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### Minority rights and freedom of expression: a dynamic interface

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## **Chapter 8 – Regulation and facilitation of expression for minorities: access rights**

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### **Introduction**

As intimated in Chapter 5 and at various junctures in Chapter 7, media-related pluralism and access can be described as an essential double-helix of (positive) State obligations to uphold the right to freedom of expression. A clear complementarity exists between both: whereas audience interests tend to prioritise having “access to ‘enough’ expression [...] and that the expression to which they have access should not be distorted”, participant interests are more likely to be concerned with “having “enough” opportunities for expression and the value of having these opportunities not be unfairly distributed”.<sup>1</sup> While these sets of complementary interests are not “exactly coincident”<sup>2</sup> with one another, there are occasions on which their relationship can become one of intersection. Certain modalities of access to expressive opportunities can have direct implications for media-related pluralism, for instance (eg. “must-carry” provisions,<sup>3</sup> etc.).

It is not necessary for present purposes to fully explore all of the possible relational permutations and combinations involving media-related pluralism and access. The essential observation to be made is that there exists considerable conceptual proximity between the notions, but that the incidence and extent of overlap between them can only meaningfully be established when they are applied in concrete situations. The focus in this chapter will be on access, which is located at the confluence of the rights to freedom of expression, participation, non-discrimination and equality.

### **8.1 Rights-based theories of access**

This section will seek to position (putative) rights of access to expressive opportunities, and in particular the media, in the broader context of positive international law provisions

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<sup>1</sup> T.M. Scanlon, “Content regulation reconsidered”, in T.M. Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy* (United Kingdom, Cambridge University Press, 2003), pp. 151-168 at 163/4. See also: T.M. Scanlon, “Content regulation reconsidered”, in Judith Lichtenberg, [...].

<sup>2</sup> *Ibid.*

<sup>3</sup> See generally, Susanne Nikoltchev, Ed., *IRIS Special – To Have or not to Have Must-carry Rules* (Strasbourg, European Audiovisual Observatory, 2005). See also the discussion in Chapter 7.4.3, *supra*.

guaranteeing the right to freedom of expression. In this regard, Article 19(2), ICCPR, is of primary importance. It reads:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

This provision clarifies that in the exercise of their right to freedom of expression, individuals are entitled to choose the medium that they would like to use to convey information and ideas. Although this “freedom” is subject to certain restrictions, most pertinently those set out in Article 19(3), the potential import of Article 19(2) is far-reaching, but as yet somewhat understated and underdeveloped. The wording of Article 13(1), CRC,<sup>4</sup> is almost identical to that of Article 19(2), ICCPR, but there is no equivalent provision in Article 10, ECHR. The absence of such a provision in Article 10, ECHR, has certainly influenced relevant doctrinal development, as will now be demonstrated.

### 8.1.1 Freedom of expression and access rights

“[N]otwithstanding the acknowledged importance of freedom of expression”, Article 10, ECHR, does not, in its current state of development, “bestow any freedom of forum for the exercise of that right”.<sup>5</sup> That being so in a broader context, the same holds true in more specific contexts and the right to freedom of expression therefore does not include an individual or group right of access to *particular* means of expression or to *particular* media. The question has been considered on several occasions in relation to access to the broadcast media, but has consistently been dismissed. As stated by the European Commission of Human Rights in the *Haider v. Austria* case,<sup>6</sup> Article 10, ECHR: “cannot be taken to include a general and unfettered right for any private citizen or organisation to have access to broadcasting time on radio or television in order to forward his opinion, save under exceptional circumstances, for instance if one political party is excluded from broadcasting facilities at election time while other parties are given broadcasting time”. A right of access must therefore be regarded as being highly contingent on specific circumstances.

Before exploring relevant case-law by the European Court of Human Rights, the notion of access needs to be unpacked. It is important to distinguish in the first place, whether access is conceived of as structural, procedural or substantive. In other words, does the sought-after access relate to a forum or medium, decision-making or production processes (within relevant structures), or content/output? Unless the notion is unpacked in this way (and indeed in even greater detail), its analytical usefulness is seriously curtailed.

Relevant statements of principle by the European Court of Human Rights can be summarised as follows:

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<sup>4</sup> It reads: “The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice.”

<sup>5</sup> *Appleby and Others v. the United Kingdom*, Judgment of the European Court of Human Rights of 6 May 2003, para. 47.

<sup>6</sup> Decision of inadmissibility of the European Commission of Human Rights (First Chamber) of 18 October 1995, Application No. 25060/94.

- States are allowed – under the third sentence of Article 10(1) – to regulate broadcasting by a licensing system based on such criteria as the nature and objectives of the proposed station and its potential audience
- States enjoy a certain margin of appreciation in this area, but it is subject to strict supervision due to the importance of the right to freedom of expression
- Broadcasting enterprises have no guarantee of any right to a licence
- The rejection by a State of an application for a broadcasting licence must not be manifestly arbitrary or discriminatory

When assessing whether the rejection of an application for a broadcasting licence amounts to a breach of Article 10, the Court places arguably undue store by the availability of other means for applicants to exercise their right to freedom of expression. The appeal of this approach is, however, merely superficial. At its centre lies the assumption that the refusal to grant a licence for a particular bandwidth or geographical area is not necessarily disproportionate if there is no impediment to the broadcasting enterprise applying for a licence on another bandwidth or another geographical area. The Court relied heavily on this argument in *Brook v. The United Kingdom*,<sup>7</sup> a case in which the exclusion of short-wave frequencies from the licensing regime was contested. The Court pointed out that the applicant could have applied for, *inter alia*, “national or local radio licences on either AM or FM frequencies, or for satellite radio licences”.<sup>8</sup> Similarly, in *United Christian Broadcasters Ltd. v. The United Kingdom*,<sup>9</sup> a case in which the applicant challenged its ineligibility, as a religious organisation, to even apply for a national broadcasting licence, the Court held:

It is, moreover, significant that the limitation on the applicant’s right to freedom of expression through radio broadcasting is far from being absolute, since there is no restriction on religious bodies applying for and being granted licences for local radio broadcasting.<sup>10</sup>

This line of reasoning is flawed. Instead of scrutinising the effect of the limitation on the applicant’s right to freedom of expression and enquiring as to whether less restrictive measures might have been more proportionate, the Court focuses on the fact that the restriction is not absolute. The Court is therefore measuring from the wrong end of the spectrum. Limitations on rights should be narrowly drawn and restrictively interpreted. They should be measured against less restrictive limitations, not more restrictive ones.

The approach taken by the Court in *Brook* and *United Christian Broadcasters* runs the risk of overlooking or at least downplaying the qualitative consequences that flow from a choice of frequency or target area. Different media initiatives have different needs and objectives (see Chapter 4, generally) and the availability of alternative broadcasting opportunities may be manifestly unsuited to specific broadcasting ambitions, thereby making the “alternative” more theoretical than real. In the *United Christian Broadcasters* case, the applicant association’s target audience was geographically dispersed, which explains why it would find a national licence vastly more attractive than local broadcasting licences. The specific facts of this case point up a more general problem for minorities whose membership is not concentrated into localised pockets: the availability of alternative frequencies simply may not be a viable

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<sup>7</sup> *Brook v. the United Kingdom*, Application No. 38218/97, Decision of inadmissibility of the European Court of Human Rights (Third Section) of 11 July 2000.

<sup>8</sup> Para.

<sup>9</sup> *United Christian Broadcasters Ltd. v. the United Kingdom*, Application No. 44802/98, Decision of inadmissibility of the European Court of Human Rights (Third Section) of 7 November 2000.

<sup>10</sup>

option. Purposive and media functionality considerations therefore merit greater judicial attention than they have hitherto received (see further, Chapter 4.3.1).

The Court adopted a variant on the above approach in the *Demuth v. Switzerland* case.<sup>11</sup> The applicant was refused a licence for CAR TV, a “segmented television program”, which he intended to set up to cover “all aspects of car mobility and private road traffic, including news on cars, car accessories, traffic and energy policies, traffic security, tourism, automobile sport, relations between railways and road traffic and environmental issues”. The programme offer would have been broadcast by cable in German and French. The applicant was refused a broadcasting licence because CAR TV’s proposed programme offer was found not to meet the stipulated requirements concerning cultural content and diversity. The European Court of Human Rights noted that the Federal Council’s decision to turn down the application for a licence for CAR TV “was not categorical and did not exclude a broadcasting licence for once and for all”.<sup>12</sup> It continued:

On the contrary, the Federal Council disclosed flexibility by stating that a segmented program such as CAR TV AG could obtain a licence if the content of its program further contributed to the “instructions” listed in Section 3 § 1 of the RTA. In this context, the Court takes note of the Government’s assurance before the Court that a licence would indeed be granted to CAR TV AG if it included cultural elements in its program.

The majority of the Court styled the possibility to adapt CAR TV’s programme offer as a factor that mitigated the severity of the interference with the applicant’s freedom of expression. However, the Court was wrong to describe this possibility as an example of “flexibility” on the part of the Federal Council. It would be more accurate to describe it as an example of “flexibility” being imposed on CAR TV. The specialised nature of the proposed television service would be diluted – and perhaps seriously compromised – by alterations to its programme offer. As pointed out in the dissenting opinion of Judge Jorundson, “this could not amount to a valid alternative for the applicant since the purpose of his program, as the name CAR TV AG suggested, was to deal exclusively with matters pertaining to automobiles”.

Again, drawing on the discussion in Chapter 4.3.2/3, it is clear that requirements such as these would go against the ideological grain of several types of minority broadcasting, especially those with intra-community communicative objectives. The argument could also be made that this amounts to (in)direct interference with the principle of editorial autonomy.

It can be concluded that the existing case-law of the European Court of Human Rights offers little grounds for optimism as far as the future development of more robust access rights is concerned. However, the perspective is not necessarily as bleak as the foregoing overview of jurisprudence might initially suggest. Some measure of potential can be detected in the Court’s judgment in the *Appleby* case. In that case, the applicants argued that the shopping centre to which they sought to gain access should be regarded as a “quasi-public” space because it was *de facto* a forum for communication. The Court held that:

[Article 10, ECHR], notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the

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<sup>11</sup> Judgment of the European Court of Human Rights of 5 November 2002, Reports 2002-IX.

<sup>12</sup> Para. 47.

automatic creation of rights of entry to private property, or even, necessarily, to all publicly-owned property (Government offices and ministries, for instance). *Where however the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights.*<sup>13</sup>

A crucially important factual feature of the *Appleby* case is that access was sought to privately-owned property *for communicative purposes*. This strengthens its analogous relevance to access to media, which often implicates the property and expressive rights of various parties.

Any prognosis for the future development of access rights must take cognizance of a number of relevant factors that can also provide impetus and direction for their growth. First, there is the inevitable interplay with, in particular, the rights to non-discrimination/equality and effective participation in public life. Second, without prejudice to any State obligations to take positive measures in order to ensure non-discrimination/equality in respect of freedom of expression (and including access to means of expression), States are under certain additional obligations by virtue of their commitment to render the right to freedom of expression effective in practice. Third, there is a dynamic quality that inheres in all rights and which implies that our understanding of rights is not static, but evolutive. These three growth-enhancing factors will now be considered in turn.

### **8.1.2 Interplay between rights**

The inter-related and interdependent character of all human rights and the synergies generated by the interplay between freedom of expression and a range of other rights, such as the right to non-discrimination/equality, effective participation in public life, religious, cultural, linguistic and educational rights, has already been carried out in Chapter 3, so it will suffice to briefly re-emphasise a few central principles here. The focus will be on their relevance for access-related issues.

States Parties to the ICCPR are required in certain circumstances to “take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant”.<sup>14</sup> Thus, the UN Human Rights Committee has held, “in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions”.<sup>15</sup> Measures constituting such affirmative State action are legitimised by their corrective, specific and temporary nature. Another crucial principle is that the prohibition of discrimination not only covers all rights enshrined in the ICCPR, but also has an autonomous existence, thereby stretching to prohibit “discrimination in law or in fact in any field regulated and protected by public authorities”.<sup>16</sup>

When applied to the right to freedom of expression, the upshot of these principles, taken together, is that it is incumbent on States authorities to actively seek to eliminate

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<sup>13</sup> (emphasis added) *Appleby and Others v. the United Kingdom*, *op. cit.*, para. 47.

<sup>14</sup> United Nations Human Rights Committee, General Comment 18, Non-discrimination, 10 November 1989, para. 10.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, para. 12.

discriminatory regulations, structures and practices that prevent members of minority groups from effectively exercising their right to freedom of expression. This reading of general State obligations to combat discrimination and promote equality under the ICCPR gains in force when considered in conjunction with State obligations towards minorities. Under Article 27, ICCPR, “positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group”; such measures must be in accordance with Articles 2.1 and 26, ICCPR, and seek to correct “conditions which prevent or impair the enjoyment of the rights guaranteed under article 27”.<sup>17</sup>

Insofar as the advancement of cultural, linguistic and religious objectives of minorities is partly dependent on the right to freedom of expression, positive State action is clearly required to eliminate discrimination and disadvantage in the system of freedom of expression. Moreover, the envisaged positive measures of protection are “required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party”. Given the huge power of private media interests to shape the system of freedom of expression and influence its workings, this candid statement by the UN Human Rights Committee has potentially far-reaching implications. It essentially recognises that in order to be effective, positive State measures cannot be limited to State bodies, but should also be horizontally applicable. It thereby mandates States to take measures limiting the power of media, but any such measures would implicitly have to be guided by principles of media sovereignty and independence.

The scope of the right to effective participation in public life necessarily includes participation in public debate. To the extent that the media and other fora serve as sites in which public debate is conducted, access rights are crucially important. Linguistic rights are also crucially important in respect of access to the media and other expressive fora: an individual’s linguistic ability or the *lingua franca* of a particular medium or forum can prove largely determinative of whether s/he can exercise his/her right to freedom of expression via that medium or forum in an effective and meaningful manner.<sup>18</sup>

Having briefly sketched the relevance of synergic interplay between selected rights for access-related issues, the enquiry will now turn to the question of the extent of relevant State obligations to render different kinds of access effective in practice. Building on the analysis carried out in Chapter 5.2.3, it is submitted that different types of obligations are implicated in different situations, and different levels of intervention may therefore be required to discharge them. Debate about the extent of State obligations in respect of the press (i.e., whether or not the State should be abstentionist or interventionist), was triggered by a proposal submitted in the earlier stages of the drafting process of the ICCPR. The proposal set out:

In order to ensure the right of the free expression of opinion for large sections of the peoples and for their organizations, State assistance and co-operation shall be given in providing the material resources (premises, printing presses, paper, and the like) necessary for the publication of democratic organs of the press.<sup>19</sup>

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<sup>17</sup> United Nations Human Rights Committee, General Comment 23, The rights of minorities (Article 27), 8 April 1994, para. 6.2.

<sup>18</sup> See further in this connection: *Many Voices One World: Towards a new more just and more efficient world information and communication order* (Great Britain, UNESCO, 1980), p. 51.

<sup>19</sup> Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, op. cit., p. 374.

This proposal was put forward by the USSR and it was very much in keeping with its Socialist credo. That it ultimately failed to prevail is of little surprise, given its in-built potential for arbitrary application and abuse by States Parties, not to mention the friction its adoption would have caused with principles of media autonomy. While the issue was uncontroversially removed from the ICCPR agenda, it re-appeared later on the UNESCO agenda in the context of the New World Information and Communication Order (NWICO) debate.<sup>20</sup> The NWICO agenda sought to promote a more equitable international communication order and free, multi-directional (as opposed to vertical or linear) information flows at the global level. To those ends, it sought to advance the concept of a “right” to communication, socially responsible journalism and other mechanisms for the circulation of information and ideas; it favoured the democratisation of (international) communications structures and processes (inter alia by making them more participatory in character) and strongly linked communicative rights to the whole development agenda. Its vision was very much shaped by the contemporary geo-political cleavages between North and South and East and West, which were perpetuated in culture, communications and commerce. The pursuit of the NWICO’s objectives proved highly polemical and led to bitter political rifts within UNESCO, with long-term consequences, such as the withdrawal of the US and the UK from the organisation.

Such proposals were also discussed in the drafting of Article 9, FCNM, for example, the so-called FUEN draft for an additional protocol to the ECHR,<sup>21</sup> which was considered in the drafting of the FCNM. The draft included the provision that persons “belonging to ethnic groups” “shall have the right to equal access to the State’s or to other public mass media, as well as the right to their own means of communication and adequate public subsidies for this purpose”.<sup>22</sup> Ultimately, no explicit provision along these lines was retained in the final text of Article 9(3) specifically (or in any other part of Article 9 either). According to the Explanatory Report to the FCNM, “No express reference has been made to the right of persons belonging to a national minority to seek funds for the establishment of media, as this right was considered self-evident.”<sup>23</sup> This explanation is somewhat inadequate, however. There is a considerable gap between guaranteeing that adequate public subsidies are available (or a provision to that effect) and merely allowing minorities to *seek* funds. Asking costs nothing, as the old adage goes, but a firm undertaking by States to ensure that relevant funds are freed up for specific purposes such as the establishment of minority media outlets, has clear and potentially far-reaching financial consequences. It will be recalled that this issue had also proved controversial during the drafting of the Universal Declaration of Human Rights.<sup>24</sup>

The promotion of access to the media, including through regulatory, licensing and subsidising measures are recurrent priorities in, but are usually confined to, the non-legally binding media-related work of the Council of Europe.<sup>25</sup> This can be explained by the fact that the genuine sense of priority that is placed on such objectives, in principle, would meet much resistance in practice if commitments demanding considerable budgetary follow-up were to be legally enshrined. The politically-binding (and even then, often non-prescriptive) character of

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<sup>20</sup> See: *Many Voices One World: Towards a new more just and more efficient world information and communication order* (Great Britain, UNESCO, 1980).

<sup>21</sup> FUEN, Fundamental Rights of Persons Belonging to Ethnic Groups in Europe, Draft for an Additional Protocol to the ECHR (Revised FUEN Draft), 1994.

<sup>22</sup> Article 10(2) of draft.

<sup>23</sup> Para. 61.

<sup>24</sup> As explained, *supra*, René Cassin removed the reference to the ear-marking of public funds for minority educational and other institutions when he reworked John Humphrey’s initial draft text.

<sup>25</sup> Enumerate relevant CM Recommendations, etc.

Committee of Ministers' Recommendations and other soft-law instruments allows States to occupy an increasingly crowded comfort zone between conscience and cost.

### 8.1.3 Dynamism of rights

It is important to note that access rights are constantly developing. This “dynamic aspect” of rights is wholly consistent with the prevalent conception of human rights instruments as being living documents. The ability of rights to create new duties has also been described as “fundamental to any understanding of their nature and function in practical thought”.<sup>26</sup> As any list of duties corresponding to a right can never be exhaustive, the full implications of a right cannot be predicted in advance – at least not always and not necessarily with any degree of certainty. As Joseph Raz has pointed out, “The existence of a right often leads to holding another to have a duty because of the existence of certain facts peculiar to the parties or general to the society in which they live”.<sup>27</sup> It is therefore conceivable that new (unforeseen) circumstances could very well give rise to a new duty being grounded in the previously recognised right.<sup>28</sup>

This theory of the dynamic character of rights can be explicated in a variety of ways. T.M. Scanlon, for instance, embeds it in his own analysis of rights, which maintains that a right has three essential components:

- (1) ends – the goals or values relative to which the consequences of unfettered discretion are judged to be unacceptable and the constraints proposed are held to be justified;
- (2) means – the particular constraints that the right in question is taken to involve; and
- (3) linking empirical beliefs about the consequences of unfettered discretion and about how these consequences would be altered by the constraints the right proposes. These include beliefs about the motivation of the relevant actors, about the opportunities to act that are already available to them, and about the collective results of the decisions that are likely to make. Also relevant here are facts about the institutional background that determine whether a given constraint is “in force”.<sup>29</sup>

Under this theoretical model, Scanlon maintains that rights possess a “creative instability”<sup>30</sup> because of the susceptibility of our empirical beliefs to change and the unlikelihood that our understanding of a right’s ends, means and empirical beliefs will, at any given time, make up a coherent whole. He argues that new or altered situations, or changes in our empirical beliefs, can prompt us to reappraise the adequacy of existing constraints, or even the sets of values “in terms of which existing constraints are justified”.<sup>31</sup> The tension released by this fluctuating, three-way relationship “gives rights a dynamic quality that can lead to an almost constant process of revision”, he concludes.<sup>32</sup>

In keeping with the foregoing comments by Raz and Scanlon, far-reaching technological developments could be classed as the kind of societal or factual changes that could give rise to the recognition of new duties flowing from an existing right, *in casu*, the right to freedom of expression. Successive waves of technological developments, especially and most recently,

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<sup>26</sup> Joseph Raz, *The Morality of Freedom* (New York, Oxford University Press, 1986), p. 171.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*, pp. 171, 185, 186.

<sup>29</sup> T.M. Scanlon, p. 152.

<sup>30</sup> *Ibid.*, p. 154.

<sup>31</sup> *Ibid.*, p. 154.

<sup>32</sup> *Ibid.*, p. 154.

the advent of the Internet, have profoundly altered informational and communicative realities throughout the world. Those changes could not have been anticipated when leading human rights treaties with generic provisions safeguarding the right to freedom of expression were drafted and adopted. Consequently, prior understandings of the scope of the right to freedom of expression require urgent updating, adaptation and expansion in order to take account of, and accurately reflect, the complexities of the new communicative dispensation. The ICCPR is a case in point: it was opened for signature and ratification in 1966 and the General Comment on Article 19 dates from 1983. Calls for the UN Human Rights Committee to adopt a new General Comment on Article 19, ICCPR, are therefore well-justified and ought to be acted on as a matter of urgency.<sup>33</sup>

The above observations were made in relation to the right to freedom of expression generally, but they are particularly true in relation to access to modern communications technologies. As J.M. Balkin has opined:

Where the exercise of a liberty depends upon technology, access to that technology largely determines the substantive liberty of the actor. Sometimes this is because the liberty in question cannot be enjoyed in any form without a general level of technology. More commonly, however, it is because liberties are always in conflict. Access to widely different levels of technology by persons who seek to exercise competing liberties may place some actors at a very significant disadvantage with respect to others, and thus result in an effective denial of their liberty.<sup>34</sup>

The future development of access rights will also inevitably give rise to a number of corresponding duties<sup>35</sup> – usually on the part of States authorities. An example of such an obligation is provided by the 2005 Joint Declaration adopted by the [then] three IGO special rapporteurs on freedom of expression, which states:

The right to freedom of expression imposes an obligation on all States to devote adequate resources to promote universal access to the Internet, including via public access points. The international community should make it a priority within assistance programmes to assist poorer States in fulfilling this obligation.<sup>36</sup>

The identification of apposite State duties should be guided by realistic considerations of what is necessary to ensure the effective exercise of all component parts of the right to freedom of expression in practice. Increasingly, in this connection, emphasis is being placed on the availability and accessibility of new media technologies for everyone. This is a key strategy employed in efforts to bridge the digital divide and it accordingly involves the promotion of media and technological literacy.<sup>37</sup> The WSIS Principles and Commitments reveal a keen awareness of the impact of new technologies on contemporary communicative practices. As such, they seek to promote not access to particular media, but to “information and

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<sup>33</sup> Such calls have come from various quarters; see, *inter alia*, Jamie F. Metzl, “Information Technology and Human Rights”, 18 *Human Rights Quarterly* (No. 4, 1996), pp. 705-746, at 743-744; Kevin Boyle & Cherian George, Final Report of the 8<sup>th</sup> Informal Asia-Europe Meeting (ASEM), Seminar on Human Rights – “Freedom of Expression”, Siem Reap, Cambodia, 26-28 Cambodia, p.7 (Recommendation No. 2).

<sup>34</sup> J.M. Balkin, “Some Realism about Pluralism: Legal Realist Approaches to the First Amendment”, 1990 *Duke L.J.* 375, at 406. [see same page for two nice quips about effectiveness of technology for communicative purposes].

<sup>35</sup> This is particularly what Joseph Raz had in mind when he referred to the “dynamic aspect of rights”, cited *supra*.

<sup>36</sup> Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 21 December 2005.

<sup>37</sup> See, for example, the Special Rapporteurs’ Joint Declaration on Diversity in Broadcasting, *op. cit.*

communication infrastructure and technologies” and “information and knowledge”.<sup>38</sup> In respect of the former, the WSIS Geneva Principles state that “Universal, ubiquitous, equitable and affordable access to ICT infrastructure and services, constitutes one of the challenges of the Information Society and should be an objective of all stakeholders involved in building it”.<sup>39</sup> Its underlying reasoning is that “Connectivity is a central enabling agent in building the Information Society”.<sup>40</sup> In respect of the latter, the WSIS Geneva Principles state that:

Information in the public domain should be easily accessible to support the Information Society, and protected from misappropriation. Public institutions such as libraries and archives, museums, cultural collections and other community-based access points should be strengthened so as to promote the preservation of documentary records and free and equitable access to information.<sup>41</sup>

The separate attention paid to the accessibility of structures and substance stems from an awareness of the technology-enhanced diversity of sources and vectors for information and ideas. The WSIS Principles and Commitments also recognise that the communicative effectiveness of relevant technologies relies heavily on ancillary factors, like capacity-building measures, the realisation of which may implicate certain State obligations.<sup>42</sup> In this connection, emphasis is also placed on the need to develop digital content in local languages.<sup>43</sup>

The impact of technology can also result in the identification of new State obligations in respect of the synergic interplay between the right to freedom of expression and other rights. The right to effective participation applies across an ever-expanding range of areas of public life. This is a logical consequence of continuous societal progress and attendant adjustments and extensions of democratic practices. With the increasing importance of the Internet and other online means of communication in governance as well as in everyday life, access to the Internet will become determinative for individuals’ ability to participate effectively in public life. It must therefore surely only be a matter of time before international standard-setting bodies begin to push for a meaningful concatenation of expressive, participatory and access rights, especially in the realm of online communications.<sup>44</sup>

Other angles of approach to the intersection of rights of participation and access also boast validity and deserve further exploration. The question has, for instance, been framed in terms of “the right to participate fully as consumers and producers in the stream of media and telecommunications”.<sup>45</sup> Some commentators have departed from the notion of rights of universal access to take the underlying concept a step further. Nico van Eijk, for instance, has referred in this context to a “contiguous” right to easily access information.<sup>46</sup> The subtext here is that the right is contiguous *to the right to freedom of expression*. Similarly, Owen Fiss has

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<sup>38</sup> WSIS Tunis Commitment, para. 9, which summarises the key principles of the Geneva Declaration of Principles (in which paras. 21-23 deal with access to information and communication infrastructure and paras. 24-28 deal with access to information and knowledge).

<sup>39</sup> *Ibid.*, para. 21; see also, WSIS Tunis Commitment, para. 18.

<sup>40</sup> *Ibid.*, para. 21.

<sup>41</sup> *Ibid.*, para. 26.

<sup>42</sup> WSIS Geneva Principles, section 4, paras. 29-34.

<sup>43</sup> WSIS Tunis Commitment, para. 14.

<sup>44</sup> See also, in this connection: David Honig, “What Kind of Future for Television?”, 32 *Intermedia* (No. 4, November 2004), pp. 10-15, at 15.

<sup>45</sup> David Honig, “What Kind of Future for Television?”, 32 *Intermedia* (No. 4, November 2004), pp. 10-15, at 14.

<sup>46</sup> Nico van Eijk, “Search Engines: Seek and Ye Shall Find? The Position of Search Engines in Law”, *IRIS plus* – Supplement to *IRIS* – Legal Observations of the European Audiovisual Observatory, 2006-2, pp. 5 and 7.

argued that “A proper regard for democratic values requires *easy access to all ideas*, for without such exposure the public is not likely to know its options or the costs of the present arrangements under which it lives”.<sup>47</sup>

The validity of such a right of easy access to information and ideas has not gone unchallenged. So far, relevant issues have only been given rather scant consideration by the European Court of Human Rights. In *Appleby*, for instance, the applicants submitted that notwithstanding the existence of other expressive outlets, they had been denied “the easiest and most effective method of reaching people”.<sup>48</sup> The Court dealt with this argument by focusing on the particular facts of the case at hand instead of seeking to elaborate any findings of more general applicability. Thus, the Court found that the applicants could not claim that they had been “effectively prevented from communicating their views to their fellow citizens”<sup>49</sup> as a result of the refusal by the property-owners to admit them onto their property. The Court would not be drawn on the question of whether the applicants’ right to freedom of expression could otherwise be exercised in a meaningful manner.<sup>50</sup> It is still premature to speculate whether *Appleby* will become a controlling precedent for this question, but the Court’s reliance on the central criterion of the effectiveness of the enjoyment of the right to freedom of expression seems both prudent and consistent with its settled case-law.<sup>51</sup> The ease with which information and ideas can be accessed is therefore perhaps best understood as a measure of the effectiveness with which the right to seek and receive information and ideas is exercised in practice.

#### **8.1.4 Prognosis for future development of access rights**

The various contributions by the above-named factors to the ongoing and likely future development of access rights are highly synergic. Indeed, all of those factors converge in the following observation by T.M. Scanlon:

One aim of freedom of expression is to provide opportunities for the kind of public discussion that is an essential precondition for fair democratic politics. If the political system is to be fair, however, a significantly widespread equality of opportunity to engage in this discussion is required. [...] But in a society like ours, one cannot achieve a significant degree of equality of access to effective means of expression simply through the strategies that freedom of [159] expression has traditionally involved (i.e. simply by constraining the power to regulate expression).<sup>52</sup>

Scanlon follows up on this observation by suggesting that the imperative of achieving a significant degree of equality of access to effective means of expression triggers positive State obligations to find new strategies for the same. Viewed from another angle, we witness a dove-tailing of the right to equality and the right to effective participation in public life. They join each other at the right to freedom of expression and glide further by virtue of their inherent dynamism.

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<sup>47</sup> (emphasis added) Owen M. Fiss, “Silence on the Street Corner”, XXVI *Suffolk University Law Review* (No. 1, Spring 1992), pp. 1-20, at p. 19.

<sup>48</sup> *Appleby and Others v. the United Kingdom*, *op. cit.*, para. 48.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> See further, the earlier discussion on *Airey*, etc., and the need for rights to be effective, real, meaningful in practice.

<sup>52</sup> T.M. Scanlon, “Content regulation reconsidered”, in T.M. Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy*, *op. cit.*, pp. 151-168, at pp. 158-159.

A crucial notion in Scanlon's observation is that of access to "effective means of expression" (emphasis added). It is commonly – and correctly – believed that the right to freedom of expression does not include the right (or any other kind of entitlement, for that matter) for one's expression to achieve its desired perlocutionary effects or to lead to the achievement of particular results/consequences. Conversely, it cannot be accepted that freedom of expression is a purely self-regarding activity either. Otherwise, it would simply have no claim to special constitutional protection. In recent times, there has been much lively academic and political debate in the context of WSIS about whether or not the right to freedom of expression could usefully be restyled as a right to freedom of communication. One of the arguments that featured in that debate suggests that such a step would be logical in light of the (implicit) communicative dimension already present in prevailing conceptions of freedom of expression and protected accordingly. A full discussion of the desirability of granting legal recognition to the right to freedom of communication is beyond the scope of this thesis. Nevertheless, it is important to acknowledge the existence of that communicative dimension within the right to freedom of expression. The right to freedom of expression stretches to cover the free, multidirectional flow of information and ideas. The other-regarding aspect of expressive activity is therefore not in doubt.

On the basis of these observations, it is legitimate to hold that a speaker must be able to communicate his/her message to others. It is not enough – on any theory of freedom of expression, or under positive international law - for him/her to be able to utter his/her message in private and only in private. It is the variously designated public, interactional, communicative nature of the expressive act that is the essence of the right. This is not to presume or even infer that speakers enjoy any kind of entitlement to compel a reluctant audience.<sup>53</sup> Properly understood, it is the right to realise the communicative potential of expression (which is not the same as predetermining the outcome of expression). What matters, therefore is that expression would have a fair or reasonable chance of being effectively communicated. It is submitted here that that is how Scanlon's reference to "effective means of expression" should be construed.

Closely related to the notion of "effectiveness" of means of expression is the notion of equivalence of means of expression. As shown in the discussion on media functionality (s. 4.3.1, *supra*), all media do not share the same objectives or *modus operandi* and their different outlooks and approaches can have significant bearing on the assessment of their actual effectiveness. Equality of expressive opportunity is only possible if the premise of comparable, or roughly equivalent, viability between media is upheld. As posited by Owen Fiss:

to rely exclusively, or even primarily, on parading or picketing [...] would leave to the less powerful elements in society only the least effective modes of political persuasion. Compare one day's work of distributing pamphlets at a local shopping center with a half hour on TV. Effective speech in the modern age is not cheap.<sup>54</sup>

Such considerations can be determinative when the access of a would-be speaker to a particular medium is denied and the only alternative fora available are qualitatively different

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<sup>53</sup> Although on some versions of the theory of freedom of expression, such unsolicited exposure could be included. See further, T.M. Scanlon, "Content regulation reconsidered", in T.M. Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy*, *op. cit.*, pp. 151-168, at p. 154.

<sup>54</sup> Owen M. Fiss, "Why the state?", in Judith Lichtenberg, Ed., *Democracy and the mass media* (USA, Cambridge University Press, 1990), pp. 136-154, at 150-151.

in character to the would-be speaker's first choice of medium. This proposition is obviously highly contingent on relevant circumstantial factors. The basic point, though, is that the effectiveness and equivalence of particular media can legitimately be taken into consideration when seeking to ascertain whether the right to freedom of expression has been infringed.

Given the quasi-public character of certain institutions, outlets or locations – a broad public interest in access can militate against narrow private interests, such as proprietary rights.<sup>55</sup> It may well prove necessary for the State to secure access for third parties to such places in order to ensure that the right to freedom of expression is not merely theoretical or illusory. That is the essence of the public forum doctrine, which could arguably be extended to means of expression such as the media (eg. insofar as they play a public forum role). If opportunities to participate in public debate are stymied, there is little chance that the debate itself will be uninhibited, robust and wide-open.

Notwithstanding the fact that access rights are of a qualified nature, a violation of the right to impart information and ideas could arise if the denial of access were to be found to be arbitrary or discriminatory. This is further evidence of the cross-cutting nature of the right to non-discrimination and equality.

## 8.2 General “taxonomy” of access rights

The notion of access to the media is as crucial as it is amorphous. Any meaningful assessment of its importance for minorities must proceed from a clear delineation of its many applied meanings. In other words, what is required is – to borrow Monroe Price's catchy phrase – “a taxonomy of access”.<sup>56</sup>

A preliminary distinction between possible types of access is self-explanatory and can be dealt with in a perfunctory manner. It is the distinction between the concepts implied by the somewhat uncouth terms, passive and active access.<sup>57</sup> The former term refers to end-users' ability to receive information/media output; it is consonant with the idea of universal service (to use conventional technical jargon). It is very important in terms of the right to receive information and ideas without restriction that physical, technological, linguistic, or indeed socio-economic factors should not impede the exercise of this right. Active access to the media suggests involvement in the creation of media output (especially by participation in managerial, editorial and production processes and representation in relevant structures) and this will be the main focus in our taxonomy of access proper.

Yet even the reference to “active access to the media” is deceptively self-contained: in reality, what is involved is varying degrees of access to different types of media. If the media are conceived of as complex processes with necessarily inter-related institutional, individual and group dynamics, it becomes important to identify and distinguish between the different degrees of access. First and foremost, the notion of active access implies, according to Karol Jakubowicz, “the ability of minorities to be actively involved in the work of the mainstream

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<sup>55</sup> Balkin, Barron, Fiss, Sunstein, *Pruneyard, Steele & Morris v. UK, Appleby v. UK*.

<sup>56</sup> Monroe E. Price, *Television The Public Sphere and National Identity* (New York, Clarendon Press, 1995), p. 194. See also: Monroe E. Price, “An Access Taxonomy”, in Andras Sajo, Ed., *Rights of Access to the Media* (The Netherlands, Kluwer Law International, 1996), pp. 1-28.

<sup>57</sup> See further: Karol Jakubowicz, “Report: A critical evaluation of the first results of the monitoring of the Framework Convention on the issue of persons belonging to national minorities and the media (1998-2003)”, in *Filling the Frame, op. cit.*, pp. 113-138, at p. 133.

media in a variety of capacities, or to own and operate their own minority media”.<sup>58</sup> It should also involve their “access to decision-making and the work of bodies involved in legislation, regulation and oversight of the media”.<sup>59</sup> These different layers of access will be discussed in more concrete terms in s. 8.3, *infra*, but for the moment, it suffices to link them back to earlier discussions about the promotion of pluralistic tolerance and intercultural dialogue in various institutional structures in the media sector (Chapter 6), as well as the potential of co-regulatory measures for enhancing the participatory rights of persons belonging to minorities in the media sector (see Chapter 4.5, *supra*).

A plethora of different types of access can be recognised, both voluntary and mandated. Some are designed to enhance freedom of expression and its underlying value of pluralism; others seek to empower groups and individuals politically and culturally. Others still are designed to stimulate independence and creativity of output or uphold qualitative standards in output. Different types of access and factors affecting minorities’ access to the media will be discussed in s. 8.3, *infra*. Beforehand, a classic form of access – the right of reply<sup>60</sup> – will be described in terms of the protection it is accorded under international law and its usefulness for minorities discussed.

### 8.2.1 Right of reply as a form of access

The putative right of reply is not provided for *expressis verbis* in the relevant articles of leading UN conventions or in the ECHR. The absence of a provision is by no means accidental. The desirability of such a provision was debated on several occasions during the drafting of the ICCPR.

A text submitted by the UN Conference on Freedom of Information contemplated the institution of such a right, which it formulated as follows: “A State may establish on reasonable terms a right to reply or a similar corrective remedy.”<sup>61</sup> The usefulness of the right to reply was stressed – along with that of “subsequent criminal liability” - as a preferable means of correcting misinformation to prior censorship.<sup>62</sup> In the heel of the hunt, a provision enshrining the right of reply was omitted not for reasons of principle, but due to technical considerations. There was general consensus among the drafters that such a provision would be more at home in “special conventions in the field of freedom of information” than in the more generalist ICCPR.<sup>63</sup>

For its part, the title of the UN Convention on the International Right of Correction<sup>64</sup> is at first glance slightly misleading. It could be taken to suggest a right of correction that is internationally available. The international dimension is present, but it is really concerned with a right of correction that is inter-national, or, more accurately, inter-State. This convention has long been regarded as ineffectual and irrelevant.

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<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*, at pp. 133-134.

<sup>60</sup> See generally, Marie McGonagle, “A Right to Reply” in ..., pp. 271-292.

<sup>61</sup> Drafting Committee, 2<sup>nd</sup> Session (1948), cited in Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, *op. cit.*, p. 374.

<sup>62</sup> Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, *op. cit.*, p. 399.

<sup>63</sup> *Ibid.*, p. 400.

<sup>64</sup> 435 UNTS 191, entry into force: 1962.

A right of reply is not expressly provided for in Article 10, ECHR, and relevant case-law from the adjudicatory organs in Strasbourg has accordingly been meagre. Nevertheless, the European Court of Human Rights has held that “as an important element of freedom of expression”, the right of reply does fall within the scope of Article 10.<sup>65</sup> The Court puts this down to “the need to be able to contest untruthful information, but also to ensure a plurality of opinions, especially in matters of general interest such as literary and political debate”.<sup>66</sup> Thus conceived, the dual purpose of recognising a right of reply under Article 10 can be described as to protect the rights of others (in accordance with Article 10(2)) and to act as a safeguard for the much-prized pluralism of information and opinions.<sup>67</sup>

In the case, *Ediciones Tiempo S.A. v. Spain*, the Commission refuted the suggestion that the judicially-enforced insertion of the aggrieved individual’s reply was a disproportionate interference with the publication’s right to freedom of expression. The Commission pointed out that the publishing house was not obliged to modify the content of the impugned article and moreover, it was allowed to republish its version of the facts alongside the aggrieved individual’s reply.

In the case, *Melnychuk v. Ukraine*, the Court engages more thoroughly with key aspects of the nature, scope and importance of the right to reply. The case involved a newspaper’s refusal to publish the applicant’s reply to a critical review of a book written by the applicant. The newspaper maintained that it had refused to publish the reply on the basis that it contained “obscene and abusive remarks” about the reviewer; that its reasoning had been communicated to the applicant and that he had declined the invitation to edit his reply accordingly.<sup>68</sup> The Court declared the application inadmissible and recalled once more that the right to freedom of expression does not confer on individuals or organisations “an unfettered right [...] to have access to the media in order to put forward opinions”.<sup>69</sup> It then noted that “as a general principle, newspapers and other privately-owned media must be free to exercise editorial discretion in deciding whether to publish articles, comments and letters submitted by private individuals”.<sup>70</sup> It acknowledged that, against this background, “exceptional circumstances” may nevertheless arise “in which a newspaper may legitimately be required to publish, for example, a retraction, an apology or a judgment in a defamation case”.<sup>71</sup> Situations such as these may create a positive obligation “for the State to ensure an individual’s freedom of expression in such media”.<sup>72</sup> The Court concluded by reiterating that a general, base-line obligation of the State is to ensure, in any event, that “a denial of access to the media is not an arbitrary and disproportionate interference with an individual’s freedom of expression, and that any such denial can be challenged before the competent domestic authorities”.<sup>73</sup>

Article 8 of the European Convention on Transfrontier Television also provides for a right of reply in the following terms:

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<sup>65</sup> *Melnychuk v. Ukraine*, Decision of inadmissibility of the European Court of Human Rights (Second Section) of 5 July 2005, para. 1 (p. 6 of decision).

<sup>66</sup> *Ibid.*, para. 1 (pp. 6-7 of decision).

<sup>67</sup> See also in this respect: *Ediciones Tempo S.A. v. Spain*, Decision of inadmissibility of the European Commission of Human Rights of 18 June 1987, Application No. 13010/87.

<sup>68</sup> *Melnychuk v. Ukraine*, *op. cit.*, p. 2 of decision.

<sup>69</sup> *Ibid.*, para. 1, p. 7 of decision.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

1. Each transmitting Party shall ensure that every natural or legal person, regardless of nationality or place of residence, shall have the opportunity to exercise a right of reply or to seek other comparable legal or administrative remedies relating to programmes transmitted by a broadcaster within its jurisdiction, within the meaning of Article 5. In particular, it shall ensure that timing and other arrangements for the exercise of the right of reply are such that this right can be effectively exercised. The effective exercise of this right or other comparable legal or administrative remedies shall be ensured both as regards the timing and the modalities.

2. For this purpose, the name of the programme service or of the broadcaster responsible for this programme service shall be identified in the programme service itself, at regular intervals by appropriate means.

This provision can be relied upon by any “natural or legal person in order to correct inaccurate facts or information, in cases where such facts or information concern him/her or constitute an attack on his/her legitimate rights (especially in regards to his/her dignity, honour or reputation)”.<sup>74</sup> As such, it can certainly be invoked by individual members of all minority groups, irrespective of the nature of those groups, as long as they are democratic. This is corroborated by the Explanatory Note to the ECTT (para. 170).

One of two documents cited as having influenced the text of Article 8,<sup>75</sup> the Committee of Ministers’ Resolution (74) 26 on the right of reply – position of the individual in relation to the press, also dealt with the issue, but it was recently thoroughly revised in order to take account of major technological developments in the media sector (eg. the existence and widespread use of electronic archives<sup>76</sup>). As a result, it has effectively been replaced by Recommendation Rec (2004) 16 of the Committee of Ministers to member states on the right of reply in the new media environment.<sup>77</sup> The Preamble to the Recommendation links the right of reply to, *inter alia*, the public’s interest in receiving “information from different sources, thereby guaranteeing that they receive complete information”. While this statement panders to the goal of pluralism, the right to reply, as configured in the Recommendation, is only of limited value in attaining that goal.

It is concerned with correcting specific, individual inaccuracies and is not designed to be a platform for countering broader patterns of stereotyping or negative reporting. According to the Recommendation, a reply must be limited to a correction of the facts challenged.<sup>78</sup> Moreover, it only applies to “factual inaccuracies and not opinions”,<sup>79</sup> thereby adhering to the conceptual distinction consistently underlined by the European Court of Human Rights, *viz.* that the latter are not susceptible of proof. Again, the limited focus of the right *ratione materiae* points up its unsuitability for use as a foil for negative reporting. The basic point being made here is that the right of reply can be a valuable tool at the micro level, for dealing with specific instances of inaccurate reporting of facts, but it clearly cannot be taken as a central prong in a more ambitious, pro-active strategy of correction at the macro level.

As already mentioned, there have been pronounced efforts to synchronise the standard-setting measures of the Council of Europe and the European Union in the audiovisual sector.<sup>80</sup> It is

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<sup>74</sup> Explanatory Report to the European Convention on Transfrontier Television, as amended, para. 168.

<sup>75</sup> Para. 167, Explanatory Note to the ECTT.

<sup>76</sup> Para. 7 of Recommendation Rec (2004) 16 and corresponding text in Explanatory Note.

<sup>77</sup> Adopted by the Committee of Ministers on 15 December 2004 at the 909<sup>th</sup> meeting of the Ministers’ Deputies.

<sup>78</sup> Principle 5 – Exceptions.

<sup>79</sup> Explanatory Memorandum to the draft Recommendation on the right of reply in the new media environment, CM(2004)206 addendum, 17 November 2004, para. 12.

<sup>80</sup> Explanatory Report to the ECTT, paras. 39, 40. See further: Daniel Krebber, *Europeanisation of Regulatory Television Policy: The Decision-making Process of the Television without Frontiers Directives from 1989 &*

therefore unsurprising that the EU's Television without Frontiers Directive should contain provisions guaranteeing a right to reply in almost identical terms to the ECTT. Article 23 of the TWF Directive reads as follows:

1. Without prejudice to other provisions adopted by the Member States under civil, administrative or criminal law, any natural or legal person, regardless of nationality, whose legitimate interests, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a television programme must have a right of reply or equivalent remedies. *Member States shall ensure that the actual exercise of the right of reply or equivalent remedies is not hindered by the imposition of unreasonable terms or conditions. The reply shall be transmitted within a reasonable time subsequent to the request being substantiated and at a time and in a manner appropriate to the broadcast to which the request refers.*
2. A right of reply or equivalent remedies shall exist in relation to all broadcasters under the jurisdiction of a Member State.
3. Member States shall adopt the measures needed to establish the right of reply or the equivalent remedies and shall determine the procedure to be followed for the exercise thereof. In particular, they shall ensure that a sufficient time span is allowed and that the procedures are such that the right or equivalent remedies can be exercised appropriately by natural or legal persons resident or established in other Member States.
4. An application for exercise of the right of reply or the equivalent remedies may be rejected if such a reply is not justified according to the conditions laid down in paragraph 1, would involve a punishable act, would render the broadcaster liable to civil law proceedings or would transgress standards of public decency.
5. Provision shall be made for procedures whereby disputes as to the exercise of the right of reply or the equivalent remedies can be subject to judicial review.

The italicised text was introduced by the amendment to the original TWF Directive in 1997 and it seeks to vouchsafe the fairness and proportionality of modalities implementing the right of reply. As with its ECTT equivalent, the overriding concern is for the correction of inaccuracies that would adversely affect the legitimate (especially reputational) interests of natural or legal persons. The kind of access it offers is therefore subject to the same limitations of reaction and responsiveness. It was proposed in the most recent European Commission report on the protection of minors and the right of reply that the latter should be extended to cover all media.<sup>81</sup>

The American Convention on Human Rights (1969) uniquely sets out the right of reply as an autonomous human right and should therefore be mentioned in passing. It is not conceived of as a limitation on the right to freedom of expression or conditionalised in any other reductionist manner. The operative article reads:

#### Article 14 Right of reply

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or make a correction using the same communications outlet, under such conditions as the law may establish.
2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.

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1997 (Nomos Verlagsgesellschaft, Baden-Baden, 2002), esp. Chaps. 4, 5 & 6; E.J. Dommering *et al.*, *European Media Law Handbook* (forthcoming 2008).

<sup>81</sup> Full citation.

3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible, who is not protected by immunities or special privileges.

One of the arguments of predilection of opponents of the right to reply is that by mandating such replies, pluralism is actually diminished as the reply takes up limited space (or airtime), thereby reducing further the available opportunities for the expression of yet other views.

To the extent that the right of reply is corrective in nature, it is an important but insufficient form of access for persons belonging to minority groups. It is a reactive mechanism which affords a valuable opportunity to set facts straight, counter prejudicial attacks and challenge specific instances of stereotyping. But its potential for advancing identity and culture is inherently (and severely) limited. It does not set its own terms; it responds to terms set by others. There is no provision for pre-emptive thrusts. It merely allows for ripostes within imposed strictures of substance and form. Defensive, parrying, it cannot be a basis for sustaining more positive images of minorities precisely because it is reactionary.

### 8.2.2 Public access channels<sup>82</sup>

Public access channels on cable or satellite networks are channels that have been reserved for non-commercial purposes. Typically, such purposes would include various kinds of public interest broadcasting - in the realms of education, community matters, civic affairs, etc. Whereas must-carry obligations tend to concentrate on particular channels, obligations on cable or satellite operators to free up a portion of available capacity for public interest broadcasting can be open to a wider range of potential participants. The concept of public access channels is well-established in Germany, where they are known as *Öffene Kanäle* (trans. "Open Channels").<sup>83</sup> This name captures the essential openness of the channels; indeed, the channels are in principle open to all parties who do not or cannot operate their own broadcasting station. They are designed to be accessible and inexpensive and in practice they are often State-subsidised. As such, public access channels offer considerable potential for ensuring minority access to programme transmission facilities. In practice, airtime is often offered on a first-come, first-served basis.

In respect of minority use of public access channels, a noteworthy development is the emergence, particularly in urban contexts, of so-called "rainbow" stations. The name derives from the diversity of (ethnic) minorities using them. "Rainbow" stations have been defined by one commentator as "those stations (usually community radio) with a wide diversity in program content, divided into generally small segments of airtime".<sup>84</sup> An obvious attraction of rainbow stations (and public access channels generally) is the large measure of editorial autonomy enjoyed by minority groups availing of the opportunity presented. In light of the autonomously segmented broadcasting model involved, there is not necessarily much contact between representatives of the different groups. However, even if it does depend largely on

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<sup>82</sup> This section has benefited from helpful exchanges with Toby Mendel.

<sup>83</sup> See further: Natali Helberger, "Germany", in Tarlach McGonagle, Bethany Davis Noll & Monroe Price, Eds., *Minority-Language Related Broadcasting and Legislation in the OSCE*, *op. cit.*, pp. 217-229, at 219; John Keane, *The Media and Democracy* (UK, Polity Press, 1991), p. 159; Donald R. Browne, *Ethnic Minorities, Electronic Media and the Public Sphere* (Cresskill, New Jersey, Hampton Press, Inc., 2005), p. 59.

<sup>84</sup> Donald R. Browne, *Ethnic Minorities, Electronic Media and the Public Sphere* (Cresskill, New Jersey, Hampton Press, Inc., 2005), p. 66 (fn. 36).

the particular personalities involved on all sides, the potential for interaction and cooperation between the various groups does exist.

Conversely, one of the typical drawbacks of so-called “rainbow” community stations is the limited amount of airtime available to each minority group. Temporal restrictions impose editorial prioritisation, which more often than not result in preference being given to (local) news, chat shows, items on culture, religion, language (depending on the predominant interests of the group) and music.<sup>85</sup> Given the (predictable) prioritisation of what is perceived as staple content, there is little scope for more creative programming or diversity of genres and formats. Another conceivable drawback of such stations is the likelihood that the communicative process will not reach beyond members of the group itself. The wider public will not, for instance, gain exposure to the broadcasts by virtue of their transmission on a mainstream channel, thereby limiting the potential for inter-cultural communication.

Another version of public access stations worth mentioning is the *närradio* (“nearby radio”), developed in Denmark, Norway and Sweden.<sup>86</sup> Under these schemes (which appear to work well in practice), any group or association may apply to use low-power transmitters (located throughout the countries in question) to broadcast their own programmes.<sup>87</sup> A couple of practical problems associated with the system ought to be mentioned. First, the limited reach of the signals emitted by the transmitters means that the service is only suitable for groups whose members live within a narrow radius of the transmitter, eg. in urban areas. Second, “the program schedule for any given transmitter may be full in the more popular broadcast hours, so newcomers might have to settle for the early morning hours”.<sup>88</sup>

As noted in the Guidelines on the use of Minority Languages in the Broadcast Media:

States should consider providing “open channels” – i.e. program transmission facilities, which use the same frequency, shared by a number of linguistic groups within the service area – where there are technical limitations on the number of frequencies available and/or groups that do not have sufficient resources to sustain their own services.<sup>89</sup>

### **8.3 Access rights for minorities under FCNM and ECRML**

#### **8.3.1 Factors affecting minorities’ access to the media: FCNM**

A number of factors tend to influence minorities’ access to the media, particularly in their own languages,<sup>90</sup> including:<sup>91</sup>

<sup>85</sup> See: Donald R. Browne, *Ethnic Minorities, Electronic Media and the Public Sphere* (Cresskill, New Jersey, Hampton Press, Inc., 2005), p. 167.

<sup>86</sup> See further: Donald R. Browne, *Ethnic Minorities, Electronic Media and the Public Sphere*, *op. cit.*, at 58 and 60.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*, p. 58.

<sup>89</sup> Section IV. Promotion of Minority Languages – A. Frequencies.

<sup>90</sup> For a more detailed analysis, see: Tarlach McGonagle, Bethany Davis Noll & Monroe Price, Eds., *Minority-language related broadcasting and legislation in the OSCE*, Study commissioned by the OSCE High Commissioner on National Minorities (Programme in Comparative Media Law and Policy (PCMLP), University of Oxford & the Institute for Information Law (IViR), University of Amsterdam, 2003), especially the section entitled ‘Overview’, pp. 1-31. The Overview points out which factors are of relevance in which countries. This study is available online at: <http://www.ivir.nl/index-english.html>.

<sup>91</sup> Some of the factors listed here apply exclusively or almost exclusively to the broadcast media – they are denoted by asterisks. The discussion of the enumerated factors is consciously weighted in favour of the broadcast

- Linguistic topography
- Official recognition of minorities/languages
- Market sustainability
- Licensing of broadcasters (\*)
- Regulation of broadcasting output (\*)
- Transfrontier dimension
- Temporal and qualitative criteria (\*)
- Facilitative measures

In practice, these factors tend to ebb and flow into one another through tentatively-drawn definitional demarcations, and thereby defy neat categorisation. Nevertheless, it is useful to examine the influence they can wield over access to the various stages of the printing/broadcasting process. As will now be discussed in greater detail, the Advisory Committee on the FCNM has been alert to the importance of these factors in its Opinions.<sup>92</sup> These factors have implications for how the right to freedom of expression is exercised in practice because they connect in different ways with the fundamental characteristics or situational specificities of persons belonging to minorities, both of which are, as explained in Chapter 1, of direct relevance for their ability to exercise their right to freedom of expression in an effective manner.

### **8.3.1(i) Linguistic topography**

The linguistic topography of a State is as it is. It has inevitably been shaped by myriad historical, geographical, demographic, political, economic, sociological, cultural, religious and other influences. So, it is easiest simply to concede that “it is what it is” and deal with the reality at hand. More often than not, States are multilingual rather than monolingual, but this term, “multilingualism”, is - of course - capable of having endless shades of meaning. It is how a State chooses to deal with its linguistic make-up that is crucial.

### **8.3.1(ii) Official recognition of minorities/languages**

The recognition of some minorities/languages, but not of others, either by constitutional or legislative means, or even as a general principle of public policy, can have very practical and concrete consequences, for instance, for the distribution of the allocative resources of the State. To what extent should issues such as the numerical strength,<sup>93</sup> the geographical concentration, the internal organisational structures or the lobbying initiatives of minorities or linguistic minorities influence the distribution of a State’s available financial resources? Express recognition does not necessarily have to be more effective than tacit, assumed or *de facto* recognition. Nor does recognition (of any kind) offer any guarantee of preferable or even adequate measures to further the use of minority languages in broadcasting. Conversely,

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- as opposed to print - media as the former tend to have to operate in an environment that is comparatively more complicated in terms of regulatory permutations and combinations and technological considerations.

<sup>92</sup> For stylistic reasons, and especially to ease the task of the reader, a selection of examples of the Advisory Committee’s consideration of these factors intersperse the more general analysis of the same.

<sup>93</sup> This is one key aspect of a broader question which has been referred to as “Problems of Numbers”: see John Packer, “Problems in Defining Minorities”, in Deirdre Fottrell & Bill Bowring, Eds., *Minority and Group Rights in the New Millennium* (The Hague, M. Nijhoff Publishers, 1999), pp. 223-273, at p.260.

though, non-recognition does not – of itself - preclude the adoption of effective measures in this regard. The Advisory Committee has homed in on the need for equality in the distribution of available resources, as exemplified by the following pronouncement:

“The Advisory Committee is concerned, however, at the uneven distribution of resources, concerning both television and radio programmes, among the various minorities. It considers the present situation problematic, since one of the main minorities, the Roma community, seems to have far less airtime than the others, particularly for programmes in its own language. Some programmes for Roma also appear to have been dropped. It is therefore important that the authorities look into this matter, and try to revise the balance - but without cutting airtime for other minorities.”<sup>94</sup>

### **8.3.1(iii) Market sustainability**

This topic requires little elaboration. Nowadays, the media have to operate in an increasingly competitive and commercialised environment. This is especially true of the broadcasting sector. In consequence, the need to boost audience shares is growing steadily as a driver of broadcasting policy. Public service broadcasters (PSBs) are also willy-nilly caught up in this vortex, despite the specificity of their mandate. The stark reality is that minority-interest programmes (and especially minority-interest programmes in “less prevalent (national or regional) languages”<sup>95</sup>) almost never command large audience shares. This can have adverse effects on advertising revenues, which in turn can lead to a general reluctance to broadcast minority-language programmes, particularly at peak viewing/listening times. In such an inhospitable climate, a persuasive case can be made for contemplating prescriptive regulation; financial stimulation; administrative relaxation (see further, ‘Facilitative measures’, *infra*), all with a view to adequately catering for the needs and interests of persons belonging to national minorities. As noted by the Advisory Committee:

“[...] In so far as the national minorities encounter difficulties in financing their publications, the Advisory Committee urges the authorities to increase the relevant State support and to pay particular attention to the numerically smaller minorities, who do not have sufficient resources to sustain their publications.”<sup>96</sup>

### **8.3.1(iv) Licensing of broadcasters**

Licensing is a regulatory tool and sometimes a licensing/regulatory authority can be expressly ascribed the task of upholding freedom of expression, diversity, pluralism, the public interest and other key values in broadcasting. The principles of licensing may have to reflect these preoccupations, or even to stimulate programming for minorities. Such goals can be pursued by adopting and implementing distinct licensing policies for different types of broadcasting.

Responsiveness to the needs and interests of the target community is a standard feature of the licensing regime in many States. An ability to add to existing diversity in the broadcasting sphere can be a criterion affecting the licensing process. The likely benefits for the development of cultures of ethnic and other minorities can also be considered.

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<sup>94</sup> Advisory Committee Opinion on Romania, adopted on 6 April 2001, para. 46.

<sup>95</sup> Bruno de Witte, “Surviving in Babel? Language Rights and European Integration”, in Yoram Dinstein & Mala Tabory, Eds., *The Protection of Minorities and Human Rights* (Dordrecht, Martinus Nijhoff, 1992), pp. 277-300, at p. 299.

<sup>96</sup> Advisory Committee Opinion on Lithuania, 21 February 2003, para. 52.

Insofar as it is employed as a licensing criterion, preference for the use of a particular language can be an advance specification for a public tender. Otherwise, linguistic commitments can be agreed upon and formalised in an individualised manner, and later become binding, for example, by their incorporation into a broadcaster's *cahier des charges*.

It should also be noted that the promotion of the official/State language is often encountered as one of the stated goals of the licensing process. Again, the Advisory Committee has shown keen awareness of the interplay between such a goal and other relevant issues:

“[...] While recognising that the Russian Federation can legitimately demand broadcasting licensing of broadcasting enterprises and that the need to promote the state language can be one of the factors to be taken into account in that context, the said article appears to be overly restrictive as it implies an overall exclusion of the use of the languages of national minorities in federal radio and TV broadcasting. The Advisory Committee considers that such an *a priori* exclusion is not compatible with Article 9 of the Framework Convention, bearing in mind, *inter alia*, the size of the population concerned and the fact that a large number of persons belonging to national minorities are dispersed and reside within several subjects of the federation.”<sup>97</sup>

A quick addendum to this consideration of licensing would do well to focus on the *prima facie* neutrality of the licensing system. Groups using less prevalent/dominant languages typically lack the financial and technological resources which would allow them to meet the – seemingly neutral and egalitarian – licensing specifications. Always of relevance, this gap between theoretical equality and effective equality is more acute in some States than in others.

### **8.3.1(v) Regulation of broadcasting output**

#### **8.3.1(v)(a) Broadcasting in general**

##### *Promotion of official/State language(s)*

A recurrent feature of language regulation in broadcasting is the goal of promoting the official/State language. The legitimacy of such a goal (often to promote national identity, social cohesion, etc.) is unlikely to be challenged (*inter alia* because it is widely considered to fall under the margin of appreciation doctrine), as long as it is tempered, proportionate and non-discriminatory in its design or effects. However, sometimes the goal of promoting a particular language is pursued with such zeal that the relevant provisions insist upon the mandatory use of the official/State language, or its high-mandatory use. Such zealous approaches are a cause of grave concern.

In most of the States where provision is made for the mandatory use/promotion of the official/State language, limited exceptions are countenanced by relevant legislation, thus significantly mitigating the effect such provisions would otherwise have. Commonly, such exceptions include: programmes intended for minorities; educational or foreign-language programmes; musical programmes; live broadcasts from abroad, and translation requirements.<sup>98</sup>

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<sup>97</sup> Advisory Committee Opinion on the Russian Federation, 13 September 2002, para. 76.

<sup>98</sup> See further, the ‘Overview’ in *Minority-language related broadcasting and legislation in the OSCE*, *op. cit.*, pp. 14-17.

It is obviously a constant concern that translation requirements (i) do not entail excessive financial, administrative or practical burdens for broadcasters operating in minority languages, and (ii) can be implemented in a flexible manner (i.e., choice of technique). This concern has not escaped the attention of the Advisory Committee either:

“[...] The Advisory Committee agrees that it is often advisable, and fully in the spirit of the Framework Convention, to accompany minority language broadcasting with sub-titles in the state language. However, the Advisory Committee considers that, as far as private broadcasting is concerned, this goal should be principally pursued through incentive-based, voluntary methods, and that the imposition of a rigid translation requirement mars the implementation of Article 9 of the Framework Convention by causing undue difficulties for persons belonging to a national minority in their efforts to create their own media [...]”<sup>99</sup>

While translation requirements are often perceived in a negative light, they need not necessarily be a limiting factor. For example, subtitling practices, coupled with the use of modern technology, can facilitate the simultaneous reception of programmes in several languages.

General prescriptions requiring that a “reasonable”, “significant” or “main part” or “considerable proportion” of programmes be in a given language are commonplace. More specific (i.e., percentaged) provisions or quotas are also frequently encountered and these can vary greatly from country to country.<sup>100</sup> Of course, the key concern here is to determine – in light of all relevant circumstances – the cut-off point at which a prescription favouring the use of one language begins to become a restriction on the use of others. This is quite an instrumentalist approach to the question of language-choice. As has been cogently argued by one commentator: “Restricting the use of certain languages simply cuts off potential audiences or makes it more difficult to reach them, and that harms one of the core interests underlying freedom of expression on any plausible account.”<sup>101</sup> The Advisory Committee is again clearly attuned to such concerns:

“[...] The Advisory Committee considers that, bearing in mind its implications for persons belonging to national minorities and the fact that excessive quotas may impair the implementation of the rights contained in Article 9 of Framework Convention, this practice needs to be implemented with caution. Furthermore, it would need to be rooted in a more precise legislative basis than what is contained in the above-quoted provision [...]”<sup>102</sup>

### *Promotion of minority languages*

In a number of States, provisions for the use of minority languages in broadcasting are styled as the obverse of provisions for official/State languages. Where specific obligations concerning minority languages do not exist, another frequently-exploited way of pursuing the same goal is the existence of provisions for the promotion of minority cultures or (general) interests. Although some States lack statutory provisions for the use of minority languages in broadcasting which are applicable across the board, it can be deceptive not to examine other contextual considerations thoroughly. Legislative provisions may only apply to certain

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<sup>99</sup> Advisory Committee Opinion on Estonia, adopted on 14 September 2001, para. 38.

<sup>100</sup> For a more detailed analysis, the reader is referred once again to the ‘Overview’ in *Minority-language related broadcasting and legislation in the OSCE*, *op. cit.*: see, in particular, pp. 13-14.

<sup>101</sup> Leslie Green, “Freedom of Expression and Choice of Language”, in W.J. Waluchow, Ed., *Free Expression: Essays in Law and Philosophy* (Oxford, Clarendon Press, 1994), pp. 135-152, at p. 144.

<sup>102</sup> Advisory Committee Opinion on Ukraine, 1 March 2002, para. 46.

designated broadcasters (PSBs, for instance) or at certain (geographical) levels. Furthermore, legislative provisions may serve to affirm opportunities rather than stipulate prescriptions in concrete terms. Having said all that, legislation in a number of States does require broadcasters in general to provide for minority-language broadcasting (or at least for the languages of certain minorities (as defined by law)).

### **8.3.1(v)(b) Public service broadcasting**

The playwright Arthur Miller once remarked that a good newspaper is a nation talking to itself. By analogy, so too is a good PSB, which is arguably a more obvious vehicle for the advancement of socio-cultural and linguistic objectives than other types of broadcasters. This argument grows from traditional perceptions and expectations of PSBs, including that they would: deliver quality of services and output; boast general geographical availability; provide a wide range and variety of programmes and show concern for national *and* minority identities and cultures. The last-listed expectation is crucial. It demonstrates very clearly that PSBs have to tread a very fine line by trying to satisfy majority and minority sections of the population simultaneously. This is also true of the linguistic demands and preferences of any population. The challenge is therefore to provide general programming in mutually comprehensible languages so that inter-community communication can be safeguarded, while also catering for the extant linguistic specificities in society to the greatest extent possible.

As with the regulation of broadcasting in general, the language obligations on PSBs are also twofold: the official/State language and other languages. The focus here will be on the latter. General PSB obligations to ensure programming in various languages exist in some States, while elsewhere, the practice has been developed to a limited degree without it actually being required by law. Specific prescriptions exist in a number of States too: as determined by boards of directors; in temporal terms; in quantitative terms; dedicated channels; well-established practices of non-State languages being used. Also of relevance here are general requirements that PSBs must devote specified amounts or percentages of their broadcast time to minority groups, without any linguistic stipulations being applicable. While this approach does not preclude some of the available time being used for programming in minority languages, it has the advantage of showing greater deference to the editorial autonomy of those making use of the slots.

### **8.3.1(vi) Transfrontier dimension**

For reasons of geographical proximity; cultural affinity; ethnic dispersity; the hard facts of recent history or economic realities (if not to say vulnerabilities), or any combination of the above, bilateral agreements and cooperative initiatives can play a hugely significant role in securing access to the media, especially in relevant languages. Examples of bilateral agreements which are general in character and contain sections on broadcasting are legion. Aside from such general treaties, States also adopt bilateral treaties specifically on broadcasting. In a number of countries, according to available means, technology is being harnessed in order to enhance transfrontier broadcasting targeting minorities.

All of this is built on the premise that the ability to receive broadcasting from abroad should not obviate the need or responsibility for States to keep their own houses in order as regards the fostering of domestic (minority-language) broadcasting. Concern must also attach to any

attempts by States to impose restrictions on the reception of broadcasts from other States (either from specific States or generally). In the words of the Advisory Committee:

“[...] The Advisory Committee [...] considers that availability of such programmes from neighbouring states does not obviate the necessity for ensuring programming on domestic issues concerning national minorities and programming in minority languages.”<sup>103</sup>

### **8.3.1(vii) Temporal and qualitative criteria**

What is crucial here is ensuring a satisfactory response to the “needs and interests” of the target audience. Some States have made legislative provision for programming (i) catering for the needs and interests of persons belonging to national minorities, and (ii) in the languages of persons belonging to national minorities, to be broadcast at certain times. Less specific provisions have been adopted elsewhere, but share the same aim: for example, where a “fair balance” has to be struck between minority groups/languages, including in the allocation of broadcasting slots.

### **8.3.1(viii) Facilitative measures**

A consideration of measures that promote access to, and the use of minority languages in, broadcasting is a problem-solving exercise; an invitation to think outside the box. Put briefly, it is the search for best practices, forward-looking and often experimental initiatives.

The representation of minorities in general and linguistic minorities in particular, on relevant authorities and decision-making bodies greatly enhances the development of policies and norms which cater for their needs and interests. Active, or better still, pro-active consultation with such groups by the relevant authorities and decision-making bodies is another way of pursuing the same goal. As such, these practices can be perceived as outgrowths of more general democratic principles. Perhaps the best relevant paradigm is that elaborated by Karol Jakubowicz: “representative participatory communicative democracy”.<sup>104</sup> This involves the application of principles of participatory democracy to broadcasting (structures). The basic idea is that while not every individual member of a group can actually broadcast, the organisational structures of the broadcasting entity should strive to facilitate maximum participation by all members in influencing policies and fixing goals.

There are only very sporadic examples of broadcasting authorities incorporating concern for minority language interests into their structures (eg. by means of the appointment of a minority language officer or committee); more common are provisions guaranteeing general representation for persons belonging to national minorities in their composition. Ensuring the

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<sup>103</sup> Advisory Committee Opinion on Albania, 12 September 2002, para. 50. See also: “[...] the Advisory Committee underlines that the availability of foreign broadcasting in Estonia in a language of a national minority does not eradicate the need for, and importance of, domestically produced broadcasting in that language.” - Advisory Committee Opinion on Estonia, *op. cit.*, para. 37.

<sup>104</sup> Karol Jakubowicz, “Access to the Media and Democratic Communication: Theory and Practice in Central and Eastern Europe”, in András Sajó, Ed., *Rights of Access to the Media* (The Hague, Kluwer Law International, 1996), pp. 139-163, at p. 145.

meaningful involvement of persons belonging to national minorities in the various stages of the legislative process<sup>105</sup> is also a priority concern:

“[...] the Advisory Committee encourages the authorities to take account of the needs of persons belonging to national minorities when preparing and adopting this legislation. In its view, the Government should consult with national minority representatives in order to ensure that any support it provides will be sufficient to meet the needs and to strike an appropriate balance among the various national minorities in terms of media access and presence [...]”<sup>106</sup>

In some States, language advisory councils have been established within PSB structures. In others, PSB audience councils, programming councils and advisory committees perform more general advisory roles, often as regards regional or local programming or programme schedules. It is interesting to compare the variety of approaches adopted by such advisory organs in different countries and to consider the extent to which they actively liaise with relevant audiences, including national minorities. The Advisory Committee has also considered relevant issues:

“[...] It notes that the absence of such programmes is explained by the fact that no request to that effect was ever made, but points out that a formal request to that effect is not a legal precondition for considering the implementation of such a facility [...]”<sup>107</sup>

Notions of social and special-interest broadcasting can, when properly calibrated and applied, play an instrumental role in the promotion of minority languages in broadcasting. This concept is recognised in a number of countries and it leads to particular regimes applying to types of broadcasting dedicated to fulfilling specific societal missions or meeting stated niche interests (including those of linguistic minorities).

Another variant on this theme concerns special treatment for particular genres of broadcasters in terms of access to infrastructure and technology that would ordinarily be beyond their financial reach. It is fairly typical for such practices to involve the sharing of channels and frequencies between broadcasters in order to defray start-up and operational costs. They can also involve the hosting of minority-interest broadcast output by established broadcasters. A rich mine of potential could be tapped into here:

“[...] The Advisory Committee also notes that digital, cable and satellite broadcasting will bring with it new and further possibilities for meeting demands. Encouragement should be given to opening up broadcasting further to national minorities, using for example opportunities offered by the implementation of new technologies.”<sup>108</sup>

The aforementioned study, *Minority-language related broadcasting and legislation in the OSCE*, also documents the vast array of other measures that could broadly be categorised as facilitative of (i) improving access to broadcasting for persons belonging to national minorities, and (ii) the use of minority languages in broadcasting. These include flexible and favourable financing schemes and fiscal regimes and the placing of firm emphasis on capacity-building; a notion of wide embrace which could include ensuring greater support for the education and training – in their own languages – of (i) students of journalism and (ii)

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<sup>105</sup> A number of definitions for co-regulation exist. Loosely put, it is a practice which involves both traditional law-makers and interested parties/representatives of civil society in the regulatory process. See further, *Co-Regulation of the Media in Europe, IRIS Special* (Strasbourg, the European Audiovisual Observatory, 2003).

<sup>106</sup> Advisory Committee Opinion on Armenia, 16 May 2002, para. 54.

<sup>107</sup> Advisory Committee Opinion on Denmark, adopted on 22 September 2000, para. 30.

<sup>108</sup> Advisory Committee Opinion on the United Kingdom, adopted on 30 November 2001, para. 69.

media professionals. The promotion of programme production and distribution can also make an important contribution to the creation of a healthier climate in which the goal of (qualitatively and quantitatively) increased broadcasting by and for persons belonging to national minorities, including in minority languages, can be achieved. Needless to say, the above all rings true for publications which share the same objectives as their audiovisual counterparts.

Finally, it should also be noted in passing that language policy documents are becoming increasingly commonplace; plotting future courses of action; devising development strategies; pursuing progress... or not. This observation is of relevance to the extent that States' language policies help to shape the matrix in which broadcasting and publishing in minority languages takes place, even when the theory and practice are out of sync with one another.

## **Conclusion**

One cannot but help feeling that "access to the media" has become something of a stock phrase, the utility of which matches the vagueness that encompasses a number of specific concerns and contexts. Whatever benefits are likely to be gained by frequently relying on a sloganistic phrase of such broad compass, there is a danger that longer-term analytical aims will be compromised. This danger could be averted or reduced if the term were to be systematically linked back to more probing and contextualised analysis by the Advisory Committee.

### **8.3.2 Factors affecting minorities' access to the media: ECRML**

#### **8.3.2(i) Official recognition of languages**

The official recognition of languages can be of both practical and symbolic importance and the Committee of Experts has, on a number of occasions, been confronted with uncertainties as to the status of languages/dialects and the nature of their recognition by States authorities. The status of the Kven language in Norway is a case in point. The Committee called for clarification of its status because, as it put it: "The Norwegian authorities seem, on the one hand, to acknowledge the Kven as a national minority, but on the other hand, not to take a stand as to whether the Kven language is a separate language from Finnish".<sup>109</sup> The acknowledgement of Kven as a separate language would, in the Committee's opinion, "probably facilitate the formulation of structured proposals for concrete measures".<sup>110</sup>

Without wishing to detract from the validity of the probabilistic assumption made by the Committee of Experts in respect of the benefits that would accrue from official recognition of the Kven language, the importance of official recognition for minority groups as groups should not be downplayed. Such recognition can constitute a constitutional or legislative basis for a range of participatory and other rights and entitlements. For example, it can lead to guarantees of representation in national councils for minorities, which must be consulted on all law- and policy-making initiatives that are of relevance to persons belonging to minorities.

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<sup>109</sup> First Report on Norway, Finding D.

<sup>110</sup> *Ibid.*

Uncertainty about the status of a language can arise from its degree of distinctiveness, both in relation to other languages or in relation to dialects. In this vein, the Committee of Experts notes, but does not adopt a position on, a curious anomaly concerning the application of the Charter in the Netherlands. Whereas the Dutch authorities have recognised the position of Limburgish as a language under the Charter, the Dutch Language Union (*Taalunie*) recognises Limburgish only as a dialect and not as a language, as such. As noted *supra*, different benefits tend to flow from different statuses, but the criteria for distinguishing between languages and dialects are generally political as well as socio-linguistic. As one commentator famously quipped, a language “is a dialect that has an army and navy”.<sup>111</sup> The Committee of Experts has shown itself to be acutely aware of relevant complexities:

Where there exists a linguistic continuum with persons in adjacent territories speaking variants similar to one another, the distinction between a language and a dialect can be a difficult question. It involves not only the linguistic criterion, but also often political, social, cultural and historical criteria.<sup>112</sup>

A final relevant consideration is the extent to which particular languages are moribund. The importance of the distinction between living and dead languages is self-evident, but nevertheless contentious.<sup>113</sup>

### **8.3.2 (ii) Active access to media**

In respect of Croatia, the Committee found that a “major drawback to the application of the Charter” in respect of media and culture is the “lack of participation by the users or representatives of the regional or minority languages in the organization, planning and funding of activities in this field”.<sup>114</sup> This finding is perspicacious because the distinct references to the organisational, planning and funding levels reflect an awareness of the different kinds of impact that participation can have at each of those levels. The strength of this finding therefore lies in its differentiation.

On other occasions, the Committee has focused on particular forms of participation and access. For instance, in respect of Cyprus, it has welcomed as a “form of *direct* participation” (emphasis added), the presentation of Armenian and Maronite programmes by members of the respective communities and the negotiation of the content of the programmes with CyBC.<sup>115</sup>

The importance of linguistic representation on PSB boards has also been acknowledged in the context of existing provisions for the same in several countries.<sup>116</sup>

The foregoing examples reveal that the ECRML does contain considerable potential for promoting the participatory rights of speakers of regional or minority languages in the media sector. However, this potential is subject to the inherent limitations of the Charter itself. As noted by the Committee of Experts in the analogous context of using regional or minority languages in dealings with States authorities:

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<sup>111</sup> Max Weinreich, cited in John Edwards, *Multilingualism* (Routledge, London and New York, 1994), at p. 24.

<sup>112</sup> First Report on Sweden, para. 31.

<sup>113</sup> For example, the Committee of Experts noted that the extent to which Skolt Sami is still a living language is unclear: Third Report on Norway, para. 12.

<sup>114</sup> First Report on Croatia, Finding E; see also: Second Report on Croatia, Recommendation 3.

<sup>115</sup> First Report on Cyprus, para. 77.

<sup>116</sup> Slovenia, paras. 144, 219; Croatia (Second Report), para. 180; Finland (Second Report), para. 152.

[...] Although the Charter can help regional or minority language speakers who have difficulty in communicating with authorities, its principal objective is to give regional or minority languages themselves a public dimension through their use in official situations, which confers an increased legitimacy on these languages. [...] <sup>117</sup>

### **8.3.2(iii) Market sustainability**

The Committee of Experts has urged States authorities to make greater use of existing financial support schemes and legal regulations that allow for promoting the use of regional or minority languages in the media. It considers that such measures do not constitute “undue interference with editorial freedom” and that they should be relied on more extensively. <sup>118</sup> The Committee has also pointed out that although “Frisian radio and television are put on an equal footing with the Dutch language radio and television in other regions of the Netherlands”, “The extra cost of broadcasting in Frisian is not therefore taken into account in the allocation of subsidies”. <sup>119</sup>

### **8.3.2(iv) Facilitative measures**

On a number of occasions, the Committee has recommended training for journalists in regional or minority languages. <sup>120</sup>

Given that the ECRML is centrally concerned with the preservation of regional or minority languages, many of which are in situations of considerable precarity, it is not surprising that factors influencing linguistic survival are regularly assessed. This is more explicit than under the FCNM. For instance, public perceptions of regional or minority languages and the social prestige which they enjoy are a recurrent concern of the Committee of Experts. Prominent usage in the media, especially television, can “enhance considerably” the “social prestige” of a regional or minority language and thereby be “a crucial factor” for its protection and promotion. <sup>121</sup> More specifically, the Committee has pointed out that the use of a regional or minority language in the media can contribute to “making it a modern language and [encouraging] young people to learn and speak it”. <sup>122</sup> The Committee has also noted other ways for improving the prestige of regional or minority languages, such as their inclusion in the cultural component of national foreign policies. Thus, the Committee was critical of the omission of Frisian language and culture from the “Dutch cultural policy abroad”. <sup>123</sup>

### *Role of the Committee of Ministers*

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<sup>117</sup> First Report on Denmark, Finding J.

<sup>118</sup> See, for example, Report of the Committee of Experts on the Charter on the application of the Charter in Germany, 4 December 2002, Finding N.

<sup>119</sup> Report of the Committee of Experts on the Charter on the application of the Charter in the Netherlands, 9 February 2001, Finding B. It should be noted, however, that in their Comments on the Report, the Dutch authorities subsequently pointed out that this situation had been addressed by an amendment of the Media Act in September 2000 which makes regional broadcasters as well as national public broadcasting eligible for funding to promote Dutch cultural radio and television broadcasting productions (Appendix II to Report).

<sup>120</sup> See, for example: Report on Hungary; Report on Switzerland, Finding E; ...

<sup>121</sup> Second Report on Switzerland, para. 118. The Committee of Experts follows up on this point in its Findings in the same report, reiterating that “the presence of a regional or minority language on television is of the utmost importance for its maintenance in modern societies” – Finding G.

<sup>122</sup> Second Report on the Netherlands, Finding H.

<sup>123</sup> Second Report on the Netherlands, Finding I.

The Committee of Ministers plays a similarly important role in the monitoring of the ECRML to the role it plays in the monitoring of the FCNM, detailed *supra*. Its country-specific Recommendations certainly have the potential to give the findings of the Committee of Experts a valuable political imprimatur.<sup>124</sup> In practice, this potential has not been optimally exploited. As noted in respect of the CM's country-specific Resolutions concerning the application of the FCNM, the texts adopted by the CM are by their nature much more summary and essentialist than the more detailed, discursive reports drafted by the AC or Committee of Experts. Their function is not to provide explanatory detail but to emphasise priorities in a way that purports to be politically meaningful.

Notwithstanding these qualifications, the overall impact of the CM's Recommendations has been disappointing. They are, in general, even less detailed than the CM's Resolutions concerning the FCNM. Five of the 16 Recommendations adopted on the basis of first Periodical State Reports<sup>125</sup> and three of the 10 Recommendations adopted on the basis of second Periodical State Reports,<sup>126</sup> lacked any media-specific recommendations. In those Recommendations in which media-specific measures were urged, they were often vague or sloganistic or reworded versions of obligations to which the State Party in question had already committed itself.<sup>127</sup> As such, they have done little to raise general levels of understanding of the nature of States' obligations regarding the media under the Charter, let alone advance their implementation.

By way of illustration, the recommendations have tended to focus on "measures" (or even "concrete measures"<sup>128</sup>) "to improve the presence of" specific languages on radio and television, without specifying what type of [concrete] measures or what types of broadcasting.<sup>129</sup> The CM has also, on other occasions, called on States authorities to "take a more active approach towards promoting the presence of the regional or minority languages in the media" and to adopt a "structured approach"<sup>130</sup> or a "more structured policy"<sup>131</sup> for protecting and promoting the use of specific regional or minority languages in the media. Again, due to their generalistic formulation, such recommendations are of limited practical value. Similarly, the CM has recommended that State authorities "increase" radio and television broadcasting in specific languages, again without clarifying crucial aspects of its recommendation.<sup>132</sup> Granted, the Committee of Ministers cannot be too directional in its recommendations for fear of overstepping its mandate and leaving itself open to accusations of interventionism. However, the trouble with recommendations such as these is that they are too open-ended to press States towards targeted action to remedy the identified shortcomings in the way they have been discharging relevant obligations under the Charter. Calls for "resolute action", for instance, on the Swiss authorities "to improve the provision for

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<sup>124</sup> CM Recommendations on Hungary (on basis of second and third reports) – ability to receive broadcasts on ordinary radio sets, suitability of frequencies on which programmes are broadcast – very usefully picking up on and reinforcing strong message sent out in Committee of Experts' reports.

<sup>125</sup> Cyprus, Hungary, Norway, Slovenia and Switzerland.

<sup>126</sup> The Netherlands, Norway and Slovenia.

<sup>127</sup> Denmark (on basis of first report), para. 5; Sweden (on basis of first report), para. 3, (on basis of second report), para. 6; United Kingdom (on basis of first report), para. 4.

<sup>128</sup> Finland (on basis of first report), para. 2. This recommendation was directed at increasing the presence of Sami within the media and called for "concrete measures" for "the creation of newspapers and the broadcasting of regular television programmes".

<sup>129</sup> Armenia (on basis of first report), para. 3.

<sup>130</sup> Spain (on basis of first report), para. 4.

<sup>131</sup> Denmark (on basis of first report), para. 1.

<sup>132</sup> Austria (on basis of first report), para. 6.

Romansh on television and radio in the private sector”,<sup>133</sup> are an improvement on the lame phrases adverted to *supra*, but only by virtue of their ability to convey a sense of urgency as to the need for State action.

Having said all that, there have been several examples of the Committee of Ministers rising above platitudes and hollow-sounding rhetoric to make more purposive recommendations. For instance, it recommended that the Croatian authorities:

create institutional mechanisms that encourage direct participation of the users of regional or minority languages in planning, funding and organising cultural activities and in the field of the mass media (on basis of first report – para. 3)

In respect of the Netherlands, the CM has urged the relevant national authorities to “take into account the special needs of broadcasting in Frisian and consider increasing its financial support”.<sup>134</sup>

### **8.3.3 New technology-driven challenges for the FCNM and ECRML**

As societies come to depend increasingly on new technologies for expressive and communicative purposes, the need for the public to have non-discriminatory, effective access to those technologies rises accordingly. Following this logic, it seems reasonable to countenance situations where the inability to access relevant technologies could impair the enjoyment of the right to receive and impart information and ideas. The digital divide is a major concern for many minority groups because such groups are regularly disadvantaged in socio-economic and political terms. Concerns relate to the use of relevant technologies both to receive and to impart information and ideas. When such disadvantages are suffered by persons belonging to national minorities, they can tend to compound their political disenfranchisement, social exclusion and inability to effectively exercise their right to freedom of expression. This explains relevant drives for universal access and the general facilitation of access to communications technologies at IGO and State levels.

A further, important aspect of burgeoning technologies concerns the requisite knowledge and skills to use them. This concern is often explored under the headings of media or Internet literacy.<sup>135</sup> One definition of media literacy is “the ability to access, understand and create communications in a variety of contexts”.<sup>136</sup> Again, there is good reason to fear that many members of minority groups will lack familiarity and know-how when it comes to the latest communications technologies. However, this need not always be the case: a recent OFCOM study revealed, *inter alia*, that “Overall in terms of usage and general competence, minority ethnic groups have somewhat higher levels of media literacy compared to the UK as a whole across the digital platforms”.<sup>137</sup>

More substantively, though, technological advances are ushering in some truly transformative changes to the media sector: increased reliance on “pull” (as opposed to “push”) technologies

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<sup>133</sup> Switzerland (on basis of second report), para. 4.

<sup>134</sup> – on basis of first report, para. 3.

<sup>135</sup> See, for example, the Council of Europe’s Internet Literacy Handbook (2004).

<sup>136</sup> This is the definition elaborated by the UK’s converged regulatory authority, OFCOM, after formal consultation with stakeholders.

<sup>137</sup> OFCOM, “Media Literacy Audit: Report on media literacy amongst adults from minority ethnic groups”, 3 April 2006, p. 5.

and the concomitant increase in audience choice; proliferation of opportunities to engage in unmediated mass communication; virtual elimination of traditional constraints on communication of temporal and spatial factors, etc. The growth of niche markets, the waning of public reliance on general interest intermediaries and the growing incidence of advance individual selection of news sources are all serving to insulate citizens from broader influences and ideas. These individualising trends in new forms of broadcasting also engender social fragmentation, by eroding the potential for shared experience through broadcasting. As Cass R. Sunstein has argued, “[W]ithout shared experiences, a heterogeneous society will have a much more difficult time in addressing social problems.”<sup>138</sup>

These issues are currently being examined by the Council of Europe’s Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN). The Report which forms the basis of this examination,<sup>139</sup> as well as its accompanying Comments,<sup>140</sup> provide valuable overviews of the nature of many of the technological advances that are prompting reconfigurations of relevant paradigms in broadcasting regulation and practice. As such, they provide a very useful basis for further analysis of the precise implications of such changes for minorities’ access to the media. Such further analysis would certainly be timely. Although originally uttered a few years ago (already), Beth Simone Noveck’s remark, “Though the future is digital, our thinking about regulation is analogue”,<sup>141</sup> retains a large degree of validity today, especially in the applied sphere of minority broadcasting regulation and practice.

Notwithstanding significant new technological opportunities, many of the familiar characteristics of existing media and regulatory and other factors influencing media activities, continue to be *de rigueur*. Moreover, the overarching framework of human rights and fundamental values remains unaltered. However, this should not in any way downplay the importance of technology-driven changes. Such changes merit careful examination in their own right, but also in terms of the adaptive strategies which they often engender in the more traditional media.<sup>142</sup> Thus, the continued relevance of many regulatory and other factors to minorities’ access to the media may themselves undergo qualitative changes and acquire new focuses of application. Participatory concerns, for example, are likely to shift to the elaboration of digital switch-over strategies, and concerns for visibility of media services are likely to shift to electronic programme guides (EPGs).

## Conclusions

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<sup>138</sup> Cass R. Sunstein, *Republic.com* (USA, Princeton University Press, 2001), p. 9. See further: Tarlach McGonagle, “Changing Aspects of Broadcasting: New Territory and New Challenges”, *IRIS plus*, Supplement to *IRIS – Legal Observations of the European Audiovisual Observatory*, 2001-10.

<sup>139</sup> Tom Moring, “Access of national minorities to the media: new challenges”, Report for the Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN), Council of Europe, Doc. No. DH-MIN(2006)015;

<sup>140</sup> Tarlach McGonagle, “Comments on the report on ‘Access of minorities to the media: new challenges’”, Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN), Council of Europe, Doc. No. DH-MIN(2006)016; Karol Jakubowicz, “Comments on the report on ‘Access of minorities to the media: new challenges’”, Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN), Council of Europe, Doc. No. DH-MIN(2006)017.

<sup>141</sup> Beth Simone Noveck, “Thinking Analogue About Digital Television? Bringing European Content Regulation Into The Information Age”, in Chris Marsden & Stefaan Verhulst, Eds., *Convergence in European Digital TV Regulation* (London, Blackstone Press Ltd., 1999), pp. 37-63 at 38.

<sup>142</sup> See further, Tom Moring,

The ability to exercise the right to freedom of expression effectively is very often contingent on having equitable access to viable expressive opportunities/fora. Nevertheless, the protection of the right to freedom of expression under international law does not, in its current state of development, guarantee any freedom of forum as such. Nor does it ordinarily extend to include an individual or group right of access to a particular means of expression or to particular media. Such a right could only be construed in specific and exceptional circumstances, eg. monopoly situations in the broadcasting sector or systemic, discriminatory obstacles to access.

Although access to the media primarily concerns the right to freedom of expression, its other key concerns include the right to non-discrimination/equality and the right to effective participation in public life. This means that an extremely powerful coalition of rights is brought to bear on the question of access to the media. Moreover, this is an area in which it is imperative that the interpretive approach to relevant rights is dynamic. Provisions in international law promoting access to the media, such as they are, were drafted in an earlier era and have been left in the slipstream of technological and societal developments since. As those texts were intended to be evolutive and bases for the further development of human rights, they must be interpreted so as to reflect the profound changes that communicative practices have undergone in the intervening period. Authoritative interpretive texts should urgently be updated in order to engage with these new communicative realities in a way that anticipates further development and change.

At this juncture, the analysis again insists on the usefulness of the concept of media functionality: in light of the technology-driven changes to communicative practices, it is timely to assess the functionality of traditional and new media/communications technologies, specifically from the perspective of persons belonging to minorities. Again, the unpacking of the media into different types of media is a necessary analytical step: new technological capacities have enabled the explosion – in terms of volume and diversity – of media types and formats. Each offers a different level of functionality to its users.

The notion of access must also be broken down into its possible component parts: it, too, has been rendered more complex and layered due to technological developments. Access can denote access to regulatory mechanisms, institutional structures of the media, editorial and management processes, production facilities, software codes, transmission facilities, airtime, column inches or screen spaces or (in a more passive sense) to content. These distinctions largely mirror the emphasis in Chapter 7 on the distinct importance of gauging media- and information-related pluralism/diversity at the levels of source/ownership, outlet and content. Differentiation between qualitatively different types of access is therefore essential for evaluating their effectiveness in relation to the right of freedom of expression of persons belonging to minorities.

This Chapter's survey of jurisprudence emanating from the European Court of Human Rights, in particular, reveals that the Court appears to under-appreciate the instrumentality of access rights in rendering the right to freedom of expression effective in practice. In specific cases in which access to particular media has been denied, the Court has accepted far too unquestioningly that the mere availability of alternative means of expression meant that there had been no infringement of Article 10, ECHR. The critical questions that the Court should have asked – and should always ask – are whether the alternative means of expression are truly accessible to relevant parties, and whether they constitute viable alternatives. In this latter connection, an assessment of the functionality of the alternative means of expression is

necessary: to what extent do the specific characteristics of the medium correspond to the specific communicative needs of the person seeking to exercise his/her right to freedom of expression? The alternative means of expression do not have to be identical to the means of expression to which access has been denied, but they should offer rough equivalence in terms of purpose, functionality and reach. Owing to the fundamental, compositional and situational characteristics of minority groups, it is harder to match the purposive features, functionality and reach of particular means of expression with groups' specific communicative needs. The above considerations should therefore be integrated more systematically into the monitoring of treaties such as the FCNM and the ECRML.

To date, the monitoring of both treaties has led to improved understandings of the importance of access to the media for persons belonging to minorities. It has done so by linking access to the advancement of cultural objectives, the promotion of pluralistic tolerance and a number of other goals. It has also done so by identifying a number of issues that tend to hinder access to the media in various ways. However, the different ramifications of access to the media – traditional and new – remains under-explored (although the general trend is gradually improving). The monitoring bodies' engagement with differentiated forms of access to various means of expression needs to become more thorough and more systematic than is presently the case. One of the commendable achievements of the monitoring of the FCNM and ECRML to date has been the elucidation of the content of the right to freedom of expression for persons belonging to minorities/speakers of regional or minority languages. This has also led to the elaboration of a valuable body of best practices. A more detailed and coherent approach to questions of media purpose, functionality and reach would greatly enhance the quality and accuracy of evaluations of whether the right to freedom of expression of persons belonging to minorities is effective in practice.