disinformation and misinformation on such services, about Ofcom's powers to request information about a matter relating to disinformation or misinformation and about Ofcom's functions in relation to countering disinformation and misinformation. The committee is to publish a report 18 months after its composition.

## II. Non-Legislative Developments

Prevent – Developments

As noted in the section on legislation and particularly in the description of the Counter-Terrorism and Security Act of 2015, the aim of Prevent is to reduce the threat to the UK from terrorism by "stopping people becoming terrorists or supporting terrorism."[227] In 2019, the government agreed to carry out an independent review of the Prevent Strategy. William Shawcross was appointed as the independent reviewer in 2021. Shawcross's appointment was

[227] https://www.legislation.gov.uk/ukdsi/2015/9780111133309/pdfs/ukdsiod_9780111133309_en.pdf

controversial as he had been accused of fostering "institutional bias against Muslims"[228] in his previous role as the head of the UK's Charity Commission. His recommendations (issued in 2023) do not provide for any substantial changes to the current concerns posed by civil society. Instead, recommendation 33 states that there must be "specific measures to counter the anti-Prevent campaign at universities."[229] Interestingly, recommendation 6 does refer to freedom of expression but in the framework of blasphemy. Specifically, the report notes that the government must "improve understanding of blasphemy as part of the wider Islamist threat. The Homeland Security Group should conduct research into understanding and countering Islamist violence, incitement and intimidation linked to blasphemy. It should feed a strong pro-free speech narrative into counter-narrative and community project work."

National Action Plan (Safety of Journalists) [230]

A National Action Plan including measures intended to enhance the safety of journalists was published in March 2021. The National Action Plan aims to ensure that "journalists operating in the UK are as safe as possible, reducing the number of attacks on and threats issued to journalists and ensuring those that are responsible for such are brought to justice."[231] One of the ways which the Plan seeks to achieve this is by helping online platforms tackle the wider issue of abuse online.

## III. Enforcement

A notable UK Supreme Court freedom of expression decision in the period under review is *Pwr v Director of Public Prosecutions* [2022].[232]The case concerned Section 13(1) of the Terrorism Act 2000, which creates an offense for a person in a public place to carry or display an article in a way which creates reasonable suspicion that he is a member or supporter of a proscribed organization. The appellants carried a flag of the Kurdistan Workers Party, a proscribed organization under the 2000 Act. The Supreme Court ruled that the protestors' conviction under the Act was compatible with the freedom of expression as the interference was proportionate due to national security concerns. The Supreme Court rejected the appellants' submission that the European Court of Human Rights (ECtHR) considers that expressive acts can only be criminalized where the expression includes an incitement to violence.

[228] https://www.theguardian.com/uk-news/2021/jan/26/william-shawcrosss-selection-for-prevent-role-strongly-criticised
[229]https://www.gov.uk/government/publications/independent-review-of-prevents-report-and-government-response/independent-review-of-prevent-accessible#recommendations
[230]https://www.gov.uk/government/publications/national-action-plan-for-the-safety-of-journalists/national-action-plan-for-the-safety-of-journalists
[231]https://www.gov.uk/government/publications/national-action-plan-for-the-safety-of-journalists/national-action-plan-for-the-safety-of-journalists#:~:text=that%20face%20us.-,Objective,such%20are%20brought%20to%20justice.
[232] https://www.bailii.org/uk/cases/UKSC/2022/2.html

SLAPP (Strategic Lawsuits against Public Participation) issues also received judicial treatment in the jurisdiction. For example, the High Court dismissed a libel claim[233] brought by a post-Soviet mining giant against a journalist's book about dirty money and corruption. English libel laws and associated legal costs have increasingly been seen as favorable to rich people and corporations seeking to silence public interest journalism[234]. This decision was therefore closely observed in legal circles.

The seemingly contradictory and unintended consequences of ballooning European hate speech laws can be seen in the case of the Bristolian Christian preachers. Two street preachers who read from the King James Bible, told Muslims their God "did not exist", and called LGBT people filthy, depraved and perverted[235] were fined £300 each. They were convicted of a religiously-aggravated public order offense. On appeal, the Bristol Crown Court judge said it was not proved the offense was religiously aggravated[236] and overruled the conviction, saying he was "conscious of the right of freedom of speech and freedom of expression"[237]. The preachers' civil suit against the police, including an argument on ECHR Article 10 grounds, however, did not succeed[238].

**Conclusion**

2015-22 was a politically polarized period for England and Wales, bookended by the upheaval of the Brexit referendum result and a turbulent 2022. The UK had five prime ministers in six years during this period. Political polarization, culture wars and populist administrations are arguably reflected in legislation such as the Higher Education (Freedom of Speech) Act. The ongoing terrorist threat, with deadly consequences, as in the 2017 Islamist Manchester Arena bombing and Far Right murder of Member of Parliament Jo Cox, is echoed in the legislative and non-legislative developments cited above. Broader regional and global trends towards increasing duties on online platforms can be seen in the passage of the controversial Online Safety Act. The strength and contribution of civil society in the jurisdiction, in part, accounts for the country's (UK) relatively strong standing in free speech indexes. It remains to be seen whether civil liberties organizations' objections to recent

[233] https://www.judiciary.uk/wp-content/uploads/2022/03/ENRC-v-Burgis-Another-judgment-020322.pdf
[234] https://fpc.org.uk/wp-content/uploads/2022/04/London-Calling-Publication-February-2023.pdf; https://www.theguardian.com/media/2023/nov/03/designed-to-distress-and-deter-the-impact-of-slapp-lawsuits-on-journalists-and-free-speech
[235] https://www.bristolpost.co.uk/news/bristol-news/christian-street-preachers-who-read-4603
[236] https://www.bbc.co.uk/news/uk-england-bristol-40448925
[237] https://www.bbc.co.uk/news/uk-england-bristol-40448925
[238] *Overd & Ors v The Chief Constable of Avon and Somerset Constabulary* [2021] EWHC 3100 (QB) https://www.bailii.org/ew/cases/EWHC/QB/2021/3100.html

government curbs[239] on protestors' rights (drafted with groups like Just Stop Oil[240]in mind) will carry much political or legal[241] weight. Alike some other Commonwealth countries, the jurisdiction's plaintiff friendly defamation laws have increasingly been seen as a cause for concern, especially in the context of heightened scrutiny of oligarchic wealth in "Londongrad," following Russia's full-scale invasion of Ukraine. [242] Encouragingly, in 2023 UK judges have been given new powers[243] to dismiss lawsuits attempting to silence those speaking out about economic crime.

**Note:** The UK has three legal systems. These are English Law, which is the generic term used for the law governing England and Wales, Northern Irish Law, which applies in Northern Ireland, and Scots Law, applied in Scotland. The first two emanate from principles of common law and the latter is a mélange of civil and common law. In relation to the judiciary, the Supreme Court of the UK is the ultimate Court for England, Wales and Northern Ireland on all civil and criminal matters and for Scotland on civil matters only.[244] Furthermore, in relation to criminal law, it is the Crown Prosecution Service[245] (CPS), which is responsible for the prosecution of criminal cases investigated by the police in England and Wales. Thus, the competent authority which decides on issues such as whether particular conduct is racially hateful, has jurisdiction over England and Wales only. For this purpose and given that *quantification and trend assessment on a cross-country level is central for the overall report,* only England and Wales, as one entity and one jurisdiction, will be assessed.

[239] https://verfassungsblog.de/civil-disobedience-in-the-uk/; https://www.youtube.com/watch?v=VqDr1jXPXVo
[240] https://www.independent.co.uk/topic/just-stop-oil
[241] https://www.bbc.co.uk/news/uk-66786938
[242] https://www.investigate-europe.eu/posts/londongrad-a-citys-addiction-to-russian-oligarchs-and-easy-money
[243] https://bills.parliament.uk/bills/3339

[244] Brice Dickson, *'Human Rights and the United Kingdom Supreme Court'* (Oxford Scholarship Online 2013) Introduction
[245] http://www.cps.gov.uk/index.html


# European Union

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Joan Barata works on freedom of expression, media regulation, and intermediary liability issues. He is a Senior Fellow at Justitia's Future Free Speech project. He is also a Fellow of the Program on Platform Regulation at the Stanford Cyber Policy Center. He has published a large number of articles and books on these subjects, both in academic and popular press. His work has taken him to most regions of the world, and he is regularly involved in projects with international organizations such as UNESCO, the Council of Europe, the Organization of American States or the Organization for Security and Cooperation in Europe, where he was the principal advisor to the Representative on Media Freedom. Joan Barata also has experience as a regulator, as he held the position of Secretary General of the Audiovisual Council of Catalonia in Spain and was member of the Permanent Secretariat of the Mediterranean Network of Regulatory Authorities.

**Country Summary**

Several pieces of legislation have been enacted in the European Union (EU) in recent years, aimed at regulating Big Tech companies especially in the areas of copyright, video-sharing platforms, and terrorist content online, contain speech restrictive provisions. The Audio-visual Media Services Directive puts obligations on video sharing platforms to take down illegal hate speech, as well as content that violates their own Terms of Service, thus delegating legal adjudication powers to platforms and creating a regime of liability that might lead to over moderation. One regulation issued during Covid on addressing the dissemination of terrorist content online requires hosting service providers to implement measures which could lead to a general obligation to monitor, to engage in active fact-finding, or to use automated tools, depriving Internet users and hosting service providers of the legal and procedural safeguards applicable to content removal. In the context of the war in Ukraine, a 2022 regulation prohibits

broadcasting, transmitting, or distributing, by any means, of any content by the State-owned and controlled Russian media outlets. The Digital Services Act of 2022 contains problematic provisions including a broad definition of "illegal content," notice-and-action mechanisms without sufficient safeguards for free speech rights of third parties, general obligations for platforms to act upon suspicion of criminal activities, obligation to detect broadly formulated "systemic risks" as well as to adopt mitigation measures which do not only cover illegal but also harmful content, and a so-called "crisis mechanism" that will put significant powers in the hands of the European Commission to control online speech. In a judicial development in 2019, the Court of Justice of the European Union endorsed the creation of a possible general monitoring obligation and the use of automated filters in certain cases, as well as the possible extraterritorial application of European limits to freedom of expression.

**Introduction**

The EU has a long tradition in its commitment to respect freedom of expression. Not only does the EU Charter of Fundamental Rights protect freedom of expression, but all EU members have also acceded to the European Convention on Human Rights (ECHR) and are bound by the European Court of Human Rights' (ECtHR) jurisprudence, including, of course, decisions on freedom of expression. The most important development is the Digital Services Act (DSA), aiming at establishing a series of horizontal obligations applicable to different types of Internet intermediaries. And there are new proposals at a very advanced stage, such as the European Media Freedom Act (EMFA) or a proposal to regulate political advertising.

## I. Legislation

In 2018, the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC[246] (General Data Protection Regulation) came into force. Article 17 enshrines the "right to erasure" which gives the data subject the right to obtain from the data controller the erasure of personal data concerning him or her without undue delay when the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed, among other cases. The controller, in such cases shall take reasonable steps, including technical measures, to inform other controllers that are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data. Exceptions would apply when processing is necessary for exercising the right of freedom of expression and information, for compliance with a legal obligation, for reasons of public interest in the area of public health, for archiving purposes in the public interest,

[246] https://eur-lex.europa.eu/eli/reg/2016/679/oj

scientific or historical research purposes or statistical purposes, and for the establishment, exercise or defense of legal claims.

The "right to erasure" derives from the original formulation of the Court of Justice of the European Union (CJEU) of the so-called "right to be forgotten," in particular in a judgement of May 13th 2014.[247] Right after the publication of the ruling the OSCE Representative on Freedom of the Media, issued a Communique[248] saying that this decision "might negatively affect access to information and create content and liability regimes that differ among different areas of the world, thus fragmenting the Internet and damaging its universality." It also noted that "information and personal data related to public figures and matters of public interest should always be accessible by the media and no restrictions or liability should be imposed on websites or intermediaries such as search engines. If excessive burdens and restrictions are imposed on intermediaries and content providers, the risk of soft or self-censorship immediately appears." These concerns were seconded by other national and international bodies.

The Audiovisual Media Services Directive[249] aims at creating a more level playing field between traditional television and newer on-demand and video-sharing services. The Directive encompasses a series of duties of so-called video sharing platforms (VSPs) concerning the prevention and moderation of content that constitutes hate speech and child pornography, affects children's physical and mental development, violates obligations in the area of commercial communications, or can be considered as terrorist. National authorities (mainly independent media regulatory bodies) are given the responsibility of verifying that VSPs have adopted "appropriate measures" to properly deal with undesirable content. This includes the guarantee that platforms properly revise and enforce their Terms of Service (ToS); have appropriate flagging, reporting, and declaring functionalities; implement age verification or rating and control systems; establish and operate transparent, easy-to-use, and effective procedures to resolve users' complaints; and provide media literacy tools. Platforms will not only have the duty of taking down illegal hate speech, but they will also hold the power to eliminate legitimate (in the sense of fully legal) content that violates their own ToS. Once again, this instrument delegates important legal adjudication powers to platforms as well as creates a regime of responsibility that might lead to over removal.

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC[250] lays down additional provisions harmonizing EU copyright law, particularly with regards to digital and cross-border uses of protected subject matter. The Directive establishes

[247] *Google Spain SL and Google Inc. vs. Agencia Espanola de Proteccion de Datos and Mario Costeja Gonzalez* C131/12.
[248] https://www.osce.org/fom/118632
[249] https://eur-lex.europa.eu/eli/dir/2018/1808/oj
[250] https://eur-lex.europa.eu/eli/dir/2019/790/oj

that internet service providers will not be able to rely on the hosting safe harbor provided by the Digital Services Act and incur liability for direct copyright infringement, unless it fulfills a number of conditions including making, in accordance with high industry standards of professional diligence, the "best efforts to ensure the unavailability of specific works and other subject matter for which the right holders have provided the service providers with the relevant and necessary information." This has been criticized in terms of impact on freedom of expression in the sense that it forces platforms to use automated filters which might not be able to properly detect protected content. However, this claim was dismissed by the CJEU in the decision of 26 April 2022.[251]

Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online[252] aims to ensure the smooth functioning of the digital single market by addressing the misuse of hosting services for terrorist purposes. The Regulation establishes a definition of "terrorist content" and includes an exception regarding material disseminated for educational, journalistic, artistic or research purposes or for awareness-raising purposes against terrorist activity. The Regulation obliges hosting service providers to ensure that the terrorist content identified in a removal order is removed or access to it is disabled in all Member States within one hour of receipt of the removal order. The removal order should contain a statement of reasons explaining the material to be removed, or access to which is to be disabled as terrorist content and provide sufficient information for the location of that content. Hosting service providers that are "exposed to terrorist content" should, where they have terms and conditions, include therein provisions to address the misuse of their services for the public dissemination of terrorist content, put in place specific measures taking into account the risks and level of exposure to terrorist content as well as the effects on the rights of third parties and the public interest to information, determine what appropriate, effective and proportionate specific measure should be put in place to identify and remove terrorist content. Where the competent authority considers that the specific measures are insufficient to address the risks, it should be able to require the adoption of additional appropriate, effective, and proportionate specific measures. The requirement to implement such additional specific measures should not lead to a general obligation to monitor, to engage in active fact-finding, or to use automated tools. However, the specific nature of the obligations and responsibilities included in the Regulation may de facto determine the (proactive) use of this latter type. With this legislation, Europe seems to move towards a progressive delegation of true law enforcement powers to private companies, depriving Internet users (and hosting service providers themselves) of the legal and procedural safeguards applicable to this kind of decision until now. Moreover, intermediary platforms may increasingly be put in a position where they feel compelled to take overbroad decisions, as the only way to avoid the high penalties and somewhat vaguely defined responsibilities.

[251] Judgment in Case C-401/19, *Poland v Parliament and Council*.
[252] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32021R0784

The Council Regulation (EU) 2022/350 of 1 March 2022[253] concerning "restrictive measures in view of Russia's actions destabilizing the situation in Ukraine" prohibits broadcasting or facilitating any content by the State-owned and controlled Russian media outlets, "including through transmission or distribution by any means such as cable, satellite, IP-TV, internet service providers, internet video-sharing platforms or applications." This is a very problematic ad-hoc legislation for a variety of reasons ranging from the competence of national independent audiovisual regulators in this field, the use of a very broad and general assessment of the information provided by the mentioned outlets rather than specific and properly analyzed pieces of content as well as the lack of proper consultation and participation in the adoption of the regulation.

The DSA[254] or Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC represents and overhaul of EU law governing intermediaries' handling of user content. It builds on the pre-existing eCommerce Directive from 2000 and preserves key ideas and legal structures from that law. The DSA applies to numerous Internet intermediary services. It provides both immunities and obligations. Many of its specific rules apply only to services in specific categories (access, caching, hosting, and marketplace providers, for example). The DSA asserts significant jurisdiction over companies based outside the EU. It reaches services "directed" to EU Member States. It allows enforcers to assess extremely steep fines, in principle reaching up to 6% of annual revenue. It also sets up major new regulatory powers within the European Commission. The DSA contains problematic provisions regarding freedom of expression, including a broad definition of "illegal content" (Article 3.h), notice-and-action mechanisms without sufficient safeguards for free speech rights of third parties (Article 16), general obligations for platforms to act upon suspicion of criminal activities (Article 18), obligation to detect broadly formulated "systemic risks" as well as to adopt mitigation measures (which do not only cover illegal but also harmful content) (Articles 34 and 35), and a so-called "crisis mechanism" that would put in the hand of the European Commission significant powers to control online speech (Article 36).

At the time of preparation of the current analysis, two relevant legislative proposals are under discussion. Firstly, the European Media Freedom Act (EMFA) or Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market.[255] This aims at tackling at the EU level fundamental issues connected to the exercise of the right to freedom of expression by media actors and media organizations. The EMFA proposal includes safeguards against political interference in editorial decisions and against surveillance. It also tackles the issues of the independence and stable funding of public service media, as well as the transparency of media ownership and of the

[253] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2022.065.01.0001.01.ENG
[254] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R2065
[255] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0457

allocation of state advertising. A key tool introduced by the EMFA is the increased regulatory cooperation and convergence through cross-border coordination tools and EU-level opinions and guidelines. The EMFA has problematic aspects including a very narrow definition of media service providers as well as obligations for very large online platforms to provide a special treatment to media service providers when it comes to content moderation. The latter raises issues of discrimination due to privileged treatment of content based only on the user that posted it and regardless of the public interest of the publication.

Secondly, the Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising[256] aims at framing existing member states' legislation by establishing harmonized rules on the provision of political advertising services, and on transparency and due diligence for sponsors and providers of political advertising services, as well as on the use of targeting and ad delivery techniques in connection with political advertising. The very broad proposal's definition of political advertising is problematic, since it clearly risks restricting a particularly protected area of freedom of expression which is the dissemination of political discourses or "political speech." The proposal grants online platforms the power and responsibility to determine whether a certain publication fits the complex and ambiguous definition of political advertising established in the Regulation. Errors or disagreements with relevant authorities in this area may trigger the imposition of significant financial sanctions. Online platforms are also granted the authority, and even the obligation, to eliminate content where they conclude that a certain promoted message constitutes political advertising, and the sponsor or provider of the advertising service has refused to cooperate, by not providing relevant information. Online platforms also face the responsibility to properly and diligently (in some cases, within 48 hours) assess third-party reports, which in some cases might be filed by malicious actors.

### II. Non-legislative developments

The EU Code of Conduct on Countering Illegal Hate Speech Online[257] was originally agreed on May 2016 between the European Commission and Facebook, Microsoft, Twitter and YouTube. Other IT companies joined afterwards. The Code follows the definition of illegal hate speech established by the Framework Decision 2008/913/JHA of 28 November 2008. The Code aims at providing IT Companies with criteria and instruments to support the European Commission and EU Member States in the effort to respond to the challenge of ensuring that online platforms do not offer opportunities for illegal online hate speech to spread virally. The implementation of the Code of Conduct is evaluated through a regular monitoring exercise set up in collaboration with a network of organizations located in the different EU countries.

[256] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0731
[257]https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en

The 2022 Code of Practice on Disinformation[258] is the result of efforts from major online platforms, emerging and specialized platforms, players in the advertising industry, fact-checkers, research and civil society organizations to deliver a strengthened and improved version of the 2018 Code. Signatories committed to take action in several domains, such as demonetizing the dissemination of disinformation; ensuring the transparency of political advertising; empowering users; enhancing the cooperation with fact-checkers; and providing researchers with better access to data. It is important to note that the new Code will become part of a broader regulatory framework, in combination with the legislation on Transparency and Targeting of Political Advertising and the DSA. For signatories that are Very Large Online Platforms, the Code aims to become a mitigation measure and a Code of Conduct recognized under the co-regulatory framework of the DSA.

The existence of such codes, or co-regulatory instruments, has been questioned from a freedom of expression perspective, since they blur the limits between illegal and harmful speech and thus, they may also create added difficulties for users to dispute platforms' interpretations and defend their rights. In addition to this, monitoring mechanisms seem to be based on a quantitative approach versus a more granular and substantive assessment, which makes it particularly challenging to detect and address possible over removals.

## III. Enforcement

Enforcement of provisions included in EU law is usually the responsibility of national authorities which, in many cases, may also have the responsibility to adopt legislation necessary to transpose EU rules into domestic regulation. This being said, the CJEU has adopted some relevant decisions regarding the interpretation and enforcement of some of the pieces of legislation mentioned above.

In *Republic of Poland v. Parliament and Council,* the Court validated Article 17 of the Copyright Directive considering that the obligation for platforms to use automated filters to monitor user's speech does not violate freedom of expression since it is accompanied by adequate safeguards. In *Google LLC v. National Commission on Informatics and Liberty (CNIL)*, the CJEU presumes a non-existing uniformity when it comes to the balance between freedom of information and privacy protection across different member States when it comes to the enforcement of the so-called right to be forgotten and uses very ambiguous criteria to refer to the possibility of applying de-referencing requests beyond the limits of the EU. In *Glawischnig-Piesczek v. Facebook Ireland Limited*, the CJEU established that EU law does not preclude a Member State from ordering a host provider to remove information which it stores, the content of which is identical, equivalent to the content of information, which was previously declared to be unlawful, or to block access to that information. It also endorses the creation of a possible general monitoring obligation and the use of automated filters in certain

[258] https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation

cases, as well as the possible extraterritorial application of European limits to freedom of expression.

**Conclusion**

All the mentioned rules and proposals contain several interesting and innovative provisions, particularly when it comes to providing more certainty and protection to European users of online platforms (and particularly Big Tech) in several areas, including expressing ideas and opinions. The safeguards in question include transparency of terms and conditions, disclosure of algorithms and recommender systems, data protection or accountability and redress mechanisms. However, platform regulation in the EU is particularly focused on tackling risks deriving from the use of social media as a tool to disseminate information by different types of actors, including malicious ones. Such risks tend to be defined in broad terms and encompass content that is not necessarily illegal but labelled as harmful *vis-a-vis* certain political and societal values. Therefore, on the one hand, EU legislation has brought a combination of delegation of private content regulatory measures to be decided by platforms themselves and, on the other oversight by agencies and regulatory bodies, the latter still waiting to be properly identified and mandated in some cases.


# France

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Pierre François Docquir (PhD) is an independent researcher and expert whose work has focused on the protection of freedom of expression and media freedom in the changing context of contemporary media landscapes.

**Country Summary:** Against the backdrop of a series of terrorist attacks and intense social unrest, several restrictive laws were introduced in France between 2015 and 2022. The Penal Code, which already sanctioned hindering the exercise of freedom of expression, was amended to specifically target acts that seek to hinder artistic freedom or the diffusion of artistic creation, raising concerns over disproportionate restrictions on the right to association. Another law on disinformation created a summary procedure through which a judge can decide on the de-publication of massively distributed fake news that disrupt the electoral processes. It also allows the media regulator to impose sanctions on foreign-controlled media that broadcast disinformation. The state of emergency declared after the terrorist attacks of 2015 and during the Covid-19 pandemic resulted in measures such as the preventive arrest of potentially troublesome individual, the discriminatory application of derogatory measures and enabled the Minister of Interior to order the suspension of online communication that incited to, or advocated for, acts of terrorism. In 2021, France put enforced a series of legal provisions that, while maintaining the principle of limited liability, placed large online platforms under the monitoring of an independent administrative authority regarding moderating content, in addition to its power to impose sanctions, raising concerns of over-moderation.

## Introduction

In January 2015, at the beginning of the period reviewed in this report, the satirical magazine Charlie Hebdo was targeted by two Islamist gunmen who killed 12 persons. After smaller aggressions in the course of the same year, Islamist terrorists killed 130 persons in a series of attacks in Paris. In 2020, high-school teacher Samuel Paty was assassinated and beheaded after he had shown two caricatures of the prophet Muhammad— those that had been published by Charlie Hebdo — while teaching a class on freedom of expression. These events explain that the need to defend the values of democracy and civil liberties against intolerance and radicalism, as well as the promotion of public security, have been driving forces in legislative activity.

Intense social protests have been another salient feature of public life.[259] The Yellow Vests movement, which spontaneously emerged and organized outside of institutionalized channels, started in May 2018 as a reaction to economic inequalities and the high cost of living. After the end of the lockdown that was imposed during the Covid-19 pandemic, public protests have been motivated by various causes, including threats on the environment and most recently the legal reform of the law on retirement pensions. The country has constantly ranked highly in human rights indexes. France has scored constantly high at 90/100 in Freedom House reports on Freedom in the world from 2017 to 2022.[260] France was ranked 26th out of 180 countries by Reporters Without Borders in 2022,[261] raising from the 38th position in 2015). In Justitia's Free Speech Index, France placed 14th out of 33 countries, with a score of 66 (medium approval).[262]

Nevertheless, serious concerns have been expressed by international organizations,[263] global NGOs[264]and by the independent national authority Défenseur des Droits[265] in relation to the increasingly violent repression of public protests by police forces. Concerns have also been expressed in relation to the concentration of ownership [266]in the media sector and lawsuits by powerful private actors[267] that aim at silencing investigative journalism (a phenomenon known as strategic litigation against public participation or SLAPP). There were instances of threats,

[259] In France, the right to protest is anchored in the protection of freedom of expression at Article 11 of the Declaration of Rights of 26 Aug. 1789 (see decision 2019-780 of the Constitutional Council).
[260] Freedom House's reports on Freedom in the World are available from 2017 to today. https://freedomhouse.org/country/france
[261] https://rsf.org/en/index?year=2022
[262] https://futurefreespeech.com/interactive%20map/
[263]https://www.france24.com/en/france/20230501-france-under-fire-at-un-for-police-violence-racial-and-religious-discrimination; https://www.coe.int/en/web/commissioner/-/manifestations-en-france-les-libertés-d-expression-et-de-réunion-doivent-être-protégées-contre-toute-forme-de-violence
[264] https://www.amnesty.org/en/documents/eur21/1791/2020/en/
[265]https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/ddd_des-risques-d-atteintes-aux-droits-et-libertes_20230414.pdf
[266] https://cadmus.eui.eu/handle/1814/74689
[267] https://rsf.org/en/country/france

violence and harassment against investigative journalism, such as the case of a female local journalist whose work focuses on the consequences of intensive farming.[268]

French laws set limits to freedom of expression to protect competing interests such as reputation and private life; they include prohibition for specific categories of content such as insult, incitement to hatred, discrimination and violence, apology of crimes against humanity, apology of terrorism, child pornography or copyright infringement. Within this framework, racist speech and incitement to hatred have remained a contentious issue — in a 2022 decision,[269] the European Court of Human Rights (ECtHR) reiterated that the French authorities could legitimately repress Holocaust denial, in parallel with a generally problematic treatment of migrants.[270]

The regulation of online content has culminated in the adoption of a 2021 law that parallels the development of the EU's Digital Services Act. Other recent laws that raised concern in terms of restrictions on the free flow of information and ideas include laws on the state of emergency, the impact of measures justified by national security and a law on disinformation.

## I. Legislation

Defending the values of the Republic

As a response to terrorist attacks, provisions that seek to protect the exercise of freedom of expression have been adopted. In 2016, Article 431-1 of the Penal Code, which already sanctioned hindering the exercise of freedom of expression, was reinforced to specifically target acts that seek to hinder artistic freedom or the diffusion of artistic creation.[271] With the aim of preventing campaigns that call for violence against particular individuals or manhunts that result in actual harm, a new criminal provision was incorporated in 2021 to punish the act of creating a danger for a person by revealing information about their private life.[272] The sanction is higher when the targeted person is a journalist.[273] However, it is feared that the 2021 law to reinforce respect for the principles of the Republic[274] will lead to discriminatory

[268] European University Institute, Monitoring media pluralism in the digital era: application of the Media Pluralism Monitor in the European Union in the year 2021. Country report: France ; https://cadmus.eui.eu/handle/1814/74689
[269] https://hudoc.echr.coe.int/fre#{
[270] https://www.hrw.org/europe/central-asia/france; https://www.amnesty.org/en/location/europe-and-central-asia/france/report-france/
[271] Law nr 2016-925 of 7 July 2016 on freedom of creation, architecture and heritage; Lepage, A. (2017). Un nouveau délit d'entrave dans le Code pénal : l'entrave à la liberté de la création artistique. *LEGICOM*, 58, 55-64. https://doi.org/10.3917/legi.058.0055
[272] Article 223-1-1 of the Penal Code, Law nr 2021-1109 of 24 Aug. 2021 "reinforcing the respect of the principles of the Republic".
[273] Sanctions are higher when the targeted person is a minor, a person in situation of vulnerability, a representative of public authorities (such as a policeman) or a journalist. See Ader, B. (2022). Le nouveau délit de mise en danger : l'article 223-1-1 du code pénal. *Légipresse*, 67, 27-29. https://doi.org/10.3917/legip.hs67.0027
[274] https://www.legifrance.gouv.fr/loda/id/JORFTEXT000043964778?

application against Muslims[275] and create disproportionate restrictions on the right to association.[276]

The State of Emergency and National Security

The French government has repeatedly resorted to declaring a state of emergency after the terrorist attacks of 2015 and during the Covid-19 pandemic. While measures such as the preventive arrest of potentially troublesome individuals and the discriminatory application of derogatory measures have been denounced by international organizations[277] and NGOs,[278] the impact of the state of emergency on freedom of expression remained ambivalent. In 2015,[279] the possibility for the government to control the press during a period of emergency was removed from the 1955 law that sets the general framework[280] for the determination of measures applicable during a state of emergency.[281] In a 2017 reform of the 1955 law,[282] journalists were given equal protection to lawyers in terms of the protection of their professional premises against search warrants. However, the 2015 reform also enabled the Minister of Interior to order the suspension of online communication that incited to or advocated for acts of terrorism.

The notion of apology of terrorism appears to be sufficiently vague as to be prone to abuse. In November 2020, four 10-year-old children were interviewed by police for hours[283] on suspicion of advocacy of terrorism because it was alleged that they had questioned the decision of the murdered teacher Samuel Paty to show the cartoons caricaturing the prophet. Nevertheless, the European Court of Human Rights (ECtHR) has confirmed decisions by French courts relating to dressing a 3-year-old for school[284] in a t-shirt that wore the words "I Am a Bomb" and "Jihad, Born on 11th September," and to a public declaration by a former member of a terrorist organization in admiration of the 2015 attackers.[285] The European Court of Human Rights has confirmed that the notion of apology of terrorism is a clear legal basis that can support a restriction to freedom of expression.

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[275] https://www.amnesty.org/en/latest/press-release/2020/11/france-is-not-the-free-speech-champion-it-says-it-is/
[276] Amnesty International, Annual Report 2022/203, at p. 176.
[277] Monitoring media pluralism in the digital era, op. cit.
[278] https://www.amnesty.org/en/documents/eur21/3364/2016/en/
[279] https://www.legifrance.gouv.fr/loda/id/LEGIARTI000031503876/2015-11-21/
[280] https://www.legifrance.gouv.fr/loda/id/LEGIARTI000034115136/2017-03-02/
[281] Terquem, F. (2017). État d'urgence et liberté d'information. *LEGICOM*, 58, 43-45. https://doi.org/10.3917/legi.058.0043
[282] https://www.legifrance.gouv.fr/loda/id/LEGIARTI000034107742/2017-03-02/
[283] https://www.amnesty.org/en/latest/press-release/2020/11/france-is-not-the-free-speech-champion-it-says-it-is/
[284] https://hudoc.echr.coe.int/fre#{
[285] In the case of Rouillan v. France (23rd June 2022), the severity of the sanction (an 18-month imprisonment) was found to be disproportionate by the European Court of Human Rights; however, in the same decision, the Court confirmed that the notion of 'apology of acts of terrorism' could be considered a clear legal basis that pursued a legitimate aim.

Amnesty International and other organizations have expressed concerns at a preoccupying legislative trend that consists of turning the state of emergency into an ordinary and permanent law.[286] On a related matter, the expansion of surveillance[287] justified by security also undermines the right to freedom of expression and other fundamental rights such as that to privacy.

In a similar perspective, the Council of State dedicated its 2021 annual study[288] to the question of states of emergency and recommended to circumscribe more precisely the definition of the notion of "situations of emergency," notably by differentiating them from other approaches to crises.

The Law on Disinformation

Although the 1881 law on freedom of the press[289] already included a provision on fake news, France adopted a 2018 law on the manipulation of information[290] to counter disinformation during the electoral periods. It created a summary procedure through which a judge can decide within 48 hours on the depublication of widely distributed fake news that disrupt the electoral processes.[291] The law also allowed the media regulator to impose sanction on foreign-controlled media that broadcast disinformation. According to the Special Rapporteurs on freedom of expression (of the United Nations, the Organization for Security and Cooperation in Europe, the Organization of American States and the African Commission on Human and People's Rights),[292] the vague and overbroad concept of "fake news" paves the way to abuses. The fight against disinformation should instead consist of supporting pluralism and diversity in the media landscape. That said, it seems that the new summary procedure has only been used in a very limited number of cases.[293] The 2018 law also created an obligation for online platforms to submit to the regulatory authority (Arcom) an annual report on the measures they adopt to counter the circulation of disinformation.

[286] https://www.amnesty.org/en/latest/news/2017/09/france-mps-must-reject-permanent-state-of-emergency-2/
[287] https://www.amnesty.org/en/latest/news/2023/03/france-intrusive-olympics-surveillance-technologies-could-usher-in-a-dystopian-future/
[288] https://www.conseil-etat.fr/publications-colloques/etudes/les-etats-d-urgence-la-democratie-sous-contraintes
[289] https://www.legifrance.gouv.fr/loda/id/LEGISCTA000006089701
[290] https://www.legifrance.gouv.fr/loda/id/JORFTEXT000037847559/
[291] In a 2018 decision, the Constitutional Council provided indications on the interpretation of the law.
[292]https://www.article19.org/resources/free-speech-mandates-issue-joint-declaration-addressing-freedom-of-expression-and-fake-news/
[293] Ader, B. (2022). Quelles réponses du droit ? Bilan judiciaire de la loi de 2018 relative à la lutte contre la manipulation de l'information et de la régulation. *Légipresse*, 67, 83-85. https://doi.org/10.3917/legip.hs67.0083

The Regulation of Online Content

After the controversial bill on hate speech known as the Avia law[294] was judged unconstitutional by the Constitutional Council[295] in a decision that reiterated the importance of the online sphere for participation in public life and the expression of ideas and opinions, the French legislator adopted a series of provisions in 2021[296] that place large online platforms under the surveillance of an independent administrative authority (Arcom) which can develop a soft law approach in addition to its power to impose sanctions.

A very broad overview of the new provisions shows that while the new regime maintains the principle of limited liability for hosting services providers, there are new obligations for online platforms in terms of increased transparency towards public authorities and the public on measures adopted to moderate content, the creation of appropriate measures for users to flag problematic content, the creation of appropriate mechanisms to deal promptly with content that gets flagged, and the existence of internal remedies to follow up on content moderation decisions.

The approach aims to be systemic: Arcom will examine how platforms implement their obligations rather than hold them liable for individual pieces of content. Commentators have noted that a risk of over moderation still exists. [297]Just like in the case of the EU DSA, the impact of the new regulatory regime will need to be analyzed in detail in the coming years.

## II. Enforcement

Two important dimensions of freedom of expression still deserve to be briefly mentioned.

The Regulation of Media

Alongside its mission in the online sphere, Arcom's jurisdiction includes the regulation of audiovisual media. For instance, in a recent decision, the regulatory authority fined a television channel after the host of a show had violently insulted a guest in order to prevent him from criticizing a shareholder of the channel.[298] The creation of the French press council in 2019 is noteworthy: known as the CDJM,[299] it operates as a self-regulatory mechanism that seeks to serve the protection and promotion of ethical standards of journalism.

[294] https://www.article19.org/resources/france-the-online-hate-speech-law-is-a-serious-setback-for-freedom-of-expression/
[295] https://www.conseil-constitutionnel.fr/decision/2020/2020801DC.htm
[296] https://www.legifrance.gouv.fr/loda/id/LEGIARTI000043968703/2021-08-26/
[297] Bigot, C., La liberté de communication dans la loi du 24 août 2021, les nouvelles obligations de collaboration des plateformes sous le contrôle de l'ARCOM, Légipresse 2022/HS1 (N° 67), pages 31 à 43, DOI 10.3917/legip.hs67.0031
[298] Blocman, A., ARCOM fines C8 for failing to control programme content and violating human rights, IRIS 2023-3:1/6
[299] https://cdjm.org/

Representation of the Female Body

The Supreme Court decided that a Femen activist[300] was guilty of exhibitionism for a bare-breasted protest against the Catholic church's opposition to abortion. The ECtHR considered that the condemnation amounted to a disproportionate restriction of the female activist's right to freedom of expression.[301] As noted by Mattiussi, this decision of the Court of Strasbourg may be interpreted as a hint that a female torso should not be seen as sexual.[302]

**Conclusion**

While the period under review opened with the image of a unanimous nation that proclaimed its attachment to freedom of expression in reaction to the murderous attack on Charlie Hebdo, it ends with the bleaker picture of a country where public authorities appear to have become less tolerant of criticism and are engaging into brutal repression of protests and a stricter control of public discourse. Recent incidents such as the detention of a woman for a Facebook post critical of the president[303] or a local prohibition to carry saucepans[304] verge on caricature and reveal a trend of deterioration of the state of freedom of expression in France. It is a relief, albeit limited, that higher courts appear to defend civil liberties and the rule of law. In addition to other decisions mentioned in the report, the Constitutional Council also rejected[305] a draft provision that would have set up a prohibition for the public to share images of police forces in action.

[300] https://femen.org/about-us/
[301] https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-13834%22]}
[302] Mattiussi, J.,"La France condamnée pour atteinte à la liberté d'expression d'une militante *Femen* : un aboutissement pour les *Femen*, un commencement pour les femmes ?", *La Revue des droits de l'homme*, Actualités Droits-Libertés, DOI: https://doi.org/10.4000/revdh.15948
[303]https://www.lalibre.be/international/2023/03/29/une-francaise-devant-la-justice-pour-avoir-insulte-emmanuel-macron-sur-les-reseaux-sociaux-JX6DF2EFC5CIVJHHQIWI62QHBY/
[304] https://www.politico.eu/article/local-french-authorities-crack-down-on-saucepans-during-macron-visit/
[305] https://www.conseil-constitutionnel.fr/decision/2021/2021817DC.htm


# Germany

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**Country Summary:** In response to public debate on the spread of hateful content online, Germany enacted the Network Enforcement Act (NetzDG) in 2017, which regulates criminal content on large social networks. While this did not create new speech related crimes, the law provides for reporting mechanisms of hateful content by users, take-downs obligations, and an obligation to report certain content (together with user identification data) to law enforcement. In 2023, the German Government announced that NetzDG will be repealed, as the EU's Digital Services Act (DSA) largely overrides it. Six amendments to the Criminal Code, all issued during Covid, introduced speech restrictive provisions: one law criminalizes engaging in the dangerous dissemination of personal data in a manner which is suited and intended to put that person in the danger of serious harm, one law extends criminal liability for insults against vulnerable groups or their members based on their belonging to this group, one law criminalizes the dissemination and possession of instructions to commit sexual abuse of children, one law punishes the violation of intimate parts of the body by taking photographs or other images, one law criminalizes disturbing public peace by threatening to commit offenses against sexual self-determination or to inflict dangerous bodily harm, one law punishes the rewarding and approval of offenses even where the offense has not yet taken place. Courts have not yet been asked to rule on these new provisions.

## Introduction

In Article 19's Global Expression Report 2022, Germany ranked 9th out of 49 countries in Europe and Central Asia,[306] Reporters Without Borders 2022 World Press Freedom Index placed Germany 16/180 with a score of 82.04.[307] In Justitia's Free Speech Index, Germany ranks 15th out of 33 countries with a score of 66 (medium approval).[308] During the 2015-2022 reporting period, three major developments with potentially speech restricting impact can be observed for Germany, namely the introduction of statutory platform accountability laws, most prominently the NetzDG and subsequent amendments, case law fostering civil law filter obligations for online platforms (notice and stay-down), and amendments to the Criminal Code introducing new speech restricting rules (in response to new phenomena like "enemy lists"). These refer to collections of data, especially address data, but also information about the personal circumstances of other people, which are published on the Internet - by extremist groups, among others. Those affected are usually political opponents such as politicians, journalists and activists.

Starting in 2015, public awareness increasingly focused on the spread of hateful criminal content online (defamatory insults, incitement to hatred against ethnic groups, etc.). It was often perceived (and to some degree also monitored[309]) that many social networks were performing poorly when such content was flagged by other users, at times leaving reporting users with frustrating results or no reaction at all. To understand the political dynamics of the Mid 2010s, one should also keep in mind that (perhaps with the exception of Google/YouTube), social media companies of that time were still politically immature. Facebook and Twitter did not have the level of professional representation and political contacts (in Europe) as they do now. Some commentators argue that the "hate speech crisis" in Germany that started in 2015 was primarily fueled by right-wing rhetoric in response to the refugee crisis of this time. In my opinion, this is merely a symptom; another factor is much more decisive: the concurrent rise of algorithmic content curation. The algorithms in place were, at least at that time, often heavily aimed at maximizing user engagement, and thus rewarding borderline, provocative or aggressive content.[310]

[306] https://www.globalexpressionreport.org/regions-europe-and-central-asia
[307] https://rsf.org/en/index?year=2022
[308] https://futurefreespeech.com/interactive%20map/
[309] In 2016/2017 Jugendschutz.net, a German youth protection agency, monitored on large social networks' response to take-down requests. The German Lawmaker partially relied on these findings for the justification of the NetzDG (BT-Drs. 18/12356 p. 1-2).
[310] https://www.washingtonpost.com/technology/2021/10/26/facebook-angry-emoji-algorithm/

One of the arguments was that civil litigation could not effectively set boundaries. In the field of hate speech - and unlike for Copyright Law - private litigation was ill-suited to pressure online companies to strengthen their efforts.[311]

## I. Legislation

NetzDG 2017 - pushing for take-downs and transparency

By the end of 2016, lawmakers started working on new statutory obligations including public oversight over the platforms' efforts to deal with ill content. In spring 2016, a draft Network Enforcement Act (NetzDG) was presented. The final Bill was approved by Parliament in summer 2017 and took full effect on January 1st, 2018. Here are the essentials:

- Criminal Content: The obligations under the law only apply to criminal content - where the dissemination would amount to a crime under the German Criminal Code (e.g., insult, defamation, incitement of hatred against ethnic groups).
- Large Social Networks: The law's main obligations only apply to large social networks (> 2 million users within Germany). After hesitating on this question for some time, the competent regulator finally decided to treat messenger-apps with large groups as social networks as well, sanctioning *Telegram* (case still pending).
- User-friendly reporting mechanisms: One of the main pillars of NetzDG 2017 is the obligation in § 3(1) S. 2 to maintain an easily recognizable and easy-to-use mechanism for submitting complaints about illegal content. Some companies, such as YouTube, incorporated these mechanisms within their flagging mechanisms. Facebook chose to introduce parallel mechanisms and, as a result, was fined for making the NetzDG-reporting-mechanism too hard to find.
- Take-down-obligations: While the draft NetzDG had contained a rather strict time-frame for obligatory take-downs, the final law's regime in § 3(2) is more flexible:
    - only systematic failure to deliver proper take-downs might be sanctionable,
    - while manifestly illegal content is expected to be taken down within 24 hours, more complex decisions shall only "in general" be taken within 7 days, plus an explicit exception (more time allowed) where the question of legality depends on facts,

[311] Affected persons (e.g., when a platform denied take-down of defamatory postings violating that person's rights) only very rarely took the efforts to sue the platforms. The first reported case dates back to 2017. Until today, only a few cases have been reported (mostly: strategic litigation supported by HateAid). The reasons for this lack of private enforcement can be explained as rational disininterest to sue (no deep pockets, no substantial damages to be expected, high risks and costs of litigation "just" over a single post).

- platforms might outsource certain take-down decisions to a self-regulatory body (Meta and Google are financing the NGO FSM for this, which is delivering a steady flow of well-reasoned and balanced content-decisions).

Platform transparency reports under the NetzDG show that millions of pieces of content have been reported to platforms under the NetzDG; take-down ratios vary, with averages at about 10-20% of the total number of complaints. Transparency reports indicate that platforms can handle the time-frames, with most decisions being taken within 24 hours.[312] So far, no sanction has been delivered for systematic failure to take-down content, however, a systemic failure case is currently pending against Twitter.

- Transparency Reporting: § 2 NetzDG obliges platforms to submit biannual reports on their handling of complaints, take-down numbers, processing times etc. All major platforms have regularly published such reports.
- Legal Representatives: § 5 NetzDG requires platforms to appoint a person authorized to receive service within Germany. This would allow for speedier initiation of civil proceedings, e.g. on take-down claims. Major platforms complied with the obligations; in most cases, law firms have been appointed as representatives.

**NetzDG 2021 - In-house appeals and notifications of law enforcement**

As the fear of overblocking had been a major point of criticism against the law, politicians soon began discussing user rights, which - together with a need to implement the 2018 Revision of the Audiovisual and Media Services[313] led to a 2021 Law amending the NetzDG.[314] Parallel to this, the Law to fight Right-Wing Extremism and Hate Crime[315] also introduced some major amendments (NetzDG 2021). Highlights include:

- Notification of Law Enforcement: § 3a NetzDG introduces an obligation to report certain content (together with user identification data) to law enforcement avenues when social networks take action after receiving a NetzDG-complaint and find reasonable suspicion for a serious crime. § 3a NetzDG served as a role model for Article 18 of the Digital Services Act. However, for social networks, § 3a NetzDG has been a red line. While none of them chose to file suit against the original NetzDG provisions, Google and Meta, and later TikTok and Twitter, took this particular obligation to court and have in large parts won their cases (argument: conflict with the country-of-origin-principle of the E-Commerce-Directive for procedural

[312] See Government Report on the Evaluation of the NetzDG (German), p. 11
[313] https://digital-strategy.ec.europa.eu/en/policies/revision-avmsd
[314] https://www.bundestag.de/dokumente/textarchiv/2021/kw18-de-netzwerkdurchsetzungsgesetz-836854
[315] https://www.bundestag.de/dokumente/textarchiv/2020/kw25-de-rechtsextremismus-701104

reasons; preliminary rulings now confirmed by a Court of Appeals,[316]) leaving § 3a NetzDG de-facto non-applied as of to date.

- Internal complaint-handling system: The new § 3b NetzDG made it obligatory to introduce an in-house appeals mechanism (plus safeguarding certain minimum standards). § 3b also allows for appeals from notice-senders (to appeal against platform decisions not to take action), thus potentially strengthening restrictive decisions in some cases. § 3b NetzDG has been widely applauded and served as a role model for Article 20 DSA. However, major platforms have successfully challenged the provision in court (together with § 3a, see above: violation of country-of-origin principle).

Lessons learned and a shifting rationale

In 2023, the German Government announced that the NetzDG will be repealed, which came as no surprise as the DSA largely overrides the NetzDG. Since its introduction in 2017, the law has been intensely analyzed by legal scholars and has undergone an extensive (government funded) evaluation.[317] Proceedings against Meta[318] have led to substantial fines for non-compliance (and to adjustments taken by the platforms), while similar proceedings against Telegram[319] and Twitter[320] are still pending. Overall, major platforms have made substantial efforts to comply with the law.

From a helicopter perspective, key take-aways looking back on 6 years of the NetzDG are:

- Big Tech is often willing to make efforts (but might exploit loopholes): The NetzDG showed that to a certain extent, platforms are willing to follow legislation, even if chances of successful litigation against a law are high. However, the NetzDG also showed that some platforms will use legal ambiguities in their favor and that administrative proceedings against the platforms are burdensome.
- Unresolved problems with fundamentally non-compliant services: The difficulties in enforcing the NetzDG against the messaging service Telegram shows that we might lack tools for enforcement against fundamentally non-compliant services (an issue unresolved in the DSA)[321].

[316] OVG NW, Beschluss vom 21. März 2023 – 13 B 381/22; https://www.ovg.nrw.de/behoerde/presse/pressemitteilungen/20_230321/index.php.
[317] BT-Drs. 19/22610; https://www.bundestag.de/webarchiv/presse/hib/2020_09/794452-794452
[318]https://www.heise.de/news/NetzDG-Verstoesse-Facebook-hat-fuenf-Millionen-Euro-an-Strafen-gezahlt-6181705.html
[319] https://www.bundesjustizamt.de/DE/ServiceGSB/Presse/Pressemitteilungen/2023/20230302.html
[320] https://www.bundesjustizamt.de/DE/ServiceGSB/Presse/Pressemitteilungen/2023/20230404.html
[321] See on this HateAid, Quality over Speed - How to strengthen platform-accountability in the Digital Services Act (DSA) 15 February 2022, p. 11.

- Over-Estimation of Overblocking: The main concern in 2017 was that NetzDG would incentivize overblocking. This has been proven unfounded through NetzDG statistics (NetzDG-complaints have not significantly led to overblocking). The debate has been and still is, in parts, exaggerated and is fueled by narratives one-sidedly jumping on conclusions (academia/NGO dynamics play a role here).[322]
- A conflict with European Law: As litigation against the NetzDG (and the parallel KoPl-G in Austria) demonstrates, there is a high likelihood that the NetzDG (and similar national fragmentations) is in conflict with Art. 3(2) E-Commerce-Directive (country-of-origin principle)[323].
- No silver bullets, laws as a motor for "voluntary" efforts: The NetzDG started with a pretty narrow approach. In the end, the discussion and public debate surrounding the law (platforms should take more responsibility) might have had a greater impact on the resources and diligence spent by platforms on safety measures than the law itself.
- A shifting rationale: It is about protecting freedom. It is noteworthy also that the debate about speech restrictions, especially against Hate Speech, has seen significant shifts during the reporting period. Back in 2016, the debate heavily focused on incentivizing social networks to take-down Hate Speech for the sake of fighting this content[324] (stop the infringement!). The focus has shifted: Lawmakers and most scholars emphasize more and more that restricting one person's hateful speech might safeguard free speech and democratic discourse for others (argument: underenforcement of existing speech restrictions leads to silencing effects).[325]

Criminal Code

Since the introduction of the NetzDG, more and more voices have been raised for strengthening criminal law enforcement as well (argument: take-down and prosecute!)

Some procedural amendments were aiming at gathering more evidence channeled through a centralized federal agency (§ 3a NetzDG, see above). Other measures were aiming at

[322] Whilst this is the respected position of the esteemed author Justitia would like to direct readers to two reports which have discussed the relationship between the NetzDG and the rise in similar legislation in authoritarian and semi-authoritarian states: https://justitia-int.org/the-digital-berlin-wall-act-2-how-the-german-prototype-for-online-censorship-went-global-2020-edition/; https://justitia-int.org/the-digital-berlin-wall-how-germany-created-a-prototype-for-global-online-censorship/

[323] OVG NW, Beschluss vom 21. März 2023 – 13 B 381/22 (*Meta v. Germany,* regards NetzDG); see also Opinion of AG Spuznar, 8 June 2023 - C-376/22 (*Meta v. Komm Austria*, regards KoPl-G); see also Holznagel, D., 'Platform Liability for Hate Speech & the Country of Origin Principle: Too Much Internal Market?', Computer Law Review International, 2020, vol. 4, p. 107.

[324] BT-Drs. 18/12727, p. 1.

[325] BT-Drucks. 19/17741, p. 1, 15. The rationale now has been endorsed also by the Constitutional Court of Germany, Beschl. v. 19.5.2020 – 1 BvR 2397/19, par. 32.

specializing existing law enforcement (prosecutors/police departments, e.g. ZAC NRW (Zentral- und Ansorechstelle Cybercrime.[326]

However, the German lawmakers were also active in amending the Criminal Code, that is, introducing new offenses or amending existing ones to cover certain behavior which typically occurs through online interactions. Such legislation often aims at closing loopholes when new online phenomena emerge. The most prominent amendments cover:

- "enemy"- or "we will get you all"-lists: § 126a Criminal Code (StGB, english version),[327] introduced in 2021, makes it a criminal action when someone engages in the dangerous dissemination of personal data in a manner which is suited and intended to put that person in the danger of serious harm (background: Neo-Nazis threatening journalists or others through so called "enemy lists"). Critics fear that the ambiguous wording might put legitimate journalism at risk, though "civic information, … research or teaching, reporting about current or historical events, or similar purposes" is exempted from criminal liability. However, a criminal investigation based on § 126a was initiated against journalists[328] (working for Turkish media outlets, reporting on an opposition member in Turkey and displaying his house) in 2023.
- Hate-mongering insult: § 192a StGB, introduced in 2021, extends criminal liability for insult to cases where vulnerable groups or its members are insulted based on their belonging to this (ethnic, religious …) group (background: traditional insult - § 185 StGB – would not cover these cases which typically are not directed against identifiable specific persons; incitement to hatred in § 130 StGB requires a public impact which might not always be given).
- Instructions to commit sexual abuse of children: § 176e StGB, introduced in 2021, makes the dissemination and possession of such instructions a crime (background: such materials were sometimes discovered during investigations regarding child sexual abuse).
- Violation of intimate parts of the body by taking photographs or other images: criminal offense through § 184k StGB, introduced in 2021, covers so-called Upskirting and similar intrusive acts.
- Disturbing public peace by threatening to commit offenses, § 126 StGB: through amendments introduced in 2021, § 126 now also covers threats with a substantial offense against sexual self-determination or dangerous bodily harm

[326]https://www.justiz.nrw.de/JM/schwerpunkte/zac/index.php;
https://www.nytimes.com/2022/09/23/technology/germany-internet-speech-arrest.html
[327] https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1303
[328]https://www.lto.de/recht/hintergruende/h/durchsuchungen-tuerkische-journalisten-strafrecht-verfassungsrecht-gg-feindeslisten-126a-stgb-staatsanwaltschaft-darmstadt/

- Rewarding and approval of offenses in § 140 StGB: through 2021 amendments, the section now also covers cases where the offense has not yet taken place ("It would be good if politician X was executed").
- Threatening the commission of a serious criminal offense, § 241 StGB: originally, the norm only covered threatening with a felony-level offense; through amendments in 2021, it now also covers e.g. offenses against sexual self-determination (background: threatening with sexual harassment).

No verdicts based on the above-mentioned new norms have been reported so far.

### II. Non-Legislative Developments

In Germany, in 2020, police searched 83 apartments and other buildings, seizing evidence like smart phones and laptops. 96 suspects were questioned about hateful posts they made online. One of the suspects was accused of making anti-Semitic comments while another insulted a female politician online.[329]

### III. Enforcement

Courts Developing (Upload) Filter Obligations - The Real Deal

Filter obligations through private rights enforcement / litigation play a crucial role when it comes to restricting illegal content online. German courts have been spearheading the evolution of the law here. In a landmark decision in 2004,[330] the German Federal High Court laid the foundations for filter-obligations to be imposed on platforms through civil law. As a consequence, a proper notice might trigger future-oriented filter obligations (notice and stay-down instead of only notice and take-down). The Court extended its logic in this case to decide many other IP cases.

Most scholars argue that similar filter obligations might arise following personality rights infringements, with the landmark case *Künast v. Facebook* now pending before a court of appeals.[331] In this case, defamatory memes were spread on Facebook. Künast demanded Facebook not only to take-down a specific flagged posting, but also similar copies and shared instances of the graphical meme. The District Court agreed. It based its ruling on the undisputed feasibility of filtering for identical instances based on hash values, but also to filter for similar graphics through broadening hash value searches combined with examining results through PDNA (photo DNA) and OCR (Optical Character Recognition).

[329] https://www.reuters.com/article/us-europe-crime-internet-idUSKBN27J1C3
[330] BGH, Urteil vom 11. März 2004 – I ZR 304/01 - Internetversteigerung I.
[331] LG Frankfurt/M., Urteil vom 8.4.2022 – 2-03 O 188/21; Meta's Appeal is pending before Frankfurt Court of Appeals.

It remains to be seen whether this German case law is in line with Article 8 of the DSA. The Court of Justice of the European Union (CJEU) landmark ruling on Article 8 DSA in *Glawischnig vs. Facebook*[332] leaves room for some interpretation. In my opinion, a better analysis is seeing the German case as compatible with Art. 8 DSA.[333]

**Conclusion**

The above has considered three key legal developments in Germany – the NetzDG, civil law and amendments to the Criminal Code – to illuminate speech restrictive laws during the period under review. It discussed the context in which the NetzDG was drafted and set out the essential elements of the Act. It has covered revisions to NetzDG in 2021, aimed at bolstering user rights, and the twilight days of the Act amidst the passage of the DSA in the EU. This provides a useful juncture at which to assess NetzDG's impact over its 6 years in force. Also, on the theme of online speech regulation, this piece notes the importance of filter obligations through enforcement and litigation – as well as Criminal Code amendments aiming to close loopholes when new online phenomena emerge.

[332] ECJ Case C-18/18, decision of 3 October 2019 (*Glawischnig-Piesczek v. Facebook*).
[333] (1.) In my opinion, it seems a misinterpretation of the Glawischnig-decision that filter obligations would or should require a prior constitutive court order; (2.) It seems a misinterpretation that Art. 8 DSA would only allow for filter obligations which a provider can comply with by relying on 100%-false-positive-free technical solutions; (3.) Hence the German case law implies filtering for similar instances of a specific infringement, the obligations do not amount to general monitoring in conflict with Art. 8 DSA.


# Japan

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## Country Summary

Between 2015 and 2022, Japan faced challenges to freedom of expression, including a surge in hateful demonstrations and concerns about online communication. Notable events like anti-nuclear protests, the Tokyo Olympics, and a former Prime Minister's assassination impacted public discourse. A surge in hateful campaigns prompted the introduction of the Anti-Hate Speech Law in 2016, aiming to curb discriminatory words and behaviors, although the law refrains from banning or penalizing hate speech. Cyberbullying and online harassment concerns prompted Penal Code revisions in 2022, resulting in stricter penalties for online insults. Additionally, amendments to the Provider Liability Limitation Act aimed to streamline

identifying anonymous online harassers. Legislative efforts also addressed terrorism-related concerns by amending the Act on Punishment of Organized Crimes and Control of Proceeds of Crime in 2017. Despite controversy and protests, the amendment passed, raising debates about potential overreach, individual rights, and surveillance. Overall, these legislative actions aimed to navigate challenges surrounding hate speech, cyberbullying, and security. In non-legislative developments, the period also witnessed notable incidents involving censorship of art exhibitions and challenges to academic freedom, as well as the 2022 Supreme Court ruling upholding the constitutionality of a hate speech ordinance, which set a precedent for similar cases.

**Introduction**

Japan is a multiparty parliamentary democracy. The Japanese Constitution of 1946[334] protects freedom of "speech, press, and all other forms of expression" and prohibits censorship (Article 21). Japan is a party to most of the core international human rights treaties.[335] However, the country has not accepted any of the individual complaint mechanism under the international human rights treaties and there is no regional human rights court covering Japan. Between 2015 and 2022, during the continuous governance of the Liberal Democratic Party (LDP), [336] Japan faced significant challenges that impacted freedom of expression. The country grappled with an alarming surge in hateful demonstrations.[337] The proliferation of online communication[338] has played a pivotal role[339] in empowering individuals to express their viewpoints and facilitate social and political movements.[340] However, it has also brought about heightened privacy concerns, the rapid dissemination of misinformation and disinformation and a surge in online harassment and hate speech.

[334] https://www.japaneselawtranslation.go.jp/en/laws/view/174/tb
[335] https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=87&Lang=en
However, Japan entered reservations to articles 4(a) and (b) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which call for the criminalization of racial hate speech to avoid potential conflicts with the protection of freedom of speech enshrined in the Japanese Constitution. Japan lacks a national human rights institution in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles).and an anti-discrimination law that explicitly prohibits racial, ethnic, religious discrimination, or discrimination based on sexual orientation or gender identity. This gap in the legal framework raises concerns about addressing and safeguarding the rights of marginalized and vulnerable groups in the country.
[336] https://www.jimin.jp/english/. The ruling Liberal Democratic Party (LDP), often characterized as a conservative party with nationalist leanings, has played a dominant role in Japan's political landscape since 1955, maintaining nearly uninterrupted governance since 1955, with only two brief periods of opposition from 1993 to 1994 and 2009 to 2012.
[337]https://japantoday.com/category/national/1152-hate-speech-rallies-reported-in-japan-since-2012-justice-ministry
[338] https://www.statista.com/topics/6897/social-media-usage-in-japan/#topicOverview
[339] https://freedomhouse.org/country/japan/freedom-net/2022#footnote1_z0mctem
[340] https://www.asahi.com/ajw/articles/14380094

During the period covered, a range of issues led to intensified political and social tensions. These included the anti-nuclear power movement post,[341] the 2011 Fukushima nuclear disaster (the largest civilian nuclear accident since the Chernobyl accident, caused by an earthquake which killed 18,000 people),[342] mega-sporting events like the Tokyo Olympics,[343] the LDP's constitutional amendment proposal (especially concerning revising the 1947 constitution's[344] pacificist nature, entrenched in Article 9),[345] laws[346], and the assassination of the former Prime Minister Abe[347] in July 2022 which raised concerns about political-religious affiliations.[348] Gender inequality issues[349] persisted[350] throughout this period, and the COVID-19 pandemic introduced further complications to Japan's multifaceted challenges. These factors collectively shaped the landscape of freedom of expression and public discourse in the country.

Japan has received commendable scores[351] for its general protection of civil and political freedoms, as assessed by Freedom House, receiving a score of 96/100 over the period 2017-22.[352] In Justitia's Free Speech Index, Japan ranks 9th out of 33 countries, with a score of 71 (high approval).[353] Notable legislative developments included the implementation of the first anti-hate speech law and revision of laws to address online harassment for purposes of striking a balance with freedom of expression. However, concerns persist about pressures on freedom of expression, media freedom and pluralism. According to the Press Freedom Ranking[354] issued by Reporters Without Borders,[355] Japan holds the lowest ranking among the seven major countries (G7).[356] In its index of 180 countries, Japan's ranking declined to 71st in 2022 from 61st in 2015, a significant deterioration from the 12th place in the 2010 report.[357] Reporters Without Borders attributes[358] this low ranking to a situation where the Japanese government and businesses exert consistent pressure on mainstream media,[359] resulting in

[341] https://asaa.asn.au/anti-nuclear-movement-street-politics-japan-fukushima/
[342] https://www.unscear.org/unscear/en/areas-of-work/fukushima.html
[343] https://olympics.com/en/olympic-games/tokyo-2020
[344] https://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html
[345]https://www.japantimes.co.jp/news/2019/11/07/national/politics-diplomacy/ldp-case-for-amending-constitution/
[346] https://www.nichibenren.or.jp/en/document/statements/160527.html
[347] https://www.japantimes.co.jp/news/2022/07/08/national/shinzo-abe-dead-nara-shooting/
[348] https://fpcj.jp/en/j_views-en/magazine_articles-en/p=96414/
[349] https://www.gender.go.jp/english_contents/pr_act/pub/status_challenges/pdf/202205.pdf
[350] https://www.asahi.com/ajw/articles/14852796
[351] https://freedomhouse.org/country/japan/freedom-world/2023
[352] https://freedomhouse.org/country/japan/freedom-world/2023.
[353] https://futurefreespeech.com/interactive%20map/
[354] https://rsf.org/en/index
[355] https://rsf.org/en
[356] https://digital.asahi.com/articles/ASR53566JR53UHBI00W.html
[357] The Press Freedom Rankings of Japan are: 12 (2010), 22 (2011-2012), 53 (2013), 59(2014), 61(2015), 72(2016), 72(2017), 67(2018), 67(2019), 66 (2020), 67(2021), 71 (2022)
[358] https://rsf.org/en/country/japan
[359]https://www.theguardian.com/world/2017/jun/13/japan-accused-of-eroding-press-freedom-by-un-special-rapporteur

widespread culture of self-censorship,[360] especially regarding sensitive issues such as national security, corruption, sexual harassment, health crises like Covid-19 and radiation, and pollution. On social networks, extreme far-right groups and individuals frequently engage in harassing journalists and individuals who criticize the government or report on subjects deemed "unpatriotic." These actions further contribute to an environment of fear and restraint, hindering free and open expression of opinions and information in the name of "public interest", "public welfare" or "national emergency". The state of civic space in Japan is characterized as "narrowed" [361] by an international NGO.

Given the constraints of space and scope, this report provides an overview of the major legislative and non-legislative developments and their enforcement which played a significant role in shaping the landscape of free expression and public discourse in Japan between 2015 and 2022.

## I. Legislative developments

Anti-Hate Speech Law and Ordinances

A surge of hateful campaigns[362] fueled by heightened nationalism[363] during the 2010s resulted in numerous civil and criminal cases[364] related to hate speech and crimes. It drew criticism from in and outside of Japan including UN human rights treaty bodies.[365] In response[366] to this alarming trend, Japan introduced its first national legislation against hate speech in 2016. The Act on Promotion of Efforts to Eliminate Unfair Discriminatory Words and Behaviours Against Persons from Outside Japan[367] (known as "the Hate Speech Elimination Act") in June 2016. The Act, however, neither prohibits nor penalizes hate speech, so as not to impede freedom of speech. Moreover, the Act is primarily focused on protecting legal residents of overseas origin and their descendants, leaving other ethnic minorities, individuals without legal residency in Japan, and various Japanese minority groups without eligibility for protection. These limitations have led to severe criticism of the Act, characterizing it as toothless and narrow in scope.

[360] https://www.dw.com/en/why-japan-ranks-poorly-in-press-freedom/a-65549778
[361] https://monitor.civicus.org/country/japan/
[362] http://www.moj.go.jp/content/001201158.pdf
[363] https://www.jstor.org/stable/24483416
[364]https://www.cambridge.org/core/books/abs/hate-speech-in-japan/kyoto-korean-elementary-school-case/04A09B33B839AF5E567678907B520F8C
[365] For example, see the Concluding Observations on the Sixth Periodic Report of Japan by the UN Human Rights Committee in July 2014 (UN Doc. CCPR/C/JPN/CO/6, para.12) and the Concluding Observations on the Combined Seventh to Ninth Periodic Reports of Japan by the UN Committee on the Elimination of Racial Discrimination in August 2014 (UN Doc. CERD/C/JPN/CO/7–9, para.11).
[366] https://www.moj.go.jp/ENGLISH/m_jinken04_00001.html
[367] https://www.japaneselawtranslation.go.jp/en/laws/view/4081/en

Nevertheless, the Act has seen some impacts in the society, including a decline in the number of hateful street rallies.[368] The Hate Speech Elimination Act has served as a catalyst for the development of policies, regulations and ordinances aimed at combating hate speech and racial discrimination.[369] Several municipalities such as Osaka City[370]and Kawasaki City[371] adopted local ordinances bolstering hate speech laws. As a national anti-hate speech law remains limited, local anti-hate ordinances have the potential to fill the gap.

Despite some progress, not all municipalities have anti-hate speech ordinances, and the implementation of such ordinances is facing significant challenges.[372] Of particular concern is online hate speech[373] which exacerbated[374] during the COVID-19 pandemic, transcending local government jurisdictions. It has turned into real life violence, as evidenced by the arson case[375] targeting residential areas of the Korean community. Frustrations over the absence of robust legal measures and official enforcement against perpetrators of hateful harassment are leading to a growing number of legal battles against such behavior.[376] Calls for a more stringent national anti-discrimination regulation which also addresses online hate speech[377] and for the establishment of an anti-hate crime law[378] have become more pronounced.

[368] https://www.japantimes.co.jp/news/2016/03/30/national/japans-first-ever-hate-speech-probe-finds-rallies-are-fewer-but-still-a-problem/
[369] http://www.rilg.or.jp/htdocs/img/reiki/001_hatespeach.htm
[370]https://www.japantimes.co.jp/news/2016/07/01/national/crime-legal/osaka-enforces-japans-first-ordinance-hate-speech-threatens-name-names/
[371] https://www.japan-press.co.jp/modules/news/?id=12622&pc_flag=ON
[372]https://www.nhk.or.jp/shutoken/yokohama/article/014/05/#:~:text=%E3%83%98%E3%82%A4%E3%83%88%E3%81%AB%E5%88%91%E4%BA%8B%E7%BD%B0%20%E5%85%A8%E5%9B%BD%E5%88%9D%E3%81%AE%E6%9D%A1%E4%BE%8B&text=%E4%BA%BA%E7%A8%AE%E3%82%84%E6%B0%91%E6%97%8F%E3%80%81%E6%80%A7,%E5%88%9D%E3%82%81%E3%81%A6%E3%81%AE%E3%81%93%E3%81%A8%E3%81%A7%E3%81%97%E3%81%9F%E3%80%82. Certain municipalities exhibit hesitance in implementing stringent measures, viewing these ordinances as educational tools rather than punitive measures.
[373] https://time.com/6210117/hate-speech-social-media-zainichi-japan/
[374] https://english.hani.co.kr/arti/english_edition/e_international/948425.html
[375] https://www.asahi.com/ajw/articles/14707159
[376] For instance, noteworthy cases that ruled in favor of victims of hate speech include: *Lee Sin Hae v. Lee Sin Hae v. Zaitokukai and Hoshu sokuho*, concluded in March 2018; the *Fuji Corp. case* which reached its conclusion at the Supreme Court in September 2022, and the *Lee Shin Hae v. DHC*, where Lee's victory was confirmed in May 2023. See also *Choi Kang-ija's case and Natsuki Yasuda's case*.
[377] https://mainichi.jp/english/articles/20220912/p2a/00m/0na/009000c
[378] https://mainichi.jp/english/articles/20220430/p2a/00m/0na/015000c

### *Regulations on Cyberbullying and Online Harassment*

In response to the alarming surge in online harassment and bullying, the Penal Code[379] underwent revisions[380] in June 2022, leading to more stringent penalties on online insults[381] While supporters welcomed the tougher legislation to crack down on cyberbullying and online harassment, opponents showed concerns[382] about potential risk to freedom of expression[383] including criminalizing disfavored political views.[384]

In order to address cyberbullying and harmful online content, the Provider Liability Limitation Act[385]underwent amendments in 2021, becoming effective in October 2022. These revisions aim to streamline the process of identifying anonymous senders, ensuring that appropriate legal procedures are followed for swift and efficient disclosure of sender information. Furthermore, in 2020 and 2022, the Act on the Protection of Personal Information[386] and the Telecommunications Business Law[387] were amended respectively. These updates place greater responsibility on telecommunication service providers for safeguarding the rights and privacy of their users.

<u>Amendment to Create Crime of Preparation of Acts of Terrorism and Other Organized Crimes/ Anti-Conspiracy Legislations</u>

The Act on Punishment of Organized Crimes and Control of Proceeds of Crime[388] was amended in June 2017, criminalizing planning and preparatory actions for terrorism and other serious organized crimes. The government stated[389] that this amendment is vital to become a party of the United Nations Convention against Transnational Organized Crime,[390] and fulfil

[379] https://www.japaneselawtranslation.go.jp/en/laws/view/3581/en
[380] https://mainichi.jp/english/articles/20220613/p2a/00m/0na/011000c
[381] https://english.kyodonews.net/news/2022/06/f67028f8bc5b-japan-passes-bill-to-make-online-insults-punishable-by-jail-time.html. The move towards amendments gained momentum after the suicide of a reality show star in May 2020 following online abuse. The previously lenient fines imposed on offenders responsible for posting insults against her, a mere 9,000 yen (around $65 dollars) each, raised widespread concerns about the inadequacy of the penalties to deter cyberbullying.
[382] https://japannews.yomiuri.co.jp/society/crime-courts/20220614-37594/
[383] https://www.nichibenren.or.jp/document/opinion/year/2022/220317.html
[384] The revision only passed after a provision was added that calls on the government to review the law in three years to examine its impact on freedom of expression.
[385] https://www.japaneselawtranslation.go.jp/en/laws/view/3610/en
[386] https://www.japaneselawtranslation.go.jp/en/laws/view/3397
[387] https://www.japaneselawtranslation.go.jp/en/laws/download/3390/09/s59Aa000860203en11.0_h27A26.pdf
[388] https://www.japaneselawtranslation.go.jp/ja/laws/view/3587
[389] https://www.shugiin.go.jp/internet/itdb_shitsumon.nsf/html/shitsumon/b193026.htm
[390] https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html. Japan became a party to the Convention on 11 July 2017, after the introduction of the Crime of Preparation of Acts of Terrorism and Other Organized Crimes.

its responsibility to improve security as the host country of the 2019 rugby world cup as well as the 2020 Tokyo Olympic Games and Tokyo Paralympic Games.[391]

However, the bill for amendment has sparked controversy and raised concerns among legal experts[392] and civil liberties advocates,[393] leading to protests attended by thousands of demonstrators.[394] Critics argue the risk of broad application of laws for actions unrelated with the scope of organized crime and terrorism, the potential inclusion of innocent parties in charged groups, and the risk of increased surveillance could infringe [395]on individual rights to freedom of expression, peaceful assembly and freedom of association. In a 2017 open letter to Japan's Prime Minister, the former UN Special Rapporteur for privacy rights, Joseph Cannataci, warned[396] of the risk of undue restrictions to the rights to privacy and to freedom of expression. This provoked[397] an angry response[398] from the Japanese government.

Despite vehement opposition protests,[399] the bill was passed, with the ruling coalition of the LDP holding a majority in both houses of parliament. In November 2022, the UN Human Rights Committee in its Concluding Observations on the seventh periodic report of Japan[400] urged Japan to revise the Act on Punishment of Organised Crime and Control of the Proceeds of Crime to decriminalize acts that are unrelated to terrorism and organized crime, as well as to adopt safeguards and preventive measures to ensure that the application of the Act does not unduly restrict fundamental rights protected under the International Covenant on Civil and Political Rights (ICCPR).[401]

### II. **Non-Legislative Developments**

Interventions on Media/Press Freedom

In February 2016, the then-Minister of Internal Affairs and Communications stated in the Diet that 'political fairness' of broadcasters mandated by Article 4(1)(ii) of the Broadcasting Act[402] as requiring an assessment of a broadcaster's overall programming. The Minister also

[391] https://www.theguardian.com/world/2017/jun/15/japan-passes-brutal-new-terror-law-which-opponents-fear-will-quash-freedoms
[392] https://www.nichibenren.or.jp/en/document/opinionpapers/20060914.html
[393] https://www.foejapan.org/en/news/170529.html
[394] https://mainichi.jp/english/articles/20170407/p2a/00m/0na/002000c
[395] https://www.nichibenren.or.jp/en/document/statements/170615.html
[396] http://www.ohchr.org/Documents/Issues/Privacy/OL_JPN.pdf
[397] https://www.reuters.com/article/us-japan-politics-conspiracy-idUSKBN18I0CG
[398] https://www.mofa.go.jp/mofaj/files/000282252.pdf
[399] https://www.aljazeera.com/news/2017/6/16/protests-in-japan-as-anti-conspiracy-bill-passed
[400]https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsuBJT%2Fi29ui%2Fb4Ih9%2FUIJO87S0HPMR1PnCPt3LQO6EolLe709268JsfEokJ6QyNqFgswSBy1rovzRJaQqYHclTttywUvvrbUCI%2F6iBnTGHkY (paras 16-17)
[401] Japan's implementation of its obligations in the International Covenant on Civil and Political Rights (ICCPR) was reviewed by the UN Human Rights Committee on 13th and 14th October 2022. The Concluding observation was issued in November 2022.
[402] https://www.japaneselawtranslation.go.jp/en/laws/view/2954

suggested that the government might shut down broadcasters if they repeatedly aired programs conflicting with this "political fairness" according to Article 76 of the Radio Act.[403] This statement prompted an outcry from lawyers and civic groups urging the government to retract its view on political fairness[404] in the Broadcasting Law and to safeguard press freedom. David Kaye, the then United Nations Special Rapporteur on freedom of expression, voiced concerns about the Broadcasting Act[405] in his visit to Japan[406] and in his report to the human rights Council.[407] He pointed out that the Broadcasting Act confers regulatory authority upon the government, which could encroach upon press freedom and independence.[408] The report triggered a vigorous response[409] from the Japanese government. The administrative documents later disclosed[410] that the Minister's statement had been influenced by pressure from the Prime Minister's office, with a former advisor to the Prime Minister exerting influence on the Communications Ministry's interpretation of the law.[411] Reinterpretation of law behind closed doors without transparent discussion as well as revelation of political intervention that could distort the autonomy of broadcasting raise serious concern on the protection of media freedom and pluralism, freedom of expression and the public access to information. In the 2018 Universal Periodic Review (UPR)[412] of Japan, numerous countries recommended[413] a reassessment of the existing legal framework to enhance media independence. The UN Human Rights Committee's Concluding observations on the seventh periodic report of Japan[414] highlighted that "sweeping powers granted to the Government under the Broadcasting Act and the Radio Act to suspend operations of broadcasters, are generating a chilling effect on the activities of journalists and human rights defenders and leading to self-censorship." The Committee has also raised concerns[415] around the Act on the Protection of Specially

[403] https://www.japaneselawtranslation.go.jp/en/laws/view/3205/en#je_ch8at12
[404] https://www.nichibenren.or.jp/en/document/opinionpapers/20160414.html
[405]https://www.ohchr.org/en/special-procedures/sr-freedom-of-opinion-and-expression/mr-david-kaye-former-special-rapporteur-2014-2020
[406]https://www.ohchr.org/en/statements/2016/04/preliminary-observations-united-nations-special-rapporteur-right-freedom-opinion?LangID=E&NewsID=19842 in April 2016
[407] http://hrn.or.jp/wpHN/wp-content/uploads/2017/05/A_HRC_35_22_Add.1_AUV.pdf
[408]https://www.theguardian.com/world/2017/jun/13/japan-accused-of-eroding-press-freedom-by-un-special-rapporteur
[409] https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/22/Add.5
[410] https://mainichi.jp/english/articles/20230308/p2a/00m/0op/011000c
[411] https://www.asahi.com/ajw/articles/14859972
[412] https://www.ohchr.org/en/hr-bodies/upr/jp-index
[413]https://www.ohchr.org/sites/default/files/lib-docs/HRBodies/UPR/Documents/Session28/JP/MatriceRecommendationsJapan.docx
[414]https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsuBJT%2Fi29ui%2Fb4Ih9%2FUIJO87S0HPMR1PnCPt3LQO6EolLe709268JsfEokJ6QyNqFgswSBy1rovzRJaQqYHclTttywUvvrbUCI%2F6iBnTGHkY (paras 36-37)
[415]https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsuBJT%2Fi29ui%2Fb4Ih9%2FUIJO87S0HPMR1PnCPt3LQO6EolLe709268JsfEokJ6QyNqFgswSBy1rovzRJaQqYHclTttywUvvrbUCI%2F6iBnTGHkY

Designated Secrets.[416] The law aimed for strengthening information security[417] took effect in December 2014, amidst protest and concerns[418] about restriction of press freedom and rights to information. The law has since remained a subject of ongoing controversy.[419] In his report[420] to the Human Rights Council, David Kaye pointed out that the Broadcasting Act confers regulatory authority upon the government, which could encroach upon press freedom and independence.[421] The report triggered a vigorous response[422] from the Japanese government. The administrative documents later disclosed[423] that the Minister's statement had been influenced by pressure from the prime minister's office, with a former advisor to the Prime Minister exerting influence on the communications ministry's interpretation of the law.[424] Reinterpretation of law behind closed doors without transparent discussion as well as revelation of political intervention that could distort the autonomy of broadcasting raise serious concern on the protection of media freedom and pluralism, freedom of expression and public access to information.

Business have exerted invisible pressure on the media, as evidenced by the long-standing scandal involving entertainment tycoon Johnny Kitagawa.[425] Despite allegations of sexual abuse against aspiring male pop stars at his talent agency, the mainstream media largely turned a blind eye to the matter, so as not to lose advertising, sponsorship and access to the powerful agency's roster of talent. Fearing repercussions, the young men involved were reluctant to file complaints with the police, enabling Kitagawa's abusive behavior to persist until his passing. The matter gained significant attention[426] after a BBC documentary[427]on this issue was broadcasted, leading to criticism from both within and outside of Japan, including from the Working Group on Business and Human Rights of the United Nations Human Rights Council.[428]

[416] https://www.loc.gov/item/global-legal-monitor/2015-01-23/japan-act-on-protection-of-specially-designated-secrets/
[417] https://www.japantimes.co.jp/opinion/2021/12/19/commentary/japan-commentary/japan-secrets-protection-law/
[418]https://www.japantimes.co.jp/news/2014/12/10/national/japans-secrecy-law-takes-effect-amid-concern-arbitrary-info-withholding-lack-oversight/
[419] The official visit, originally planned for December 2015, was abruptly cancelled and rescheduled due to the Japanese Government's request citing difficulties in arranging meetings with relevant officials.
[420] http://hrn.or.jp/wpHN/wp-content/uploads/2017/05/A_HRC_35_22_Add.1_AUV.pdf
[421]https://www.theguardian.com/world/2017/jun/13/japan-accused-of-eroding-press-freedom-by-un-special-rapporteur
[422] https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/22/Add.5
[423] https://mainichi.jp/english/articles/20230308/p2a/00m/0op/011000c
[424] https://www.asahi.com/ajw/articles/14859972
[425] https://www.bbc.com/news/world-asia-65599546
[426]https://www.theguardian.com/world/2023/jun/05/pressure-builds-on-johnny-kitagawas-j-pop-agency-to-address-abuse-claims
[427] https://www.bbc.co.uk/programmes/m001jw7y
[428] https://www.japantimes.co.jp/news/2023/07/12/national/johnnys-un-investigation/

In April 2018,[429] the Japanese government requested[430] internet service providers to block manga piracy websites. This move, along with a proposed law to expand the scope of website blocking,[431] sparked a public debate[432] that underscored the balance between safeguarding intellectual property rights and upholding users' privacy rights, while adhering to the constitutional prohibition against censorship.

"Taboo" in Art and Exhibitions

In August 2019, an art exhibition titled 'After "Freedom of Expression?"' in the Aichi prefecture faced cancellation[433] due to an inundation of complaints and death threats from far-right groups and individuals. The center of criticism was two artworks: a statue symbolizing the 'comfort women' forced into Japan's World War II brothels and a short film featuring the burning of Emperor Hirohito's photograph. These works were labelled as "anti-Japanese propaganda" by those echoing the nationalistic sentiments of conservative politicians who criticized the exhibit.[434] Following fervent controversy revolving around censorship and the withdrawal of public funding, the exhibition was eventually reopened for a limited period, with access restricted to a reduced number of visitors.

In the aftermath of this sensation, the intersections of art, politics, and memory have continued[435] to provoke questions.[436] In May 2022, the Tokyo Metropolitan Government's Human Rights Division rejected[437] the screening of a film artwork[438]addressing the massacre of Koreans during the Great Kanto Earthquake in 1923.[439] Leaked e-mails from the Human Rights Division indicated that the screening was rejected due to an interview in the film stating the massacre of Koreans during the earthquake as a historical fact. This decision was thought[440] to be influenced by the stance of Tokyo Governor Yuriko Koike, who has consistently refrained[441] from conveying a specific message to the Korean victims during the annual memorial event for the 1923 Great Kanto Earthquake. The lack of transparency in the

[429]https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3471638&fbclid=IwAR3IyI6lC0wSa_06YnH4MPeaZgoi--l4N5Nlbi9-vFalp_9nTgLIylwSkTc
[430] https://mainichi.jp/english/articles/20180406/p2a/00m/0na/003000c
[431] An anti-online piracy law was revised in June 2020 to tighten copyright control.
[432] https://freedomhouse.org/country/japan/freedom-net/2018
[433] https://www.nytimes.com/2019/08/05/world/asia/japan-aichi-trienniale.html
[434] https://www.nytimes.com/2019/08/05/world/asia/japan-aichi-trienniale.html
[435]https://english.kyodonews.net/news/2019/11/236a35ed414b-japan-defends-withdrawal-of-support-for-vienna-art-exhibition.html
[436] https://artreview.com/yokohama-triennale-2020-afterglow-review-must-the-show-go-on/
[437] https://www.asahi.com/ajw/articles/14757972
[438]https://www.tokyoartbeat.com/en/articles/-/tokyo-metropolitan-government-censors-yuki-iiyamas-film-touching-on-korean
[439] https://mainichi.jp/english/articles/20230512/p2a/00m/0na/010000c
[440]https://www.tokyoartbeat.com/en/articles/-/tokyo-metropolitan-government-censors-yuki-iiyamas-film-touching-on-korean
[441]https://gjia.georgetown.edu/2021/10/25/un-remembering-the-massacre-how-japans-history-wars-are-challenging-research-integrity-domestically-and-abroad/

disapproval process and the reasons revealed sparked protests[442] from the author artist and supporters, who see it as an act of censorship based on historical revisionism and racism.

Academic Freedom

In October 2020, the then Prime Minister Yoshihide Suga refused[443] to appoint six scholars nominated to serve on the governing body of the Science Council of Japan,[444] the country's leading academic society. The Prime Minister's appointment, typically a procedural formality, took a significant turn, as Suga's rejection marked the first such instance[445] since the inception of the nomination system. This move was widely criticized[446] as a threat to academic freedom. The scholars who were denied appointment were predominantly known for their critical stance on the government's security and anti-conspiracy legislations. However, the precise grounds for their rejection remained unclear.

The Ministry of Education's textbook approval process[447] as well as the educational board's decision-making process[448] for selecting textbooks remain controversial particularly regarding the treatment of Japan's 20th century colonial and military history in history textbooks.

Liberal Democratic Party lawmaker Mio Sugita has accused a group of researchers of misappropriating public research grants to support gender activism, characterizing their work as "research against national interests," "anti-Japan activity."[449] Sugita is currently facing a defamation lawsuit[450] filed by these researchers.

## III. Enforcement

Constitutionality of Hate Speech Ordinance

In February 2022, the Supreme Court of Japan delivered its inaugural judgement on the constitutionality of a hate speech ordinance, affirming the constitutional validity of the Osaka Hate Speech Ordinance. In a landmark case, the Supreme Court ruled that the Osaka Hate Speech Ordinance did not violate freedom of expression under Article 21(1) of the Constitution by disclosing the username of an individual who uploaded a hateful online video. The court emphasized the importance of deterring discriminatory behaviors, incitement to hatred, or criminal acts against racial or ethnic groups, recognizing the urgent necessity of hate

[442] http://surl.li/klqnl
[443] https://www.science.org/content/article/japan-s-new-prime-minister-picks-fight-science-council
[444] https://www.scj.go.jp/en/
[445] https://mainichi.jp/english/articles/20201002/p2a/00m/0na/007000c
[446] https://asia.nikkei.com/Politics/Suga-s-rejection-of-science-nominees-spurs-constitutional-storm
[447] https://thediplomat.com/2015/04/why-japans-textbook-controversy-is-getting-worse/
[448]https://www.japantimes.co.jp/news/2013/08/29/national/history/yokohama-recalls-texts-describing-1923-massacre-of-koreans/
[449] https://www.asahi.com/ajw/articles/13054277
[450] https://mainichi.jp/english/articles/20190212/p2a/00m/0na/011000c

deterrence in light of escalating malicious expressions in Japan. This ruling may impact ongoing discussions about striking a balance between freedom of expression and the implementation of anti-hate speech ordinances across Japan, and catalyze the adoption of similar ordinances.

Restriction on Public Protest

Several NGOs, as well as former UN Special Rapporteur David Kay in his country visit [451]and his report,[452] voiced concerns[453] about the limitations on the right to expression through public demonstrations, especially the silencing of anti-U.S. base protesters in Okinawa.[454] The concerns encompassed excessive force, numerous arrests of protest participants, and the use of force against journalists covering the protests. The United Nations Working Group on Arbitrary Detentions[455] denounced[456] the confinement of an Okinawan anti-base protest leader[457] as arbitrary detention.

Freedom of Speech of Judges

In 2018, the Supreme Court rendered a ruling[458] regarding a dispute involving judges' rights to express opinions on social media[459] and their official duties. The court reprimanded[460] Judge Kiichi Okaguchi for an "inappropriate" tweet which involved his commentary on a civil case involving someone who abandoned his dog.[461] In 2020, the Supreme Court also subjected[462] Judge Okaguchi to a cautionary disciplinary measure for another social media post.[463] The same judge[464] is undergoing an impeachment trial.[465]

**Conclusion**

Notwithstanding commendable strides in formulating anti-hate speech laws and ordinances, Japan encounters ongoing struggles in effectively combating diverse forms of discrimination.

[451]https://www.ohchr.org/en/statements/2016/04/preliminary-observations-united-nations-special-rapporteur-right-freedom-opinion?LangID=E&NewsID=19842
[452] http://hrn.or.jp/wpHN/wp-content/uploads/2017/05/A_HRC_35_22_Add.1_AUV.pdf (paras. 58-60)
[453]https://www.ohchr.org/en/statements/2016/04/preliminary-observations-united-nations-special-rapporteur-right-freedom-opinion?LangID=E&NewsID=19842
[454] https://imadr.org/japan-un-foe-countryvisit-okinawa-19april2016/
[455] https://www.ohchr.org/en/special-procedures/wg-arbitrary-detention
[456] https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session82/A_HRC_WGAD_2018_55.pdf
[457]https://www.japantimes.co.jp/opinion/2017/01/04/commentary/japan-commentary/silencing-anti-u-s-base-protester-okinawa/
[458][458] https://www.courts.go.jp/app/hanrei_en/detail?id=1604
[459] https://mainichi.jp/english/articles/20180912/p2a/00m/0na/021000c
[460] https://mainichi.jp/english/articles/20181017/p2a/00m/0na/032000c
[461] https://mainichi.jp/english/articles/20180912/p2a/00m/0na/021000c
[462] https://digital.asahi.com/articles/ASN8V6JF5N8VUTIL03Q.html
[463] https://sp.m.jiji.com/english/show/6904
[464] https://www.asahi.com/ajw/articles/14374888
[465]https://www.japantimes.co.jp/news/2022/03/02/national/sendai-judge-social-media-case/#:~:text=A%20judge%20at%20Sendai's%20High,inappropriate%20messages%20on%20social%20media.

The absence of comprehensive legal measures and a frail enforcement mechanism against discriminatory speech and behaviors remains a significant concern. The intricate equilibrium between addressing hate speech and harassment both online and offline, while upholding the sanctity of freedom of expression persists as a paramount challenge.

Furthermore, concerns about media autonomy and censorship persist. Notable incidents involving media independence, academic freedom, art exhibitions, and journalistic integrity underscore the influence exerted by government and corporate pressures. These influences often remain invisible to the public, hidden in untransparent, covert dialogues, or manifest as self-censorship, which has become more prevalent during the COVID-19 pandemic. During the period covered in this report, the unbroken stretch of strong conservative governance amid compounded crises, encompassing health and security threats, has emboldened far-right groups and individuals, particularly in virtual spaces. Ensuring that legislation fulfils its designated role without unduly compromising the essential rights and freedoms of people necessitates vigilant monitoring and thorough scrutiny. As the digital landscape continues to evolve, Japan must remain attentive to revising its laws and regulations to address emerging challenges, safeguarding individual rights, and fostering a secure online environment where people can express themselves freely, without concerns about discrimination or censorship. It is essential for Japan to construct transparent and accountable legal and institutional mechanisms to safeguard fundamental rights and freedoms for all its inhabitants.


# The Republic of Korea

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**Country Summary**

With restrictions to freedom of expression imposed during the pandemic lifted, three laws are still raising concern over their chilling effect on speech: The National Security Act includes provisions that could be used to restrict political pluralism and freedom of expression. After decreasing between 2017 and 2019, the number of persons accused of violating the National Security Act increased by 57.7% to 41 in 2021 and then decreased to 15 in 2022. The offenses of defamation and insult contained in the Criminal Code have been systematically used by public figures and corporations to silence criticism and accusations against them, stifling voices of whistleblowers or victims. It is estimated that there are over 60,000 complaints and accusations of criminal defamation and insults each year. The Communication Deliberation System allows the blocking and removal of online content on the request of the person concerned, acting as a means of administrative censorship of the Internet. More than 450,000 Internet postings are blocked annually under this system. The Public Official Election Act allows the removal of online content during election period: The National Election Commission demanded the deletion of 53,716 online postings during the 2020 general election and 86,639

online postings during the 2022 presidential election. Four laws prohibit civil servants from expressing their political opinions and belonging to a political party.

**Introduction**

From 2015 until 2022, the Republic of Korea has faced various challenges in promoting and respecting the freedom of expression. Being categorized as a medium-approval country for free speech, according to Justitia's Free Speech Index,[466] and 47/180 in Reporters Without Borders 2023 Index.[467] The country has had to deal with partial restrictions on freedom of expression due to the COVID-19 pandemic. These restrictions were initially implemented to prevent the spread of the virus and included national quarantine guidelines and social distancing policies. While the restrictions have now been lifted, there are still alarming issues such as National Security Acts, criminal defamation law, the communication deliberation system, and hate speech that could potentially hinder the quality of freedom of expression in the Korean community. During the 2021-2022 presidential election campaign, Korean society witnessed the escalation of gender conflict, including hatred and violent rhetoric against women and controversy over the abolition of the Ministry of Gender Equality and Family. The politicization of gender equality has exacerbated hatred against women and anti-feminist sentiments among young men, deepening gender conflict.[468] In a 2016 NHRCK Survey Research on Realities of Hate Expression and Regulation Measures, 94% of sexual minorities, and 79% of people with disabilities have experienced hate expression against them online.

**I. Legislation**

National Security

There has been concern that Article 7 of the National Security Act[469] violates the basic human rights including the freedom of expression as the provision is prescribed in a way that is excessively ambiguous and abstract. The fourth Concluding Observations of the UN Human Rights Committee in 2015[470] and the 2016 report of the UN Special Rapporteur on peaceful association and assembly[471] stated that there is a possibility of abuse of the National Security Act and restriction of political pluralism and freedom of expression due to this provision. Since early 2000, the National Human Rights Commission of Korea (NHRCK) has recommended to the government to abolish the National Security Act as the Act might restrict the freedom of thought and conscience as well as expression. However, the government did not accept the

[466] https://justitia-int.org/report-who-cares-about-free-speech-findings-from-a-global-survey-of-free-speech/
[467] https://rsf.org/en/index
[468] By the end of 2021, complaints filed with the NHRCK alleging adverse impact discrimination against men accounted for 60 per cent of the total number of complaints about sex discrimination. This trend is steadily increasing. (in Korean) https://www.yna.co.kr/view/AKR20211127043100004
[469] https://elaw.klri.re.kr/eng_service/lawView.do?hseq=26692&lang=ENG
[470] CCPR/C/KOR/CO/4 (2015), paras.48-49.
[471] A/HRC/32/36/Add.2 (2016), para.79.

recommendation.[472] In 2016, the NHRCK recommended to the Korean government to devise measures including revising Article 7 to prevent abuse of the act and prevent human rights violations in the National Action Plan (NAP, 2017-2021).

The number of people accused of violating the National Security Act decreased steadily to 73 in 2015, 27 in 2017 and 15 in 2019, but increased by 57.7% to 41 in 2021 and 15 in 2022.[473] This is an increase in the number of offenders violating the National Security Act as a result of a joint investigation by the National Intelligence Service (NIS) and the police, prior to the transfer of the anti-communist investigation function from the NIS to the police in 2024. There is a strong possibility that the number of people charged with violating the National Security Law will increase in the future.

Defamation

Under the Criminal Act,[474] the offense of defamation and insult is punishable by imprisonment for expressing facts or feelings (swear words) that may harm the social status of others. This excessive criminal punishment system has often been abused by political and economic powers, such as public figures and corporations, to silence voices of criticism and accusations against them. In addition, even telling the factual truth can lead to criminal defamation charges, which severely stifles the voices of whistleblowers or victims, including those involved in the MeToo movement. It is estimated that there are over 60,000 complaints and accusations of defamation and insult each year.[475] In the third (2017)[476] and fourth (2023)[477] cycles of the Universal Periodic Review (UPR) recommendations, there were recommendations to abolish the criminalization of defamation and insult, which restricts freedom of expression and threatens citizens with criminal punishment in order to resolve them through civil proceedings, but these were not implemented.

Regulation of Online Content (The Communication Deliberation System)

Article 44-2 of the Act on Promotion of Information and Communications Network Utilization and Information Protection, Etc.,[478] stipulates that, if someone claims that an online posting infringes their rights and requests to block it, the Internet operator shall take measures to block it. This system seriously violates freedom of expression and the right to information on the Internet, as it initially blocks online expressions only upon someone's request, when such

[472]https://www.humanrights.go.kr/site/program/board/basicboard/view?boardtypeid=24&boardid=7608328&menuid=001004002001 (in Korean)
[473] Status of handling of public security cases by crime type - Violation of the National Security Act (in Korean) e-index.go.kr
[474] https://elaw.klri.re.kr/eng_service/lawView.do?hseq=28627&lang=ENG
[475] (in Korean) https://www.fnnews.com/news/201609280904403919 Data from National Assembly member Keum Tae-sub's office (Source: Ministry of Justice, 2016)
[476] A/HRC/37/11 (2017)
[477] A/HRC/53/11 (2023)
[478] https://elaw.klri.re.kr/eng_service/lawView.do?hseq=38422&lang=ENG

expressions should be protected under the presumption of legality. It is known that more than 450,000 Internet postings are blocked annually under this system[479] and public figures and corporations use the system as a means of controlling public opinion on the Internet by requesting that large numbers of Internet postings critical of them be blocked.[480]

The Korea Communications Standards Commission (KCSC) is an administrative agency that has a communication deliberation system in place. This system is used to review illegal or harmful information that is posted on the Internet. If such information is found, the KCSC can request that information and communication service providers block it from being accessed based on Article 21 of the Act on the Establishment and Operation of Korea Communications Commission[481] and Article 8 of the Enforcement Decree of the Act.[482] This system, which acts as an administrative censorship of Internet information, blocks more than 200,000 cases of information every year.[483] Not only information with significant and obvious illegality, but also information that requires a high degree of legal judgment, such as defamation, violations of the National Security Act, as well as harmful information are subject to communication deliberation. Such a method has a high risk of potential abuse for censoring public thought or controlling public political opinion. It can largely block the information that should be protected under the freedom of expression only by the assertion of a person or a decision of an administrative body before the court's illegality decision.

Freedom of Expression during the Election Period

Freedom of expression on the offline sphere during the election period is limited by articles 90 and 93(1) of the Public Official Election Act.[484] During the 2016 general elections, individuals and civil society organizations who expressed their views on candidates and political parties were searched, confiscated and prosecuted for violating the Public Officials Election Law, convicted and fined. Some were even sentenced to five years' disqualification from standing for election. There were also problems with freedom of expression online during the election period. The Constitutional Court of Korea ruled the Internet Identity Verification System unconstitutional in 2012[485] and the Internet Real Name System unconstitutional during the 2021 election period.[486] However, any online post or article by a voter could be deleted, blocked or even investigated if the National Election Commission (NEC) deems it a violation of the Public Officials Election Act. The National Election Commission demanded deletion of

[479] (in Korean) http://www.mediaus.co.kr/news/articleView.html?idxno=104720 Data from National Assembly member Shin Yong-hyeon's office (Source : Korea Communications Commission, 2017)
[480] (in Korean) https://www.opennet.or.kr/19060
[481] https://elaw.klri.re.kr/kor_service/lawView.do?hseq=55370&lang=ENG
[482] https://elaw.klri.re.kr/kor_service/lawView.do?hseq=49544&lang=ENG
[483] Korea Internet Transparency Report, http://transparency.kr/
[484] https://elaw.klri.re.kr/kor_service/lawView.do?hseq=60172&lang=ENG
[485] Constitutional Court Decision, 2011Hun-Ma686 (2012)
[486] Constitutional Court Decision, 2018Hun-Ma456 (2021)

86,639 online postings during the 2022 presidential election and 53,716 online postings during the 2020 general election respectively.[487]

## II. Non-Legislative Developments

Freedom of Expression for Public Officials

Unlike ordinary citizens, civil servants are prohibited from expressing their political opinions and belonging to a political party under the Political Parties Act,[488] the Public Officials Election Act,[489] the State Public Officials Act[490] and the Local Public Officials Act,[491] and are subject to criminal sanctions. In addition, the Election of Public Officials Act imposes extensive restrictions on the participation of employees of public institutions and cooperatives in election campaigns, even though they are not civil servants or teachers, but civilians. The duty of political neutrality is imposed on civil servants and employees of public institutions and cooperatives in order to maintain the impartiality of public services. However, those who are subject to the law are excessively prohibited from exercising their right to freedom of expression in their daily lives outside of their duties.

The Regulation of Media

In September 2022, the government refused MBC (Munhwa Broadcasting Corporation) reporters who broadcasted the president's hot mic incident[492] when boarding the presidential aircraft. Despite the statement by the President of the Republic of Korea about the potential danger of misreporting to diplomatic relations with the United States, the hot mic incident has been controversial among the public as to whether it was misreporting at all, but more importantly, whether it should be considered a case of excessive suppression of the press as a violation of freedom of speech and expression. On the other hand, media organizations and related trade unions took a contrary stance to the government. Eight media and journalists' organizations, such as the Korean Federation of Journalists, issued a joint statement saying that restricting a certain kind of media organization from equal reporting opportunities for criticizing the government's misbehavior is a clear violation of freedom of expression in a democratic country. It is likely that foreign reporters shared a similar concern that a selective measure targeting a particular kind of media organization leads to press suppression and hinders the development of freedom of expression.

[487] (in Korean) https://www.opennet.or.kr/21096
[488] https://elaw.klri.re.kr/kor_service/lawView.do?hseq=60320&lang=ENG
[489] https://elaw.klri.re.kr/eng_service/%20lawView.do?hseq=38405&lang=ENG
[490] https://elaw.klri.re.kr/eng_service/lawView.do?hseq=444&lang=ENG
[491] https://elaw.klri.re.kr/kor_service/lawView.do?hseq=57376&lang=ENG
[492] https://en.yna.co.kr/view/AEN20221110001400315
;https://www.koreatimes.co.kr/www/nation/2023/05/120_343623.html?utm_source=KK

Political Satire

In October 2022, the Ministry of Culture, Sports and Tourism of Republic of Korea warned the Korea Cartoon and Video Agency for awarding a high school cartoon that includes satire of the current president.[493] It justified the warning by saying that artworks containing political satire or defaming a person's reputation are among the reasons for disqualification. However, the Webtoon Association of Korea, cultural critics and politicians criticized the Ministry of Culture, Sports and Tourism for interfering in private artistic activities, as it is the role of such national institutes to guarantee the autonomy of the public cultural sector. Although members of the Democratic Party submitted a petition to the NHRCK to investigate whether the following issue violates freedom of expression, the petition was rejected for failing to meet the standard of investigation.[494] Meanwhile, the NHRCK said it would make its views known to the Ministry of Culture, Sports and Tourism, with the intention that freedom of expression should not be restricted for the purpose of political engagement.

### III. Enforcement

From 2015 to 2022 there were no major case law developments concerning freedom of expression.

### Conclusion

The UN has been concerned about freedom of expression in the Republic of Korea since 2010, as described in the reports by the UN human Rights Council, special procedures, treaty bodies and the UPR. It is worth noting that most of the freedom of expression issues remain unresolved, if not worsened. The ability to engage in public scrutiny and criticism is also an important measure of a country's democratic maturity. Regrettably, the Republic of Korea still faces restrictions on open criticism, revealing its democratic immaturity, for example, as criminal defamation law implicitly serves as a political tool to stifle and intimidate the press and individuals.

[493] https://en.yna.co.kr/view/AEN20221005007900315
[494] https://imnews.imbc.com/replay/2023/nwdesk/article/6477643_36199.html (in Korean)


# New Zealand

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**Country Summary**

Against the backdrop of terrorist attacks, New Zealand adopted the Counter-Terrorism Legislation Act in 2021, expanding the scope of organizations that can be declared to be terrorist entities as well as the scope of terrorist control orders under the Terrorism Suppression (Control Orders) Act 2019, which provides powers for the Police to apply to the Courts for orders that can restrict the rights of persons suspected or accused of involvement in terrorist acts. Between 2015 and 2022, six restrictive laws were passed: three regulating online content, one providing criminal and civil penalties for harmful online speech directed at individuals, one providing for a presumption of imprisonment for repeat offensives of banned publications involving the sexual exploitation of children, and one passed during Covid, permitting the Department of Internal Affairs to order online content hosts to remove access to banned publications. One law on misinformation provides for a ban on publishing false statements to influence voters on election day. Two laws regulating the media, one amending the rules around public descriptions of self-inflicted death, and one codifying the law of contempt of court in New Zealand, creating criminal offenses around ensuring the orderly function of Court and trial processes. A fall in prosecutions for offensive language is evident, with the number of prosecutions dropping from 659-1050 annually before 2015, to

96-200 prosecutions between 2015-2022. Defamation law remains an ongoing concern for freedom of expression in New Zealand, heavily favoring plaintiffs, with the obligation of establishing the truth of any claims remaining with the publisher, although Courts have expanded the possible defenses to defamation, especially in the political sphere.

**Introduction**

New Zealand remains a society whose laws have a healthy respect for freedom of expression, but one where vigilance remains necessary. New Zealand scores well in other international comparison of freedom. Freedom House scored New Zealand 99/100 points in 2021 and 2022,[495] with perfect marks on freedom of expression and belief from 2017-2022.[496] In the assessed period, two events have particular salience for consideration when addressing legal and regulatory changes affecting freedom of expression: First, the 2019 terror attack at two Christchurch Mosques,[497] which saw 51 Muslims killed, and second, the lockdowns and other restrictions occasioned by the Covid-19 Pandemic, particularly the additional and longer lockdowns that were put in place in Auckland, New Zealand's largest city.

New Zealand laws set limits on freedom of expression in areas in common with other liberal democracies, including protection of reputation and privacy, prohibitions on inciting racial hatred and the protection of public order. The censorship regime bans images of child sexual abuse, and other material such as support for and depiction of terrorism, and encouragement of violence. Although New Zealand does not have a codified constitution, it does have statutory protection for civil and political rights in the New Zealand Bill of Rights Act 1990,[498] including freedom of expression. While Courts cannot strike down laws passed by Parliament, Courts are required to take account of the Bill of Rights when interpreting other statutes, and can strike down subsidiary legislation, and government decisions for non-compliance with guaranteed rights. The restrictions imposed by defamation law, although not out of step with other liberal democracies remain an ongoing concern in New Zealand, while new issues have arisen out of the legislative and regulatory responses to the threat of terrorism, and for news media, concern about Court suppression orders, particularly in high profile cases.

<u>Response to Terrorism</u>

The 2019 Terrorism Suppression (Control Orders) Act 2019 [499]provides powers for the Police to apply to the Courts for orders that can restrict the rights of those whom the Government suspect of an intention to engage in terrorism. They can be used to impose substantial

[495] https://freedomhouse.org/country/new-zealand/freedom-world/2023
[496] During 2017-2019, New Zealand scored 98/100 overall. In 2020 New Zealand dropped a point to 97 following the terrorist attack in 2019.
[497] https://en.wikipedia.org/wiki/Christchurch_mosque_shootings
[498] https://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html
[499] https://www.legislation.govt.nz/act/public/2019/0079/latest/whole.html#LMS258603. These have been further expanded in 2023.

restrictions on people even if they have not been convicted of a terrorism offense (or indeed any offense). These control orders can limit the freedom of expression (banning people from accessing the Internet, for example) and freedom of association and movement of people whom the Government can convince a Court are at risk of engaging in terrorism. Concern around terrorism, following both the Mosque attack and a frenzied knife attack in 2021 that resulted in injuries to several victims at an Auckland Supermarket,[500] saw the Government response to terrorism stepped up, including passage of both the Counter-Terrorism Legislation Act 2021,[501] which expanded the definition of which organizations can be declared to be terrorist entities and expanded the scope of terrorist control orders under the aforementioned 2019 Act.[502]

A recommendation from the Commission of Inquiry into the attacks[503] that New Zealand adopt a wide-ranging reform of hate speech legislation, largely drawing on law in the Republic of Ireland, was pursued by the government but has not resulted in any legal amendment. The Inquiry's proposal would have removed the crimes involving the incitement of hatred from the Human Rights Act 1993,[504] where they were little used and moved them to the Crimes Act 1961,[505] expanding their scope to cover additional protected characteristics (including religious identity, sex and gender, and sexual orientation), along with increased penalties and a civil prohibition on incitement to discrimination. There was substantial public opportunity for both civil society organizations and individuals to comment on the hate speech proposals at the initial design phase, and once legislation had been proposed, with more than 19,000 submissions[506] on the 2021 discussion document, "Proposals against incitement of hatred and discrimination."[507] After considering the public feedback, the Government did not adopt the substantive approach proposed by the Royal Commission, instead favoring a narrower expansion to existing hate incitement provisions.[508] The proposed law was abandoned in early 2023,[509] with the government announcing it would refer question of reform of "Legal Responses to Hate" to the Law Commission, meaning any expansion of regulation of incitement will be delayed for some years. Work has not begun on this project. [510]

[500] https://en.wikipedia.org/wiki/2021_Auckland_supermarket_stabbing
[501] https://www.legislation.govt.nz/act/public/2021/0037/latest/LMS479298.html
[502]https://www.legislation.govt.nz/act/public/2019/0079/latest/whole.html#LMS258603. These have been further expanded in 2023.
[503] https://christchurchattack.royalcommission.nz/
[504] https://legislation.govt.nz/act/public/1993/0082/latest/DLM304212.html
[505] https://www.legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html
[506]https://www.justice.govt.nz/about/news-and-media/news/feedback-on-incitement-and-hate-speech-laws-released/
[507] https://www.justice.govt.nz/assets/Documents/Publications/Incitement-Discussion-Document.pdf
[508] https://legislation.govt.nz/bill/government/2022/0209/latest/whole.html
[509] https://bills.parliament.nz/v/6/75c45918-9b4f-478e-a070-fdf2f467ba36?Tab=history
[510] https://www.lawcom.govt.nz/our-projects/legal-responses-hate

The New Zealand/France-led Christchurch Call to Eliminate Terrorist and Violent Extremist Content[511] has not resulted in legislative change in New Zealand, operating largely as a partnership between governments and tech companies on reporting tools and algorithms. Content that supports terrorism is regulated under New Zealand's censorship legislation, which has had some technical changes, but is largely unchanged.

The Committee Against Torture expressed concerns with aspects of New Zealand's counter terrorism legislation, in particular the Counter Terrorism Legislation Act 2021,[512] which it considered allowed "excessive restrictions on the rights of persons suspected or accused of involvement in terrorist acts."[513]

Covid State of Emergency

Restrictions made under the COVID-19 Public Health Response Act 2020[514] drastically limited rights of assembly and protest during periods of nationwide and local lockdowns to respond to the COVID-19 pandemic. They have now been repealed. While there was general support for firm measures at the beginning, public unease grew, and protests were held in places where protests were banned. While Police did not break up these protests, those alleged to be leading the protests have been prosecuted and imprisoned for breaching the restrictions imposed by the emergency response.[515] In 2022, post-lockdown rules around vaccinations led to a 24-day occupation of the grounds of the New Zealand Parliament,[516] ending with violent resistance to a Police action to clear the grounds and surrounding streets. There were dozens of arrests, but many of the more minor charges have been dropped. Government concern about misinformation arising during Covid has seen expanded efforts to combat this, to date, largely through engagement with tech companies, with no law changes, yet.

## I. Legislation

The Regulation of Online Content

The Harmful Digital Communications Act 2015 was passed, providing criminal and civil penalties for harmful online speech directed at individuals. It created a criminal offense of intentionally causing serious emotional distress through electronic publication, which has been most widely applied to prosecute non-consensual publication of consensually obtained intimate images (so-called "revenge porn"), but which is not limited to this. Amendments in

[511] https://www.christchurchcall.com/
[512] https://www.legislation.govt.nz/act/public/2021/0037/latest/LMS479298.html
[513]https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/DownloadDraft.aspx?key=4i+iDvQURHuSmCsMKg0hCJ7wU6SfXjmcPyhyA5TbH5+Ct5+5+H9Qe+OOqiBtZRk3kLC1sKE1KoARLohHoNhJAA==
[514] https://www.legislation.govt.nz/act/public/2020/0012/latest/LMS344134.html
[515]https://www.nzherald.co.nz/nz/crime/covid-19-lockdown-breach-conspiracy-theorists-billy-te-kahika-vincent-eastwood-sentenced-to-prison/7OJ73C2SKJDF7FX3AWZITGBIL4/
[516] https://en.wikipedia.org/wiki/2022_Wellington_protest

2022[517] sought to make revenge porn easier to prosecute. The Act contains very strong protections for intermediaries.[518] The Films, Videos, and Publications Classification (Objectionable Publications) Amendment Act 2015[519] amended censorship law to update it for changes in technology, and to provide for a presumption of imprisonment for repeat offensives involving banned publications involving the sexual exploitation of children.

The Films, Videos, and Publications Classification (Urgent Interim Classification of Publications and Prevention of Online Harm) Amendment Act 2021[520] allowed the Censor to ban publications on an interim basis and permits the Department of Internal Affairs to order online content hosts to remove access to banned publications.

Misinformation

The Electoral Amendment Act 2017[521] narrowed the effect of the ban on publishing false statements to influence voters to include only information first published on election day and in the two days preceding election day, following a Court decision which said it covered information which was still online during that time. The law also expanded restrictions on advertising during the advance voting period by creating buffer zones around voting places in which campaigning is prohibited.

Regulation of the Media

The Coroners Amendment Act 2016[522] amended the rules around public descriptions of self-inflicted death. For the first time it permitted people to describe a death as a "suspected suicide" without needing permission from a Coroner. The ban on describing the method of a self-inflicted death was expanded to explicitly include a ban on describing any detail of a suspected self-inflicted death that suggests the method of death. The process for obtaining permission to do so was streamlined.

The Contempt of Court Act 2019[523] codified the law of contempt of court in New Zealand, creating a number of criminal offenses around ensuring the orderly function of Court and trial processes. Courts may order websites, including news media, to take down information to preserve trial rights. Most controversially, it codified the prohibition on "scandalizing the Court," providing a criminal offense of publishing false statements about judges and courts in order to undermine public confidence in the judiciary.

[517] https://legislation.govt.nz/act/public/2022/0003/latest/LMS368115.html
[518] https://legislation.govt.nz/act/public/2015/0063/latest/DLM6512505.html
[519] https://www.legislation.govt.nz/act/public/2015/0042/latest/whole.html
[520] https://www.legislation.govt.nz/act/public/2021/0043/latest/LMS294551.html
[521] https://www.legislation.govt.nz/act/public/2017/0009/latest/DLM6963343.html
[522] https://www.legislation.govt.nz/act/public/2016/0029/latest/DLM6223504.html
[523] https://www.legislation.govt.nz/act/public/2019/0044/latest/LMS24753.html

Censorship

In a welcome move, the Films, Videos, and Publications Classification (Interim Restriction Orders) Amendment Act 2017[524] provided a process by which interim restrictions could be imposed on publications pending the resolution of a challenge to a decision of the Censor, after an award-winning young adult novel was temporarily banned in 2015,[525] that being the only option then available.

## I. Enforcement

Fall in Prosecutions for Offensive Language

One promising feature of New Zealand's approach to freedom of expression is the approach its courts and police take to the enforcement of expansive criminal laws. New Zealand has offensive language laws[526] similar to those in England and Wales,[527] but the Courts have substantially narrowed the application of the New Zealand offenses, and Police are less likely to pursue charges. Following a 2010 decision of the New Zealand Supreme Court limiting the scope of the offensive behavior charge,[528] prosecutions for offensive language dropped markedly. In the 10 years before the decision, the number of prosecutions ranged from 659-1050 annually, during the 2015-2022 period there were between 96-200 prosecutions.

Enforcement of Censorship Laws

New Zealand's Chief Censor took an active role in banning terrorist related content, leading to numerous prosecutions[529] for those sharing the livestream of the Christchurch Terror attacks. The terrorist's written "manifesto" was also banned in New Zealand but was not the subject of as many prosecutions.[530] A major concern with New Zealand's censorship legislation arises not from the role of the censor themselves, but in the exercise of prosecutorial discretion by Police and other prosecutors. Many people are not prosecuted who theoretically could be, while some people face major consequences that most others would not. An example of concern is prosecution of the individual described above as committing the terrorist knife attack in Auckland.[531] The individual had come to the attention of authorities well in advance of the attack, and he was under substantial surveillance at times. He was prosecuted for sharing

[524] https://www.legislation.govt.nz/act/public/2017/0043/latest/DLM7029804.html
[525]https://www.nzherald.co.nz/entertainment/will-i-be-burnt-next-into-the-river-author-ted-dawe-on-book-banning/JVZ5AJFAHX6T7MMOWY72GWU6OI/
[526] https://legislation.govt.nz/act/public/1981/0113/latest/DLM53500.html
[527] https://www.legislation.gov.uk/ukpga/1986/64/section/5
[528] *Morse v The Queen* SC 10/2010. (https://www.courtsofnz.govt.nz/cases/valerie-morse-v-the-queen-1)
[529] https://www.rnz.co.nz/news/national/397953/charges-laid-in-35-cases-over-sharing-of-video-of-christchurch-terror-attacks
[530] https://www.classificationoffice.govt.nz/news/news-items/response-to-the-march-2019-christchurch-terrorist-attack/
[531] https://en.wikipedia.org/wiki/2021_Auckland_supermarket_stabbing

material on Facebook said by Police to support violence or terrorism. The Chief Censor ruled that it did not support terrorism (some of the items included footage of atrocities, including material that had aired on al Jazeera, and had been posted online by the Daily Mail) and instead imposed an age restriction, forbidding the items from being shown to those under 18. He was then prosecuted for sharing R18 material with people under 18 because of the Facebook posts, although there was no evidence anyone under 18 had visited his Facebook page, and even though the age-restriction had not existed at the time of the posting. It was not previously clear that the offenses around showing age-restricted material to people under the age restriction operated retrospectively, but the High Court was prepared to sentence him on this basis. While prosecutions from possession of objectional material are common, prosecutions around restricted material are rare, and would be highly restrictive if applied more generally.

Court Decisions

As a common law jurisdiction, New Zealand's courts also play a substantial role in developing the law, including in areas around freedom of expression. There have been several major Supreme Court decisions touching on freedom of expression. In 2021 and 2022, there was a Court challenge to a decision taken by the Auckland City Council to cancel the booking of a public space for a meeting to be held by a pair of alt-right provocateurs. The case reached the New Zealand Supreme Court,[532] and although those who challenged the cancellation ultimately lost because of the particular facts of their case, the general principle that Councils must respect freedom of expression in these decisions was established, and some Councils have subsequently been more careful in response to similar events.[533]

Over the course of several years, the Supreme Court ruled[534] that engaging in political advocacy did not preclude Greenpeace from being a registered charity, but that Family First, a socially conservative advocacy organization that "seeks to promote strong families, marriage, and the value of life," could not. Family First continues to operate as a non-profit without the benefits of registration as a charity.

Name suppression remains an ongoing concern for news media, with Courts prohibiting the publication of important case details in respect of 6,437 charges (8% of cases) in the 2021/2022[535] financial year, this included 766 people who received name suppression despite being convicted.[536]

[532] https://www.courtsofnz.govt.nz/cases/malcolm-bruce-moncrief-spittle-and-david-cumin-v-regional-facilities-auckland-ltd-and-auckland-council
[533] e.g. *Whitmore v Palmerston North City Council* [2021] NZHC 1551, a successful injunction requiring a Council-owned public library to permit a booking for a public meeting on a proposed law change to go ahead.
[534] https://www.courtsofnz.govt.nz/cases/attorney-general-v-family-first-new-zealand
[535] https://www.justice.govt.nz/assets/UgEda1-Justice-Statistics-data-tables-notes-and-trends-jun2022-v1.0.pdf
[536] Automatic suppression of the names of offenders appearing in the Youth Court is excluded from these data.

Defamation law remains an ongoing concern for freedom of expression in New Zealand, heavily favoring those complaining of defamation, with the obligation of establishing the truth of any claims remaining with the publisher. Court rulings have expanded the possible defenses to defamation, especially in the political sphere, but the prohibitive cost of defending complex defamation proceedings means that even mainstream news media can be reluctant to publish important information in the public interest in respect of wealthy individuals. New Zealand's largely plaintiff-friendly defamation laws lack basic processes like anti-SLAPP (Strategic Lawsuit against Public Participation) laws to quickly weed out unmeritorious claims, and the cost burdens civil justice can impose upon others mean New Zealand's civil justice system remains at risk of libel tourism.[537] In a 2017 defamation proceeding brought against a member of Parliament for statements made while he was leader of the opposition, the Courts extended the defense of qualified privilege to include public statements on matters of public interest.[538] The new defense is in its infancy but follows other expansions to qualified privilege defenses.[539]

**Conclusion**

New Zealand is not routinely questioned over its record on freedom of expression. No questions or comments about freedom of expression were raised in New Zealand's most recent Universal Periodic Review before the UN Human Rights Council, nor in the most recent periodic report of the Human Rights Committee. The most recent Reporters Without Borders reporting notes that "New Zealand is a model for public interest journalism. With market regulation, favorable legal precedents and respect for diversity, the population of 5 million benefits from a high degree of press freedom." [540] Nevertheless, there remain ongoing concerns. The cost of defending civil litigation, and plaintiff-friendly defamation laws, mean that concern about facing legal action is a threat to investigative journalism. Strong Court precedent when dealing with speech restrictive criminal offenses, limit the use of the criminal law as a response to political speech, although prosecutions related to protest remain, albeit usually under other laws (for example, trespass). Expanding counter-terrorism powers remain a concern as well, with the Censor's office expanding its role in Countering Violent Extremism. New Zealand's laws tend to provide strong protections for online intermediaries across all areas, including copyright, harmful communications and banned content. Despite New Zealand experiencing disruptive protests, like the Covid occupation at Parliament, and anti-fossil fuel protests blocking public roads, to date there have been no moves to respond with additional police powers or expanded criminal offenses in this area. Several important matters have arisen in 2023, outside the time covered by this report, including the Government's

[537]https://www.rnz.co.nz/national/programmes/mediawatch/audio/2018735209/jones-vs-maihi-case-prompts-calls-for-defamation-law-reform
[538] *Hagaman v Little* [2017] NZHC 813.
[539]https://www.equaljusticeproject.co.nz/articles/2017/07/cross-examination-andrew-little-new-zealands-defamation-laws
[540] https://rsf.org/en/country/new-zealand

referral of hate speech regulation to the Law Commission[541] and a government discussion document proposing to regulate online content under a new media regulator[542] aiming to achieve "Safer Online Services and Media Platforms."

[541] https://www.lawcom.govt.nz/our-projects/legal-responses-hate
[542] https://www.dia.govt.nz/safer-online-services-media-platforms-consultation


# Norway

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**Country Summary:** The new Penal Code of 2015 decriminalized blasphemy and defamation while still punishing the violation of privacy. In 2021, three amendments to the Criminal Code were introduced: Section 185 of the Code was amended to include hate speech against a person or group based on their gender expression or gender identity; Section 77 introduced gender and gender expression as an aggravating circumstance in the committal of an offense; and unentitled sharing of infringing images was confirmed as a criminal offense. In 2019, the Working Environment Act was amended to include a general duty for the employer to secure a good environment for free speech in the workplace. Three non-legislative developments are currently underway: one amendment to the Surveillance legislation allowing intelligence services to command digital services providers to facilitate any border crossing communication for analysis. The amendment contains a degree of court control and protection of journalists' sources, but there have been discussions on the amendment's possible chilling effect. One bill proposes a ban on "conversion therapy" and one proposed amendment to the Freedom of Information Act. It establishes that not only internal documents of a government agency but also entries in records relating to internal organ documents, may be exempted from public disclosure. Amendments are also proposed to the Freedom of Information

Regulations and the Archive Regulations to clarify that public bodies may record internal documents of a government agency without information about these documents being published in the public postal journals that are available online.

## Introduction

Norway has been number one on the Word Press Freedom Index of Reporters without Borders[543] for several years. Norway ranks 4th out of 161 countries in Article 19's 2022 Global Expression Report.[544] It ranked 1st out of 33 countries in Justitia's 2021 Free Speech Index which looked at public attitudes to freedom of expression.[545] The media enjoys a high degree of protection through legislation, in terms of protection against defamation charges, protection of sources and independence. It is illustrative that, during recent debates on the implementation of the European Media Freedom Act, the Association of editors-in-chief expressed concern that the regulation could lead to weaker protection than what already exists in Norway. Freedom of expression is also strong in other areas. Academic freedom is protected in universities, although discussions on cancel culture and no-platforming have arisen in Norway as well. A very hot issue regarding freedom of expression at the moment is the burning of the Koran in public. This is considered a protected expression and is, as such, not punishable, even if the context may in certain cases imply hate speech. This has led to much debate since Norwegian and Swedish practice is quite similar, and because this practice has become an issue with Sweden's membership in NATO. It remains to be seen whether such political pressure means that the principled protection of such expressions is weakened.

The Norwegian courts have also traditionally enforced the principles of freedom of expression consistently. An example of that is a Norwegian Supreme Court ruling known as the "Rolfsen case." It was deemed by Columbia University to be the most significant ruling in 2016[546] for not letting the fight against terror overshadow journalistic source protection. In the case, the police had seized film recordings made by a documentary filmmaker who was working on a film about the recruitment of possible terrorist. The Supreme Court lifted the seizure.

Freedom of expression in the Norwegian workplace seems to be under some pressure. This concerns actual perceived freedom of expression, not legal changes. In fact, legislation on this aspect of freedom of expression is actually improved. However, research shows that fewer people today are willing to make critical statements about the workplace than before. It is uncertain what is the cause of this development. One hypothesis could be increased professionalization in both private and public workplaces, for example the use of designated public relations personnel. Another hypothesis could be that there has been so much focus on

[543] https://rsf.org/en/index
[544] https://www.article19.org/wp-content/uploads/2022/06/A19-GxR-Report-22.pdf
[545] https://futurefreespeech.com/who-cares-about-free-speech-findings-from-a-global-survey-of-free-speech/
[546] https://globalfreedomofexpression.columbia.edu/prizewinners2016/

rules on whistle blowing, based on certain criteria and case management, that use of the general freedom of expression has been somewhat displaced.

As in all countries, there is a lot of debate in Norway on how to deal with artificial intelligence and various aspects of social media. It is well known that these phenomena could have a large impact on actual freedom of expression. Norway's special position here is that the regulation of these areas takes place through European legal development. It is expected that European rules will be implemented in Norway. At the same time, Norway is not a member of the EU, and has limited influence on the development of these rules. Many would argue that for this reason, the Norwegian authorities have been passive on these issues.

## I. Legislation

New penal code

In October 2015, the new Norwegian penal code entered into force. This led to several changes with implications for freedom of expression. Of particular importance are the rules on blasphemy, defamation and privacy. [547]

*Blasphemy*

Parliament decided that the new law should not include a section criminalizing blasphemy. In April 2015, the Parliament's Justice committee decided to repeal the current blasphemy section, as no one had been prosecuted for breach of the paragraph since the 1930's and the committee also expressed that "as much free and open criticism and debate of religion as possible is a prerequisite for a well-functioning democracy, especially in a multicultural society." Blasphemy is no longer punishable by law in Norway.

*Decriminalization of defamation*

When the new Penal Code entered into force, defamation was decriminalized. At the same time, a new section 3-6(a) in the Civil Code entered into force.[548] According to this, the insulted party can claim damages in civil proceedings, based on the criteria developed by the European Court of Human Rights. Through this, Norway adhered to the Parliamentary Assembly of the Council of Europe (PACE) Resolution 1577 Towards Decriminalization of Defamation (2007) and corresponding Recommendation 1814 (2007).

[547] Preparatory Work: https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Innstillinger/Stortinget/2014-2015/inns-201415-248/) and https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Innstillinger/Odelstinget/2008-2009/inno-200809-073/?lvl=0#a13.1.2

[548] https://lovdata.no/dokument/NL/lov/1969-06-13-26/KAPITTEL_3#KAPITTEL_3

*Privacy*

Violation of privacy is not decriminalized; it is still a criminal offense according to Section 267 of the new Penal Code.[549] The protected "privacy" does not cover all personal data but is limited to publication of sensitive personal information. The maximum penalty for this offense was even raised in the new code, based on the argument that those who have to withstand stronger public criticism, must also have strong protection for the most private.

*Hate Speech - Amendments to the Penal code section 185*

Section 185 in the Norwegian Penal Code criminalizes hate speech. The section has its foundation in Norway's ratification to the International Convention on the Elimination of All Forms of Racial Discrimination and has since been amended several times. It constitutes an interference with the right to freedom of expression, to protect people against discriminatory hate speech. Section 185 was amended in January 2021, to also include hate speech against a person or group based on their gender expression or gender identity. The majority of the Parliament's Judiciary Committee found it important and necessary to protect transgender persons. The majority further pointed out that freedom of expression, belief and religion is strongly protected, and that the provision is not intended to restrict religious communities' interpretations and statements of their own religious texts.

In August 2022, the Freedom of Expression Commission recommended amending Section 185 to better reflect the threshold for conviction as set up in the Supreme Court's judgements (discussed in the section on 'enforcement' below). The report[550] has been subjected to a public hearing and the statements are currently under consideration by the Ministry.[551]

*Amendments in the Penal Code section 77 on Aggravating Circumstances*

Section 77 of the Penal Code deals with aggravating circumstances when determining sanctions. As of January 1st 2021, this provision also includes gender expression and gender identity. Paragraph 77 (i) has the following wording:

"In connection with sentencing, aggravating factors to be given particular consideration are that the offense:

[549] https://lovdata.no/dokument/NL/lov/2005-05-20-28/KAPITTEL_2-9#KAPITTEL_2-9
[550]https://www.regjeringen.no/contentassets/753af2a75c21435795cd21bc86faeb2d/no/pdfs/nou20222022000900 0dddpdfs.pdf
[551] The consultation statements from different organizations, companies, private parties and public bodies: https://www.regjeringen.no/no/dokumenter/nou-20229-en-apen-og-opplyst-offentlig-samtale-horing/id2928888/?expand=horingsbrev&lastvisited=undefined

i. was motivated by a person's religion or life stance, skin color, national or ethnic origin, homosexual orientation, gender expression or gender identity, disability or other circumstances relating to groups with a particular need for protection,

The amendment aimed to strengthen the protection of trans gender people and others who have a gender identity or expression that goes against the expectations of their surroundings.

*Protection of sensitive information*

In 2021, amendments were made to Sections 267 (a) and (b) of the Penal Code, criminalizing sharing of infringing images. More specifically, the Penal Code was amended to include sharing of images, films, and audio recordings of offensive or evident private nature, for instance, of someone's sexual life or intimate body parts, someone who is subjected to violence or other humiliations, or someone who finds themselves in a very vulnerable situation. The amendment was intended to ensure that non-consensual sharing of infringing images is a criminal offense, and that this is clearly expressed in the law. The penalty level was also raised for serious cases of unjustified sharing of such images in a new Section 267(b). For other violations, the amendment was meant to establish the level of punishment established in previous case law.

*Amendments to the penalty provision for violations of the representative of a foreign state*

Section 184 of the Penal Code concerns public order offenses against a foreign state or an intergovernmental organization. The section was clarified in the interests of freedom of expression, so that only illicit insults can be punished, as opposed to the previous wording that stated that insults were punishable by law. At the same time, the scope of the provision was expanded to also include representatives from intergovernmental organizations.

Civil Rights Law

*Amendments to the Personal Data Protection Act and the Freedom of Information Act (freedom of expression and information, etc.)*

Parliament adopted amendments to the Personal Data Act and the Freedom of Information Act. Section 26 (6) of the Freedom of Information Act makes exceptions to the right of access for compilations and overviews prepared in connection with access to one's own personal data pursuant to the General Data Protection Regulation. Furthermore, there is a new regulation in paragraph 5 regarding deferred access to information from The Norwegian Parliamentary Oversight Committee on Intelligence and Security Services, as well as amendments to Paragraph 3 of the Personal Data Protection Act.

*Trade Secrets Act*

The new act on trade secrets came into force on January 1st, 2021, and implements the EU's directive on the Protection of Trade Secret. The act aims to simplify the regulations and strengthen the protection of trade secrets by bringing together previously overlapping and scattered rules.

*Media Liability Act*

A new Media Liability Act was implemented in 2022, clarifying the media's limits when it comes to, among other things, freedom of expression, source protection, and defamation. At the same time, amendments were made to Section 3-6 of the Indemnity Act relating to defamation.

*Postal Services Act*

The Postal Services Act was amended in 2015 to include a change in the number of redistribution days. The changes were based on the fact that Norwegians send fewer and fewer letters. As opposed to the previous delivery of mail from five times a week, it is now one delivery of postal items every other day, Monday to Friday, in a two-week cycle, to any legal or natural person's place of business or permanent year-round residence. The authority may issue regulations and make individual decisions concerning services subject to delivery, including requirements relating to the scope of services, geographical coverage area, service and quality, collection scheme, and the number and location of expedition locations. The authorities may also issue regulations and make individual decisions on compensatory measures.

*Working Environment Act and Whistleblowing*

The Working Environment Act was amended in 2017, to provide protection of whistleblowers in chapter 2A.[552] The rules contain a description of reprehensible acts that can form the basis for whistleblowing, protection of the employee and the employer's duties. In case of any retaliation from the employer, the employee is entitled to damages. In 2019 the protection was further strengthened. In 2019 Section 1-1 c of the Working Environment Act[553] was amended to include a general duty for the employer to secure a good environment for free speech in the workplace.

Scope of protection: The chapter in the Working Environment Act relating to notification and health environment and safety, was expanded to also give rights to persons who are not employees. According to the new law "the following persons are regarded as employees

[552] https://lovdata.no/dokument/NL/lov/2005-06-17-62/KAPITTEL_3#KAPITTEL_3
[553] https://lovdata.no/dokument/NL/lov/2005-06-17-62/KAPITTEL_3#KAPITTEL_3

pursuant to the Act's provisions concerning notification and health environment and safety when performing work in undertakings subject to the Act:

a. students at educational or research institutions,
b. national servicemen,
c. persons performing civilian national service and Civil Defense servicemen,
d. inmates in correctional institutions,
e. patients in health institutions, rehabilitation institutions and the like,
f. persons who for training purposes or in connection with work-oriented measures are placed in undertakings without being employees,
g. persons who without being employees participate in labor market schemes.

**Other proposed amendments to the law which are not yet enacted or in force**

*Surveillance legislation*

Norway has two intelligence services: a branch of the police (PST) for domestic matters, and "Etterretningsjenesten" for threats from abroad. Legislation for both services has recently been amended to increase their access to digital information in "bulk." The legislation is only partly in force. For Etterretningsjenesten, Chapter 7 of the Etteretningstjenesteloven[554] will give the service authority to command digital service providers to facilitate any border crossing communication for analysis. The amendment contains a degree of court control and protection of journalist's sources, but there have been discussions on the amendment's possible chilling effect. The amendment regarding the domestic service (PST) has led to similar discussions. This will give PST authority to download all openly accessible information on the Internet. According to a new section 65(a) in the Politiregisterlov,[555]such material can be stored for up to five years and, for surveillance purposes only can be analyzed with artificial intelligence.

*Ban on Conversion therapy*

The Ministry of Culture and Equality has proposed to criminalize "methods for the purpose of prompting another to change, deny or suppress their sexual orientation, or gender identity, which is clearly liable to cause the person in question psychological harm." The Ministry has pointed out that the penalty provision must be interpreted with the Constitution and Norway's human rights obligations. In terms of religious practice, expressions of opinion and religious expression, the threshold for which actions are affected can only be ascertained after a closer assessment of the rights to freedom of religion and freedom of expression. The proposal has

[554] https://lovdata.no/dokument/LTI/lov/2020-06-19-77
[555] https://lovdata.no/dokument/NL/lov/2023-04-28-11?q=endring%20politiregisterlov

been subject to a public hearing, and the statements and proposal are currently being processed by the Ministry. [556]

Proposed amendments to the Act relating to the right of access to documents held by public authorities and public undertakings (Freedom of Information Act)

The Ministry of Justice has proposed an amendment to Section 14 (1) of the Freedom of Information Act that makes it clear that not only internal documents of a government agency as such, but also entries in records relating to internal organ documents, may be exempted from public disclosure. Furthermore, amendments are proposed to the Freedom of Information Regulations and the Archive Regulations to clarify that public bodies may record internal documents of a government agency without information about these documents being published in the public postal journals that are available online through eInnsyn or in some other way. As of April 20th 2023, the proposal is being subjected to a public hearing.

## II. Enforcement

Case law from the Supreme court of Norway on hate speech from 2015-2022:

*HR-2022-1843-A (gender identity, gender expression):* The case concerned the question of whether statements made to a trans woman on Facebook were punishable by the law. The defendant and the victim had known each other for 15-20 years and they had previously had social interaction, including on "laiv", which is a form of role-playing. A few years prior to the Facebook messages, the victim had changed legal gender from male to female, and changed name to a woman's name. The defendant called her, among other things, a perverted male pig with sick fantasies and wrote that it was incomprehensible to him that the authorities still allowed her to care of her kids. The supreme court found that the statements constituted hate speech.

*HR-2022-1707-A (ethnicity):* The case concerned a man who had shouted at a 16-year-old girl with a Somali background that she should "go back to Somalia, you'll be much better off, because you won't get any NAV [557] there." The majority of the Supreme Court (3 out of 5 judges) found that the speech was hate speech but would not be so if the victim was an adult. Dissenting judges found that the statement was protected by free speech.

*HR-2020-2133-A: (ethnicity*) A woman had said, without any prior interactions between the parties, in a queue outside a fast-food restaurant, among other things to a young boy of

[556] Consultation statements from different organizations, companies, private parties and public bodies here: https://www.regjeringen.no/no/dokumenter/nytt-lovforslag-om-forbud-mot-konverteringsterapi/id2919197/

[557] The Norwegian Labour and Welfare Administration is composed of a central agency and elements of the municipal social service systems. The Norwegian Labour and Welfare Administration helps provide social and economic security while encouraging a transition to activity and employment

African origin: "go back to Africa where you come from, fucking foreigner." The Supreme Court found that the statements were covered by Section 185 of the Penal Code, and constituted hate speech.

*HR-2020-185-A (religious background and ethnicity):* A man had written several statements about blacks, Muslims and Islam in a closed Facebook group, with 15,000 Members. The court found that the following statements where punishable as hate speech:

"- I guess it's better that we remove these despicable rats from the face of the earth ourselves in my opinion!!"

"- Fill up these soot pipes in containers and drop them at the bottom of the sea

- "Yes, they will disappear the day these steppe baboons go where they belong"

*HR-2020-184-A (Ethnicity):* A person had written the following about an activist from Somalia in a comment section on a closed Facebook group with about 20,000 members: "fucking black offspring go back to Somalia and stay there your corrupt cockroach." The woman was convicted for hate speech.

**Conclusion**

The overall trend is that freedom of expression is still being strengthened in Norway, especially for "traditional topics." In particular, it is worth noting that defamation has been decriminalized, blasphemy abolished, and that freedom of expression has been strengthened in working life. The paradoxes of freedom of expression are illustrated by the fact that it has not necessarily led to greater perceived freedom of expression in the workplace. There seems to be an increased informal chilling effect that leads to less criticism. Another problem area is increased monitoring of the Internet to combat terror and serious crimes. This may raise questions about the protection of sources and have a possible chilling effect. These questions are, however, addressed during the national legislative processes. The digital age has meant that questions about artificial intelligence and regulation of social media have become particularly important. In this area, Norway is anticipating regulation from the EU and therefore Norwegian authorities have so far refrained from lawmaking in these domains.


# Portugal

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**Country Summary**

Portugal's press freedom is safeguarded by a Union of Journalists, self-regulation instruments, and an independent regulatory authority. Significant media-related laws were implemented to uphold freedom of expression and adapt to modern challenges. There is one law promoting transparency in media ownership which led to modifications in press and radio laws. Another law aligns with the Audiovisual Media Services Directive, affecting television and registration with the Portuguese Media Regulatory Authority (ERC). The Portuguese Charter of Human Rights in the Digital Era, adopted in 2021 and revised in 2022, safeguards digital freedoms and disinformation concerns, with some clauses revoked to avoid suppressing expression. One Law transposes the European Accessibility Act for Products and Services, including audiovisual media, addressing accessibility barriers. Amid the COVID-19 pandemic, one Law adapted TV obligations for health information, and one Law supported media financially. Judicial decisions emphasize the balance between freedom of expression and protection of honor. The financial vulnerability of media groups poses a significant challenge, prompting discussions about potential public financial support to maintain media independence. While Portugal maintains

[558] Credits: Graphics Studio MH

strong legal protections for freedom of expression and press, the issue of media sustainability remains a key concern.

**Introduction**

There is consensus in Portugal being a democracy, anchored in the rule of law and the recognition of fundamental rights. The 1976 Constitution (Article 2) declares that the Portuguese Republic is based on "plural democratic expression" and recognizes "freedom of expression and information" (Article 37) and "freedom of the press and the media" (Article 38). It is noteworthy that the Constitution also gives a constitutional grounding to the principle of the regulation of the media under an independent regulatory authority (Article 39)[559].

In general, Portugal is a part of all major international human rights instruments, some of which establish mechanisms either of supervision or of quasi-judicial control (see, for example, the International Covenant on Civil and Political Rights and the acceptance of jurisdiction of the Human Rights Committee[560]). In Portugal, among several other public entities, there is a Union of Journalists, responsible for the adoption of self-regulatory instruments such as the Code of Ethics, modified in 2017, and the Deontological Council, which accepts complaints and adopts advisory opinions.[561]

Portugal was ranked 7th out of 180 countries in the Reporters without Borders (RWB) World Press Freedom Index. [562]This is the highest position during the period ranging from 2015 to 2022. Since 2020 Portugal has always been in the top 10. This amounts to a positive evolution since the country was ranked 26th in 2015. In its 2022 report, RWB states that "Freedom of the press is robust in Portugal. Journalists can report without restrictions, although some face threats from extremist groups."[563] In 2019, RWB urged Portugal to "drop charges against "Football Leaks" whistleblower, Rui Pinto[564], who has been on trial since 2020 under a series of criminal charges.

Finally, in its last report on Portugal (periodical review, 2019), the UN Human Rights Council made a reference to the somehow surprising position of the Committee on the Elimination of Racial Discrimination, which recommended "Portugal [to] investigate and, as appropriate,

[559] https://www.parlamento.pt/sites/EN/Parliament/Documents/Constitution7th.pdf.
[560] Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, ratified by Portugal in 1983. It is worth to notice that Portugal has ratified 17 out of 18 universal human rights treaties. See https://indicators.ohchr.org/.
[561] *Queixa de Licínia Girão contra Pedro Almeida Vieira, diretor do jornal online "Página Um"*, 23 July 2023, https://jornalistas.eu/queixa-de-licinia-girao-contra-pedro-almeida-vieira-diretor-do-jornal-online-pagina-um/ (in Portuguese).
[562] https://rsf.org/en/index?year=2022
[563] https://rsf.org/en/country/portugal
[564] https://rsf.org/en/portugal-urged-drop-charges-against-football-leaks-whistleblower.

prosecute and punish acts of hate speech, including those committed by politicians during political campaigns"[565].

## I. Legislation

On the July 28th 2015, Law 78/2015,[566] which regulates the promotion of transparency on ownership, management and means of financing of the entities that perform activities of social communication, was adopted. The adoption of this law led to the modification of Article 15, as well as the revocation of Article 4(2) and Article 16 of the Law of the Press (Law 2/99, 13 January 1999). Furthermore, it led to the revocation of Article 3 of the "Lei da Rádio" (Law of Radio, Law 54/2010, 24 December 2010).

Law 74/2020, of 19 November 2020[567] on the Transposition of Directive (EU) 2018/1808 of the European Parliament and the Council, of 14 November of 2018, amending Directive 2010/13/EU on the coordination of certain provisions laid down in law, regulation or administrative action in Member States concerning the provision of audiovisual media services (AVMS Directive) in view of changing market realities, implied several changes in the Law of Television, namely related with the on-demand audiovisual media services and video sharing platforms.

As a consequence, considering the enlargement of the entities that need to be registered in the "Entidade Reguladora para a Comunicação Social (ERC)" (Portuguese Media Regulatory Authority), Decree-Law 107/2021, of 6 December 2021,[568] changes the regulation of the rates paid by those entities to the Media Regulatory Authority, and Portaria n.º 24/2022, of 7 January,[569] stipulates the amounts to be paid to ERC by audiovisual media services. These rates are part of the Budget of the Portuguese Media Regulatory Entity and have been disputed by the major media groups in the past. The Constitutional Court ruled that these rates and taxes did not infringe the Constitution, nor the protection guaranteed to the freedom of the press.

In May 2021, the Portuguese Parliament adopted the Portuguese Charter of Human Rights in the Digital Era, Law 27/2021, of 17 May, which was later modified in August 2022 by Law 15/2022.[570] This law was adopted by the Portuguese Parliament, invoking the need to protect human rights in the digital era. Article 4 establishes freedom of expression in the digital environment (side by side with artistic creation). Furthermore, Article 6 deals with the right to protection against disinformation.

[565] Report of the Office of the United Nations High Commissioner for Human Rights, *Compilation on Portugal*, A/HRC/WG.6/33/PRT/2, p. 2.
[566] https://files.dre.pt/1s/2015/07/14600/0510405108.pdf (in Portuguese).
[567] https://pgdlisboa.pt/leis/lei_mostra_articulado.php?artigo_id=3354A0012&nid=3354&tabela=leis&nversao= (in Portuguese).
[568] https://files.dre.pt/1s/2021/12/23500/0001300016.pdf2 (in Portuguese).
[569] https://diariodarepublica.pt/dr/detalhe/portaria/24-2022-177309297 (in Portuguese).
[570] https://pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=3446&tabela=leis&so_miolo= (in Portuguese).

In fact, this was the main article modified in August 2022, when its paragraphs 2 to 6 were revoked. Article 6 had originated in two requests to the Portuguese Constitutional Court (by the President of the Republic and the Portuguese Ombudswoman, "Provedora de Justiça") precisely because of the definition of disinformation and the limits of satire, enshrined in former paragraphs 2 to 4. The constitutionality of this article was questioned on the grounds of non-acceptable restrictions to the right of freedom of expression. The constitutionality of the mechanism of complaint to the Portuguese Media Regulatory Authority (enshrined in former paragraph 5) and the support and financing of new mechanisms for "certifying" "truth" in information (enshrined in former paragraph 6) were also questioned by those two entities to the Constitutional Court. Finally, the Parliament decided to revoke those questionable paragraphs of Article 6, anticipating a negative decision of the Constitutional Court, and leaving the jurisdiction with no object to decide upon.[571]

At the end of 2022, Decree-Law 82/2022, of 6 December 2022, promoted the transposition of Directive (EU) 2019/882 on the accessibility requirements for products and services. This Directive, known as the European Accessibility Act, aims to harmonize accessibility requirements for certain products and services by eliminating and preventing any free-movement barriers that may exist because of divergent national legislation, and to bring benefits to businesses, people with disabilities and the elderly. Applying accessibility requirements will clarify the existing accessibility obligation in EU law, particularly in public procurement and structural funds. The Decree-Law includes, as prescribed in the Directive, its application to audio-visual media services (Article 2(2)(b)) and designates responsibility for its enforcement to the Portuguese Media Regulatory Authority (Article 28 (1)(b)).

In the context of COVID 19, two legislative initiatives by the Government should be highlighted. Law 7/2020[572] established exceptional and temporary responses to the SARS-CoV-2 epidemic, changing Article 51 of the Law of Television, introducing line o), which included, within the obligations of public service, "to promote the broadcasting of programs that advise and stimulate the practice of physical exercise and good nutrition in case of the collective duty to remain at home because of the state of exception or the necessity of social isolation". Also, during the pandemic, the government decided to anticipate the procurement of institutional publicity to financially support media services (Decree-Law 20-A/2020, of 6 May.[573]) This last decision was by far the most disputed one, because of the alleged risks of an attack to media independence. The criteria to define the distribution of the institutional publicity were accepted with no relevant debate. Some of the media (among them, "Observador," the most relevant newspaper online) decided to decline this public financial

[571] Constitutional Court Decision https://www.tribunalconstitucional.pt/tc/acordaos/20230066.html (in Portuguese).
[572] https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=3357&tabela=leis&so_miolo= (in Portuguese).
[573] https://diariodarepublica.pt/dr/detalhe/decreto-lei/20-a-2020-133161452 (in Portuguese).

support and, on the contrary, transformed this issue into an interesting campaign to attract more online subscribers.

The fact is that the financial weakness of media groups in Portugal, and the corresponding economic consequences to journalism (on average, journalists' salaries are very low), are probably the most real threat to journalism in general, independence of the media and to the freedom of information. This phenomenon has been aggravated by the COVID pandemic. It is, however, a structural problem, with some worrying symptoms, such as a very steep decrease in the sales of newspapers (without an equivalent increase in online subscriptions).

## II. Non-legislative developments

A new Code of Ethics for Journalists was adopted on 30 October of 2017,[574] after being approved in the 4th Congress of Journalists (on the 15th of January) and confirmed by referendum on the 26th, 27th and 28th of October. Three main substantive changes were introduced: 1) in respect to the exception of, for undoubtable reasons of public interest, the obligation of the journalist to identify him/herself as such when obtaining information, images or documents it was assessed that it should only be the case after any other means had been impossible to put into practice (paragraph 4); 2) the obligation not to identify minors was enlarged – "[T]he journalist shall not reveal, directly or indirectly, the identity of minors, whether they are sources, witnesses of fact, victims or authors of acts that the law qualifies as crimes" (paragraph 8); 3) the grounds on prevention of discriminatory treatment were enlarged to include "color, ethnicity, language, territory of origin, religion, political or ideological convictions, education, economic situation, social condition, age, sex, gender or sexual orientation."

## III. Enforcement

Most national judicial decisions during this period are related to restrictions to freedom of expression and press freedom because of the protection of honor and reputation.[575] Until quite recently, there was a trend to accept (maybe too easily) the prevalence of the protection of "honor."[576] However, in the last few years there has been a significant change. Without denying protection to rights relating to personality, the Supreme Court evaluates the protection under the expectable criteria, probable decision, and values weighting of the

[574] https://jornalistas.eu/novo-codigo-deontologico/ (in Portuguese).
[575] Portuguese Penal Code, Chapter VI, *Crimes against honour*, articles 180 ff.
[576] *A liberdade de expressão e informação e os direitos de personalidade na jurisprudência do Supremo Tribunal de Justiça (Sumários de acórdãos das Secções Cíveis e Criminais, de 2002 a Janeiro de 2015)*, Gabinete dos Juízes Assessores, Supremo Tribunal de Justiça (in Portuguese), https://www.stj.pt/wp-content/uploads/2017/10/cadernoliberdadeexpressoinformaodireitospersonalidadejurisprudncia-stj.pdf.

European Court of Human Rights (ECtHR).[577] This "nationalization" of an international interpretation of "necessity" and "proportionality" is relevant, even though it is still difficult to anticipate a clear evolution of jurisprudence.

At the international level, in *Patrício Monteiro Telo de Abreu* (June 2022), the ECtHR ruled that Portugal had violated the right to freedom of expression under the Article 10 of the European Convention on Human Rights (ECHR). A Portuguese court convicted and sentenced the applicant (an elected municipal councilor) to the payment of a fine and damages for aggravated defamation to another municipal councilor, on the grounds that the applicant had published three cartoons that were considered defamatory on a blog that he administered.[578] The ECtHR concluded unanimously that those cartoons referred to an ongoing political debate (criticizing the municipal leadership). Despite the sexual stereotyping of one female member of the municipal board, the ECtHR found that the caricatures had remained within the limits of exaggeration and provocation that were typical of satire. It also found that the criminal sanction in the present case could have a chilling effect on satirical forms of expression concerning political issues.

In January 2022, in *Freitas Rangel*, the ECtHR held that Portugal had violated Article 10 of the ECHR.[579] The case concerned the applicant's conviction for critical statements made about the professional bodies for judges and for public prosecutors at a hearing of a parliamentary committee. In particular, he had linked the judiciary and the prosecution service to, among other things, interference in politics and widespread breaches of confidentiality. He had been convicted and had had to pay EUR 56,000 in fines and damages. The ECtHR found that the fine and the damages had been wholly disproportionate and had to have had a chilling effect on political discussion. The domestic courts had failed to give adequate reasoning for such interference with the applicant's free speech rights, which had not been necessary in a democratic society.

In October 2019, in *L.P. and Carvalho*, the ECtHR found that Portugal had violated article 10.[580] The case concerned findings of liability against two lawyers for defamation and for attacking a person's honor, in respect to two judges whom the lawyers had criticized in documents they had drawn up in their capacity as legal representatives.

[577]Supreme Court of Justice, 4555/17.1T8LSB.L1.S1, 1.ª Secção, 2 December 2020, https://jurisprudencia.csm.org.pt/ecli/ECLI:PT:STJ:2020:24555.17.1T8LSB.L1.S1.E4/ (in Portuguese). As for other Judgements on this topic, see https://jurisprudencia.csm.org.pt/?queries[courts][]=1&queries[freesearch]=liberdade%20de%20express%C3%A3o.

[578] *Patrício Monteiro Telo de Abreu v. Portugal*, 7 June 2022, https://hudoc.echr.coe.int/fre?i=001-217556 (available in French).

[579] *Freitas Rangel v. Portugal*, 11 January 2022, https://hudoc.echr.coe.int/fre?i=001-214674.

[580] https://hudoc.echr.coe.int/eng?i=001-196399 (available in French).

In several other cases, such as *Antunes Emídio and Gomes da Cruz,*[581] or *Paio Pires de Lima,*[582] the pattern of violation of Article 10 was materially similar, putting at stake freedom of expression and the freedom of the press.

In *Pinto Coelho*, the ECtHR held Portugal responsible for the violation of freedom of expression because of the criminal law fine imposed on a journalist for having broadcasted excerpts in a news report which included sound recording from a court hearing obtained without permission from the judge.[583] This specific case, such as older ones (*Campos Dâmaso*[584] and *Laranjeira Marques da Silva*[585]), calls attention to the topic of the secrecy of judicial investigations ("segredo de justiça"), which still is a divisive and contentious issue in relations between the media and the judiciary.

**Conclusion**

In general, the right to freedom of expression is robustly guaranteed in Portugal, either in the Constitution or by specific legislation. Considering the case-law of the ECtHR, no serious discrepancy has been detected between the practice of national institutions, including judicial organs, and international standards of protection. However, debate continues on the ambiguity in the reach of the secrecy of judicial investigations and the harmonization of certain rights related to personality with an effective protection of freedom of information. This is an area for improvement, although there is no noticeable judicial decision restricting the rights of journalists because of alleged violations of the secrecy of judicial investigation referred to above. A key threat to freedom of expression and to freedom to information in Portugal is the financial weakness of media groups. It seems inevitable therefore that there will be a discussion about the adoption of some process or mechanism of public financial support of the press (broadly understood), considering that this debate is already taking place in other European countries.

[581] *Antunes Emídio and Soares Gomes da Cruz v. Portugal*, 24 September 2019, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-195982%22]}.
[582] *Paio Pires de Lima v. Portugal*, 12 February 2019, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-189757%22]}
[583] *Pinto Coelho v. Portugal*, 22 March 2016, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-161523%22]}
[584] *Campos Dâmaso v. Portugal*, 24 April 2008, https://hudoc.echr.coe.int/tkp197/view.asp#{%22fulltext%22:[%22D%C3%A2maso%22],%22itemid%22:[%22001-86076%22]}.
[585] *Laranjeira Marques da Silva v. Portugal,* 19 January 2010, https://hudoc.echr.coe.int/tkp197/view.asp#{%22itemid%22:[%22001-96776%22]}.


# South Africa

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**Country Summary**

South African media played a vital role in uncovering mass corruption which led to the removal of President Jacob Zuma in 2018. This growing role left journalists vulnerable to threats. Between 2017 and March 2022, 22 incidents of physical harassment of journalists have been recorded. Six restrictive laws were passed, among which one introduced a broad definition of hate speech, which goes beyond the constitutional definition and imposed firm reporting obligations on electronic services providers, one expanded the powers of the Film and Publication Board to regulate speech, including to determine what constitutes incitement of imminent violence, propaganda for war and advocacy of hatred, and one criminalized publishing statements with the intention to deceive another person about the pandemic and the government's response. South African courts have heard several cases involving limitations on the right to freedom of expression, and have predominantly ruled in favor of that right, except during the Covid-19 pandemic. However, in one case in 2021, the Constitutional Court held that criminalizing "hurtful speech" as hate speech is unconstitutional, and in 2022, the Court confirmed that the SLAPP (Strategic Lawsuit against Public Participation) suit defense to defamation existed in South African law. South Africa remains a strong constitutional

democracy – but with a heavy reliance on the judiciary to ensure compliance with the Constitution and respect for and promotion of the rights to freedom of expression. However, there are worrying signs that the media and freedom of expression environment are at greater risk than at any time since the first democratic election in 1994.

**Introduction**

South Africa's ranking in the RSF's World Press Freedom Index[586] has remained relatively stable over the period of review, and (accepting the change in methodology in the 2022 Index), improved from position 35/180 in 2022 to position 25/180 in 2023. In Article 19's 2022 Global Expression Report, South Africa ranked 48/161.[587] In Justitia's Free Speech Index, South Africa has medium approval for free speech. [588]

The years between 2015 and 2022 have been a turbulent period – politically, economically and socially – in South Africa. After former-president Jacob Zuma[589] resigned in 2018, the change in leadership of the ruling African National Congress (ANC) under Cyril Ramaphosa appeared, initially, to signify a more progressive environment[590] but the promise has not been fulfilled. An energy crisis has affected the economy and contributed to political infighting within the ANC, and the 2024 general election is predicted to be the most tightly-contested since the first democratic election in 1994. This general instability bleeds through into the media and expression environment, as the 2020s have been characterized by rising threats to journalists and new laws being enacted which have the potential to limit freedom of expression.

The media has played a vital role in this period, perhaps most significantly in uncovering mass corruption which led to the removal of President Jacob Zuma. In May 2017, a massive leak of documents was received by two of South Africa's biggest investigative journalism units – the Daily Maverick's *Scorpio* and amaBhungane Centre for Investigative Journalism. These leaks, which became the *Gupta Leaks*,[591] led to a series of stories published on the Daily Maverick, amaBhungane and News24, which exposed the levels of "State Capture" orchestrated by the Gupta family (the family responsible for some of the most extreme corruption and political interference in the country) and corruption between the Guptas, President Zuma and various other members of the ANC and the government. Due to the increased pressure on the ANC from this exposure, the ANC "recalled" President Zuma in February 2018, which led to the election of Cyril Ramaphosa as ANC[592] and national president.[593] The "Zondo Commission,"[594]

[586] https://rsf.org/en/country/south-africa
[587] https://www.article19.org/wp-content/uploads/2022/06/A19-GxR-Report-22.pdf
[588] https://justitia-int.org/report-who-cares-about-free-speech-findings-from-a-global-survey-of-free-speech/
[589] https://www.news24.com/news24/jacob-zuma-resigns-as-president-of-south-africa-20180214
[590] https://www.theguardian.com/world/2019/may/25/cyril-ramaphosa-begins-south-africa-presidency
[591] https://www.gupta-leaks.com/
[592] https://www.news24.com/news24/southafrica/news/live-anc-voting-results-expected-20171218
[593] https://www.news24.com/citypress/news/an-emotional-ramaphosa-officially-elected-president-uncontested-20190522#:~:text=Political%20parties%20have%20rallied%20behind,for%20the%20first%20time%20today.
[594] https://en.wikipedia.org/wiki/Zondo_Commission

a commission of inquiry into state capture headed by then-Deputy Chief Justice Raymond Zondo, ran from 2018 to 2022 and laid bare the depth of corruption as well as proposing specific recommendations to prevent its repeat.

Reflecting the change in the political atmosphere, in a joint submission[595] to South Africa's Universal Periodic Review in 2022, Amnesty International South Africa, the Campaign for Free Expression, the Committee to Protect Journalists, Media Monitoring Africa, and the South African Editors Forum stated that "threats to freedom of expression in South Africa are being experienced on several fronts at once".[596] The submission referred to in-person and online harassment and surveillance of journalists, legislative restrictions, and challenges facing the state broadcaster. The joint submission mentions 22 incidents of physical harassment of journalists between 2017 and March 2022.

Online, journalists experience harassment – particularly female journalists – and there remains a lack of available protection offered by law enforcement and the courts. Online expression has been relatively unrestricted over the period of review, but the Cybercrimes Act,[597] which came into force in December 2021, poses new challenges – which have as yet not been tested in the courts. Perhaps the most significant online experience was the campaign led by British PR firm, Bell Pottinger, who had been appointed by the Gupta to distract from the state capture allegations. The campaign which fanned racial tension through the use of Twitter bots and online fora, eventually led to the collapse of Bell Pottinger.[598] This experience demonstrated both that South Africa is vulnerable to online campaigns, but also that the independent media and individual expression has been strong enough to combat it.

The courts remain a battleground for the protection of democracy and the enjoyment of constitutional rights. With strong constitutional protection for the rights to freedom of expression and the press, individuals and the media regularly challenge laws or their implementation before the country's judiciary. Although the strong judgments in favor of the right to freedom of expression are positive, they also are a symptom of the fragility of South Africa's democracy, which is overly reliant on the judiciary for resolution of political, social and rights conflicts.

South Africa implemented a lockdown to address the Covid-19 pandemic, governed by regulations. Along with strict limitations on movement, these regulations included prohibitions against false news and on in-person religious worship. The regulations were finally removed in mid-2022.

[595] https://www.amnesty.org/en/documents/afr53/5467/2022/en/
[596] Joint Submissions para 6.
[597] https://www.gov.za/documents/cybercrimes-act-19-2020-1-jun-2021-0000
[598] https://www.nytimes.com/2018/02/04/business/bell-pottinger-guptas-zuma-south-africa.html

With so many newly implemented laws and the ongoing instability, the role of the media and civil society and the judiciary in protecting the right to freedom of expression will remain vital.

## I. Legislation

*Overview*

There has been a flurry of new laws – both enacted Acts and Bills moving through Parliament – which potentially threaten the right to freedom of expression. All South African bills have an open public participation process where individuals, civil society groups, academics, business associations, and other groupings submit written comments to the relevant parliamentary committee. These written submissions are not made publicly available, although some groups independently provide their submissions on their own websites. Accordingly, it is not possible to access all submissions, and so analyses of the submissions are skewed in favor of those bodies that do make them public. Parliamentary committees may then hold oral hearings in which some individuals and groups are invited to make oral submissions.

The possibly problematic laws have either only been enacted in the past two years or have not come into force. Accordingly, it is difficult to know how their implementation will affect freedom of expression. Although not a complete solution, there is a high likelihood that civil society groups would challenge provisions of the laws when their application appears to unjustifiably limit the right to freedom of expression.

The Protection of Personal Information Act, 4 of 2013.[599]

This Act's commencement was staged: the first tranche of sections came into effect on 11 April 2014; the second tranche on 1 July 2020; the third tranche on 30 June 2021; and the full act into full effect on 1 July 2021. While the Act serves an important role in protecting the right to privacy in South Africa, it does also create conditions under which access to information is limited and transparency inhibited. There is an exemption in section 7 that the Act "does not apply to the processing of personal information solely for the purpose of journalistic, literary or artistic expression to the extent that such an exclusion is necessary to reconcile, as a matter of public interest, the right to privacy with the right to freedom of expression". However, the terms "journalistic," "literary" and "artistic" expression are vague and undefined, and the exemption is limited for journalists in section 7(2) to the extent that a journalist who is subject to a professional code of ethics is bound by that code to the exclusion of the Act. The Act's provisions are also not well understood by public officials, and an overbroad reliance on the need to respect the Act and personal information frequently leads to unjustified refusals of access to information.

[599] https://www.gov.za/sites/default/files/gcis_document/201409/3706726-11act4of2013popi.pdf

The Cybercrimes Act, 19 of 2020.[600]

This Act was signed into law on 26 May 2021, but only came into effect on 1 December 2021 through a presidential proclamation[601] which brought some provisions into operation.[602] The Act expands on the Electronic Communications and Transactions Act 25 of 2002 and adds new cyber offenses. The offenses in the Cybercrimes Act are broadly defined, including a broad definition of hate speech in the criminalization of hate speech which goes beyond the constitutional definition. The Act criminalizes the unlawful access of data, which could be interpreted to extend to the media's access of leaked information while there is no public interest defense to the offense within the Act. The Act imposes several obligations on Electronic Communication and Service Providers (ECSPs), including an obligation to inform law enforcement within 72 hours of becoming aware of the use of their network in a cybercrime, reporting unauthorized access of data to law enforcement and to the Information Regulator, retaining and handing over information for use by law enforcement and a court, and assisting the police in search and seizure of data or hardware. Failure to comply with these obligations can result in criminal conviction and imposition of a fine. Notably, the provisions relating to electronic communications providers *did not* come into effect in 2021.[603]

The Film and Publication Amendment Act, 11 of 2019.[604]

This Act came into force on 1 March 2022. The Act expands the powers of the Film and Publication Board (FPB) to regulate speech, including to determine what constitutes incitement of imminent violence, propaganda for war and advocacy of hatred (speech prohibited under the Constitution). The Act criminalizes the dissemination of various pieces of information, including private sexual photographs without consent. The Act also obliges Internet Service Providers (ISPs) to provide law enforcement and the FPB with information on users who post prohibited content, and to take down content after being instructed to do so by the FPB following a complaint and investigation. This appears to contradict the "safe harbor" provisions limiting ISP liability under the Electronic Communications and Transactions Act. On 28 October

[600] https://www.gov.za/sites/default/files/gcis_document/202106/44651gon324.pdf
[601] https://legalbrief.co.za/media/filestore/2021/11/45562_30-11_JusticeConDev.pdf
[602] The provisions that came into effect in 2021 are: Chapter 1; Chapter 2, with the exclusion of Part VI; Chapter 3; Chapter 4, with the exclusion of sections 38(1)(d), (e) and (f), 40(3) and (4), 41, 42, 43 and 44; Chapter 7; Chapter 8, with the exclusion of section 54; and Chapter 9, with the exclusion of sections 11B, 11C, 11D and 56A(3)(c), (d) and (e) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), in the Schedule of laws repealed or amended in terms of section 58. Refer to GG 45562
[603] In 2023, amaBhungane Centre for Investigative Journalism was interdicted from publishing further articles on a controversial businessman and his companies, partly based on the argument that the media entity was "in possession of stolen property" because it had obtained leaked documentation "stolen" by a whistleblower from the companies. The company's lawyers relied on the Cybercrime Act's vague extension of the common law crime of theft to "not to exclude the theft of incorporeal property". This crime has not yet been tested in a criminal court, but it was utilized in the civil case against amaBhungane in an attempt to prevent journalists from possessing information obtained through leaking of electronic documents.
[604] https://www.gov.za/sites/default/files/gcis_document/201910/42743gon1292.pdf

2022, the FPB issued a notice[605] placing additional obligations on ISPs to inform the FPB of their actions to protect children and criminalizing a failure to do so.

Regulations under The Disaster Management Act, 2020.[606]

These regulations were introduced to regulate the country's response to the COVID-19 pandemic, and prohibited gatherings (except for funerals, at essential workplaces, or for the purchasing of essential goods and services) and criminalized publishing statements with the intention to deceive another person about the pandemic and the government's response. The regulations were amended in various ways and were finally removed in April 2022.

The Prevention and Combatting of Hate Crimes and Hate Speech Bill, 2018.[607]

This Bill was first introduced into Parliament in 2018. It has been passed by the National Assembly, and as of July 2023, is under consideration by the second house of parliament (the National Council of Provinces). The Bill would criminalize hate speech, through an overly broad definition of hate speech that goes beyond the constitutional definition. There is no exemption from the offense of dissemination of hate speech, such as for the media or academic and artistic use.

The Protection of State Information Bill ('the Secrecy Bill'), 2010.[608]

This Bill has had a long history having first been mooted in 2010. In 2020, the President sent it back to the national assembly for re-consideration as he believed it would not pass constitutional muster. The central concern is that the Bill unconstitutionally protects state security at the expense of freedom of expression. Its definitions of "national security" and "state security matter" are vague and would criminalize possession of classified documents without a public interest defense for sharing protected information. The Bill would also exclude the country's access to information legislation from the state security information regime.

## II. Non-Legislative Developments

In September 2022, former president Zuma instituted a private prosecution against a senior legal journalist, Karyn Maughan, who had reported on corruption (including the state capture mass corruption involving Zuma) for many years. Zuma alleged that Maughan was guilty of unauthorized disclosure of information for having reported on a medical report of Zuma's which had been submitted to court in a separate matter.

[605] https://www.gov.za/sites/default/files/gcis_document/202210/47373gon2682.pdf
[606] https://sacoronavirus.co.za/wp-content/uploads/2022/04/46195_4-4_CoOperativeGovernance.pdf
[607] https://www.justice.gov.za/legislation/hcbill/B9-2018-HateCrimesBill.pdf
[608] https://static.pmg.org.za/130423bill06d-2010_2.pdf

## III. Enforcement

South African courts have heard multiple cases involving limitations on the right to freedom of expression, and have predominantly found in favor of that right, except during the Covid-19 pandemic.

*Right to Publish* – in 2017, the Supreme Court of Appeal set aside the prosecting authority's refusal to grant a newspaper permission to publish a report from an investigation into a former minister.[609]

*Hate Speech* – in 2021, the Constitutional Court held that a legislative provision that criminalized "hurtful speech" as hate speech was unconstitutional.[610]

*SLAPP Suits* – in 2021, the High Court in Johannesburg held that a defamation case brought by a former executive of a state-owned entity against a Twitter user constituted a SLAPP suit;[611] in 2022, the Constitutional Court confirmed that the SLAPP suit defense to defamation existed in South African law.[612]

*Data Privacy* – in 2021, the Constitutional Court held that the legislation governing the interception of communication was constitutionally defective as it unjustifiably infringed the right to privacy.[613]

*Right to Protest* – in 2016, the Independent Communications Authority of South Africa, held that an order from the SABC to no longer broadcast footage from protests was invalid; in 2018, the Constitutional Court held that the legislative provision which criminalized holding a gathering for which authorization had not been obtained was unconstitutional;[614] in 2019, the Constitutional Court held that an apartheid-era law, the Intimidation Act, was unconstitutional because it criminalized the making of intimidatory statements;[615] in 2020, the Constitutional Court held that the 1956 Riotous Assembly Act was unconstitutional to the extent that it criminalized the incitement of "any offence;"[616] in June 2022, the High Court in Johannesburg ruled that the levying of a fee for a protest is an unjustifiable limitation of the right to protect (protected by section 17 of the Constitution).[617]

[609] Maharaj v. M&G Centre for Investigative Journalism 2018 (1) SA 471 (SCA)
[610] Qwelane v. South African Human Rights Commission 2021 (6) SA 579 (CC)
[611] Koko v.Tanton [2021] ZAGPJHC 383 (7 September 2021)
[612] Mineral Sands Resources (Pty) Ltd v. Reddell 2023 (2) SA 68 (CC).
[613] AmaBhungane Centre for Investigative Journalism v. Minister of Police 2021 (3) SA 246 (CC)
[614] Mlangwana v. S 2019 (1) BCLR 88 (CC)
[615] Moyo v. Minister of Police; Sonti v. Minister of Police 2020 (1) BCLR 91 (CC)
[616] Economic Freedom Fighters v. Minister of Justice 2021 (1) SA 1 (CC)
[617] Right to Know Campaign v. City Manager of Johannesburg Metropolitan Municipality 2022 (2) SA 570 (GJ)

*Access to Information* – in 2016, the Supreme Court of Appeal held that there was an unqualified right to access private companies' share registers;[618] in 2018, the Constitutional Court held that the right to access information (along with the right to vote) required that political parties proactively disclose their private donations;[619] in 2022, the High Court in Cape Town ordered that a private company provide journalists with access to an independent financial report for which the journalists had applied under the Promotion of Access to Information Act.[620]

*Access to Justice* – in 2015, the Supreme Court of Appeal confirmed that court documents are, by default, public and that a refusal by a state entity to furnish a municipality with information (under the claim of confidentiality) in litigation infringed the right to freedom of expression;[621] in 2016, the Supreme Court of Appeal ruled that a Parliamentary Rule which required television cameras to focus only on the speaker during times of 'grave disorder or unparliamentary behavior' was an unconstitutional limitation of the right to freedom of expression;[622] in 2017, the Supreme Court of Appeal held that a complete ban on audiovisual coverage would limit the right to freedom of expression, and that the question of whether a case should be broadcast must be decided on a case-by-case basis.[623]

*Censorship* – in 2018, the High Court in Pretoria set aside a decision from the Film and Publications Board to classify a film about a homosexual relationship during Xhosa initiation[624] as X18 SLNVP (no under eighteens because of sex, language, nudity, violence and pornography), but only a technicality and appeared to favor cultural rights over the right to freedom of expression.[625]

*Harassment of Journalists* – in 2019, the Equality Court held that statements made on Twitter that were critical of journalists did not constitute hate speech as they did not incite harm and that journalists, as a class, did not deserve particular protection;[626]

*Covid Pandemic Limitations* – in 2020, the High Court in Pretoria held that the regulations prohibiting religious worship were a reasonable and justifiable limitation of the rights to freedom of religion, movement and association given the threats to life posed by the pandemic; in 2020, the Broadcasting Complaints Commission found a television news station

[618] Nova Property Group Holdings v. Corbett 2016 (4) SA 317 (SCA)
[619] My Vote Counts v. Minister of Justice and Correctional Services 2018 (5) SA 380 (CC)
[620] Tiso Blackstar v. Steinhoff 2023 (1) SA 283 (WCC)
[621] City of Cape Town v. South African National Roads Authority 2015 (3) SA 386 (SCA).
[622] Primedia v. Speaker of Parliament 2017 (1) SA 572 (SCA)
[623] Van Breda v. Media24 2017 (2) SA SACR 491 (SCA)
[624] https://africageographic.com/stories/xhosa-circumcision-ritual-south-africa-its-hard-to-be-a-man/
[625] Indigenous Film Distribution v. Film and Publication Appeal Tribunal [2018] 3 All SA 783 (GP)
[626] South African National Editors Forum v Economic Freedom Fighters (90405/18) [2019] ZAEQC 6 (24 October 2019)

had infringed the Subscription Broadcast Code of Conduct by featuring a Covid conspiracy theorist who had made comments that were false and not reasonable and justifiable.[627]

## Conclusion

South Africa remains a strong constitutional democracy – but with a heavy reliance placed on the judiciary to ensure compliance with the Constitution and continued respect for and promotion of the rights to freedom of expression. However, there are worrying signs that the media and freedom of expression environment is at greater risk than at any time since the first democratic election in 1994. There is real concern over the effect of new laws introduced which, at first glance, appear to address worthy social objectives, such as preventing violent hate crimes, unjustifiable violations of privacy through online access, and preventing the distribution of child pornography. The laws are, in general, overly broad, lack precision in the definitions and exemptions, and serve to limit freedom of speech in what appears to be an unconstitutional manner. There has been active public participation in the drafting of the laws but – with the exception of the Protection of State Information Bill – this has not led to significant improvements in the content of the legislation. One particular area to watch is how the implementation of the Cybercrimes Act impacts on the ability to freely share and access information online, and the effect the increased offenses will have. Although the acceptance from the courts of a SLAPP suit defense provides welcome financial protection, the risks of physical harm through harassment and intimidation of journalists and activists with little assistance from law enforcement does create a chilling effect.

[627] Media Monitoring Africa v. eNCA Channel 403 09/2020 (30 October 2020)


# Spain

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**Country Summary**

Despite its high ranking in freedom of expression indexes, political polarization, reflected in the media, and an increase in Strategic Lawsuit against Public Participation (SLAPPs) against journalists remain issues of concern in the country. Restrictive laws were passed between 2015 and 2021: one which adopted a broad definition of hate speech not requiring a direct and justifiable link with incitement to discrimination, hostility, or violence, inducing a rise in the number of strategic lawsuits against public participation (SLAPPs); one law criminalized the "lack of respect and consideration" for agents of the authority; while criminal sedition provisions included in the Spanish Criminal Code were repealed in 2022 and replaced with an "aggravated public disorder" offense. Three notable non-legislative developments were described: A "Procedure for intervention against Disinformation" adopted by the Department of National Security which raised concerns among media and civil society of being used as a

tool to monitor the Internet on a regular basis. The secessionist process in Catalonia and the Government's policies during the Covid-19 pandemic triggered acts of verbal denigration, attacks against journalists and media actors during coverage of public demonstrations were also reported. Also, journalists and media entities complained about the way online press conferences by Government officials were managed and organized during the Covid-19 pandemic.

**Introduction**

Since the adoption of the Constitution of 1978, Spain can be considered a Western liberal democracy based on the rule of law and the respect and protection of fundamental rights. Spain has ratified the most relevant international and regional human rights instruments, is a member of the European Union and the Council of Europe and accepts the jurisdiction of the European Court of Human Rights (ECtHR). The Spanish Constitution protects the right to freedom of expression and freedom of information (Article 20). Protection for such rights can be obtained from both ordinary courts and the Constitutional Court, among other possible mechanisms (including the Ombudsperson or *Defensor del Pueblo*).

Spain occupies the position number 32/180 in the Reporters without Borders (RWP) World Press Freedom Index.[628] This is the lowest position during the period 2015-2022. Spain obtained the highest ranking during the years 2019-2021, at 29th position. In Article 19's Global Expression Report 2023, Spain is ranked 20/161 with a score of score of 87.[629]The most recent report highlights political polarization reflected in the media, and an increase in SLAPPs against the media and journalists as main issues in the country. In Justitia's Free Speech Index, Spain comes 8th out of 33 countries, with a score of 73 – a high approval of free speech.[630]

In 2020 Spain undertook the third cycle of the United Nations Universal Periodic Review (UPR). However, recommendations accepted by Spain in the previous cycle (2015) were (and still remain) not fully implemented. Areas to be addressed include: (i) decriminalization of defamation and (ii) modification of the Public Safety Law so that freedom of expression and the right to peaceful assembly are not affected, and there is an increase in security forces' awareness of respect for human rights during demonstrations. During the third cycle new recommendations were also accepted in areas such as revising the Criminal Code, to ensure that crimes align with internationally recognized definitions, and a review is conducted of criminal laws concerning lèse-majesté and offending religious feelings. However, Spain did not agree to fully decriminalize defamation and include it in the Civil Code, and in doing so follow standards set by the European Court of Human Rights.

[628] https://rsf.org/en/country/spain
[629] https://www.article19.org/wp-content/uploads/2022/06/A19-GxR-Report-22.pdf
[630] https://futurefreespeech.com/interactive%20map/

During the mentioned cycle, several civil society organizations submitted reports to the Human Rights Council, raising issues of criminalization of slander and defamation, criminalization of offenses to Spain and its symbols as well as religious sentiments, excessive scope of hate speech restrictions, disproportionate and unjustified legislation on public safety, and broad criminalization of glorification of terrorism and indoctrination. Most of these issues remain unaddressed.

## I. Legislation

In 2015 a comprehensive reform of the Criminal Code was adopted. It significantly impacted the regulation of hate speech under Article 510 (Organic Law 1/2015 of 30 March). The explanatory memorandum of the law refers to Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law to justify this reform. However, the reform enshrined a very broad notion of hate speech, which does not necessarily require the concurrence of a direct and justifiable link with incitement to discrimination, hostility or violence. This consideration of hate speech as a broad category has enabled individuals and collectives such as politicians and security forces to criminally prosecute anyone who insults them on social media, thus giving rise to a situation of intimidation of anyone who expresses distasteful or hurtful ideas, especially in political discourse, artistic creation, and parody.

Organic Law 4/2015 of March 30 on the protection of public safety includes, as a serious offense subject to fines of 601 to 30,000 euro, the unauthorized use of images and other data of members of security forces in the event that such endangers principles as broad as "the personal or family safety of the agents, the protected facilities or the success of an operation, with respect to the fundamental right to information" (Article 36 (23)). It also punishes the "lack of respect and consideration" for agents of the authority. These general administrative provisions have proved problematic in relation to the exercise of freedom of information. People conducting activities of a journalistic and informative nature in relation to the mode of action of the security forces and corps have been subject to administrative procedures that have led to economic penalties. In 2020, the Constitutional Court declared that article 36.23 was not aligned with the constitutional protection of the right to freedom of information. However, journalists covering police actions (particularly in the course of public demonstrations) have continued to be punished under the also mentioned more general provisions included in the law on respect and consideration.

Criminal sedition provisions included in the Spanish Criminal Code (articles 544 to 549) were repealed by Organic Law 14/2022 of 22 December and replaced it with an "aggravated public disorder" offense carrying between three – five years' imprisonment. This reform was triggered by criticism around the Supreme Court decision of 2019 sentencing a series of Catalan politicians and activists to imprisonment terms.

## II. Non-legislative developments

A "Procedure for Intervention against Disinformation" adopted by the Department of National Security created some concern among media and civil society since it was seen as a tool to monitor the Internet on a regular basis[631].

In 2017 a Swedish-Turkish journalist was detained by the police at the El Prat airport in Barcelona, where he was vacationing. Police reported that he was held by police following Interpol order. The next day he was arrested on charges of "insulting the Turkish president" and "terror propaganda." The National High Court (Audiencia Nacional) decided to release and allow him to return to Sweden a few weeks after the detention[632].

Political polarization in Spain around the secessionist process in Catalonia as well as more general political controversies (including the Government's policies during the COVID-19 pandemic) triggered alleged acts of verbal denigration and attacks against journalists and media actors. Physical attacks and intimidation during coverage of public demonstrations were also reported.[633]

During the COVID-19 pandemic journalists and media entities complained about the way online press conferences by Government officials were managed and organized. Journalist had to submit their questions in advance and some access restrictions were also established.[634]

## III. Enforcement

In 2019, a series of Catalan politicians and activists were sentenced to 9-13 years of prison over 2017 independence referendum and its aftermath. Convicted individuals were found guilty of sedition, disobedience, and misuse of public money.[635] Decisions were confirmed by the Constitutional Court. Previously, the UN Special Rapporteur on the right to freedom of opinion and expression, David Kaye, urged Spanish authorities to refrain from pursuing the criminal charge of rebellion against political figures and protesters in Catalonia that carries a jail sentence of up to 30 years. The Rapporteur also expressed that charges for acts that do not involve violence or incitement to violence may interfere with rights of public protest and dissent.[636] In 2021 the Government issued partial pardons (regarding the sedition conviction) for all defendants thus releasing all from prison. A ban on a return to public office was

[631] https://rsf.org/en/government-s-anti-fake-news-policy-potentially-threatens-press-freedom-spain
[632] https://europeanjournalists.org/blog/2017/09/27/spain-must-release-journalist-hamza-yalcin/
[633] https://rsf.org/en/journalists-attacked-during-far-right-protests-spain , https://rsf.org/en/catalan-referendum-attacks-journalists-biased-coverage and https://rsf.org/en/alarm-about-growing-violence-against-reporters-catalonia
[634]https://rsf.org/en/coronavirus-spanish-government-yields-pressure-journalists-and-agrees-live-press-conferences
[635] https://internationaltrialwatch.org/wp-content/uploads/2021/03/STCIA_EN.pdf
[636]https://www.ohchr.org/en/press-releases/2018/04/un-expert-urges-spain-not-pursue-criminal-charges-rebellion-against

maintained as a penalty for other crimes.[637] The pardon had been previously recommended by the Parliamentary Assembly of the Council of Europe.[638]

In *Stern Taulats and Roura Capellera v. Spain* (2018), the ECtHR found that the Spanish courts had violated the freedom of expression of two citizens by imposing criminal sanctions for expressing political disapproval by burning a picture of the Spanish royals during an official visit.[639]

In 2017, the National High Court convicted writer and activist Cassandra Vera to a year in prison for the publication of a tweet containing a joke about the death of Luis Carrero Blanco, the Head of Government during the dictatorship of General Franco, as a result of an action by the terrorist group ETA. Vera was acquitted by the Supreme Court in 2018.[640]

In 2018, the Supreme Court confirmed the conviction and sentence of a rapper on charges of hate speech and incitement to terrorism. The rapper had made public audio and video archives of his songs which included lyrics valorizing groups regarded as terrorist and calling for violence against politicians and the Spanish royal family. The Court held that the lyrics constituted criminal offenses because they created an atmosphere of fear and anxiety and that it was irrelevant that the rapper did not intend to harm any person. The Court found that imprisonment was a proportionate response and confirmed the lower court's sentence of three and a half years' imprisonment.[641] The Constitutional Court refused to review this case.

In 2020, the Constitutional Court revoked the judgment of the Supreme Court that had sentenced a singer and songwriter to one years' imprisonment after the singer published a series of tweets seeming to support two terrorist groups. The ruling of the Constitutional Court considered that the decision of the Supreme Court did not take into account the preferred position that freedom of expression occupies in any democratic society and the repressive nature of criminal sanctions which should be applied as the last resort of the judiciary.[642]

In 2022, the Supreme Court confirmed the decision of the Central Election Commission considering reasonable and proportionate Twitter's decision to suspend the account of the political party Vox on grounds of racist comments.[643]

[637] https://www.theguardian.com/world/2021/jun/22/spanish-government-pardons-nine-jailed-catalan-leaders
[638] https://assembly.coe.int/LifeRay/JUR/Pdf/TextesProvisoires/2021/20210603-ProsecutionPoliticians-EN.pdf
[639] https://hudoc.echr.coe.int/eng?i=001-181719 and
https://globalfreedomofexpression.columbia.edu/cases/stern-taulats-roura-capellera-v-spain/
[640] https://en.wikipedia.org/wiki/Cassandra_case
See also: https://globalfreedomofexpression.columbia.edu/cases/state-v-cassandra-vera/
[641] https://globalfreedomofexpression.columbia.edu/cases/case-jose-miguel-arenas-valtonyc/
[642] https://globalfreedomofexpression.columbia.edu/cases/the-case-of-cesar-strawberry/
[643] https://www.poderjudicial.es/search/TS/openDocument/3a7e96863b8ab6f2/20220314

## Conclusion

The right to freedom of expression and freedom of information is constitutionally and legally protected in Spain. Spanish institutions formally accept the international provisions, interpretation criteria and standards set by existing mechanisms including the European Court of Human Rights. However, there are still areas for improvement regarding the exercise and protection of the mentioned rights in the country. Journalists receive strong attacks from politicians based on ideological interests. Reporting activities may also be the target of threats of physical attacks in certain circumstances, such as when covering big political rallies and police abuses. Administrative legislation on public safety still contains broad provisions that are used to restrict the mentioned reporting activities. Criminal legislation still includes a significant number of provisions that can be used against those expressing shocking and offensive ideas, including artists, performers, and activists. This application of repressive legislation may lead to particularly severe and disproportionate penalties in areas such as hate speech or terrorism. Political figures and particularly the royal family still enjoy a privileged protection against criticism and extreme views on monarchy. Even though the situation in Catalonia – regarding the illegal referendum of 2017 and the so-called independence process – entails several complex legal matters, certain measures and decisions taken by the judiciary against those involved in these events have had a disproportionate and negative effect on the right to freedom of expression. The ruling coalition between the socialist party (PSOE) and a group of left-wing parties (Podemos) has been announcing their willingness to reform existing legislation to better protect freedom of expression. However, changes in this area have not been significant and most important issues remain to be addressed.


# Sweden

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**Country Summary**

Sweden is consistently ranked at the top tier in freedom of expression rankings. Still, speech-restrictive laws were passed between 2015 and 2022: at least three (two of which during Covid) on combating terrorism, publicly advocating for affiliation with terrorist organizations, and moderating terrorist content online, provisions criticized for creating a chilling effect on free speech. Three restrictive laws on privacy, one prohibiting the spreading of images or other information in a way that is intended to cause tangible harm to the person subject of the information, and two (one of which during Covid) regarding court proceedings, prohibiting taking photographs in, or into, a court room and disseminating such pictures. One law which criminalized agitation against a national or ethnic group was widened to include transgender persons as one of the groups protected by the criminalization. One amendment to the Foreign Espionage Act, passed during Covid, extended criminal espionage acts to include acts that can affect Sweden's international relations. In one important non-legislative development, the Court of Justice of the European Union (CJEU) deemed Swedish national legislation, which allowed general and indiscriminate retention of traffic and location data of subscribers and registered users of electronic communication for the purpose of fighting crime, contrary to EU law. This led to the adoption of new legislation in 2019, which limited the possibilities for law

enforcement authorities to retain user data regarding traffic and location. The burning of the Koran during demonstrations is spurring calls for legislative changes on national security grounds, due to threats to Swedish interests; Swedish law does not currently allow for the banning of demonstrations over considerations of national security.

## Introduction

In global democracy and free speech reports, Sweden has consistently scored among the highest-ranking countries throughout the reporting period. In Article 19's 2022 Global Expression Report Sweden ranked as number 3, with a score of 94 (100).[644] Only Denmark and Switzerland were ranked higher than Sweden, both countries had a score of 95.[645] In Reporters Without Borders World Press Freedom Index for 2022 Sweden ranked as number 3, with a score of 88.84 (100).[646] In the 2015 World Press Freedom Index Sweden ranked as number 5, with a score of 90.53.[647] In Justitia's Free Speech Index, Sweden ranked 4th out of 33 countries, with a high approval of free speech.[648]

The above rankings indicate that freedom of expression is well protected in Sweden. However, during the reporting period some trends can be observed that give cause for concern. One such trend relates to legislative measures used to combat terrorism. In this area the Swedish criminalization is now very far-reaching, and its implementation has required constitutional amendments that limit the freedom of association. Another trend, spurred by Russia's war of aggression in Ukraine, is an increasing propensity to limit freedom of expression with reference to national security. As illustrated by the recent debate regarding demonstrations with Koran-burnings, the free speech principle may be subject to negotiation if the stakes are high enough.

## I. Legislation

Legislative Developments

In the reporting period several legislative acts that aim to combat terrorism have been enacted. At least some of these acts can be said to impose restrictions on the right to freedom of expression. In 2019, a range of legislative changes were introduced, to transpose Directive (EU) 2017/541 on combating terrorism.[649] In particular, the criminalization regarding receiving training for terrorism was expanded. Whereas the criminalized area was previously restricted to instructions – regarding, for example, the making or use of explosives or hazardous substances – that were particularly designed to further terrorist activities, the criminalization

[644] https://www.article19.org/wp-content/uploads/2022/06/A19-GxR-Report-22.pdf
[645] Article 19, The Global Expression Report 2022, p. 11.
[646] https://rsf.org/en/index?year=2022
[647] Data available at: https://rsf.org/en/index
[648] https://futurefreespeech.com/interactive%20map/
[649] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

now encompasses any such instruction as long as it is received with the intention of committing or aiding terrorist activities. In the public consultation, which forms part of the legislative process in Sweden, several organizations criticized the proposal. Uppsala University, for instance, noted that the criminalization now extends even to students enrolled in university courses in chemistry (provided that they have the required criminal intent).[650]

In 2019, new penal provisions were introduced, making it criminal to affiliate with terrorist organizations by performing certain enumerated actions. Additionally, it was made a criminal act to publicly advocate for affiliation with terrorist organizations. The proposal was criticized by the Council on Legislation – a body composed of current or retired Supreme Court justices, which performs non-binding ex ante scrutiny of legislative proposals – which expressed doubts regarding the proposal's conformity with Article 10 (freedom of expression) of the European Convention on Human Rights (ECHR).[651]

The prohibition to affiliate with terrorist organizations was not the Governments preferred option. Rather, the aim was to introduce a general criminalization on participating in terrorist organizations. However, those plans were temporarily suspended, when the Council on Legislation declared a proposal to that effect an impermissible limitation on the right to freedom of association protected by the Swedish Instrument of Government.[652] In January 2023 the Instrument of Government was amended to include a possibility to limit the freedom of association with respect to associations that are engaged in or support terrorism.[653] And as of July 2023 it is criminal to participate in a terrorist organization. The criminalization includes a prohibition to publicly advocate for participation in terrorist organizations. The Council on Legislation criticized the legislation and argued that difficult border-line cases between legitimate journalistic reporting activities and criminal participation in terrorist organizations might arise, which could have a chilling effect on freedom of speech.[654]

One final terrorist-related legislative development that will be mentioned is Regulation (EU) 2021/784 on addressing the dissemination of terrorist content online, which entered into force on June 7th 2022.[655] Importantly, the regulation provides that all member states should ensure that competent authorities are able to issue removal orders requiring hosting service providers (e.g., large platforms such as Facebook) to remove terrorist content at the latest within one

[650] Proposition 2017/18:174 p. 55.
[651] Proposition 2019/20:36 p. 44.
[652] See Chapter 2 Articles 2 and 24 (second section) Instrument of Government, SFS 1974:152. English version (not fully up to date) available here.
[653] See further Government Report (SOU) 2021:15 (Summary in English).
[654] Proposition 2022/23:73 p. 39.
[655] Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online.

hour of receipt of the removal order. As of 1 July 2023, the failure of hosting service providers to follow a removal order from the Police Authority, can lead to administrative fines.[656]

In the past decade or so there has been a growing perception that the balance between free speech and privacy has been tilted too heavily in favor of the former in the Swedish legal system. Hence, some legislative proposals have introduced restrictions on freedom of expression in order to safeguard privacy-related interests.

In 2018, a new crime was introduced, unlawful breach of privacy, which makes it criminal to violate someone else's private life by spreading images or other information in a way that is intended to cause tangible harm to the person who is the subject of the information.[657] More specific, but similar, criminalization's were introduced in 2019 and 2020 regarding court proceedings. Thus, it is now prohibited to take photographs in, or into, a court room and to disseminate any such pictures.[658]

In this context, it could also be noted that the scope of criminal responsibility for agitation against a national or ethnic group was widened in 2019, so as to include transgender persons as one of the groups protected by the criminalization.[659] This required not only statutory changes but also amendments to the Freedom of the Press Act, which is a constitutional law.

A final category of legislative initiatives concern restrictions on freedom of expression in order to protect national security. The Russian war of aggression in Ukraine, and the perception of a heightened threat against Swedish national security, has led to an increase of such initiatives.

In accordance with legislation adopted in 2019, the grant and transfer of allocation of radio frequencies can be denied if the buyer's radio use can be assumed to harm Swedish security interests. Under the same circumstances a granted license can be revoked.[660] It should be noted that these rules are not applicable to the transmission of radio programs as such. However, the Government is currently investigating the possibility to deny and revoke licenses to transmit radio and television programs, if the transmissions can be assumed to harm Swedish security.[661]

A controversial criminalization is the introduction of the foreign espionage act, which entailed amendments of the Swedish constitutional media laws (the Freedom of the Press Act and the Fundamental Law on Freedom of Expression) and came into effect on January 1st 2023.[662] The amendments concern a widening of criminal espionage to include acts that can affect

[656] Proposition 2022/23:71.
[657] Chapter 4, Article 6 c Criminal Code, SFS 1962:700.
[658] Chapter 5, Article 9 b and Chapter 9, Article 5 a Code of Judicial Procedure, SFS 1942:740.
[659] Chapter 16, Article 8 Criminal Code, SFS 1962:700.
[660] Chapter 3, Articles 6 and 23, and Chapter 7, Article 6 Law on Electronic Communications, SFS 2003:389.
[661] See Government Remit 2022:81 and 2023:39.
[662] It is in fact a number of legislative acts. A brief summary in English of the legislative changes can be found here.

Sweden's international relations – previously only acts that could harm Swedish security were criminalized. Media organizations, such as Reporters Without Borders, have expressed fear that the new laws could criminalize whistleblowers and journalists that report on corruption or other issues of public interest.[663]

Covid-19

During the Covid-19 pandemic a range of temporary measures were enacted with the aim of stopping the spread of the virus. It should be noted that to a substantial extent these measures took the form of non-binding recommendations. This strategy of focusing on individual responsibility rather than a lock down approach, which has received international attention, can be criticized for blurring the distinction between legally imposed limitations on individual rights and more general recommendations.[664] However, even in Sweden many restrictions on the freedom of assembly, in particular, had a statutory basis. These rules were amended frequently and at the height of the pandemic the freedom to hold demonstrations was in effect limited to a bare minimum.[665] As of February 9th 2022, the temporary restrictions due to the pandemic were repealed.

Denial of Genocide

Finally, it can be noted that the European Commission has launched an infringement procedure against Sweden based on Sweden's transposition of the EU's Council Framework Decision on combating racism.[666] In light of this, an all-party committee of inquiry has drafted a legislative proposal, where criminal responsibility would be introduced for publicly condoning, denying or grossly trivializing genocide, crimes against humanity and war crimes (under certain circumstances).[667] The committee's proposals will now be subject to a public consultation.

## II. Non-Legislative Developments

International Supervision and EU Law

It is notable that within the UN system a number of recommendations concerning Sweden call for measures to combat hate speech and to prohibit racist organizations, that is, to restrict freedom of expression. There would seem to be few, if any, recommendations that call for

[663] See e.g.: https://www.dn.se/debatt/lat-inte-erdogan-fa-styra-svensk-medierapportering/
[664] See e.g. Henrik Wenander, Sweden: Non-binding Rules against the Pandemic – Formalism, Pragmatism and Some Legal Realism, 12 European Journal of Risk Regulation (2021) 127.
[665] At certain times during the pandemic assemblies with more than eight participants were prohibited. See e.g. the report of the Coronavirus Commission (SOU 2021:89 Chapter 6).
[666] Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.
[667] Government Report (SOU) 2023:17 (Summary in English).

stronger protection for freedom of expression.[668] During the reporting period the ECtHR decided three cases where individuals claimed that their right to freedom of expression under article 10 of the ECHR had been violated.[669] In all of the cases the applications have been declared inadmissible, which means that the ECtHR found no violation of the right to freedom of expression.

A notable case, which did not directly concern Article 10, is *Centrum för Rättvisa v. Sweden*.[670] In this case the European Court of Human Rights (ECtHR) found that certain features of the Swedish secret surveillance regime, including bulk interception of communications and intelligence sharing, was not in full compliance with the right to respect for private life and correspondence under article 8 ECHR. The Court stated, inter alia, that it had insufficient information regarding certain aspects of the manner in which the rules on destruction of intercepted materials are applied in practice. This has potential free speech implications since intercepted data has to be destroyed if it is protected by constitutional provisions of secrecy for the protection of anonymous authors or media sources.[671]

A related issue was put before the Court of Justice of the European Union (CJEU) in the *Tele2 Sverige-case.*[672] In this case the CJEU determined that Swedish national legislation which, for the purpose of fighting crime, provided for general and indiscriminate retention of traffic and location data of subscribers and registered users of electronic communication was contrary to EU law. In particular, the CJEU found that the Swedish legislation exceeded the limits of what is strictly necessary and could not be considered to be justified within a democratic society, as required by article 11 (freedom of expression and information) and article 52.1 (scope of guaranteed rights) of the EU Charter.[673]

The CJEU judgement led to the adoption of new legislation concerning police access to electronic communications data in 2019, which limited the possibilities for law enforcement authorities to retain user data regarding traffic and location.[674] When passing the proposal, the Riksdag (Swedish parliament) at the same time made a declaration to the Government that it should work out a new proposal, allowing for the retention of *more* data for the purpose of fighting crime.[675] In essence, the Riksdag felt that the Government had gone too far in order to acquiesce the EU.

[668] See e.g. Human Rights Council, A/HRC/29/13 and A/HRC/44/12, Human Rights Committee, CCPR/C/SWE/CO/7 and Committee on the Elimination of Racial Discrimination, CERD/C/SWE/CO/22-23.
[669] Salihu and others v. Sweden, no. 33628/15 (10/05/2016), Grimmark v. Sweden, no. 43726/17 (11/02/2020) and Steen v. Sweden, no. 62309/17 (11/02/2020).
[670] Centrum för rättvisa v. Sweden, no. 35252/08 [GC] (25/05/2021).
[671] Centrum för rättvisa v. Sweden, p. 338 and 339.
[672] C-203/15, Tele2 Sverige, EU:C:2016:970.
[673] Charter of Fundamental Rights of the European Union (2000/C 364/01).
[674] Proposition 2018/19:86.
[675] Committee on Justice 2018/19:JuU27.

Free Speech Debates

The Swedish application to join NATO, and the ensuing Turkish reluctance towards Swedish membership, has somewhat surprisingly spurred a free speech debate. The debate can be traced to the actions of an Islam-critic[676] who on numerous occasions has applied for demonstration permits, with the explicit purpose of using his freedom of demonstration for public Koran-burnings. His actions have inspired others to do the same. These demonstrations have led to heavy criticism from Turkey.[677] The police, which is the authority issuing such permits, has recently decided to reject applications where demonstrators have declared that they will burn the Koran during demonstrations, claiming that such demonstrations increase the risk for terrorist attacks in Sweden. However, Swedish law does not allow for considerations of national security when determining whether an application to hold a demonstration should granted or rejected, which has been confirmed by the Swedish Administrative Courts.[678] In the face of Turkish critique and its potential impact on Swedish NATO membership, two former ministers of foreign affairs[679] have criticized the earlier decisions of the police to grant demonstration permits, and an influential former head of legal affairs[680] within the Department of Foreign Affairs have called for legislative changes.

## II. Enforcement

In the wake of the 2017 #MeToo movement, which had the aim of drawing attention to a prevailing culture of sexual abuse, a number of women have been convicted of defamation in Swedish courts.[681] Although, no such case is yet to reach the Supreme Court the cases highlight a peculiar element of Swedish defamation law.[682] Under Swedish defamation law, the defendant cannot rely on proving the truth of her statements as an absolute defense. Rather, the truth of a defaming statement is only a legally relevant defense if the court first reaches the conclusion that it was justifiable for the defendant to utter the defaming statement. In performing this assessment, a number of factors are taken into account (whether the defamed person is a public figure etc.), but not the veracity of the statements. Hence, in all the post-MeToo convictions, the truth of the defaming statements has been legally irrelevant, since the courts in all cases have determined that it was unjustifiable for the defendant to utter the defaming statements. This line of case-law can be viewed as problematic, whereas the ECtHR has indicated that the truth should be an available defense in defamation proceedings.[683]

[676] https://omni.se/paludan-ska-branna-en-koran-varje-fredag/a/vew3w4
[677] https://www.svt.se/nyheter/inrikes/erdogan-sverige-kan-inte-forvanta-sig-natostod-efter-koranbranningen
[678]https://www.domstol.se/forvaltningsratten-i-stockholm/nyheter/2023/04/domar-i-de-s.k.-koranmalen---polisen-har-inte-haft-ratt-att-neka-tillstand-for-allman-sammankomst/
[679] https://omni.se/eliasson-ger-bildt-stod-jag-delar-denna-kritik/a/5BR0AW
[680] https://www.svd.se/a/jlm3vA/sverige-maste-kunna-skydda-egna-intressen-skriver-ehrenkrona
[681] See e.g. Linnea Wegerstad, #metoo och de fem förtalsdomarna, Glänta 3-4 (2019) p. 35.
[682] See Chapter 5, Article 1 Criminal Code, SFS 1962:700.
[683] Cf. Colombani et.al. v. France, no. 51279/99, (25/06/2002) p. 66.

## Conclusion

The developments during the reporting period indicate that, even if freedom of expression is firmly protected in the Swedish legal system, the political aims of combating terrorism and protecting national security have led to tangible free speech restrictions. Furthermore, there is a general trend where privacy aspects are gaining importance, with inevitable free speech restrictions as a consequence. It should be emphasized that not all of these developments are disproportional or lacking in necessity. However, the overall picture is one where other considerations and interests are consistently outweighing freedom of expression. It can be noted that a substantial portion of the legislative initiatives limiting freedom of expression would seem to have a basis in EU law.


# Taiwan

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**Country Summary:** Taiwan has maintained a stable environment for freedom of speech; however, a series of legislative and non-legislative developments that occurred between 2015 and 2022 are drawing concern. Apart from increasing the upper limit of fines for existing speech-related criminal laws, the Taiwanese Congress adopted five restrictive legal amendments to the "Combatting Disinformation Action" in 2019-2020: one law on spreading false information that affects living necessity transaction prices, one on spreading false information in situations of disasters, one on spreading false information on food safety, one on spreading false information on the military and one on spreading false information on the Covid-19 pandemic. Another legislative trend to restrict speech for the purpose of national security is reflected in a special criminal law prohibiting political donations, directly or indirectly, from "foreign hostile forces", and campaign speech or lobbying based on instructions and financing from foreign hostile forces. While Taiwan has not implemented any law on online speech, content removal requests made by the government to social media platforms are noteworthy: 95 removal requests to Twitter from January 2021 to December 2021, with an average compliance rate of 27.4%. Since 2011, Taiwan's government and courts have filed 1,067 removal requests against Google, mostly for reasons of privacy, defamation, election law, control of goods and services, and copyright.

## Introduction

According to the Freedom House index (2017-2022),[684] Taiwan has consistently been rated as "free" and received a perfect score of 16/16 in the freedom of expression and belief category. In Article 19's Global Expression Report 2022, Taiwan is ranked 38 out of 161 countries.[685] In Justitia's Free Speech Index, Taiwan is ranked 17th out of 33 countries with medium approval of free speech.[686] Therefore, it is fair to conclude that Taiwan has maintained an enabling and stable environment for freedom of speech. However, it is worth observing and analyzing the specific actions taken by Taiwan's legislative, executive, and judicial branches regarding freedom of speech from 2015 to 2022, particularly in response to major events.

Several events have impacted Taiwan's freedom of speech between 2015 and 2022. These include the 2014 Sunflower Movement, which protested against economic policies that are overly reliant on China and resulted in university students occupying the Congress building. Additionally, the rise of online media, particularly social media, has become the main channel for people to access information. The spread of disinformation during the 2018 local elections and referendums also played a role, as did the COVID-19 pandemic since 2020. These events have compelled legislative, executive, and judicial authorities to continually address issues related to protests, online speech (including rumors and conspiracy theories), defamation during elections, dissemination of public health misinformation, and regulation of internet intermediaries.

This report introduces the actions taken by Taiwan's legislative, executive, and judicial branches regarding freedom of speech from 2015 to 2022. The legislative developments during this period include several legislative procedures. These include the 2019 criminal amendments that increased penalties for existing speech crimes such as incitement, defamation, public insult, and obscene speech. In 2020, criminal amendments were introduced to tackle disinformation. The 2020 Anti-Infiltration Act was enacted to counter foreign influences, including increased punishment for acts that assist foreign hostile forces in influencing Taiwan's elections and political procedures. In addition, the 2023 amendment draft of the National Mobilization Preparation Act allows for necessary media control during wartime or emergency situations. The 2022 Digital Intermediary Services Act draft is modeled on the EU Digital Services Act, and the 2023 criminal amendment punishes deepfaked sexual images.

Several major events have occurred in non-legislative developments, including regulating television media, and banning Chinese publications and apps. In terms of enforcement, significant aspects include the Taiwan Constitutional Court's (TCC) rulings (formerly

[684] https://freedomhouse.org/country/taiwan/freedom-world/2022
[685] https://www.article19.org/wp-content/uploads/2022/06/A19-GxR-Report-22.pdf
[686] https://futurefreespeech.com/interactive%20map/

Interpretations of the Judicial Yuan before 2022) on illegal billboards, censorship of cosmetic advertisements, prisoners' speech, real-name sponsorship of tobacco companies, prior restraints of street performance, and mandatory apologies. Additionally, relevant court rulings at all levels of the judiciary on speech control during COVID-19 are also noteworthy.

## I. Legislation

For a long time, Taiwan has had provisions for criminal punishment of speech. The Criminal Code stipulates that acts such as insulting public officials (§140), incitement (§153), defamation (§310), public insult (§309), and obscene speech (§235) should be subject to criminal responsibility. The Grand Justices of the Judicial Yuan (now the TCC) declared the criminal punishment for defamation and obscene speech constitutional in the Judicial Yuan Interpretations No. 407, 509 (regarding defamatory speech), and 617 (regarding obscene speech). Even high-value political speech may be subject to criminal punishment. For example, §104 of the Civil Servants Election and Recall Act includes a specific criminal provision to penalize false campaign speech.

In 2016 and 2019, the Taiwanese Congress amended the Criminal Code and the Civil Servants Election and Recall Act to increase the maximum fines for existing speech crimes. Apart from increasing the upper limit of fines for existing speech-related criminal laws, the Taiwanese Congress adopted a set of criminal and administrative legal amendments for the "Combatting Disinformation Action" in 2019-2020.

Regarding criminal law amendments, the Taiwanese Congress has increased fines and maximum imprisonment for spreading false information that affects living necessity transaction prices in the Criminal Code §251 amendment of 2020. The Congress has also intensified punishment for spreading false information in special criminal laws, such as those related to disasters (§53 Disaster Prevention and Protection Act), food safety (§46-1 Act Governing Food Safety and Sanitation), military (§72 Criminal Code of the Armed Forces), and the COVID-19 pandemic (§14 Special Act for Prevention, Relief and Revitalization Measures for Severe Pneumonia with Novel Pathogens). Furthermore, the amendment drafts for disinformation regarding nuclear accidents (§31-1 Nuclear Emergency Response Act) and state actions of collecting equipment during the preparation before wartime (§§15, 31 National Mobilization Preparation Act) have not yet passed the legislative process.

The §63 Social Order Maintenance Act, in existence since 1991, is the most commonly used administrative law by government agencies to restrict false speech that could disrupt public order and peace. In addition, the 2019-2020 campaign of the Taiwanese Congress to combat disinformation raised administrative penalties for spreading false information about infectious diseases (§63 Communicable Disease Control Act), food trade (§§15-1, 18-3 Food

Administration Act), and agricultural products (§§6, 35 Agricultural Products Market Transaction Act, §27 Agricultural Production and Certification Act).

In addition, there has been a legislative trend in Taiwan's Congress between 2015-2022 to restrict speech for the purpose of national security. One notable example is the Anti-Infiltration Act of 2020. This special criminal law prohibits political donations (§3), directly or indirectly, from "foreign hostile forces" (§2), and campaign speech (§4) or lobbying (§5) based on instructions and financing from foreign hostile forces. There are also enhanced penalties for offenses directed or financed by foreign enemies (§§6-7).

Another example is the draft amendment to the National Mobilization Preparation Act proposed by the Department of Defense in 2023. The Act allows the executive branch to regulate the dissemination of news in print, broadcast, and online media (§33), and increases the penalties for inaccurate information (§61) when the President issues an emergency order and conducts a national or localized mobilization (i.e., the Mobilization Implementation Phase). The Bill is currently on hold due to opposition from the opposition party.

The Taiwanese Congress also adopted speech-restrictive laws such as the new Article 319-4 of the Criminal Code in 2023 and the draft Digital Intermediary Services Act proposed in 2022 in response to the damage caused or enhanced by digital and information technology. According to the former, a person who creates, distributes, publicly displays, or sells false images of another person using deep-fake technology sufficient to cause damage to another person shall be punished by a fine or imprisonment of not more than five years. The latter is a step in Taiwan's long history of attempting to regulate online media.

Taiwan's media were tightly controlled during the 38-year military martial law regime (1949-1987), with the government, the then ruling party (KMT), and the military controlling the three wireless television stations. After democratization in the 1990s, the revised Radio and Television Act (1993), the Cable Radio and Television Act (1993), and the Satellite Broadcasting Act (1999) became the main legal framework for media regulation in Taiwan. The social movements of the early 2000s succeeded in pushing the state, political parties, and the military to withdraw from the mass media.

However, even though a draft Digital Communications Broadcasting Act was proposed in 2016, no law in Taiwan specifically regulates online media. In 2022, the National Communications Commission (NCC) proposed the Digital Intermediary Services Act, modeled after the European Union's Digital Services Act (DSA), which distinguishes between different types of Internet services and their regulatory intensity. However, as soon as the draft was proposed, it was criticized by the opposition party (KMT) and public opinion that the law risks restricting online speech. The ruling party (DPP) did not take this opportunity to open a public discussion on Internet governance policy, but quickly shelved the Bill's progress.

## II. Non-Legislative Developments

Non-legislative developments related to freedom of expression during 2015-2022 include two events: first, in November 2020, the National Communications Commission (NCC) rejected CTi News' application to renew its broadcasting license[687] on the grounds that the channel had been fined for repeated breaches of its fact-checking obligations in 2018-2019 and that its internal self-regulatory mechanism had failed. As the incident involved political speech and news channels, it triggered a heated political controversy and a legal debate on balancing journalistic ethics and commercial competition in the Internet age. CTi News became an internet TV channel, broadcasting via YouTube and OTT.

This was followed by the removal of Chinese children's books from public libraries in 2020 and the banning of Chinese apps in 2022. Due to the (verbal and diplomatic) conflict between China and Taiwan since the 1940s, Taiwanese law has adopted a prior authorization system for importing Chinese books, movies, and programs (§37 of the Act Governing Relations between the People of the Taiwan Area and the Mainland Area). Since Taiwan's democratization, this law has rarely been strictly enforced in practice. However, as Taiwan-China tensions rise, Taiwanese society has become increasingly wary of Chinese military intimidation and cultural penetration. Against this backdrop, the discovery in 2020 of a public library's display of books promoting China's COVID measures, and the Chinese military, sparked renewed debate over whether and how to restrict Chinese political propaganda. The same debate happened again as the Ministry of Digital Development announced in 2022 that TikTok and Xiaohongshu are "products that endanger national information and communication security," prohibiting civil servants and official agencies from downloading these apps.

## III. Enforcement

When thinking about enforcement, it is necessary to consider both decisions of the Taiwan Constitutional Court and Taiwanese court decisions more generally. In constitutional decisions involving freedom of speech, the Judicial Yuan/TCC has repeatedly adopted the two-tracks theory originating from the U.S. in Interpretation No. 734 of 2015 (involving the placement of illegal billboards) and Interpretation No. 806 of 2021 (involving the license system and place restrictions for street performances), Grand Justices argued that content-based restrictions should be subject to strict scrutiny, while restrictions on the time, place, and manner of speech should be subject to moderate scrutiny. Notably, in Interpretation No. 794 in 2020, which deals with tobacco companies' real-name sponsorship, Grand Justices appear to be willing to reduce the level of protection for commercial speech by tobacco companies. In Judgment 111-Hsien-Pan-2, filed in 2022, the TCC partially overturned its 2009 precedent of J.Y. Interpretation No. 656, and declared court-ordered apologies unconstitutional. The TCC opined that compelled

[687] https://www.taipeitimes.com/News/front/archives/2020/11/19/2003747178

public apologies violate the speaker´s high-valued freedom of thought and freedom not to speak and cannot survive the strict scrutiny. Also, regarding prior restraint of speech, Grand Justices' 2017 Interpretation No. 744 seemed to adopt the strict "direct, immediate, and irreparable harms test"[688]as the scrutiny standard on the regulation of prior restraint, but a few months later, Interpretation No. 756 (involving speech of prisoners) again relaxed the scrutiny standard for prior restraint of speech.

At the level of general court decisions, it is worth observing the decisions made during the COVID-19 pandemic. In 2020, the Taiwanese Congress passed the COVID-19 Special Act, which gives broad authorization to the Central Epidemic Command Center (CECC) to enforce pandemic control policies (§7). During the period of Level-3 Alert from May 19, 2022, to July 27, 2022, the CECC imposed a ban on outdoor social gatherings of more than ten people. However, few court cases have been related to this issue, with decisions mostly related to administrative penalties for disobeying the social gathering ban.

Regarding COVID-19-related disinformation, the government usually invokes the "Social Order Maintenance Act," "Communicable Disease Control Act," and the COVID-19 Special Act. Statistics show that when false information is related to COVID-19, the rate of being sanctioned is higher.[689]

**Conclusion**

While the Judicial Yuan/Taiwan Constitutional Court repeatedly affirmed the pro-speech two-tracks theory, the Taiwanese Congress maintained criminal and administrative speech penalties during 2015-2022. The types of speech penalized have not been increased, but the upper limits of penalties have been raised in general.

Although the 2014 Sunflower Movement directly contributed to the pro-independence Democratic Progressive Party (DPP) winning the 2016 presidential election, the parliament did not abolish the requirement for prior permission for outdoor assemblies and demonstrations. It is worth noting that since 2019, with the increasingly serious military threat from China and the outbreak of the 2022 war in Ukraine, Taiwan has increased its control over "Chinese influence" in legislative and administrative actions.

Regarding internet speech regulation, Taiwan's Congress has not created any criminal or administrative laws that solely target speech online. However, the amendments to the Criminal Code in 2019 and 2020, which increase penalties for illegal speech, apply to offline and online speech. As for the legal liability of internet intermediaries, particularly social media platforms,

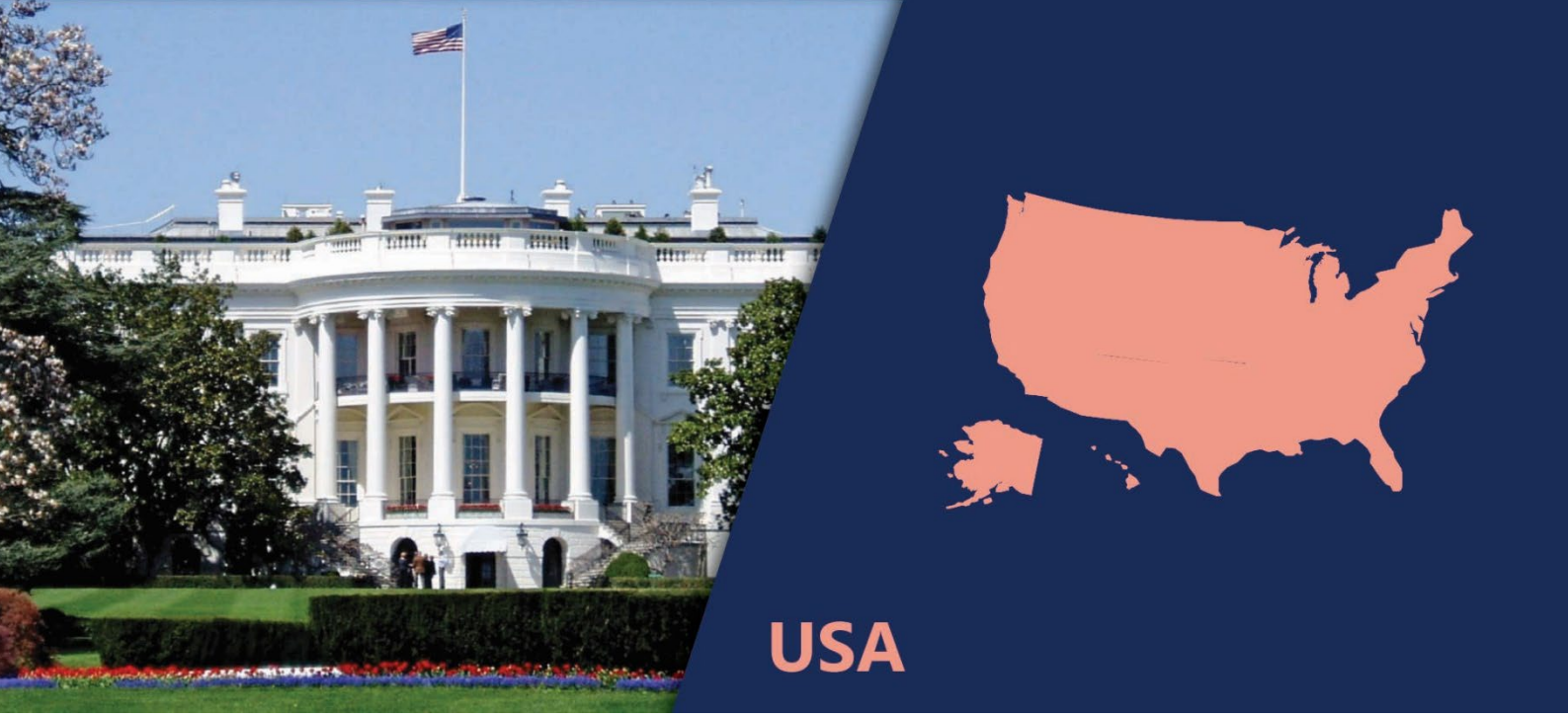
[688] https://www.law.cornell.edu/supremecourt/text/403/713
[689] Chun-Yuan Lin, 'Misinformation, Disinformation and the Courts' Response in Taiwan: An Analysis of the Social Order Maintenance Act Cases from 2007 to July 2020', 31 Academia Sinica Law Journal 255, pp. 398-302 (2022)

the Taiwan Congress proposed a Digital Service Intermediary Law in 2022 based on the EU model. However, the law has not been passed due to social controversy. In this context, it is worth considering content removal requests made by the government to social media platforms. Meta did not provide data on content removal requests made by the Taiwan government in its transparency report.[690] According to Twitter's transparency report, the Taiwan government has made 95 removal requests to Twitter from January 2021 to December 2021, with an average compliance rate of 27.4%.[691] Since 2011, the Taiwan government (and courts) has filed 1,067 removal requests against Google, mostly for reasons of privacy, defamation, election law, control of goods and services, and copyright.[692]

In regulating and enforcing speech controls during the COVID-19 pandemic, Congress clearly gave the executive branch a broad mandate, and administrative authorities consequently placed severe restrictions on indoor gatherings and outdoor assemblies. Notably, the courts have also been more inclined to penalize false speech about COVID-19 with fines.

In summary, Taiwan's speech restriction laws between 2015 and 2022 have generally maintained the status quo. Penalties are generally increased, but not significantly expanded. It is worth noting that "national security" and the "China factor" will likely be important issues in the coming years. In addition, online speech governance will continue to be a major point of contention based on Taiwan's authoritarian history and the rapid development of the Internet ecosystem.

[690] https://transparency.fb.com/data/content-restrictions/country/TW/
[691] https://transparency.twitter.com/en/reports/countries/tw.html
[692]https://transparencyreport.google.com/government-removals/government-requests/TW?lu=country_breakdown&country_request_amount=group_by:requestors&country_item_amount=group_by:reasons&country_breakdown=period:2015H1




# United States of America

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**Country Summary**

In the United States, Congress has introduced measures that impact freedom of speech. The country ranks 3rd in public support for free speech but 22nd in global expression rankings. Legislative proposals focus on social media content control, campaign finance reform, critical race theory bans, and limiting public protests, all with potential implications for First Amendment rights. Five notable federal legislative developments between 2015 and 2022 target issues such as Section 230 immunity, child exploitation facilitation, privacy protection, disinformation, and health misinformation on digital platforms, indicating attempts to regulate "Big Tech." Public protests, driven by social justice issues and COVID-19 restrictions, prompted restrictive legislation through acts like the Holding Rioters Accountable Act and the Support Peaceful Protest Act, withholding federal funding for accountability and making protesters financially liable for damages. While federal legislative activity poses a threat to First

Amendment freedoms, state-level laws regulating social media and content also spark constitutional concerns, with ongoing legal challenges. Such legislation seeks to ban the teaching of "divisive concepts" and critical race theory, impacting educational freedom. These measures, influenced by evolving technology and societal challenges, intersect with free speech concerns in the digital age, prompting debates over the balance between protection and restriction.

**Note:** Given the fact that this report seeks to have an overview of the state of free speech in democracies around the globe and taking into account the length and extent of analysis that would be required to incorporate every development between 2015-2022 on a State level, the report on the United States of America considers developments on a federal level with some mentions of State laws made for narrative purposes. As such and given that at State level there are restrictions to free speech (for example, between January and August 2022, 36 different states introduced a total of 137 educational gag order bills, an increase of 250 percent over 2021[693]), we note the restrictions that may arise in terms of a holistic overview of the state of free speech in the US. We hope that, in due course, we are able to draft a report depicting the situation in the US on both a federal and State level as a single piece of research.

**Introduction**

The U.S. Congress has been active in introducing measures that impact freedom of speech. The U.S. came 3rd out of 33 on Justitia's 2021 Free Speech Index on the public's support for free speech with a score of 78.[694] The country ranks 30/161 for 2022 in Article 19's Global Expression Report.[695] In its 2022 freedom of the Net report, Freedom House ranks the U.S. 12th out of 72 countries ranked with a score of 76 on internet freedom.[696]

The four most common areas or speech restriction include (1) measures restricting expression on social media and digital platforms, (2) regulation of campaign finance and speech, (3) measures that prohibit the alleged teaching of "critical race" theory; and (4) measures targeting public protests. All four of these categories of proposed federal legislation impact First Amendment freedoms. Many of the measures related to social media platforms call for content moderation or content control of some sort. The regulation of campaign finance triggers First Amendment protection, particularly when the U.S. Supreme Court for nearly 50 years has determined that money is speech for purposes of First Amendment analysis. Next, the bans on the teaching of critical race theory trigger one of the most important First Amendment doctrines --- the right to receive information and ideas. Finally public protests directly threaten

[693] https://pen.org/report/americas-censored-classrooms/
[694] https://futurefreespeech.com/interactive-map/
[695] https://www.article19.org/wp-content/uploads/2022/06/A19-GxR-Report-22.pdf
[696] https://freedomhouse.org/sites/default/files/2022-10/FOTN_2022_Country_Score_Data.xlsx

not only freedom of speech but also the cognate First Amendment freedoms of assembly and petition. Each of these three areas of proposed legislation is summarized below.

## I. Legislation

Social media and digital platforms

It should come as no surprise that measures to limit freedom of expression involve social media and digital platforms. After all, that is the way that people communicate, and it is a relatively new medium of communication. As Justice Anthony Kennedy expressed:

> While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.[697]

Couple that with the indelible reality that every time there is a new technology, closely behind follows what Robert Corn Revere famously called a cycle of regulation.[698] Every time throughout history that there has been a new technology, closely behind has been the hand of censorship. Consider that the abhorrent English licensing laws followed the printing press, the censorship of motion pictures followed shortly after that new technology. There are many other examples.

Some of the recent measures seek to rein in "Big Tech" by abrogating Section 230 immunity[699] --- a federal law[700] that provides immunity to interactive service providers such that they are not liable for third-party generated content. Section 230 stipulates that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." In a 2023 case against Google, the Supreme Court rejected efforts to restrict the use and application of Section 230 of the Communications Decency Act. [701]

Another measure allows victims of child sexual abuse to bring a civil cause of action against tech platforms for facilitating child exploitation.[702] Other measures focus on the privacy of personally identifiable information[703], suspicious transmissions that might help in

[697] Packingham v. North Carolina, 582 U.S. _ (2017).
[698] See generally, Robert Corn Revere. *The Mind of the Censor and the Eye of the Beholder* (2021).
[699] See, e.g., H.R. 2635 (118th Congress) – called "The Big Tech Accountability Act of 2023."
[700] 47 U.S.C. §230; see. e.g. the Safe Tech Act of 2023, S. 560 (118th Cong.).
[701] https://www.supremecourt.gov/opinions/22pdf/21-1333_6j7a.pdf
[702] Stop CSAM Act of 2023, S. 1199 (118th "Congress).
[703] See, e.g.., Online Privacy Act of 2023, H.R. 2701 (118th Congress).

counterintelligence activities,[704] and the creation of the Federal Digital Platform Commission.[705] Still other measures would target the spread of disinformation through deep-fake video alterations[706] and punish social media platforms that allow for the proliferation of health misinformation.[707]

Campaign Finance Reform and Attempts to Overturn Citizens United

One of the more controversial First Amendment decisions by the U.S. Supreme Court in recent memory is *Citizens United v. Federal Election Commission*.[708] Critics have decried the decision as one that increased the influence in elections of corporations and wealthy donors.[709] However, others defended the decision as a victory for freedom of speech.[710] In *Citizens United*, the U.S. Supreme Court by a 5-4 vote invalidated a provision of the Bipartisan Campaign Reform Act that prohibited corporations and unions from using their general treasury funds for express advocacy or electioneering purposes.[711] Justice Anthony Kennedy, in his majority opinion, reasoned that the corporate status of a speaker should not impact whether the speech is protected. The decision flows from the Supreme Court's seminal decision in *Buckley v. Valeo* back in 1976 that both political expenditures and contributions are a form of speech – though the Court found more free-speech protection for expenditures.[712]

Ever since the Supreme Court's decision in *Citizens United*, there have been attempts to either chip away at the Court's ruling through additional legislation or to overrule by constitutional amendment. This has continued in more recent years. For example, in 2015, Senator Bernie Sanders introduced a resolution calling for a constitutional amendment to overrule *Citizens United*.[713] Later that year, there was a House Resolution that called for Congress to pass a constitutional amendment that declared that money is not speech, corporations are not persons, and that *Citizens United* should be overturned.[714] Similarly, in 2017, there were at

[704] See Something, Say Something Online Act of 2023, S. 147 (118th Congress).
[705] Digital Platform Commission Act of 2022, H.R. 7858 (117th Congress).
[706] Deep Fakes Accountability Act, H.R. 2395 (117th Congress)
[707] Health Misinformation Act of 2021, S. 2448 (117th Congress).
[708] 558 U.S. 310 (2010).
[709] Tim Lau, "Citizens United Explained," Brennan Center for Justice, Dec. 12, 2019. Citizens United Explained | Brennan Center for Justice
[710] David Bossie, "Supreme Court's 'Citizens United' decision still protects the First Amendment 10 years later," Fox News, Jan. 21, 2020. https://congress.gov/116/meeting/house/110456/documents/HHRG-116-JU10-20200206-SD005.pdf
[711] See David L. Hudson, Jr. Citizens United, First Amendment Encyclopedia, Citizens United v. Federal Election Commission | The First Amendment Encyclopedia (mtsu.edu)
[712] Buckley v. Valeo, 424 U.S. 1 (1976).
[713] S.J. Res. 4 (114th Cong..
[714] H. Res. 311 (114th Cong.)

least two resolutions introduced in the House of Representatives declaring that Congress should pass the 28th Amendment to the U.S. Constitution overruling *Citizens United*.[715]

Other measures related to campaign finance focus more on disclosure requirements for super PACS[716] or target deceptive messages during political campaigns.[717]Another measure targets the influence of foreign nationals in political campaigns. [718]

Critical Race Theory

In recent years, Congress has been quite active in introducing legislation targeting the teaching of critical race theory --- a school of thought that originated in law schools in the 1970s and 1980s that called for a "fundamental reorientation of legal studies on race."[719] However, critical race theory in recent years has become a bogeyman of sorts, garnering legislative proposals for its regulation, a form of politically popular legislation that presents serious First Amendment concerns.[720]

Congress has introduced a host of bills related to the banning of teaching "divisive concepts" and "critical race" theory. These include measures such as the "Combating Racist Training in the Military Act of 2023,"[721] "the Warrior Act,"[722] and "Securing Our Schools Act of 2023."[723] The measures either flatly prohibit the teaching of critical race theory or they deny federal funding to a public institution that teaches critical race theory in the curriculum.

Limiting Public Protests

The limitation of public protests flows from the reaction to many public protests involving challenges to social justice/BLM (Black Lives Matter)/ death of George Floyd and, to a lesser extent, protests related to those who have been upset with COVID-19 restrictions. For example, the Holding Rioters Accountable Act of 2020 would withhold federal funding to those state and local authorities who refuse to hold rioters accountable.[724] Likewise, the Support Peaceful Protest Act of 2020 would hold those convicted of federal offenses while protesting financially liable for the expenses and damage caused by their disruptive activities.[725]

[715] See Restore Democracy Resolution, H. Res. 343 (115th Cong.); H. Res. 377 (115th Congress).
[716] S. 4822 (118th Cong.)
[717] For the People Act of 2021, S. 1 (117th Cong.)
[718] We the People Democracy Reform Act of 2017 (115th Cong.)
[719] See David L. Hudson, Jr. "Nonexistent critical race theory curriculum is caught in the crosshairs," *ABA Journal*, Feb. 1, 2022. https://www.abajournal.com/magazine/article/nonexistent-critical-race-theory-curriculum-is-caught-in-the-crosshairs
[720] Ibid.
[721] S. 556 (118th Cong.)
[722] H.R. 2378 (118th Cong.)
[723] S. 1082 (118th Cong.)
[724] H.R. 8301 (117th Cong.)
[725] H.R. 289 (118th Cong.)

## II. Non-Legislative Developments

Congress has forced the CEOs of notable social media companies to testify before Congress in both 2020 and 2021. Most notably, Mark Zuckerberg of Facebook, Jack Dorsey (the former head of Twitter), and Google's Sundar Pichai had to appear before a House committee in March 2021 to answer questions from legislators about how they deal and police disinformation online.[726] In July 2020, the Big Tech giants faced tough questioning from Congress, though that focused more on antitrust issues than freedom of expression.[727] But, real enforcement has not occurred in the form of comprehensive legislation at the federal level.[728] Section 230 has long been a target of federal legislators but somehow Section 230 remains intact. But federal legislators continue to inveigh against the immunity the federal law provides social media platforms.[729]

## III Enforcement

The below are cases heard before the US Supreme Court:

Political Speech

*Minnesota Voters Alliance v. Mansky (2018)*[730]

The Supreme Court held that a ban on wearing political insignia such as budges in a polling area on Election Day violated the First Amendment of the U.S. Constitution.

*Heffernan v. City of Paterson (2016)*[731]

Heffernan sued after he was demoted for picking up a campaign sign for his mother. The Supreme Court ruled that an employer could be sued for violating an employee's First Amendment rights even if the employer mistakenly thought the employee was exercising those rights.

[726] See, e.g., Shannon Bond, Facebook, Twitter, Google CEOs Testify Before Congress: 4 Things To Know, NPR.org, 3/25/2021. https://www.npr.org/2021/03/25/980510388/facebook-twitter-google-ceos-testify-before-congress-4-things-to-know

[727] Tony Romm, Amazon, Apple, Facebook, and Google grilled on Capital Hill over their market power," The Washington Post, July 29, 2020. https://www.washingtonpost.com/technology/2020/07/29/apple-google-facebook-amazon-congress-hearing/

[728] See Brian Fung, "The U.S. government is still trying to find ways to regulate Big Tech," CNN.com, Jan. 11, 2023. https://www.cnn.com/2023/01/11/tech/jonathan-kanter-doj/index.html

[729] Rosie Moss, "The Future of Section 230: What Does It Mean for Consumers?" National Association of Attorney's Generals, https://www.naag.org/attorney-general-journal/the-future-of-section-230-what-does-it-mean-for-consumers/

[730] https://supreme.justia.com/cases/federal/us/585/16-1435/

[731] https://supreme.justia.com/cases/federal/us/578/14-1280/

Content Discrimination

*Reed v. Town of Gilbert (2015)*[732]

Content-based laws are presumed to be unconstitutional, and restrictions may be justified only if the government can prove that they are narrow and exist for an important state interest. Based on this, the Supreme Court invalidated a local ordinance which treated the positioning of signs differently according to their content. This case affirms the principle of content-discrimination as a central element in the application of the First Amendment.

False Statements

*U.S. v. Alvarez (2012)*[733]

Alvarez publicly lied about being a retired member of the U.S Marines and that he was wounded in combat. He was prosecuted under the Stolen Valor Act which criminalizes lying about receiving military honor. Alvarez argued that the Act did not conform to the First Amendment. The question before the Supreme Court was whether the Act in question violated the First Amendment. The Supreme Court found that there is no general exception to the First Amendments for lies/false statements and that such statements occur in an open public or private conversation.

**Conclusion**

Federal legislative activity remains a pervasive threat to First Amendment freedoms in the United States. However, there are arguably far more restrictions at the state level. Furthermore, for whatever reason, the state measures often do not seem to be as vetted nearly as well as proposed federal legislation. In other words, the starker and more flagrant affronts to freedom of speech take place at the state level. Florida enacted the Parental Rights in Education Act[734] - the "Don't Say Gay" law - restricting speech in public schools. This has spawned several copycat bills, as noted by PEN America[735]. PEN has been developing a tracker[736] of 'educational gag orders' – state legislative attempts to restrict teaching, training, and learning in primary and secondary schools, and higher education. These bills, generally targeting discussions of race, gender, sexuality, and US history, began to appear during the 2021 legislative session and quickly spread to statehouses throughout the country. By the end of 2021, 54 bills had been filed in 22 states, of which 12 became law. Between January and August 2022, 36 different states introduced a total of 137 educational gag order bills, an

[732] https://supreme.justia.com/cases/federal/us/576/13-502/
[733] https://supreme.justia.com/cases/federal/us/567/709/
[734] https://legiscan.com/FL/text/H1557/id/2541706
[735] https://pen.org/press-release/expanded-dont-say-gay-law-in-florida-is-a-flagrant-escalation-of-censorship-in-schools-says-pen-america/
[736] https://docs.google.com/spreadsheets/d/1Tj5WQVBmB6SQg-zP_M8uZsQQGH09TxmBY73v23zpyr0/edit#gid=1505554870

increase of 250 percent over 2021[737]. A few states have taken the bold step of passing laws that attempt to regulate content on social media. Most prominently among these are the Stop Social Media Censorship Act in Florida and a similar measure in Texas.[738] Federal lawsuits challenged both of these state laws and the issue is now before the U.S. Supreme Court. The Justices have asked the U.S. solicitor general to file a brief identifying their position on these state laws.[739] Many believe these laws are constitutionally problematic.

[737] https://pen.org/report/americas-censored-classrooms/
[738] See David L. Hudson, Jr. "State laws targeting social media platforms face First Amendment challenges," ABA Journal, Dec. 2022. https://www.abajournal.com/magazine/article/state-laws-targeting-social-media-platforms-face-first-amendment-challenges
[739] Amy Howe, *Justices request federal government's views on Texas and Florida social-media laws*, SCOTUSblog (Jan. 23, 2023, 4:44 PM), https://www.scotusblog.com/2023/01/justices-request-federal-governments-views-on-texas-and-florida-social-media-laws/


# Uruguay

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**Country Summary**

Despite a generally amenable environment to freedom of expression, three restrictive laws were passed in Uruguay between 2015 and 2022: one law approved during Covid allows an administrative authority to request the removal of illegal online transmissions of live sporting events without the intervention of judicial authorities and without guarantees for potential affected parties, compromising the right to due process, one Anti-Terrorism law uses overly broad and vague definitions of "acts of a terrorist nature" which could affect civic space and limit the right to freedom of expression, leaving room for discretion that allows for the arrest, imprisonment, and prosecution of peaceful members of civil society organizations and human rights defenders, one law on processing of automated data grants the rights of data subjects to be informed of the criteria for data evaluation and processing but uses conflicting language on the type of information that should be provided to data subjects, while not adequately

safeguarding trade secrets and industrial secrets, a common requirement in international regulations on data protection.

**Introduction**

Uruguay is one of the most stable democracies in Latin America.[740] In the Freedom House index, the country consistently scored 97-98 in the period 2015-2022. While it suffered from a military dictatorship between 1973 and 1985, the return of democracy came with a resilient political system, even amidst the economic turmoil often caused by crises in its northern neighbor (Brazil) and towards the south of the Río de la Plata (Argentina). While the Frente Amplio (a left-of-center coalition) ruled the country for three consecutive presidential terms between 2010 and 2020, a right-of-center party won the elections of 2020 and took over. The country's political life changed very little. Generally speaking, it is difficult to find laws that are obviously problematic from a freedom of expression standpoint. But, two pieces of legislation stand out.

**I. Legislation**

Law 20.075 – Accountability and Balance of Budget Execution

First, the Law 20.075 on Accountability and Balance of Budget Execution for the year 2021[741] was approved on October 18, 2022. The law consists of 530 articles and was a massive political investment by the right-of-center governing coalition. The law introduced new regulations in various areas. On freedom of expression, the regulation on blocking illegal online broadcasting of sporting events is especially noteworthy. Indeed, the law establishes that the Regulatory Unit of Communication Services (URSEC) may request Internet Service Providers (ISPs) to disable real-time access to those illegal transmissions. For this purpose, the rights holders or their representatives must submit a reasoned request to URSEC. Once it is submitted, URSEC may issue precautionary measures to protect the rights, ordering the disabling of access to the illegal online transmissions of live sporting events for the duration of the respective event. Once the precautionary measure is issued, it will be communicated to the ISPs and the rights holders or their representatives.

This is a typical notice and take down system, based on strong deference towards copyright holders. The law clarifies that URSEC should not promote, nor should ISPs execute, the complete blocking of access to a server or website that hosts legal services and content, but only the temporary disabling of access to illegal online transmissions of live sporting events. While the initial bill included a provision limiting liability of ISPs, the guarantees were sacked during the drafting process. What remained was Article 233 of the law, which allows an Administrative Authority to request the removal of content from the Internet without the

[740] https://freedomhouse.org/country/uruguay/freedom-world/2022
[741] https://infolegislativa.parlamento.gub.uy/htmlstat/pl/leyes/ley20075.pdf

intervention of judicial authorities and without guarantees for potential affected parties, compromising the right to due process. It also requires ISPs to disable access or remove illegal live online sports streams within 30 minutes of receiving a notification of non-compliance with the precautionary measure provided by URSEC. The article does not indicate what evidence rights holders must present, what factors will be considered for a decision, the possibility for an affected website to present evidence in its favor, or whether these orders are subject to judicial review.

Freedom of expression is protected in Uruguay's Constitution. Specifically, article 29 states that the communication of thoughts by words, private writings or publishing in the press or in any other form of dissemination are free and shall not be subject to prior censorship. The author, printer or issuer will be responsible for the abuses they commit as established by law. While freedom of expression is not an absolute right and may be subject to certain limitations, according to Inter-American jurisprudence, these limitations must adhere to the standards set by the tripartite test to be permissible.[742] Firstly, the limitation must be clearly and precisely defined through a formal and substantive law. Secondly, the limitation must be aimed at achieving compelling objectives authorized by the American Convention. Finally, the limitation must be necessary in a democratic society to achieve the compelling purposes being pursued, strictly proportional to the intended aim, and suitable to achieve its objective. These conditions must be met simultaneously for the limitations to be legitimate.

Regarding the first requirement, it is important to highlight that it requires the law's text to be as clear and precise as possible in order to prevent legal uncertainty for citizens. In this case, the article has unclear and confusing definitions, and it encompasses too many services, disregarding the diverse nature of internet platforms.[743] As the tripartite test establishes, the restriction must be necessary to achieve the compelling purposes being pursued. This means that there must be a clear and compelling necessity to impose the limitation, without any other less restrictive means available. When faced with various possible measures, the one that imposes the least restriction on the protected right should be chosen, aiming to ensure the exercise of the right to freedom of expression. The measures taken must also be strictly proportional to the legitimate purpose pursued. However, the proposed text poses a significant risk of blocking incorrect content. It introduces important risks of censoring legal content, affecting rights, and generating possibilities of content blocking in different ways across different networks, resulting in Internet fragmentation. Any request addressed to intermediaries for content moderation must be preceded by an order issued by a court or competent authority that is independent of any undue influence, whether political, commercial, or otherwise. Therefore, the possibility for an Administrative Authority such as the

[742]http://www.oas.org/es/cidh/expresion/docs/cd/sistema_interamericano_de_derechos_humanos/index_MJIAS.html
[743]http://www.oas.org/es/cidh/expresion/docs/cd/sistema_interamericano_de_derechos_humanos/index_MJIAS.html

URSEC to request the removal of content from the Internet without the intervention of judicial authorities and without guarantees for potential affected parties, compromising the right to due process, is very problematic.

On the other hand, Law No. 20.075[744] also modified Law No. 18.331.[745] It established that, in the case of automated data processing regulated by Article 16 of the law, the criteria for evaluation, applied processes, and technological solution or program used must be disclosed to the affected individuals. The new wording of Article 13 also establishes that when personal data is not collected directly from the data subjects, the relevant information must be provided to them within a period of five business days from the receipt of the request by the data controllers. Failure to comply enables the data subject to take actions. The supervisory authority may establish specific conditions for the permanent advertisement of the information indicated in this article. On the other hand, Article 16 addresses the right to challenge personal assessments and establishes that individuals have the right not to be subjected to a decision with legal effects that significantly affects them, based on automated or non-automated data processing intended to evaluate certain aspects of their personality, such as their work performance, credit, reliability, behavior, among others. According to Article 16, the affected individual has the right to obtain information from the database controller regarding the evaluation criteria and the program used in the processing that led to the decision expressed in the act.

It can be observed that there are discrepancies between the type of information that should be provided according to the two articles, creating legal uncertainty regarding how to interpret both provisions harmoniously. On the other hand, in the wording of Article 13, the protection of trade secrets and industrial secrets is not adequately safeguarded, which is also a common requirement in international regulations on data protection and is extremely relevant for promoting innovation at the national level.

Law No. 19.749 – The Comprehensive Anti-Terrorism Law

Finally, Law No. 19.749[746] (the Comprehensive Anti-Terrorism Law) was enacted by the Uruguayan Parliament in May 2019. As stated in its first article, its purpose is to implement financial sanctions on individuals or legal entities related to terrorism, the financing of terrorism, and the proliferation of weapons of mass destruction, in accordance with the Resolutions of the United Nations Security Council. As in many countries in the Americas, these types of laws pose risks in terms of the potential to abuse some of the powers these laws codify in ways that restrict freedom of expression.

[744] https://www.impo.com.uy/bases/leyes/20075-2022
[745] https://www.impo.com.uy/bases/leyes/18331-2008
[746] https://www.impo.com.uy/bases/leyes/19749-2019

Of course, the need to prevent the financing of terrorism is an essential aspect of any effective counterterrorism strategy. However, on many occasions these laws have opened the door to the adoption of repressive measures at the national level against the lawful and non-violent activities of civil society.[747] In this context, many of the international and national measures adopted to combat terrorism financing and criminalize the provision of material support to terrorism have had the indirect effect of restricting the space in which humanitarian non-governmental organizations and human rights defenders can carry out their activities, limiting the right to freedom of expression, freedom of association, and freedom of assembly.

Among the problems of the law, the broad ways in which it defines terrorism poses a problem from the point of view of the Inter-American system three prong test. As highlighted by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms in the fight against terrorism: "the adoption of excessively expansive definitions of terrorism can lead to deliberate distortions of the term. For instance, they may be used to suppress Indigenous peoples' claims and social movements, as well as unintentionally result in human rights violations. Unclear, imprecise, or overly broad definitions can be weaponized to target civil society, silence human rights defenders, bloggers, and journalists, and criminalize peaceful activities aimed at defending minority rights, religious rights, labor rights, and political rights."

In this context, the Special Rapporteur also emphasized that "criminalizing actions such as 'encouraging,' 'promoting,' or 'supporting' acts of terrorism, 'justifying' or 'glorifying' terrorism, as well as 'inciting' to commit an act of terrorism, should be appropriately defined. The elements of the criminal offense (*actus reus* and *mens rea*) should be rigorously defined to adhere to the principles of necessity and proportionality. Similarly, the inclusion of phrases such as 'overthrowing the constitutional order,' 'endangering national unity,' 'social peace,' 'disturbing public order,' or 'insulting the reputation of the State or its position,' without adding other elements constituting serious crimes, such as the use of lethal violence, can have serious consequences on various human rights, including freedom of expression, freedom of association, and freedom of assembly."

In addition to the previously mentioned standards, when the limits on freedom of expression are established by criminal laws, the inter-American Court of Human Rights has established[748] that they must satisfy the principle of strict legality: "should the restrictions or limitations be of a criminal nature, it is also necessary to strictly meet the requirements of the criminal definition in order to adhere to the *nullum crimen nulla poena sine lege praevia* principle." Laws must use strict and unequivocal terms, clearly restricting any punishable behaviors, including a clear definition of the incriminated behavior, setting its elements and defining the

[747]https://www.amnesty.org/en/latest/news/2018/05/chile-autoridades-deben-dejar-de-criminalizar-personas-mapuches-a-traves-de-ley-antiterrorista/
[748] https://globalfreedomofexpression.columbia.edu/cases/uson-ramirez-v-venezuela/

behaviors that are not punishable or the illicit behaviors that can be punishable with non-criminal measures.

When analyzing Article 14 of the law, special attention should be given to the new elements added in the second part of the first paragraph to the definition of "acts of a terrorist nature". Particularly problematic is the inclusion of the phrase "This definition also includes any act intended to provoke a state of terror or widespread fear in part of the population." This wording is vague and ambiguous, which can lead to overreach and impact the legitimate exercise of rights such as freedom of expression, freedom of assembly and association, as well as the right to protest, under the argument that these social expressions generate "widespread fear in part of the population."

The use of these overly broad definitions of terrorism narrows and affects civic space, as well as the right to freedom of expression, creating room for discretion that allows for the arrest, imprisonment, and prosecution of peaceful members of civil society organizations.

## II. Non-Legislative Developments

From 2015 to 2022 there were no major non-legislative developments concerning freedom of expression.

## III. Enforcements

From 2015 to 2022 there were no major enforcement developments concerning freedom of expression.

## Conclusion

Any notice and take down system must be mindful of the potential of it being abused: those whose rights are *a priori* recognized in these systems have the capacity of invoking that presumption broadly, in ways not necessarily desired by the regulation. Hence, these systems must include specific safeguards that will prevent those abuses from happening. On the other hand, anti-terrorism legislation must include specific guarantees against the possibility of abuse by those in charge of enforcing. Sadly, in Latin America there are important precedents that show how this kind of legislation can be used to harass civil society.

# Report Conclusion

This report demonstrates that the world´s most free and open democracies have been consistently limiting free speech, the very freedom that sets the democracies apart from illiberal and authoritarian states. Among the countries reported upon, there has been a steady rise in speech restrictive developments in 2015-22. Contributors have grappled with the question of whether democracies are contributing to, or countering, the global "free speech recession." In doing so, they suggest answers to the thorny questions of why and how freedom of speech is in global decline – a fundamental question for The Future of Free Speech.

Through discussion of legal developments relating to national security, hate speech, privacy, intermediary obligations, disinformation, defamation, Covid-19, amongst other cultural and political issues, contributors have sought to explain the reasons for this free speech recession across a geographically dispersed and culturally diverse group of leading democracies. Illustrative of the geographic spread of this growth in speech restrictions, Denmark, Australia and Japan had the most reported developments, which the regional graphs in Appendix 1 detail further.

While over three-quarters of developments reported on are speech restrictive, this report has painted a nuanced picture across democracies, presenting instances of free speech protection by legislatures and courts. Press freedom, political pluralism and the protection of democracy are the most common justifications for expressive rights protection. This trend highlights the link between the health of free speech and the health of democracy in a polity.[749] Empirical research reinforces this link, as there is a high degree of overlap in the countries topping global free speech and democracy indexes. However, interestingly, South Africa, a "flawed" and increasingly troubled democracy, produced the most speech protective developments of any country reported upon. This arguably reinforces the strength of the South African Constitutional Court's case law when adjudicating expression issues.[750] France and Portugal were also a strong source of reported speech protective developments, as illustrated by the regional graphs in Appendix 1, albeit far behind South Africa.

While the individual restrictions documented in this report do not mirror the draconian measures of censorship and repression in countries like Russia, Iran or other authoritarian countries, the cumulative effect of free speech erosions is likely to have serious and negative long term effects on the ecosystem of free expression in the countries surveyed. This is also likely to have serious negative consequences for free speech at the international level, where open democracies are supposed to act as the bulwark against norm erosion in international human rights law and to condemn regimes violating the freedom of expression of dissidents,

[749] See also *Handyside v UK* https://globalfreedomofexpression.columbia.edu/cases/handyside-v-uk/
[750] https://futurefreespeech.com/wp-content/uploads/2022/05/Article_South-Africa-the-Model-A-comparative-Analysis-of-Hate-Speech-Jurisprudence-of-South-Africa-and-The-European-Court-of-Human-Rights.pdf

journalists, civil society and ordinary citizens. When democracies themselves err on the side of restricting freedom of expression authoritarian states are emboldened and criticism of their repressive actions carry less weight.

In the light of the threats posed to free speech by the restrictions discussed in the contributions to this report, we offer some recommendations.

*National security and hate speech*

The governmental imperative to snuff out expression that could threaten the state and democracy itself, as well as the urge to be intolerant towards intolerance, are reflected in the fact that speech restrictions based on national security, cohesion and public safety concerns are the biggest category of restrictive legislation and enforcement. Hate speech is also a major restrictive category. History, authoritarian regimes today – and even developments in open democracies – teach us that in the wrong hands the meaning of "national security," "national cohesion" and "hate speech" can be perverted and become doublespeak. This lesson should inform lawmakers so that the proposed cures are not worse than the disease, and sledgehammers are not used to crack nuts. We recommend that democracies reconsider the usefulness of hate speech laws and that such restrictions on freedom of expression should map more closely to the strict requirements under Article 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR). This includes taking inspiration from the so-called Rabat Plan of Action's six-part test, which emphasizes, among other factors, that hate speech should only be restricted if based on the intent to create imminent harm.[751] Examples like the conviction of a woman for a post on Twitter/X in Spain, for a joke about the assassination of a fascist politician in Franco's dictatorship fifty years ago, and English police hunting down a woman for a satirical placard featuring coconuts with reference to senior cabinet ministers, illustrate the creep of laws against "offense" and "insult" and the limiting of space for political comment.

These considerations are particularly relevant to the content regulation of online platforms discussed above, where the trend is towards government legislation regarding content removals at scale, which represents a serious threat to freedom of expression.

*Intermediary obligations*

Governments should tie content regulation to international human rights law, ensuring their new laws are legitimate, necessary, and proportional. Illegal content under this content regulation should again map more closely to Article 19 and 20 of the ICCPR.

[751] https://www.ohchr.org/en/freedom-of-expression#:~:text=The%20Rabat%20Plan%20of%20Action%20suggests%20a%20high%20threshold%20for,article%2020%20of%20the%20ICCPR.

Legislative proposals such as the UK's Online Safety Bill (OSB), which recently passed into law, arguably not only curtail speech protected by the International Bill of Human Rights[752], but even Article 10 of the ECHR,[753] which is less permissive in its speech protection than Article 19 ICCPR. Thankfully, the UK Secretary of State overseeing the OSB's passage into law dropped the nebulous, subjective, and inevitably censorious "legal but harmful" clause in November 2022, on the grounds that, 'it is [not] morally right to censor speech online that is legal to say in person'[754]. This commendable ministerial statement does not, however, seem to tell the full story. Internet law expert, Graham Smith, highlights the various ways in which the Bill continues to make illegal online some of what is legal offline.[755] The DSA too empowers states to pressure private companies into quickly removing content at the risk of fines, it will likely spur further enlargements in expansive platform hate speech policies.

There are serious reasons why societies dedicated to freedom, dignity and equality seek to counteract the promotion of hatred. Hate speech can result in harm to individuals, their communities and society more broadly. A tragic, recent illustration of this is when Myanmar's military used Facebook to incite widespread violence against the Rohingya Muslim Minority. [756]Further, hate speech may lead to psychological harm, fear[757] and prompt self-censorship.[758]

However, there is also a growing amount of evidence[759] to suggest that free speech is more likely to limit than to increase violent conflict – including terrorism[760] – in open democracies. Consequently, banning hate speech is not necessarily an efficient solution that can be implemented without serious risks to freedom of expression and indeed wider freedoms. Opaque and broadly construed hate speech bans may be used to target dissenting viewpoints and also the very groups that such measures are intended to protect.

The Future of Free Speech has previously discussed the possibilities of counter-speech and increased decentralization as a more proportionate means to the legitimate aim of combatting the harms of hate speech online.[761] This too applies to disinformation on online platforms.

*Privacy*

[752] https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights
[753]https://www.indexoncensorship.org/wp-content/uploads/2022/05/Legal-analysis-of-the-impact-of-the-Online-Safety-Bill.pdf
[754] https://questions-statements.parliament.uk/written-statements/detail/2022-11-29/hlws385
[755] https://inforrm.org/2022/12/22/some-of-what-is-legal-offline-is-illegal-online-graham-smith/
[756] Evelyn Doyek, 'Facebook's Role in the Genocide in Myanmar: New Reporting Complicates the Narrative' (2018) Lawfare
[757] Phyllis B. Gerstenfeld, 'Hate Crimes: Causes, Controls, and Controversies' (1st ed. 2017 Sage).
[758] Billy Henson, Bradford W. Reyns, Bonnie S. Fisher, 'Fear of Crime Online? Examining the Effect of Risk, Previous Victimization, and Exposure on Fear of Online Interpersonal Victimization' (2013) Journal of Contemporary Criminal Justice
[759]https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4578663#:~:text=On%20one%20side%20of%20the,and%20attempt%20to%20marginalize%20them.
[760] https://journals.sagepub.com/doi/full/10.1177/0032321720950223
[761]https://futurefreespeech.com/wp-content/uploads/2023/07/Community-Guidelines-Report_Latest-Version_Formated-002.pdf

The right to be forgotten has been at the center of a debate about balancing privacy and free speech in the internet age.[762] In Europe, both principles are written into the European Union's bill of rights, the Charter of Fundamental Rights. Proponents say the right to erasure is a much-needed legal tool for people, particularly those outside the public eye, to have personal information delisted from search results.[763]

It can be argued, however, that its reach has broadened over time and that countries within the European Union are interpreting it differently. Critics often point to examples of the right being used to target news articles, it expanding into areas for which it was not intended and being abused to keep information out of the public domain.[764] While it is likely that examples which substantiate these criticisms can be found, criteria such as the nature and sensitivity of the information, the public interest and the role played by the data subject in public life help to mitigate disproportionate censorship.[765] We recommend that these criteria should be applied in a way that promotes free speech to a large degree – both by courts and search engines (in their quasi-judicial function).

Conversely, a lack of privacy can have a chilling effect on free speech. As Privacy International notes, "today, more than ever, privacy and free expression are interlinked; an infringement upon one can be both the cause and consequence of an infringement upon the other."[766] This is particularly the case when it comes to communications surveillance. Lawyers and technologists have flagged the risk to free speech posed by any erosion of end-to-end encryption under the UK's Online Safety Bill.[767] However, to understand the true nature of the threat, the devil will be in the detail of the codes of practice developed by the UK communications regulator, Ofcom, around CSAM and encryption[768]. Activists and experts see similar threats[769] to encryption posed by the EU's mooted Child Sexual Abuse Material Regulation.[770] The ACLU notes equivalent threats from current bills going through Congress.[771]

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[762]https://www.mediadefence.org/ereader/publications/advanced-modules-on-digital-rights-and-freedom-of-expression-online/module-5-trends-in-censorship-by-private-actors/right-to-be-forgotten/#:~:text=There%20were%20concerns%20that%20an,indefinitely%20defined%20by%20their%20past

[763] https://www.cnil.fr/fr/pour-un-droit-au-dereferencement-mondial

[764] https://www.accessnow.org/cms/assets/uploads/2017/09/RTBF_Sep_2016.pdf

[765] https://gdpr-info.eu/art-17-gdpr/; https://www.dataprotection.ie/en/individuals/know-your-rights/right-erasure-articles-17-19-gdpr; https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf

[766] https://privacyinternational.org/blog/1111/two-sides-same-coin-right-privacy-and-freedom-expression

[767] https://haddadi.github.io/UKOSBOpenletter.pdf; https://www.indexoncensorship.org/wp-content/uploads/2022/11/Surveilled-Exposed-Index-on-Censorship-report-Nov-2022.pdf; https://www.libertyhumanrights.org.uk/wp-content/uploads/2022/04/Joint-civil-society-briefing-on-private-messaging-in-the-Online-Safety-Bill-for-Second-Reading-in-the-House-of-Lords-January-2023.pdf

[768] https://www.youtube.com/watch?v=E--bVV_eQR0; https://www.computerweekly.com/news/366551278/UK-minister-fails-to-reassure-tech-companies-over-encryption-risk

[769] https://www.theguardian.com/world/2023/may/08/eu-lawyers-plan-to-scan-private-messages-child-abuse-may-be-unlawful-chat-controls-regulation; https://www.politico.eu/article/whatsapp-signal-meta-facebook-uk-online-safety-bill-encryption/

[770] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A209%3AFIN

[771] https://www.aclu.org/press-releases/aclu-strongly-opposes-cascade-of-dangerous-legislation-threatening-to-destroy-digital-privacy

We recommend that lawmakers think carefully about these concerns, being aware of the law of unintended consequences, when drafting bills regulating content online.

*Defamation*

SLAPPs aim to shut down critical speech by intimidating critics and draining their resources, undermining their active public engagement. A key characteristic of this kind of legal action is the disparity of power and resources between the plaintiff and the defendant.[772]

We recommend that countries should follow the example of countries like Canada, by passing robust anti-SLAPP laws, especially as several authors have noted the risk of defamation laws being abused within their jurisdictions by well-resourced actors. Anti-SLAPP legislation can help to give effect to free and equal speech, empowering less advantaged voices to exercise free speech rights substantively. Legal costs regimes and the accessibility of legal aid in defamation cases also have serious implications for free speech. Regarding legal aid in defamation cases, the ECtHR has emphasized, "there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate…on matters of public interest such as health and the environment",[773] when famously ruling on the rights of two activists sued by McDonald's for libel. In the absence of legislation, courts have an important role to play – potentially especially in common law jurisdictions – to identify defamation claims correctly as SLAPPs. Countries could also tweak their defamation laws so that public figures can only sue for defamation if they can demonstrate the authors acted maliciously, with knowing or reckless disregard for the truth[774]. In other words, adopt something closer to the U.S. libel standard.[775]

As examples from Spain, Korea and elsewhere have illustrated, criminal defamation laws are inherently vague, arbitrary, and outdated. In line with many international bodies and NGOs, we call for their repeal everywhere, but especially in democracies committed to free speech and democracy.

*Disinformation*

Disinformation should not be conflated with illegal content under content regulations of online platforms, such as the DSA. Any powers given to state bodies to regulate disinformation should be narrowed to very concrete and imminent harms so as to limit the chances of governments becoming arbiters of truth. Developments discussed above in Spain ('Procedure for intervention against Disinformation'), France (2018 law on information to counter disinformation) and Taiwan (legislative changes for the "Combatting Disinformation Action" in

[772] https://www.ecpmf.eu/slapp-the-background-of-strategic-lawsuits-against-public-participation/
[773] *Steel and Morris v. United Kingdom* [2005] EMLR 314 https://globalfreedomofexpression.columbia.edu/cases/steel-v-united-kingdom/; https://www.coe.int/en/web/impact-convention-human-rights/-/justice-for-environmental-activists-in-mclibel-defamation-case
[774] https://www.taxpolicy.org.uk/2023/11/07/libel/
[775] https://globalfreedomofexpression.columbia.edu/cases/new-york-times-co-v-sullivan/

2019-2020) illustrate the growth of these powers in 2015-22. This trend has only increased in recent month as events in Australia (Misinformation Bill) and England & Wales[776], amongst other countries, show.

*Covid-19*

Many countries brought in restrictions during the Covid-19 pandemic. These can be seen as core aspects of what one leading British human rights lawyer has called the "emergency state"[777] – what happens when the machinery of government "reorganizes itself to tackle an existential threat." With regard to free speech in democracies, it is necessary to ask whether all Covid-19 related restrictions have expired or been repealed since the pandemic has "finished", and whether these restrictions were drafted and enforced in a legitimate, necessary, and proportional way. While different democracies adopted different approaches to the pandemic, grappling with a myriad of public health and contextual factors, it does seem there are some examples of better practice from a rule of law and free speech perspective, especially around legal certainty, protest rights[778] and disinformation regulation.

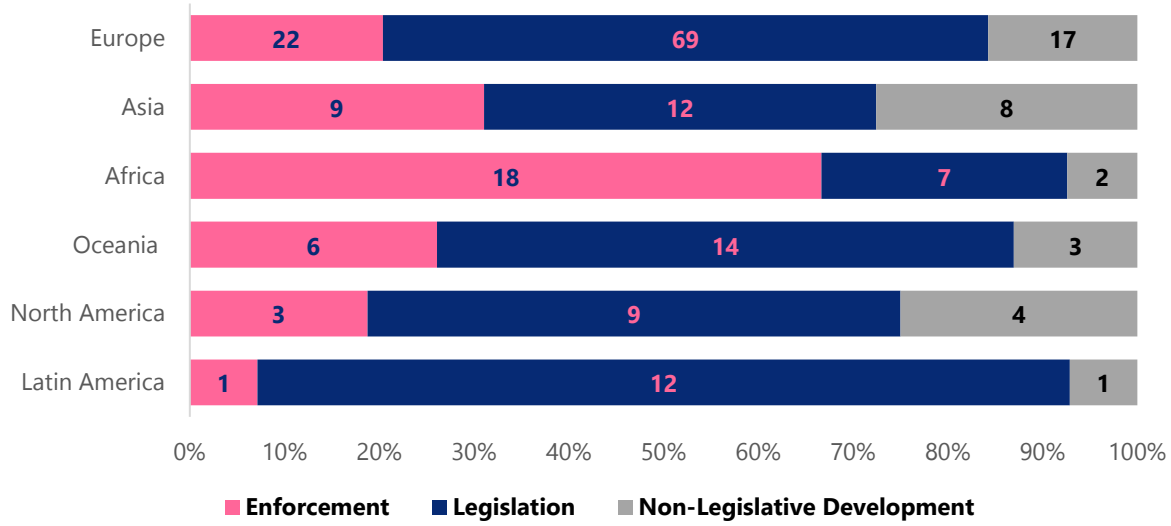
*Academic Freedom*

Academic freedom was an issue of major importance in the United Kingdom (England and Wales for this report for reasons explained above) with the Bill being passed just after the time period of our assessment (2023). Whilst this piece of legislation could prove to be speech protective legislation as its mission is to promote academic freedom, there are concerns that State power on campus could be enhanced thereby setting a dangerous precedent for free speech. In Quebec, legislation was passed in 2022 to adopt academic freedom policies with critics voicing concern over increased ministerial authority on the matter. These are new pieces of legislation and time will tell in terms of their use by ministers/the State.

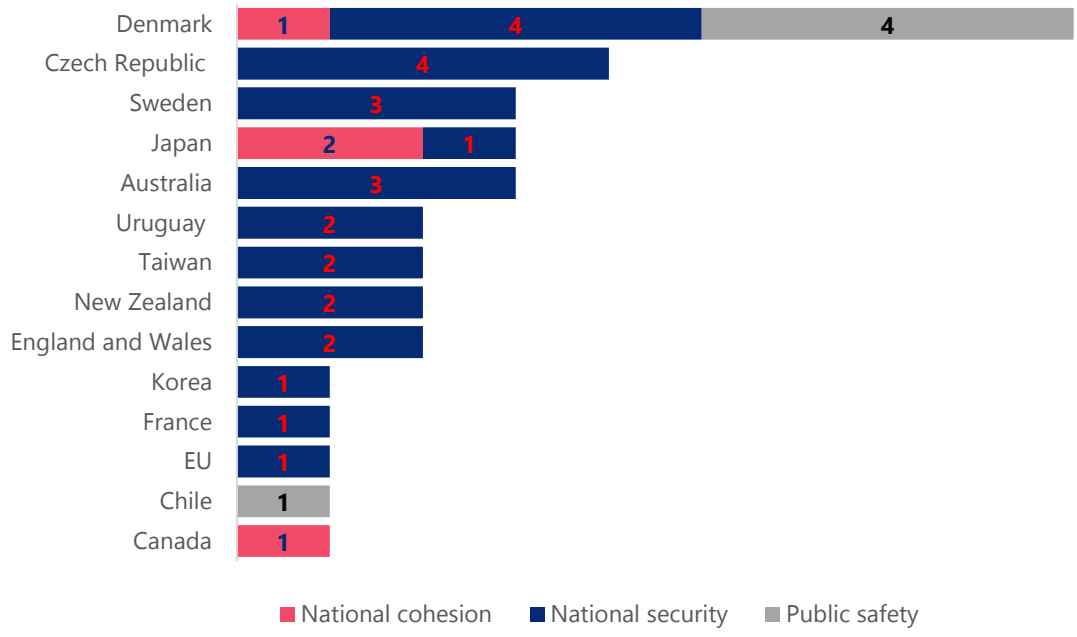
[776] https://bigbrotherwatch.org.uk/2023/10/government-apologises-after-counter-disinformation-unit-spread-misinformation-about-journalist-to-uk-and-us-governments/
[777]https://www.penguin.co.uk/books/453539/emergency-state-by-wagner-adam/9781847927460; https://www.ft.com/content/6bf9234f-5186-4f17-b2f6-6094330d2982
[778]https://www.theguardian.com/uk-news/2022/mar/11/met-police-breached-rights-of-organisers-of-sarah-everard-vigil-court-rules

# Appendix 1: regional graphs

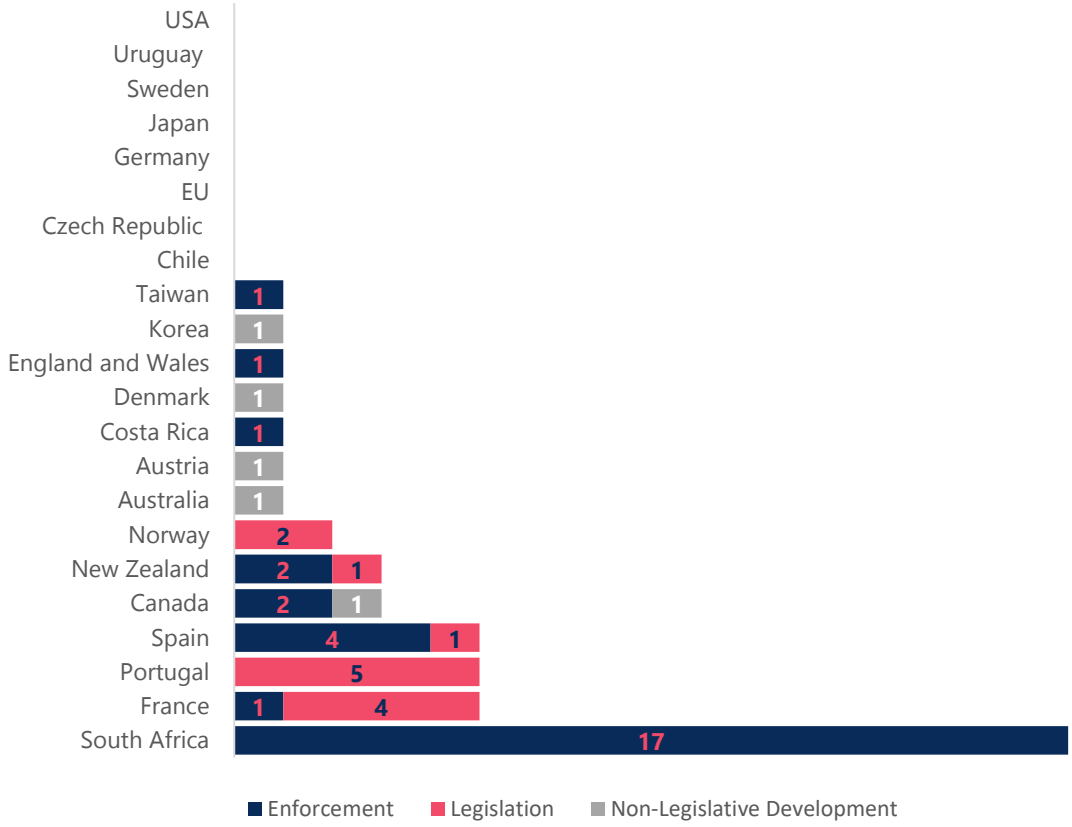
**Type of developments in regions**
(217 developments)



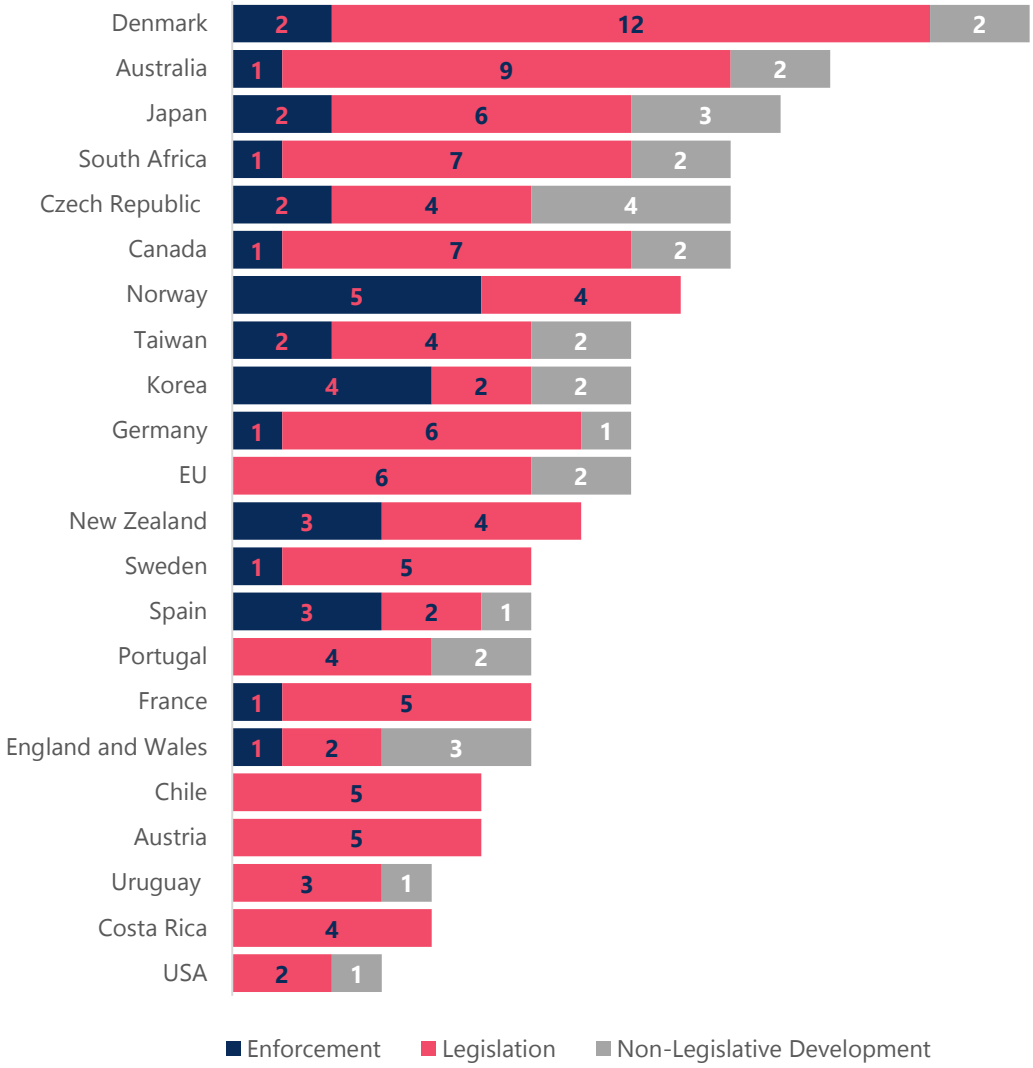

**National security, National Cohesion, Public Safety as grounds for speech restriction in different countries**
(2015-2022)

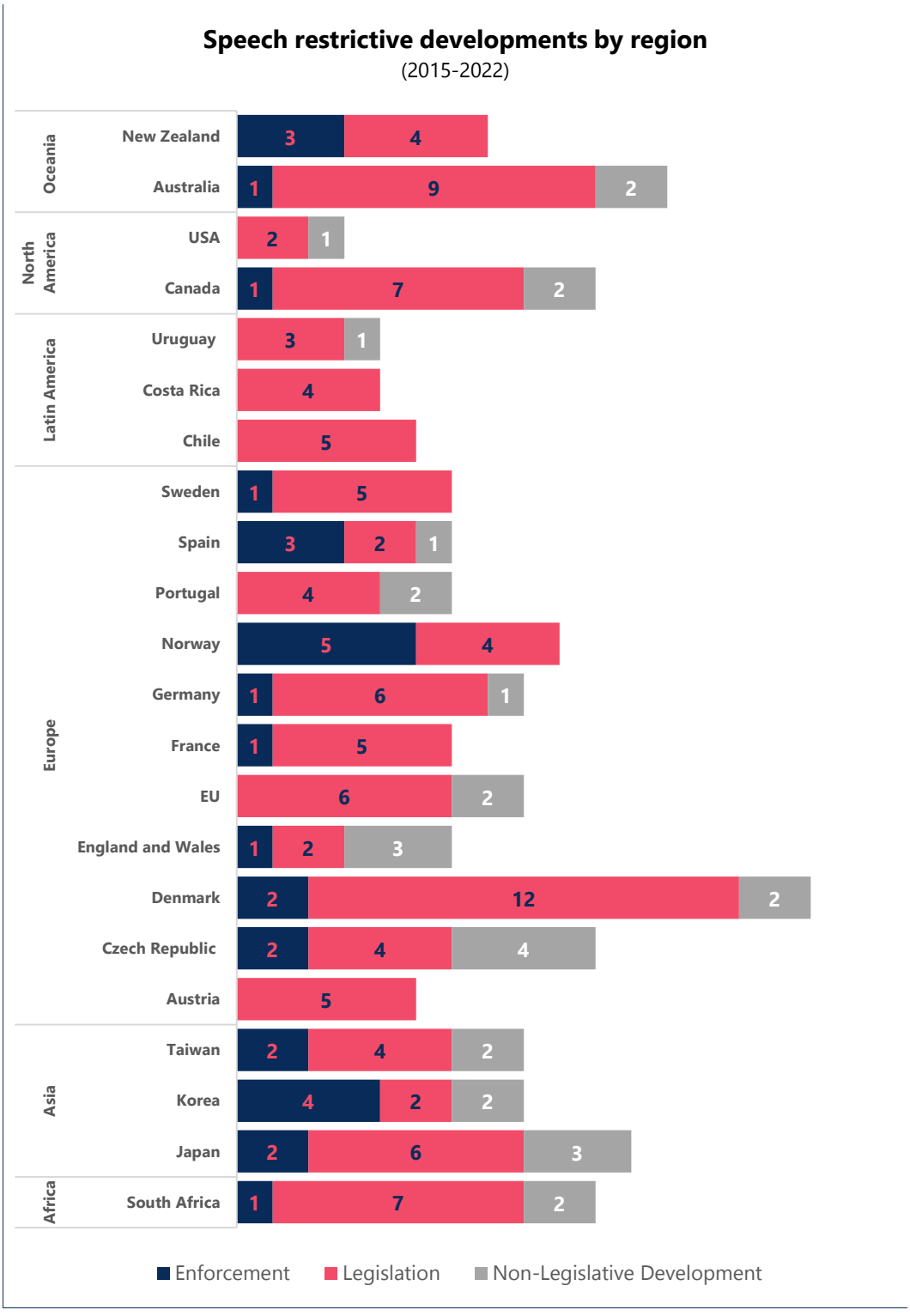


**Speech protective developments by country**
(2015-2022)

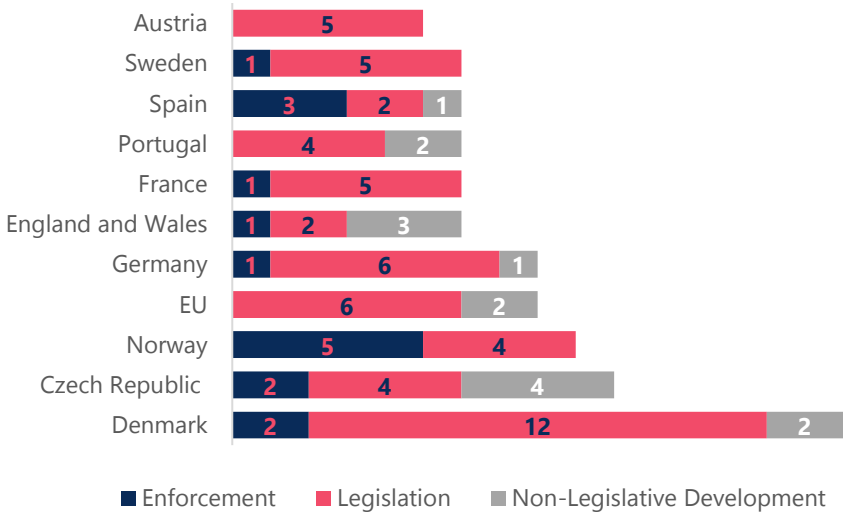


**Speech restrictive developments by country**
(2015-2022)

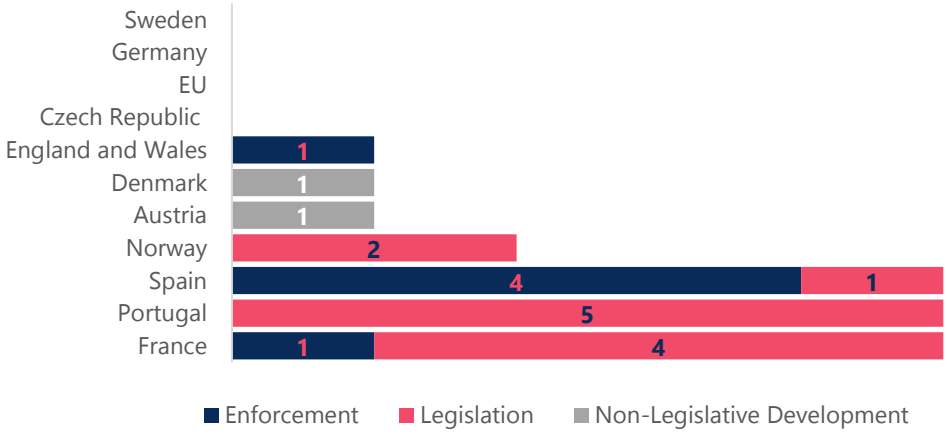



Speech restrictive developments by region
(2015-2022)
Oceania
New Zealand 3 4
Australia 1 9 2
North America
USA 2 1
Canada 1 7 2
Latin America
Uruguay 3 1
Costa Rica 4
Chile 5
Europe
Sweden 1 5
Spain 3 2 1
Portugal 4 2
Norway 5 4
Germany 1 6 1
France 1 5
EU 6 2
England and Wales 1 2 3
Denmark 2 12 2
Czech Republic 2 4 4
Austria 5
Asia
Taiwan 2 4 2
Korea 4 2 2
Japan 2 6 3
Africa
South Africa 1 7 2
Enforcement
Legislation
Non-Legislative Development

**Speech restrictive developments by country**
Europe (2015-2022)




**Speech protective developments by country**
Europe (2015-2022)



# Appendix 2: list of authors

**A list of countries assessed, and their experts can be seen in the table below**

| No | Country | Expert(s) | Affiliation |
|---|---|---|---|
| 1. | Australia | Richard Murray | The University of Queensland |
| 2. | Austria | Matthias C. Kettemann & Felicitas Rachinger | University of Innsbruck |
| 3. | Canada | James L. Turk | Centre for Free Expression, Toronto Metropolitan University |
| 4. | Chile | Lucia Maurino & Matías González | Centre for Studies on Freedom of Expression and Access to Information (CELE) |
| 5. | Costa Rica | Lucia Maurino & Matías González | Centre for Studies on Freedom of Expression and Access to Information (CELE) |
| 6. | Czech Republic | Petr Ráliš | Institute H21 |
| 7. | Denmark | Jacob Mchangama and Oline Nyegaard Grothen | Justitia/FFS |
| 8. | England and Wales | Natalie Alkiviadou and Nicholas Queffurus | Justitia/FFS |
| 9. | European Union | Joan Barata | Justitia/FFS |
| 10. | France | Pierre François Docquir | Independent Researcher |
| 11. | Germany | Daniel Holznagel | Judge |
| 12. | Japan | Ayako Hatano | The University of Oxford<br><br>The Center for Human Rights Education and Training |

| | | | |
|---|---|---|---|
| 13. | The Republic of Korea | Buhm-Suk Baek | Kyung Hee University Law School |
| 14. | New Zealand | Graeme Edgeler | Barrister, Blackstone Chambers |
| 15. | Norway | Vidar Strømme & Vilde Tennfjord | Norwegian Human Rights Institution |
| 16. | Portugal | José Alberto Azeredo Lopes | Catholic University of Portugal |
| 17. | South Africa | Caroline James | Independent Researcher |
| 18. | Spain | Joan Barata | Justitia/FFS |
| 19. | Sweden | Mikael Ruotsi | Uppsala University |
| 20. | Taiwan | Hui-Chieh Su | National Taiwan University |
| 21. | USA | David L Hudson Jr. | Belmont University |
| 22. | Uruguay | Lucia Maurino & Matías González | Centre for Studies on Freedom of Expression and Access to Information (CELE) |

# Final Remarks

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