

France: Freedom of expression in decline - Annex

Background on comparative legal framework

March 2021

In 2020, the French Government developed the Global Security Bill ("[Loi de Sécurité Globale](#)") that was adopted by the National Assembly (a lower chamber of the French Parliament) on 24 November 2020. The Bill should be presented to the French Senate in March 2021 for its final adoption.

Among other provisions, Article 24 of the Bill aims to amend the 1881 Law's Article 35 by prohibiting the publication of any photo or footage that identifies police in any way that is considered ill-intentioned. Article 24 provides:

Without prejudice to the right to impart information, whoever broadcasts the image of the face or any other element of identification of a national police official or a soldier of the national gendarmerie in the context of a police operation, by any means whatsoever and whatever the medium, with the aim of undermining their physical or mental integrity, will be punished with one year's imprisonment and 45,000 euros fine.

This provision equally affects journalists and citizens and might apply to situations like protests, demonstrations, civil unrest and others. Violation of this Bill could lead to a one-year imprisonment and a EUR 45.000 fine.

In order to advocate for the removal of this provision and provide a comparative perspective, ARTICLE 19 partnered with leading international law firms, through TrustLaw – the global pro bono service of the Thomson Reuters Foundation, to conduct legal research that examines whether there are similar provisions in legislation of other countries.

The research focused on legislation from **Germany, Ireland, the Netherlands and Canada** (Quebec). This background briefing provides an overview of the following key points under the legislation of the respective country:

- Overall legal framework applicable to freedom of information and freedom of expression including freedom of speech and freedom of the press in the country;
- Laws or provisions aiming to restrict these freedoms in the name of protecting national security forces and their rights to privacy, moral, mental and physical integrity (similar to the draft Article 24 of the French Global Security Bill);
- Data protection and privacy considerations of security forces in the context of a police operation;
- Information about the application of the law in practice and the analysis of relevant jurisprudence.

ARTICLE 19 and TrustLaw appreciate the help of law firms DLA Piper, Dentons and Blake, Cassels and Graydon LLP who gathered information for this background brief.¹

¹ This information does not constitute legal advice.

GERMANY

Overall legal framework applicable to freedom of information and freedom of expression including freedom of speech and freedom of the press

The German Constitution guarantees the freedom of speech and the freedom of the press as fundamental rights.

There is no provision in the German law that is similar or comparable to the new Article 24 of the French Global Security Bill prohibiting specifically the publication of pictures of police officers. There is also no law in Germany that specifically prohibits taking photos of police operations.

Instead, the general privacy regulations (the European GDPR and the German KUG) are also applied to police operations. There, the privacy rights of the police officer are balanced against the rights of the photographer (freedom of the press).

The German courts have rules in a number of administrative/police law cases, where police officers ordered photographers to stop taking photos. In addition, there have been civil law cases where the police officers requested the court to prohibit the photographer from publishing the photos. There have also been some cases where police officers started criminal proceedings against persons who had filmed them based on the allegation of an infringement of the non-publicly spoken word.

Laws and provisions aiming to restrict these freedoms in the name of protecting national security forces and their rights to privacy, moral, mental and physical integrity

Article 5 (1) of the German Constitution (*Grundgesetz, GG*) guarantees freedom of speech, freedom of the press and of broadcasting as well as freedom of information. Within the system of fundamental rights protection in Germany, this provision is of special significance. In landmark decisions, the Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*) emphasised the extraordinary importance of freedom of speech as “the most direct expression of the human personality in society, one of the most noble human rights of all” and, secondly, as “the very essence of a free and democratic state order” (BVerfG, judgment of 15 January 1958 – 1 BvR 400/51).

Freedom of the press in Article 5 (1) GG not only guarantees the freedom to publish news and opinions; rather, it also protects the entire area of journalistic activities, which includes in particular the gathering of information such as the taking of photographs by journalists.

In addition, Art. 5 (1) GG prohibits the (pre-)censorship of press publications.

To prevent these fundamental rights from being too easily compromised Art. 5 (2) GG provides for a special legal reservation. According to this section, these fundamental rights can *solely* be restricted by provisions for the protection of youth, personal honour or statutes that do not prohibit a specific opinion, that are not directed against the expression of an opinion, but serve to protect a *general* legal interest.

In addition to these constitutional requirements, the German federal states protect the freedom of the press with State Press Laws (*Landespressegesetz*) or State Media Laws (*Landesmediengesetz*). These laws usually protect freedom of the press and the media on a statutory basis and prohibit special measures affecting the freedom of the press. However, these regulations only concern the intellectual content of the press products and the dangers

to public safety they pose and therefore only have a restrictive effect in this respect. Restrictions concerning the external framework of press activities can be permissible under police law.

There is no provision in the German law that is similar or comparable to the new Article 24 of the French Global Security Bill prohibiting specifically the publication of pictures of police officers. There is also no law in Germany that specifically prohibits taking photos of police operations. Instead, it is generally allowed to take photos or videos of police action in Germany. The issue at hand is then dealt with by general laws, especially police law and privacy law.

Data protection and privacy considerations of security forces in the context of a police operation

There is no specific data protection/privacy regulation for photos in a police context in Germany. Instead, the general data protection laws apply, especially the GDPR (a.) and the laws that make use of the GDPR's opening clause for journalistic purposes (b.).

a. GDPR

Privacy is regulated by the Regulation (EU) 2016/679 (*General Data Protection Regulation, GDPR*) as well as by additional privacy laws in Germany.

The GDPR regulates the "processing" of "personal data". "Processing" means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction (Art. 4 (2) GDPR). So, the taking and publication of photos are usually considered to be "processing" in terms of the GDPR.

"Personal data" means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person (Art. 4 (1) GDPR). Because of this, images of the face or any other element of identification (as mentioned in Art. 35 of the new French law) are usually considered to be personal data in terms of the GDPR.

Under the GDPR, the processing of personal data is generally only lawful if at least one of the requirements/legal bases of Art. 6 (1) (a) to (f) GDPR applies. These legal bases include:

- Consent of the data subject: This is usually not relevant in the police context of the French law as the police officers will usually not consent to having their photo taken or even published.
- Processing is necessary for the performance of a contract: This is also usually not relevant in the police context as the police officers are not party to a contract with the photographer or publisher of the photos.
- Processing is necessary in order to protect the vital interests of the data subject or of another natural person: This could theoretically be relevant in extreme cases where the taking of the photos stops the police officers from using e.g. excessive (illegal) force against other individuals.

- Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data: This is usually the relevant legal basis for processing of photos where the data subject did not agree to having the photo taken or published. Then the right of the police officer to privacy needs to be balanced against the right of the photographer/publisher to take/publish the photo and the above-mentioned fundamental constitutional freedoms are taken into account and may not be discounted against the other rights.

The GDPR does *not* apply to purely personal or household activities (Art. 2 (2) (c) GDPR), e.g. someone taking photos as a hobby for their personal interest. Of course, the activity is *not* purely personal anymore, as soon as a broader publication (e.g. on the Internet) is intended.

The GDPR does only apply to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system (Art. 2 (2) GDPR). This means, that in terms of photos, the GDPR does generally not apply to analogue photography without a filing system. Of course, most photos are taken digitally now so photos will be in the scope of the GDPR in a lot of cases.

b. KUG/Journalistic purposes

If images are taken for journalistic purposes, they are subject to the so-called media privilege. Based on the opening clause of Art. 85 GDPR, the German federal states have adopted regulations in their state press, state media or state data protection laws that largely exempt the press, broadcasting and equivalent media from the data protection requirements of the GDPR.

In addition, the German Art Copyright Act (*Kunsturhebergesetz, KUG*) contains special provisions for the publication of photographs (for journalistic, but also for other purposes). It provides a legal basis for the publication and display of images of persons including images of police officers. The interrelation between the GDPR and the KUG is still disputed in the German legal literature, but we notice a tendency that the German courts continue to handle image publications for journalistic purposes based on the requirements of the KUG.

According to this Law, images of a person may in principle only be published with that person's consent (Sec. 22 sentence 1 KUG). The publication of a person's image generally constitutes a restriction of his or her general right of personality that requires justification.

The publication of a person's image that is not covered by the consent of the person depicted is only permissible if this image can be based on one of the exceptions of Sec. 23 (1) KUG and if the legitimate interests of the person depicted are not violated (Sec. 23 (2) KUG). The publication of a photo against Sec. 22, 23 KUG is also a criminal offence (Sec. 33 KUG).

The exceptions of Sec. 23 (1) KUG – no consent required – are:

- Images of “contemporary history” – this is usually the relevant requirement in a police context. In assessing whether an image is to be classified as “contemporary history”, the rights of the person depicted must be weighed against the rights of the press (German Federal Court of Justice, judgment of 7 July 2020 – VI ZR 246/19);

- Images in which the persons appear only as “accessories” next to a landscape or other location – this can be relevant in a police context if the police officers are only “accessories” and not the main content of the image;
- Images of demonstrations, parades and similar events in which the persons depicted participated – this can also be relevant in a police context if the police accompany a demonstration;
- The last exception from the requirement of consent is images which have not been made to order, provided that the publication or display serves a “higher artistic interest”. This is usually less relevant in a police context (but it can be for images that can be considered as artwork).

Generally, in the case of photographs of public events or in public spaces, an overriding interest of the photographer is assumed. Typically, an interest in information prevails if police officers are merely pictured without being the focus of attention. For an individual officer depicted, it is relevant whether they take part in special events or actions, in particular by behaving contrary to their duty. An overriding interest of a data subject that weights against the publication of the photograph will generally only be assumed in exceptional cases if, for example, photographs were taken secretly or covertly, the photographs affect the private life of the person depicted or they (may) have a discrediting or discriminatory effect.

In some way, this aspect of balancing the rights of the police officer against the rights of the journalist resembles the question of whether or not there is “*ill intention*” (as in the new Article 24 of the French law).

Implementation of the law in practice and analysis of the jurisprudence

The German courts are dealing with the issue of images in a police context on different levels: (a) administrative/police law, (b) civil law and (c) criminal law.

a. Administrative/police law

There are cases in Germany where police officers try to prohibit taking or publishing photos based on the police laws of the German federal states. These are general administrative laws to protect the public safety and order without specifically targeting photos of police officers. These laws allow police officers to take the necessary measures to protect the general public or individuals in order to prevent imminent dangers to public safety or order or to eliminate disturbances to public safety or order in individual cases.

Typically, such preventive measures include an identity check, a ban from the premises, an explicit prohibition of taking photos and/or a confiscation of the camera or memory card. In such cases, lawful police action against the photographer requires an imminent threat to “public safety” or “public order”. This includes, not violating legal provisions, the integrity of life, health, freedom, honour and property of individuals and the existence and functioning of the state and its institutions. In the context of photographing police action, the police need to demonstrate that taking the photos leads to an imminent threat of the infringement of laws, including:

- Taking the photos leads to an imminent threat of an infringement of the privacy rights (e.g. from the GDPR or KUG) of individuals, including the police officers themselves.
- Taking the photos leads to an imminent threat of an infringement of other laws, e.g. the photographer obstructs the police work or supports violent protesters. Such an imminent

danger usually disappears with the photographer moving further away from the police action (e.g. by using telephoto lenses).

Cases where police officers issue such orders against journalists taking photographs (usually with the intention to prevent publication of the photos by acting against the taking of the photos) are highly controversial in Germany. Examples of such cases are:

- The Federal Administrative Court (*Bundesverwaltungsgericht* = *BVerwG*) decided in a landmark case where officers of the police special task force were photographed by a journalist during a transport of prisoners in a public pedestrian zone. The head of operations ordered the journalist to refrain from taking photos.

In a first step, the *BVerwG* clarified that the public safety was affected because, first, the concrete police operations could have potentially failed due to the photographer's involvement since the task force members were threatened to be exposed as a consequence of a press report, and, second, their personal rights to their own image were implicated. On that basis, however, the court considered the respective police action disproportionate and thus unlawful. It reasoned that a ban on photography, which restricted the exercise of the freedom of the press, was not necessary. A danger to public safety through taking photographs could only be imminent if there are *concrete indications* that the person taking the photograph will later publish it without the consent of the person depicted or other legal bases for justification.

When considering similarities to Article 24 of the new French law, especially the criterion of "*ill intention*", this aspect is vital. The *BVerwG* essentially prevented police officers from automatically concluding that a subsequent (unlawful) publication can be assumed without further evidence. In this respect, an increased effort of substantiation is required on behalf of the police.

The court further stated that in such cases it is usually not proportionate to prevent the intended *taking* of the photograph by the journalist, but only to take precautions against a possible infringement of a legal right through the *publication* of the photo. This could be done, for example, by the police communicating their legal position to the journalist and urging an agreement on "whether" and "how" a publication is to take place. Only if there is no prospect of success to prevent the alleged unlawful publication of the photos, the police are authorised to intervene by using police law powers (*BVerwG*, judgment of 28 March 2012 – 6 C 12/11).

- Later, the Federal Constitutional Court (*Bundesverfassungsgericht*, *BVerfG*) decided in a matter where a private individual participated in a demonstration. The individual was asked by police officers to identify himself, as his companion gave the impression that she was filming the police officers. The police officers argued that they thought the video could be uploaded to the Internet infringing the police officers' rights (based on Sec. 22, 23, 33 KUG) and the identified person had to accept responsibility for the behaviour of his companion, with whom he had acted as an "observation team" towards the officers. The person complied with the request, but subsequently took legal action against the police.

The *BVerfG* deemed the police measures to be unconstitutional. The determination of a person's identity by questioning them and the request that they hand over identity papers carried with them for examination interferes with the fundamental right to informational self-determination guaranteed by Art. 2 (1) in conjunction with Art. 1 (1) GG. The court stated it would be unacceptable if taking photographs or video recordings of a police operation should suffice to implement police measures with reference to the mere

possibility of a subsequent criminal infringement of the right to one's own image according to Sec. 22, 33 KUG.

The BVerfG further clarified, that anyone who has to fear preventive police measures if it merely cannot be ruled out that their behaviour will give rise to police intervention will, out of fear of police measures, also refrain from making admissible recordings and the criticism of state action that often accompanies them. The BVerfG confirmed the BVerwG's ruling that it cannot be generally assumed that once images have been taken, they are subsequently published unlawfully. Hence, the court concluded (in accordance with the BVerwG ruling) that if security authorities assume that such unlawful publication is likely, there must be *sufficiently strong evidence* for this assumption. In this matter, it was also likely that the filming was intended to gather evidence for possible legal disputes – and not for unlawful publication of the videos. The police officers were required to justify why they assumed that the videos were intended for unlawful publication (BVerfG, judgment of 24 July 2015 – 1 BvR 2501/13).

- The Administrative Court of Aachen (*VG Aachen*) decided in a matter where a journalist took photos of police officers during a police operation. Persons from the environmental activist scene had started a fire and the police supervised the extinguishing of the fire. Two police officers remained in the background and each had pepper spray in their hands for self-protection. The plaintiff approached them and pulled out his smartphone to take a picture of one of the officers. The police officers prohibited the plaintiff from taking the picture. The plaintiff intended to publish the photograph for public discourse and opinion-forming purposes and to describe how the photograph came about in the context of the existing public discussion about Hambacher Forst (a forest that was to be cleared, against which environmental activists demonstrated) and the confrontation between demonstrators and police, in which, according to the plaintiff, the media would mostly portray the demonstrators as rioters. The plaintiff claims that he only wanted to take a picture of the police officer from his shin to his navel. When he picked up the smartphone, the police officers immediately grabbed it and his hand and prevented him from taking the picture.

VG Aachen decided that the police action was lawful. From the perspective of the acting police officers, there was an imminent danger that the plaintiff would take and publish a portrait of one of the officers. This threatened an infringement of the legal order in the form of a breach of Sec. 22, 23 and 33 KUG. The court confirmed the BVerwG ruling by arguing that taking photos of police operations is generally allowed. According to the KUG, it is not the taking of photographs per se that is prohibited, but the publication of the images. In this respect, it cannot be assumed without further justification that images will always be published unlawfully. However, there is a threat of danger to the police due to the taking of photographs if there are concrete indications that they will be published without the consent of the person depicted as well as other grounds for justification and that this would make the photographer liable to prosecution under Sec. 33 KUG.

In the VG Aachen's case, the police officers knew and the plaintiff confirmed that he wanted to publish the photos. According to VG Aachen, the police operation in question concerned neither a demonstration nor an event related to the public's need for information. It was an everyday police operation that was not covered by Sec. 23 (1) no. 1 KUG. The police operation was also not part of the discussions about Hambacher Forst – instead, it was just about extinguishing the fire. According to the findings of the court, there was no particular public interest to publish the photo and the plaintiff just intended to publish it with a kind of stigmatising effect without any connection to the actual operation. Because of this, the rights of the police officer prevailed over the rights of the photographer (VG Aachen, judgment of 4 May 2020 – 6 K 3067/18).

b. Civil law

Police officers also try to obtain court orders that prohibit the publication of photos in injunctive relief/cease-and-desist proceedings. This can be as a precaution – the police officer noticed the photo being taken and knows that the photographer is a journalist who wants to publish the photo. But it can also be after the publication in order to remove the photo from the Internet, to avoid further coverage and to claim damages.

In such a proceeding, the claimant (police officer) needs to provide evidence that the publication of the photo is (or would be) illegal based on the general laws mentioned above, especially the KUG. The publisher of the photo needs to demonstrate that he can base the publication of the photo on a legal basis, especially on one of the legal bases mentioned in Sec. 23 KUG. It is then up to the court to weigh the privacy rights of the police officer against the rights of the publisher of the photo (especially the freedom of the press).

Two recent examples of matters that have been decided by German courts are:

- The Higher Regional Court of Naumburg (OLG Naumburg) has decided that photos of a federal police officer at a Neo-Nazi concert who wears patches on his uniform that are also used in the extreme right-wing scene can be based on “contemporary history” (Sec. 23 (1) no. 1 KUG) because reporting this is of societal interest. That the publication of the photo could theoretically lead to threats against the police officer can generally not justify prohibiting the publication of the photo (OLG Naumburg, judgment of 2 July 2020 – 9 U 122/19).
- The Regional Court of Darmstadt (LG Darmstadt) decided that the use of the image of a police officer in a music video was a serious infringement of the police officer’s right of personality. The police officer was part of a group of police officers that needed to secure a (right-wing) music concert because demonstrations had been expected. She was filmed there and the band later used the images in a new music video that was uploaded on YouTube. The court acknowledged that the music video was a piece of art but it rejected using Sec. 23 (1) no. 4 KUG as a legal basis because there was no “higher artistic interest” that justified an infringement of the rights of the individual police officer (LG Darmstadt, judgment of 4 September 2019 – 23 O 159/18).

c. Criminal law

The provisions of general criminal law, especially Sec. 201 of the German Criminal Code (*Strafgesetzbuch* = *StGB*), can potentially restrict the freedom of the press in the context of police operations.

Sec. 201 (1) no. 1 StGB prohibits (inter alia) the unauthorised recording of the non-publicly spoken word of another person. This also applies to unauthorised video recordings that include the recording of sound but it does not apply to just taking images without sound. Sec. 201 StGB does also not target police officers specifically, but it applies to all individuals. The legal discussions revolve around whether statements of police officers during a police operation are considered to be “non-publicly” spoken and whether the recording was “unauthorised”.

Examples of court decisions in such criminal matters are:

- The Regional Court of Munich (*LG München*) decided in a matter where a demonstration was confronted with a counter-demonstration that tried to disturb the original demonstration with loud music. The police wanted to control one counter-protester playing the loud music. Another counter-protestor, not affected by the police control, followed the

police officers and filmed them which basically disturbed the police control. The counter-protester filmed the words of the counter-protester that played the loud music (the subject of the police control) and of the police officer. There was only one other person close to the situation who was able to hear the spoken words.

According to LG München, the words were “non-publicly spoken”. For the court, it was irrelevant that these were words spoken on the occasion of official acts on public roads. Because the counter-protester to be controlled was taken aside by the police officers, the rest of the demonstration had moved on. Incidentally, the words of the police officer were addressed exclusively to the counter-protester and not to the general public. The words would have been publicly spoken if the police announcements had been directed at the demonstration as a whole (for example).

But that was not situation in the case decided by the LG München. The fact that another person was standing directly next to the counter-protester did not change this as this alone does not make the words “publicly” spoken. The defendant was aware of this because the police officer had asked her to stop recording multiple times. There was also no reason for the defendant to assume that there had been an unlawful police action, the documentation of which would have been necessary for evidentiary purposes. Because of this, the LG München confirmed the criminal liability of the defendant (LG München, judgment of 11 February 2019 – 25 Ns 116 Js 165870/17).

- The Regional Court of Kassel (*LG Kassel*) decided in a matter where the defendant filmed a police control of her boyfriend at a railway station in the forefront of a large demonstration. The police confiscated her iPhone and the public prosecutor’s office claimed an alleged criminal offence against Sec. 201 StGB.

According to LG Kassel, police checks on persons are generally in the scope of Sec. 201 StGB. Words spoken during a conversation in the context of a police control are generally not addressed to the general public, i.e. are not intended for an audience beyond a circle of persons delimited by personal and factual relationships so the words are “non-publicly spoken”.

However, the court acknowledged that there might be a “de facto public” which precludes criminal liability. A statement is “de facto public” if it is made under circumstances according to which knowledge by third parties must be expected. According to LG Kassel, a “de facto public” cannot be assumed simply because it was technically possible to make a recording of the conversation; such a broad interpretation would render the offence under Sec. 201 StGB irrelevant. Rather, the circumstances to be taken into account are those that are also openly recognisable to those persons whose communication is affected. Examples of a “de facto public” are the loudly spoken word in a crowded restaurant or the loud telephone conversation in a crowded train compartment, but also loudly spoken words on streets and squares.

In the LG Kassel case, the police control happened at a railway station and the conversation was clearly audible for a lot of persons around it so the conversation was “de facto public”. Because of this, the defendant did not commit a criminal offence against Sec. 201 StGB (LG Kassel, judgment of 23 September 2019 – 2 Qs 111/19).

IRELAND

Overall legal framework applicable to freedom of information and freedom of expression including freedom of speech and freedom of the press

Subject to several restrictions, freedom of expression in Ireland is guaranteed by Art 40.6.1°.i of the Irish Constitution.

Article 40.6.1°

[The State guarantees liberty for the exercise, subject to public order and morality, of:-]

i The right of the citizens to express freely their convictions and opinions.

The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.

Article 40.6.1°.i stipulates certain permissible objectives for restrictions on freedom of expression and permits some of them to be achieved through the criminal law. When considering an objective that is not referred to in Article 40.6.1°.i, it would appear that the courts ought to judge whether it is constitutionally permissible with reference to the underlying objectives of the free expression guarantee; the more the restricted speech deviates from those objectives, the easier it is to justify the constraint in question.

Laws and provisions aiming to restrict these freedoms in the name of protecting national security forces and their rights to privacy, moral, mental and physical integrity

In 2018, the Minister for Justice indicated that he was considering the introduction of legislation to criminalise photography of members of An Garda Síochána (the Irish police service) but this suggestion was met with strong opposition from various quarters including opposition political parties, civil liberty groups and the media. There have been no further attempts to introduce such legislation since that time.

Data protection and privacy considerations of security forces in the context of a police operation

Nothing under the GDPR prohibits people from taking photographs in a public place. However, whether an individual can publish a photograph or a video to a broad-based audience is a different question and has data protection considerations i.e. a legal basis to process the personal data (e.g. take and store photos).

Article 85 GDPR, requires EU Member States to reconcile the right to protection of personal data with the right to freedom of expression and information. Section 43 of the Irish Data Protection Act 2018 disapplies the main GDPR principles and rights (including the principles relating to lawful processing, special categories of data and the rights to access, rectification, erasure, to object and to restrict processing) where processing of personal data is for the purpose of exercising the right to freedom of expression and information, including processing for journalistic purposes or for the purposes of academic, artistic or literary expression and where, having regard to the importance of the right of freedom of expression and information in a democratic society, compliance with the provision would be incompatible with such purposes.

Section 43(5) sets out that in order to take account of the importance of the right to freedom of expression and information in a democratic society that right shall be interpreted in a broad manner.

Implementation of the law in practice and analysis of the jurisprudence

To date there has been no Irish case law on the right to take photographs of An Garda Síochána vis-à-vis the constitutional right to freedom of expression.

The Irish courts increasingly rely on the jurisprudence of the European Court of Human Rights in interpreting the scope of freedom of expression under Article 40.6.1^o.i of the Irish Constitution. Since the enactment of the European Convention on Human Rights Act 2003, the courts are, of course, required to have regard to the State's obligations under the Convention but even prior to the introduction of that legislation, Irish courts had had regard to the provisions of Article 10 of the Convention when dealing with issues of freedom of expression.

THE NETHERLANDS

Overall legal framework applicable to freedom of information and freedom of expression including freedom of speech and freedom of the press

The right to freedom of expression, which includes the freedom of information and freedom of the press is coded in article 7 of the Dutch Constitution. This article is however more of a symbolic nature, as article 94 of the Constitution determines that universally binding provisions of conventions and resolutions of international organisations take precedence over the national law. Therefore, article 10 of the ECHR is the law that should be relied upon.

European jurisprudence shows that it is up to States to establish an effective system of protection for authors and journalists (in the broad sense of the word, including citizen-journalists) and to create a climate conducive to the participation of all persons concerned in public debate, so that they can express their opinions and ideas without fear, even if these opinions and ideas are contrary to those held by the official authorities or a significant proportion of public opinion.

Laws and provisions aiming to restrict these freedoms in the name of protecting national security forces and their rights to privacy, moral, mental and physical integrity

In the Netherlands, no similar laws to the proposed French Bill apply. The right to freedom of expression is however not absolute, and certain provisions under Dutch law are able to restrict the freedom of expression when photographing 'police officers'. These laws are the following:

- Article 441b of the Dutch Criminal Code
- Article 18 to 21 of the Dutch Copyright act: The portrait right

a. Article 441b of the Dutch Criminal Code (photographing or filming)

Article 441 of the Dutch Criminal Code is the article in criminal law that comes closest to prohibiting filming or photographing police officers in the public area. Generally, photographing or filming in public areas, such as on the streets during demonstrations, is allowed, provided that the person that photographs or films uses non-installed cameras that are clearly visible to the public. A (hand-held) video camera or visible mobile phone applies as such clearly visible non-installed camera.

In this way, article 441b of the Dutch Criminal Code prohibits *intentional* filming or photographing with *installed* cameras, unless the filming or photographing is explicitly announced beforehand.

The above demonstrates that article 441b of the Dutch Criminal Code does not restrict the freedom of expression and information in such a way as the proposed French Bill does as filming in a public area with a clearly visible camera is not prohibited and the article merely aims at protecting citizens against hidden cameras in e.g. stores, restaurants or bars.

Further, violating article 441b of the Dutch Criminal Code could lead to an imprisonment of up to two months or a maximum fine of EUR 8.700. The sanctions for violating this are therefore significantly lower and more proportionate than an imprisonment of one year and a fine of EUR 45.000 that the French Global Security Bill proposes.

b. Article 18 to 21 of the Dutch Copyright act: The portrait right (publication of the footage)
When it comes to the publication of the footage, the Dutch Copyright Act comes into play. If the portrait (e.g. photo or video) was not commissioned by the person portrayed, publication is not permitted to the extent that a reasonable interest of the person portrayed prevents such publication. Case law shows that public persons of social importance should allow a greater invasion of their privacy than any private persons. This applies to police officials as well.

In a 2005 court case, the High Court of Arnhem determined that police officials that act in the performance of their duties should allow more criticism and a greater intrusion into their privacy as they are considered “public figures.”²

The facts of the case show that photographing police officers during speed checks and subsequently publishing these photos on a website, would generally not count as a violation of the portrait rights of police officers. The court ruled that police activities may indeed be reported. To what extent photographs are necessary for this *“is a journalistic decision in which the court in principle should not intervene.”*

In this case however, the police officials’ photographs were published in a recognisable way and the website made it possible for visitors to place comments on the photos and videos. These comments, combined with the fact that the report on the website was about the police as such and not about specific police officials, constituted enough reasons for the court to assume that there was no journalistic necessity to depict the officials in a recognisable way and to mention their names on the website. The court stated: *“To the extent the police officers oppose the publication of their name, head and face (whether or not in combination with each other), granting their claim is therefore necessary in a democratic society.”*

Conclusion

In the Netherlands, there are no similar laws that apply as article 24 of the proposed French Bill does and freedom of expression and information is highly valued. There are however certain restrictions to these freedoms when it comes to filming and photographing police officials and the subsequent publication of the footage.

Generally, filming and photographing of police officials is allowed, provided that the cameras that are used are non-installed and clearly visible. The rationale behind the proposed French Bill seems to protect police officials in the public area even when filmed with visible cameras. This is much more stringent than Dutch law as it allows for no exceptions.

² High Court of Arnhem 15 March 2005, ECLI:NL:GHARN:2005:AT0895

Further, when it comes to publishing the photographs or video footage of the police officials in the context of their duties, Dutch case law shows that police officials should allow for more criticism than private persons. This criticism is however not unlimited as police officials could enjoy reasonable interests to oppose the publication. This would be the case if there exists no journalistic necessity to depict police officials in a recognisable and general way.

The relevant provisions under Dutch law do however not state any restrictions on 'ill-intentioned' filming and only aim at the protection of publicly recognisable individuals in the context of performing their duties. Article 24 of the French Security Bill is therefore not in line with the practice of protecting the freedom of expression and information in the Netherlands.

CANADA (THE PROVINCE OF QUEBEC)

Overall legal framework applicable to freedom of information and freedom of expression including freedom of speech and freedom of the press

The [Canadian Charter of Rights and Freedoms](#) (the "Charter"), as set out in its first Section, guarantees the rights and freedoms subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. This includes a protection of, inter alia, fundamental freedoms such as freedom of expression and freedom of the press.³ According to the Supreme Court of Canada, the link between freedom of expression and the political process is the "linchpin" of the fundamental freedom's protection; freedom of expression is a core value of all because it lies at the heart of democratic government. The Charter applies to the Canadian Parliament, the Government of Canada, the legislature and government of each province vis-à-vis public matters (e.g. legislations, acts of the public administration, etc.) involving natural and/or, as applicable, legal persons – it does not apply to private matters (e.g. dispute between two natural persons, etc.). In sum, the Charter aims at protecting all individuals' rights and freedoms from overreaching actions from governments, parliament, legislatures, or government agents (e.g. law enforcement officers) (collectively "Government Actions")

The Province of Québec has also enacted a [Charter of Human Rights and Freedoms](#)⁴ (the "Québec Charter") which protects fundamental freedoms. The Québec Charter has precedence over all provincial legislation in the Province of Québec, and it applies to both provincial Government Actions and private matters. The Québec Charter does not apply to federally regulated activities in Québec, as those are subject to the Charter and/or the Canadian Human Rights Act.

In the Province of Québec, [the Act respecting Access to Documents Held By Public Bodies and the Protection of Personal Information](#)⁵ (hereinafter the "Access Act") provides for the right of access to information from public bodies and proactive publication of certain information. The province has created a body that is both an administrative tribunal and a supervisory body that oversees the application of, inter alia, the Access Act, the Commission d'accès à l'information du Québec.

³ Section 33 of the Charter allows Parliament of the legislature of a province to derogate from certain sections of the Charter, namely Section 2 (fundamental freedoms). Once Section 33 is invoked, it effectively precludes judicial review of the legislation under the fundamental freedoms section, for instance. The declaration is only valid for 5 years. After this period, it ceases to have any effect unless it is re-enacted. Given that Section 33 has not been used in the context of this Project, we will limit our comments to this.

⁴ CQLR, ch. C-12.

⁵ CQLR, ch. A-2.1

Laws and provisions aiming to restrict these freedoms in the name of protecting national security forces and their rights to privacy, moral, mental and physical integrity

The Québec Access Act restricts access to personal information and other government-related information that might affect intergovernmental relations, negotiations between public bodies, the economy, the administration of justice and public security, administrative or political decisions and auditing. Such restrictions also apply to information which reveals or confirms the existence of an immediate danger to the life, health or safety of a person or a serious or irreparable violation of the right to the quality of the environment, unless its disclosure would seriously undermine the measures taken to deal with such danger or violation.

With respect to Article 24 of the French Global Security Law, we have not identified, within the legal corpus in the Province of Québec, a similar piece of legislation or provision applicable to regular law enforcement officers. However, the question of whether a private person can film and broadcast images of law enforcement officers in action in Canada (and in Québec) is a contemporaneous issue due mostly to Canadian and Québec's public attitude towards enhanced scrutiny towards actions of law enforcement officers.

Pursuant to Section 129 of the [Canadian Criminal Code](#),⁶ everyone who (a) resists or wilfully obstructs a public officer or peace officer in the execution of their duty or any person lawfully acting in aid of such an officer, (b) omits, without reasonable excuse, to assist a public officer or peace officer in the execution of their duty in arresting a person or in preserving the peace, after having reasonable notice that they are required to do so, or (c) resists or wilfully obstructs any person in the lawful execution of a process against lands or goods or in making a lawful distress or seizure, is guilty of (i) an indictable offence and is liable to imprisonment for a term not exceeding two years, or (ii) an offence punishable on summary conviction ("Obstruction of Public or Peace Officer").

In a nutshell, unless filming a police intervention endangers someone or amounts to Obstruction of Public or Peace Officer, private persons can film and broadcast a police intervention (which may incidentally disclose the identity of Police Officers). Furthermore, subject to other provisions of the Criminal Code or any other applicable law, a law enforcement officer cannot force someone to stop filming or broadcasting a police intervention, and cannot seize one's phone. In Québec, sharing such recording on social media may be illegal if, inter alia, it is done with the objective of defaming a law enforcement officer or with malicious intent.

The [Code of Ethics of Québec Police Officers](#)⁷ (hereinafter "Code of Ethics") applies to all police officers under provincial jurisdiction (including, police officers, wildlife protection officers, special constables, highway controllers and Unité permanente anti-corruption investigators) (together "Police Officers") and specifies the duties and standards of conduct a Police Officer must abide by, which includes, among others, the following:

- s. 5. A police officer must act in such a manner as to preserve the confidence and consideration that his duties require.
A police officer must not: [...]
 - (2) fail or refuse to produce official identification when any person asks him to do so;
 - (3) fail to carry prescribed identification in his direct relations with the public;

⁶ (R.S.C., 1985, c. C-46)

⁷ 5 CQLR, ch. P-13.1, r. 1

- s. 6. A police officer must avoid any form of abuse of authority in his relations with the public.
A police officer must not: [...]
 - (2) make threats, intimidate or harass;
- s. 7. A police officer must respect the authority of the law and of the courts and must collaborate in the administration of justice.
A police officer must not:
 - (1) prevent or contribute to preventing justice from taking its course;
 - (2) conceal or fail to pass on evidence or information in order to benefit or harm any person.

In other words, a Police Officer contravenes the provisions of the Code of Ethics if a Police Officer intimidates an individual by threatening to seize or break a mobile phone (see *Commissaire à la déontologie policière v. Fillion* below) and also if a Police Officer refuses to identify oneself when asked. In fact, the obligation imposed on Police Officers to identify themselves when asked to do so is a measure without which the application of the Code of Ethics could be jeopardised.⁸

Implementation of the law in practice and analysis of the jurisprudence

To be found guilty of Obstruction, the prosecution must establish beyond a reasonable doubt that the defendant's actions constituted obstruction of the police officer's work while they were acting in the performance of their duties. As for the defendant's actions, they must have been taken voluntarily (*Vigneault c. The Queen*⁹).

In Québec, the [Commissaire à la déontologie policière](#) receives and examines the complaints filed against Police Officers who may have violated the Code of Ethics, and after, inter alia, investigation, it can cite (prosecute) a Police Officer before the [Comité de déontologie policière](#) (the "Comité"). The Comité will then adjudicate whether a Police Officer has indeed violated the Code of Ethics and, if such is the case, will impose a penalty onto the Police Officer. The Comité has rendered several decisions about video recording of police interventions, some of which are listed below.

- In [Commissaire à la déontologie policière v. Benoit](#),¹⁰ the seizure of a video camera was made under false pretences on the part of the police officers, there was a violation of section 7 of the Code of Ethics by searching without right and, moreover, erasing without right the contents of the plaintiff's camera. These actions also constituted abuse of authority by the police officers. Both officers were suspended for eight days.
- In [Commissaire à la déontologie policière v. Fillion](#),¹¹ as soon as the plaintiff began recording, the police officer said "You film me, you take my picture, I'll snatch your phone, and I'll break it". The adjudicator confirmed that the police officer, while performing his duties, abused his authority by threatening the plaintiff of breaking his mobile phone, and that, consequently, his conduct constitutes an act derogating from section 6 of the Code of Ethics. The officer received a rebuke.

⁸ *Commissaire à la déontologie policière v. Gagnon*, 2000 CanLII 22255 (QC CDP), para. 25. See also *Commissaire à la déontologie policière v. Paquette* below).

⁹ 2001 CanLII 25420 (QC CS), para 32, confirmed by the Court of Appeal and reaffirmed in *Kosoian v. Société de transport de Montréal*, 2019 SCC 59, para. 132.

¹⁰ 2020 QCCDP 25.

¹¹ 2019 QCCDP 5.

- In [Commissaire à la déontologie policière v. Ledoux](#),¹² the plaintiff, after being intercepted by Constable Ledoux, questioned the veracity of the reasons for his interception and took pictures of the situation, which subsequently caused the situation to degenerate. The adjudicator confirmed that Constable Ledoux failed to respect the authority of the law and failed to contribute to the sound administration of justice with respect to the plaintiff by proceeding without right to search his camera and by illegally asking him to destroy one or more images (photographs) belonging to him. Consequently, his conduct constituted an act derogating from section 7 of the Code of ethics of Québec police officers.
- In [Commissaire à la déontologie policière v. Paquette](#),¹³ it was decided that the police officer, while performing his duties, did not behave in a manner that preserved the trust and consideration required by his position, by refusing to identify himself at the request of the plaintiff, which constitutes an act derogating from section 5 of the Code of Ethics. The officer received a warning for this violation.

Additionally, several law enforcement organisations in Canada are currently contemplating the implementation of body cameras for Police Officers.

¹² 2016 QCCDP 31.

¹³ 2006 CanLII 81628 (QC CDP).