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Minority rights and freedom of expression: a dynamic interface

McGonagle, T.E.

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Introduction

The notion of pluralism was introduced at the beginning of Chapter 1 and it will now be appropriately revisited at the core of this thesis. Pluralism, as already noted, is a very amorphous concept. Its precise interpretation differs between ideologies, disciplines and, inevitably, individual texts and commentators. For instant purposes, the focus will primarily be on two distinct, but inextricably linked, types of pluralism: societal pluralism and value-pluralism. It will also note and seek to explain the inexorable gravitation of these kinds of pluralism towards notions of tolerance. Later, in Chapter 7.1, the analysis will turn to an applied pluralism which specifically concerns the media.

2.1 Overview of selected theories of pluralism and tolerance

2.1.1 Pluralism

Pluralism has been variously described. Incurrigible and a “messy reality”¹ are two of the more imaginative descriptors it has attracted. Its incurrigibility has already been commented on at the very beginning of Chapter 1, but it is useful to reiterate here that despite the negative connotations of the term, it does serve to adequately describe the inherent, permanent and indelible nature of pluralism. Its incurrigibility is underscored by the ease of individual and group movement, most saliently illustrated by migration and mobility patterns, in contemporary, post-modern times. The familial and parochial anchorage of individual lifestyles, so typical in the past, is increasingly on the wane. Societal propensities towards individualisation are (at least) facilitated by developments in communications technologies.

The “messy reality of pluralism” has similarly negative connotations. It must be pointed out, however, that the messiness is not inevitable, which means that this choice of adjective is not entirely justified. It is not the reality of pluralism as such that is messy. Pluralism makes no pretensions toward coherence or orderliness; it does not purport or aspire to be unitary or systematic. Thus, any putative messiness would more accurately describe failure to adequately accommodate pluralism, thereby leading to messy (societal) consequences.

Michael Walzer resorts to a musical metaphor in his attempt to describe what pluralism entails: “The voices are loud, the accents various, and the result is not harmony – as in the old

¹ Nancy L. Rosenblum, “Pluralism and Self-Defense”, in Nancy L. Rosenblum, Ed., *Liberalism and the Moral Life* (Massachusetts, Harvard University Press, 1989), pp. 207-226.

image of pluralism as a symphony, with each group playing its own instrument (but who wrote the music?); the result is a jangling discord [...]”² Benjamin Barber also employs a similar musical metaphor, but one that reveals a different interpretive approach to pluralism:

Noise is of course a concomitant of democratic politics, and the citizen has nothing to fear from a little high decibel cacophony. But the aim is harmony: the discovery of a common voice. Not unity, not voices disciplined into unison, but musical harmony in its technical meaning. [...] in music, harmony is not a matter of a single voice but of several voices, of distinct notes, which complement and support one another, creating not the ennui of unison but a pleasing plurality.³

It is futile to get caught up in metaphorical entanglement here. Both interpretive approaches can validly be upheld on their own terms. Indeed, in practice, pluralism can be more or less harmonious or acrimonious, depending on the structures that are in place to accommodate its different voices and notes. It is in that accommodation that societal and value-pluralism converge. It is also where the notion of tolerance begins to come into its own.

2.1.2 Tolerance

Tolerance/toleration operates at several levels – individual, group and State (at least).⁴ Tolerance is a child of historical struggles for freedom of religion, but it has matured to outgrow its childhood features.⁵ While still retaining great relevance for religious issues, it is nowadays readily related to a broader range of beliefs, ideas, expressions and (cultural) practices. The focus here will be less on tolerance in interpersonal relations than on tolerance between different societal groups, and especially between the State and different societal groups.

2.1.2(i) Notions of tolerance

Tolerance is a concept of complex, composite coloration: at least seven different shades of tolerance can be identified. These reflect, to a greater or lesser extent, the different intensities of meaning which the term conjures up for different people. Tolerance must begin with awareness; a consciousness of the other (person or opinion); but it must also go further than that. Mere awareness does not imply any degree of engagement with the other; it is still possible to damn him/her with indifference. The next shade of tolerance could therefore be said to be forbearance, which in turn leads on to a form of acceptance in the guise of non-discrimination. From this passivity, a more active form of acceptance – entailing affirmative efforts or measures - can emerge. Its manifestation is as equality. In its turn, equality is a precursor to full respect for the dignity of the other and full respect for the difference of the other.

² Michael Walzer, *On Toleration* (USA, Yale University Press, 1997), p. 96.

³ Benjamin R. Barber, “Liberal Democracy and the Costs of Consent”, in Nancy L. Rosenblum, Ed., *Liberalism and the Moral Life* (Massachusetts, Harvard Uni. Press, 1989), pp. 54-68, at 65.

⁴ In this text, the terms are used interchangeably, although Jürgen Habermas has argued that “in English the word ‘tolerance’ as a form of behavior is distinguished from ‘toleration,’ the legal act with which a government grants more or less unrestricted permission to persons to practice their particular religion.” - Jürgen Habermas, “Intolerance and discrimination”, 1 *I.CON* (No. 1, 2003), pp. 2-12, at pp. 2-3.

⁵ See further, *ibid.*, and Egbert Dommering, “Tolerantie, de vrijheid van meningsuiting en de Islam”, in Aernout Nieuwenhuis and Wouter Hins, Eds., *Van ontvanger naar zender: opstellen aangeboden aan prof. mr. J.M. de Meij* (Amsterdam, Cramwinckel, 2003), pp. 89-108.

Michael Walzer has also conceptualised a continuum of toleration, which can be summarised as: “any attitude on the continuum of resignation, indifference, stoicism, curiosity, and enthusiasm”,⁶ but which is preferable to cite more amply:

Understood as an attitude or state of mind, toleration describes a number of possibilities. The first of these, which reflects the origins for religious toleration in the sixteenth and seventeenth centuries, is simply a resigned acceptance of difference for the sake of peace. People kill one another for years and years, and then, mercifully, exhaustion sets in, and we call this toleration. But we can trace a continuum of more substantive acceptances. A second possible attitude is passive, relaxed, benignly indifferent to difference: ‘It takes all kinds to make a world.’ A third follows from a kind of moral stoicism: a principled recognition that the ‘others’ have rights even if they exercise those rights in unattractive ways. A fourth expresses openness to the others; curiosity; perhaps even respect, a willingness to listen and learn. And, furthest along the continuum, there is the enthusiastic endorsement of difference [...].⁷

Even from these two attempts to articulate the full span of tolerance/toleration, it is very clear that the exercise is firmly rooted in subjectivity. It can be taken as a given that all definitions of tolerance would have to comprise the notion of enduring practices or ideas to which one is personally opposed. It is extolled because of the perceived (libertarian) values of self-restraint and of deference to the autonomy of others. But tolerance must be contained within certain limits, for everything that is tolerated contributes to the shaping of the society in which we live.⁸ Otherwise, there would be a danger that what Karl Popper has termed the “paradox of tolerance” would materialise.⁹ According to that paradox, unlimited tolerance leads inexorably to the disappearance of tolerance. Popper explains: “If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them”.¹⁰ Thus, as noted by Umberto Eco, “to be tolerant, one must set the boundaries of the intolerable”,¹¹ an apparently intractable challenge. What is required to meet this challenge is a certain measure of “rational intolerance”.¹²

It is important at this juncture to recall the allusion at the beginning of this section to beliefs, ideas, expression and (cultural) practices as various objects of tolerance. The delineation of tolerable *expression* is centrally important for minorities. Unanimity tends to prove elusive whenever efforts are made to trace the conceptual contours of the right to freedom of expression. While the existence of an impregnable inner zone of inoffensive speech is undisputed, disagreement tends to stymie attempts to fix the outer definitional demarcations of the right. Yet, as Ronald Dworkin has observed, “[I]t is the central, defining, premise of freedom of speech that the offensiveness of the ideas, or the challenge they offer to traditional ideas, cannot be a valid reason for censorship; once that premise is abandoned it is difficult to see what free speech means”.¹³ Thus, this intellectual gauntlet will have to be taken up before any attempts are made to accurately delineate the scope of the right to freedom of

⁶ *Ibid.*, p. 92.

⁷ *Ibid.*, pp. 10-11.

⁸ Alexander Bickel, *The Morality of Consent* (USA, Yale University Press, 1975), p. 74.

⁹ Karl Popper, *The Open Society and Its Enemies (Volume I: The Spell of Plato)* (New York & London, Routledge, 2005), p. 293.

¹⁰ *Ibid.*

¹¹ Umberto Eco, “Tolerance and the Intolerable”, 23 (*I&2*) *Index on Censorship* 47 (1995), at p. 53.

¹² Author’s translation of “rationele intolerantie [van meningen]” - Egbert Dommering, “Tolerantie, de vrijheid van meningsuiting en de Islam”, *op. cit.*, at p. 98.

¹³ Ronald Dworkin, *Freedom’s Law* (New York, Oxford University Press, 1996), p. 206.

expression.¹⁴ It has also been observed that: “[E]xtremist speech is the anvil on which our basic conception of free speech has been hammered out”.¹⁵

Leaving aside definitional complexities and controversies for the moment,¹⁶ it can be said that “hate speech” is generally regarded as the cut-off point between permissible and impermissible types of expression. Why should “hate speech” be tolerated? What factors should determine the level of our tolerance? “Is there”, as Ursula Owen asks, “a moment where the *quantitative* consequences of hate speech change *qualitatively* the arguments about how we must deal with it?”¹⁷ How tolerant should society be of extremist speech? The underlying concerns are reminiscent of Popper’s “paradox of tolerance”. Alexander Bickel picks up on these concerns in a stark manner when he warns against excessive tolerance because in an environment “[W]here nothing is unspeakable, nothing is undoable.”¹⁸

2.1.2(ii) Normative articulations of tolerance

Whereas the attainment of tolerance is central goal common to all IGOs active in the realm of human rights protection, it is usually styled in relevant international instruments as a guiding principle rather than as an operative provision. This has much to do with the difficulty of defining such a vague concept. A notable exception in this regard is the Council of Europe’s Framework Convention for the Protection of National Minorities (discussed in detail in Chapter 6.5.1, where it is presented as a case-study of a comprehensive approach to “hate speech”). Article 6, FCNM, places States Parties under a programmatic obligation to promote tolerance and has led to the application of the notion in a variety of practical ways. Nevertheless, the general trend is for international conventions to refer to tolerance merely as a preambular principle, with attempts to explore its actual meaning more likely to arise in instruments that are not legally binding on States. The upshot of all of this is that in practical terms, attempts by IGO texts to explore the substance of the concept are of limited value for the advancement of legal understandings of the meaning of tolerance. UNESCO’s Declaration of Principles on Tolerance (1995), is a case in point.

The Declaration comprises a Preamble and six Articles (“Meaning of tolerance”; “State level”; “Social dimensions”; “Education”, “Commitment to action” and “International Day for Tolerance”). The Preamble merits little critical analysis: as is the wont of preambular sections, it grounds the Declaration proper in relevant principles, international standards and relevant issues. As the Declaration was not drafted as a document purporting to create legal obligations for States, it is somewhat predictable that the language used in its operative part lacks the kind of clinical or technical precision that could legitimately be demanded of a legalistic text. As such, examples of loose usage of terminology will not be subjected to the rigorous analysis applied to legal texts elsewhere in this study. Rather, attention will focus on the spirit of the document and on some of its more useful aspirations and observations.

¹⁴ See T.I. Emerson, *The System of Freedom of Expression* (New York, Random House Publishing Company, 1970), p. 9: “In constructing and maintaining a system of freedom of expression the major controversies have arisen not over acceptance of the basic theory, but in attempting to fit its values and functions into a more comprehensive scheme of social goals. These issues have revolved around the question of what limitations, if any, ought to be imposed upon freedom of expression in order to reconcile that interest with other individual and social interests sought by the good society.”

¹⁵ Lee C. Bollinger, *The Tolerant Society* (New York, Oxford University Press, 1989), p. 4.

¹⁶ These complexities and controversies are dealt with at length in Chapter 6, *infra*.

¹⁷ Ursula Owen, “Hate Speech – The Speech That Kills”, *27(1) Index on Censorship* 32 (1998), at 37.

¹⁸ Alexander Bickel, *The Morality of Consent*, *op. cit.*, p. 73.

Article 1 comprises four paragraphs, which are rather disjointed. Article 1.1 is celebratory of the richness of cultural diversity in the world, “our forms of expression and ways of being human”. It describes tolerance as, *inter alia*, “harmony in difference”, “a moral duty” as well as “a political and legal requirement” and “the virtue that makes peace possible”. These descriptions fail to elucidate the nature of tolerance, however. Article 1.2 points out that “Tolerance is not concession, condescension or indulgence” but that it is “above all, an active attitude prompted by recognition of the universal human rights and fundamental freedoms of others”. It also usefully points to the differentiated levels of application of tolerance, but the way it does so (by stating that tolerance “is to be exercised by individuals, groups and States”) is potentially problematic. Its identification of groups as an intermediate category assumes that groups are structured units or at least that they have representative structures capable of making decisions and taking formal stances that could be characterised as tolerant. It is difficult to imagine how a group *qua* group could exercise tolerance, unless via representative decision-making structures. To hold otherwise would be to assume consensual attitudes among all group members, thereby ignoring inevitable heterogeneity within groups.

Article 1.3 links tolerance to “human rights, pluralism (including cultural pluralism), democracy and the rule of law”. It then correctly states that it “involves the rejection of dogmatism and absolutism and affirms the standards set out in international human rights instruments”. A puzzling inclusion in Article 1.4 is the statement that “the practice of tolerance does not mean toleration of social injustice or the abandonment or weakening of one’s convictions”. Perhaps the intention here was to close some perceived loophole that might have allowed tolerance to be misconstrued as condoning social injustice. The remainder of this paragraph then approximates a description of tolerance: “It means that one is free to adhere to one’s own convictions and accepts that others adhere to theirs. It means accepting the fact that human beings, naturally diverse in their appearance, situation, speech, behaviour and values, have the right to live in peace and to be as they are. It also means that one’s views are not imposed on others”.

To synthesise, Article 1, which purports to explain tolerance, does pick up on several key notions developed in the theoretical discussion, *supra*: tolerance can be considered from moral, political and legal perspectives; it is an active attitude that is respectful of the rights and differences of others; it is at home in an interrelated conceptualisation of human rights; it rejects fundamentalism; it recognises the value of the convictions and lifestyles of others.

Article 2 is concerned with one particular level of application of tolerance: the State-level. Basically, the case is made for a favourable enabling environment for the realisation of tolerance. This involves adherence to human rights norms, just laws and enforcement procedures, the availability of social and economic opportunities for everyone on a non-discriminatory basis, social and political inclusion.

The social dimensions of tolerance are explored in Article 3. It is noted that nowadays, “the globalization of the economy” and “rapidly increasing mobility, communication, integration and interdependence, large-scale migrations and displacements of populations, urbanization and changing social patterns” present additional challenges for the realisation of tolerance (Article 3.1). It recognises that tolerance can be promoted by education and the media. It reaffirms some of the socio-economic priorities of the UNESCO Declaration on Race and Racial Prejudice and advocates the use of scientific studies and networking for the advancement of international efforts to promote tolerance.

Article 4 describes education as “the most effective means of preventing intolerance” (para. 1). The importance of rights education is stressed, as is the need for education for tolerance to address the root causes of intolerance. In the same vein, education for tolerance “should aim at countering influences that lead to fear and exclusion of others, and should help young people to develop capacities for independent judgement, critical thinking and ethical reasoning” (Article 4.3). Relevant means for attaining these aims include the improvement of: “teacher training, curricula, the content of textbooks and lessons, and other educational materials including new educational technologies [...]” (Article 4.4).

In keeping with the overall mandate of UNESCO, Article 5 commits States to the promotion of “tolerance and non-violence through programmes and institutions in the fields of education, science, culture and communication”. Article 6 proclaims 16 November as the annual International Day for Tolerance.

The Declaration has a clear patchwork character: it is comprised of conceptual and practical elements as well as sociological ruminations and a measure of attention for State obligations. Its usefulness lies in its exploration of the different ramifications of tolerance and pluralism in a way that is hardly feasible within the strictures of legally-binding instruments. By tracing various strands of tolerance and pluralism, the Declaration therefore contributes to their elucidation. The importance of conceptual clarification cannot be gainsaid, given that, first of all, the concepts of tolerance and pluralism underlie and animate the entire system of human rights protection, and secondly, as already mentioned, attempts to explain the concepts simply are not forthcoming in legally-binding texts in which they are relied upon.

2.2 Towards a notion of comprehensive pluralistic tolerance

Having signalled the limited explanatory value of existing normative articulations of tolerance, the discussion will now continue with an exploration of relevant theories. The term, “pluralism”, is much used and abused. It tends to be bandied about in a variety of contexts – philosophical, political and legal, to name but a few – as an *idée reçue*; with its premises usually taken for granted and seldom explained, much less, questioned. Indeed, the use of the term is bedevilled by a lack of definitional precision and consistency across international instruments and academic literature (and notoriously even within international instruments and in the works of individual authors). These inconsistencies and the despairing confusion which they have generated have been well-documented, not least in the context of freedom of expression and information.¹⁹ Some definitional decortication is therefore in order if we are to disabuse ourselves of prevalent misunderstandings arising from inconsistent applications of this term.

This exploration of “pluralism” will begin with some brief etymological musings; take a philosophical spin and then veer towards a more standard legal analysis of normative provisions in international human rights law.

In its ordinary, everyday usage, “pluralism” is a (value-)neutral term which is purely descriptive of a particular societal state - in this case, a heterogeneous one, in which different groups, often with distinctive cultural identities, espousing different moral values and leading different lifestyles, co-exist. However, at another interpretive level – the one that concerns us

¹⁹ Dietrich Westphal, “Media Pluralism and European Regulation” [2002] EBLR 459-487.

here – the term is vested with an additional, value-laden signification. By acquiring an evaluative moral element, the concept becomes more purposive; more normative. As such, it has alternately been referred to as “moral pluralism”, “value-pluralism”,²⁰ and, with superior clarity, “a pluralism of values”.²¹

Thus conceived and interpreted, the notion of “pluralism” expands laterally in the direction of the adjacent notion of “tolerance”. Taken to its logical ends, this lateral expansion ultimately leads to a kind of “pluralistic tolerance” (also referred to elsewhere as “pluralist toleration”²² – but meaning essentially the same thing) – one of the most powerfully animating principles of the European Convention on Human Rights. Time and again, the European Court of Human Rights has averred that [societal] pluralism has been hard-won over the ages and that it is indissociable with democratic life. In the same vein, it has consistently held that pluralism, along with its kindred concepts of tolerance and broadmindedness, constitutes one of the essential hallmarks of democratic society. The Court’s case-law concerning Articles 9 and 10 have proved very fertile ground for the cultivation of “pluralistic tolerance”.

The notion of pluralistic tolerance does not harbour any ambition to dissolve inter-community differences; rather, as is argued *infra*, its primary concern is to build and consolidate awareness and understanding of inter-community differences. In terms of democratic political theory, it could therefore be characterised as “integrationist” – as opposed to “assimilationist”. Although connotatively sceptical, there is a relevant kern of validity in Frank Michelman’s observations that pluralism involves “the deep mistrust of people’s capacities to communicate *persuasively* to one another their diverse normative experiences: of needs and rights, values and interests, and, more broadly, interpretations of the world”, and that it “doubts or denies our ability to communicate such material in ways that move each other’s views on disputed normative issues toward felt (not merely strategic) agreement without deception, coercion, or other manipulation”.²³ If the reconciliation of particular worldviews is a goal that is conceded to be ultimately unattainable, the default objective becomes the creation of structures and processes which provide for, or at least facilitate, the presentation and discussion of pertinent differences. The airing of such differences in democratic, discursive fora is a laudable societal goal in itself: the democratic merits of the structural and procedural facilitation of disagreement are considerable, if often under-appreciated.²⁴

2.3.1 Minimum moral and ideological commonality

It is of crucial importance to insist that all of the foregoing assumes the (prior) existence of minimal foundations of ideological commonality, without which democratic society simply cannot exist.²⁵ There need not be agreement on all substantive values, but at least on the terms

²⁰ Joseph Raz, *The Morality of Freedom* (New York, Oxford University Press, 1986), pp.

²¹ Isaiah Berlin, “Two Concepts of Liberty”, in Isaiah Berlin, *Liberty* (Ed. Henry Hardy) (Oxford University Press), pp.166-217, at 217.

²² Joseph Raz, “Free Expression and Personal Identification”, 11 *Oxford Journal of Legal Studies* (No. 3, 1991), pp. 303-324, at 322.

²³ Frank Michelman, “Law’s Republic”, 97 *Yale Law Journal* 1493, 1507 (1988). Also quoted in Kent Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech* (Princeton, Princeton University Press, 1995), p. 128.

²⁴ See further on this point: John Keane, *The Media and Democracy* (UK, Polity Press, 1991), pp. 176, 178 and 179.

²⁵ See also, in this connection, Peter Dahlgren, *Television and the Public Sphere: Citizenship, Democracy and the Media* (London, SAGE Publications, 1995), pp. 20 and 141.

of democratic engagement; an *a priori* commitment by all communities to the animating philosophies and support structures of democratic society. There are many theoretical ways of describing this anterior commitment to the implied terms and conditions of democratic engagement. One could, for example, take a “social contract” style of approach, after Rousseau, or explore the niceties of other variations on the civil compact theme. Although academic literature on this topic is rich and varied and grapples with many problematic questions,²⁶ it need not detain us unduly here. The main point to be stressed is that tolerance expresses “a recognition of common membership that is deeper than these conflicts [i.e., serious conflicts – at the deepest level – about the nature and direction of society], a recognition of others as just as entitled as we are to contribute to the definition of our society”.²⁷

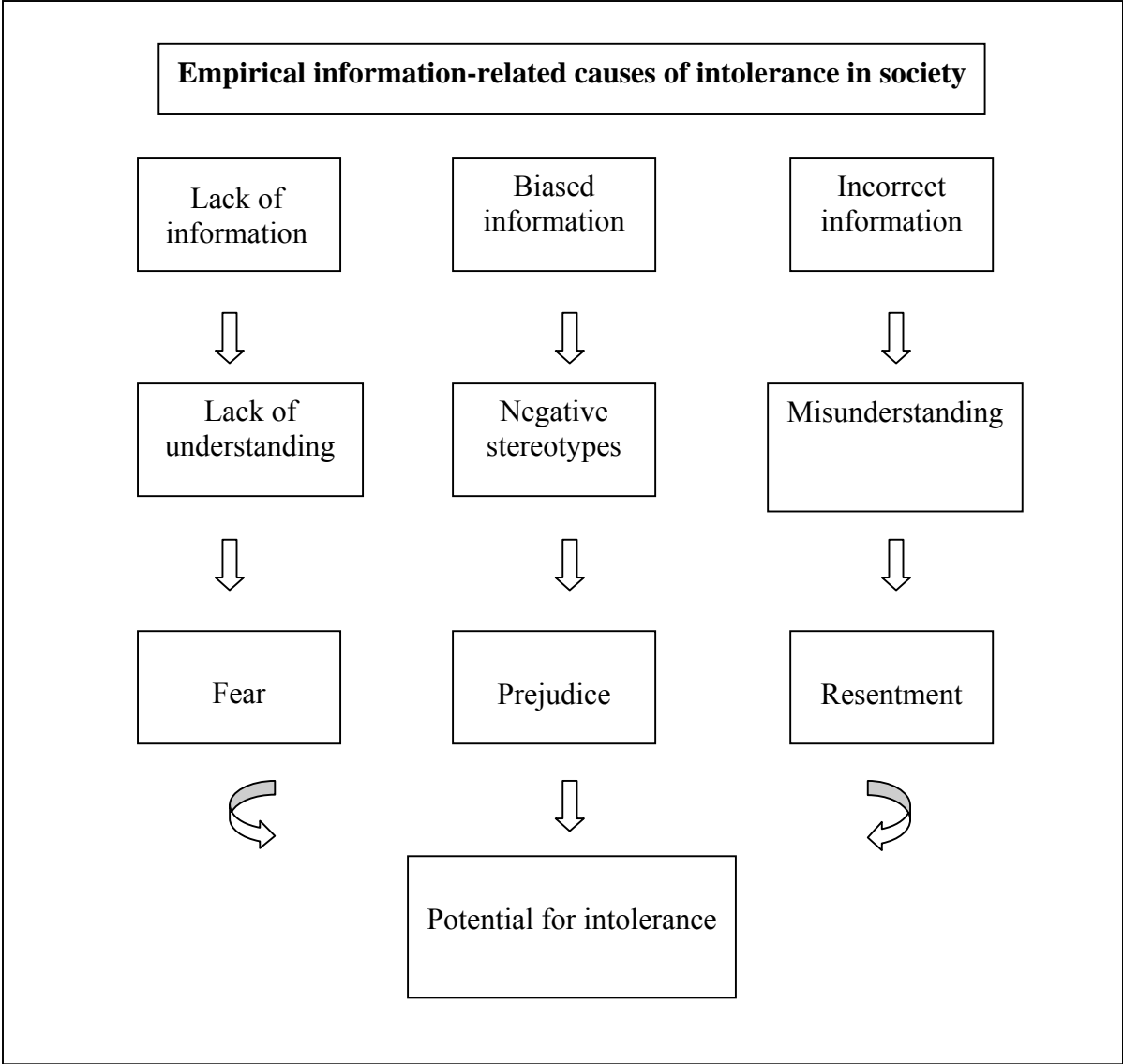
In any society, occasional incidents can strike raw community nerves, cause hurt and clamouring for vengeance. One must resign oneself to the inevitability of such occasional flash-points for society (while, of course, striving to minimise their incidence). One strategy for pre-empting the occurrence of such flash-points is to examine the underlying reasons for the “rawness” of inter-community nerves in the first place.

As discussed at the beginning of Chapter 1, individuals and groups exhibit intuitive uneasiness/distrust/dislike of that which is foreign and unfamiliar to them; that which lies outside the circle of their own experience.²⁸ In philosophy and literature, the irruption of the alien is often discussed in terms of otherness. In religion, the appellation has traditionally been more emotionally charged and (ironically, perhaps) decidedly less charitable. Instinctive distrust of otherness or difference is one of the many reasons for intercommunity stand-offishness and/or hostility. This distrust feeds on lack of information about and consequent comprehension of, the other. The following diagram seeks to empirically set out information-related causes of intolerance:

²⁶ For example, firstly, is it necessary to (formally) ascertain group consent to be bound by the tenets of democracy be ascertained? How could it be ascertained? Would it have to be expressed actively (and if so on a once-off basis or regularly) or could it be inferred (and if so, from positive actions or merely passive behaviour)?

²⁷ T.M. Scanlon, “The difficulty of tolerance”, in T.M. Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy* (United Kingdom, Cambridge University Press, 2003), pp. 187-201, at 193.

²⁸ A disclaimer of subjectivity and empirical non-verifiability applies here.



This diagram illustrates the importance in pluralistic democratic society of the adequacy and availability/accessibility of information and ideas in terms of their quantity, objectivity and accuracy. In this respect, questions of presentation and representation are extremely important. From the perspective of persons belonging to minorities, problematic practices in this regard include: “tokenism; negative stereotyping; unrealistic and simplistic portrayals of their community; negative or non-existent images of their countries or areas of origin”.²⁹ Engagement with these practices and their underlying issues pursuant to international instruments will be examined in detail in Chapter 6 of this study.

The arguments and observations and speculations canvassed above all appear to gravitate towards, and indeed precipitate, the conclusion that greater inter-community communication would help to reduce tensions and to foster intercultural and intergroup understanding and tolerance. This preliminary conclusion – or better, working principle – is consistent with Eric Barendt’s conceptualisation of freedom of expression as not only containing a set of rights,

²⁹ Andrea Millwood Hargrave, Ed., *Multicultural Broadcasting: concept and reality*, Report for the British Broadcasting Corporation, Broadcasting Standards Commission, Independent Television Commission and Radio Authority, November 2002, p. 2.

but also reflecting important public, societal values, especially pluralistic tolerance.³⁰ T.M. Scanlon goes even further by arguing that a commitment to freedom of expression actually implies “certain institutional arrangements as crucial means to those goals”.³¹

If the notion of tolerance espoused here is to be in any way meaningful, then it has to necessarily be stronger than mere indifference to the identities, creeds and worldviews of other groups in society.³² On such a reading, tolerance has to be conscious, informed and considered. This can only be achieved when there is effective communication and engagement between individuals and groups,³³ and as Lee C. Bollinger has noted, “free speech stands symbolically as the gateway to social intercourse”.³⁴ Dialogical interaction across community lines provides various groups with opportunities to articulate and advance their identities, values and viewpoints, as well as commensurate opportunities for hearing and listening to descriptions of the identities, values and viewpoints of other groups (which are often unfamiliar to them). Exchange and reciprocity of perspective are central here; the notion of tolerance involved is necessarily “deliberative”.³⁵

While undoubtedly of importance in instances of individualised communication, the realisation of inter-community communication is also of considerable importance for society in general. Thus, a compelling case can be made for pursuing this objective in structural and systematic terms.³⁶ Furthermore, as posited by Jacob T. Levy: “Whether through the evolved rules or explicit agreement”, different cultural communities “must develop a framework for interaction – the interactions of their members as well as the interactions of their traditions and norms and rules.”³⁷ The significance of Levy’s point lies in the fact that it looks beyond the specifically verbal preoccupation of most analyses of structural intercommunity dialogue. It probes the dialogical character of deeper cultural values and their non-verbal expression. Such an approach acknowledges that communicative channels are merely part of more pervasive societal structures. Bhikhu Parekh advocates a similarly coherent and comprehensive approach: intercommunity dialogue would be structured by what he terms “operative public values” (see further, Chapter 3.1.1), and there is a need to find “new institutional forums” in which such dialogue could be conducted.³⁸

2.3.2 Pluralistic tolerance, democracy and freedom of expression

One of the most compelling arguments in favour of minority rights is the need to safeguard democratic society from what has been termed the “tyranny of the majority”, a term first introduced into the lexicon of political theory by Alexis de Tocqueville. The notion requires little explanation: it involves unchecked or insufficiently checked majoritarian tendencies and preferences which tend to ride roughshod over minority values and interests. Morally

³⁰ Eric Barendt, *Freedom of Speech* (2nd Edition), *op. cit.*, p. 36.

³¹ T.M. Scanlon, “The difficulty of tolerance”, *op. cit.*, p. 189.

³² See further, s. 2.1.2(i), *supra*, for a more detailed discussion of the various shades of meaning ascribed to “tolerance”.

³³ See further, Eric Barendt, *Freedom of Speech* (2nd Edition), *op. cit.*, p. 36.

³⁴ Lee C. Bollinger, *The Tolerant Society*, *op. cit.*, p. 238.

³⁵ See generally: James Bohman, “Deliberative Toleration”, 31 *Political Theory* (No. 6, December 2003), pp. 757-779.

³⁶ This point will be developed significantly, *infra*.

³⁷ Jacob T. Levy, *The Multiculturalism of Fear* (New York, Oxford University Press, 2000), p. 41.

³⁸ Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Second Edition) (New York, Palgrave Macmillan, 2006), p. 306.

speaking, the legitimacy of majority rule is contingent on the existence of mechanisms allowing for the effective participation of minorities in deliberative political processes. Only such inclusive participatory practices can provide “the moral basis for binding everyone to the rule ultimately adopted”.³⁹ This point can easily be extended beyond decision-making and also applied to the legitimation of ideas generally through effective participation in public debate. The key consideration is, as John Dewey has noted, that ideas be given the opportunity “to spread and become the possession of the multitude”.⁴⁰ This is of clear relevance for information about minority groups as well as their views and interests. The underlying concern is for “the methods and conditions of debate, discussion and persuasion”.⁴¹

But the workings of democracy can be distorted or subverted at the other extreme of the spectrum too. Unbridled contractarianism could, for instance, lead to vocal and influential minorities dictating in large measure the affairs of state.⁴² Some minority groups might - just like their majoritarian counterparts - try to use the apparatus of state to extend the application of their values society-wide. One must also reckon with what has been termed the “displaced majority syndrome”, a belief among dominant societal groups “that too much attention is being paid to the needs of ethnic communities, which are becoming more assertive”.⁴³ Such tendencies, too, go against the grain of truly democratic ideals. As Isaiah Berlin has put it, “truth and justice” are not “the monopoly of the martyrs and the minorities” and society should “strive to remain fair even to the big battalions”.⁴⁴

Fears of majority tyranny or minority diktat are not confined to the political arena. Given the far-reaching influence of the media on public deliberation and the formation of public opinion, these fears also spill over into the media sector. Power in the media sector can yield significant influence in the political sector. The skewing of public debate is not at far remove from the skewing of political decision-making (see further, Chapter 7). This proximity between official and non-official institutions in the public sphere has already been underlined.

Thomas Emerson’s understated fourth rationale for freedom of expression⁴⁵ – which has eloquently been described by another commentator as “a means of maintaining societal homeostasis and social cohesion”⁴⁶ – deserves special mention at this juncture. It explains the crucial importance of freedom of expression in the triangular relationship linking pluralistic tolerance, democracy and freedom of expression. He explicates:

³⁹ Frederick Schauer, *Free speech: a philosophical enquiry*, *op. cit.*, p. 42.

⁴⁰ John Dewey, *The Public and its Problems* (Chicago, The Swallow Press, Inc., 1954), p. 208.

⁴¹ *Ibid.* He describes the “essential need” for “the improvement of the methods and conditions of debate, discussion and persuasion” as “*the problem of the public*” (italics per original).

⁴² See further in this connection: Albert Weale, “Toleration, individual differences and respect for persons”, in John Horton & Susan Mendus, Eds., *Aspects of Toleration* (London & New York, Methuen, 1985), pp. 16-35, at 23 *et seq.*

⁴³ Roger Eatwell, “Why are Fascism and Racism Reviving in Western Europe?”, 65 *Political Quarterly* (No. 3, July/September 1994), pp. 313-325, at 319. It would be interesting to undertake an empirical examination of the extent to which the so-called “multiculturalism of fear” is a contributory factor to the shaping of attitudes and jockeying for power.

⁴⁴ Isaiah Berlin, “Historical Inevitability”, in Isaiah Berlin, *Liberty* (Ed. Henry Hardy) (Oxford University Press), pp. 94-165, at 151.

⁴⁵ The three other rationales for freedom of expression put forward by Emerson describe freedom of expression as being essential: “as a means of assuring individual self-fulfillment”; as a “process for advancing knowledge and discovering truth”, and “to provide for participation in decision making by all members of society”: Thomas I. Emerson, *The System of Freedom of Expression* (New York, Random House, 1970), pp. 6-7.

⁴⁶ Thomas David Jones, *Human Rights: Group Defamation, Freedom of Expression and the Law of Nations* (The Netherlands, Martinus Nijhoff Publishers, 1998), pp. 65-66.

[...] freedom of expression is a method of achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus. This follows because suppression of discussion makes a rational judgment impossible, substituting force for reason; because suppression promotes inflexibility and stultification, preventing society from adjusting to changing circumstances or developing new ideas; and because suppression conceals the real problems confronting a society, diverting public attention from the critical issues. At the same time the process of open discussion promotes greater cohesion in a society because people are more ready to accept decisions that go against them if they have a part in the decision-making process. Moreover, the state at all times retains adequate powers to promote unity and to suppress resort to force. Freedom of expression thus provides a framework in which the conflict necessary to the progress of a society can take place without destroying the society. It is an essential mechanism for maintaining the balance between stability and change.⁴⁷

John Rawls also places great store by “the stability of just institutions”, reasoning that such “stability means that when tendencies to injustice arise other forces will be called into play that work to preserve the justice of the whole arrangement”.⁴⁸ In other words, when democracy and justice enjoy firm institutional and societal anchorage, the dangers posed by anti-democratic forces can be more readily absorbed by the system. The strength of the democratic organism produces its own antibodies against anti-democratic infection, without needing to have recourse to more heavy-handed measures such as the antibiotics of coercive or repressive legislation.

2.3 Comprehensive pluralistic tolerance in practice

Just as pluralism – and by extension, democracy – presuppose the absence of discrimination and the existence of effective equality, so too are they predicated on the existence of tolerance. Pluralism demands a certain balancing of majority/minority interests, leading to the tolerance and democratic accommodation of minority interests. This has been recognised by the European Court of Human Rights:

Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.⁴⁹

The Court sees pluralism and tolerance very much as being in the service of effective political democracy:

in a democratic society even small and informal campaign groups [...] must be able to carry on their activities effectively and [...] there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest [...]⁵⁰

⁴⁷ Thomas I. Emerson, *The System of Freedom of Expression*, *op. cit.*, at 7. See also, for a fuller exposition of this rationale for freedom of expression, Thomas I. Emerson, *Toward a General Theory of the First Amendment* (New York, Random House, 1966).

⁴⁸ John Rawls, *A Theory of Justice (Revised Edition)* (USA, Harvard University Press, 1999), p. 192.

⁴⁹ *Young, James & Webster v. United Kingdom*, Judgment of the European Court of Human Rights of 13 August 1981, Series A No. 44 p. 25, para. 63; *Chassagnou & Others v. France*, Judgment of the European Court of Human Rights of 29 April 1999, para. 112.

⁵⁰ *Steel & Morris v. United Kingdom*, Judgment of the European Court of Human Rights (Fourth Section) of 15 February 2005, para. 89.

The precepts of pluralism and tolerance are also of central relevance to other rights and interests that are themselves crucial for the assertion of minority identities, such as culture and language, and religion. As regards culture and language, it has been noted that:

In our increasingly diverse societies, it is essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities as well as their willingness to live together. Policies for the inclusion and participation of all citizens are guarantees of social cohesion, the vitality of civil society and peace. Thus defined, cultural pluralism gives policy expression to the reality of cultural diversity. Indissociable from a democratic framework, cultural pluralism is conducive to cultural exchange and to the flourishing of creative capacities that sustain public life.⁵¹

The foundational importance of freedom of religion for democratic society cannot be gainsaid. The Court has repeatedly held that the “pluralism indissociable from a democratic society, which has been dearly won over the centuries depends on it”.⁵² However, solutions as to how potentially competing interests ought to be balanced are not always self-evident. Pluralism entails diversity and divergence, which in turn mean that the balancing exercise can often involve a certain amount of antagonism.⁵³ To continue with the example of freedom of religion:

The Court reiterates that the autonomous existence of religious communities is indispensable for pluralism in a democratic society. While it may be necessary for the State to take action to reconcile the interests of the various religions and religious groups that coexist in a democratic society, the State has a duty to remain neutral and impartial in exercising its regulatory power and in its relations with the various religions, denominations and beliefs. What is at stake here is the preservation of pluralism and the proper functioning of democracy, one of the principal characteristics of which is the possibility it offers of resolving a country’s problems through dialogue, even when they are irksome⁵⁴

Inherent in the protection and promotion of public debate and dialogue (especially concerning “irksome” issues or problems) is the risk that falsehoods will be floated and malice propagated. However, this is all part of the democratic experiment;⁵⁵ the cut and thrust of debate that is free, robust and uninhibited.⁵⁶ As stated in the *Handyside* case, information and ideas which “offend, shock or disturb the State or any sector of the population” must be allowed to circulate in order to safeguard the “pluralism, tolerance and broadmindedness” that underpin “democratic society”.⁵⁷ Thus, the catch-cry of consumers, “let the buyer beware”, is equally *de rigueur* in the domain of freedom of expression and information. The poet e.e. cummings has astutely extended the application of this slogan: “democ/ra(caveat emptor)cy”.⁵⁸

The purpose of this sub-section is merely to present a short selection of different instances on which the European Court of Human Rights has engaged with the notions of pluralism and

⁵¹ Article 2, UNESCO Universal Declaration on Cultural Diversity.

⁵² *Hasan & Chaush v. Bulgaria*, para. 60.

⁵³ *Kokkinakis v. Greece*, para. 33; *Metropolitan Church of Bessarabia and others v. Moldova*, para. 123; *Hasan & Chaush v. Bulgaria*, para. 78; *Serif v. Greece*, para. 49; *Agga v. Greece*, paras. 53, 56; *Manoussakis v. Greece*, para. 44; *Supreme Holy Council of the Muslim Community v. Bulgaria*, para. 93.

⁵⁴ *Supreme Holy Council of the Muslim Community v. Bulgaria*, para. 93.

⁵⁵ Paraphrasal of Holmes, J., dissenting, in *Abrams v US*, 250 US 616 (1919), at p. 630, when he described both the US Constitutional enterprise and life itself as being experimental.

⁵⁶ Paraphrasal of the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁵⁷ *Handyside v. United Kingdom*, *op. cit.*, para. 49.

⁵⁸ e.e. cummings, “a salesman is an it that stinks Excuse”, in G.J. Firmage, Ed., *E.E. CUMMINGS COMPLETE POEMS 1904-1962* (New York, Liveright, 1994), at p. 549.

tolerance.⁵⁹ Further examples of such engagement with these concepts are recurrent throughout Chapter 3.

Conclusions

Pluralism and tolerance are complex concepts. It is very important to engage with their conceptual complexity in order to clarify precisely what is involved when they are invoked in international instruments. Such invocations tend to occur as preambular rather than operative provisions. As such, they serve as guiding principles which help to shape the interpretive context of human rights generally. The two concepts are brought together in this analysis and described as pluralistic tolerance, which in turn is presented as an “operative public value”. To style pluralistic tolerance as an “operative public value” is to acknowledge the diverse practical implications of its conceptual complexity. It is also to articulate the actual approach of the European Court of Human Rights to pluralistic tolerance in democratic societies. This approach involves an appreciation of the societal benefits of vigorous debate, assured by effective communicative rights, equitable deliberative structures and processes, and viable communicative opportunities, including for persons belonging to minorities. This approach also involves engagement with minorities and their rights at the societal level and not in a compartmentalised fashion. Minorities are in a dialectical and dialogical relationship with other groups in society and the validation of their rights and interests need to be realised in that broader, integrated perspective.

It is the very essence of pluralistic tolerance that the expression of differences in values, beliefs and opinions be tolerated – subject to certain limits elaborated in accordance with the abuse of rights doctrine. Pluralistic tolerance must not be understood as a passive attitude, but as the active recognition of the need for democratic society to foster the expression of difference. It is rendered “comprehensive” when it is meaningfully applied across the whole spectrum of human rights (see further, Chapter 3). A key purpose of pluralistic tolerance is to prevent the curbing or chilling of public debate. Intolerant attitudes, or even genuine (but intensely subjective) grievances, should not be allowed to inflate restrictions on the right to freedom of expression that are enshrined in international law and (narrowly) interpreted by officially-designated authoritative bodies. Pluralistic tolerance must therefore serve as a brake on any illegitimate erosion of the right to freedom of expression. At the same time, it must also uphold other rights (eg. non-discrimination, participation, etc.) in order to ensure that any expression that does not fall under the limitations permitted by international law, but is nevertheless considered objectionable or offensive by discrete groups in society, can be vigorously contested on equitable terms of engagement.

The scrutiny and explication of the above considerations provided in this Chapter aim to offset the incantatory nature of invocations of pluralism and tolerance in international instruments. The analysis reveals that the theories underlying relevant provisions in international instruments are more multi-dimensional, and their implications more far-reaching, than is often appreciated. As an operative public value, the converged notion of pluralistic tolerance generally needs to be addressed in a more serious and focused way than heretofore. This demands renewed reflection on effective strategies for upholding and operationalising relevant values. It is particularly pertinent to enquire about the nature and extent of the obligations that such operationalisation would entail for States authorities and

⁵⁹ See further in this connection, Aernout Nieuwenhuis, “The Concept of Pluralism in the Case-Law of the European Court of Human Rights”, *European Constitutional Law Review*, 2007-3, pp. 367-384.

also for third parties, especially the media. Through its elucidation of the notion of pluralistic tolerance, this Chapter paves the way for a detailed examination of these questions in Chapter 6.