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Minority rights and freedom of expression: a dynamic interface

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Chaque génération, sans doute, se croit vouée à refaire le monde. La mienne sait pourtant qu'elle ne le referra pas. Mais sa tâche est peut-être plus grande. Elle consiste à empêcher que le monde se défasse.

- Albert Camus¹

Introduction²

Many journeys are born out of necessity or curiosity or, as in the case of this thesis, both. The necessity was to explore the underdocumented interface between freedom of expression and the rights of persons belonging to minority groups, as well as the impact thereupon of new communications technologies. The curiosity was to determine the potential for synergic interaction between these traditionally distinct areas of international human rights law and new communications technologies.

The concern at the heart of Camus' stark analysis, cited epigraphically, could perhaps be put more temperately in another way: "We must re-imagine liberty in every generation, especially since a certain number of people are always afraid of it".³ Any conception of rights and freedoms – individually or *en bloc* – is doomed to inevitable relativity; to the inescapable contingencies of context, time and place. Every wave of history throws up new navigational perils and priorities. The past century alone has experienced several dramatic changes of *Zeitgeist*: the imperial/colonial excesses at the dawn of the century; the attrition and grinding destruction of the First World War; the short-lived League of Nations which sought to champion the rights of smaller nations; the unprecedented nihilistic horrors of the Second World War; the defiant emergence of a new creed of universal, indivisible human rights; the ideological divisiveness of the Cold War; the thrusts towards (partial) European economic integration; the dismantling of the Soviet Bloc; the internecine mutilation in the Balkans under the watchful eye of the international community; the fits and starts of successive (so-called) generations of human rights...

Most recently, the sea-change in political and broader societal attitudes to human rights and security issues, for which the atrocities of 11 September 2001 were the ultimate catalyst, has been much-documented.⁴ The resultant polarisation of perspectives has, and will continue to have, implications for the three main focuses of this study: freedom of expression, the rights of minorities and the influence of new communications technologies on the interplay between them.

It is important to emphasise the very real danger that hard-won standards of human rights could be/are being sapped of their vitality by invidious practices of politicisation. This trend involves applying the politics of fear and exploiting individual and societal yearning for

¹ Albert Camus, Acceptance speech for the 1957 Nobel Prize for Literature, City Hall, Stockholm, 10 December 1957.

² Research for this thesis was completed on 1 May 2008. Any inclusion of sources post-dating 1 May is therefore merely incidental.

³ Arthur Miller, quoted in Salman Rushdie, 'Arthur Miller at Eighty' in *Step across this line: collected non-fiction 1992-2002* (London, Vintage, 2002), pp. 51-53 at 53.

⁴ See generally, Conor A. Gearty, "Reflections on Civil Liberties in an Age of Counter-Terrorism", 41 *Osgoode Hall Law Journal* (2003), pp. 185-211; Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton, New Jersey, Princeton University Press, 2004); J.L. Holzgrefe & Robert O. Keohane, Eds., *Humanitarian intervention: ethical, legal and political dilemmas* (Cambridge, Cambridge University Press, 2003).

security. Conor Gearty makes the point both imaginatively and effectively when he describes a “super-virus” that has infected the international human rights movement.⁵ The virus works like a standard computer virus – it has entered the system and is wreaking havoc from within. Like many computer viruses, it is known by its acronym: GWOT. This virus “causes the human rights idea to manifest itself in gross human rights violations and egregious human rights abuses which it presents not as incompatible with but as necessitated by human rights”.⁶ GWOT, of course, stands for Global War on Terror: the emotive reason routinely given by many States authorities for their dismantling of much human rights architecture in recent times.

An increasing number of human rights bodies and mechanisms are proving alert to the grave dangers posed by the GWOT virus. The general thrust of their warnings is that the events of 11 September 2001 and the subsequent (re-)actions of States – individually and collectively – have occasioned a veritable sea-change in international relations and protection of human rights. The revival and re-legitimation of historical forms of discrimination unleashed by GWOT are identified as particularly troubling.⁷ As noted in a recent joint report by the UN Special Rapporteur on freedom of religion or belief and the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance:

Discrimination is practised based on the two main national issues that Governments consider to be threatened by terrorism: security and identity. In this regard, with the proclaimed motivation of preserving national security, Governments have adopted policies gradually curtailing or disregarding civil and political rights or selecting those rights more fitting to that goal. In the same spirit, on the grounds of protection of national identity, cultural, social and economic rights, particularly those guaranteeing the rights of national minorities, immigrants and foreigners, are deliberately violated or marginalized. Rights related to culture and religion are particularly targeted. [...]⁸

In a similar vein, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism recently noted that:

[...] the very old trend of States resorting to the notion of “terrorism” to stigmatize political, ethnic, regional or other movements they simply do not like, is also very much a new trend. What is new is that, since September 2001, the international community seems to have become rather indifferent to the abuse of the notion of terrorism. The result is that calls for and support for counter-terrorism measures by the international community may in fact legitimize oppressive regimes and their actions even if they are hostile to human rights. [...]⁹

⁵ Conor Gearty, “Is the idea of human rights now doing more harm than good?”, Lecture at the Centre for the Study of Human Rights, London School of Economics, London, 12 October 2004. The text of the lecture is available at: <http://www.lse.ac.uk/Depts/human-rights/Documents/12.10.04_CG.pdf>. For further insights into Gearty’s reflections on related themes, see: Conor Gearty, *Can Human Rights Survive?* (Cambridge, Cambridge University Press, 2006).

⁶ *Ibid.*, at p. 7 of the transcript of the lecture.

⁷ Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled “Human Rights Council”, Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance, 20 September 2006, A/HRC/2/3, para. 7. See also, in this connection, paras. 5-8.

⁸ *Ibid.*

⁹ “Promotion and protection of human rights”, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 28 December 2005, E/CN.4/2006/98, para. 56(a).

These considerations of the post-2001 political *Zeitgeist* have considerable bearing on contemporary interpretations of the provisions of international human rights law that are central to freedom of expression and the struggle against racist discrimination.¹⁰ Such considerations also generally serve to harden societal attitudes towards (especially unfamiliar) minorities and to colour relevant controversies, as will be demonstrated below.

Problématique and methodology

This is a study of the right to freedom of expression of persons belonging to minorities, as vouchsafed by international human rights law. Its geographical focus is Europe, which necessarily involves engagement, not only with relevant European standards and approaches, but also with those which apply globally, including in Europe. Various international and European treaties contain provisions on the right to freedom of expression and provisions on the rights of persons belonging to minorities. Treaty provisions on the right to freedom of expression of persons belonging to minorities are, however, fewer in number.

The main objectives of this study are therefore to: (i) identify and group; (ii) contextualise and describe, and (iii) critically evaluate prevailing international and European legal standards concerning the dynamic interface between the right to freedom of expression and the rights of persons belonging to minorities. The critical evaluation will be concerned, above all, with the effectiveness of the right to freedom of expression of persons belonging to minorities in practice. The central research question pursued could therefore be formulated as follows: are the conceptualisation and calibration of relevant international and European legal standards sufficiently nuanced and robust to ensure that persons belonging to minorities are able to exercise their right to freedom of expression in an effective manner?

The international and European legal systems for the protection of human rights are made up of many disparate provisions which are binding on States to varying degrees. The macro picture is forged out of multiple micros. The study's aim to explore the actual content and potential reach of international and European law necessarily entails an examination of *de lege lata* (the law as it is) and *de lege ferenda* (the law as it ought to be or may in the future be).¹¹

The approach taken is primarily that of international and European human rights law, but it is impossible to cordon off those branches of law from other branches of international and European law. Where relevant, the constraining interpretive impact of other areas of international and European law has been taken into consideration.¹²

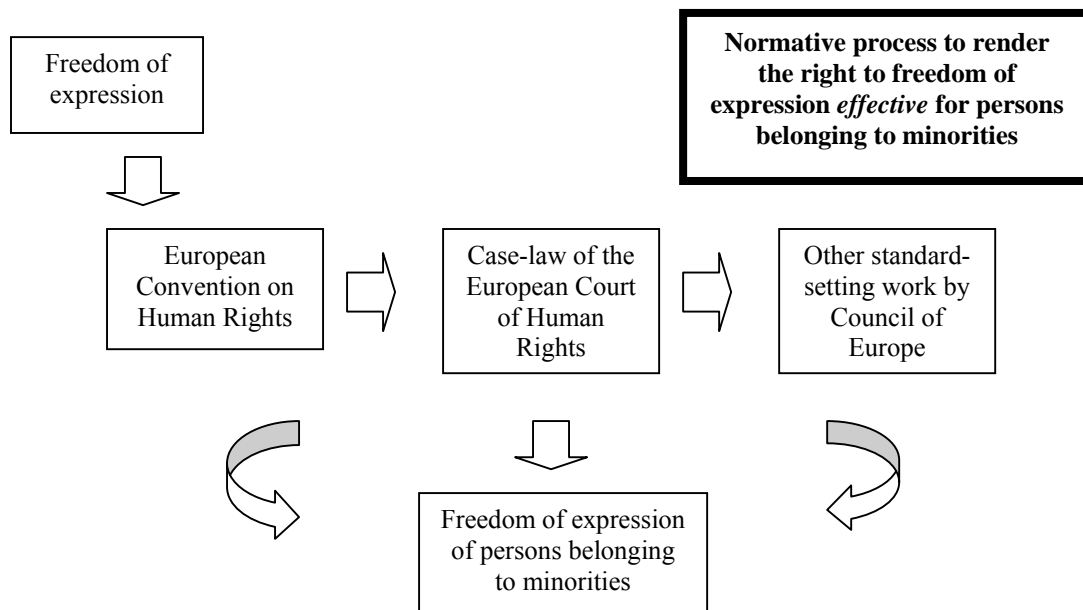
What is the particularity of the right to freedom of expression of persons belonging to minorities? The ultimate purpose of international human rights law is to ensure that human rights are rendered real, meaningful and effective for everyone. Principles of freedom of

¹⁰ For an NGO perspective, see: "Global 'war on terror' has become a global war on minorities", Minority Rights Group International Press Release, 8 September 2006, available at: <http://www.minorityrights.org/media_centre/media_press/media_centre_press_sept11.htm>. See also the accompanying table detailing how minorities in different countries have been affected by GWOT: <http://www.minorityrights.org/media_centre/media_press/sep11table.pdf>.

¹¹ *Oxford Dictionary of Law* (New Edition) (Oxford, Oxford University Press, 1997).

¹² EU media regulation is a good example of supra-national regulation which, although partly grounded in human rights, is largely shaped by regulation targeting other concerns such as the free movement of services within the EU, the consolidation of the Internal Market, the prevention of unfair competition, etc.

expression, as enshrined in international treaties, have to undergo a double translation exercise before they can truly be considered real, meaningful and effective for persons belonging to minorities. First, the (often) lapidary textual provisions articulating relevant principles need to be translated into a vital body of standards. In turn, this vital body of standards needs to be translated into a vital body of standards that concord with the specific needs and interests of persons belonging to minorities. The double translation exercise can be regarded as a normative process to operationalise the first principles, to turn them into something workable. In terms of the Council of Europe, this normative process can be schematised as follows:¹³



By way of further elucidation of this schematisation, it is important to mention that “other standard-setting work” includes relevant treaties (as well as their monitoring processes, which help to give expression to the “organic vitality”¹⁴ of the treaties themselves) and political measures adopted by various organs of the Council of Europe. Whether relevant standard-setting takes place within treaty monitoring structures or whether, driven by other political impulses, it is pursued via processes that are extraneous to treaty law, it can certainly aid evaluations of the effectiveness of existing international law. For instance, standard-setting can facilitate the:

- elucidation of the content of treaty provisions when applied to concrete situations;
- provision of a level of detail that is generally lacking in treaty provisions;
- interpretation of treaty provisions in a way that is in tune with the times;
- identification of good or best practices;
- establishment of appropriate bench-marks.

¹³ A more complex schematization would obviously apply to the normative process operationalising freedom of expression in the context of UN structures and standards, owing to the greater multiplicity of bodies, treaties and standard-setting texts implicated.

¹⁴ Italo Calvino, *Six Memos for the Next Millennium* (Cambridge, Massachusetts, Harvard University Press, 1988) (Trans. Patrick Creagh), p. 110.

Yet even bearing those extra considerations in mind, the schematisation remains incomplete. The entire process is also influenced (to varying degrees) by the application of academic theories and the negotiation of political priorities and sensitivities. As will presently become evident, this study is indebted to the valuable analytical groundwork carried out by other scholars and seeks to build on their endeavours. It aspires to be theoretically informed and politically aware.

“With unfortunate frequency”, writes Frederick Schauer, “particular legal approaches to particular social concerns remain imprisoned in their particularism, ignoring the extent to which specific rules or principles may affect other rules and principles located some doctrinal distance away”.¹⁵ It would be ambitious, one would think, to seek to apply this remark to the right to freedom of expression, given its very firm anchorage at the heart of international human rights law, not to mention its polyvalent character and its importance in facilitating the realisation of numerous other human rights. However, the developing relationship between the right to freedom of expression and the rights of persons belonging to minority groups (i.e., rights which have much looser (and more recent) conceptual moorings) is perhaps the exception that proves the rule. The influence exerted by the traditional mass media and new communications technologies on this relationship cannot possibly be understated.

As a result of the evolution of international legal norms concerning freedom of expression, the mass media have come to benefit from a more robust right to freedom of expression than the ordinary individual. This can be explained by the crucial role of the media as a lynchpin of democracy. The ability of members of minority groups to enjoy unhindered and indeed sometimes even facilitated access to the media is crucial to the exercise of their right to freedom of expression. It is also inextricably linked to the assertion of their identity and the safeguarding of their right to effective participation in public life.

The media’s privileged legal standing and increased freedom are accompanied by the expectation-cum-obligation of heightened social responsibility. Thus, the danger that the media might be used as a mouthpiece for offensive or hateful expression must be vigilantly guarded against. This danger is compounded by the fact that disagreement tends to stymie attempts to fix the outer definitional demarcations of the right to freedom of expression (as opposed to the impregnable inner zone of inoffensive speech, the existence of which is undisputed). As members of minority groups are the most frequent victims of extremist, racist or so-called “hate speech”, its examination is highly warranted. This invites an analysis of the most appropriate balancing of the public’s right to receive information and ideas of all kinds with the wishes of minorities not to be portrayed in a biased, stereotyped or prejudicial manner. Although issues are often treated with reasonable sensitivity by certain sections of the mainstream media, biased and unfair reporting and loaded agenda-setting nevertheless persist.

The protection of minority rights is one of the most burgeoning areas of international law and has yet to be fully consolidated, or indeed, explored. The very notion of minority rights is likely to undergo much development – in both conceptual and practical terms – in the near future. Of the general international treaties that contain provisions on minority rights, only the UN International Covenant on Civil and Political Rights and the Convention on the Rights of the Child lay a convincing claim to being universally applicable.¹⁶ Supplementing those

¹⁵ Frederick Schauer, “Commercial Speech and the Architecture of the First Amendment”, 56 *University of Cincinnati Law Review* (1988) pp. 1181-1203, at p. 1181.

¹⁶ Article 27, ICCPR and Article 30, CRC.

treaties of a more generalist character, an increasing body of international instruments is now treating the issue in a specific manner (eg. the Council of Europe's Framework Convention for the Protection of National Minorities, the European Charter for Regional or Minority Languages, the United Nations General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, etc.) and an acceleration of this trend can reasonably be expected.

As already hinted, freedom of expression is crucial to minorities; both as an individual right and as a collective or associative one. The facets of the right to freedom of expression that are of greatest concern to minorities are not necessarily those which preoccupy members of majority groups within any given society. For instance, linguistic and cultural issues are necessarily uppermost in the priorities of minorities owing to the (often) precarious status of their languages and culture. In short, the enjoyment of freedom of expression is very often the guarantor of the whole panoply of rights (civil and political, economic, social, cultural, linguistic and others) to which members of minority groups lay claim - either individually or collectively.

While the proliferation of media outlets would suggest the existence of increased communicative opportunities for minorities, this implicit promise has not always materialised. Concerns for pluralism and diversity remain because the internationalisation and concentration of ownership, as well as the commercialisation of content, have been very much in step with the aforementioned proliferation of media outlets. When viewed from such a perspective, it is clear that minority rights have yet to extend in a meaningful way to the structural regulation of the mass media. Trends of globalisation in the mass media, with particular emphasis on their implications for minority rights, identities and interests, demand careful scrutiny. Against the background of such trends, the importance of public service, regional/local and community, broadcasting is especially salient. This consideration will be pondered within a broader analysis of attempts to check the ongoing erosion of cultural and linguistic specificities.

The future development of international standards and jurisprudence concerning freedom of expression will not necessarily follow the same curves as in the past. Increased technological convergence in broadcasting and the first, occasionally tentative, steps of broadcasters and the traditional print media into the online world are likely to radically alter the familiar features of the mass media. The heightened levels of individualisation in the media and specialised, niche-interest broadcasting (for example) are engendering greater individualisation and fragmentation in society as a whole. It is inconceivable that the relationship between democracy and the media will remain untouched by the changing nature of the latter. It is therefore timely to examine how the technology-driven modifications of current media regulatory orders, structures and practices are likely to impact on minority rights, both directly and indirectly.

Overview of issues

Chapter 1

The first Chapter of this thesis seeks to establish the conceptual parameters of “minority rights”.¹⁷ This entails an examination of past and projected evolutions of existing legal approaches to persons belonging to minorities and their rights, as well as an examination of the nature of relevant definitions and terminology and of alternatives proposed in other quarters. Among the notions explored here is the observation that minority rights – not least as shaped by current international legal and political standards – have individual and collective dimensions to them, thus rendering them clearly distinguishable from individual human rights *tout court*. A multi-layered argument is also advanced concerning the complementary relationship between the individual and collective dimensions.

There is a real dearth of definitional provisions in the existing corpus of relevant international instruments and where they do exist, they are not always coterminous with one another. In general, these attempts to define minorities tend to pivot on the national/ethnic, religious, linguistic and cultural distinctiveness of minority groups, or various permutations and combinations of the same. In any event, these attributes ought to be enduring and not merely transient and elective. Otherwise, it is often contended, the associative element that is key to group identity would be rendered ancillary or whimsical and the definitional sluice-gates would be thrown open. According to one of the most widely quoted definitions of a minority group, its members should, *inter alia*, “show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language”.¹⁸ A related – and fascinating – question concerns the extent to which these characteristics can be eclectically chosen by would-be beneficiaries of minority rights. How much scope is there for individual differentiation within any group and what are the absolute identity *sine qua non*s for membership?

Notions of numerical strength and degrees of dominance in society are frequently encountered in (attempted) definitions of minority groups. So, too, is the consideration of territorial concentration/geographical dispersity. As definitions are the bedrock of legal provisions, there is a need to create a more solid conceptual base for minority rights. The clarification of these kinds of notions can have crucial practical implications, such as for the distribution of States’ allocative resources.

Wrangling over definitional minutiae has not prevented the growth of substantive minority rights at the international level. This section will sift through existing international standards and jurisprudence with a view to enhancing the clarity of the panorama of minority rights at the present time. Considerable attention will be paid to the structures and processes giving shape to this area of international human rights law, as well as to the political context in which they are embedded.

Although minority rights are no longer, strictly-speaking, *in statu nascendi* in international law, there is nevertheless a lengthy period of consolidation and growth ahead in this domain. This will assuredly entail a shift of focus from generalities to specifics; not least in respect of the specific issues under consideration here. Any new developments as regards international standards are likely to emanate from the relevant sections of the United Nations, the Council

¹⁷ Although minority rights and the rights of indigenous peoples share certain similarities, they are not one and the same. The latter are subject to a specific regime of protection under international law, central pillars of which include the Indigenous and Tribal Peoples Convention, 1989, and the UN Declaration on the Rights of Indigenous Peoples, 2007. It should be noted that an analysis of this regime of protection is beyond the scope of this thesis.

¹⁸ Francesco Capotorti, *Study on the rights of persons belonging to ethnic, religious and linguistic minorities* (E/CN.4/Sub.2/384/Rev.1) (1979), p. 96, para. 568.

of Europe, the Office of the OSCE High Commissioner on National Minorities and the European Union, thus warranting an assessment of the *modi operandi* of each. The agendas of these hubs of norm-fixing activity have been scanned for indicators of future priorities, without, however, neglecting the importance of ideas and initiatives generated by regional and national bodies and NGOs.

This section will conclude by examining whether some rights which are a fusion of individual and collective elements and generally considered to be “minority” rights proper could be extended to an even broader spectrum of potential beneficiaries (most notably so-called “new” minorities (i.e., immigrant populations), social minorities, etc.). The basis for such an enquiry is that these rights are often the inevitable outcrops of general democratic principles. More concretely, then: the realisation of the right to freedom of expression – as enjoyed by members of minority groups – depends on the existence of effective structural and other practical accommodations. Such facilitation of a particularised form of the right to freedom of expression need not, the present argument runs, be contingent on the traditional definitional constrictions of minority rights. Insofar as a central rationale for following through on the derivative implications of the right to freedom of expression is to redress “historical inequities”¹⁹ or contemporaneous social inequalities of particular groups, it could be argued that definitional attributes such as “national”/“ethnic”, “cultural”, “religious” or “linguistic” should not be considered exhaustive. When seeking to determine the enduring characteristics of potential beneficiary groups, some of the wider-embracing language of extant equality and non-discrimination provisions could usefully be borrowed instead. Such language typically includes references to sex, race, colour, national/social origin, etc.

Chapter 2

The second chapter begins with a critical examination of societal responses to the heterogeneous realities of its composition. It explores, in turn, notions of pluralism and tolerance, both in the sense of ideologies and societal practices. Whereas pluralism is essentially value-neutral and descriptive, tolerance is value-laden and capable of holding any of several meanings (varying in affective intensity). Before embracing tolerance, however, its theoretical basis and outer limits must first be identified. Competing individual and societal interests are at stake here and their problematic interface is very fertile ground for analysis.

That exploration reveals an irresistible tendency of both notions to converge into pluralistic tolerance. That composite notion is then developed into comprehensive pluralistic tolerance: the idea that pluralistic tolerance should be comprehensive in its scope, both by its extension to everyone in society and by its application in all spheres of public life. The realisation of comprehensive pluralistic tolerance depends on a number of infrastructural prerequisites at societal level. The operative public values of any society are best shaped in inclusive dialogical fora. The media are an important forum for such purposes to the extent that they constitute sites for the realisation of expressive opportunities and the mediation of narratives and ideologies. The potential of the media for fostering inter-group dialogue, understanding and tolerance is also dwelt upon.

¹⁹ *Bernard Ominayak and the Lubicon Lake Band v. Canada*, United Nations Human Rights Committee Communication No. 167/1984, adopted on 26 March 1990, para. 33.

Chapter 3

The third chapter of this thesis begins by setting out the conceptual framework for the entire thesis: that of the universality, indivisibility, interdependence and inter-relatedness of all human rights. This choice of conceptual framework facilitates the exploration of interplay between different rights. Its integrated analytical approach helps to avoid particularist readings of issues and situations.

In its General Comment 23, the United Nations Human Rights Committee stresses that the rights conferred on persons belonging to minorities are “distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant”.²⁰ Comprehensive treatment is therefore given here to a selection of rights which are vouchsafed for individuals in international human rights instruments, but which also have added significance for persons belonging to minorities by virtue of their suitability for collective exercise and enjoyment. Each of the selected rights/topics (non-discrimination/equality, participation, education, culture, religion and language) touch on freedom of expression issues too. The analytical approach to each of these rights proceeds from a general introduction to more specific treatment in respect of their exercise by persons belonging to minorities. Various aspects of the rights in question recur and impact upon the right to freedom of expression of persons belonging to minorities.

Chapter 4

Chapter 4 opens with a brief distillation of the main theories of freedom of opinion, expression and information (hereinafter ‘freedom of expression’), with particular emphasis on their importance from the perspective of minorities. The analysis progresses from the more general rationales for freedom of expression to narrower, more specific justifications and purposes of the right.

With its empowering and facilitative qualities, freedom of expression allows for political, social, cultural, economic, legal and other forms of engagement by members of minority groups. Its importance as a cornerstone in the democratic edifice is magnified in the context of minority rights as full enjoyment of the right obviates – or at least diminishes - the risk of disenfranchisement of minority sections of any given society.

This focus leads logically to a careful consideration of the indispensable role played by freedom of expression in the assertion of minority rights: how the effective enjoyment of freedom of expression can ensure the preservation and even promotion of minority cultures, languages, shared religious and political beliefs and other values. This section sifts through pertinent theories before analysing the protection provided for the potentially synergic coupling of freedom of expression and minority rights under international law.

It is then demonstrated that the media’s right to freedom of expression is more vigorous than that of the ordinary individual, owing to the watchdog and corrective political roles played by the media in a democratic society. Such is the importance of these roles that some commentators refer to the media as “the Fourth Estate” – an additional pillar of State to complement the conventional tripartite division of State power (the so-called “separation of

²⁰ *The rights of minorities (Article 27)*, United Nations Human Rights Committee General Comment 23/50, adopted on 8 April 1994, para. 1.

powers” doctrine holds that liberty is best safeguarded by the division of the legislative, executive and judicial functions of government between separate independent organs). Indeed, the media’s role in safeguarding and enhancing democracy and equality constitute a *leitmotif* of the research.

It is important to note that the media cannot fulfil the democratic tasks ascribed to them unless they operate in a suitable “enabling environment”. This notion is unpackaged, demonstrating the importance of media regulation for safeguarding relevant expressive freedoms, but also the limitations of formal, legislative regulation for the achievement of the same.

References to “the media” deceptively suggest a unitary and unified entity. For analytical purposes, it is desirable to examine individual media separately: as they possess different characteristics, they are used for different purposes. Here, the notion of media functionality enters into play. The question of media functionality – the correspondence of media types and formats with the communicative needs and resultant media preferences of the public – is of acute importance for minorities as they are often only able to draw on a more restricted *relevant* range of media types and formats (due to linguistic or other obstacles). Media functionality is therefore also important to the extent that it provides minorities with a “context of choice”²¹ in terms of cultural output.

When analysing the different categories of media (community, public service, commercial and transnational), the touchstone is the extent to which they: (i) carry out their broadcasting missions in a manner that is sensitive to public interests; (ii) accommodate the needs, interests and perspectives of minorities in their various broadcasting activities. As such, they are analysed along the axes of purpose, functionality and reach.

The transformative impact that the advent of new media and communications technologies has had and continues to have on paradigms of media operation and media regulation is then discussed. One of the net results of such technological developments is that the discursive and participatory capacities of the media have been significantly enhanced. On the other hand, the public sphere has become increasingly fragmented and individualised, thereby following changes in the nature of media technologies themselves. These developments have ambiguous consequences for minorities seeking both inter- and intra-group communication. The potential of co-regulatory structures for enhancing minority participation in the area of media policy and regulation is explored.

Chapter 5

The fifth Chapter of this thesis posits that the right to freedom of expression and minority rights have not been coupled in an extensive way in international human rights treaties of generalist scope. It explains why various formal attempts to do so ultimately did not prevail. In that explanation, it draws on various rationales for the particular importance of freedom of expression for minorities, as detailed in Chapter 4. It points up the limitations of international treaty law generally, before examining the extent to which two thematically-specific regional European treaties have managed to offset the apparent neglect of generalist treaties at the international level. The treaties in question are the Council of Europe’s Framework Convention for the Protection of National Minorities and its European Charter for Regional or

²¹ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (New York, Oxford University Press, 1995), eg. at pp. 82-84.

Minority Languages. Operative articles of both treaties are introduced, with a view to facilitating a more probing analysis of specific focuses within those articles in subsequent chapters. A final focus is on the extent to which the interstices of international treaty law (general and specific) can be filled by “soft law”, a problematic and much-criticised term, but one which is not – as is shown – devoid of practical usefulness for normative endeavours.

Chapter 6

Chapters 6-8 examine the extent to which international human rights law provides for, or requires, the restriction and facilitation of expression affecting minorities. Chapter 6 deals *mainly* with negative State obligations concerning freedom of expression and minorities, whereas Chapters 7 and 8 deal *mainly* with positive State obligations concerning the same (pluralism and access respectively). This conceptual division follows the writings of Isaiah Berlin and others, but it uses the distinction between positive and negative State obligations as an organizing principle rather than as a distinction between two hermetic categories. In fact, positive and negative State obligations are positioned here on a continuum of State obligations. Moreover, additional conceptual refinements apply.

Chapter 6 provides a meticulous analysis of restrictions on the right to freedom of expression under international law. It does so from the perspective of restrictions that are most relevant to the rights and interests of minorities. It highlights individual inconsistencies which potentially and in practice tend to undermine the presumptive coherence of relevant provisions across treaties. Article 4(a), ICERD, seems to have a particularly frictional relationship with the right to freedom of expression, as enshrined in other international legal conventions. This friction should, however, be seen as less of a conceptual challenge to the conceptualisation of human rights as interdependent and inter-related (see Chapter 3) than a zealous approach to tackle a particular issue which suffers from crucial drafting deficiencies – conceptually and stylistically.

The term “hate speech” is increasingly used to justify restrictions on freedom of expression. The term is neither included in nor defined in relevant international treaties. Although the approximate meaning of the term is reasonably clear, an authoritative legal definition at the international level is required urgently. Law- and policy-makers and international adjudicative bodies rely on this term, without taking adequate account of its origins in critical race theory. Critical race theory is (to put it very summarily) an approach to racism where the victim and the victim’s perspective are given pride of place.²² It seeks to ensure that law and policy are adequately informed by circumstances and experiences [of victims of racism]. The ramifications of the term, “hate speech”, are therefore potentially more expansive than is commonly realised. In itself, the broad meaning of the term is not problematic, but if it is to continue to be viably employed in any legal sense, it must be suitably defined. It may be that a more circumspect term or definitional approach would be better-suited to describing relevant permissible restrictions on freedom of expression, as recognised by international law.

²² See generally: Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado & Kimberlè Williams Crenshaw, Eds., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, USA, 1993); Richard Delgado & Jean Stefancic, Eds., *Critical Race Theory: the cutting edge* (2nd Edition) (Temple University Press, USA, 2000); Richard Delgado & Jean Stefancic, *Understanding Words That Wound* (Westview Press, USA, 2004).

A selection of current controversies – genocide-denial, “defamation” of religions and the protection of founders of religions (from severe criticism and insult) – are measured against international human rights standards. They are considered from the perspectives of freedom of expression, religion and freedom from discrimination. Each controversy involves a complex interplay of rights and concepts.

Finally, Chapter 6 concludes with an examination of the Council of Europe’s strategies for combating “hate speech” and racism. Those strategies reveal different emphases and they are not centrally coordinated. Nevertheless, their approximate and at times serendipitous coherence is worthy of further contemplation. The approach taken under the Framework Convention for the Protection of National Minorities is particularly interesting: it focuses on the twin goals of facilitating and creating expressive opportunities for minorities and of promoting intercultural dialogue, understanding and tolerance. In doing so, it endorses the often sceptically-received argument that “more speech” or “counter-speech” can be an effective means of combating hate speech.²³ However, its endorsement of that argument rests on a re-conceptualisation of counter-speech as a pre-emptive – and not merely reactionary - force. Such thinking places considerable faith in the empowering and identity-sustaining properties of speech. It also implicitly recognises the importance of egalitarian public debate and dialogical interaction as prerequisites for pluralistic tolerance

Chapter 7

Chapters 7 and 8, with their focus on positive State obligations concerning freedom of expression and minority rights, draw extensively on a number of earlier chapters. They build on the earlier theoretical discussion of State obligations (esp. 5.2.2 and 5.2.3) and affirm that the main generic positive State obligations within this thematic interface involve upholding pluralism and access.

Chapter 7 also takes the general discussion of pluralism in Chapter 2 to a new level of application: the starting point of Chapter 7 is that media- and information-related pluralism is a specific scion of the more generic notion of pluralism. The right to receive information is qualitatively affected by the availability of media pluralism and diversity. These two notions are unpackaged and explained. Structural and substantive aspects of media-related pluralism are considered generally and also in terms of their relevance for qualitatively assessing states of media-related pluralism. Such an assessment necessarily focuses on State obligations and media responsibilities.

To what extent should the public’s right to receive a diverse range of information and ideas (particularly from the media) be trammelled by the right of minorities - and of individual members of minority groups - not to be portrayed in a negative light? What are the limits of each of these rights? Considerations of individual and collective dignity are obviously highly relevant. So, too, is society’s need for diversity of opinion; the starting-point for this very debate. As such, this chapter follows through on the discussion of pluralistic tolerance in Chapter 2 and gives it a new level of application.

²³ See further: Katharine Gelber, *Speaking Back: The Free Speech Versus Hate Speech Debate* (Amsterdam/Philadelphia, John Benjamins Publishing Company, 2002).

The chapter assesses the extent to which the various theories and concepts concerning media-related pluralism are actually taken up in international law instruments before assessing the extent to which those provisions are applied in practice.

It concludes with an examination of international instruments promoting the goal of cultural diversity. The examination pays particular attention to the different roles played by the media towards the attainment of this objective, as well as the importance of this objective from the perspective of persons belonging to minorities.

Chapter 8

Chapter 8 then shifts to the other generic component of positive State obligations: rights of access to the media and other expressive opportunities. As such, it draws on underlying theories of access introduced in Chapter 4 and examines the resonance they have achieved in international standards and their actual implementation in practice. This analysis connects in an important way with Chapter 2. This is because access rights are typically not only about freedom of expression, but also non-discrimination/equality and participation (in particular). The interaction with these additional rights strengthen the legal justification of access rights for minorities and the dynamism of relevant synergies is duly noted. As the object of access rights – the media – are undergoing fundamental technological changes, the nature of access rights are also changing. This introduces additional dynamism into rights-dimension of the question.

In practical terms, access can take a number of forms: to content (i.e., information and ideas), as well as the media, structures and processes which ensure the dissemination of content. A selection of the main mechanisms for access are enumerated and evaluated. They include the right of reply and public access channels. Chapter 4's emphasis on community, public service and commercial broadcasting is also relevant here.

Finally, the question of access – as guaranteed by minority-specific treaties – is addressed. This involves analysing a range of factors which affect the access of persons belonging to (national) minorities to the media. The primary vehicle for this analysis is the monitoring experience built up under the FCNM, but it also incorporates the monitoring experience accumulated under the ECRML, as well as relevant academic theories. The engagement of both treaties' monitoring bodies with real-life situations facilitates the task of evaluating whether provisions of international law guaranteeing the right to freedom of expression for persons belonging to minorities are adequate or effective in practice.

The conclusions to this study will comprise a synopsis of the issues examined and the main points of evaluation.