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Introduction: aim, scope and method

Ever since Johannes Gutenberg invented mechanical movable type printing, the mass media has played an important role for human communication. Before the internet emerged as the first democratic mass medium, operators of mass communication infrastructures, such as newspapers, TV or radio broadcasting, had the unique ability to disseminate information and ideas to a mass audience without the recipients having to be present, and to issue such publications on a periodical basis. The professional media, by virtue of its possibilities of newsgathering, its manpower and its infrastructure, was better equipped than private individuals to disseminate publications to a mass audience. It was incumbent on the traditional media to impart information and ideas on matters of public concern, to investigate government action, expose fraud and corruption and to inform the public, thus playing an essential role as a 'watchdog' or 'fourth estate' in a democratic society.[1] Therefore, the mass media had the capacity to inform the public and shape public opinion, together with the opportunities to abuse this power. Many domestic constitutions[2] and courts applying international human rights conventions[3] thus acknowledge a special role of the mass media in the framework of freedom of expression not only by granting special

[1] Stewart (1975) 634; Nimmer (1975) 653; West (2011) 1069–70; Lord Justice Leveson, An Inquiry into the Culture, Practices and Ethics of the Press, 2012, pp. 63 ff.

[2] Such as the First Amendment to the US Constitution, Article 5(1)2 German Basic Law, Article 21(2) Italian Constitution, Article 25(1) Belgian Constitution or Article 17 Swiss Constitution.

[3] See, e.g., Human Rights Committee, *Bodrožić* v. *Serbia and Montenegro* [2005] Communication no. 1180/2003 [7.2]; *Toktakunov* v. *Kyrgyzstan* [2011] Communication no. 1470/2006 [6.3]; Concluding observations on Kuwait (CCPR/CO/69/KWT), para. 20; ECtHR, *Sunday Times* v. *United Kingdom (No. 1)* [1979] App. no. 6538/74 [65]; *Lingens* v. *Austria* [1986] App. no. 9815/82 [42]; *Goodwin* v. *United Kingdom* [1996] App. no. 17488/90 [39]; IACtHR, *Fontevecchia and D'Amico* v. *Argentina* [2011] Case 12.524 [44–5]; *Vélez Restrepo* v. *Colombia* [2012] Case 12.658 [140].

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privileges, but also by imposing enhanced duties and responsibilities on journalists and media companies.

Today, media law faces three fundamental challenges. First, the phenomenon of technological and content-related media convergence complicates the traditional categorisation of media services into broadcasting and press. Second, due to the concentration of media ownership, fewer individuals and organisations control increasing shares of the mass media. Third, as the internet evolves, the ability to reach a mass audience is no longer the privilege of traditional media corporations, and, hence, not a clearly distinguishing element for the media–public divide anymore. Citizen-journalists and other actors in civil society, in light of economically plagued traditional journalism, increasingly play the role of watchdog, for instance by covering local matters or reporting from conflict areas which professional journalists have hardly any access to.[4] At the same time, an increasing number of newspapers, magazines and broadcasters do not engage in investigative, core public interest journalism, but prefer to report on people's private lives.[5]

These challenges lead to significant legal uncertainty. Should media privileges be maintained, and, if so, how is 'the media' to be defined? Does 'media freedom' as a legal concept also encompass bloggers who have not undertaken journalistic education? And should a legal distinction be drawn between investigative journalism, on the one hand, and reporting on purely private matters, on the other? This book seeks to answer these questions.

In methodological terms, this study combines doctrinal and conceptual comparative analysis with descriptive and normative theory. At the same time, this book is, in a positivistic way, restricted to the *law* of the media; hence it does not expand on media ethics. It aims to develop a theoretical and doctrinal framework for the scope, content and limitations of media freedom as a fundamental right. The book particularly builds on the work of Jürgen Habermas and Robert Post on public discourse. A Media Freedom Principle[6] should create incentives for the media to strive towards an ideal communication community: a public sphere where undistorted rational public discussion of matters of general concern is institutionalised.[7] Media freedom has to be

[4] See Anonymous author (2007) 1005; Calvert and Torres (2011) 344.
[5] See, e.g., Lord Justice Leveson, An Inquiry into the Culture, Practices and Ethics of the Press, 2012, pp. 539 ff.
[6] The term is based on Frederick Schauer's 'Free Speech Principle'; see Schauer (1982) p. 6.
[7] See Habermas (1962); Habermas (1981b) p. 2.

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conceptualised as a liberty that protects institutional mass communication against both the state and private actors.

Since the study of fundamental rights is to a significant extent the study of fundamental rights adjudication,[8] the book compares the approaches to media freedom taken by international conventions and their interpretation by courts and tribunals. Therefore, the book refers to international adjudicators' jurisprudence, but wants to provide theoretical underpinning, and aims at developing legal doctrine further. It thereby seeks to highlight and consolidate international minimum standards of media freedom where they exist, and developing globally applicable legal principles where they do not yet exist. This book searches for international consensus among human rights adjudicators on the content of media freedom, on the need to restrict media activity to protect individual or public interests and on the limitations of those restrictions, particularly the principle of proportionality. The book is theoretical in the sense that it provides a justification for the existence of media freedom, and a view on the general character and normative goals thereof. It is also doctrinal by deducing a workable and rationally reviewable system for the judicial interpretation and application of media freedom from the theoretical analysis.

The book is based on the principle that the provisions of each international human rights document should be interpreted and applied in light of the evolution of international human rights law in general. The evolution of the body of international human rights law relevant to the interpretation and application of a particular convention can be extracted from other instruments on human rights and their interpretation.[9] Thus, when examining a petition lodged against a state alleging violation of human rights, a regional adjudicator must pay attention to the other relevant norms of international law that apply to this state, such as the International Covenant on Civil and Political Rights (ICCPR), and to the evolution of a '*corpus juris gentium* of international human rights law over the course of time'.[10] International human rights conventions are 'living instrument[s]' which must be 'interpreted in the light of present day conditions'.[11]

[8] See Alexy (2002) p. 2.
[9] Compare IAComHR, *Oscar Elías Biscet and others* v. *Cuba* [2006] Case 12.476 [42], with further references; IACtHR, *Olmedo Bustos and others* v. *Chile ('The Last Temptation of Christ')* [2001] Case 11.803 [69]; *Ricardo Canese* v. *Paraguay* [2004] Case 12.032 [83] and [84]; AfComHPR, *Law Offices of Ghazi Suleiman* v. *Sudan* [2003] App. no. 228/99 [48] and [50]; *Article 19* v. *Eritrea* [2007] App. no. 275/03 [94] and [108]; ECtHR, *Stoll* v. *Switzerland* [2007] App. no. 69698/01 [111].
[10] IAComHR, *Oscar Elías Biscet and others* v. *Cuba* [2006] Case 12.476 [41].
[11] See ECtHR, *Tyrer* v. *United Kingdom* [1978] App. no. 5856/72 [31].

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Because of its aim to develop globally applicable minimum standards of media freedom, the book is confined to the international dimension of media freedom, largely to the exclusion of domestic constitutions and jurisprudence. Although international human rights catalogues are rooted in domestic human rights declarations and codifications of the late eighteenth and nineteenth century, international human rights have developed into a 'self-contained regime', possessing a logic of their own.[12] International human rights adjudicators draw inspiration from the interpretation of domestic constitutions by states' courts, but in the hierarchy of a multi-layered judicial system, decisions of international courts, *de facto* and sometimes even *de jure*, take precedence over judgments of domestic courts.[13] This does not exclude, and might even require, a certain margin of appreciation to domestic courts' judgments. In turn, principles that are developed in this study are only applicable to a limited degree to states that are not member to one of the human rights treaties covered by this book or that have made reservations to the relevant provisions. This applies, in particular, to the United States, which has made substantive reservations to Article 20 ICCPR. Furthermore, the US has – in strange concomitance with, among other states, Cuba – not ratified the American Convention on Human Rights (ACHR) yet (although it has at least adopted the American Declaration of the Rights and Duties of Man). The book therefore refers to US case-law in order to describe conformity and divergence between the international approaches and First Amendment doctrine.[14] In the US, First Amendment jurisprudence is based on the presumption that if communication is categorised as 'speech' within the meaning of this clause, then it deserves strong, albeit not absolute, protection. This understanding requires US courts to define certain 'well-defined and narrowly limited classes of speech',[15] which do *a priori* not receive First Amendment protection. By contrast, the 'duties and responsibilities' clauses in international conventions allow adjudicators to balance freedom of expression with conflicting rights and interests on an *ad hoc* basis. Hence the seminal question is whether an interference with speech may be justified for the protection of conflicting rights and interests.

[12] De Schutter (2010) pp. 1, 8.
[13] Compare German Federal Constitutional Court, '*Presumption of innocence*' [1987] Case 2 BvR 589/79; '*Görgülü*' [2004] Case 2 BvR 1481/04. In Austria, the European Convention of Human Rights even has constitutional status.
[14] However, Congress referred to the jurisprudence of the UN Human Rights Committee on the law of libel in Section 2(4) Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act 2010.
[15] US Supreme Court, *Chaplinsky* v. *New Hampshire*, 315 US 568, 571 (1942).

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In contrast to the First Amendment, international conventions do not afford dominance to freedom of speech, but treat freedom of speech as a right with equal value to human rights of others, especially the right to respect for private life and its sub-categories, privacy and reputation.

A book that aims at the development of globally applicable doctrines of media freedom is almost necessarily subject to the suspicion of an over-broad generalisation. Claims of universalism in human rights have been highly controversial, as they risk overriding cultural, historical and theoretical differences. For example, the European Court of Human Rights (ECtHR) mainly deals with human rights interferences in developed democracies. Cases brought to Strasbourg alleging violations of freedom of expression and media freedom often require a delicate balancing exercise between the right to criticise one's government or to be informed on the lives of public figures, on the one hand, and the right to reputation and privacy of politicians or other prominent figures, on the other hand. Cases involving arbitrary arrests or prosecutions of journalists are the exception, not the rule in Strasbourg. By contrast, many member states to the ICCPR, the ACHR and the African Charter on Human and Peoples' Rights (AfCHPR) are, at best, developing and consolidating democracies. The UN Human Rights Committee, the Inter-American Court of Human Rights (IACtHR) and the African Commission on Human and Peoples' Rights (AfComHPR) often have to deal with appalling violations of human rights. Their cases imply accusations of torture and the killing of journalists for the exercise of their profession. Such claims of extrajudicial executions of, or physical violence against, journalists do not require the same fine balancing exercises as defining the limits of acceptable criticism of politicians in newspaper articles would. Authoritarian regimes usually interfere with the rights of journalists through direct limitations, including arbitrary arrests, extraditions or even murder. However, the more a country develops towards a democracy, direct interferences are replaced by more refined forms of limiting journalistic freedom, including administrative regulations and judicial decisions in civil law cases.[16]

It is also true that the jurisprudence of the Human Rights Commitee on freedom of expression and media freedom under the ICCPR is less refined than the case-law of regional adjudicators, especially the ECtHR. The ambit of the Human Rights Committee's jurisprudence is global rather than restricted to a particular continent, and therefore it is even more difficult for the Committee to define common standards for

[16] Compare Schonsteiner, Beltran y Puga and Lovera (2011) 365; Grossman (2001) 621–2.

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freedom of expression and its limitations. Furthermore, the United Nations comprises a larger body of human rights treaties, including, for instance, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), all of which have equal legal status. Thus, compared to the regional conventions, the ICCPR does not constitute the core of human rights protection at UN level, and the Human Rights Committee does not yield powers comparable to the regional human rights courts. Furthermore, an adjudicator's case-law can only be as doctrinally refined as the cases brought to this adjudicator allow: the Human Rights Committee has had fewer media-related cases to decide than, for instance, the ECtHR, and thus less opportunity to develop a coherent body of case-law in this area.

In addition, notwithstanding the guidelines of the Vienna Convention on the Law of Treaties, the jurisprudence of international courts and committees is not always coherent and sometimes appears under-theorised.[17] This deficit is caused by several factors. First, international jurisdiction is of a subsidiary, reinforcing and complementary nature.[18] International human rights catalogues only protect human rights at a basic level, and they cannot substitute a domestic constitution. International courts and tribunals are thus not able to replace a domestic constitutional court.[19] Furthermore, international adjudicators need to respect a certain margin of appreciation of the Member States on matters where an internationally agreed standard is lacking, such as in the interpretation of 'morals' or where significant domestic interests are concerned, as is the case with national security. Conceptual uncertainty hence favours Member States' discretion. Consequently, in marginal cases, the exact balance between media freedom and conflicting interests that each liberal democracy develops differs according to constitutional, historical and social settings.[20]

Finally, the EC/EU jurisprudence and legislation in media law is to a significant degree characterised by the EU's focus on the development of a common market, and therefore on the media's role as an economic factor, rather than by the pursuit of human rights standards. Under EU law, media goods and services had, in the first place, been perceived as economic commodities. In the seminal *Sacchi* decision, the then-European Court of Justice (ECJ)[21] held that broadcasting of television

[17] Compare Fenwick and Phillipson (2006) pp. 1 and 6.
[18] IACtHR, *Perozo and others* v. *Venezuela* [2009] Case 12.442 [64].
[19] Fenwick and Phillipson (2006) p. 7.
[20] Compare Weaver and Partlett (2005–6) 60.
[21] Court of Justice of the European Union (CJEU) since the Lisbon Treaty.

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signals, including those in the nature of advertisements, falls within the rules of the Treaty relating to services.[22] In *Procureur du Roi* v. *Debauve*, the ECJ included transnational transmission of broadcasting signals by cable television within the rules of the Treaty relating to services as well.[23] Thus Article 62 in conjunction with Article 53(1) of the Treaty on the Functioning of the EU (TFEU) and their predecessors authorised the EU to issue the Audiovisual Media Services Directive (AVMS Directive), which harmonises the rules on TV broadcasting and video-on-demand in the EU.[24]

Despite all these objections, a global approach to media freedom can nonetheless be built on three principles that run as common threads throughout all jurisdictions.

First, all human rights treaties have been inspired by the Universal Declaration of Human Rights (UDHR): they are similarly worded and they even require taking into consideration the interpretation of other human rights conventions. The human rights enshrined in the UDHR have been further developed in subsequent international treaties, regional human rights instruments and national constitutions, and have served as the foundation for the ICCPR, the ICESCR and other international treaties.[25] According to Article 53 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Article 29(b) ACHR, nothing in these conventions shall be interpreted as limiting or derogating from any of the human rights which may be ensured under any agreement to which the state concerned is a party – and this is in most cases the ICCPR. Similarly, Article 7 of the Court Protocol to the AfCHPR provides that '[t]he Court shall apply the provisions of the Charter *and any other relevant human rights instruments ratified by the States concerned*' (emphasis added).[26] International human

[22] *Sacchi* [1974] ECR 00409, Case C-155/73 [6].

[23] *Procureur du Roi* v. *Debauve and others* [1980] ECR 00833, Case C-52/79 [15]. See also *Coditel and others* v. *Ciné Vog Films and others* [1980] ECR 00881, Case C-62/79: assignment of copyright limited to the territory of a Member State is capable of constituting a restriction on freedom to provide services.

[24] See Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States concerning the Provision of Audiovisual Media Services (Audiovisual Media Services Directive), OJ 2010, L95/1, and its predecessor Directives.

[25] For example, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of Discrimination Against Women, the UN Convention on the Rights of the Child, or the UN Convention Against Torture.

[26] A similar provision, Article 60, applies in the AfCHPR; see AfComHPR, *Media Rights Agenda* v. *Nigeria* [2000] App no. 224/98 [52]; *Law Offices of Ghazi Suleiman* v. *Sudan*

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rights instruments, therefore, include or presuppose general principles of law.[27] These principles include, for instance, the concept of an 'interference' with human rights, the principle of proportionality and the principle that states are not only compelled to abstain from violations of human rights, but that they may also be under an obligation to actively protect human rights. By regularly referring to each other,[28] international adjudicators are in a constant judicial dialogue when interpreting the provisions of the human rights treaty they supervise. As the decisions of the IACtHR over the last decade show, cases requiring a more refined approach to media freedom and its limits will inevitably appear with the progressing consolidation of democracies. It is not surprising that the Inter-American Court, when deciding on privacy issues or on conflicts between freedom of the media and religious freedom, regularly refers to the European Court of Human Rights.[29] In turn, the Inter-American Court has a more generous approach to freedom of access to information, which should serve as role-model for the interpretation of Article 10 ECHR.[30] As regards Africa, the uprising in the Arab Spring in particular will hopefully lead to a transition towards a more refined body of case-law concerning political participation – and media reporting thereof.

Moreover, the EC/EU has also recognised the media as a factor of public interest with implications that go far beyond the market, such as cultural diversity, the right to information, diversity of opinion, media plurality, the protection of minors and consumer protection. According to Article 167(1) TFEU, the EU 'shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore'. Article 167(4) TFEU requires the Union to take cultural aspects into account in its action under other provisions of that Treaty, in particular in order to respect and promote the diversity of its cultures. A cultural policy, such as the safeguarding of a pluralist and

[2003] App. no. 228/99 [49]; *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe* v. *Republic of Zimbabwe* [2009] App. no. 284/03 [123].

[27] Beck (2008) p. 239.

[28] See, for instance, IACtHR, *Olmedo Bustos and others* v. *Chile ('The Last Temptation of Christ')* [2001] Case 11.803 [69]; *Ricardo Canese* v. *Paraguay* [2004] Case 12.032 [83] and [84]; *Kimel* v. *Argentina* [2008] Case 12.450 [88]; IAComHR, *Stephen Schmidt* v. *Costa Rica* [1984] Case no. 9178 [6]; AfComHPR, *Huri-Laws* v. *Nigeria* [2000] App. no. 225/98 [41]. From scholarship, see Bertoni (2009).

[29] See, for instance, IACtHR, *Ivcher-Bronstein* v. *Peru* [2001] Case 11.762 [152]; *Herrera-Ulloa* v. *Costa Rica* [2004] Case 12.367 [113] and [126].

[30] See ECtHR, *Stoll* v. *Switzerland* [2007] App. no. 69698/01 [111], referring to the seminal IACtHR case on access to information *Claude Reyes and others* v. *Chile* [2006] Case 12.108.

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cultural range of programmes available on television distribution networks, may therefore constitute an overriding requirement relating to the general interest which justifies a restriction on the freedom to provide services.[31] Furthermore, it was the ECJ which introduced human rights into the Community legal order.[32] Since then, fundamental rights have formed an integral part of the general principles of law which the Court observes.[33] The principles established by the Court's case-law are now reaffirmed in Article 6(3) of the Treaty on European Union (TEU). Finally, the Charter of Fundamental Rights of the European Union (EUChFR), which has the same legal value as the Treaties, has brought significant change with regard to human rights protection in the EU.

Second, as a normative argument, the internationalisation and globalisation of trade, mobility and, with particular relevance for this book, communication, necessitates the development of globally applicable legal principles. The internet will inevitably lead to a rise of transnational violations of reputation and privacy, resulting in an increasingly important role of private international law and internationally coordinated regulation.[34] By institutionalising globally applicable standards and limitations of media freedom, this book will contribute to the development of a global *ordre public* for torts committed by, or against, the media, and to a harmonisation of regulatory principles.

Third, all human rights instruments include general principles of media freedom, which can all be traced back to one fundamental tenet: a free media is essential for any functioning democracy and state governed by the rule of law. Based on this tenet, rules of media freedom need to be developed on a global scale. Such rules include how to define 'journalism' and 'the media', what the rights and privileges of journalists

[31] ECJ, *United Pan-Europe Communications Belgium SA and others* v. *Belgium and others* [2007] ECR I-11135, Case C-250/06 [41]. On media pluralism, see Chapter 14. See also Article 16 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts OJ 2004, L 134/114, which excludes public service contracts for certain audiovisual services in the field of broadcasting from the scope of the Directive.

[32] The first decisions were *van Eick* v. *Commission* [1968] ECR 329, Case C-35/67; *Stauder* v. *City of Ulm* [1969] ECR 419, Case C-29/69.

[33] See, e.g., *ERT* v. *DEP and others* [1991] ECR I-02925, Case C-260/89, [41]; *Schmidberger* v. *Austria* [2003] ECR I-05659, Case C-112/00 [71].

[34] See, for instance, CJEU, *eDate Advertising and Olivier Martinez, Robert Martinez* v. *MGN Ltd.* [2011] ECR I-10269, Cases C-509/10 and C-161/10; *Google Spain SL and others* v. *AEPD and others* [2014] (not yet reported), Case C-131/12; German Federal Court of Justice, '*Google*' [2013] Case VI ZR 269/12 [7]. See also ECJ, *Shevill* v. *Presse Alliance* [1995] ECR I-415, Case C-68/93, for a case involving a newspaper article.

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are, what constitutes an 'interference' with the media's freedom and how such an interference can be justified. This does of course not exclude divergences at the margins and 'hard cases' in a Dworkinian sense.[35] However, while there might not yet be an international consensus on the *conceptions* of media freedom, it will be shown that media freedom is an internationally accepted *concept*.[36]

This book, therefore, positions itself in the movement towards the development of a transnational, transcontinental and international *jus commune* of human rights. There is no place for a specific 'African media freedom' or 'European freedom of expression'. A time where publications are being disseminated worldwide calls for universally applicable principles, providing legal certainty for those who generate, impart and receive information and ideas transnationally.

The book is divided into three parts: Part I develops a theory of media freedom, especially in its relationship with freedom of expression. Part II analyses the scope of media freedom and develops general principles for the examination of an interference with media freedom. Part III then provides specific rules on limitations to media freedom, divided into several sub-chapters concerning legitimate aims justifying an interference (Chapters 7 to 10), particular content-based limitations (Chapters 11 to 13) and the relationship between media freedom and media pluralism (Chapter 14). These examples are not exhaustive and necessarily limited to the core elements of the issues concerned. This book does not attempt to provide all-encompassing frameworks for these concepts, such as 'privacy' or 'morals', but rather to make them operable under a Media Freedom Principle. Reference to in-depth academic literature will be provided.

[35] See Dworkin (1977) Chapter 4.
[36] On the difference between a concept and conceptions, see Dworkin (1977) p. 134.

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