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The role of regional media as a tool for building participatory democracy

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2014

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Table of contents

Introduction	5
1. Theoretical and conceptual framework.....	7
2. Normative framework.....	15
2.1 Freedom of expression and media freedom.....	15
2.1.1 The European Convention on Human Rights (ECHR).....	17
2.1.2 Framework Convention for the Protection of National Minorities	19
2.1.3 The European Charter on Regional or Minority Languages.....	21
2.1.4 Non-treaty-based standard-setting	24
2.2 Participation.....	31
2.2.1 Scope of the right to participation.....	31
2.2.2 Participation and technological capabilities	33
3. Practice and best practices	39
3.1 Legal definitions and licensing schemes	39
3.2 Participatory provisions	40
3.3 Independence and autonomy.....	41
3.4 Media literacy	41
3.5 Media pluralism	42
3.6 Promotional measures.....	42
3.7 Technological challenges	43
4. Conclusions and recommendations.....	44
4.1 Review existing instruments	44
4.2 Foregrounding of ‘regionalism’ and ‘participation’	45
4.3 Functional, technology-neutral and dynamic approach.....	46
Bibliography	48

Introduction

The media play a number of crucial roles in democratic society, most notably, the role of public watchdog; the role of creating channels for the circulation of information and ideas, and the role of providing forums for public debate. The media's forum-providing role is particularly important for fostering participatory democracy because the media can open up shared spaces for discussion and debate on matters of public interest. Such discursive spaces can be created at different geographical levels, which exhibit different features.

Media operating at the regional level have special significance for participatory democracy as the relationship between regional media and persons from the areas and communities they serve tends to be closer, stronger and more representative than equivalent relationships at, say, the national or international levels. That proximity is often evident in audience/readership/user statistics and in levels of participation in the media.

The special significance of regional media for participatory democracy can also be gauged by the nature and focus of regional journalism. This is due, first, to regional journalism's coverage of regional politics and issues that are either underrepresented in, or absent from, national journalism. Second, regional journalism also fosters public discussion of, and engagement with, regional politics and issues. The proximity of regional media to their target communities is therefore also political in character. This extends to social media (eg. Twitter) because they are an increasingly important source of information and tool for engagement when it comes to regional politics and issues, particularly during the run-in to regional elections or plebiscites.

The communicative space created by regional media allows regional identities (including cultural, linguistic and religious identities) to be explored, developed, sustained and promoted to a greater extent than is usually possible at the national level. Regional identities and languages are sometimes marginalized by dominant/mainstream national media, which underscores the importance of regional media as alternative discursive forums. Regional languages are a case in point: their vibrancy in society is often dependent on the availability and accessibility of regional media operating in those languages.

The shared nature of the communicative space created by regional media also facilitates intercultural dialogue, understanding and tolerance and thus contribute to the pre-emption and countering of hate speech.

Well-designed regulation and policy – at the European and national levels - can create an enabling environment for regional media and thus participatory democracy at the regional level. Various bodies of the Council of Europe (and the European Union) have adopted standards, some legally-binding, some politically influential, that seek to create such an enabling environment. However, the overall body of relevant standards is not coherent and their value and impact is, to a large extent, contingent on the adequacy of corresponding or complementary standards at the national level.

This study will first briefly give a theoretical framework for the relationship between regional media and participation in democratic society. It will then provide a comprehensive overview and analysis of Council of Europe standards that are of relevance to the regional media and therefore shape the environment in which they operate. Against that backdrop it will select and comment on different (national) regulatory, policy approaches to regional media and best or interesting practices. The study will identify and examine a range of challenges facing regional media – legal, political, cultural, linguistic and economic. These different dimensions will factor into the selection of best and interesting practices. The study will be theoretically-informed, politically-aware and solution-oriented.

The term, “regional media”, is open to multiple interpretations or definitions. For the purposes of this study, the term is understood and used broadly as comprising a range of different types of media operating at different sub-national levels. Thus, it covers print, broadcast and digital media. Moreover, it also covers public service, commercial, community, local and even transfrontier media. Differentiation is, however, made between these different types of media at relevant junctures, for example when referring to their respective objectives and functionalities. It is also useful to point out that while regional media are the primary outlet for regional journalism, regional media are not necessarily or exclusively concerned with journalistic activities. It should also be recognised that emergent trends of collaborative or so-called citizen journalism show significant similarities with news-related community media’s activities.

1. Theoretical and conceptual framework

It is important to examine the specific relationship between regional media and participatory democracy on the more general canvas of freedom of expression and participation in public affairs. This chapter will recall the main rationales for freedom of expression and explain the particular relevance of those rationales for the media and participation in democratic society. It will then differentiate between various types and functionalities of the media, before homing in on the participatory potential of the different media.

The main rationales for freedom of expression are well-known and will not be revisited in detail here. They can be briefly summarised as: self-fulfilment or individual autonomy; the advancement of knowledge and discovery of truth; the argument from democracy; distrust of government, etc.¹

Each of these general rationales is relevant – in varying degrees – for regional media, and none more so than the argument from democracy. Eric Barendt characterises this argument as being “from citizen participation in a democracy”.² This characterisation is more refined than the conventional way of describing the argument from democracy, which tends to be limited to pointing out the importance of ideas and information for the processes of opinion-forming and decision-making by the body politic. Barendt’s characterisation goes further as he sees opinion-forming and decision-making as parts of a broader participatory paradigm.

The media play a crucial instrumental role in the realisation of the right to freedom of expression. In practice, information and ideas are circulated and debate is conducted primarily in the media. By virtue of their reach, speed, influence and impact, more often than not, the media are the most effective means of receiving, imparting and seeking information and ideas. These are complementary roles that generate considerable power and influence for the media. Thus, the media (as traditionally understood) have come to be regarded as “an essential dimension of contemporary experience”³ and as “the central *institution* of a democratic public

¹ See generally: Eric Barendt, *Freedom of Speech* (2nd Edition) (Oxford, Oxford University Press, 2005), pp. 1-23; Frederick Schauer, *Free speech: a philosophical enquiry* (Cambridge, etc., Cambridge University Press, 1982), pp. 3-86.

² Eric Barendt, *Freedom of Speech* (2nd Edition), *op. cit.*, pp. 18-21.

³ Roger Silverstone, *Why Study the Media?* (London/Thousand Oaks, CA/New Delhi, SAGE Publications, 1999), p. 1. See also, Peter Dahlgren, *Television and the Public Sphere: Citizenship, Democracy and the Media* (London, SAGE Publications, 1995), p. 155.

sphere”.⁴ But their influence is not limited to the public sphere. The advent of social media and trends towards the personalisation of media services have extended their influence into the private sphere.

The media can equally play a crucial instrumental role in the realisation of the right to (effective) participation in public affairs. They do so most obviously – again - through ensuring the wide dissemination of information and ideas, based on which opinions are formed and decisions are made. They also create forums in which democratic deliberation and debate can take place. In other words, the media facilitate participation in public debate on matters of public interest. This can be termed participation *through* the media. Another important dimension to participation (albeit one that is less widely appreciated) is participation *in* the media, i.e., in media decision-making structures and processes.

The distinction between participation in and through the media is important.⁵ Participation in the media implies “participation in the production of media output (content-related participation) and in media organizational decision-making (structural participation)”, which enhances the potential for members of different groups in society to influence how they are represented in the media.⁶ Self-representation and empowerment are strengthened through participation in the media.

The notion of voice is central here; “voice as a *process* [...] and voice as a *value*”.⁷ Valuing voice involves “particular attention to the conditions under which voice as a process is effective, and how broader forms of organization may subtly undermine or devalue voice as a process”.⁸ Voice can then be taken as a product of both participation *in* the media and participation/expression *through* the media.

In media/journalism studies, attention for participation in the media has given rise to what is sometimes called the “democratic-participant theory”.⁹ Denis McQuail lists the guiding

⁴ (emphasis per original). C. Edwin Baker, “Viewpoint Diversity and Media Ownership”, 60 *Federal Communications Law Journal* (No. 3, 2009), p. 651-671, at p.654.

⁵ Nico Carpentier, *Media and Participation: A site of ideological-democratic struggle* (Bristol/Chicago, Intellect, 2011), pp. 66–70; see also M. Grünangerl, J. Trappel and C. Wenzel, “Public value and participation of civil society – a case for public service or community media?”, *kommunikation.media*, 1, April 2012, pp. 1–32.

⁶ Nico Carpentier, *Media and Participation: A site of ideological-democratic struggle*, op. cit., p. 68.

⁷ (emphasis per original) Nick Couldry, *Why Voice Matters* (Los Angeles, etc., SAGE, 2010), p. 1.

⁸ *Ibid.*, p. 2.

⁹ Denis McQuail, *Journalism and Society* (Los Angeles, etc., SAGE, 2013), p. 47.

principles of this theoretical approach as those of “participation, interactivity, smallness of scale, local identity, cultural autonomy and variety, emancipation and self-help”.¹⁰ He describes its main beneficiaries as “groups within the larger society, based on a variety of criteria, including ethnicity, immigration, local community, special needs or interests, beliefs etc.”¹¹

The democratic, participatory model of media governance elaborated by Karol Jakubowicz is largely consonant with the “democratic-participant theory”. Jakubowicz uses the more complex term: “representative participatory communicative democracy”,¹² which implies the application of principles of participatory democracy to media (structures). The basic idea is that while not every individual member of a group can actually broadcast, the organizational structures of the media entity should strive to facilitate maximum participation by all members in influencing policies and decisions and fixing goals.

This kind of participation is contingent on access to the media in the first place. The “media” can be described as a convenient, amalgamated concept that comprises content, structures and processes.¹³ Access to each of those components of the media is assured in different ways, which makes it helpful to frame the broader discussion of access in terms of a “taxonomy of access”.¹⁴ A number of “levels and forms of access and participation” can therefore usefully be identified: “at the level of (i) programming, (ii) work-force, (iii) editorial control and management, (v) [*sic*] ownership of media, (vi) regulation and oversight of the media, (vii) legislation, etc.”¹⁵

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Karol Jakubowicz, “Access to the Media and Democratic Communication: Theory and Practice in Central and Eastern Europe”, in Andras Sajó, Ed., *Rights of Access to the Media* (The Hague, Kluwer Law International, 1996), pp. 139–63, at p. 145.

¹³ For discussion of “the various structures, contexts and dynamics that inform and shape media representations”, see Simon Cottle, “Introduction – Media Research and Ethnic Minorities: Mapping the Field”, in Simon Cottle, Ed., *Ethnic Minorities and the Media: Changing Cultural Boundaries* (Buckingham & Philadelphia, Open University Press, 2000), pp. 1-30, at pp. 16-18.

¹⁴ 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 Sajó, Ed., *Rights of Access to the Media, op. cit.*, pp. 1-28.

¹⁵ 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: Five years of monitoring the Framework Convention for the Protection of National Minorities* (Strasbourg, Council of Europe Publishing, 2004), pp. 113-138, at p. 116; Karol Jakubowicz, “Persons Belonging to National Minorities and the Media”, 10 *International Journal on Minority and Group Rights* (2004), pp. 291-314, at pp. 294-295; Karol Jakubowicz, “Minority Media Rights: A Brief Overview”, in George Jones, Sally Holt & John Packer, Eds., 8 *Mercator Media Forum* (2005), pp. 100-113, at pp. 104-5.

The media can also be described as an amalgamated concept insofar as the term comprises various different types of media, eg. public service, commercial, community and transfrontier. Logically, different types of media have different objectives, characteristics and working methods. In consequence, the modalities of participation in each also differ. Besides differences between types of media, additional dimensions of differentiation can also be recognised, including: genre or subject matter; target audience; geographical reach or focus; technology or medium; business model.¹⁶

Vast literature exists on the traditional rationales for and characteristics of public service broadcasting/media.¹⁷ A useful synthesis is provided by Georgina Born and Tony Prosser, who have identified three essential normative criteria for public service broadcasting: citizenship (“enhancing, developing and serving social, political and cultural citizenship”), universality and quality of services and of output.¹⁸ It is commonplace for public service broadcasters to have regional branches in order to realise their overarching objectives effectively at the regional level. Moreover, when notions of regionality transcend state borders, like in the Nordic states, there is structured cooperation between national public service broadcasters at the regional level.

Commercial media (sometimes erroneously referred to as private media) can also develop a strong presence at the regional level. Their interest in regional operations can be determined by commercial calculations such as: critical mass; definable interests that are translatable into content terms; established patterns of media usage; general level of affluence, etc., but none of these considerations preclude them from making a contribution to regional participatory democracy. Commercial objectives do not necessarily negate coverage of public interest issues. Commercial media can, of course, also play a vital role at the regional level, either by counterpoising the public service media offer or by taking on public service tasks, based on legislative or licensing commitments and/or incentive-based opt-in arrangements.

¹⁶ See further, Denis McQuail, *Journalism and Society*, *op. cit.*, pp. 11-12.

¹⁷ See, for example, Eric Barendt, *Broadcasting Law: A Comparative Study* (Oxford, Clarendon Press, 1993), Chapter III ‘Public Broadcasting’, pp. 50-74 and Toby Mendel, *Public Service Broadcasting: A Comparative Legal Survey* (Second Edition) (France, UNESCO, 2011).

¹⁸ Georgina Born & Tony Prosser, “Culture and Consumerism: Citizenship, Public Service Broadcasting and the BBC’s Fair Trading Obligations”, 64 *The Modern Law Review* (Issue No. 5, September 2001), pp. 657-687, at 671.

The literature on community media is less extensive than for public service media. Community media “have at their heart the concepts of access and participation”.¹⁹ The concept rests on “the assumption of a shared relevance that community issues have for both parties, both senders and receivers, because they all participate in the same community and because the community serves as a frame of reference for a shared interpretation of the relevance of the topics communicated within the community”.²⁰ The key features of community media can be essentialized as: in service of community (both local communities and communities of interest); individual participation in all stages of production and dissemination, and independent and non-profit status.²¹

For their part, transnational media can play an important role at the regional level too, through their ability to satisfy informational needs of communities no longer resident in their kin-States. Another important dimension to transnational media concerns cultural representation and identity-formation. In this respect, the transnational “recognizes both the possibilities of networks and communities to surpass national boundaries, as well as the continuing significance of the national borders in partly framing and restricting social actions and their meanings”.²²

It can be seen from the foregoing that different types of media have different objectives, which lead to different functionalities. In assessing the adequacy of regional media, it can therefore be useful to examine their institutional completeness and their functional completeness. Tom Moring has described institutional completeness in respect of the media as the level of completeness of a media system that serves a particular group or area, with levels of completeness being measured by the availability of different types of media, and the availability of different formats [within available media types].²³ To complement the notion of “institutional completeness”, Moring introduces the notion of “functional completeness” as,

¹⁹ Chris Atton, *Alternative Media* (London, SAGE Publications, 2002), p. 17.

²⁰ Ed Hollander, James Stappers, and Nicholas Jankowski, “Community Media and Community Communication”, in Nicholas W. Jankowski, Ed., *Community Media in the Information Age: Perspectives and Prospects* (Cresskill, New Jersey, Hampton Press, Inc., 2002), pp. 19-30, at 23.

²¹ Tarlach McGonagle, *Minority Rights, Freedom of Expression and of the Media: Dynamics and Dilemmas* (Antwerp, Intersentia, 2011), p. 142.

²² Myria Georgiou, *Diaspora, Identity and the Media: Diasporic Transnationalism and Mediated Spatialities* (Cresskill, New Jersey, Hampton Press, Inc., 2006), p. 10.

²³ Tom Moring, “Functional Completeness in Minority Language Media”, in Mike Cormack & Niamh Hourigan, Eds., *Minority Language Media: Concepts, Critiques and Case Studies* (Clevedon, Multilingual Matters Ltd., 2007), pp. 17-33.

which refers to “the extent to which people within a target group actually lean on the media supply that is produced for them (in their language or for their community)”.²⁴

It is necessary to include social media in discussions of institutional and functional completeness of the media. Owing to their participatory and many-to-many character, it is difficult to position social media in an institutional or institutionalised media setting; rather, they operate around existing institutionalised media. Their relevance for the functional completeness of a media system cannot be gainsaid, however, notwithstanding qualitative differences between social and institutionalised media.²⁵

A final relevant distinction concerns ownership and control of regional media. The governance structures in place in given regional media can determine the degree of participation in those media, as well as their importance for democratic society. When media create forums for discursive activity, those forums can be seen as part of a shared public sphere or as segregated public sphericules.²⁶ Thus, regional media owned and run by particular (minority) groups in society may deliberately have an essentially intra-group communicative function, whereas mainstream media may be open to everyone, including minority groups, and fulfil an essentially inter-group communicative function. These two functions are not necessarily mutually exclusive. Some scholarship suggests that intra-group communication can be a beneficial preliminary step towards subsequent inter-group communication, insofar as the former creates and protects a space for internal deliberations before the outcome of those deliberations would feed into inter-group communications.²⁷ This can result in net benefits for the quality of public debate, the research posits.²⁸

This chapter has briefly unpacked the concepts of freedom of expression and participation in public debate in and through the regional media. It has also insisted upon their importance for a well-functioning democratic society. By way of concluding remarks, it should be noted that the different types of participation explored in this chapter can optimally be realised in an

²⁴ 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), Doc. DH-MIN(2006)015, 20 November 2006, p. 9.

²⁵ See generally, Eugenia Siapera, *Understanding New Media* (Los Angeles, etc., SAGE, 2012).

²⁶ See further: Todd Gitlin, “Public Sphere or Public Sphericules?”, in Tamar Liebes and James Curran, Eds., *Media, Ritual, Identity* (London, Routledge, 1998), pp. 168-175.

²⁷ See, for example: Cass R. Sunstein, “Ideological Amplification”, 14(2) *Constellations* (2007), 273-279; Cass R. Sunstein, *Why Groups Go to Extremes* (Washington, D.C., The AEI Press, 2008).

²⁸ *Ibid.*

environment that is conducive to free expression. Such an environment is sometimes referred to as an “enabling environment” for freedom of expression.²⁹ A key characteristic of such an enabling environment is media pluralism. In other words, a free, independent and diversely-constituted media sector is a pre-requisite for freedom of expression to flourish. Pluralist democracy necessarily requires a plurality of sources, voices and functionalities in the media sector.

²⁹ For a comprehensive exploration of the concept, see, Peter Krug & Monroe E. Price, “The Enabling Environment for Free and Independent Media: Contribution to Transparent and Accountable Governance”, The USAID Office of Democracy and Governance Occasional Paper Series, January 2002, Doc. No. PN-ACM-006, and more recently and succinctly, Monroe Price & Peter Krug, “The Enabling Environment For Free and Independent Media” in Mark Harvey, Ed., *Media Matters: Perspectives on Advancing Governance & Development from the Global Forum for Media Development* (Beijing, Internews Europe, 2007), pp. 94-101.

2. Normative framework

This chapter will examine how the theories, concepts and definitions discussed in the previous chapter, are articulated in relevant European standards. It will provide an overview and analysis of relevant Council of Europe standards, identify broad lines and patterns, as well as specificities (eg. different bodies within Council of Europe have different emphases), and explain the (legal/political) weight of the many relevant standards. The chapter has two related thematic axes: (i) freedom of expression and media freedom, and (ii) participation.

2.1 Freedom of expression and media freedom

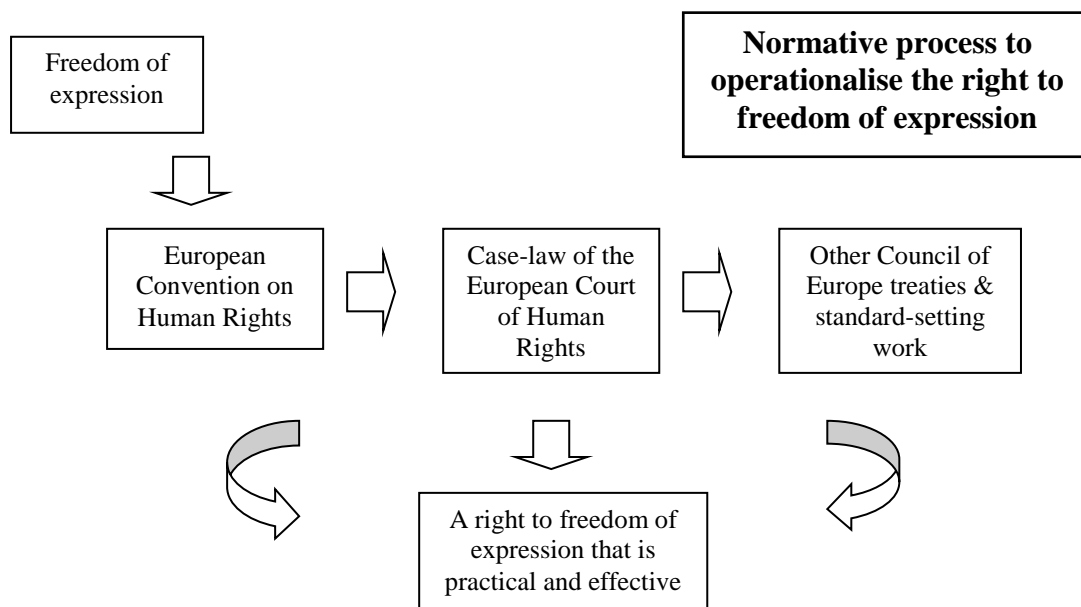
The Council of Europe has developed an elaborate system for the protection of freedom of expression. The system strives to operationalise abstract theories of freedom of expression and turn them into a right to freedom of expression that is meaningful and effective in practice. The system could be described as creating an “enabling environment” for freedom of expression, as described in the previous chapter. In the case of *Dink v. Turkey*, the European Court of Human Rights found that States are required to create a favourable environment for participation in public debate for everyone and to enable the expression of ideas and opinions without fear.³⁰ The Court has therefore recognised the clear relationship between freedom of expression, media freedom and participation in public debate, as outlined in the previous chapter.

The system (visualized below) comprises treaty law and case-law; political and policy-making standards (hereafter: standard-setting texts), and State reporting/monitoring mechanisms. It is the interplay between each of these components that ultimately shapes the contours of the right to freedom of expression in practice. The word “interplay” is important here because the relationship between legally-binding standards and political standard-setting texts is not one-directional. Standard-setting texts ought to be grounded in the European Convention on Human Rights and the case-law of the European Court of Human Rights, but they can also influence the development of that case-law.

³⁰ *Dink v. Turkey*, nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14 September 2010, § 137.

As standard-setting texts tend to focus on particular (human rights) issues or (emerging) situations with democratic or human rights implications, they can serve to supplement existing treaty provisions. They can do so by providing a level of detail lacking in treaty provisions or by anticipating new issues not yet dealt with in treaty provisions or case-law. It is noteworthy that judgments of the European Court of Human Rights refer, for example, to the Committee of Ministers' standard-setting texts in an increasingly systematic and structured way.³¹ In the same vein, these standard-setting texts can facilitate the interpretation of existing treaties by applying general principles to concrete situations or interpreting principles in a way that is in tune with the times.

Figure 1: Freedom of expression – from theory to practice.



The attention will now turn to a selection of Council of Europe treaties containing provisions that govern regulatory approaches to regional media: the European Convention on Human Rights, the Framework Convention for the Protection of National Minorities (FCNM) and the European Charter for Regional or Minority Languages (ECRML). The titles of these treaties give indications as to their substantive focuses. The ECHR (in particular its Article 10) is the central reference point, but the FCNM and the ECRML both contain detailed provisions on

³¹ For example, Recommendation No. R (97)20 of the Committee of Ministers to member states on ‘hate speech’, 30 October 1997, is cited in the European Court of Human Rights’ judgments in *Gündüz v. Turkey*, no. 35071/97, § 22, ECHR 2003-XI and *Féret v. Belgium*, no. 15615/07, § 44 and 72, 16 July 2009.

minorities' access to, and use of, the media, and the role of the media in promoting regional or minority languages, respectively. Given that minority groups and speakers of regional or minority languages are often concentrated at the regional level, the interpretation and implementation of the FCNM and ECRML are often more tailored to the needs of regional communities than equivalent, more general provisions in the ECHR.

2.1.1 The European Convention on Human Rights (ECHR)

Article 10, ECHR is the centrepiece of the Council of Europe's system for the protection of the right to freedom of expression. It reads:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 10(1) sets out the right to freedom of expression as a compound right comprising three distinct components: the freedom to hold opinions and to receive and impart information and ideas. Article 10(1) also countenances the possibility for States to regulate the audiovisual media by means of licensing schemes.

Article 10(2) then proceeds to trammel the core right set out in the preceding paragraph. It does so by enumerating a number of grounds, based on which the right *may* legitimately be restricted, *provided that* the restrictions are *prescribed by law* and are *necessary in a democratic society*. It justifies this approach by linking the permissibility of restrictions on the right to the existence of *duties* and *responsibilities* which govern its exercise.

The European Court of Human Rights has developed a standard test to determine whether Article 10, ECHR, has been violated. Put simply, whenever it has been established that there has been an interference with the right to freedom of expression, that interference must first of all be prescribed by law (i.e., it must be adequately accessible and reasonably foreseeable in its consequences). Second, it must pursue a legitimate aim (i.e., correspond to one of the aims set out in Article 10(2)). Third, it must be necessary in a democratic society (i.e., correspond to a “pressing social need”) and be proportionate to the legitimate aim(s) pursued.

The instrumental importance of journalists and the media for enhancing public debate in democratic society has been stressed repeatedly by the Court. The media can make important contributions to public debate by (widely) disseminating information and ideas and thereby contributing to opinion-forming processes within society. As the Court consistently acknowledges, this is particularly true of the audiovisual media because of their reach and impact. The Court has traditionally regarded the audiovisual media as more pervasive than the print media and now considers the Internet to be a medium with “no less powerful an effect than the print media”.³² The media can also make important contributions to public debate by serving as forums for discussion and debate.³³ This is especially true of regional media, by virtue of their close physical proximity to their audiences. It is also especially true of new media technologies which have considerable potential for high levels of individual and group participation in society.³⁴

Furthermore, the role of “public watchdog” is very often ascribed to the media and journalists in a democratic society. In other words, they should monitor the activities of governmental authorities vigilantly and publicise any wrongdoing on their part. In respect of information about governmental activities, but also more broadly in respect of matters of public interest generally, the Court has held time and again that: “Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them”.³⁵

³² *Fatullayev v. Azerbaijan*, no. 40984/07, § 95, 22 April 2010.

³³ *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, § 27, 14 April 2009.

³⁴ *Ahmet Yildirim v. Turkey*, no. 3111/10, § 49, ECHR 2012.

³⁵ *The Sunday Times v. the United Kingdom*, (no. 1), 26 April 1979, § 65, Series A no. 30.

In light of the important democratic functions which the media can fulfil, the case-law of the Court tends to acknowledge an enhanced level of freedom of expression for journalists and other media actors (as opposed to ordinary individuals). The same approach is taken in relevant standard-setting texts adopted by the Council of Europe's Committee of Ministers and Parliamentary Assembly as well.³⁶

Although the Court's case-law dealing specifically with regional media is negligible, many of its more general principles concerning participation, the media and democracy have (clear) resonance for regional media.

2.1.2 Framework Convention for the Protection of National Minorities

The FCNM sets out a range of rights to be enjoyed by persons belonging to national minorities. The implementation of the FCNM at national level is assessed in the context of a system of State-reporting. Ultimate control and responsibility for monitoring the implementation of the FCNM rests with the Committee of Ministers of the Council of Europe and a purpose-created Advisory Committee (AC) assists it in this regard.

As far as the right to freedom of expression is concerned, the most important provision is Article 9, FCNM.³⁷ It reads:

1 The Parties undertake to recognise that the right to freedom of expression of every person belonging to a national minority includes freedom to hold opinions and to receive and impart information and ideas in the minority language, without interference by public authorities and regardless of frontiers. The Parties shall ensure, within the framework of their legal systems, that persons belonging to a national minority are not discriminated against in their access to the media.

³⁶ See generally: Susanne Nikoltchev and Tarlach McGonagle, Eds., *Freedom of Expression and the Media: Standard-setting by the Council of Europe, (I) Committee of Ministers - IRIS Themes* (Strasbourg, European Audiovisual Observatory, 2011); Susanne Nikoltchev and Tarlach McGonagle, Eds., *Freedom of Expression and the Media: Standard-setting by the Council of Europe, (II) Parliamentary Assembly - IRIS Themes* (Strasbourg, European Audiovisual Observatory, 2011).

³⁷ For commentary, see: John Packer & Sally Holt, "ARTICLE 9", in Marc Weller, Ed., *The Rights of Minorities in Europe: A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford, Oxford University Press, 2005), pp. 263-300.

2 Paragraph 1 shall not prevent Parties from requiring the licensing, without discrimination and based on objective criteria, of sound radio and television broadcasting, or cinema enterprises.

3 The Parties shall not hinder the creation and the use of printed media by persons belonging to national minorities. In the legal framework of sound radio and television broadcasting, they shall ensure, as far as possible, and taking into account the provisions of paragraph 1, that persons belonging to national minorities are granted the possibility of creating and using their own media.

4 In the framework of their legal systems, the Parties shall adopt adequate measures in order to facilitate access to the media for persons belonging to national minorities and in order to promote tolerance and permit cultural pluralism.

It is modelled closely on Article 10, ECHR and represents a modest extension of scope of the former. The text of the FCNM enables States Parties to give due consideration to relevant national (or sub-national) sensibilities and needs when adopting and implementing measures facilitating access to the media for persons belonging to national minorities. By the same token, the treaty's monitoring system enables the AC to consider the adequacy/efficiency of State measures in light of relevant "particular circumstances" obtaining in the State, in any region of the State, or in respect of any minority group in the State. This results in a dialogue which facilitates the identification of issues governing the effectiveness of access to the media for persons belonging to national minorities and, by extension, the effectiveness of their right to freedom of expression. It also facilitates the compilation of relevant best practices.

In the context of its monitoring work, the AC has frequently focused on the impact of geographical, technological and market-related factors on the effectiveness of national minorities' access to the media. Such focuses would, for example, invite consideration of whether the geographical reach of particular media targeting a particular minority group matches the actual demographic concentration of that minority. Useful distinctions in this regard include: sub-national (i.e., local and regional), national and transfrontier reach. Another relevant line of enquiry is the suitability of the means of distribution for media content. In other words, is the distribution platform in question accessible to, and widely used by, members of the target minority group? Finally, as regards market-related factors: media output catering for the interests of national minorities or in their languages is often less lucrative than mainstream equivalents. This fact can make it difficult for media to secure investment capital and

advertising, which in turn makes it difficult for them to operate independently and efficiently. Such difficulties militate against the growth of minority (language) media, thereby maintaining access opportunities at a low level.³⁸

The AC also tends to distinguish between access to different types of media, eg. public-service, community and commercial, each of which can serve the expressive and informational needs and interests of persons belonging to national minorities in different ways. Given that the media comprise content, structures and processes, regulation tends to be both behavioural and structural. The Advisory Committee therefore monitors the calibration of prescriptions (eg. broadcasting quota and percentages of programming budgets) of particular types of content, such as that produced by or for minorities, including in their own languages. It also monitors the allocation of time-slots for the same with a view to determining whether they are long enough, frequent enough and scheduled at appropriate times. Subtitling and dubbing practices are also routinely monitored on account of their potential for making content accessible to a wider audience comprising varied linguistic backgrounds. The need for broadcast licensing processes to recognise and accommodate the needs, interests and situational specificities of national minorities, is another recurrent priority theme. The general question of the official recognition of national minorities and their languages (to the extent that the applicability of media laws and policies is conditional on the enjoyment of official status) is often addressed as well.

2.1.3 The European Charter on Regional or Minority Languages

The central purpose of the ECRML is to protect and promote regional or minority languages in Europe. Its conceptual point of departure is that regional or minority languages are a “threatened aspect of Europe’s cultural heritage” and therefore merit protection and promotion.³⁹ The Charter’s dual strategy is to focus on (i) non-discrimination as regards the use of regional or minority languages, and (ii) measures offering active support for such languages.⁴⁰ The promotional measures set out in the Charter concentrate on the use of regional

³⁸ See generally: Mike Cormack & Niamh Hourigan, Eds., *Minority Language Media: Concepts, Critiques and Case Studies* (Clevedon, Multilingual Matters Ltd., 2007).

³⁹ Explanatory Report to the European Charter for Regional or Minority Languages, para. 10.

⁴⁰ *Ibid.*

or minority languages in specific spheres of public life. The contemplated promotional measures – in a range of pertinent contexts – are seen as a means through which regional or minority languages may be “compensated, where necessary, for unfavourable conditions in the past and preserved and developed as a living facet of Europe’s cultural identity”.⁴¹ As such, the objective of cultural and linguistic diversity also informs the Charter’s approach.⁴²

In terms of scope, the Charter covers “regional or minority languages”, which are defined as languages: “(i) traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State’s population; and (ii) different from the official language(s) of that State”.⁴³ Furthermore, “dialects of the official language(s) of the State or the languages of migrants” are not included in the definition of regional or minority languages.⁴⁴

Article 11 is the Charter’s principal article concerning the right to freedom of expression and the media.⁴⁵ Like Article 9, FCNM, its wording also borrows from that of Article 10, ECHR.⁴⁶ It opens with an acknowledgement that national public authorities have varying levels of competence in respect of media regulation and oversight and a call for the principle of “the independence and autonomy of the media” to be respected (Article 11(1)). The main substantive focuses of the Article are:

- public service radio and television (Article 11(1)(a));
- radio and television generally (Article 11(1)(b) and (c), respectively);
- production and distribution of audio and audiovisual works (Article 11(1)(d));
- newspapers (Article 11(1)(e));
- funding for the media/audiovisual production (Article 11(1)(f));
- support for the training of journalists and media professionals (Article 11(1)(g));

⁴¹ *Ibid.*

⁴² *Ibid.*, para. 11.

⁴³ Article 1(a), ECRML.

⁴⁴ *Ibid.* For further explanation, see the Explanatory Report to the Charter, *op. cit.*, paras. 30-33.

⁴⁵ See further, Jean-Marie Woehrling, *The European Charter for Regional or Minority Languages: A critical commentary* (Strasbourg, Council of Europe Publishing, 2005), pp. 200-214, and very comprehensively, Tom Moring & Robert Dunbar, *The European Charter for Regional or Minority Languages and the media* (Strasbourg, Council of Europe Publishing, 2008).

⁴⁶ For an acknowledgement of the textual similarities, see the Explanatory Report to the ECRML, paras. 107-113, esp. para. 112.

- freedom of direct reception and non-opposition of retransmission of radio and television broadcasts from neighbouring countries (Article 11(2));
- non-restriction of free circulation of information in the written press (Article 11(2)), and
- representation/taking into account of interests of regional or minority language speakers within bodies with “responsibility for guaranteeing the freedom and pluralism of the media” (Article 11(3)).⁴⁷

States Parties are required to choose and apply at least one paragraph or sub-paragraph from Article 11. Most of the paragraphs and sub-paragraphs contain internal choices between commitments of varying degrees of onerousness. The extent of the available choice is widened further by recurrent reliance on the formula, “to encourage and/or facilitate” [particular measures]. For instance, Article 11(1)(a) offers States a choice between the following options in respect of their public service broadcasting systems:

- i to ensure the creation of at least one radio station and one television channel in the regional or minority languages; or
- ii to encourage and/or facilitate the creation of at least one radio station and one television channel in the regional or minority languages; or
- iii to make adequate provision so that broadcasters offer programmes in the regional or minority languages;

The ability to make internal choices within paragraphs therefore clearly offers States a lot of flexibility to determine the precise focus and extent of their commitments in respect of the media.

Many of the key issues identified by the Advisory Committee on the FCNM are also regularly flagged by the Charter’s Committee of Experts. Engagement with these issues is similar to the engagement under the FCNM, but predictably with extra scrutiny for their linguistic

⁴⁷ It should be noted that each of these focuses pertains specifically to regional or minority languages.

dimension.⁴⁸ Also, as one would expect, there is systematic attention for the impact of general language policy on media activities in regional or minority languages. The impact of the media on the public profile, prominence and prestige enjoyed by regional or minority languages is also a recurrent issue. Arising from Article 11(3), ECRML, the representation of interests of speakers of regional or minority languages in media regulatory/monitoring authorities is frequently addressed. Article 11(3) addresses an additional dimension to the questions of representation and participation in the media, discussed at the beginning of this chapter. To ensure that the interests of the users of regional or minority languages are taken into account in bodies charged with guaranteeing freedom and pluralism of the media is a very important and potentially far-reaching policy goal. It strives for the institutional incorporation of minority interests in bodies which often have considerable influence on law and policy-making. Such policies can be regarded as outgrowths of more general democratic principles and they greatly enhance the likelihood that future regulation and policy will reflect and cater for the needs and interests of linguistic minorities.⁴⁹

2.1.4 Non-treaty-based standard-setting

As mentioned above, the case-law of the European Court of Human Rights dealing with distinctive features of regional media is scant. In practice, the FCNM and ECRML compensate for that – to an extent – by focusing on minority-specific and linguistic issues that are relevant for (some) regional media. Other standard-setting work, for instance by the Committee of Ministers and the Congress of Local and Regional Authorities, complements the treaty-based approaches by spelling out the relevance of the Court’s general principles for regional media. Selected texts of the Committee of Ministers and the Congress of Local and Regional Authorities will be discussed below.

⁴⁸ See further: Tom Moring & Robert Dunbar, *The European Charter for Regional or Minority Languages and the media*, *op. cit.*

⁴⁹ See further, Tarlach McGonagle, “Introduction to and Summary of the Survey of State Practice: ‘Minority-Language Related Broadcasting and Legislation in the OSCE’”, in George Jones, Sally Holt & John Packer, Eds., 8 *Mercator Media Forum* (2005), pp. 84-99, at p. 95. For an analysis of the practical shortcomings of Article 11(3), ECRML, see: Robert Dunbar, “Definitively interpreting the European Charter for Regional or Minority Languages: the legal challenges”, in Robert Dunbar, Gwynedd Parry & Simone Klinge, Eds., *The European Charter or Regional or Minority Languages: Legal Challenges and Opportunities* (Regional or Minority Languages, No. 5) (Strasbourg, Council of Europe Publishing, 2008), pp. 37-61, at pp. 50-51.

This standard-setting work, in particular that of the Committee of Ministers, is largely guided by the Council of Europe Conferences of Ministers responsible for Mass Media/Media and Information Society, the most recent of which was held in Belgrade in 2013 and was entitled, ‘Freedom of Expression and Democracy in the Digital Age: Opportunities, Rights, Responsibilities’. The Conference adopted a Political Declaration and three Resolutions, entitled: 1) Internet Freedom, 2) Preserving the essential role of media in the digital age, and 3) Safety of journalists.⁵⁰ Regional media are not an explicit thematic focus in any of these texts, but Resolution No. 3 recalls the crucial role of journalists in democratic societies and reiterates that States are under a positive obligation to “create a favourable environment for participation in public debate by all persons, enabling them to express their opinions and ideas without fear” (para. 5).⁵¹ The obligation for States to guarantee the safety of journalists – and “others who communicate in the public interest” is of paramount importance in this connection (para. 8).⁵²

Resolution No. 2 is the most relevant of the texts adopted at the Belgrade Conference. It centrally concerns the need to safeguard the democratic – and in particular, public watchdog - tasks ascribed to journalists and the media, as performed by a growing range of actors.⁵³ It sees media self-regulation, independence, ethics, diversity and pluralism as key features of the enabling environment for media in the digital age. It invites the Council of Europe to take specific forms of action to strengthen those features, including: the close examination of “the state of media concentration, transparency of media ownership and regulation and their impact on media pluralism and diversity, and [to] consider the need for updating European standards in this respect in the digital age” (para. 10(i)).

⁵⁰ The Council of Europe Conference of Ministers responsible for Media and Information Society, ‘Freedom of Expression and Democracy in the Digital Age: Opportunities, Rights, Responsibilities’, Belgrade, 7-8 November 2013; texts available at: http://www.coe.int/t/dghl/standardsetting/media/belgrade2013/Belgrade%20Ministerial%20Conference%20Texts%20Adopted_en.pdf.

⁵¹ See also, *Dink v. Turkey*, *op. cit.*, para. 137.

⁵² See also para. 9, *ibid.*; Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media, 21 September 2011; Tarlach McGonagle, *How to address current threats to journalism?: The role of the Council of Europe in protecting journalists and other media actors*, Expert paper, Doc. No. MCM 2013(009), the Council of Europe Conference of Ministers responsible for Media and Information Society, ‘Freedom of Expression and Democracy in the Digital Age: Opportunities, Rights, Responsibilities’, Belgrade, 7-8 November 2013; Philip Leach, “The principles which can be drawn from the case-law of the European Court of Human Rights relating to the protection and safety of journalists and journalism”, Paper for the Council of Europe’s Steering Committee on Media and Information Society (CDMSI), Doc. No. CDMSI(2013)Misc3, 13 February 2013.

⁵³ This is clear from the text of the Resolution generally, but see, in particular, para. 2.

Resolution No. 2 touches on various issues that are very relevant for regional media's role in fostering participatory democracy when it posits that:

The preservation of the essential role of media in the digital age justifies, alongside commercial media, further support for, on the one hand, a well-funded, sustainable, independent, high quality and ethical *public service media* providing distinctive content on all services and platforms and, on the other hand, non-profit *community media* capable of addressing the specific needs of various communities and committed to inclusive and intercultural practices. (para. 9)

This points up the ability of digital technologies to facilitate public service and community media's engagement with their audiences/ambient communities and to strengthen the "inclusive and intercultural" exchanges that they generate.

Several texts adopted by the Committee of Ministers merit special mention in this connection. The first of those texts focuses on the role of community media in promoting social cohesion and intercultural dialogue and two others focus on different – but related – aspects of media pluralism and diversity of content and concentration of ownership. The fourth explores "a new notion of media" and another deals with human rights and social networking services.

The Committee of Ministers' 2008 Declaration on the role of community media in promoting social cohesion and intercultural dialogue⁵⁴ explains in detail the distinctive characteristics of community media and their functional importance to society. It recognises "community media as a distinct media sector, alongside public service and private commercial media" and stresses the need to examine ways in which legal frameworks could be adapted in order to facilitate the development and optimal functioning of community media. It favours allocating a sufficient number of (analogue and digital) frequencies to community media and ensuring that community media are not disadvantaged by the digital switch-over. It advocates educational and vocational measures geared towards maximising all communities' use of available technological platforms.

The Declaration also "[S]tresses the desirability of":

⁵⁴ Declaration on the role of community media in promoting social cohesion and intercultural dialogue, 11 February 2009.

- exploring various funding possibilities for the community media sector;
- promoting good practice in community media, *inter alia* , through conducting studies, exchanging information, developing exchange programmes and other collaborative projects;
- facilitating appropriate capacity-building and training of community media workers;
- “encouraging the media’s contribution to intercultural dialogue”, *e.g.* by establishing networks on which to exchange information.

As such, this Declaration is very much in the tradition of earlier standard-setting work by the Committee of Ministers that emphasises the important social and democratic contributions that can be made by the media, especially as regards the promotion of societal tolerance.⁵⁵ The particular role of community media in fostering societal cohesion and intercultural exchanges and understanding at the regional and local levels is largely explained by their participatory objectives and accessibility to the communities they serve.

For its part, the Committee of Ministers’ 2007 Declaration on protecting the role of the media in democracy in the context of media concentration⁵⁶ is very forthright in its recognition of the symbiotic relationship between media freedom, pluralism and democracy. It underscores the importance of the media for facilitating effective participation in democratic processes and the development of a “democratic and participatory public sphere”. The Declaration is “Conscious of the opportunities offered by the development of new communication services and of phenomena such as multimedia, alternative media, community media and consumer-generated content on the Internet, but aware also that their opinion-shaping impact is often dependent upon their content being carried in or reported by mainstream media”. Based on that insight, it stresses that “policies designed to encourage the development of not-for-profit media can be another way to promote a diversity of autonomous channels for the dissemination of information and expression of opinion, especially for and by social groups on which mainstream media rarely concentrate”.

⁵⁵ See, for example, Committee of Ministers’ Recommendation Rec (2003) 9 on measures to promote the democratic and social contribution of digital broadcasting, 28 May 2003 and Recommendation No. R (97) 21 on the media and the promotion of a culture of tolerance, 30 October 1997.

⁵⁶ Declaration on protecting the role of the media in democracy in the context of media concentration, 31 January 2007.

The Committee of Ministers' 2007 Recommendation on media pluralism and diversity of media content⁵⁷ is also cognizant of “the crucial contribution of the media in fostering public debate, political pluralism and awareness of diverse opinions, notably by providing different groups in society – including cultural, linguistic, ethnic, religious or other minorities – with an opportunity to receive and impart information, to express themselves and to exchange ideas”. It recommends that media ownership rules “should be adapted to the size and the specific characteristics of the national, regional or local audiovisual media and/or text-based media market to which they would be applicable” (para. 2.2). It also calls on Council of Europe member states to “take any financial and regulatory measures necessary to protect and promote structural pluralism of audiovisual and print media” (para. 6.1). In the general spirit of the Recommendation, this would have particular consequences for regional media.

The Committee of Ministers' 2011 Recommendation on a new notion of media describes the role traditionally played by the media in society and sets out a number of familiar rationales for media regulation. It then documents various technology-driven changes in the media sector and their broader consequences, including “unprecedented levels of interaction and engagement by users, offering new opportunities for democratic citizenship” and the facilitation of “users’ participation in the creation process and in the dissemination of information and content, blurring the boundaries between public and private communication” (para. 5). The evolving relationship between traditional and new media is also considered.

These developments prompt a need for the re-examination of existing media policy. The Recommendation states that “[a]ll actors – whether new or traditional – who operate within the media ecosystem should be offered a policy framework which guarantees an appropriate level of protection and provides a clear indication of their duties and responsibilities in line with Council of Europe standards” (para. 7). It continues: “[t]he response should be graduated and differentiated according to the part that media services play in content production and dissemination processes” (para. 7). To these ends, it recommends that Member States:

- **“adopt a new, broad notion of media”** encompassing all relevant actors;
- **“review regulatory needs in respect of all actors”**;
- **“apply the criteria set out”** in the Appendix **“when considering a graduated and differentiated response** for actors [...], having regard to their specific functions in the

⁵⁷ Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content, 31 January 2007.

media process and their potential impact and significance in ensuring or enhancing good governance in democratic society”;

- **“engage in dialogue with all actors in the media ecosystem** in order for them to be properly apprised of the applicable legal framework [...]”;
- **“adopt strategies to promote, develop or ensure suitable levels of public service delivery”** so as to ensure, *inter alia*, “a satisfactory level of pluralism, diversity of content and consumer choice”;
- **“remain attentive to addressing situations of strong concentration in the media ecosystem** [...]”;
- **“undertake action, individually or collectively,** to promote these approaches in appropriate international fora”. (para. 7)⁵⁸

The Recommendation does not refer to regional media as a distinct category at any point. It is primarily concerned with relevant distinctions between the (technological) nature of media, as opposed to the geographical level at which they operate. Nevertheless, the Recommendation’s general call for heightened levels of graduation and differentiation in media law and policy could logically be extended to regional media, which are also experiencing the same technological developments and repercussions as media operating at the national and international levels.

The Committee of Ministers’ Recommendation CM/Rec(2012)4 on the protection of human rights with regard to social networking services (SNS) describes SNS in its opening section as “human rights enablers and catalysts for democracy”.⁵⁹ It stresses the importance of SNS for the “freedom to express, to create and to exchange content and ideas, and the freedom of assembly” (para. 1). It states that the “increasingly prominent role of social networking services and other social media services also offer great possibilities for enhancing the potential for the participation of individuals in political, social and cultural life” (para. 2).

The Congress of Local and Regional Authorities, for its part, has also engaged with the relationship between regional media and participatory democracy in a detailed way. Its approach does not focus exclusively on the nexus between regional media and participatory

⁵⁸ Bold text per original.

⁵⁹ Recommendation CM/Rec(2012)4 of the Committee of Ministers to member States on the protection of human rights with regard to social networking services, 4 April 2012.

democracy, but different facets of that nexus feature prominently. The Congress' approach is set out in its Recommendations and Resolutions on the state of regional print media in Europe – Pluralism, independence and freedom in regional press (2002) and on regional media and transfrontier co-operation (2005).⁶⁰ These texts are less widely known than Committee of Ministers' texts, but their sharp focus on regional media, coupled with the detailed, tailored nature of the measures they propose to different stake-holders, means that they can play an important role in bridging more general Council of Europe standards and policy and practice in Council of Europe Member States.

As their name suggests, the Recommendation and Resolution on the state of regional print media in Europe – Pluralism, independence and freedom in regional press, examine the economic situation of the regional press and the implications of financial precariousness and concentrations of ownership for pluralistic democratic society. Both the Recommendation and Resolution put forward a range of measures that could usefully be pursued by a variety of stakeholders in order to ameliorate pluralism among regional media. While the continuing relevance of these twin texts cannot be gainsaid, it could be useful to conduct (insofar as possible) an impact assessment and drawing on that assessment, re-examine their specific emphases in the current media environment.

The importance of the central focus of the Recommendation and Resolution on regional media and transfrontier co-operation is underscored by the uncertain future of the European Convention on Transfrontier Television. The Recommendation and Resolution contain many insightful provisions that complement and reinforce other Council of Europe instruments dealing with similar issues, eg. the FCNM and ECRML. These texts refer in passing to the potential of Internet and new technologies for transfrontier cooperation in the media. It would be advantageous to extend such references and foreground them in any future work by the Congress on relevant themes.

In the above overview and analysis, it can be seen that freedom of expression and media freedom are closely related to questions of participation. The right to freedom of expression

⁶⁰ Resolution 145 (2002) on the state of regional print media in Europe – Pluralism, independence and freedom in regional press, 6 June 2002; Recommendation 119 (2002) on the state of regional print media in Europe – Pluralism, independence and freedom in regional press, 6 June 2002; Resolution 203 (2005) on regional media and transfrontier co-operation, 2 June 2005; Recommendation 173 (2005) on regional media and transfrontier co-operation, 2 June 2005.

and the right to participate in public affairs often dove-tail to constitute a crucial element in pluralistic democracy. The next section focuses more explicitly on participatory rights.

2.2 Participation⁶¹

Participation in democratic society is determined by the effectiveness with which a whole cluster of rights can be exercised. Those rights include, first and foremost, freedom of expression, assembly and association, the right to vote and stand for elections, etc. Although the ECHR does not explicitly provide for a right to participation in democratic society, such a right is recognised in other treaties, eg. the FCNM. It is also a recurrent objective of various texts concerning the media adopted by the Committee of Ministers and the Parliamentary Assembly.

Whereas *formal* participation in *official* democratic structures and processes is clearly of central importance for any democratic polity, the importance of participation in *unofficial* democratic practices, eg. public debate, including as conducted by and in the media, should not be underestimated. The societal impact of the latter can be very significant.

2.2.1 Scope of the right to participation

The notion of participation in democratic society is broad and includes participation in a range of activities (political, social, cultural and economic) which together make up public affairs. In other words, even though democratic society cannot exist without political participation, the importance of participation in other realms of public life should not be downplayed either. In *Bowman v. the United Kingdom*, a case arising out of a prosecution for distributing anti-abortion leaflets in the run-in to political elections, the European Court of Human Rights held that “Free elections and freedom of expression, particularly freedom of political debate,

⁶¹ This section draws extensively on and updates: Tarlach McGonagle, “Participation in democratic society”, in Yasha Lange, Ed., *Living Together: a handbook on Council of Europe standards on media’s contribution to social cohesion, intercultural dialogue, understanding, tolerance and democratic participation* (Strasbourg, Council of Europe Publishing, 2009), pp. 35-47.

together form the bedrock of any democratic system”.⁶² It added that the “two rights are inter-related and operate to reinforce each other”.⁶³

The ability to participate in the full range of public affairs is often contingent on the ability to freely assemble and associate and freely express oneself for relevant purposes. As noted by the Court in the *Gorzelik v. Poland* case:

pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively.⁶⁴

As already mentioned, the ECHR does not countenance a right to participation, as such, but the essence of such a right can be derived from several articles in the Convention. Moreover, the Court also repeatedly refers to the importance of democratic society. Without effective participation, a democratic society would be a very hollow concept indeed. Nevertheless, in the absence of an express ECHR right to participation, the right is otherwise assured in the Council of Europe context by Article 15, FCNM, as well as the European Charter of Local Self-Government. Article 15, FCNM, provides as follows:

The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.

This article provides for a right of effective participation for persons belonging to national minorities generally, as well as a more specific right where issues affecting them are at stake. The insertion of the adjective, “effective”, in Article 15 is of huge potential significance. It

⁶² *Bowman v. the United Kingdom*, 19 February 1998, Reports of Judgments and Decisions 1998-I, para. 42.

⁶³ *Ibid.*

⁶⁴ *Gorzelik and others v. Poland* [GC], no. 44158/98, ECHR 2004-I, 17 February 2004, para. 92.

implies that consultation or representation of minorities that is merely tokenistic is not sufficient. Their participation must be real and effective.

2.2.2 Participation and technological capabilities

The ECHR should be seen as a “living instrument” and interpreted in a “dynamic and evolutive” manner. By taking this interpretive approach, the European Court of Human Rights has recognised that rights are dynamic and that their content can develop over time. Similarly, factors influencing the effectiveness with which rights are exercised are also liable to change over time, especially under the influence of societal and technological developments. This is particularly true of the right to participation. One reason for this is that modalities of participation are increasingly affected by technological capabilities. As affirmed by the European Court of Human Rights in its judgment in the *Yildirim* case, for instance:

the Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest.⁶⁵

For example, as regards formal participation in *official democratic structures and processes*, e-democracy is very much in the ascendant. The more governmental services that are provided online, the more important it will become for all members of society to have full access to ICTs. Importantly in this connection, CM/Rec(2007)11 on promoting freedom of expression and information in the new information and communications environment views access to the Internet as instrumental for accessing information and therefore also “participation in public life and democratic processes”. Similarly, as regards participation in *unofficial democratic practices*, such as public debate, increased interactivity with and within the media is evident across the services they provide.

Similar principles inform Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content, which includes a specific focus on “Promotion of a wider democratic participation and internal diversity”. It zooms in on the role of the media in fostering democratic

⁶⁵ *Ahmet Yıldırım v. Turkey*, no. 3111/10, § 54, ECHR 2012.

participation. It states that Member States should, while respecting the principle of editorial independence encourage the media to:

- supply the public with a diversity of media content capable of promoting a critical debate and a wider democratic participation of persons belonging to all communities and generations;
- contribute to intercultural and inter-religious dialogue, so as to promote mutual respect and tolerance and to prevent potential conflicts through discussions.

To these ends, it calls for the development by the media of organisational policies to accommodate the participation of minorities and a responsiveness to “dynamic technological changes”, including for the promotion of digital media literacy.

Flowing from these observations, it is clear that effective participation in democratic societies increasingly requires a bridging of the so-called digital divide. Various Committee of Ministers’ Recommendations and other standard-setting texts aim to promote this objective, eg. Recommendation No. R (99) 14 on universal community service concerning new communication and information services, Recommendation Rec (2003) 9 on measures to promote the democratic and social contribution of digital broadcasting, Declaration on human rights and the rule of law in the Information Society (2005), Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content, Recommendation CM/Rec(2007)11 on promoting freedom of expression and information in the new information and communications environment.

In sum, relevant standards of the Council of Europe promote participation in democratic society in a broad sense, but they also contain numerous specific emphases on the role of the media in promoting individual and group participation in public affairs. The media’s ability to contribute to public debate, as enhanced by continuing technological advances, is of foremost importance in this connection.

The participatory potential of the media, as well as their effectiveness for communicative purposes depend (at least) on their: availability; affordability; accessibility; functionality.

In the first place, *availability* implies that the public is able to receive information, ideas and opinions disseminated by the media. This includes the ability to receive content, regardless of the technical means of distribution used. In order to realise this goal, a number of Council of Europe standard-setting texts promote the introduction and development of particular types of media, eg. digital broadcasting, ICTs. Relatedly, *availability* is often affected by *affordability*: the high costs associated with the introduction of new technologies can hinder their penetration and take-up in society and thereby their overall availability.

Of particular importance in this regard are the aforementioned Committee of Ministers' texts: Recommendation No. R (99) 14 on universal community service concerning new communication and information services, Recommendation Rec (2003) 9 on measures to promote the democratic and social contribution of digital broadcasting, Declaration on human rights and the rule of law in the Information Society (2005), Recommendation CM/Rec(2007)11 on promoting freedom of expression and information in the new information and communications environment.

The Recommendation on universal community service brings together principles dealing with questions of access, content and services, information and training, financing the costs of universal community service and fair competition safeguards. All of these principles are intended to feed into guidelines for a European policy for the implementation of universal community service. The Recommendation on the democratic and social contribution of digital broadcasting also sets out a set of "basic principles for digital broadcasting". They focus on the switch-over to digital television and issues of orientation in the digital environment. They also concern the activities of broadcasters, especially public service broadcasters, in the digital environment (eg. questions of remit, universal access and financing). The thematic priorities in the Guidelines put forward in Rec(2007)11 are indicative of its considerable engagement with social and participatory dimensions to new technologies:

- Empowering individual users
- Common standards and strategies for reliable information, flexible content creation and transparency in the processing of information
- Affordable access to ICT infrastructure
- Access to information as a public service
- Co-operation between stakeholders

If understood expansively, the notion of availability could also be taken to include the availability of a pluralistic media landscape, the importance of which for freedom of expression and societal cohesion was explored above.

In turn, the *accessibility* of particular media for particular sections of the public depends on their availability and affordability. It also depends on the ability of the public to use them in an informed way. This requires technological and linguistic knowledge and understanding of how the media work, sometimes referred to as media literacy. The promotion of media literacy is regularly included in Committee of Ministers' texts in a general way and sometimes in relation to specific goals.⁶⁶

Accessibility has another important dimension, however – media governance. Media governance is taken to mean the sum total of mechanisms, centralized and dispersed, that aim to organize media systems according to the resolution of media policy debates.⁶⁷ Denis McQuail has noted that it “refers to a process in which a range of different actors co-operate for different purposes, with actors drawn from market and civil society institutions as well as from government”.⁶⁸ In 2012, the Committee of Ministers adopted a pair of texts – a Declaration and a Recommendation – on public service media governance.⁶⁹

The Declaration notes that the “development of new information and communication technologies [...] allows public service media to enter into a meaningful dialogue with their audiences, engaging them as stakeholders, participants and co-creators, rather than as simply passive recipients” (para. 9). It stresses that a “robust and forward-looking system of governance is essential for the successful transition of public service media to a new media environment” (para. 10). It proposes a broad definition of ‘governance’ that includes the following elements:

⁶⁶ For a detailed overview, see: Tarlach McGonagle, “Media Literacy: No Longer the Shrinking Violet of European Audiovisual Media Regulation?”, in Susanne Nikoltchev, Ed., *Media Literacy, IRIS plus 2011-3* (Strasbourg, European Audiovisual Observatory, 2011), pp. 7-27, at pp. 20-22.

⁶⁷ W.A. Meier, ‘From Media Regulation to Democratic Media Governance’, in J. Trappel, W. A. Meier, L. d’Haenens, J. Steamer and B. Thomass, Eds., *Media in Europe Today* (Bristol/Chicago, Intellect, 2011), pp. 155–166, at p. 159.

⁶⁸ Denis McQuail, *McQuail’s Mass Communication Theory*, 6th edn, (Los Angeles, Sage, 2010), p. 232.

⁶⁹ Declaration of the Committee of Ministers on public service media governance and Recommendation CM/Rec (2012)1 of the Committee of Ministers to Member States on public service media governance, both adopted on 15 February 2012.

- The legal frameworks through which the State ensures an appropriate balance between the independence and accountability of public service media;
- The regulations and practices through which public service media ensure that their processes and culture are the most appropriate to fulfil their remit and best serve the public interest;
- An active and meaningful dialogue with its wider stakeholders including new levels of interaction, engagement and participation (para. 11).

The Recommendation on public service media governance also focuses on the ability of public service media to “promote broader democratic, social and cultural participation, inter alia, with the help of new interactive technologies”. To this end, it encourages “public service media to co-operate actively on a pan-European scale and to exchange best practice and best content, in order to create a vibrant European public sphere and foster democratic citizenship within the wider Europe”. Appended to the Recommendation is a set of guiding principles for public service media governance. The Guiding principles are structured into two main sections: the context/challenges facing public service media and the role of governance in meeting those challenges. The challenges are identified as: securing the right level of independence from the State; transformation from public service broadcasting to public service media; justifying the “dual system” in today’s market, and the wider context of public service provision. In terms of the role of governance, there is significant emphasis on transparency and openness and responsiveness and responsibility *vis-à-vis* audiences and stakeholders (paras. 35-49).

Finally and relatedly, from the perspective of users, the *functionality* of the media is largely determined by its accessibility. The question of media functionality is particularly important for persons belonging to minorities. For example, the ready availability of media in a dominant or State language may be of little functional value to a linguistic minority group. In the same vein, local broadcasting facilities may be of little functional value to a group that is dispersed throughout a State, or that has a transfrontier presence. As such, the criteria of availability, affordability and accessibility are prerequisites for (but not necessarily guarantees of) the achievement of media functionality.

Through their many focuses on the aforementioned issues, relevant Council of Europe standard-setting documents collectively explore and promote the potential of the media for enhancing communication in democratic society. In doing so, those standard-setting texts

affirm the importance of the media for ensuring that the right to freedom of expression is exercised effectively in practice.

3. Practice and best practices

The litmus test for the principles based on the ECHR, FCNM and ECRML that were examined in the previous chapter is whether they are effectively implemented and have practical impact. This section of the report seeks to identify exemplary ways in which selected normative principles are operationalised by, or in respect of, regional media. In doing so, it will address a number of current challenges (regulatory, technological, political, financial, etc.) that must be overcome in order for relevant principles to achieve their desired impact.

Building on the analysis in the previous chapters, some best practices for creating and sustaining an enabling environment for regional media will be identified and grouped under various categories, which we see as the most relevant ones. Given the large number of member states and the limitations of this study, we will restrict ourselves to identifying the typology of best practices, without mentioning particular countries or examples. However, the observations are drawn from existing studies and based on additional desk research.

3.1 Legal definitions and licensing schemes

Defining regional media - in a legal sense - is not an easy task. However, the criteria mentioned in the first chapter of this report provide guidance. Often geographical criteria (combined with others, such as language) are sufficiently precise to create a regulatory environment for the modelling of regional media. In some countries regional media are subject to more or less the same regulatory model as national media. It is important to assess whether indeed the same assumptions (still) apply. In general a lighter-touch approach seems appropriate in order to avoid the risk that the regulatory system and the consequences that come with it, stifle the development of regional media. Certain obligations might turn out to be too costly (such as a 100% obligation to subtitle) or restrictive (excessive programming requirements). A flexible and realistic approach is also necessary when it comes to the scale of regional media. A regional television station covering millions of inhabitants is by nature different from a small scale community media station. It can be argued that – unless the allocation of scarce resources is at stake – regulation should provide for licence-free solutions (i.e. by creating a system of ‘general authorizations’). Certain countries already have put such licence-free solutions into place. Furthermore, it should be noted that the notion of regional media includes the printing

press which, in many countries, has always been free from a specific regulatory regime, as is also the case with several of the so-called ‘new media’ (eg. websites, Twitter, blogs). The application of new media should not legitimize the introduction of new licensing regimes.

3.2 Participatory provisions

In order to facilitate the participatory aspects of regional media, several options are available. In the first place, participatory requirements can be integrated into the regulatory system. This assumes some contextualisation of the participation model. Is participation embedded in the organisational model? Is participation linked to the media activities as such? Participation as part of the organisational model can include models where the decision making processes are subject to the consent or advise of a body reflecting the participatory framework (i.e. a representative program council). Another option could include representation at the level of the decision making entities within the organisation (i.e. the (editorial) board). It should be noted that the participatory elements can but do not necessarily need to overlap with protecting or embedding media pluralism.

Sometimes the participatory aspects are also reflected at the content level, i.e. as part of quota-regulation. This can have a stifling effect on the editorial freedom. Furthermore, seeking ‘double guarantees’ (both on the organisational and editorial level) might not be necessary. More voluntary instruments, such as an editorial statute, provide a higher level of flexibility.

To promote participatory activities, strategies can include the use of a volunteer-model. Several countries have community media that are based on this model. Only a limited amount of professional staff train and help volunteers who are mainly responsible for creating content. Using this volunteer-model allows for regional media to exist in circumstances where budgets are tight.

3.3 Independence and autonomy

Regional media are close to their social environment. This creates additional challenges regarding independence. The risks of political influence and lack of transparency are often higher than on the national level. Chinese walls need to be put in place to prevent these risks. For example, executive roles within regional media should be declared incompatible with holding a political mandate. Financing should not be subject to political oversight alone, but framed in a system of checks and balances that guarantees editorial independence.

Regional media can have many different organisational structures. The entities involved can be outside any specific regulated structure (such as ‘new media’) or part of a hierarchical system where regional media are a subset of a national broadcasting system. Best practices include independent editorial control and organisational autonomy (i.e., regional media as a *sui generis* institution).

3.4 Media literacy

Media literacy is often understood as “the ability to access, analyze, evaluate, and create messages in a variety of forms”.⁷⁰ It has evolved from an emphasis on critical engagement with media output to embrace the ability to use media technologies to contribute to media production and content creation processes. A powerful participatory rationale underpins media literacy. It has been described as “a prerequisite for full participation in late modern society, involving as it does the critical skills of analysis and appreciation of the social dynamics and social centrality of media as framing the cultures of the everyday.”⁷¹ It empowers individuals and enables them to participate more fully in democratic societies, which are increasingly reliant on media and information and communication technologies (ICTs).

The European Broadcasting Union (EBU) sees the promotion of media literacy as an objective that should typically be pursued by public service broadcasters/media. It has organised its

⁷⁰ Sonia Livingstone, “Media Literacy and the Challenge of New Information and Communication Technologies”, 7 *The Communication Review* (No. 1, 2004), pp. 3-14, at p. 5. See further, Tarlach McGonagle, ‘Media Literacy: No Longer the Shrinking Violet of European Audiovisual Media Regulation?’, in Susanne Nikoltchev, Ed., *Media Literacy, IRIS plus 2011-3* (Strasbourg, European Audiovisual Observatory, 2011), pp. 7-27.

⁷¹ Roger Silverstone, “Regulation, media literacy and media civics”, 26 *Media, Culture & Society* (No.3, 2004), pp. 440-449, at p. 448.

Principles on Media Literacy along three main axes: “[b]ridging the digital divide”, “inform[ing] and empower[ing] citizens to democracy”, and “creating a trusted space”.⁷² The organisation’s current efforts to promote media literacy include the show-casing of relevant best practices developed by its members. On the relevant section of the EBU website a number of these best practices have usefully been selected, itemized and grouped in categories, including: ‘Encouraging online engagement’, ‘Platform for expression’, and ‘Facilitating interaction and creativity’.⁷³ A number of the best practices included in the show-case – from different countries – could usefully be replicated at the regional level.

3.5 Media pluralism

In this study, media pluralism and diversity of media content have repeatedly been identified as key features of a healthy enabling environment for media freedom. Their importance is very pronounced at the regional level due to political economy considerations that are particular to regional media. The communities and markets served by regional media tend to be smaller, more specific and less lucrative than those served by media operating at the national and international levels.⁷⁴ This has obvious implications for advertising and other sources of revenue for regional media. Such financial strictures can also lead to concentrations of ownership of regional media. The production of regional content can be resource-intensive and presents a real challenge to the financial sustainability of regional media, especially in the current climate of prevalent economic cutbacks and austerity. In light of these observations, general measures to promote media pluralism may require specific adjustment for optimal application to regional media.

3.6 Promotional measures

⁷² European Broadcasting Union, “Empowering Citizenship Through Media Literacy: the Role of Public Service Media”, *European Broadcasting Viewpoint*, February 2012.

⁷³ See: <http://www3.ebu.ch/sites/ebu/contents/policies/eu---policy/public-affairs-and-legal-issues/media-literacy-1.html>.

⁷⁴ For wide-ranging analysis of relevant issues, see generally: Gregory Ferrell Lowe and Christian S. Nissen, Eds., *Small Among Giants: Television Broadcasting in Smaller Countries* (Gothenburg, Nordicom, 2011). For analysis of the impact of market-related issues specifically on minority(-language) media, including in a changing media environment, see: Tom Moring, “Media Markets and Minority Languages in the Digital Age”, *Journal on Ethnopolitics and Minority Issues in Europe*, Vol. 12, No. 4, 2013, 34-53 and Sally Broughton Micova, “Rights vs. Reality: Minority Language Broadcasting in South East Europe” *Journal on Ethnopolitics and Minority Issues in Europe* Vol. 12, No. 4, 2013, 54-79.

Often regional media are considered less important than national media, at least as far as resources are concerned. This is in contrast with the fact that media pluralism at the regional level is less developed. At the same time, unlimited resources are not available. This requires a balanced policy. The reallocation of existing resources can be considered. Alternative models, such as the earlier mentioned volunteer-model, can create new opportunities. Specific subsidy schemes can be put into place for the promotion of regional journalism and existing subsidies should not exclude regional media.

3.7 Technological challenges

In the context of this study we more or less focus on regional media with a mass media character. The underlying aim is to make these media available to the entire region, taking into account practical, financial and technological limitations. Practical limitations include natural barriers (wide rural service area, mountains/valleys). Financial limitations are not just about the lack of sufficient resources for creating content, but are also at stake when finding technological solutions for distribution. Building new infrastructure can be expensive and disproportionate. Technological limitations include the lack of frequencies or the lack of internet access in the region. On the other hand, using ‘bricks and mortar’ technology in areas with sophisticated distribution technology might not make sense either. There might be no need to promote the use of the printing press when high-speed internet access is widely available. Traditional television broadcasts can be integrated in a less costly internet environment and allow for very small-scale media activities (including the use of apps, Twitter, etc.). Best practices should be based on a functional approach: what can be done with existing distribution facilities and how can adequate access to these facilities be guaranteed? What is needed in addition to make regional media most effective? Must-carry obligations on analogue and digital distribution networks should include regional media. Findability on platforms (eg. electronic program guides) needs to be secured sufficiently. Supporting regional media may include the reallocation of existing distribution resources (eg. frequencies, multiplexes, etc.).

4. Conclusions and recommendations

The media can play vital roles in pluralist democratic societies, such as acting as public or social watchdogs, circulating information and ideas, and providing forums for public debate. They foster participatory democracy by opening up shared spaces for discussion and debate on matters of public interest. An enabling environment for freedom of expression is a pre-requisite for the media to be able to fulfil the democratic roles ascribed to them.

Those democratic roles assume particular importance at the regional level due to the proximity that characterizes the relationship between regional media and persons from the areas and communities they serve. Regional media have heightened participatory potential. Yet the term, “regional media”, is open to multiple interpretations or definitions and therefore requires unpacking. It comprises a range of different types of media operating at different sub-national levels and sometimes in cross-national contexts. It covers print, broadcast and digital media. It also covers public service, commercial, community, local and transfrontier media.

In light of this differentiation, it is important to frame regulatory and policy approaches to regional media in terms of the functions ascribed to, and carried out by, a range of different types of media operating at the regional level. Regulatory and policy frameworks also need to be designed in a technology neutral way in order to be able to embrace ongoing technological developments and convergence and anticipate future developments.

4.1 Review existing instruments

The Council of Europe has adopted an array of instruments that govern the position and operation of regional media across its 47 Member States. The most salient of those instruments have been inventorised and analysed in this study. They vary from standards that are legally binding on all Member States (eg. ECHR) and those that are only legally binding on those member states which have ratified the treaties in question (eg. FCNM, ECRML). They also vary from legally-binding standards to political commitments/policy recommendations (eg. CM Declarations and Recommendations). Although these instruments contain negligible references to “regional media” as such, they do, by and large, demonstrate an appreciation of the importance of many of the functions carried out by different types of regional media (eg.

participation in public debate/affairs, social cohesion, diversity, etc.). That appreciation is, however, evidenced by various – dispersed - references across relevant instruments. A considerable dot-joining exercise is required in order to draw a coherent picture of relevant provisions in relevant instruments.

As part of the proposed review of existing instruments, particular attention should be paid to the Congress of Local and Regional Authorities' own existing standards – on regional print media and on regional media and transfrontier co-operation. A report should be drawn up on measures in Council of Europe Member States that address the key focuses and recommendations of the aforementioned texts. The report should also document concrete examples of follow-up to the various lines of action proposed by the relevant Recommendations and Resolutions.

The different strands to the overall review process could feed into a process to draft a new Recommendation and Resolution on the state and prospects of regional media in a reconfigured media environment. Such new texts could consolidate and expand on the Congress' existing expertise and experience and usefully integrate the expertise and experience developed by other bodies of the Council of Europe, as relevant. Such new texts should be functional, technology-neutral and dynamic in character (see below), in order to ensure their coherence and ability to embrace future technological changes affecting the media environment.

4.2 Foregrounding of 'regionalism' and 'participation'

While present in the Council of Europe's instruments, the appreciation of the important democracy-bolstering functions carried out by regional media is piecemeal and understated. It is not articulated explicitly, consistently or coherently. This calls for a "regionalism" audit of existing instruments, with a view to identifying provisions in which the regional perspective can be further specified and strengthened. Such an audit would provide a basis for developing strategic goals and guidelines for States authorities – at national and regional levels – for safeguarding an enabling environment for regional media.

4.3 Functional, technology-neutral and dynamic approach

Both a review of existing instruments and the foregrounding of regionalism and participation need a balanced approach. This approach should at least include three elements. In first place a functional approach should be leading. Defined goals must be accompanied with the appropriate means to meet these goals. Often media policies are dominated by a ‘means’ orientation (such as a focus on traditional media (radio, television)). This is way – as a second principle – a technology neutral approach can be more helpful. Such an approach can more explicitly include new media. Thirdly, a ‘dynamic approach’ seems to meet best the needs of participatory regional media. European regulatory and policy instruments must reflect the diversity that is inherent to regional media. A ‘one-size-fits-all’ approach ignores the regional potential to find appropriate solutions. Respecting contextual relevance (regional differences), while keeping fundamental rights as the main orientation point, is necessary.

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