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Introduction

This book explains contemporary European and international media law from a liberal democratic perspective. To accomplish this broad objective, it describes domestic media law as, very simply, the set of rules that the state uses to define its relationship with the media and to manage, as best it can, the public information environment in which it exists. Control of that relationship has been essential to the security, authority, and legitimacy of the state since the first appearance of the print media in the pamphlets and posters of the 1600s. Aside from the media's potential to incite public disaffection or even violence towards the state and to disclose its secrets, media publications threaten intrusion into the privacy of individuals and the ruin of their reputations as well as exposure of households and communities to grossly offensive images and comment. The state that cannot contain those threats to itself and the public will struggle to survive.

Yet, for all that, the flow of information and ideas is also indispensable to many governmental aims, whether democratic or authoritarian in nature. Without a sufficient flow of accurate information, commerce cannot flourish and the public is often left confused and apprehensive and, moreover, unable to participate effectively in democratic life. States have consequently been compelled to balance their many reasons for restricting publication with sufficient laxity to obtain the benefits of an active media. Indeed, the state often intervenes to promote its public policy goals by encouraging media publication or even taking charge of that process itself.

The relationship between the media and the state has nonetheless always been in flux and is rarely under the complete control of any state. For centuries, the publication of media content has been driven forward by the pursuit of revenue and profit harnessed to an unquenchable consumer demand for news and entertainment. The speed and reach of media publication has also steadily increased as commercial forces, sometimes aided or supplanted by the state, have exploited new communication technologies. In the media state relationship, the state is therefore usually on the back foot, adapting its legal and administrative powers to an ever enlarging sphere of public communication. However, in that process, the state has enjoyed the ultimate advantage of coercive power, which it can deploy against the vulnerable processes of content production and distribution, including editors and journalists as well as printers, book sellers, and broadcasting managers. The rise of the internet has however threatened to overturn that long standing advantage.

Even in countries as dedicated to close control over media content as China, the current communications revolution, in which mass and personal as well as foreign and domestic communication have merged, has created new forms of media that severely challenge the state's capacity to set the boundaries of public information. As China has demonstrated, it is only with resources and ingenuity that the state can make its territorial boundaries felt in the contemporary global flow of information and ideas.

Beyond commerce and technology, the relationship between the media and the state has developed under political and social pressures that fostered markedly different ideas about the purposes and limits of the state. It is here that liberalism has made its special mark on media law and policy, providing a rich store of ideas and arguments favouring an expansive sphere of speech and publication that is comparatively free from interference by others. Liberalism's emphasis on media freedom is grounded in its fundamental concern for personal liberty, which is often bound to a deep suspicion of the motives and methods of the state. Yet the broad tradition of liberal thought also carries other concerns about personal autonomy that emphasize the dignity and well being of the individual and severely complicate rights to speak and publish freely where expression causes harm.

This awkward balancing of liberty and restraint has been a central issue in liberal thought since the Enlightenment and the elevation of individual freedom and well being to the first rank of moral and political concerns. Consequently, the argument that the liberty to publish is essential to democratic forms of government, enabling an informed citizenry, has played a pivotal role in curbing legitimate claims for restraint and protection from harmful and offensive publications. Accordingly, where there is a public interest in wider access to information, the protection of collective and individual security and well being should yield to the needs of democracy and the open scrutiny of public authorities and affairs. These consequential aims are also profoundly liberal democratic, embracing the accountability of democratic government and the pursuit of effectiveness and integrity in public administration. When coupled with economic arguments for efficiency and consumer choice through the liberalization of markets for media goods and services, this consequentialism gives liberal democracy a generally coherent and stable approach to problems of freedom of expression. In the internet era, this has moreover provided a basic point of reference for the development of law and policy in a fast changing public information environment.

This critically important relationship between the media and the liberal democratic state is at the heart of this book. However, its focus is not on the problems of particular liberal democracies in maintaining effective control over public information in the midst of a communications revolution. As much as the media state relationship is defined by the territorial state, it has never been easily contained within those boundaries. Information and ideas, whether in printed form or transmitted by wireless or wired means, have always flowed or seeped across borders. Maintaining state control over the domestic public information environment has therefore involved constant tending of the state's defences against unwanted foreign sourced content. In addition to unilateral measures, governments

have also looked to like minded, neighbouring states for assistance in combatting illicit publications and transmissions. Indeed, as cross border communications have grown in scale and complexity so too have efforts to cooperate regionally and internationally in areas of mutual concern. The focus of this book is therefore on the comparatively successful effort to entrench liberal economic and political principles into the laws and institutions of European public order, which has had profound consequences for domestic media law and policy across Europe. It is also on equally long running efforts to entrench those same principles into international public order.

Since World War II, cooperation between states on media content standards and communications infrastructures has been gradually subsumed into the fabric of newly constructed regional and international legal regimes. In Europe, the world's pre-eminent regional order, domestic media law is now enmeshed in thickly layered rules broadly founded on market based economic relations and political liberalism. In the international sphere, parallel efforts to entrench liberal economic and political values in the institutions and agreements that support a nascent global public order have been markedly less successful. Undoubtedly, in establishing the WTO, the United States and its allies seized a critical moment with the collapse of the Soviet Union to secure the foundations of a market based, global economic order. However, despite a near decade of multilateral negotiations in the Doha Round, the aspirations of the WTO treaties have yet to be fulfilled. The bold assumption that the post Cold War era would see a worldwide triumph of political liberalism has moreover proven even less credible. On the contrary, it appears that the global entrenchment of liberal economic relations has left behind the liberal democratic political project, accepting participation by any form of government provided it trades on a market basis.

Despite their profound differences, the European regional order and the international patchwork of regimes share common features that are immensely important to the future of domestic media law. In both spheres, the core treaties embrace the idea that the legitimacy of state conduct, both internal and external, should be determined according to supranational, objective legal standards. As a result, European and international law claim to set out the boundaries for legitimate state conduct generally and, more specifically, the proper conduct of the state in relation to the media.

Structural similarities in European and international law have also caused them to share two fundamental weaknesses. The first of these stems from the awkward relationship between supranational obligations and national sovereignty. In European and international legal regimes, the limits of national sovereignty are defined by the scope of member state obligations and any permitted exceptions or rights of derogation. The gradual deepening of European and international obligations has however kept these boundaries between national and supranational authority in constant flux, causing perpetual uncertainty in domestic law. Secondly, efforts to establish European and global public order have been built on a clear, formal separation between the fields of economic and human rights law. This separation had many advantages, not the least ensuring that each regime could develop with distinct, manageable goals. Nonetheless, it also created a deep fault line that has not

only created enormous problems for the coherence and consistency of European and international law, but has also severely complicated the relationship of supranational and domestic law.

In the media sector, where commercial, social, and political issues are often inseparable, the distinction between supranational economic and human rights obligations has rendered domestic law more opaque and unpredictable. A media claim, for example, that the state should not interfere with the publication of a particular piece of information can be pursued as an economic rights claim or as a human rights claim. While that is perhaps a useful conceptual distinction at the domestic level, it is not useful that those claims are oriented towards different fields of European and international law. Even worse, in supranational economic law, there have historically been virtually no substantive obligations that protect collective or individual interests from harmful media publications. While these are often covered through various exceptions to trade and market access obligations, it is only in the human rights field that they have received positive protection from the outset. Supranational economic law has therefore always held certain advantages for an argument for greater liberty to publish and distribute media content, attracting forum shopping by claimants and forum shifting by negotiating governments.

Constitutionalism has been the most obvious solution to the deep structural problems of European and international law. A constitutional framework of common values and principles offers a basis on which the ambiguous interface between national autonomy and supranational obligations as well as the equally difficult one between supranational economic and human rights law can be resolved. Europe moreover has moved a long way in this direction. Most recently, the member states have adopted the Treaty of Lisbon, which not only made the Charter of Fundamental Rights legally binding for most member states and paved the way for the EU to become a party to the European Convention on Human Rights, but also strengthened the basis for non-market public policy measures in EU Law. In contrast, the international sphere remains fragmented. Many questions about the limits of national autonomy and the relationship between different regimes are far from resolution. The interface between international economic and human rights law is especially weak, to the extent that human rights issues are more likely to arise in the WTO as a matter of domestic public policy than through any articulation of principle by UN human rights bodies.

From a liberal democratic perspective, constitutionalism offers several notable benefits for the development of European and international media law. Doctrinal coherence, based on liberal economic and political values, that closes the gap between economic and human rights law is essential in creating a more stable relationship between supranational and domestic media law. In addition, constitutionalist methods bring greater uniformity to domestic law, which is also plainly beneficial in an era of instantaneous cross border communication and media globalization. There are nonetheless many objections to supranational constitutionalism, some of which are particularly significant for the media state relationship. Media law is intensely local. It is always uniquely important to its place, reflecting differences in languages, religious faiths, popular beliefs and traditions,

political preferences, and even the consequences of local geography. Equally important, the media state relationship is always changing, even while enmeshed in local circumstances. This not only involves change through the developments of communication technologies or media services referred to above, but also through the evolution of the state itself. The contemporary liberal democratic state, highly porous and interlinked with non-state institutions and networks, has broadened its methods of law and administration. In the media sector, many governments have, for example, turned to methods of co and self regulation to maintain more effective and responsive control over new media services.

The aims of supranational constitutionalism, including coherence and consistency across boundaries, are often at odds with this diversity in local circumstances and methods of law and regulation. European and international rule making and adjudication are clearly designed to allow member states sufficient leeway to implement their obligations in ways that suit national circumstances. Nonetheless, the logic of common obligations means that that margin of discretion should not be so wide that participating states are able to avoid the central purposes of those obligations. In Europe, the incorporation of many new member states has moreover depended on the rigour and integrity of regional economic and human rights rules, especially considering that new member states are often in transition from a non-democratic past.

There is however no bright line that separates illiberal and liberal practices. A common rule for member states, even when flexible, will also eliminate public policy choices and measures that are plainly justifiable on liberal democratic grounds. It is, as a result, impossible in European law to fully accommodate American constitutional principles on freedom of expression. The structure of the European Convention on Human Rights and an irreversible commitment to proportionality analysis have frequently placed American preferences for greater liberty to speak and publish outside the bounds of European law.

In the international sphere, differences in national media law and policy are less often confined by common obligations. More often, these differences have proven to be a roadblock to agreement. In the international human rights field, the implications of the right to freedom of expression remain contentious. There is certainly no universal or even general consensus that this right bears an exclusively liberal democratic meaning and, as influence over global affairs shifts away from the western democracies, that goal will not be achieved in the foreseeable future. Even in the field of trade relations, where the principle of market based trade is widely accepted, many governments, including major liberal democracies, have rejected the application of that principle to trade in media goods and services, demanding strong protections for their non-market public policies.

Constitutionalist objectives in the international sphere, especially in relation to media law and policy, are therefore highly problematic. On one hand, a constitutionalist vision of global public order, in some form, is probably an unavoidable necessity. Liberal democracy is also likely to remain at the heart of that vision. Although its reputation has waned considerably since the end of the Cold War, no significant competing intellectual framework has emerged to provide an alternative

understanding of the role of the state or the structure of international order. Authoritarian capitalism is, so far, an exception to the liberal democratic project rather than an alternative vision of world order.

On the other hand, the communications revolution has ruptured the traditional media state relationship. The increasing globalization of media services has overturned once effective methods of state control, including methods of cooperation between states to manage content standards. Consequently, while public exposure to new ideas, images, and information has broadened exponentially, governments have needed to reconsider their basic goals for media content and look for ways to achieve them. The media state relationship has therefore become volatile and unpredictable. Given how widely states range in their politics and capacities, it is thus not surprising that international human rights and trade law have failed to provide a common understanding of the nature of the media state relationship or how it should be encompassed within any notion of global public order.

It is not obvious that the resolution of that problem lies in liberal democratic constitutionalism. Ultimately, this is a test of liberalism's claim to universality and its argument that legitimate differences can be accommodated through mutual tolerance. In the internet era, however, the clash of different ideas and beliefs has gone well beyond the scope of liberal tolerance. The liberal democratic model, whether in a European or other form, is unacceptable in the wider international sphere, at least not before a radical dilution of its liberalism. From this perspective, the concept of legal pluralism seems to provide a better description of the present conflict of radically different views on the future of the media state relationship.

Part I of *European and International Media Law* looks first at the changing relationship between the media and the state from an internal perspective, focusing on the effects of new technologies and services as well as the liberal and democratic context for those changes. It then expands the focus to European and international law, explaining how domestic media law fits within supranational economic and human rights frameworks. Part II of this book then examines the principal obligations, exceptions, and rights of derogation in European and international law that bear on the domestic media state relationship. It does not however address copyright, which is largely beyond scope of this work. In Part III, the book covers state measures that generally have a restrictive effect on the liberty to publish. These include measures that restrict expression that directly affects the state, such as criticism of public authorities and incitement to violence, as well as measures that protect the well being of others and also preserve the authority and legitimacy of the state, including measures concerning pornography and incitement to hatred. The book concludes with Part IV, which concerns positive intervention in media markets to achieve political, social, and cultural policy goals.