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# CUESTIONES POLÍTICAS

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## European Experience in Constitutional and Legal Guarantees of Freedom of the Media \*

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### Abstract

The document presents the results of a comparative legal analysis dedicated to the constitutions of the European states regarding the identification of norms that guarantee the freedom of the social media in them. Methodologically The study was built on the basis of a dialectical approach to the dissemination of legal phenomena and processes using general scientific methods (systemic, logical, analysis and synthesis) and particular. By way of conclusion, all the evidence shows that, in the most common version, the constitutional regulation of guarantees is concise and includes only the recognition or guarantee of the freedom of the media together with the prohibition of censorship. In more detailed versions, prohibitive or regulatory rules may indicate specific types of liability, administrative procedures, etc. For federal states, it is typical to pay special attention to press matters within the scope of jurisdiction issues.

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**Keywords:** freedom of the media; guarantee; prohibition; restriction; censorship.

## Experiencia europea en garantías constitucionales y legales de libertad de los medios

### Resumen

El documento presenta los resultados de un análisis legal comparativo dedicado a las constituciones de los estados europeos con respecto a la identificación de normas que garanticen la libertad de los medios de comunicación social en ellos. En lo metodológico El estudio se construyó sobre la base de un enfoque dialéctico para la divulgación de fenómenos y procesos legales utilizando métodos científicos generales (sistémicos, lógicos, de análisis y síntesis) y particulares. A modo de inconclusión toda la evidencia muestra que, en la versión más común, la regulación constitucional de las garantías es concisa e incluye solo el reconocimiento o la garantía de la libertad de los medios junto con la prohibición de la censura. En versiones más detalladas, las reglas prohibitivas o regulatorias pueden indicar tipos específicos de responsabilidad, procedimientos administrativos, etc. Para los estados federales, es típico prestar especial atención a los asuntos de la prensa dentro del alcance de los temas de jurisdicción.

**Palabras clave:** libertad de los medios de comunicación; garantías; prohibición; restricción; censura.

### Introduction

In modern society and the state, the influence of the media on various spheres of collective activity, as well as the formation of individual opinions is indisputable (Bibik et al., 2014: 111-113; Zhezheleva, 2018: 129-131; Graber, 1997: 5-9). Despite the widespread constitutional formalization of freedom of the media (Basharatyan, 2007; Karakotov, 2013; Fenwick & Phillipson, 2006; Leeson, 2008: 155-169; Bhattacharyyaa & Hodler, 2015), the actual mechanisms of its guarantee remain relevant (Frolova, 2012; Kulikova, 2019; Lyudmila, 2018: 3682-3685), which we also associate with constitutional norms in their basic variation. Their consideration in the comparative legal aspect of European countries is the subject of this work. The texts of the latter were taken from the works.

Of all the provisions examined, the required norms are not revealed only in the constitutions of Monaco, the Netherlands, San Marino, as well as in the constitutional acts of Great Britain.

Anticipating the presentation of the comparative legal analysis results, we will clarify that typically norms and guarantees of freedom of the media are associated, on the one hand, with positive legal regulation and institutional assistance, and on the other, with prohibitions (censorship, other restrictive measures). In addition, we believe that the basic ones in this sense should be considered the constitutional provisions that recognize (guarantee) precisely the freedom of the mass media in any form (for example, freedom of the press). Moreover, in relation to this work, we distinguish these norms from freedom of thought and speech. Although, of course, we do not deny their basic nature for freedom of the media (Tulnev, 2019: 66-69).

## **1. Methodology**

The study was built on the basis of a dialectical approach to the disclosure of legal phenomena and processes using general scientific (systemic, logical, analysis and synthesis) and particular scientific methods. Among the latter are formal-legal, linguistic-legal, comparative-legal, which were used together to identify the principles of the judiciary.

## **2. Discussion and Results**

The Austrian Constitution, taking into account the laws amending it, in its Article 13 formalized the right of everyone within the law to express their opinion orally, in writing, through print and artistic images. In the norm itself, it is established that printing materials cannot be subject to censorship or restrictions by means of an authorization system. Domestic printed works are not subject to administrative postal bans. Thus, the prohibition of Caesura, the use of administrative mail prohibitions, as well as the restrictions of the licensing system for printed works are regarded as special guarantees of freedom of the media. We make a remark that we nevertheless identify constitutional norms similar to Article 13 formalizing the right / freedom of expression in the press, and in writing at all, as freedom of the media.

Given the federal political and territorial structure of Austria, the norm of Part 1 of Article 10 is logical; it clarifies that the jurisdiction of the Federation includes legislation and executive activities related to the press. In its continuation, Part 2 of Article 102 determines that within the framework of the competence established by the Constitution, the federal bodies can directly engage in execution on issues related to the press.

Therefore, we believe that we can thoroughly talk about institutional guarantees of freedom of the media, involving the participation of state bodies at various levels in them.

The German Constitution in its chapter on fundamental rights guarantees freedom of the press and information through radio and films. Moreover, censorship does not exist (paragraph 1 of Article 5).

In Article 18 it is defined: one who abuses freedom of opinion and, in particular, freedom of the press (paragraph 1 of Article 5) with the purpose to fight against the foundations of a free democratic system, is deprived of these fundamental rights. The deprivation of these rights and its scope are determined by the federal constitutional court. Thus, a specific guarantee of the freedom in question was implemented in case of its violation, but on the basis of the law and by an authorized entity.

By analogy with Austria, by virtue of the federal political and territorial structure of the state, paragraph 1 of Article 75 of the German Constitution defines the Federation's right to issue model regulations for land laws on issues of press and films.

Summarizing, we note that in comparison with Austria, Germany fully formalizes guarantees of freedom of the media through press and information through radio and films. Prohibitive and positive guaranteeing legal constructions are set out in details.

Next, we present a block of European constitutions in which the sought-after norms are convicted of concise establishments. Thus, the Andorran Constitution in Chapter III, "Fundamental Rights of the Person and Public Freedoms," briefly formalizes the recognition of freedom of expression, communication, and information. In addition, it was recorded that preliminary censorship or any other method of ideological control by public authorities is prohibited (Article 12). It seems that the wording "recognition of freedom of expression, communication and information" is ambiguous; we can regard it as the basic norm for guaranteeing freedom of the media in Andorra.

In the Belgian Constitution, the required norms are also located in Part II "On the Belgians and their rights". Article 25 reflects the provision on freedom of the press (most clearly applicable to freedom of the media), and also that censorship can never be established; no requirements on collateral from writers, publishers or printers is allowed.

Brief wording is inherent in the Constitution of Denmark. According to its Article 77, everyone has the right to freely express their thoughts in the press, in writing and orally, provided that they can be prosecuted in court. Censorship and other preventive measures will never be restored. Thus, in the guaranteeing vein here, we can regard the very establishment

of freedom of thought in the press, prohibition of censorship, and judicial responsibility.

Article 11 of the French Constitution contains a similar norm without prohibition of censorship: all citizens are free to speak, write, print, bearing responsibility for the abuse of this freedom in cases established by law.

Similarities with Danish constitutional provisions are also found in the Constitution of the Principality of Liechsteinstein. Its Chapter VI “Fundamental Rights and Obligations of Citizens” enshrines the right of everyone to freely express their opinions and their thoughts orally, in writing, in print or by image, within the limits of the law and moral requirements. Censorship can only be established in relation to public performances and exhibitions. Let us clarify that the second part of the indicated constitutional norm is original: the only option is the legalization of censorship in relation to public performances and exhibitions.

According to Article 73 of the Constitution of Iceland, everyone has the right to freely express their thoughts, but must be prepared to bear responsibility for them in court. Censorship and other similar restrictions on freedom of speech are prohibited. However, freedom of speech, but not of the mass media, is formalized in it, and the prohibition of censorship has been declared in relation to it. Of course, the abstract interpretation suggests in this regard that the Constitution of Iceland guarantees freedom of the media, but in the literal sense, we deny this approach within the framework of our study.

It is appropriate to clarify that the Finnish Constitution in its § 12 also identified freedom of expression and freedom of information without a direct link to the press and the media. However, the same norm consolidates that the law may establish prescriptions for such restrictions on video programs that are necessary to protect children. Thus, the Finnish Constitution nevertheless presents the guarantee of freedom of the media partly in its prohibitive aspect.

The provision of Article 24 being a part of the Constitution of Luxembourg is already more detailed in the concise versions considered. Let us clarify that it is also placed in the chapter on Luxembourgers and their rights. So, this norm guarantees freedom of the press while retaining responsibility for offenses committed while using this freedom. There are also a number of guaranteeing provisions:

- Censorship can never be established;
- The requirement of a pledge from authors, publishers or printers is not allowed;
- The stamp duty of local magazines and periodicals is cancelled;

- No prosecution can be brought against publishers, printers or distributors if the author is known, if he/she is a Luxembourger and resides in the Grand Duchy.

The options for the sought guarantees in the constitutions of Ireland, Malta and Norway are interesting from the point of view of their wording. So, in accordance with Article 6.1 of the Irish Constitution, the creation of public opinion is the most important issue for the common good, therefore the state will make efforts to ensure such manifestations of public opinion as radio, press, cinema, preservation of their legitimate freedom of expression, including criticism of Government policy, but it should not be used to undermine public order or morality or authority of the state. We believe that the application of the efforts of the state to ensure the freedom of radio, the press, and cinema is the guarantee of freedom of the media with the specification of the limits of such freedom (criticism of the Government).

The constitutional provisions of Malta are authentic in various aspects. It is defined in its part 3 of Article 41 "Expression of Thoughts and Words" that anyone who is resident of Malta may publish or print a newspaper or magazine, daily or periodically, provided that an order can be created by law on:

(a) Protecting or restricting the publication or printing of any such newspaper or any such magazine by persons under the age of twenty-one years; and

(b) Requiring any person who is the publisher or typographer of any such newspaper or magazine to inform the prescribed authority about the results of his/her activities and age, as well as his/her place of residence.

Thus, formalized law is limited by qualifications of both implementing entities and those who may be affected by print media.

In addition, part 4 of the same article establishes a mechanism for the police to arrest any publication or newspaper as the way in which the crime was committed. Within twenty-four hours of arrest, the police must bring the fact of the arrest to the attention of the competent court, and if this court does not find that the case is primarily about such a crime, this publication must be returned to the person where it was arrested.

Norms of this kind are procedural guarantees of freedom of the media.

Paragraph 100 of the Norwegian Constitution formalizes freedom of the press, as well as the rule that no one can be punished for any work he/she has submitted for printing or published, regardless of the content, unless he/she consciously or openly displays disobedience to laws, contempt for religion, morality or the constitutional authorities and resistance to their orders, does not incite others to this, or does not raise false or disgraceful accusations on anyone. This Constitution does not contain a prohibition of censorship.

The provisions of the Portuguese Constitution are perhaps the most substantive and comprehensive from the point of view of reflecting the variety of guaranteeing institutions of freedom of the media. Chapter 1 is devoted to personal rights, freedoms and guarantees; its Article 37 formalized freedom of speech and information, and Article 38 separately enshrined freedom of the press and speeches in the media. Moreover, freedom of the press is precisely guaranteed (part 1). Further, we consider Part 2, Article 38, valuable in the essential aspect: it clarifies that freedom of the press means:

a) Freedom of speech and creativity of journalists and men of the pen, as well as the impact of journalists on the content-stylistic orientation of the relevant media, with the exception of cases where the latter belong to the state or are of a doctrinal or confessional nature;

(b) The right of journalists to access, within the framework of the law, sources of information and to protect independence and professional secrets, as well as the right to elect editorial boards;

c) The right to establish newspapers and any other print media that does not require the permission of the administration, surety, or prior recognition of authority.

The variety of guaranteeing norms is represented by institutional, procedural and material varieties in the following legal constructions:

- The law provides in general terms the distribution of the amounts and means of financing mass media (part 3).

- The state ensures the freedom and independence of the media in the face of political and economic power consistently pursuing the principle of specialization of enterprises producing print media; the state takes care and supports them without discrimination and prevents their concentration in the same hands, in particular by increasing the number of participants in such enterprises or by cross participation (Part 4).

- The state ensures the existence and activities of the public radio and television service (Part 5)

- The structure and functioning principles of state-owned mass media should ensure their independence from the Government, state administration and other public authorities, as well as guarantee the possibility of expression and clash of different opinions (Part 6);

- Radio and television transmitting stations can operate only if there is a license issued on the basis of an open tender, in accordance with the provisions of the law (Part 7).

We regard Article 39 of the Portuguese Constitution on high media leadership in a similar institutional and guaranteeing aspect. In accordance with it, the high leadership of the media ensures the right to information, freedom of the press and freedom of speaking in the media in the face of political and economic power, as well as the possibility of expression and clash of various views and the exercise of the right to broadcast, to answer and to political statement. Constitutional norm of Article 39 also consolidated the functionality of high-level leadership of the media, including areas of guaranteeing freedom of the media.

One can point out the absence of a prohibitive norm of censorship of the media as a drawback of the Portuguese Constitution concerning the subject of research.

## **Conclusions**

We associate the European constitutional experience of guaranteeing freedom of the media with the recognition / guarantee of freedom of the media in conjunction with prohibitions (censorship, other restrictive measures) or positive legal regulation, and institutional assistance.

In the most common version, constitutional regulation is concise and includes only the recognition / guarantee of freedom of the media in conjunction with the prohibition of censorship. At the same time, the prohibition of censorship is almost universal, although an exception has been found. The Liechtenstein Constitution has legalized censorship of public performances and exhibitions.

In more detailed versions, prohibitive or regulatory norms may indicate specific types of responsibility, administrative procedures, etc. For federal states, it is characteristic that special attention be paid to press issues as part of the subjects of jurisdiction.

In addition, a number of constitutions have been identified (Ireland, Malta and Norway), in which the sought guarantees in the original legal constructions are formulated.

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