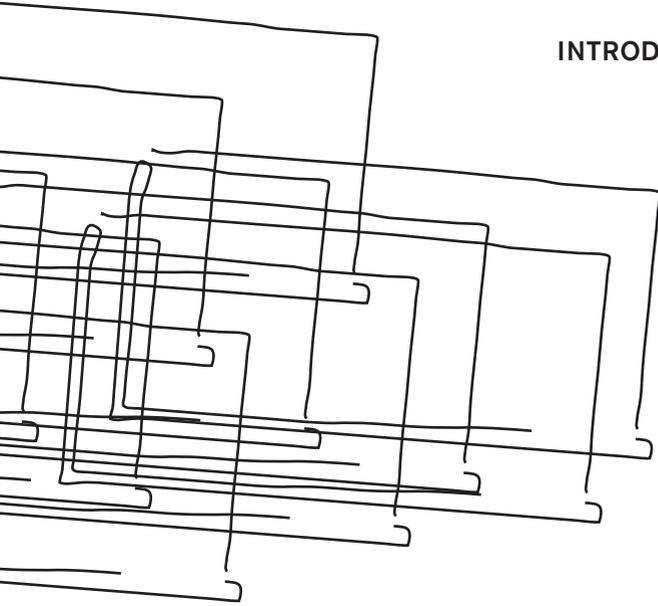


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INTRODUCTION TO MEDIA LAW



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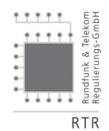


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Never before has mass communication been so pervasive in our everyday life. Thanks to social media, anyone with internet access can take on the role of a publisher, potentially spreading their message to an audience of millions with just the click of a mouse. That enormous potential comes at a high cost: today it is easier than ever to spread lies about people and destroy their reputation in just a few minutes. For this reason, it is vital not only for journalists but also for the general public to have a basic knowledge of media law and ethics, in order to act responsibly and ethically when disseminating content to a mass audience.

This handbook addresses novice journalists as well as citizens interested in gaining a general overview of the field of media law. It summarizes the most important legal instruments that define and regulate the work of media outlets and individual journalists.

Media law does not refer to a uniform body of law but is rather a collection of a variety of laws and ethical standards that influence the work of the media. Also, different forms of media are subject to different regulations. Nevertheless, there are universal rules that need to be respected by all journalists when practicing their profession. Only when journalists adhere to the generally accepted legal and ethical principles of their profession can they fulfill their main function in a democratic society: serving the public interest.

The legal provisions presented in this publication apply to all countries that are members of the Council of Europe and are formally applying the European Convention on Human Rights and Fundamental Freedoms (ECHR). The handbook is intended only to provide a general introduction to the area. For specific regulations in individual countries, please refer to other sources.

The publication “Introduction to Media Law” was developed within the project “Connecting young people with ex-Yugoslavian background by means of radio production”, funded by the ERASMUS+ programme of the European Union.

I. MASS MEDIA AS A SUBJECT OF MEDIA LAW

The mass media

Mass media can take various forms: print media (magazines, newspapers), broadcast media (radio and television operating via various formats of transmission – terrestrial, cable, or satellite), news agencies, online media, cinema and film.

Mass media consist of all media that provides journalistic content to a vast, heterogeneous and anonymous audience through methods of dissemination and reproduction. The existence and usage of mass media makes mass communication possible.

According to Maletzke's definition, mass communication should be understood as "the process by which information is imparted publicly (i.e., without a restricted or pre-defined audience), indirectly (i.e., involving spatial, temporal or spatiotemporal distance between the communication partners) and one-sided (i.e., without a role change between information provider and information receiver) using technological means of dissemination (the so-called "mass-media") to a dispersed audience."¹

[1] Gerhard Maletzke (1998):
Kommunikationswissenschaft im Überblick:
Grundlagen, Probleme, Perspektiven.
Westdeutscher Verlag, p.45

The role of mass media in a democratic society

Social and political life as we know it would be impossible without the existence of mass media. They are often recognized as the "fourth power", alongside the legislative, executive and judicial branches of government. Their role is not solely confined to the reproduction of facts. The mass media also communicates political, social, ethical, cultural and other ideas, and thereby makes an important contribution to the formation of public opinion.

In a democratic system, media outlets perform vital functions for a number of core areas of society:

In the political system media outlets

disseminate politically relevant information;

facilitate public debate;

fulfill the checks and balances of the political system;

provide a public forum for the participation of citizens in the political discourse;

promote the transparency and accountability of those in power.

In the social and cultural spheres, media outlets

provide social orientation;

facilitate the socialization of individuals;

provide education;

contribute to cultural development;

provide a source of entertainment.

In the economic system media outlets

contribute to economic development by covering economic processes;

serve as an advertising medium, contributing to the circulation of goods and services;

influence employment rates by providing information on job opportunities.

Only media outlets which are free and independent from government control can successfully play a meaningful role in society by fulfilling these functions. Conversely, media outlets can increase social divisions by abandoning their main functions and, instead, using their influence to reinforce state or economic powers and excluding critical voices from public discourse. In some extreme cases, the media can even be instrumentalized to incite violent conflicts.

Media law

Media law is a branch of law that consists of a system of legal norms that regulate the activities of the mass media. It examines the limits within which media outlets and journalists can operate. Media law, on the one hand, regulates the principles of the dissemination of media products, and, on the other hand, it can affect the format and content of media products. Some regulations apply only to specific types of media. For example, there are broadcasting laws that apply only to the activities of broadcast media. More general legal provisions are to be respected by all media.

II. LEGAL FRAMEWORK

The law relating to mass media does not constitute a single field of law but is rather comprised of a diverse set of laws and provisions that are scattered across the entire legal framework. The foundations of the principles of media law can be found in the constitutions of many countries, specific national legislation, as well as international conventions and acts dealing with this subject.

International Conventions

The following international treaties outline human and universal rights and freedoms, including the freedom of expression and freedom of speech. These conventions have important implications on the behavior and actions of states towards the media and journalists:

- Universal Declaration of Human Rights, United Nations General Assembly, 10 December 1948;
- International Covenant on Civil and Political Rights (ICCPR), General Assembly resolution 2200A (XXI), 16 December 1966;
- Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, European Court of Human Rights, 1950;
- International Convention on the Elimination of All Forms of Racial Discrimination, General Assembly Resolution 2106 (XX), 21 December 1965.

Council of Europe Legislation

For Council of Europe Member States, of crucial importance for guaranteeing the freedom of expression is the jurisprudence of the European Court of Human Rights regarding Article 10 of the European Convention on Human Rights.

The Treaty on European Union and the Treaty on the Functioning of the European Union are the two main sources of EU law relevant to the media. The Treaty on European Union represents agreements between the EU Member States and focuses on principles of democracy, human rights and the functioning of EU institutions. The Treaty on the Functioning of the European Union deals with the various fields of policy in which the EU can legislate.

Within the EU, the media sector is primarily regulated on the national level, but there are a few areas of media regulation, where the EU has well established competences. One aspect is guaranteeing fair competition on the marketplace. Their legal basis is contained in the Treaty on the Functioning of the European Union and addresses provisions regulating the free movement of goods and services, competition policy, technological harmonization, culture, etc.²

A second important area of regulation regards the media sector in relation to human rights, the freedom of expression and access to information and their importance for the functioning of a democratic state. Protection of the freedom of the media is acknowledged by the European Union as a fundamental right and is guaranteed by several legal instruments: the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, and the common constitutional traditions of the Member States.

[2] Michael Holoubek, Klaus Kassai, Matthias Traimer (2010): Grundzüge des Rechts der Massenmedien, Springer

Constitutional Law

Protection of the freedom of expression, freedom of the press and, in some cases, the right of access to information are guaranteed in the national constitutions of EU Member States. Also, the prohibition against the censorship of the media and the right of access to information is enshrined in constitutional law. General provisions related to the licensing of broadcast media are also subject to constitutional provisions.

Criminal Law

Criminal law regulates criminal acts and their consequences and, therefore, the relationship between individuals and the state. Some violations brought by the media or individual journalists can be subject to criminal prosecutions, for example, libel or slander, defamation of business reputation, insult, incitement to racial or religious hatred, etc.

Civil Law

Civil law regulates interactions between individual legal subjects, including both natural persons and legal persons. Civil cases related to the media and journalism can involve liability in relation to the damage of honor or civil reputation, copyright issues, right to one's own image, etc.

The Regulation of Broadcast Media

Broadcast media plays a central role in the functioning of modern societies, in particular in the formation and transmission of social values. For this reason, the broadcasting sector is subject to specific regulations based on common values, such as the freedom of expression, pluralism, copyright protection, the promotion of cultural and linguistic diversity, the protection of minors and of human dignity, etc.

In most democratic countries, broadcast regulators serve two primary functions. The first is overseeing the allocation of broadcast frequencies through the award of licenses. Secondly, they develop and implement codes of conduct that deal with various content and broadcast practice topics.

In Europe, a so-called **dual broadcasting model** exists, which is characterized by the existence of both public service and commercial broadcasters.

Public service broadcasters are financed and controlled by the public and are neither commercial nor state-owned. Their main role is to contribute to a democratic and pluralistic society by providing high quality programming to a diverse audience.

The regulation of public service media aims to guarantee its independence from political or commercial interference, ensuring accountability towards the public and managing the allocation of public funding. Public broadcasting regulators also closely monitor the content they produce in order to ensure their main functions are fulfilled. These functions include, among others: sustaining national culture, maintaining universal access, meeting high journalistic and moral standards, providing content that reflects all segments of society, thereby contributing to media pluralism, etc.³

Commercial broadcasters, in contrast, are for-profit entities that are primarily accountable to their owners, investors and clients. The regulation of commercial broadcasters concentrates mainly on the following areas: the amount and content of advertising, the monitoring of content that could potentially be harmful to youth or offensive to other groups of society, procedures for complaints and the right of reply.

[3] Christian Nissen (2006): Public Service Media in the Information Society. Media Division, Directorate General of Human Rights, Council of Europe

Media self-regulation

Given the role of the media as a government watchdog, the regulation of media activities by the state, the very entity being observed, can be challenging. That is why many states have established self-regulatory mechanisms, which set up specific rules for the media and oversee the compliance of those rules through fellow media organizations and journalists.

Self-regulatory instruments can take the form of ethics codes, press and media councils and professional guidelines.

Journalistic ethics codes define the roles, rights and duties of journalists and are developed by a collaborative endeavour between media professionals to create voluntary editorial guidelines to abide by.

Journalistic codes of conduct vary in different countries but also share some common elements, including the principles of truthfulness, accuracy, objectivity and impartiality, the right of the public to truth, the right to fair comment and criticism, the use of fair methods to obtain information, the willingness to correct mistakes, and respecting the confidentiality of sources.⁴

[4] Andrew Puddephatt (2011): The Importance of Self-Regulation of the Media in Upholding Freedom of Expression. UNESCO

Introducing a code of ethics is merely the first step towards effective media self-regulation. In order for self-adopted codes to be upheld, it is also important to establish an independent body to supervise and impose sanctions against individuals or organizations in violation of those principles.

A press council is the most common form of self-regulatory body. Press councils are primarily composed of media professionals. Their main role is the handling of complaints about breaches of the code of ethics thus providing guidance for media professionals and the public on journalistic standards.⁵

Alongside journalistic codes of conduct, journalists should also be guaranteed editorial independence in order to work without being subject to pressure from the commercial interests of media owners. A third important element of self-regulation is the professional guidelines adopted by media organizations as part of their editorial policy. The BBC is an example of a media organization that has adopted strong professional guidelines that have heavily impacted the content that they publish.

[5] <http://www.europarl.europa.eu/EPRS/EPRS-Briefing-554214-Press-freedom-in-the-EU-FINAL.pdf>

III. THE RIGHT TO FREEDOM OF EXPRESSION

Freedom of expression is the ability to hold and openly express one's opinions or ideas without fear of censorship or government interference. The right to freedom of expression is not limited to verbal communication but also includes the ability to express one's views through published articles, books or leaflets, television or radio broadcasting, works of art, the Internet and social media. It also includes the right to receive information through various communication channels.

The term "media freedom" is often used alongside, or as an alternative to, the terms "freedom of speech" or "freedom of expression", but the protection of media freedom takes a special position due to the media's role as a "public watchdog" as well as its function to disseminate information and ideas, thus guaranteeing the right of the public to receive this information.

Freedom of expression and media freedom are essential foundations for open and democratic societies. The freedom to express one's ideas and form an opinion is an important prerequisite for political processes to function in a democratic way. At a national level, freedom of expression is necessary for good government and, therefore, for economic and social progress. At an individual level, freedom of expression is vital to the development, dignity and fulfillment of every person. Without a broad guarantee of the right to freedom of expression, protected by independent courts, there is no democracy and no free country.⁶

[6] <https://www.article19.org/pages/en/freedom-of-expression.html>

How is freedom of expression protected?

The right to freedom of expression is guaranteed by international and regional human rights treaties such as the Universal Declaration of Human Rights (Article 19), the UN International Covenant on Civil and Political Rights (Article 19), the European Convention on Human Rights (Article 10) and Charter of Fundamental Rights of the European Union (Article 11). It is also enshrined in the constitutions of the Member States of the Council of Europe.

Universal Declaration of Human Rights (Article 19)

» Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.«⁷

[7] <http://www.un.org/en/universal-declaration-human-rights/>

European Convention of Human Rights (Article 10)

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

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.«⁸

[8] http://www.echr.coe.int/Documents/Convention_ENG.pdf

Charter of Fundamental Rights of the European Union (Article 11)

»1. Everyone has the right to freedom of expression. The right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.«⁹

[9] http://www.europarl.europa.eu/charter/pdf/text_en.pdf

Limitations on the freedom of expression

Freedom of expression and press freedom are not absolute rights and may be restricted in order to protect the rights or reputations of others, for example by prohibiting speech that incites violence or hatred against a particular group, to protect children from sexual exploitation or to protect the reputation of individuals from false accusations.

These rights can also be limited when national security, public order, public health or morals are endangered. In case of a conflict between the right to freedom of expression and other rights that are protected under human rights law, such as personality rights, freedom of expression can be subject to certain limitations. However, restrictions can only be imposed provided they are “necessary in a democratic society”, “prescribed by law” and have a “legitimate aim.”¹⁰

[10] Dirk Voorhoof (2004): The Right to Freedom of Expression and Information under the European Human Rights System. Towards a More Transparent Democratic Society, Robert Schuman Centre for Advanced Studies, p.2

IV. MEDIA AND THE PROTECTION OF PERSONAL RIGHTS

The right to freedom of expression is not absolute and can be a subject to limitations when it infringes upon the personal rights of others.

The mass media can violate personality rights in several ways. Two examples of personality rights violations are the violation of an individual's right to privacy and the spreading of false information about a person that could negatively impact their reputation, a violation known as defamation.

The term "personality rights" is not universally defined but is broadly used by international courts and many national jurisdictions. It refers to a number of rights that protect the dignity and emotional and psychological integrity of a person, such as the protection of reputation, the right to privacy and private life, the right to the protection of one's image, etc.¹¹

[11] <https://www.article19.org/data/files/medialibrary/38362/Defamation-Principles-Background-paper.pdf>

Protection of the strictly personal sphere

Everyone has the right to privacy. It implies the citizens' rights to be left alone or to have control over the unwanted publication of their private information. Where the private sphere ends and the public sphere begins depends on the context. In some cases, actions or incidents that occur "in public" actually belong to the private sphere.

The goal of privacy laws is to protect people from unwanted intrusions into their private lives. Many civil law jurisdictions also have specific provisions that protect an individual's image, personal data, name, likeness and other generally private information.

How to avoid invasion of privacy liability

The publication of true but private facts about an individual can lead to a claim of invasion of privacy if the publicized information is highly offensive to a reasonable person, not generally known to the public, widely communicated and if it is of no legitimate concern to the public.¹²

There are several steps a journalist can take in order to avoid invasion of privacy liability:

Report on subjects and topics that are newsworthy

Report on topics and facts that are of legitimate public concern. In this way, you will not invade the privacy of individuals presented in your work or unlawfully exploit their names or likenesses.

Gather your information in public places and from publicly available sources

If you acquire your information from publicly available sources, such as property records and public financial information, it is unlikely that your publication will invade the privacy of an individual.

Where possible, get consent

Consent is generally a comprehensive defense to privacy claims. When interviewing someone or taking photographs for later publication, seek permission to use the information you have gathered.

[12] <https://www.rcfp.org/browse-media-law-resources/digital-journalists-legal-guide/publishing-highly-personal-and-embarrassi>

The Right to Privacy

The right to privacy is anchored in both the Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms:

Universal Declaration of Human Rights (Article 12)

» No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.«¹³

[13] <http://www.un.org/en/universal-declaration-human-rights/>

European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 8)

» 1) Everyone has the right to respect for his private and family life, his home and his correspondence.

2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society and in the interests of national security, public safety and economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others.«¹⁴

[14] http://www.echr.coe.int/Documents/Convention_ENG.pdf

Exceptions to general privacy rights can be made when reporting on public figures or when the private information disclosed is in the public interest. In such cases, the media must be able to prove that the violation of privacy is justified.

Defamation

Defamation involves the act of making a false statement about another person that harms the person's reputation or good name. Such statements may be made orally (slander) or in writing (libel).

Defamation laws aim to protect the reputations of individuals against injury. Nearly all countries have legislation that addresses this matter, but the form and content of the legislation differs considerably. Some countries have specific defamation statutes, while others have provisions in more general laws. In a majority of Council of Europe Member States, defamation falls within the scope of both civil and criminal law.¹⁵

Defamation usually concerns only individual reputation, but defamation cases may also cover claims made about "legal persons", which are entities that have been granted legal status, such as companies or corporations. Furthermore, in some countries a defamation suit can be brought in order to protect the reputation of a group of people, a flag or an insignia, an office or an institution.¹⁶

According to international standards, public officials should tolerate a larger degree of criticism and intrusion into their lives than ordinary citizens. "Public figures"- individuals who occupy certain prominent positions in society and, therefore, are subject to public interest and scrutiny – also have to tolerate a larger degree of criticism and intrusion than ordinary citizens.¹⁷

[15] Tarlach McGonagle (2016): Freedom of Expression and Defamation. A Study of the Case Law of the European Court of Human Rights, Council of Europe

[16] http://legaldb.freemedia.at/wp-content/uploads/2015/08/FoE-Media-Law-Defamation_ENG.pdf

[17] <https://www.article19.org/data/files/medialibrary/38362/Defamation-Principles-Background-paper.pdf>

Elements of a defamation claim:

Defamation law varies from state to state, but there are some generally accepted rules that are common in many places. To prove defamation, the claimant must prove the following elements:

Reference to the claimant:

the defamatory statement should be easily referable to the plaintiff, even when the claimant is not mentioned by name;

Publication

the offending information must be disseminated or distributed to one or more third parties;

Falsehood

A false statement for defamation purposes must be a false statement of fact. Opinions are protected and not actionable;

Injury

In order for a statement to be actionable, it must have caused harm to the plaintiff's reputation.

Defenses to defamation

In defamation cases, the concept of journalistic due diligence plays an important role and can, if proven, absolve a journalist of liability. Other important defenses against claims of defamation that can be drawn from international law include:¹⁸

Defense of the truth

Proof that the disclosed information is true can generally absolve the defendant of liability.

Defense of "reasonable publication"

Evidence that the accused had sufficient grounds to believe that, at the time the statement was made, the claim was true. Due to their responsibility to expediently and effectively maintain the flow of information to the public, journalists cannot always wait until they are completely sure that every fact made available to them is correct before publishing or broadcasting a story.

Absolute privileges

Statements made in certain forums in which the ability to speak freely is vital, for example, statements in proceedings of judicial character or statements made under oath, enjoy absolute privilege and should not be at risk of litigation for defamation.

Statements of opinion vs. statements of fact

A statement which cannot be shown to be true or false, or which is clearly not intended as a statement of fact, cannot be justification for a defamation charge.

Words of others

No one should be held accountable for fairly and accurately reporting the words of others. This principle recognizes that journalists have a responsibility to cover the news, which can include reporting on statements which could undermine the reputation of others.

Qualified privileges

Statements which the speaker is under a legal, moral or social duty to make, such as reporting a suspected crime to the police, enjoy qualified privilege and should be exempt from liability.

[18] <https://www.article19.org/data/files/medialibrary/38362/Defamation-Principles-Background-paper.pdf>

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