Minority rights and freedom of expression: a dynamic interface

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Summary and conclusions

Addressing the problématique

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

The third, and most challenging, prong to the central research question – the critical evaluation of standards – is all-important and will be the primary focus of these conclusions. Nevertheless, the importance of the first two components to the central research question should not be underestimated, owing to: (i) the disparate provisions of international standards that deal with relevant issues and the fact that they are binding on States to varying degrees; (ii) the multiplicity of contextualising factors that affect the framing and assessment of relevant international standards and how they are/ought to be interpreted - the interrelated character of all human rights; operative public values which shape the interpretive matrix; the relevance of media functionality and technological possibilities for the exercise of the right to freedom of expression in practice. This study expressly seeks to be theoretically informed and politically aware - an aim that necessarily leads to two further layers of contextualisation. All of these contextualising foci will feature recurrently in these conclusions.

Rights of persons belonging to minorities

Chapter 1 of this thesis begins by grouping and surveying the main rationales for the focus in international law on the protection of minority rights. In the interests of critical evaluation, it is important to consider the extent to which these rationales have informed the drafting and final wording of relevant international texts. The Chapter then examines the legal and political difficulties that explain why, to this day, no hard-and-fast definition of a "minority" has been enshrined in international law. It charts the development of the international protection of minority rights through focuses on the emergence of key texts and institutional developments. Drawing on each of these elements, it assesses the *status quo* and makes a number of recommendations for future progress in respect of the protection of minority rights.

As argued in Chapter 1, the specificity of minority rights is not that they are conceptually distinct from or additional to universal human rights; rather, their realisation implicates different, and often more extensive, State obligations. The specificity of minority rights is worth dwelling on – also here in the conclusions – because it is conceptually fundamental to this thesis.

One of the premises on which the concept of minority rights rests is that an overly individualistic approach to human rights protection can, in various respects, prove inadequate for guaranteeing the effective realisation of the human rights of persons belonging to minorities. The limitations of a system of protection of human rights that is exclusively

focused on individual rights are revealed by an examination of the most commonly invoked rationales for minority rights.

First, the most basic objective of minority rights is to ensure the existence and survival of minority groups *qua* groups (as opposed to their individual members). Second, minority rights are often regarded as an important mechanism for ensuring that the application of non-discrimination and equality provisions to persons belonging to minorities guarantee equality that is not merely formal but effective. This may necessitate specific measures in order to counteract "historical inequities" from which minority groups often suffer.[1] Such trends of injustice, traditional or established patterns of persecution and discrimination, engrained societal prejudice, and other socio-cultural, -economic and -political factors stemming from membership of a minority group can be more or less determinative of how a group is structured and situated *vis-à-vis* other groups in society. In turn, these structural considerations can affect the substance of rights and strategies for their protection. On such a reading, minority rights aim to approximate for persons belonging to minorities the circumstances (or "existential status"[2]) enjoyed by majority sections of the population. Thirdly and similarly, situational considerations arising from group membership can adversely affect the ability of members of a group to fully realise their individual right to cultural identity. The thickness of individual identity is a crucial notion for these purposes. This notion portrays identity not as simply innate, but as being shaped by a range of external influences, which often flow from group or societal associations.

A fourth principal rationale for minority rights recognises the importance of the group dimension to a range of individual rights. That recognition in no way presumes to affect the inalienability of individual human rights. Rather, it serves to stress the dual nature of minority rights or, in other words, their individual and collective dimensions. The symbiotic relationship between the individual and collective dimensions of minority rights is nicely illustrated by the example of linguistic rights. While the need for a right may be individual (eg. the right to use one's mother tongue), the exercise of the right can conceivably be collective and therefore dependent on interaction with others (eg. the ability to *effectively* use one's mother tongue). Cultural, participatory and associative rights also illustrate the inherent duality of minority rights. As a result of that duality, different strategies are required for the realisation of minority rights.

Despite these justifications for the protection of minority rights, the "fate of minorities" has suffered from congenital politicisation and prevarication. The consistent failure of international law-makers to forge a legally-recognised and -binding definition of a "minority" has merely exacerbated these congenital dispositions. The absence of a legally authoritative definition at the international level leaves the door open for subjective interpretations of the term at the national level. The erroneous – but prevalent – assumption that the official recognition of minority groups leads *ipso facto* to an obligation to guarantee a broad *corpus* of additional rights, or even to fuel the (latent) secessionist ambitions of minority groups, also explains the reluctance of many States to pursue the issue in international law-making fora. This fear is encapsulated in Heinrich Klebes' reference to "the spiral 'cultural autonomy, administrative autonomy, secession'".[3] As a general objection to minority rights, the

[1] *Bernard Ominayak and the Lubicon Lake Band v. Canada*, United Nations Human Rights Committee Communication No. 167/1984, adopted on 26 March 1990, para. 33.
[2] This term is central to Rolf Künnemann's analytical model of human rights – see further, *infra*.
[3] Heinrich Klebes, "The Council of Europe's Framework Convention for the Protection of National Minorities", 16 *Human Rights Law Journal* (No. 1-3, 1995) pp. 92- , at 96.

presumption of a (direct) causal connection between the recognition of minority groups by States and their ultimate secession from the States that recognise them, is flawed. Minority rights are in no way contingent on the prior recognition of discrete minority groups by State authorities. It has long been held under international law that the existence of a minority is not a matter of law, but of fact.[4] Nor can it be a matter of political discretion either.

For the purposes of international law, the term, "minority", is not simply a description of a group that is numerically inferior to the majority population in a given society and whose members share certain characteristics or interests. Rather, it is understood as a group which is numerically inferior and distinguished on the basis of certain shared, specified – i.e., ethnic, cultural, religious or linguistic – characteristics. Furthermore, members of the group must harbour a sense of solidarity directed towards the preservation of their culture, traditions, religion or language. This is the general thrust of approximate definitions of a minority in intergovernmental circles, but slight variations in the formula do tend to come to the fore from time to time. Although a definition has never been formally adopted in a legally-binding multilateral treaty, the so-called "Capotorti definition" remains a central reference point in relevant debates. Under this approach, a combination of objective and subjective criteria is applied for the recognition of minority groups. The relevance of this approximate definition is relatively unchallenged at the European level, although regional and national (European) approaches do place heavier insistence on "national" minorities.

An important upshot of the foregoing is that relevant discussions at the highest level are (implicitly) framed in terms of a relatively narrow range of (supposedly) constitutive characteristics of minorities. In this connection, it is important to resist any implicit suggestion that collective identities are largely static. Characteristics which are constitutive are fundamental but not necessarily fixed and are capable of undergoing natural evolution or concerted development. Emphasis on the salient shared characteristics ascribed to all group members must not overlook the internal differentiation within the group. Rich literature exists in sociology and in political science demonstrating the thickness of identities and how they are shaped by myriad influences, including those relating to group membership. Definitional approaches to minorities should explicitly embrace the richness of that literature and reflect the importance of fluidity in notions of identity (i.e., the ability of individual identity to respond (and adapt) to changing personal and societal circumstances), which is of increasing relevance as networking, globalising trends in contemporary society continue unabated.

A more disconcerting problem with the definitional approach sketched above is the inclusion of a nationality criterion. This definitional element requires the prior presence (of unspecified duration) of a minority in a State in order for it to be recognised as a minority. The position taken in Chapter 1 is that it is inappropriate for the recognition of minority rights to be made contingent on such unspecified temporal considerations. As long as a minority group satisfies the other definitional requirements, its minority status should be recognised accordingly. The length of time a minority has been present in a State could, however, be a relevant consideration when assessing the extent of State obligations towards the realisation of a particular minority group's specific needs. The question of classification of minorities (for the purpose of ascertaining their needs and the extent of State duties towards them) is a separate and subsequent question to the questions of definition and recognition. "New" minorities

[4] Advisory Opinion of the Permanent Court of International Justice (PCIJ) in the *Greco-Bulgarian "Communities"* case: Advisory Opinion No. 17, July 31, 1930, *Series B, No. 17, pp. 4 – 46*, at p. 22. See also the corroborating statement at p. 27: "it is incorrect to regard the "community" as a legal fiction existing solely by the operation of the laws of the country."

should therefore be included under relevant international standards of protection. This is the line that has been taken by the UN Human Rights Committee, but the question has proved divisive in numerous international fora. The highly politicised nature of the question should not detract from the imperative of securing human rights for everyone. The importance of an effective right to freedom of expression is very often most acute for "new" minorities, recent immigrants and non-citizens, who are otherwise politically disenfranchised and are generally excluded from expressive fora and participatory structures and processes in public life. These arguments explain this study's insistence on the inclusion of "new" minorities under relevant international standards of protection.

Pluralistic tolerance and relational aspects of rights

The co-existence of minorities with other societal groups means that their rights must be recognised and realised in a manner that reflects the realities of pluralistic society. As the terms "pluralism" and "tolerance" tend to be invoked in the preambular provisions of international treaties (as opposed to their operative provisions), the fullness of their respective meanings is under-appreciated. The exploration of the theoretical ramifications of pluralism and tolerance elucidates the content of each. Chapter 2 merges the complex concepts of pluralism and tolerance and develops the concept of "pluralistic tolerance", which it styles as an operative public value, *pace* Parekh. To style "pluralistic tolerance" as an operative public value is to insist that it is more than a guiding interpretive principle for human rights generally and minority rights in particular. It is to point to the need to operationalise the value of "pluralistic tolerance"; to incorporate it in regulatory, policy and institutional practice so that it is meaningfully applied. This approach logically implies the facilitation of expressive and dialogical fora. A key purpose of "pluralistic tolerance" is to protect the vigour of public debate and uphold the importance for democratic society of contestation and criticism that takes place within the limits of appropriate legal standards.

This thesis takes as its conceptual point of departure the universality, indivisibility, interdependence and inter-relatedness of human rights as affirmed, *inter alia*, in the Vienna Declaration (1993). Such an approach allows for the key focuses of the thesis – minority rights and freedom of expression – to be analysed not only in terms of their own intersectional aspects, but also in the broader context of their respective relationships with other human rights. This is important because it is more conducive to rounded and coherent reflection than an approach based on separate, particularised lines of enquiry. It allows for closer scrutiny of the abrasive and synergic aspects of the relationship between the right to freedom of expression, the rights of persons belonging to minorities and other rights, like those prioritised in Chapter 3: non-discrimination/equality, participation, education, culture, religion and language. The right to freedom of expression clearly intersects with the added value of the minority-specific dimension to each of these rights. The presumptive coherence of all human rights does not preclude the possibility that their actual interplay, in specific circumstances, could involve varying degrees of friction. This explains the importance of pluralistic tolerance as an operative public value and as a guiding interpretive principle. Pluralistic tolerance can be considered "comprehensive" when it is meaningfully applied across the whole spectrum of human rights, and protects the space for frictional interaction between rights without vitiating the rights of their content.

Freedom of expression

The right to freedom of expression rests on different theoretical bases with varying levels of complementarity. Chapter 4 demonstrates that each of the traditionally-invoked rationales for freedom of expression has clear relevance for minorities – both in terms of their individual members and of their viability as collectivities. The rationale of self-fulfilment is particularly important for minorities which are distinguishable from other sections of the population by virtue of their linguistic and/or cultural identity. Their individual and collective self-fulfilment is contingent on their ability to fully exercise their right to freedom of expression in their own language(s) in public and in private and also to articulate and thereby develop and shape their cultural identity. As such, freedom of expression is vital for the protection, consolidation, (inter-generational) transmission, development and promotion of minority languages and cultures. The other main rationales for freedom of expression can be loosely grouped together as advancing (i) the quest for truth/avoidance of error and (ii) participation in democratic society. Again, the ability to receive and impart information and ideas in minority languages can determine the effectiveness of minority participation in public life. Moreover, communicative interaction is imperative in (pluralistic) democratic society, for example, for the preservation and cultivation of inter-group understanding and tolerance. In light of the foregoing, it is necessary to explore the theories and practical modalities of achieving such inter-group harmony in some detail. Pluralistic tolerance in society is undergirded by information- and media-related pluralism.

The ability of persons belonging to minorities to exercise their right to freedom of expression in an effective manner is largely determined by the availability and suitability of expressive fora and media. In this connection, it is necessary to disaggregate the concept of mass media and to conduct specific analyses of particular media philosophies/practices (eg. public service broadcasting, community media, transnational media and commercial media) and their level of functionality for minorities. Different types of media correspond to varying degrees to the various but specific communicative needs and preferences of different minority groups in different situations. Degrees of media functionality are therefore crucial considerations in any assessment of whether the right to freedom of expression of persons belonging to minorities is exercised effectively by them in practice. This observation explains the centrality of media functionality to Chapter 4 in particular, but also to the thesis as a whole.

This analysis takes place against the background of the broader enabling environment for media freedom. In other words, the impact of regulation and regulatory policy on discrete media sectors, with particular emphasis on minorities, is evaluated. The analysis necessarily reckons with the advent of new media technologies (eg. increased convergence of media and increased reliance on user-generated content and the demise of general interest intermediaries) and new regulatory paradigms (eg. co-regulation), both of which have far-reaching implications for practices of communication and participation, including for persons belonging to minorities.

Mapping relevant international standards

The right to freedom of expression, as vouchsafed by international law, comprises a number of key components: the right to hold opinions and to seek, receive and impart information of all kinds regardless of frontiers. The full realisation of the right to freedom of expression necessarily involves different emphases on those individual components. Taken together, those components amount to more than the mere sum of their parts. They cover extremely

dynamic processes which typically involve not only speakers and listeners, but also, very often, third parties who are not directly targeted by particular instances of expression, but for whom that expression may nonetheless have implications. The rights – and interests – of persons seeking, imparting and receiving information and opinions, as well as those who are indirectly affected by the same, do not always coincide. While it is important to distinguish between these sometimes divergent and sometimes even conflicting rights and interests ordinarily, the need to do so increases when parties in question are persons belonging to minorities. The reason is that certain group-specific characteristics or situational realities can heavily influence whether or not the rights in question can be exercised effectively by members of the group and the nature and extent of State obligations to ensure that the rights are fully realisable for members of the group.

The range of State obligations to guarantee the right to freedom of expression for persons belonging to minorities implies both preventive and promotional strategies for the full realisation of the different components of the right. Chapter 5 argues that it is important to eschew a binary analytical framework dividing State obligations into the categories of "positive" and "negative", as the distinction between both categories is often fuzzy. It is tidier, conceptually, to view State obligations to respect, protect and fulfil human rights as corresponding to points along the continuum of so-called "negative" and "positive" State obligations. By using the tripartite typology of State obligations to respect, protect and fulfil rights, it is possible to apply greater analytical and evaluative nuance than under the negative/positive dichotomy. In practice, the tripartite typology has been used most extensively by the CESCR. By extrapolation from its application of the typology to economic, social and cultural rights, Chapter 5 identifies a number of programmatic measures that could/should readily be adopted by States authorities in order to guarantee the effective exercise of the right to freedom of expression by persons belonging to minorities. The requirement that States adopt such measures flows from their generic duty to secure human rights for everyone and also specific obligations entered into under specialised minority treaties such as the FCNM.

Whereas the modern international human rights regime is primarily individualistic in character, pertinent treaties and their enforcement/monitoring mechanisms also have the wherewithal to engage with the specific implications of membership of particular, discrete groups in society for the exercise of human rights by members of such groups. The engagement in question can be based on treaties or treaty provisions explicitly focusing on minorities, or derived from other treaties or treaty provisions that are more general in their orientation. Explicit treaties or treaty provisions do not necessarily guarantee more effective engagement with minority rights than the engagement provided for by treaties or treaty provisions that are more general in focus. Very often, the "minority-sensitivity" of the interpretation of relevant norms and the nature of the mechanisms for their implementation are determinant.

The great challenge for international adjudicative bodies is to develop doctrine exploring and elucidating minority rights, while one of the challenges for international treaty-monitoring bodies is to identify and map out best relevant standards at the national and sub-national levels with a view to bringing them to prominence and replicating them at the level of international standard-setting. These distinct roles should not be confused; court decisions are essentially declaratory and courts should not ordinarily be in the business of making policy recommendations.

Although standard-setting exercises by competent bodies can usefully fill the interstices of international treaty law and seek to spell out in greater detail the implications of a right for a variety of parties and in a variety of concrete situations, such exercises need to be conducted with greater circumspection than is often the case at present. When standards pertaining to a particular treaty are elaborated by a competent court or a designated monitoring body, those standards must respect their anchorage in precise treaty provisions. Any standard-setting that does not follow the procedures germane to formal treaty drafting and amendment is subject to inherent limitations. When standards are elaborated extraneously to (specific) treaties, they must nevertheless be mindful of the legal standards enshrined in relevant specific treaties, otherwise it is likely that a problematic hiatus will result between actual legal standards and popular (mis-)understandings of the same.

These concerns have already been raised in Chapter 6 in respect of departures from legally-recognised limitations on the right to freedom of expression. ICERD sits somewhat uneasily with other leading international human rights treaties as regards its engagement with the right to freedom of expression. The operative article in ICERD, Article 4, provides for restrictions on the right to freedom of expression that go beyond those set out in any other comparable treaty. Article 4 is a composite and convoluted article and is widely regarded as having been poorly drafted. Nevertheless, the mitigating influence of Article 5, ICERD, could make the situation workable, but only if CERD would relinquish its hitherto overly strict interpretation of State obligations under Article 4. Its "strict liability" approach to expression is unnuanced and in conflict with prevailing international standards on freedom of expression. It refuses *ab initio* to contextualise expression or to assess or quantify its (likely) harmful impact. Furthermore, CERD is also guilty of mis-applying the standards enshrined in ICERD, thereby further compounding uncertainty as to the precise scope of those standards. As revealed in Chapter 6, two of CERD's key General Recommendations misquote the offences created under Article 4 and thereby misrepresent the nature of the State obligation(s) in question. The consequences of these errors were quick to ripple into other influential fora, as other bodies did not notice the mistake and quoted it in their own texts (eg. the EU Network of Independent Experts on Fundamental Rights). ECRI, too, has not always been rigorous enough in its standard-setting work. It has also misquoted its own standard-setting work and willy-nilly downplayed the importance of freedom of expression.

Restricting expression in order to protect minorities

Under international law, the most fundamental obligation on States in respect of freedom of expression and the protection of minorities is to prohibit expression that incites to genocidal acts, racism or hatred against them. The types of incitement follow a general pattern, but their definitional contours are sketched differently in different treaties. Those contours tend to curve in the same direction, with the exception of ICERD, which encroaches further on the right to freedom of expression than any other international treaty with a comparable number of ratifications. There are several reasons for this, including: the difficulty of reaching political compromise on substantive issues (most notably squaring the prevention of racial discrimination with the rights to freedom of expression and association); the imperfect drafting which sought to express those compromises; the over-zealous interpretation of its provisions and the confusion resulting from the mis-application of relevant standards.

Discussions centring on the outer limits of protected expression are further complicated by the increasing tendency of international courts, adjudicative and monitoring bodies, law- and

policy-makers to take "hate speech" as the conceptual focus of their discourse. The term, as such, is not defined in any legally-binding international instrument, which means that its precise scope is somewhat speculative. At its core, "hate speech" is clearly about expression that is motivated by some kind of racial or kindred animus. However, the determination of its definitional perimeter is not straightforward. As explicated at length in Chapter 6 in the context of the jurisprudence of the European Court of Human Rights, because the term is not organic to the ECHR, it has not undergone the same natural interpretive growth as other terms that do figure in the original text of the Convention. Instead, the term was imported into the case-law of the Court in 1999[5] and has been invoked – sometimes nervously[6] – on a regular basis since. In the absence of a definition of the term, the Court is quite right to be nervous about its application. The Court sometimes refers to the Committee of Ministers' Recommendation (97) 20 on "Hate Speech", which *describes* the term (albeit for the purposes of the application of the principles set out in the Appendix to the Recommendation) as "covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin".[7]

An authoritative articulation of what exactly is meant by the term "hate speech" will necessarily have to precede its usage in a more confident way by the Court. The sudden, unexplained introduction of the term, without setting out its definitional parameters, is puzzling, given that the case-law of the Court prior to 1999 had already engaged – effectively – with the same kind of issues. That earlier case-law was grounded in more familiar and patiently developed terminology.

As demonstrated in Chapter 6, the need for caution is underscored by the origin of the term in critical race scholarship emanating (predominantly) from the United States. Critical race theory is (to put it very summarily) an approach to racism where the victim and the victim's perspective are given pride of place. It seeks to ensure that law and policy are adequately informed by circumstances and experiences [of victims of racism]. This suggests that the term has traditionally had a wider meaning than is commonly recognised; it cannot be assumed that it is straightforwardly synonymous with prevailing international legal standards on the restriction/prohibition of racist and other kinds of hateful expression. Critical race theory therefore draws attention to the variety and complexity of harms suffered by victims of "hate speech": psychic harm, damage to self-esteem, inhibited self-fulfilment, etc.

Partly in recognition of the complexity of relevant harms, different treaties and bodies have different approaches (conceptual and practical) to the question of legitimate restrictions on freedom of expression.[8] The challenge is therefore to identify "which criteria allow us to distinguish between harms that justify restrictions and those that do not".[9] The notion of "abusive speech"[10] could prove useful in this connection: it allows for a distinction to be made

[5] It would appear that the term was first used in the cases, *Sürek v. Turkey (No. 1)* and *Sürek & Özdemir v. Turkey*, Judgments of the European Court of Human Rights of 8 July 1999. See: para. 62 and para. 63, respectively.
[6] See, for example, *Gündüz v. Turkey*, Judgment of the European Court of Human Rights (First Section) of 4 December 2003, para. 51.
[7] Appendix to Recommendation No. R (97) 20, adopted on 30 October 1997.
[8] See further, *supra*.
[9] David Kretzmer, "Freedom of Speech and Racism", 8 Cardozo L. Rev. 445 (1987), at p. 478.
[10] Jean-François Gaudreault-DesBiens, "From Sisyphus's Dilemma to Sisyphus's Duty? A Meditation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide", (2000) 46 McGill L.J. 121, at p. 133.

between expression that offends human dignity and should be prohibited and expression that "offends, shocks or disturbs" certain sections of the population and should be tolerated in the spirit of broadmindedness that is a prerequisite to democratic society. The importance of the consequences of expression should also be stressed, as well as the need to develop suitable methodological tools for the evaluation of such consequences.

When applying their normative principles to specific factual circumstances, adjudicative bodies should give sufficient weighting to factors such as the intent of the speaker and "contextual variables".[11] The latter could include the nature and impact of the medium used to convey the expression; audience-related considerations; socio-political factors; the nature, necessity and proportionality of the measure(s) employed to restrict the perceived harm involved; the triviality/seriousness of the perceived harm and the probability that it would in fact result from the impugned expression. Depending on the findings of such an assessment, it could become clear that a variety of policy measures and practical strategies could be relied upon to restrict the dissemination of objectionable expression. Whereas legal prohibitions are justified in respect of "abusive speech" (as defined *supra*), alternative, i.e., non-legal, measures can prove particularly effective in curbing the dissemination of expression which would not fall foul of existing restrictions on freedom of expression, but which is nevertheless harmful. Again, these conclusions plead for the concerted application of negative and positive measures in a comprehensive, but differentiated, approach to legally-based limitations on freedom of expression.

A significant emphasis on *positive* State obligations can be detected in international human rights law. The Durban Declaration and Programme of Action and the Framework Convention for the Protection of National Minorities, in particular, adopt root-and-branch approaches to combating hate speech by targeting the hatred and intolerance from which it spawns. Their strategies include the promotion of expressive opportunities, especially via the media, for persons belonging to minorities. The promotion of tolerance and of intercultural understanding and dialogue is similarly prioritised. Measures advocated include specialised training for journalists on intercultural themes, ensuring access to media for minorities or other groups, funding of various initiatives promoting ethical journalism and programme production, etc., as detailed in Chapter 6.

Another topical source of considerable confusion about the delineation of the outer limits of free expression concerns the protection of religious beliefs. Freedom of religion – as guaranteed by international law – does not include the right not to be offended in one's religious beliefs or sensibilities. Instead, the main components of the operative right are to hold or change one's religion or belief and to manifest one's religion or belief, "in worship, teaching, practice and observance".[12] As such, it would require a high level of abusive expression to prevent or restrict the exercise of any of the constituent parts of the right to freedom of religion. Despite significant political gains achieved by the concerted international campaign against the so-called "defamation of religions", relevant legal standards do not protect religions *qua* belief systems from "defamation" or virulent criticism. Nor are spiritual leaders beyond the reach of criticism, legally-speaking, although the drafting history of an ultimately unfinished and unadopted UN Treaty on Freedom of Information favoured the inclusion of such protection for religious leaders as a permissible restriction on the right to freedom of expression.

[11] Michel Rosenfeld, "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis", 24 Cardozo L. Rev. 1523 (2003), at 1565.
[12] Article 9(1), ECHR.

A more promising angle of approach to the question therefore lies within the right to freedom of expression itself. The exercise of the right is governed by respect for certain duties and responsibilities and the right can also be limited, where necessary, in order to protect the rights of others. Hence, the European Court of Human Rights has elaborated a line of jurisprudence that seeks to stress that the gratuitous offence of religious beliefs and symbols cannot be justified by appealing to the right to freedom of expression. As Chapter 6 shows, this line of jurisprudence is not always consistent and it falters in places. Nevertheless, its general message is clear, even if greater refinement and consistency is required in the methodology it applies to the balancing of relevant rights and interests.

Whereas a legalistic analysis of these flash-points in the penumbral regions of freedom of expression can prove dispositive of certain controversies, the same can hardly be said of socio-political perspectives. In any given society, different groups may have different understandings and expectations of the real and symbolic functions of the law. The *causes célèbres* of *The Satanic Verses* and the "Mohammed Cartoons" are examples of *inter alia*, different, or rather, opposing perspectives on the limits of freedom of expression. Fora for expression and communication (i.e., exchange of information and opinions) have great potential for fomenting societal cohesion. This explains why increased attention for the role of different types of dialogical fora in the building of inter-ethnic knowledge, understanding and respect needs to be emphasised. Support for, and the development of, such fora are a necessary measure for giving effect to the "operative public value" of comprehensive pluralistic tolerance.

Facilitating expression of minorities

Under international law, the most important obligations on States to facilitate the expressive rights of persons belonging to minorities are the promotion of media- and information-related pluralism and access to expressive fora, especially various media. Both pluralism and access are vitally important for linguistic and cultural identity – their preservation, transmission and development, but also for rights relating to effective participation in public life, religion and education. The different components of the right to freedom of expression are also relevant for the discharge of positive State obligations: pluralism is important mainly for the right to seek and receive information and ideas, whereas access is primarily geared towards the right to impart information.

It is a well-established principle of international human rights law that States are ultimately responsible for upholding pluralism in society generally and in the media sector in particular. Societal pluralism and media pluralism are not identical, but they are related in some important respects. The concept of comprehensive pluralistic tolerance is developed to describe the relationship between more generic notions of pluralistic tolerance and the more applied meaning of media pluralism. Information- and media-related pluralism is best gauged by integratively assessing substantive and structural features of a given mediascape and by having due regard for media functionality. Different media types and formats are differently suited to the fulfilment of individual informational, communicative, cultural and linguistic needs and preferences. These considerations apply, *mutatis mutandis*, to minorities.

The right to freedom of expression can only be fully realised when there is widespread access to a diverse range of expressive opportunities and sources of information and opinions.

Quantitative and qualitative considerations are determinative here. Chapter 7 usefully disaggregates the concept of information- and media-pluralism and explains its importance at various levels, in particular source/ownership, outlet and content. These levels span structures, processes and output, each of which offers different opportunities for the participation of persons belonging to minorities. As argued in Chapter 4 in respect of the usefulness of a disaggregated analytical approach to the media, the disaggregated analysis of information- and media-related pluralism conducted here allows for probing evaluation. As such, the systematic application of this disaggregated analytical approach to the monitoring of relevant provisions of relevant treaties would greatly enhance its contribution to assessments of the effectiveness of operative treaty provisions in practice.

Chapter 7 also advocates a disaggregated approach to cultural diversity, along the lines of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions and various other standard-setting texts from the Council of Europe. Cultural diversity entails the existence and expression of multiple cultural identities. Cultural diversity is therefore enabled by a societal climate of pluralistic tolerance and by the transmission of cultural expressions via diverse media and in diverse fora. The disaggregated approach pursued here allows for greater analytical precision as regards the effectiveness of relevant instruments in the fulfilment of their objectives. The weak wording throughout the UNESCO Convention has had debilitating effects on the nature and extent of the legal obligations to which it creates/recognises for States Parties. As such, its main worth lies in the disaggregation of measures that could be used to advance its central goal. This is also the prime value of the CoE's relevant standard-setting texts. Such disaggregation facilitates the identification and compilation of best practices for States which are amenable to the objective of protecting and promoting cultural diversity. Other legally-binding regulations, particularly those governing the European broadcasting sector do precious little to promote cultural diversity. Rhetoric simply does not match regulatory reality. This failure to engage with relevant objectives is disappointing as the media in general, and broadcasting in particular can have a huge impact on the vitality of a culture and its dissemination. This is particularly true of the cultures of persons belonging to minorities.

As well as guaranteeing media pluralism, the other main obligation on States to facilitate the expressive rights of persons belonging to minorities is to ensure access rights. This obligation is an obvious complement to its obligation to safeguard information- and media-related pluralism. The right to freedom of expression would not be effective if discriminatory practices were to prevail in relation to access to the media, or influential media. The right to effective participation in public life is obviously also implicated here. This means that a powerful triumvirate of rights (expression, non-discrimination and participation) are brought to bear on the issue of access to the media. This is without prejudice to the relevance of the possible cultural, linguistic and religious goals that might be pursued after having secured access.

Whereas there is no right to freedom of expression via a particular medium of one's choice, as such, adequate access to expressive opportunities and discursive fora requires the development and enforcement of certain procedural safeguards (at least). This is especially true for persons belonging to minorities; because of situational factors, established patterns of discrimination and persecution, etc., additional measures may often be required to ensure that their access to expressive fora are also real and effective. A "taxonomy of access"[13] –

[13] Monroe Price, "An Access Taxonomy", in Andras Sajó, Ed., *Rights of Access to the Media* (The Hague, Kluwer Law International, 1996), pp. 1-28.

enumerating the many different forms that access could take – indicates that measures such as the right of reply and public-access channels, have considerable potential for persons belonging to minorities.

Ownership, licensing and miscellaneous regulatory provisions can affect access in a variety of ways. The proportionality of regulation should always be assessed in light of a wide range of factors, including the existing political, social, religious, cultural and linguistic environment; the number, variety, geographical reach, character, function and languages of available broadcasting services, and the rights, needs, expressed desires and nature of the audience(s) affected.

Human rights are inherently dynamic and it is unsurprising that the advent of new information and communications technologies would have implications for rights and give rise to new applications of existing rights. It can at least be argued that the effective exercise of the right to freedom of expression (especially the right to seek and receive information) in the digital age is increasingly contingent on access to new technologies, the acquisition of relevant technological skills and fluency in media literacy, etc. These factors which increasingly determine the quality or effectiveness of access need to be consistently emphasised in policy- and law-making, and applied by adjudicative and monitoring bodies. They are precisely the kind of measures required to render principles of and provisions for freedom of expression operative and effective; to bridge the gap between theory and practice.

Media functionality, including a focus on the impact of new media techologies on communicative practices and regulatory approaches, is not merely of theoretical interest. The systematic inclusion of such considerations would be of enormous benefit for the analytical and insightful quality of the monitoring of international human rights treaties containing provisions concerning the right to freedom of expression. The organic vitality of those treaties and the rights they safeguard is not always reflected in authoritative interpretations of the same. For instance, the General Comments on Articles 19 and 20, ICCPR, date from 1983. Since then, staggering technological and societal changes have taken place with far-reaching implications for how information and ideas are sought, received and imparted. Technology is very often a crucial determinant of the effectiveness of the right to freedom of expression in concrete situations. It is therefore imperative that relevant legal provisions reflect contemporary realities; this necessarily involves engaging with the (varying levels of) functionality of old and new media technologies.

Final remarks

In recent times, progress has steadily been made in terms of the reduction of conceptual and political resistance to minority rights' protection at IGO-level. An increasing number of standard-setting texts provide a largely consistent framework for the protection of minorities. Not all of those texts are legally-binding on States and those that are designed to be legally binding have not necessarily been signed or ratified by States with poor track-records in minority rights' protection. Another problem is that far-reaching reservations can effectively lead to the emasculation of States' substantive obligations under relevant treaties. Nevertheless, all of the relevant texts contribute in their own way to broadly consistent goals centring on the advancement of minority rights.

Progress can also be measured in terms of the extent to which minority rights have been mainstreamed within international human rights law and within key bodies involved in the protection and promotion of human rights standards. The growing number of agencies devoted to the cause is further evidence of the raised profile enjoyed by minority rights of late. Having largely achieved acceptance in international and regional European standards, the next challenge facing minority rights is their consolidation at the national and sub-national levels. In the spirit of the universality, indivisibility, interdependence and inter-relatedness of human rights, it is necessary to examine in a meticulous manner how all human rights relate in their respective ways to minority rights. This thesis has sought to do so in respect of the right to freedom of expression, a multi-layered, high-valency right. The resulting analysis has demonstrated that the interface between the two is extremely dynamic. The interplay between minority rights and the right to freedom of expression is occasionally frictional, but mostly generative of powerful synergies.

It is simply not possible to meaningfully condense an evaluation of the enormous complexities and extensive dimensions involved in the *problématique* of this thesis into a couple of paragraphs. These conclusions have condensed the analysis and arguments of the thesis. They have explained a number of strengths of the current set of international standards protecting and promoting the right to freedom of expression of persons belonging to minorities. They have also identified and criticised a long list of its shortcomings. Throughout the thesis, including its conclusions, the effectiveness of the right to freedom of expression is consistently contextualised by references to:

- Specific rationales for freedom of expression and minority rights
- Assessment of particular communicative needs of minorities, based on salient group characteristics and situational specificities
- Comprehensive pluralistic tolerance as an operative public value
- Interrelatedness and interdependence of all human rights
- Interplay between freedom of expression, minority rights and other human rights
- Enabling environment and broader societal considerations
- Media functionality (including its technology-driven dimensions)
- Dynamism of human rights
- Qualitative and hierarchical distinctions between applicable legal and other standards, coupled with an understanding of their purpose, potential and limitations

The systematic integration of these considerations, along the detailed lines drawn in this thesis, into interpretive and monitoring exercises of relevant international standards, would greatly enhance their consistency and clarity.

By critically evaluating all of these issues throughout the thesis, the journey undertaken ultimately also became its destination.